COLONIALISM WITHOUT COLONIES: ON THE EXTRATERRITORIAL JURISPRUDENCE OF THE U.S. COURT FOR CHINA

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I
INTRODUCTION

The United States Court for China was created by Congress in 1906, and it was not abolished until 1943. The Shanghai-based court had extraterritorial jurisdiction over all American citizens[1] within its district, known as the "District of China" for jurisdictional purposes. The court is fascinating in its own right, and it produced what one observer has described as a "system of jurisprudence" that was "more complete than that of any [other] body of extraterritorial law."[2] In this article, I will elaborate at some length on the court's jurisprudence. In keeping with the theme of this symposium, I will focus on some of the conflicts-

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1. "America" and "American" are used in this article purposely both overinclusively and underinclusively. This usage simply reflects the jurisprudence of the U.S. Court for China, which sometimes treated the terms as roughly synonymous with the territory and citizens of the United States, and at other times used them to refer to places beyond the borders of the United States and to people who were not necessarily U.S. citizens.

2. Crawford M. Bishop, *American Extraterritorial Jurisdiction in China*, 20 AM. J. INT'L L. 281, 297 (1926).

of-law problems the court had to face.[3] As it turns out, those problems and the context in which they arose open a window onto the colonial history of extraterritorial jurisdiction more generally. In the end, the history of the U.S. Court for China exemplifies a kind of colonialism without colonies.

Part I describes in some detail the law applied by the court, which consisted of a mélange of colonial common law as it existed prior to American independence, general congressional acts, the municipal code of the District of Columbia, and the code of the Territory of Alaska. Apart from the unusual jurisprudence the court produced, the court's jurisdiction itself seems extraordinary, given the conventional wisdom that the principle of territorial sovereignty was predominant at the time. Part II places the court and its practice of extraterritorial jurisdiction within a longer global genealogy. Despite the contemporary rhetoric of globalization and its claims about the relatively stronger tendency for the extraterritorial application of national laws today, extraterritorial jurisdiction was in fact the norm for much of the extra-European world through the nineteenth century. Ultimately, the unique, and seemingly arbitrary, jurisprudence the court produced was intimately connected with the extraterritorial nature of its jurisdiction. Part III suggests that the conflicts of law faced by the U.S. Court for China proved exceedingly difficult to resolve precisely because of the legal fiction of extraterritoriality upon which the court's jurisdiction rested. As part of its mandate in applying the laws of the United States, the court was required to treat China as if it were the United States. Yet the principle of territoriality that performed a key role in resolving conflicts within the federal system in the United States could not do the same in China for the profoundly simple reason that, in the end, legal fictions aside, China was not America. Unsurprisingly, the end result was an imperial court that was left to fashion its own law, which in turn was distinct from that of every other territorial jurisdiction. Indeed, it constituted a kind of American common law of China, and the legal world of Americans in China constituted a kind of U.S. colony, albeit one that did not formally infringe on China's territorial sovereignty.

3. My analysis of the court's work draws on two volumes of case reports published by the court, entitled *Extraterritorial Cases*, as well as primary research, conducted in the National Archives, on the records of the U.S. State Department, which exercised supervisory control over the court during most of its existence. In addition, I have benefited from other recent work on the court, including EILEEN P. SCULLY, BARGAINING WITH THE STATE FROM AFAR: AMERICAN CITIZENSHIP IN TREATY PORT CHINA 1844–1942 (2001); David J. Bederman, *Extraterritorial Domicile and the Constitution*, 28 VA. J. INT'L L. 451 (1987–88) (focusing on the history of the concept of "extraterritorial domicile" in China); and Tahirih V. Lee, *The United States Court for China: A Triumph of Local Law*, 52 BUFF. L. REV. 923 (2004) (analyzing the procedure and evidence law applied by the court).

II

AN AMERICAN COMMON LAW OF CHINA

In 1906, Congress passed an act for the establishment of the U.S. Court for China.[4] Although the court was likely "the strangest federal tribunal ever constituted by Congress,"[5] it remains largely unknown.[6] In fact, its history is part of a much longer history of American extraterritorial jurisdiction in China. In the nineteenth century, China's refusal to accept "free trade" in opium (among other things) led to the so-called Opium War (1839–42) with Britain. At the conclusion of the war, China signed a series of treaties that have come to be known collectively as "Unequal Treaties," which structured China's relationship with the West for a century.[7] The United States signed its first Unequal Treaty with China in 1844, in the village of Wanghia in Macao.[8] Among other things, this treaty secured the citizens of the United States the privilege of extraterritoriality when in China.

For more than sixty years, the United States followed the model of the European powers and exercised its right of extraterritorial jurisdiction in so-called consular courts: it vested its consular representatives in China with the power to adjudicate legal disputes. However, most consular judges had no legal training whatsoever. One particularly notorious American consul in fact prided himself on being "short on law" but "hell on equity."[9] A report by the State Department in 1905 confirmed what everyone already knew: American consular courts in China were plagued by incompetence, inefficiency, and corruption.[10] In 1906, the Congress finally responded by creating the United States Court for China, which was to be a properly constituted judicial tribunal, in contrast to the irregular and unprofessional consular courts.[11]

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4. An Act Creating a United States Court for China and Prescribing the Jurisdiction Thereof, Pub. L. No. 59-403, 34 Stat. 814 (1906), repealed 1948, in accordance with the Treaty for the Relinquishment of Extraterritorial Rights in China and the Regulation of Related Matters, U.S.–China art. 1, Jan. 11, 1943, 57 Stat. 767, 6 Bevans 739.

5. Bederman, *supra* note 3, at 452.

6. I describe the genesis of U.S. extraterritorial jurisdiction in China in greater detail in Teemu Ruskola, *Canton Is Not Boston: The Invention of American Imperial Sovereignty*, 57 AM. Q. 859 (2005), *reprinted in* LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS 267 (Mary L. Dudziak & Leti Volpp eds., 2006). For another recent analysis emphasizing the "legalised hegemony" inherent in the globally uneven practice of extraterritoriality in the nineteenth century, see Gerry Simpson, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER 227–53 (2004).

7. *See generally* DONG WANG, CHINA'S UNEQUAL TREATIES: NARRATING NATIONAL HISTORY (2005).

8. Treaty of Wanghia, U.S.–China, July 3, 1844, 8 Stat. 592, 6 Bevans 647.

9. NORWOOD F. ALLMAN, SHANGHAI LAWYER 97 (1943). In more diplomatic language, the Senate was told in 1850 that American consuls in China were "destitute of all legal requirements." S. EXEC. DOC. NO. 31–72, at 2 (1850).

10. *See* HERBERT H.D. PIERCE, REPORT ON THE UNITED STATES CONSULATES IN THE ORIENT (1904).

11. An Act Creating a United States Court for China and Prescribing the Jurisdiction Thereof, *supra* note 4.

The extraterritoriality provisions of the 1844 Treaty of Wanghia,[12] together with subsequent revisions of the treaty,[13] set up a system in which jurisdiction depended on the defendant's nationality. A "citizen[] of the United States" who committed a crime in China was triable "only by the Consul, or other public functionary of the United States, thereto authorized according to the laws of the United States."[14] Similarly, "[s]ubjects of China" who were "guilty of any criminal act towards citizens of the United States" were to be punished "by the Chinese authorities according to the laws of China."[15] In civil suits as well, a Chinese plaintiff could sue an American citizen only in an American court, while an American citizen would have to sue a Chinese subject in a Chinese court.[16] The legislation that formally set up a system of American consular courts in China codified this basic agreement.[17] When the U.S. Court for China was created in 1906, it inherited the principles of consular jurisdiction.[18]

How did the Court exercise its extraordinary extraterritorial jurisdiction? More specifically, what law did it apply? The oath to be taken upon admission to the bar of the U.S. Court for China required members to swear, among other things, that they would not bring suits that were "unjust," except insofar as the justice of such suits was "honestly debatable under the law of the land."[19] But just what was the law of the land? Or, rather, the law of *which* land was the bar to uphold? At first glance, the answer was deceptively easy: the term "law of the land" referred to the "laws of the United States" according to Sino–

12. Treaty of Wanghia, *supra* note 8.

13. Treaty of Tientsin, U.S.–China, June 18, 1858, 12 Stat. 1023, 6 Bevans 659; Treaty of Peking, U.S.–China, Nov. 17, 1880, 22 Stat. 828, 6 Bevans 688.

14. Treaty of Tientsin, *supra* note 13, art. XI.

15. *Id.*

16. *Id.* However symmetrical this arrangement may seem—the Chinese could be sued only in Chinese courts under Chinese law, and Americans in American courts under U.S. law—such symmetry is ultimately misleading: the Chinese *in America* had no equivalent extraterritorial privileges. On the contrary, they were barred even from entering the country after the enactment of a series of Chinese exclusion laws, starting in 1882. Act of May 6, 1882, ch. 126, 22 Stat. 58; Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504. *See generally* LUCY E. SALYER, LAWS HARSH AS TIGER: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995).

17. An Act to Carry Into Effect Certain Provisions in the Treaties Between the United States and China and the Ottoman Porte, Giving Certain Judicial Powers to Ministers and Consuls of the United States in Those Countries, 30 Cong. Ch. 150, 9 Stat. 276 (1848). For major revisions of this Act, in keeping with revisions of the Treaty of Wanghia along with new and amended extraterritoriality treaties with other countries, see An Act to Carry Into Effect Provisions of the Treaties Between the United States, China, Japan, Siam, Persia, and Other Countries, Giving Certain Judicial Powers to Ministers and Consuls or Other Functionaries, of the United States in Those Countries, and for Other Purposes, 36 Cong. Ch. 179, 12 Stat. 72 (1860); An Act to Amend an Act Entitled "An Act to Carry Into Effect Provisions of the Treaties Between the United States, China, Japan, Siam, Persia, and Other Countries, Giving Certain Judicial Powers to Ministers and Consuls or Other Functionaries, of the United States in Those Countries, and for Other Purposes," 41 Cong. Ch. 194, 16 Stat. 183 (1870).

18. *See* An Act Creating a United States Court for China and Prescribing the Jurisdiction Thereof, *supra* note 4.

19. Extraterritorial Remedial Code § 15, available at the National Archives and Records Administration, College Park, MD, in Record Group 59, Department of State, Decimal Files 1910–29 [hereinafter National Archives, RG 59], as an attachment to doc. 171.2/19.

American treaties[20] as well as the court's organic act.[21] In the strange conditions of American extraterritoriality in China, however, even the innocent phrase "laws of the United States" led to serious interpretive difficulties. For example, did it cover only federal legislation passed by the United States Congress, or did it include the common law as well? If so, the common law of which state—or states?

A. Federal Laws

At the heart of some of the most difficult questions was the court's irregular place in the American judicial hierarchy. At the most basic level, was it a federal or state court? Obviously—or perhaps not?—China was not a "state" of the United States. In the end, the only thing truly obvious was that the court was *sui generis*. Some did in fact seek to analogize China (along with the U.S.-occupied Philippines) to a state, at least as far as the organization of the bar was concerned. Chauncey Holcomb, District Attorney for the District of China, explained to the House Committee on Foreign Affairs, "We have a bar association which is a branch of the American Bar Association, just the same as the States of Delaware or New Jersey."[22] The local branch, the Far Eastern American Bar Association, indeed convinced the American Bar Association to amend its definition of "state" so as to include the District of China within it.[23]

The court itself, however, much preferred to associate itself with the prestige of the federal system. In the preface to the first volume of the court's case reports, Judge Lobingier described his jurisdiction confidently as "territorially the largest district of our Federal Court system."[24] Elsewhere, he referred to his tribunal—slightly more equivocally—as "a part of the Federal Judicial system, corresponding in grade *mainly* to the District Courts."[25] In the opinion of Lobingier's former district attorney, the judge of the U.S. Court for China was just "a regular district judge"[26] (although he did recognize the rather

20. Treaty of Wanghia, *supra* note 8, art. XXI; Treaty of Tientsin, *supra* note 13, art. XI.

21. An Act Creating a United States Court for China and Prescribing the Jurisdiction Thereof, *supra* note 4.

22. *United States Court for China: Hearing on S. 4014 Before the H. Comm. on Foreign Affairs*, 64th Cong. 16 (1917) (statement of Chauncey Holcomb, District Attorney for District of China).

23. FAR EASTERN AMERICAN BAR ASSOCIATION, PRESIDENT'S ANNUAL REPORT FOR 1919, at 6 (1919), available in National Archives, RG 59, as attachment to doc. 172.6/202 ("The word 'state,' whenever used in this Constitution, shall be deemed to comprise . . . insular or other possessions of the United States and places over which the United States exercises territorial jurisdiction."). The Far Eastern American Bar Association was established in 1914 and became affiliated with the ABA in 1915. It had three vice-presidents—one each for North China, South China, and the Philippines—and in 1916 it had a total of forty-seven members. U.S. COURT FOR CHINA, DECENNIAL ANNIVERSARY BROCHURE 48, 52–53 (1916), available in National Archives, RG 59, enclosure to doc. 172./653 [hereinafter DECENNIAL ANNIVERSARY BROCHURE].

24. Charles Sumner Lobingier, *Editor's Preface*, *in* 1 EXTRATERRITORIAL CASES iii (1920).

25. CHARLES SUMNER LOBINGIER, AMERICAN COURTS IN CHINA 6–7 (1919) (emphasis added). *Cf.* UNITED STATES COURT FOR CHINA, DECENNIAL ANNIVERSARY BROCHURE 1 (1916).

26. *Hearing on H.R. 7909 Before the H. Comm. on Foreign Affairs*, 74th Cong. 13 (1935) (statement of Chauncey Holcomb, District Attorney for District of China).

anomalous fact that the judge's district was "as large as our homeland"[27]). The State Department, too, happily referred to the U.S. Court for China as "a regular district court of the United States."[28]

Nevertheless, all these claims about the court's utter ordinariness were belied by Judge Lobingier's efforts on behalf of legislation that would "expressly" confer on him "the powers of a judge of the district court of the United States."[29] The Ninth Circuit indeed deliberately declined to address the status of the court. The China Trade Act, one of the few pieces of congressional legislation passed specifically for application in China, provided that, for its purposes, the term "federal district court" included the U.S. Court for China.[30] Confronted with a dispute under the Act, in dicta, the Ninth Circuit merely "[a]ssum[ed], without deciding, that the U.S. Court for China was 'a court of the United States.'"[31]

Of course, the court *was* like a federal court in that any definition of the law it was charged with applying—"the laws of the United States"—undoubtedly included general legislation enacted by Congress. However, this body of law was largely irrelevant to the lives that Americans lived in China; they married, divorced, entered into contracts and breached them, embezzled, raped, murdered, wrote wills and died, and Congress had had very little to say about such matters. Judge Lobingier—the longest serving judge on the court—himself acknowledged that, although his court "derive[d] its entire authority from the Federal Government," it nevertheless exercised "much of the jurisdiction commonly possessed by a state court."[32] The court's main problem from the beginning was that the only body of law to which it had an unquestionable claim—general acts of Congress—was simply irrelevant to the disputes that were typically brought before it.[33]

B. Common Law

Fortunately, Congress had anticipated the potential inadequacy of federal legislation in the conditions of China. In setting up the court, it had provided

27. *Id.* at 7 (statement of Chauncey Holcomb, District Attorney for District of China).

28. *United States Court for China: Hearing on S. 4014 Before the H. Comm. on Foreign Affairs*, *supra* note 22, at 3 (statement of Wilbur J. Carr, Director of Consular Service, State Department). In fact, an early draft of the bill for the U.S. Court for China described the court expressly as a "district court"; however, this characterization was left out of the final bill. *See* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, S. Doc. No. 58-95, at 2 (1905).

29. S. REP. NO. 101, at 20 (1916).

30. China Trade Act 1922 § 2(d), 15 U.S.C.A. § 142 (West 2008). *Cf.* An Act to Regulate the Practice of Pharmacy and the Sale of Poison in the Consular Districts of the United States in China, Pub. L. No. 63-262, 38 Stat. 817 (1915).

31. Smith v. Am. Asiatic Underwriters, Fed., Inc., U.S.A., 127 F.2d 754, 755 (9th Cir. 1942). *Cf.* United States v. Chapman, 14 F.2d 312 (W.D. Wash. 1926) (considering the U.S. Court for China a district court for the purposes of removal of a criminal suspect for trial).

32. *In re* Corrigan's Estate, 1 EXTRATERRITORIAL CASES 717, 721 (1918).

33. *See* LOBINGIER, *supra* note 25, at 11 (complaining that federal law "deal[s] with subjects (mostly of public law) not directly affecting the ordinary American citizen residing in this part of the world").

that where "the laws of the United States . . . are deficient in the provisions necessary to give jurisdiction or to furnish suitable remedies, the common law and the law as established by the decisions of the courts of the United States shall be applied."[34] The good news was that this provision did provide Americans in China with basic rights based in common law—those of "property, succession, the contract, which constitute the staple matter of ordinary life."[35] The bad news was that this appeared to be an archaic common law frozen in a much earlier time. Given that each state had developed its own common law since separation from England, the U.S. Court for China explained that "*the* common law" as a singular body of law referred generally to the common law of England as it existed in American colonies "at the date of the transfer of sovereignty."[36]

The result may have been logically satisfying, but in practical terms it implied that the court was called on to "ascertain the common or unwritten law in force in the colonies prior to the Declaration of Independence" and then to "attempt to apply it to modern conditions in China," as one eminent Shanghai lawyer put it, adding that this was certainly an occasion for some "amazement."[37] Remarkably, the only thing that seemed to amaze him was the *temporal* disjunction—not the fact of applying American law in China, so long as it was state-of-the-art American law.

C. Laws of Alaska and the District of Columbia

Functionally, then, the U.S. Court for China was left with the hybrid task of serving as a federal court *and* a state court, yet as far as the latter role was concerned, its misfortune was to be a state court without a state. In the leading case of *Biddle v. United States* (described by one commentator as "epoch-making"[38]), Judge Wilfley resolved the court's dilemma with the simple act of borrowing the municipal code of the District of Columbia and the territorial

34. An Act Creating a United States Court for China and Prescribing the Jurisdiction Thereof, *supra* note 4, § 4.

35. United States Judicial Authority in China, 7 Op. Att'y Gen. 495; 1855 US AG LEXIS 28, *16–17 (1855).

36. United States v. Biddle, 1 EXTRATERRITORIAL CASES 84, 87 (1907) (holding that the common law applicable in the U.S. Court in China was "the common law in force in the several American colonies at the date of the separation from the mother country"). Analogously, the Supreme Court of the Territory of Wyoming held in 1879 that "the common law" in force in the Territory was "English common law proper" as it stood "at the date of the Declaration of Independence"—not a synthetic "compound of the law as it applied in the several states." Ware v. Wanless, 2 Wyo. 144, 152–53 (1879).

37. LOBINGIER, *supra* note 25, at 17 (quoting Stirling Fessenden's characterization of the court's jurisprudence). Equally important, the decision rested on factually incorrect premises. Under Swift v. Tyson, 41 U.S. 1 (1842), which would not be overruled until Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), a body of *federal* common law did indeed exist, which the court failed to acknowledge. Some federal guidance in criminal matters arrived subsequently in the form of a federal criminal law when Congress enacted the Federal Penal Code. For application of the Federal Penal Code in China, see, for example, United States v. Diaz, 1 EXTRATERRITORIAL CASES 784 (1918); United States v. LeClair, 1 EXTRATERRITORIAL CASES 414 (1914). Yet the Code was far from comprehensive and, of course, provided no coverage at all outside of criminal law.

38. Bishop, *supra* note 2, at 285.

code of Alaska.[39] As congressional statutes, these codes were certainly laws enacted *by* the United States, even though this still left room to argue about whether the two codes were laws *of* the United States, in terms of their territorial applicability.[40] Equally important, since neither the District of Columbia nor the Territory of Alaska enjoyed the rights of full self-government, these congressional codes covered also what would ordinarily have been state-law matters.

The solution was strikingly effective, yet it seemed to ignore entirely what Congress could possibly have intended in passing the D.C. and Alaska codes.[41] The court expressly acknowledged that "Congress may enact a law for a limited area under its exclusive jurisdiction, such as Alaska or the District of Columbia" and that the law may "by its terms . . . have no force whatever outside of such area."[42] Yet, the court insisted that, so long as such a law was both necessary and suitable for the purposes of its extraterritorial jurisdiction in China, it was the law in China.[43] Quite simply, in the court's view "any pertinent act of Congress" was in force in the District of China "regardless of the limits within which it was originally intended to apply."[44]

This reasoning had startling implications. As the leading Shanghai lawyer Stirling Fessenden put it, in one bold stroke, it got the court out of "the wilderness of colonial common law."[45] After a dearth of applicable law, the U.S. Court for China was suddenly awash in an excess of law. As a dismayed

39. *See Biddle*, *supra* note 36, at 124–26. Subsequently, the Court extended its holding to cover civil matters as well. *See* Cavanagh v. Worden, 1 EXTRATERRITORIAL CASES 317 (1914).

40. The court's position was in fact later validated by the United States Supreme Court. In 1915, the Supreme Court held that the Philippine Tariff Act of August 5, 1909, passed by Congress but applicable only to the Philippines, was "a statute of the United States." Gsell v. Insular Collector of Customs, 239 U.S. 93, 95 (1915).

41. Judge Wilfley's solution in *Biddle* was perhaps necessary, yet legislative history indicates that Congress had in fact considered authorizing the application of D.C. laws in China before finally rejecting the idea. A 1905 draft bill for the U.S. Court for China directed the court to apply "the laws of the United States *and* the laws of the District of Columbia not in conflict therewith," with the evident implication that "the laws of the District of Columbia" were not encompassed in the phrase "the laws of the United States." MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, S. DOC NO. 58-95, at 3 (1905) (emphasis added). The decision to drop the reference to D.C. laws from the final bill thus suggests that as a matter of legislative intent, D.C. laws were not meant to be included in the mandate of the U.S. Court for China.

42. United States v. Allen, 1 EXTRATERRITORIAL CASES 308, 311 (1914).

43. *Id.* The sole qualifications for "a law of the United States" to be applicable in China were that it had to be both "necessary" for the exercise of the court's extraterritorial jurisdiction (which was the case with almost every law, at least in Judge Lobingier's opinion) as well as "suitable" for the conditions of China. *Id.* On their own terms, most laws were *not* suitable to China; for one thing, almost invariably they contained references to government organs and officials that did not even exist in the District of China. The court brushed such objections aside summarily. For example, where a statute might refer to a D.C. "workhouse," an institution absent in China, the court would simply substitute the Shanghai American "prison" as the most closely analogous institution. *See* U.S. v. Osman, 1 EXTRATERRITORIAL CASES 540 (1916).

44. *Osman*, *supra* note 43, at 544. Remarkably, the court's holding in *Biddle* was followed in other extraterritorial cases as well. *See In re* Blanchard's Estate, 29 N.Y.S.2d 359 (1941) (holding, in appeal from the Unted States Consular Court at Cairo, Egypt, that "the law governing intestate succession is found in the special acts of Congress providing for intestate succession in the District of Columbia").

45. UNITED STATES COURT FOR CHINA, DECENNIAL ANNIVERSARY BROCHURE 21, 24 (1916).

member of the House Committee on Foreign Relations summed up the situation, "any law enacted from the foundation of the Government of United States up to the present time that the court may think applicable is applicable"[46]—regardless of whether such act had been originally passed for the U.S. as a whole, or for Washington, D.C., Alaska, the Philippines, or any other federal territory. In short, the court's holding resulted in an explosion—or perhaps more properly an implosion—of American law into China: *all* federal law applicable *anywhere* in the United States and its territories was now potentially the law in China.

In Judge Wilfley's opinion, it had been one of the court's "worst embarrassments" that it lacked "an adequate body of laws to be applied."[47] Instead, the court was now faced with the novel problem of choosing among an exhilarating proliferation of law. When the House Foreign Relations Committee protested the broad judicial discretion such choice entailed, Judge Lobingier disingenuously denied the need to resort to any discretion at all: "the policy of the court has been to apply *every* act that could be applied, and it has not seemed desirable to exclude *anything* that seems to have any bearing on the conditions [in China] at all."[48] To be sure, just as Judge Lobingier seemingly never confronted a case over which he did not want to take jurisdiction, so he never appeared to come across a law that he did not want to apply in China.[49] Yet this hardly eliminated the need for choice of law, since territoriality—the key traditional criterion in choice of law analysis—was not of much use in the *extra*territorial application of U.S. law. For example, which law should the court apply when legislation for the various territories was in conflict? Or if a special act, say, for Alaska, conflicted with a general congressional statute, which should govern?

To address the problem, the court applied two basic principles. First, when two special acts (that is, federal laws of limited territorial application) conflicted, the later enactment was to control over the earlier one.[50] Second, in a conflict between a special act and a general one, the general act was to take

46. *United States Court for China: Hearing on S. 4014 Before the H. Comm. on Foreign Affairs*, *supra* note 22, at 10 (statement of Rep. Henry Cooper, Member, House Comm. on Foreign Affairs). The bill under consideration, which sought to codify the law applicable in the U.S. Court for China, was never passed.

47. *Judge Wilfley Before the New York Chamber of Commerce, March 5, 1908*, 8 J. AM. ASIATIC ASS'N 69, 71 (Apr. 1908).

48. *United States Court for China: Hearing on H.R. 4281 Before the H. Comm. on Foreign Affairs*, 65th Cong. 13 (1917) (statement of Charles Lobingier, Judge, United States Court for China) (emphasis added).

49. Referring to his exceedingly broad interpretation of the *Biddle* doctrine—blessed by the Ninth Circuit—which opened the door for the application of even "special acts" of Congress in China, Judge Lobingier maintained that "there can be no half way adoption of that doctrine; it includes all such laws or none. It cannot logically be restricted to any particular class of acts. It is just as applicable to civil laws as to criminal; just as 'necessary' in respect to corporations as to procedure." United States *ex rel.* Raven v. McRae, 1 EXTRATERRITORIAL CASES 655, 664 (1917).

50. *See, e.g., Cavanagh supra* note 39, at 371; Way Cheong & Co., Ltd. v. Methodist Episcopal Church (South) Mission, 2 EXTRATERRITORIAL CASES 490, 491 (1923).

precedence.[51] Applying these rules to the choice between the codes for the District of Columbia and for the territory of Alaska, presumably the slightly newer D.C. code should have controlled over the Alaska code. Yet in the opinion of Judge Lobingier, "[m]uch of the District of Columbia legislation is inherited from colonial Maryland and is therefore antiquated," which was the very infirmity the court was trying to avoid.[52] Moreover, Lobingier noted, D.C. legislation was enacted for an urban community whose life was "complex" and "highly advanced."[53] Therefore, it was "ill adapted to conditions in a country like China"—those conditions being, by implication, simple and primitive.[54] In contrast, "the Compiled Laws of Alaska afford a fairly modern and up to date piece of legislation," and, besides, they were designed for "a primitive, frontier community," and thus seemed "far more suitable and workable" for China.[55] Apparently, then, D.C. legislation was both too old *and* designed for such a highly developed community as to be inappropriate for China; the laws of Alaska were preferable because they were more modern *and* suitable for primitive conditions.[56]

By whatever leap of logic Judge Lobingier arrived at his preference for the laws of Alaska, those laws did not necessarily always take precedence over legislation for the District of Columbia, either—except when they did. In the opaque legal universe of the District of China, observers could not agree on what was, even in theory, the jurisdiction's primary source of law; some claimed it was the D.C. code,[57] while others believed it was the territorial code for Alaska.[58] This was no wonder, considering the patchwork of law the court created. Not only were its choices often inconsistent, in that it preferred D.C. legislation in one area of law and Alaska law in another, but the court felt free to mix-and-match even within an area of law. For example, although D.C. law

51. *See, e.g.,* Ezra v. Merriman, 1 EXTRATERRITORIAL CASES 809, 810 (1918).

52. *United States Court for China: Hearing on H.R. 4281 Before the H. Comm. on Foreign Affairs*, *supra* note 48, at 55 (statement of Charles Lobingier, Judge, United States Court for China).

53. *Id.*

54. *Id.*

55. *Id.*

56. Elsewhere, Judge Lobingier asserted his preference for the D.C. code thus:

> [A]s between the Alaskan and Columbian Codes, both enacted by the same Congress, the former, which is a few months the earlier, having been drafted for a sparsely settled, frontier community, is, on the whole, better suited to conditions in China than the latter, tho each contains desirable features not found in the other.

Lobingier, *supra* note 25, at 14.

57. Note: *The United States Court for China*, 49 HARV. L. REV. 793, 794 (1935–36) (stating that legislation "for the District of Columbia . . . now forms the principal source of law for the Court for China"). *See also* Bishop, *supra* note 2, at 297 ("For all legal purposes, [the] position [of an American citizen in China] is the same as though he were in the Federal District.").

58. *United States Court for China: Hearing on H.R. 4281 Before the H. Comm. on Foreign Affairs*, *supra* note 48, at 7 (statement of Charles Lobingier, Judge, United States Court for China) (arguing that "not only the lawyers in the courts but business men [sic] and litigants—prospective litigants, at least—have settled down to the proposition that the[] Alaska laws are the principal ones"). *See also* American Trading Co. v. Steele, 274 F. 774, 780 (9th Cir., 1921) ("conceding, without deciding, that the Alaska Code is controlling in the United States Court for China . . .").

applied to divorce generally,[59] the court nevertheless applied the law of Alaska to determine the parties' residence for purposes of divorce.[60]

The laws of Alaska experienced some especially dramatic twists. For example, once the court had declared that the federally enacted corporation law of Alaska was available for the creation of American corporations in China, the court then insisted that Alaskan corporation law would remain valid *in China* even after it was repealed in Alaska.[61] In effect, the corporation law of Alaska continued to live on as a ghostly presence in China, long after its demise in Alaska. Alarmed at this extraordinary situation, the Congress passed the 1922 China Trade Act, a special law applicable only in China, for the creation of American corporations for the purpose of doing business in China.[62] When the court still refused to let the Alaskan corporation law die, in 1925 the Congress amended the 1922 Act to make it perfectly clear that from then on the China Trade Act was to be the *only* law under which American businesses were to incorporate in China.[63]

Apart from Congress's concern about the state of Alaskan law in China, there were several other attempts as well—all of them unsuccessful—to define more precisely just which "laws of the United States" the court was supposed to be applying. As early as 1908, Congress had considered improving "the code of

59. *Cavanagh*, *supra* note 39, at 371 ("Of the two Acts of Congress . . . prescribing grounds for divorce, that relating to the District of Columbia, as the latest expression of legislative opinion, will naturally be applied here if the two are in conflict.")

60. *United States Court for China: Hearing on S. 4014 Before the H. Comm. on Foreign Affairs*, *supra* note 22, at 8 (statement of Mr. Holcomb). The House Committee on Foreign Affairs was quite stunned by this:

> MR. COOPER: You mean by that that [the judge] uses the code of Alaska, so far as the residence requirement is concerned, and then applies the code of the District of Columbia for the rest of it?
>
> MR. HOLCOMB: That is very well known, sir.
>
> MR. COOPER: It may well be known. You mean that the judge selects what he thinks is the best to be administered?
>
> MR. HOLCOMB: That is all he has to go by.

Id. at 19.

61. *McRae*, *supra* note 49, at 656. Essentially, the court argued that to hold otherwise would permit the citizens of Alaska to repeal legislation applicable to the District of China and thus, effectively, to legislate outside *its* territorial limits. *Id.* While the U.S. Court for China might have been thought sympathetic to the possibility of extraterritorial legislation, in the case of Alaska it found such a result "monstrous" and, accordingly, held that Alaskans were empowered to repeal laws of the Territory of Alaska only insofar as those laws applied to *them*, not anyone else. *Id.*

62. An Act to Authorize the Creation of Corporations for the Purpose of Engaging in Business Within China (China Trade Act), 67 Cong. Ch. 346, 67 Pub. L. No. 312, 42 Stat. 849 (1922).

63. An Act to Amend the China Trade Act 1922 (China Trade Act Amendments), 68 Pub. L. No. 484, 43 Stat. 995 (1925) ("Hereafter no corporation for the purpose of engaging in business within China shall be created under any law of the United States other than the China Trade Act."). In any event, the awareness of either D.C. or Alaska law remained quite elementary in the District of China—despite the court's boasts of being home to the "most valuable library of federal legislation" outside of the United States. Consider, for example, the following urgent query that the District Attorney cabled to the State Department: "Please ask District Attorney, District of Columbia, and telegraph answer what provision of law available to prosecute for throwing rock and breaking window in private building." Telegram from District Attorney of U.S. Court for China to Secretary of State (June 19, 1926) (on file with the National Archives, RG 59, doc. 172.006/57).

laws governing the conduct of the United States Court for China" by directing it to apply the laws of California.[64] Judge Lobingier himself pushed for a bill that would have codified his preferred (and ultimately discretionary) mix of laws: making Alaska the primary source of law in China, while the District of Columbia code would continue to apply in cases where the laws of Alaska were "deficient."[65]

It is also noteworthy that even after the court had selected a law and found it both "necessary" and "suitable," in the requisite sense of these terms, it then declared itself free to ignore the penalties prescribed by the otherwise applicable law. The court admitted frankly that "the case must be exceptional where one part of a statute is applicable and the other part not."[66] However, the court adverted to "obvious difficulties" that would arise given that "the penalties fixed for similar offenses in the [codes of Alaska and District of Columbia] differ from each other."[67] The court never explained what these "obvious difficulties" were; seemingly, either one or the other code would have been applicable in a given case, and the penalty would likewise have been governed by the same code. The court simply asserted that the applicable section of the code of Alaska "leaves the fixing of penalties for criminal offenses committed within this extraterritorial jurisdiction to the discretion of trial officers. For that reason it is not believed that the Court is bound by the penalties prescribed in [the codes of Alaska and District of Columbia]."[68] Almost as an afterthought, the court noted that "while the penalties fixed in those codes are not binding on this Court they *may* be well utilized as guides and treated with great respect."[69] At least, the court was permitted to follow the law, even if it was not required to do so.

D. The United States Constitution

How did the court's work comport with the Constitution? Caleb Cushing, the man who negotiated America's very first extraterritoriality treaty in 1844 and who subsequently became U.S. Attorney General,[70] believed firmly that under the regime he had helped create, the Constitution would apply in China

64. UNITED STATES COURT FOR CHINA, H.R. REP. NO. 60-1662 (1908).

65. *United States Court for China: Hearing on H.R. 4281 Before the H. Comm. on Foreign Affairs*, *supra* note 48, at 55 (statement of Charles Lobingier, Judge, United States Court for China).

66. United States v. Grimsinger, 1 EXTRATERRITORIAL CASES 282, 285 (1912).

67. *Id.* at 286.

68. *Id.* Construing the language in the section of the Alaska statute that provided for an *element* of discretion in determining the penalty, the court not only forced a reading of the language that made the discretion *limitless* in the District of China, but it then claimed that "this definite and specific language . . . disclos[ed] the *intent* of Congress that the fixing of penalties for the punishment of crimes in this extraterritorial jurisdiction should be at the discretion of the trial officer." *Id.* at 285 (emphasis added). The appeal to legislative intent is spurious, considering how implausible it is that *any* member of Congress would have foreseen that the code of Alaska would eventually be applied in China as well.

69. *Id.* (emphasis added).

70. *See generally* JOHN M. BELOHLAVEK, BROKEN GLASS: CALEB CUSHING AND THE SHATTERING OF THE UNION (2005); CLAUDE MOORE FUESS, THE LIFE OF CALEB CUSHING (1923). On Cushing's role in negotiating the Treaty of Wanghia in 1844, see also Ruskola, *supra* note 6.

as well, and he indicated so in an opinion he gave in 1855.[71] However, while Cushing thought that the Constitution did apply in China and that American extraterritorial jurisdiction in China was consistent with it, in 1881 the Senate ended up debating the constitutionality of the entire system of consular justice. In response to a seemingly innocent request for funds for the maintenance of an American jail in China, one Senator queried urgently, "I would like to know, just for the peace of my own conscience as a Senator, what authority we have to vote money to keep [Americans] in jail [in China] until somebody can hang them by judicial murder. . . . I assert here that they are in prison there in violation of the Constitution of the United States."[72] This concern was shared by Secretary Blaine in the State Department, most notably, who suggested twice, in 1881 and 1884, that the United States replace the make-shift consular court system in China with a proper judicial tribunal, complete with a jury and the full panoply of constitutional guarantees.[73] Ironically, the U.S. Court for China grew out of Blaine's notion, without incorporating the constitutional guarantees that had most concerned the Congress and the State Department.[74] In any event, such concerns were laid to rest definitively by the Supreme Court in 1881 when it announced, in an appeal from a consular court in Japan, "By the Constitution a government is ordained and established 'for the United States of America,' and not for countries outside of their limits."[75] Quite simply, the Court held, "The Constitution can have no operation in another country."[76] Whether

71. United States Judicial Authority in China, *supra* note 35, at *16.

72. 11 Cong. Rec. S410 (daily ed. Jan. 7, 1881) (statement of Sen. Carpenter). The Senator expressed considerable consternation at the legislation authorizing U.S. extraterritorial courts in China:

> I must apologize to Senators who have charged me with having been on the Judiciary Committee for several years and with not having brought forward a bill for the repeal of these statutes. I must say, and I say truthfully, that until within two years I had no more idea that such a provision could be found on any statutes passed by Congress than I had that I should be hanged myself by the judgment of a lamp-lighter.

Id. at 415 (statement of Sen. Carpenter). It is noteworthy that the Senator's proposed remedy was *not* judicial withdrawal from China but rather the establishment of proper courts to exercise United States' extraterritorial jurisdiction: "You should establish a court to try [Americans in China], according to the Constitution. You should have a judicial district and a judge, a law for subpoenaing a grand jury, and you should have attorneys, clerks, &c., as we do at home." *Id.* at 413 (statement of Sen. Carpenter).

It is notable that the Supreme Court of California had considered the constitutionality of consular courts in China in 1859 and upheld them. Forbes et al. v. Scannell, 14 Cal. 242, 279 (1859). In 1875, the U.S. Supreme Court considered an appeal from an American consular court in Egypt and similarly rejected a constitutional challenge to it. Dainese v. Hall, 91 U.S. 13 (1875).

73. *See, e.g.*, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, S. Exec. Doc. No. 47-21 (1881).

74. *See* FRANK E. HINCKLEY, AMERICAN CONSULAR JURISDICTION IN THE ORIENT 75–77 (1906); Bishop, *supra* note 2, at 284.

75. *In re* Ross, 140 U.S. 453, 464 (1891). *In re Ross* is, of course, no longer good law; in 1956, the Supreme Court called it "a relic from a different era," and it referred to the notion of a consular court by placing the word "court" in quotation marks. Reid v. Covert, 354 U.S. 1, 12, 10 (1957). The contemporary debate—most notably with regard to the U.S. military bases in Guantánamo Bay—is about the precise *extent* to which the Constitution applies extraterritorially.

76. *Id.* Subsequently, the *Insular Cases* established the doctrine that even *within* the United States the residents of so-called "unincorporated" territories enjoyed a lesser degree of constitutional protection. For example, a conviction without an indictment or without a unanimous jury in the annexed islands of Hawaii was held not to violate the U.S. Constitution. Hawaii v. Mankichi, 190 U.S.

American courts in China complied with the Constitution had been declared officially a moot question.

Indeed, by 1925, the U.S. Court for China summarily asserted that there was not even a "hint" that the Constitution was in force in the District of China.[77] Thus, even though every other federal law in force in the United States and its territories—and even some that had been repealed—was exportable to China, the supreme law of the land was not.[78] (Still, and rather inexplicably, the oath of admission to the bar of the U.S. Court for China required each candidate to "solemnly swear that I will support the Constitution and the laws of the United States of America."[79] Taking this duty seriously would obviously have put a member of the bar on an inevitable collision course with the court's jurisprudence.)

The court's declaration that it was free to mete out whatever penalties it preferred was hardly the only constitutionally suspect practice in which it engaged. Chauncey Holcomb, a former District Attorney for the District of China, explained to the House Committee on Foreign Affairs, "If a man is arrested and locked up when the Judge happens to be away, sometimes we have to keep that man locked up for six months waiting for trial."[80] The judge might be away for several reasons. For one thing, he was required by statute to hold sessions at least once a year in Hankow, Tientsin, and Canton. This was indeed roughly equivalent to a New York judge being required to take his court periodically to Boston, Chicago, and San Francisco, and the demands of such travel could result in lengthy absences from the court.[81] Moreover, when the U.S. constituencies in Shanghai were unhappy with the justice they received in the U.S. Court for China, they often exploited diplomatic and political avenues and took their grievances to Washington, D.C. During the hearings on the petition for Judge Wilfley's removal, for example, the court did not sit for nearly a year, and, likewise, when Judge Lobingier went to Washington, D.C. to address charges made against him, the court's work came to a halt.[82] Tellingly, though, such situations were perceived as commercial crises for Americans in China, not constitutional ones.[83]

197 (1903). *See also* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 85–89 (1996).

77. United States v. Furbush, 2 EXTRATERRITORIAL CASES 74, 85 (1921).

78. Effectively, "living in China was deemed to be American enough to permit an extraterritorial domicile, but not American enough to allow the Constitution to apply." Bederman, *supra* note 3, at 474.

79. Extraterritorial Remedial Code, *supra* note 19, § 15.

80. *Hearing on H.R. 7909 Before the H. Comm. on Foreign Affairs*, *supra* note 36, at 7 (statement of Chauncey Holcomb, District Attorney for District of China).

81. *Id.* at 17 (statement of Chauncey Holcomb, District Attorney for District of China).

82. *See generally* FAR EASTERN AMERICAN BAR ASSOCIATION, THE THIRD ATTACK ON THE UNITED STATES COURT FOR CHINA: PRESS COMMENTS ON THE OUTCOME (Shanghai 1923).

83. During the hearings for Judge Lobingier's removal, the American Consul General described the conditions in Shanghai as "deplorable": "Creditors of American firms are unable to collect when

Even when it was in session, the court itself expressed little concern about the absence of the Constitution. Judge Lobingier, for example, felt confident that he could do very well without the assistance of juries, as he had previously while serving as a judge in the U.S.-occupied Philippines—a practice that had been upheld by the U.S. Supreme Court in the *Insular Cases*: although the Constitution did apply in the Philippines (since it was indisputably under U.S. sovereignty), it was held to require only the observation of "fundamental rights," which in the Court's view did not include jury trials.[84] Indeed, Judge Lobingier insisted that allowing juries in China "would not be wise," and he assured Congress that "there is no popular demand for anything of the sort."[85] The latter claim at least was patently untrue. Those wary of the powers of the judge of the U.S. Court for China constantly complained of the lack of juries as a check on his power. They noted poignantly that even His Britannic Majesty's Supreme Court for China had jury trials,[86] while in contrast the American judge was entrusted with a kind of despotic power "consistent with the practice under the barbarous system obtaining in China, against which we were attempting to guard when we demanded our extra-territorial jurisdiction."[87] One member of the American bar in Shanghai described the procedure of the court as a "star-chamber proceeding,"[88] and even the less-than-radical Associated American Chambers of Commerce insisted that, at a minimum, the court should adopt a system in which the judge sits with lay assessors in cases that would ordinarily be entitled to a jury trial.[89]

E. Procedure

Despite the absence of constitutional due-process guarantees, the court did not function wholly without procedural guidelines. Although there were no federal rules of procedure to turn to until 1938, there was a set of regulations governing the procedure of consular courts.[90] These regulations had been

suit is necessary. Business firms are not inclined to deal with American firms because of the absence of facilities for enforcing contracts should such be necessary." Letter from Edwin S. Cunningham, American Consul General in Shanghai to Wilbur J. Carr, Secretary of State (June 22, 1922) (on file with the National Archives, RG 59, doc. 172/684). All in all, this was regarded as "a serious matter from a commercial standpoint." *Id.*

84. Dorr v. United States, 195 U.S. 138 (1904). Ironically, the decision in *Dorr*, in turn, was predicated in part on the jury-less practice of the U.S. consular courts in China, which had been upheld in *In re Ross*, *supra* note 75, at 453.

85. *United States Court for China: Hearing on H.R. 4281 Before the H. Comm. on Foreign Affairs*, *supra* note 48, at 11 (1917) (statement of Charles Lobingier, Judge, United States Court for China).

86. *See, e.g.,* WILLIAM S. FLEMING, THE U.S. COURT FOR CHINA AS AN INSTITUTION 4 (Shanghai 1921).

87. *Id*. at 8.

88. *Chinese Court Bill: Hearing on H.R. 17142 Before the H. Comm. on Foreign Affairs*, 60th Cong. 11 (1908) (statement of Stirling Fessenden).

89. REPORT OF THE ANNUAL MEETING OF THE ASSOCIATED AMERICAN CHAMBERS OF COMMERCE OF CHINA 13 (1925).

90. Consular Court Regulations for China, General, 1864. H.R. Exec. Doc. No. 39-1007, pt. 2, at 413–21 (1866). For further regulations promulgated in 1881 and 1897, see HINCKLEY, *supra* note 73, at 235–36. For a discussion of the court's procedure, see also Lee, *supra* note 3.

enacted in 1864 by the Minister to China, and the China Court Act made them applicable to the U.S. Court for China as well,[91] although it authorized the judge "from time to time to modify and supplement said rules of procedure."[92] Judge Lobingier, however, wanted to go further and draft a new code of procedure, not only for his own court but for the consular courts as well.[93] Speaking before Congress in favor of a bill that would have authorized him to do so, he promised, "[A]s soon as this measure passes, which confirms the authority to make rules, it is my intention to promulgate them, and they will cover the subject of procedure pretty generally."[94]

The bill never passed, but Judge Lobingier wrote his own rules anyway, and then proceeded to apply them under the title of the *Extraterritorial Remedial Code*.[95] Their legal status remained ambiguous. In an appeal from the U.S. Court for China, the Ninth Circuit speculated about what it thought "the practice prevailing in the China court" likely was, but ultimately it conceded its ignorance: "We do not have access to the rules."[96] The State Department was no more knowledgeable, although it was charged with administrative supervision of the court.[97] When the chair of the Senate Committee on Rules asked for information regarding the procedure of the court,[98] he was told politely that "the Department is not informed as to the rules under which the Court is now proceeding."[99]

91. An Act Creating a United States Court for China and Prescribing the Jurisdiction Thereof, *supra* note 4. § 5 ("[T]he procedure of the said court shall be in accordance, so far as practicable, with the existing procedure prescribed for consular courts in China in accordance with the Revised Statutes of the United States.").

92. *Id.*

93. *United States Court for China: Hearing on H.R. 4281 Before the H. Comm. on Foreign Affairs, supra* note 48, at 16 (statement of Charles Lobingier, Judge, United States Court for China).

94. *Id.*

95. *See* Extraterritorial Remedial Code, *supra* note 19.

96. Am. Trading Co. v. Steele, 274 F. 774, 781 (9th Cir. 1921).

97. See SCULLY, *supra* note 3, at 118–19.

98. Letter from Sen. Lee S. Overman to Fred K. Nielsen, Assistant Solicitor, State Department (Apr. 15, 1916) (on file with the National Archives, RG 59, doc. 172./644). Senator Overman's query was motivated by an inquiry from a lawyer in Chapel Hill, North Carolina, who was about to graduate and was interested in pursuing a legal career in Shanghai. *See* Letter from R.T. Bryan, Jr., to Sen. Lee S. Overman (Apr. 12, 1916) (on file with the National Archives, RG 59, doc. 172./644). Although neither the Senator nor the State Department was able to provide him with the rules of procedure for the U.S. Court for China, the tenacious Mr. Bryan was apparently not deterred, for he was admitted to the bar of the court in May the following year. *See Roll of Attorneys (Admitted to the Bar of the Court since its Organization)*, 1 EXTRATERRITORIAL CASES ix (1920).

99. Letter from the State Department to Sen. Lee S. Overman (Apr. 18, 1916) (on file with the National Archives, RG 59, doc. 172./644). The State Department kindly suggested writing directly to the court for details. An attorney who had tried—unsuccessfully—to obtain a certified copy of the *Extraterritorial Remedial Code* had subsequently been informed that "there is apparently no record in the Court that this code was duly adopted or promulgated, as by order of court." Letter from Frank E. Hinckley to Secretary of State (Jan. 16, 1925) (on file with the National Archives, RG 59, doc. 172.6/369). When he wrote to the State Department expressing his alarm, the department simply sent a polite letter in acknowledgment ("The Department thanks you for bringing this matter to its attention."). Letter from J. V. A. MacMurray, Assistant Secretary of State, to Frank E. Hinckley (Jan. 16, 1925) (on file with the National Archives, RG 59, doc. 172.6/369).

F. Non-U.S. Law

In addition to applying its own curious mix of American law, the court recognized that there was authority even for applying the municipal regulations of the International Settlement.[100] Yet what was most peculiar about this willingness to apply the regulations was not simply that they were not American law, but that they existed, even in the State Department's view, "outside of *any* general system of law."[101] Technically, the multinational International Settlement was on sovereign Chinese territory, yet in the mid-nineteenth century it essentially seceded from China and set up its own municipal government (including a militia and a police force) that was constitutionally accountable only to its electorate.[102] Consequently, the regulations of the government of the International Settlement were not promulgated under the authority—direct or delegated—of *any* national government.

Finally, the court applied even Chinese law. It enforced what it called "compradore" or "Chinese custom,"[103] and it adopted Chinese law with regard to real property insofar as it followed the British Supreme Court for China, which had ruled that land would be governed by *lex loci rei sitae*.[104] Judge Lobingier went so far as to propose (unsuccessfully) that the U.S. Court for China should in fact adopt the new Chinese codes as the law of the court—that way, finally, a "uniformity of laws" would obtain in China.[105]

* * * *

The above is a description of some key aspects of the jurisprudence of the U.S. Court for China. Some of it is perhaps unsurprising, but some of it certainly strikes one as odd at best and outrageous at worst—and even some of the otherwise rather ordinary aspects of the court's jurisprudence seem weird in the context of China. Before attempting to evaluate the court's work more fully, how should we characterize it as a matter of positive description?

Summarizing the jurisprudence of the U.S. Court for China is not easy. On the one hand, Alaska and the District of Columbia were the court's

100. In an analysis where it refused to apply Chinese postal laws, the court reproduced in detail a set of 1887 guidelines by the State Department, in which the Department expressed its considered opinion that the municipal regulations of the International Settlement (unlike Chinese laws) could in fact be enforced against American citizens in consular courts. Letter from Secretary Bayard to Minister Denby (Mar. 7, 1887), *in* 4 MS. INST. CHINA 244; Moore, 2 INTERNATIONAL LAW DIGEST 648–50*, reprinted in* 1 U.S. v. Donohoe, 1 EXTRATERRITORIAL CASES 347, 350 (1920).

101. *Id.* (emphasis added).

102. *See, e.g.*, *Judge Feetham Surveys Shanghai: A Digest*, 4 PAC. AFFAIRS 586, 592 (No. 7, July 1931) (explaining "a special doctrine of rights" justifying the unique position of the International Settlement); Robert Bickers, *Shanghailanders: The Formation and Identity of the British Settler Community in Shanghai 1843–1937,* 159 PAST & PRESENT 161, 169 (1998); Parks M. Coble, Jr., *The Kuomintang Regime and the Shanghai Capitalists, 1927–29*, 77 CHINA Q. 1, 3 (1979). S*ee generally* ANATOL M. KOTENEV, SHANGHAI: ITS MUNICIPALITY AND THE CHINESE (Shanghai 1927).

103. King Ping Kee v. Am. Food Mfg. Co., 1 EXTRATERRITORIAL CASES 735, 736 (1918).

104. United States v. Bascom, 1 EXTRATERRITORIAL CASES 382, 389 (1914) (citing Macdonald v. Anderson, H.B.M. Supreme Court for China (1904) for the British practice of applying Chinese law to land in China).

105. Charles Lobingier, *Shall China Have an Uniform Legal System?*, 6 CHINA L. REV. 327 (1933).

predominant sources of law. On the other, the law it produced was a remarkable synthesis that was neither the law of Alaska nor the law of the District of Columbia. Indeed, it was not the law of *any* jurisdiction anywhere, other than the District of China. In the end, the final product constituted a unique body of law of its own—a kind of "American common law of China"—which the court constructed for its own purposes.

III

EXTRA-EUROPEAN EXTRATERRITORIALITY: AN EXCEPTION?

There is much that can be said about the extraordinary extraterritorial jurisdiction of the U.S. Court for China and about the American common law of China it constructed. To be in a better position to consider the ways in which the court's extraterritorial jurisprudence was both extraordinary and ordinary, it is useful to begin by placing the court's jurisdiction within a larger global and longer historical context.

Conventional analyses of classic international law, written from the perspective of Europe, typically view the increasing extraterritorial application of laws as a byproduct of globalization—the decline of "the Westphalian system" that is regarded as the cornerstone of the international legal order.[106] Yet as a matter of historical fact, extraterritorial jurisdiction was the *rule* for much of the world *outside* Europe prior to the post–World War II decolonization movements.[107] To the extent that this history of extraterritorial jurisdiction is recognized, it is invariably presented as "exceptional."[108] Yet characterizing it as an exception within the overall international legal architecture amounts effectively to bracketing most of the globe from consideration. Viewed from outside the United States, the jurisprudence of the United States Court for China stands out as one notable example of the standard extraterritorial application of the laws of Euro-American states in "barbaric" and "semi-civilized" countries outside the metropolitan West.[109]

106. *See, e.g.*, SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION (1996); GLOBALIZATION AND JURISDICTION (Piet Jan Slot & Mielle Bulterman eds., 2004); Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PENN. L. REV. 311 (2002); Note, *Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norms*, 103 HARV. L. REV. 1273, 1276 (describing the decline of "territorial constraints on jurisdiction" as a reflection of "an emerging belief that the state must maintain relations with those citizens beyond its geographic borders"). For an analysis of the Peace of Westphalia as the origin myth of international law, see STEPHANE BEAULAC, THE POWER OF LANGUAGE IN MAKING INTERNATIONAL LAW (2004).

107. See, for example, the extensive discussion of extra-European extraterritoriality in 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 593–755 (1906).

108. *See, e.g.*, LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 481 (1905) (describing the existence of extraterritorial jurisdiction in "non-Christian states" as "in every point an exceptional one"); SIR TRAVERS TWISS, THE LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL COMMUNITIES: ON THE RIGHTS AND DUTIES OF NATIONS IN TIME OF WAR 223–24 (1861) (describing the "[e]xceptional position of Europeans whilst resident amongst Asiatics" and referring to extraterritoriality treaties as "in the highest degree exceptional").

109. *See infra* text accompanying notes 122–124.

In most discussions of extraterritoriality, the express or implicit point of reference is nineteenth-century positivism—the notion that all law emanates from nation-states, each sovereign within its territory. The arch-positivist John Austin, for example, wished to define sovereignty in strictly territorial terms.[110] However, toward the end of his *Province of Jurisprudence Determined*, even Austin had to admit grudgingly that law does in fact frequently operate extraterritorially.[111] He recognized similarly that, in order to render his definition of positive law complete, he could not simply ignore what he called "anomalous cases."[112] Nevertheless, he insisted that such cases were not relevant to a "*general* attempt to determine the province of jurisprudence."[113] Rather, they could be simply "tacked to the definition in the way of supplement."[114]

Stated slightly differently, in the end in Austin's provincial jurisprudence, the proper "province" of jurisprudence is that of a territorially hermetic nation-state. It does in fact seem accurate to observe that as far as Europe is concerned, the notion of territorial jurisdiction enjoyed at least relatively greater respect in the nineteenth century than in the twentieth century.[115] But as the conventional story goes, in the aftermath of World War I the political map of Europe fragmented, and thereafter the continuing decline of national sovereignty has been accompanied by a move to multilateral institutions instead.[116] Yet the case of China reminds us that the increasing resort to extraterritorial jurisdiction today is not only an incident of twentieth-century world wars, twenty-first century globalization, or the emergence of transactions that take place in an elusive "cyberspace."[117] To view it as an exception to a

110. *See Generally* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Prometheus Books 2000) (1832).

111. *Id.* at 351–54.

112. *Id.* at 355.

113. *Id.* (emphasis in original).

114. *Id.* One need hardly be a self-identified deconstructionist to be alerted by Austin's characterization of extraterritoriality as a mere "supplement" to ordinary territorial jurisdiction. For a classic analysis of the way in which the "supplement" is in fact constitutive of that which it (purportedly merely) supplements, see JACQUES DERRIDA, OF GRAMMATOLOGY 145 (Gayatri Chakravorty Spivak trans., 1974).

115. *See, e.g.*, Kal Raustiala, *The Evolution of Territoriality: International Relations and American Law*, *in* TERRITORIALITY AND CONFLICT IN AN ERA OF GLOBALIZATION 219, 219 (Miles Kahler & Barbara F. Walter eds., 2006) ("In the nineteenth century the dominant rule of legal spatiality was strict territoriality: law and land were understood to be tightly and fundamentally linked.").

116. *See* David Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841 (1987).

117. It is striking that one of the few references to the court in the contemporary law-review literature (apart from the singular analyses of the court by Lee, *supra* note 3, and Bederman, *supra* note 3) is by a cyberlaw scholar, who proposes it as a model for a "United States District Court for the District of Cyberspace." Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 100 (1996). In considering the nature of America's extraterritorial jurisdiction in China, it is also noteworthy that the debate about the regulation of law and borders in cyberspace is, at its heart, a debate about whether "territorial" legal rules are capable of regulating cyberspace. On one side are those who claim that cyberspace is qualitatively different from "real" space. In modern states—the argument goes—ordinary legal rules are based on the assumption that legally meaningful events take place in an identifiable physical location, and more often than not only in one location, which in turn determines jurisdiction. In cyberspace, in contrast, an event and its effects take place most often both "everywhere" and "nowhere" in particular: a website does not exist in a particular physical location,

general rule is to fall victim to a false rule–exception pattern: from a global perspective, in the nineteenth century extraterritorial jurisdiction was the norm for much of the extra-European world.[118] To exaggerate only slightly, European international law declared the rest of the planet to be in a state of exception—a kind of state of emergency where "normal" rules did not apply.[119]

In the West's legal encounter with the states of Asia, for example, the practice of extraterritorial jurisdiction emerged as a key technology of a kind of nonterritorial imperialism—in effect, a colonialism without colonies as such.[120] In the nineteenth century, international legal discourse justified the practice of extraterritoriality explicitly on civilizational grounds, just as it justified colonialism more generally.[121] However, international law did not divide the world simply into fully sovereign "civilized" states and "savages" whose lands were either *terra nullius* only waiting to be "discovered" or won through colonial conquest.[122] In certain circumstances, a less-than-civilized—whether "semi-civilized" or "semi-barbaric" or even outright "barbaric"—state might have some degree of sovereignty, but it could not impose its laws on civilized men even when they entered that state's territory.[123] Over time, such an

but it can be accessed from any place that has an internet connection. *See* David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1376 (1996); David G. Post, *Against "Against Cyberanarchy*," 17 BERKELEY TECH. L.J. 1365, 1383 (2002). On the other side of the debate are those who claim that the Internet is in fact susceptible to regulation by ordinary legal rules. *See, e.g.*, Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998). Notably, the latter accuse the "regulation-skeptics" of being "in the grip of a nineteenth century territorialist conception of how 'real space' is regulated and how 'real space' conflicts of law are resolved." *Id.* at 1205. This view, they observe, "was repudiated in the middle of [the twentieth] century." *Id.* Since then, the expansion of the extraterritorial application of law has "revolutionized conflict of laws." *Id.* at 1208. Therefore—the claim goes—the rules that make transnational legal regulation possible today are equally well-suited for the regulation of territorially dispersed Internet transactions as well. *Id.* at 1205–08. What is noteworthy about the debate is the mistaken assumption by *both* sides that a widespread exercise of extraterritorial jurisdiction is a late twentieth-century development.

118. I borrow the notion of "false rule-exception pattern" from MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 294 (1987).

119. Stated in terms of Carl Schmitt's definition of sovereignty—the "[s]overeign is he who decides on the exception"—Europe as a whole enjoyed sovereignty over the rest of the world. CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 1 (George Schwab trans., MIT Press 1985) (1922). *See also* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 98–178 (2001).

120. I describe extraterritoriality as a species of nonterritorial imperialism in Ruskola, *supra* note 6.

121. *See generally* GERRIT W. GONG, THE STANDARD OF "CIVILIZATION" IN INTERNATIONAL SOCIETY (1984).

122. For a general discussion of the broad legal spectrum between sovereign states on the one hand and colonies on the other, see, e.g., JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 186–214 (1979).

123. As Gerrit Gong states, "Those in the barbarous sphere were granted at best only partial recognition as 'semi-civilized' states with limited or 'imperfect' legal status and personality, only partial membership in the Family of Nations, and only partial (if any) legal status." GONG, *supra* note 121, at 56. James Lorimer developed one of the more elaborate legal taxonomies of civilization:

> As a political phenomenon, humanity, in its present condition, divides into three concentric zones or spheres—that of civilized humanity, that of barbarous humanity, and that of savage humanity. To these . . . belong, *of right*, at the hands of civilized nations, three stages of recognition—plenary political recognition, partial political recognition, and natural or mere

exemption from local law became established as the right of extraterritorial jurisdiction, often (though not always) formalized in (more or less imposed) treaties.[124]

Indeed, China as a whole was never colonized by the United States or any other western power, and the West's extraterritorial legal presence in China was ultimately authorized in a series of bilateral "Treaties of Trade, Peace and Amity" to which China had given its formal consent—even if only at gunpoint.[125] Significantly, the United States had at its founding rejected outright territorial colonialism on the European model. (Although it applied its own model in North America, it did not regard it as colonialism at all, but simply as the young nation's Manifest Destiny.) It was in fact not at all clear at first whether the United States would also decline to follow the European practice of extraterritorial jurisdiction in the "Oriental" states of Asia. As I have argued elsewhere, the Treaty of Wanghia constituted a key moment in United States' political relations with Asia more generally.[126] Not only did it "plac[e] our relations with China on a new footing, eminently favorable to the commerce and other interests of the United States," as President Tyler proudly informed the Congress in 1845,[127] but once ratified it became the model for subsequent American extraterritoriality treaties elsewhere in the Asia-Pacific region as well.[128] In short, although the United States had rejected European-style

> human recognition. . . . The sphere of partial political recognition extends to Turkey in Europe and in Asia, and to the old historical States of Asia which have not become European dependencies—viz., to Persia and the other separate States of Central Asia, to China, Siam, and Japan.

1 JAMES LORIMER, THE INSTITUTES OF THE LAW OF NATIONS: A TREATISE OF THE JURAL RELATIONS OF SEPARATE POLITICAL COMMUNITIES 101–02 (William Blackwood & Sons, 1883). For an analysis of Chinese law as "semi-barbarous," see, e.g., Joseph W. Rice, *Family Safeguards of a Semi-Barbarous Code*, 12 LAW NOTES 29 (May 1908).

124. *See, e.g.*, WILHELM G. GREWE, THE EPOCHS OF INTERNATIONAL LAW 457 (Michael Byers, trans. 2000) ("[In the nineteenth century,] the civilised nations reserved a special jurisdiction ('consular jurisdiction') over their own nationals, whom they did not wish to have subjected to the legal order and justice system of a half-civilised or uncivilised country."); TWISS, *supra* note 108, at 224 ("[F]rom the oldest time an immiscible character between Europeans and Orientals has been maintained. Europeans . . . continue [as] strangers and sojourners in the land, if they reside amongst them; they form *de facto* an *extra-territorial community*."). *See also* Consular Jurisdiction, 18 Op. Att'y Gen. 219; 1885 U.S. AG LEXIS 40, *2–3 (1885) (referring to "the well received doctrine of international law, that consuls in barbarous or semibarbarous states are to be regarded as investing with extraterritoriality the place where their flag is planted").

125. *See* Ruskola, *supra* note 6.

126. *Id.*

127. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. Exec. Doc. No. 28-69, at 1 (1845).

128. Most notably, Borneo (1850), Siam (1856), Japan (1857), Samoa (1878), Korea (1882), and Tonga (1886). See, respectively, Treaty of Peace, Friendship, Commerce, and Navigation, U.S.–Borneo, June 23, 1850, 10 Stat. 909, 5 Bevans 1080; Treaty of Amity and Commerce, U.S.–Siam, May 29, 1856, 11 Stat. 683, 11 Bevans 982; Rights of American Citizens in Japan, U.S.–Japan, June 17, 1857, 11 Stat. 723, 9 Bevans 359; Treaty of Friendship and Commerce, U.S.–Samoa, Jan. 17, 1878, 20 Stat. 704, 11 Bevans 437; Treaty of Peace, Amity, Commerce, and Navigation, U.S.–Korea, May 22, 1882, 23 Stat. 720, 9 Bevans 470; Treaty of Amity, Commerce and Navigation, U.S.–Tonga, Oct. 2, 1886, 25 Stat. 1440, 11 Bevans 1043. Moreover, not only did the United States adopt this European practice of empire in its political intercourse with Asia, but it perfected it so effectively that it came to serve as an imperial

colonialism (at least until its conquest of the remains of the Spanish Empire in the Spanish-American War), it proceeded to construct a virtual empire in the Asia-Pacific on the nonterritorial foundation of extraterritorial jurisdiction.

Indeed, even if the American extraterritorial regime in China was not formally a colonial one, it was hardly coincidental that the first two judges of the United States Court for China both served previously in America's territorial colony in the Pacific: Libbeus Wilfley was a former Attorney General of the Philippines and Charles Lobingier a former United States Judge in the colony.[129] Moreover, their colonial perspective was shared by even more casual observers of American affairs in China. For example, the noted scholar and codifier David Dudley Field declared, "So long as the judicial institutions of the Oriental states remain as they are, it is impossible to subject Americans and Europeans to their jurisdiction."[130] He based his claims on personal experience, having stayed in what he referred to as the "colony" of Shanghai.[131] Tellingly, he conflated the legal status of a colony in the territorial sense, such as Hong Kong, and that of an extraterritorial jurisdiction, such as Shanghai.

It is also noteworthy that as early as 1859 the California Supreme Court had observed, in an appeal from a consular court, "It seems that American citizens residing for the purpose of trade in the ports of China are not regarded as subjects of that government, but that, for purposes of government and protection, they constitute a kind of colony, subject to the laws and authority of the United States."[132] The U.S. Court for China declined that particular analogy, but instead it held that "China, in so far as the administration of the estates of Americans decedent therein is concerned, is a separate, distinct and complete jurisdiction, similar to that of an unorganized territory belonging to the United States"[133]—a comparison that paid equally little respect to Chinese sovereignty.

In sum, given its similarities to and differences from classic territorial imperialism, Western extraterritoriality in China constituted a kind of

model in its own right. Although the British had been the first to obtain extraterritoriality in China, the American statement of extraterritorial rights in the treaty language itself was regarded as "superior" in terms of precision and extensive coverage and it came to be hailed as "one of the distinct contributions of the treaty to the diplomacy of the Far East." *See* KENNETH SCOTT LATOURETTE, THE HISTORY OF EARLY RELATIONS BETWEEN THE UNITED STATES AND CHINA 1784–1844, at 140–41 (1917). In the end, the American extraterritoriality provision became the model for the other European nations that entered into their own treaties with China in the following years. *See* Ruskola, *supra* note 6.

129. *See* SCULLY, *supra* note 3, at 111, 140–41; WINFRED LEE THOMPSON, THE INTRODUCTION OF AMERICAN LAW IN THE PHILIPPINES AND PUERTO RICO 1898–1905, at 76 (1989).

130. DAVID DUDLEY FIELD, *Applicability of International Law to Oriental Nations*, *in* 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 447, 455 (A. P. Sprague ed., 1884). For the original paper, see David Dudley Field, *De la possibilité d'appliquer le droit international européen aux nations orientales: Mémoire presenté à l'Institut de droit international*, 7 REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPAREE 659, 663 (1875).

131. Field, *Applicability of International Law to Oriental Nations*, *supra* note 130, at 455. In his embellished account of Chinese justice he claimed that "[t]he punishments inflicted in all Oriental nations are strange and cruel" and insisted that they included even "crucifixion"—a claim without any factual justification regarding China. *Id*.

132. Forbes v. Scannell, 13 Cal. 242, 279 (1859).

133. Cunningham v. Rodgers, 1 EXTRATERRITORIAL CASES 109, 110 (1907).

colonialism without colonies that was in some ways remarkably modern—more akin to neocolonialism than to traditional colonialism, insofar as neocolonialism refers to "the largely economic rather than the largely territorial enterprise of imperialism."[134] At the same time, and paradoxically, to regard the practice of extraterritorial jurisdiction as primarily a development of the late twentieth and early twenty-first centuries is to ignore its long history outside Europe and North America, sanctioned by Euro-American international law.[135]

IV

EXTRATERRITORIAL CONFLICTS

To return to the theme of this symposium, what does the U.S. Court for China have to tell us about conflicts of law, in light of the historical context in which the court operated? The extraterritorial jurisdiction to which it lay claim was in effect a means by which western powers were able to prevent conflicts of laws from even arising in the first place. An assertion of extraterritoriality simply trumped any local law that otherwise might have applied. In this regard, the conceptual framework of extraterritoriality in the extra-European world appears even more "imperial" that that of territorial colonialism proper. The latter had to confront at least the threshold question whether, and to what degree, it ought to recognize the existing law of an annexed territory. In contrast, the U.S. Court for China was not permitted even to consider whether it should apply Chinese law. Ultimately, its application was simply not (at least in theory) a legitimate option, given the foundational legal fiction that, for jurisdictional purposes, China was to be treated as if it were part of the United States—a mere "District of China." China as such simply disappeared behind the judicial horizon. At the same time, even though the U.S. Court for China was foreclosed from even considering Chinese law, the court could not ignore it in practice. Indeed, as we have seen, although the court did not have either the statutory or treaty-based authority to do so, it did apply Chinese law in at least some cases, as well as local "compradore" or "Chinese custom."[136]

134. GAYATRI CHAKRAVORTY SPIVAK, A CRITIQUE OF POSTCOLONIAL REASON: TOWARD A HISTORY OF THE VANISHING PRESENT 3 (1999). *See also* Donald E. Pease, *US Imperialism: Global Dominance Without Colonies*, *in* A COMPANION TO POSTCOLONIAL STUDIES 203 (Henry Schwarz & Sangeeta Ray eds., 2000).

135. Moreover, the imperial practice of western extraterritorial jurisdiction in the Orient did not disappear even with the onset of the twentieth century and the political emergence of the norm of national self-determination after World War I. When the abolition of extraterritoriality was being discussed yet again at an international conference in Washington in 1922, a contemporaneous article in the *American Journal of International Law* still insisted that "the burden of proof" remained on China to justify the abolition of the practice, rather than on the United States (among others) to defend its continuation. Benjamin H. Williams, *The Protection of American Citizens in China: Extraterritoriality*, 16 AM. J. INT'L L. 43, 58 (1922). Remarkably, it was not until World War II that the United States gave up officially its right of extraterritorial jurisdiction in China. Treaty for the Relinquishment of Extraterritorial Rights in China and the Regulation of Related Matters, U.S.–China, Jan. 11, 1943, 57 Stat. 767, 6 Bevans 739.

136. *See supra* II.F.

However, while the assertion of extraterritorial jurisdiction was a remarkably effective way of defining away even potential conflicts between U.S. and Chinese law, it also introduced other, no less intractable conflicts. That is, the court found itself awash with conflicts among different potentially applicable bodies of *United States* law,[137] rather than conflicts between Chinese and U.S. law. Ordinarily, these would presumably have been just the kind of technical questions—far removed from the politically charged matter of dealing with Chinese law—that any moderately competent U.S. court *could* handle, given the key role of conflicts of law in the complex functioning of the federal system. Yet, ironically, the U.S. Court for China had tremendous difficulties precisely with these mundane conflicts.

Evidently, at the heart of the problem lay the very notion of extraterritoriality on which the court's jurisdiction rested. It made the conflicts among potentially applicable U.S. laws impossible to resolve by the dominant criterion of territoriality by which they would have been resolved at home. For example, given that the District of China was not a state of the United States, it was eminently unclear which of the several state common laws should apply there, as we have seen.[138] And although the court resorted to the codes of Alaska and the District of Columbia as a way of avoiding the problem, it found itself equally unable to choose consistently between the two codes; evidently, China was not Alaska or D.C., either.[139] It was of course no accident that the court determined that the codes of Alaska and D.C. were the relevant choices: unorganized territories as well as the federal district were governed by the federal government more or less as internal colonies, without democratic representation. Yet at the same time, this hardly made them equivalent to the District of China. In the end, jurisdictional events that took place in China simply had no evident territorial or jurisprudential referents in the United States.

It should come as no surprise, therefore, that the body of law the court created—the extraordinary American common law of China that emerges from the pages of the *Extraterritorial Reports*—seems so arbitrary and so unmoored from any "real" (read: territorial) United States law.

V

CONCLUSION: BANALITY OF EXTRATERRITORIALITY

It is difficult to arrive at a definitive evaluation of the jurisprudence of the U.S. Court for China. Some of it seems banal and routine, some of it simply weird, and much of it weird precisely *because* it is so strangely matter-of-fact, as if the extraterritorial nature of the court's jurisdiction were of no particular significance. Yet it would be too easy to take the court's jurisprudence as an

137. *See supra* II.A–D.
138. *See supra* II.C.
139. *See supra* II.C.

argument in favor of a strictly territorial and national conception law against an extraterritorial and therefore per se "imperial" conception of law. If anything, the court illustrates the necessarily contingent nature of any attempt to maintain a coherent distinction between extraterritorial and "intraterritorial" jurisdiction.[140] Moreover, to complain that the court failed to construct in China a flawless replica of the law of territorial United States would be to presuppose that American law in the United States is somehow "real," a thing in itself, and to regard the American common law of China as merely a flawed "representation" of it. Surely law, "like sailing, gardening, politics, and poetry," is "a craft of place" that works "by the light of local knowledge," as Clifford Geertz has put it.[141] Thus, while the impossibility of projecting a territorially based conception of American law into China gave the court a great deal of freedom to fashion a law of its own, it is hardly surprising that in the "District of China" the resulting pastiche consisted not only of eclectic pieces of American law but incorporated aspects of Chinese law as well. In the end, the court's extraterritorial common law self-evidently had to be both "American" as well as "Chinese."[142] In fact, one may well view the court's jurisprudence as an instance of the kind of legal pluralism that has been the defining feature of various regimes of territorial colonialism as well.[143]

In short, while extraterritoriality created distinct problems for the court and gave rise to an idiosyncratic jurisprudence, in the end what is so inescapably disquieting about the court is not so much the nature of its jurisdiction

140. *Cf.* Ralf Michaels, *Territorial Jurisdiction After Territoriality*, *in* GLOBALIZATION AND JURISDICTION, *supra* note 106, at 105–06 (questioning the presupposition that "a conception of jurisdiction based on a distinction between intra- and extraterritoriality is both intelligible (i.e. any case can be placed in either of the two groups), and legitimate").

141. CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167 (2000).

142. Tahirih Lee suggests that insofar as the U.S. Court for China was able to construct its own jurisprudence, distinct from that of federal courts in the United States, it constituted "a triumph of local law over sovereign law." Lee, *supra* note 3, at 1058–62. Indisputably, the court's jurisprudence was distinctive, as I too argue above. Whether it was "local" or not depends ultimately on the observer's perspective. Lee's analytic perspective is largely that of *Americans* in China. From their point of view, where the norms of American law in China prevailed over the norms of American law in the United States, this was surely a triumph of a *kind* of local law. This article considers the status of American law in China primarily from the Chinese point of view. From that vantage point, it is much less evident that the operation of American law in China constituted a triumph of the local. It is of course important to recognize that some Chinese did bring, and win, suits in the U.S. Court for China. Hence, it would undoubtedly be inaccurate to view American law in China as *nothing* but an American imposition. Yet most Chinese surely regarded the court with some degree of hostility, and it seems likely that even those Chinese who did resort to the court did so with some ambivalence. For an insightful analysis of the nature of "semicolonialism" in early twentieth-century China, see SHU-MEI SHIH, THE LURE OF THE MODERN: WRITING MODERNISM IN SEMICOLONIAL CHINA, 1917–1937 (2001).

143. *See, e.g.*, M.B. HOOKER, LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS (1975) (describing plural legal systems in various colonial as well as neo-colonial contexts). This is obviously not to suggest that legal pluralism is somehow limited to colonial legal orders alone. *See* LAUREN BENTON, LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400–1900, at 9 (2002) (arguing that "[c]olonies were not distinctive because they contained plural legal orders but because struggles within them made the structure of the plural legal order more explicit").

(territorial versus extraterritorial) or even its style of reasoning (both ordinary and extraordinary at various times), but simply the colonial historical context in which it came about and in which it operated. For colonialism without colonies is still a kind of colonialism—even if a (possibly) kinder colonialism.