

**FROM HERE TO EXTRATERRITORIALITY:
The United States Within and Beyond Borders**

Jeffrey T. Gayton

University of Wisconsin
Political Science Department
110 North Hall
1050 Bascom Mall
Madison, WI 53706

Phone: (608) 259-9084

Fax: (608) 265-2663

E-mail: jtgayton@polisci.wisc.edu

WWW: <http://polisci.wisc.edu/~jtgayton.INDEX.HTML>

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Abstract

Beginning in the late eighteenth century and running well into the twentieth, the United States claimed at least partial extraterritorial jurisdiction over American citizens in countries in Africa, Asia, the Middle East, and the Pacific. While the United States no longer claims such jurisdiction over its citizens abroad, it has not abandoned extraterritoriality. Today, the United States claims at least partial jurisdiction over a wide range of activities abroad that have effects within the United States.

In this paper, I will attempt to trace and explain the historical development of American extraterritorial claims, focusing on claims made against China, Turkey, and the Barbary states of Morocco and Libya; and claims made in the area of antitrust law. I will argue that realist conceptions of power and interest and liberal conceptions of interdependence and international regimes are important, but incomplete explanations of American extraterritorial claims. Early American claims were in part driven by competition with the European states that made similar claims and may be viewed as constituting an international regime. Contemporary American extraterritorial claims are in part a reflection of American power and are driven by the blurring of sovereign jurisdiction caused by growing interdependence. However, in order to fully understand these two sets of claims, and in particular, to understand the shift from one to the other, I argue that (changing) conceptions of sovereignty are just as, if not more important.

Exploring the development of American extraterritorial claims is important for several reasons. It will help develop and expand upon realist and neoliberal theory. It will provide an empirical contribution to the often abstract literature on sovereignty. It will contribute to our understanding of the role of domestic politics in foreign policy, particularly the role of the American judiciary. Finally, American extraterritoriality is not an arcane legal issue, but a major source of conflict between the United States and its friends and neighbors.

In 1786, the United States made its first extraterritorial claim, establishing jurisdiction over American citizens in Morocco. By the middle of the nineteenth century, the United States had made similar claims in fourteen other countries.¹ But by the middle of the twentieth century, the United States had abrogated all extraterritorial jurisdiction over American citizens in these countries.² At about the same time however, the United States started making a new set of extraterritorial claims. Instead of claiming jurisdiction over *American citizens* residing *outside* its borders, the United States claimed jurisdiction over any *foreign activities* that had *effects inside* its borders.³

Extraterritoriality is rooted in the concept of sovereignty, if only because it is traditionally considered a violation of it. I define sovereignty as a state's claim of exclusive jurisdiction over individuals or activities within its borders.⁴ Extraterritoriality therefore can be defined as a state's claim of jurisdiction over individuals or activities beyond its borders. Extraterritoriality can be differentiated into two types. First, extraterritorial claims can be regional (applying to individuals or activities *within a specific area* outside the territory of the state) or global (applying to individuals or activities *regardless of their location* outside the territory of the state). Second, claims can be exclusive (no other actor has jurisdiction over the individual or activity) or shared (other actors may have some jurisdiction as well). The United States' claims of jurisdiction over

¹ These countries were Algeria (Algiers), Borneo, China, Egypt, Iran (Persia), Japan, Korea, Libya (Tripoli), Madagascar, Morocco, Samoa, Tanzania (Zanzibar/Muscat), Thailand (Siam), Tunisia (Tunis), and Turkey (Ottoman Porte). I use the contemporary names of states, even though they are sometimes anachronistic.

² There are a couple of exceptions, however. In accordance with normal diplomatic practice, the United States retains jurisdiction over its diplomatic officials abroad. The United States also claims jurisdiction over American military personnel on American military bases abroad. Finally, the United States has criminalized some activities engaged in by Americans abroad. For example, the Foreign Corrupt Practices Act prohibits American companies from paying bribes to foreign officials. However, the Foreign Corrupt Practices Act is very different from the past practice of extraterritorial jurisdiction over American abroad, because it covers American companies around the world. It is, in a sense, a hybrid of "regional" and "global" extraterritoriality. See below for a discussion of these terms.

³³ Such activities include antitrust, money laundering, drug production and sale, counterfeiting, fraud, and most recently, the use of American property confiscated by Cuba.

⁴ Of course, no state exercises truly *exclusive* jurisdiction over *all* activities within its borders. Nevertheless, as an "ideal-type," it is a useful starting-point for exploring sovereignty and extraterritoriality. See below for a further discussion of this point. See also, Jeffrey T. Gayton. *From Personalism to Territoriality: State Authority and Foreign Policy in Medieval and Modern Europe*. Paper presented at the International Studies Association Conference (San Diego, CA, 16-20 April 1996).

American citizens in particular countries are an example of regional extraterritoriality. The United States' claims of jurisdiction over foreign activities with domestic effects are global. Both sets of claims are, as will be shown below, shared.

This paper will attempt to answer three questions. Why did the United States make regional extraterritorial claims? Why did it give up those claims? And why does it now make global extraterritorial claims? To put it more concisely, how do we explain the United States' dramatic shift from regional to global extraterritorial claims? I will argue that the insights of (neo)realism and neoliberalism provide partial, but incomplete explanations of this change. (Neo)realism's emphasis on power and interest draws attention to the power imbalances inherent in extraterritorial claims and the economic interests often associated with them. But it cannot explain why American (and European) regional claims were as limited as they were. It also fails to explain why the United States abandoned its regional extraterritorial claims when it did. Neoliberal conceptions of interdependence help us understand how transnationalism blurs jurisdictional boundaries, making exclusive territorial jurisdiction increasingly problematic. Neoliberalism's emphasis on international regimes may also be useful in understanding the "rules" governing American (and European) practices of regional extraterritoriality. However, treating the United States' current global extraterritorial claims as an international regime may be a bit premature.

I will argue that changing norms of sovereignty have played a key role in the development of American extraterritorial claims. In terms of regional extraterritoriality, the United States believed that "uncivilized" countries were not subject to the "Christian" "law of nations" and therefore were not sovereign. This not only legitimated regional extraterritorial claims against such states, but contributed to their unique form – generally applying only to American defendants, not American plaintiffs. The development of the principle of self-determination made this conception of sovereignty increasingly untenable. Self-determination held that sovereignty was not a *privilege of civilized states* but a *right of all states*. In some cases, American extraterritorial claims were renounced when countries became "civilized." In other cases, the United States gave up its claims without such "civilization," based purely on the right of self-determination.

Changing norms of sovereignty are even more important in understanding global extraterritorial claims, because they represent an attempt to redefine the meaning of sovereignty.

As noted above, sovereignty has traditionally been understood as the state's exclusive jurisdiction with a territory. What is interesting about American global extraterritorial claims is that they both undermine and expand this notion of exclusive territorial jurisdiction. The territorial principle is bolstered by encompassing not only the location of *activities* but the location of the *effects* of those activities. At the same time, the exclusive principle is undermined because jurisdiction must be shared between the state where the activity occurs and the state where the activity has its effects.

An analysis of American extraterritorial claims will make several important theoretical contributions. First, it will help place (neo)realist conceptions of power and interest and neoliberal conceptions of interdependence and international regimes in a broader context. Second, it will contribute to the growing literature on sovereignty. Extraterritoriality violates sovereignty because it intrudes on exclusive territorial jurisdiction. To the degree that sovereignty is undermined by growing political, social, and economic transnationalism, extraterritoriality may be a way for states to redefine the meaning of sovereignty and accommodate it to a changing world. Third, it will contribute to our understanding of the role of domestic politics, particularly the role of courts, in international relations. Many extraterritorial claims, particularly in the United States, emanate from the judicial system, which has been chronically underappreciated as a source of foreign policy.⁵

An analysis of American extraterritoriality will also make important empirical contributions. Because extraterritorial claims challenge the exclusive territorial jurisdiction of states, they are not cases of arcane international law, but instances of major international conflict. American extraterritorial claims have often threatened its usually cordial relations with friends and neighbors. Many states have enacted "blocking statutes" that prevent their citizens and companies from complying with American extraterritorial laws and court rulings.⁶ The Helms-Burton law, which would open American courts to lawsuits against foreign companies using

⁵ Most studies of the role of the judiciary in American foreign policy focus on its role as an arbiter in the conflict between the executive and legislative branches over foreign policymaking power. See for example, Randall Walton Bland, *The Black Robe and the Bald Eagle: The Supreme Court and the Foreign Policy of the United States, 1789-1953* (San Francisco: Austin & Winfield, 1996).

⁶ States with blocking statutes include Australia, Canada, Denmark, Finland, France, Italy, Japan, Mexico, New Zealand, Norway, Sweden, Switzerland, and the United Kingdom. The European Union and the Organization of American States have also lodged formal protests against American extraterritorial claims. See A.V. Lowe, ed. *Extraterritorial Jurisdiction: An Annotated Collection of Legal Materials* (Cambridge: Grotius Publications Ltd., 1983), pp. 79-225.

American property expropriated by Cuba, has become a highly contentious issue.⁷ A State Department official claimed that official protests over the law contained “the most undiplomatic language I’ve ever seen.” Disputes over the law may even threaten the World Trade Organization. Several states have pledged to take the dispute to the W.T.O., and the United States has stated it will invoke the “national security” exemption to any judgment against it. Such an act might cripple the W.T.O.⁸

The first section of this paper is a very brief outline of international relations theory as it relates to extraterritoriality. The second section traces the development of American extraterritorial claims in China, Turkey, and the Barbary States of Morocco and Libya.⁹ The third section traces the development of American extraterritorial claims in the area of antitrust, through an analysis of major U.S. court decisions.¹⁰ I will conclude with a few remarks on the empirical and theoretical import of this study.

⁷ It should be noted however, that President Clinton has thus far suspended this provision. The only effects of Helms-Burton today are the barring of the families of these companies from entering the United States (an act that is not strictly extraterritorial) and the extension of a so-called "secondary boycott" on Cuban goods.

⁸ *The New York Times*. (6 June 1996), A1; (13 June 1996), A9; (23 July 1996), A4; (23 October 1996), A1; (13 February 1997), A1; (21 February 1997), A1.

⁹ Since the United States made extraterritorial claims in fifteen countries, space prevents me from discussing them all and statistics prevents me from drawing a valid sample. My case selection can be justified on other grounds though. One is Harry Eckstein’s “crucial case study.” Given the competition and relative power differences between European powers and the United States in China and the Ottoman Empire, my argument that changing conceptions of sovereignty led to the abrogation of American extraterritorial claims can be considered “least-likely” cases. Alternatively, this paper can be seen as a “plausibility probe.” Indeed it is the beginning of a much larger project on American extraterritorial claims – my dissertation. Harry Eckstein. “Case Study and Theory in Political Science.” In Fred I. Greenstein and Nelson W. Polsby, eds. *Handbook of Political Science*, Vol. 1 (Reading: Addison-Wesley, 1975), pp. 79-137. Robert Yin argues for another, perhaps more convincing strategy. He suggests a “replication” logic rather than a “sampling” logic for case selection. Cases are selected on the basis of their relevance to theory. Each case that confirms the theory is seen not as representative of all the cases, but as a quasi-experimental replication of the test of the theory. Robert K. Yin, *Case Study Research: Design and Methods*, 2nd ed. (Thousand Oaks: Sage, 1994), pp. 45-51. As to the problem of selecting on the dependent variable, in this paper, I can only concede.

¹⁰ Again, case selection becomes a problem, as I cannot discuss all contemporary American extraterritorial claims or draw a valid sample. However, antitrust is one the most well-developed areas of American law, both domestically and extraterritorial. In addition, it has been the American judicial system, rather than Congress or the President, that has played the greatest role in determining the jurisdictional scope of American law. It might be added that this approach does not present a problem of selecting on the dependent variable, as I also examine cases where American courts refused to extend extraterritorial jurisdiction.

EXTRATERRITORIALITY IN THEORETICAL PERSPECTIVE

International relations theory has been profoundly silent on the issue of extraterritoriality.¹¹ In some ways, this silence is not surprising. Two of international relations' dominant approaches – (neo)realism and neoliberalism – have theoretical and methodological “biases” that turn their interest away from extraterritoriality. (Neo)realism, with its focus on the issues of war and peace, the pursuit of interest, and the exercise of power, is predisposed to view extraterritorial claims as pure exercise of power in the pursuit of interest, dressed up in legalistic garb. Neoliberalism, with its focus on transnationalism, international regimes, and multilateralism, is predisposed to view extraterritoriality as a result of the jurisdictional problems created by transnationalism, but a relatively uninteresting one because of its inherently unilateral (rather than multilateral) nature. Perhaps more surprising is the lack of interest in extraterritoriality by those exploring the issue of state sovereignty. This diverse group, ranging from neoliberals analyzing sovereignty as an international regime, to constructivists and post-modernists focusing on sovereignty as a normative structure or social construct, has shown virtually no interest in extraterritoriality. In this section, I will briefly explore these literatures

(Neo)Realism

Hans Morganthau defined realism as “interest defined in terms of power.” All states' foreign policies are based on the use of power in pursuit of interest, and the primary interest is usually power. This purpose of this rather circular definition is to assure a “rational” approach and to “guard against two popular fallacies: the concern with motives and the concern with

¹¹ International law is not silent on extraterritoriality. However, it is not concerned with *why* states make extraterritorial claims, only the *legal basis* of those claims. See Armand L.C. De Mestral *et al. Extraterritorial Application of Export Control Legislation: Canada and the U.S.A.* (Boston: M. Nijhoff, 1990); Richard A. Falk. *The Aftermath of Sabbatino* (Dobbs Ferry: Oceana Publications, 1965); Michael J. Glennon and Thomas M. Franck. *United States Foreign Relations Law: Documents and Sources* (London: Oceana Publications, 1980); Joseph P. Griffin, ed. *Perspectives on the Extraterritorial Application of U.S. Antitrust and Other Laws* (Chicago: American Bar Association, 1979); A.H. Hermann. *Conflicts of National Laws with International Business Activity* (London: British-North American Committee, 1982); John Lacey, ed. *Act of State and Extraterritorial Reach* (Chicago: American Bar Association, 1983); Dieter Lang and Gary Born, eds. *The Extraterritorial Application of National Laws* (Deventer: Kluwer Law and Taxation Publishers, 1987); Lowe, ed. (1983); Eugene F. Mooney. *Foreign Seizure: Sabbatino and the Act of State Doctrine* (Lexington: University of Kentucky Press, 1967); A.D. Neale and M.L. Stephens. *International Business and National Jurisdiction* (Oxford: Clarendon Press, 1988); Douglas E. Rosenthal and William M. Knighton. *National Laws and International Commerce: The Problem of Extraterritoriality* (London: Routledge & Kegan Paul, 1982); James B. Townsend. *Extraterritorial Antitrust: The Sherman Act and U.S. Business Abroad* (Boulder: Westview, 1980); James Michael Zimmerman. *Extraterritorial*

ideological preferences.”¹² Interest defined in terms of power is also the basis of Morgenthau’s conception of balance of power: states will not allow adversaries (or even allies) to secure more power than them.¹³ As for sovereignty and international law, Morgenthau argues that they are not incompatible, but only in a limited sense:

[S]overeignty is incompatible only with a strong and effective, because centralized, system of international law. It is not at all inconsistent with a decentralized, and hence weak and ineffective, international legal order. Sovereignty is the very source of that decentralization, weakness, and ineffectiveness.¹⁴

In other words, sovereignty itself precludes international law from being an effective limit on states pursuit of interest defined in terms of power. But sovereignty itself is not a part of international law.

Kenneth Waltz attempted to redefine Morgenthau’s political realism in terms of the structure of the international system. This neorealist formulation does not define interest in terms of power, but in terms of international anarchy. Waltz argues that international anarchy creates a “self-help” system in which states must provide for their own security. Domestic politics do not matter as much for Waltz as they did for Morgenthau. Indeed, the pressures of the anarchic international system require states to behave in similar ways; hence, states are considered “like units.” Waltz’s conception of states as like units interacting in a system of anarchy is intimately connected to his conception of sovereignty:

To call states “like units” is to say that each state is like all other states in being an autonomous political unit. It is another way of saying that states are sovereign.¹⁵

Like realists, neorealists believe that sovereignty is not a part of international law. Sovereignty is little more than a description of the international system of anarchy.

Neither realists nor neorealists have attempted to analyze extraterritoriality, but an explanation can be generated from their theories. Both realism and neorealism suggest that states will make extraterritorial claims when it is in their interest and they have the power to do so. Differences emerge only in the source of those interests; realism looking more towards domestic politics and neorealism focusing on the structure of the international system. Possible interests

Employment Standards of the United States: The Regulation of the Overseas Workplace (New York: Quorum Books, 1992).

¹² Hans J. Morgenthau. *Politics Among Nations: The Struggle for Power and Peace*, 3rd ed. (New York: Alfred A. Knopf, 1960), pp. 5-6.

¹³ Morgenthau (1960), pp. 167-223.

¹⁴ Morgenthau (1960), p. 313.

¹⁵ Kenneth N. Waltz. *Theory of International Politics* (New York: Random House, 1979), p. 95.

include protecting the economic activities engaged in by fellow nationals and competition with other states engaged in similar activities. International law and the principle of sovereignty will play virtually no role. Violations of either will be common when they conflict with the interests of sufficiently powerful states.

Neoliberalism

Neoliberal approaches do not differ greatly from (neo)realist. They acknowledge the importance of interest and power and the impact of anarchy on foreign policy. The primary difference lies in its emphasis on the impact of interdependence on foreign policy. Robert Keohane and Joseph Nye define interdependence as “situations characterized by reciprocal effects among countries or among actors in different countries.”¹⁶ While recognizing that “interdependence [does] not necessarily lead to cooperation...,” neoliberalism tends to focus on cooperation, particularly multilateral cooperation through international regimes:

Interdependence affects world politics and the behavior of states; but governmental actions also influence patterns of interdependence. By creating or accepting procedures, rules, or institutions for certain kinds of activity, governments regulate and control transnational and interstate relations. We refer to these governing arrangements as *international regimes*.¹⁷

A neoliberal account of extraterritoriality would look to the impact of interdependence on states, particularly in the area of sovereignty. The “reciprocal effects among countries” caused by interdependence have the potential to create jurisdictional conflicts. Neoliberalism’s emphasis on international regimes is problematic from the standpoint of creating a theory of extraterritoriality, because extraterritoriality is an inherently unilateral act. However, if other states make extraterritorial claims, it may be possible to treat extraterritoriality as an international regime. In that case, one would expect states making extraterritorial claims to generally adhere to the “procedures, rules, or institutions” that govern them.

This approach is reflected in one of the few international relations treatments of extraterritoriality. Anne-Marie Burley argues that “liberal states operate in a ‘zone of law,’ in which domestic courts regulate transnational relations under domestic law.”¹⁸ Liberal states, led

¹⁶ Robert O. Keohane and Joseph S. Nye. *Power and Interdependence*, 2nd ed. (Glenview: Scott, Foresman, 1989), p. 8.

¹⁷ Keohane and Nye (1989), pp. 249, 5. Emphasis in original.

¹⁸ Anne-Marie Burley. “Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine.” *Columbia Law Review*, Vol. 92, No. 8 (December 1992), p. 1910.

by the United States, are eroding the “act of state doctrine,” which precludes their adjudication of the acts of another government in their own territory.

Sovereignty

The literature on sovereignty has focused primarily on what sovereignty is rather than on how sovereignty affects foreign policy or foreign policy affects sovereignty. The classic definition of sovereignty is that of F.H. Hinsley: “[T]he idea of sovereignty was the idea that there is a final and absolute political authority within the territory... ‘*and no final and absolute authority exists elsewhere.*’”¹⁹ Stephen Krasner sees three major problems with this conception of sovereignty. First, he argues that “final authority within a given territory has been challenged in one way or another throughout the history of the state system.” Second, he notes that “there are territories and spheres of human activity in which partial sovereignty – that is, control over only some issues – is claimed.” Third, “The claims that states have made with regard to the authoritative control of movements of people, commodities, investments, and information, ideas, or culture across their international boundaries have changed across time and over countries.”²⁰

John Ruggie takes issue with the neorealist conception of sovereignty:

The concept of sovereignty...has become utterly trivialized by recent usage, which treats sovereignty either as a necessary adjunct of anarchy or as a descriptive category expressing unit attributes, roughly synonymous with material autonomy....[I]n its proper modern usage, [sovereignty] signifies a form of *legitimation* that pertains to a *system* of relations....²¹

Alexander Wendt argues similarly, claiming that sovereignty provides a system of order for states based on the "mutual recognition of one another's right to exercise exclusive political authority within territorial limits."²²

From this discussion, one might distill a definition sovereignty as an institution negotiated and supported by states to legitimate and maintain their claims to exclusive authority within their territories. This exclusive authority is more an ideal than a description of states’ actual condition, but it is an important ideal over which states struggle. The problem is that this gives us very little to work with to explain extraterritoriality. The sovereignty literature does help

¹⁹ F.H. Hinsley, *Sovereignty*, 2nd ed. (Cambridge: Cambridge University Press, 1986), p. 26. Italics in original

²⁰ Stephen Krasner. “Sovereignty: An Institutional Perspective.” *Comparative Political Studies*, Vol. 21, No. 1 (April 1988), pp. 87-88.

²¹ John Gerrard Ruggie. “Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis.” *World Politics*, Vol. 35, No. 2 (January 1983), pp. 275-6.

²² Alexander Wendt. “Anarchy is What States Make of It: The Social Construction of Power Politics.” *International Organization*, Vol. 46, No. 2 (Spring 1992), p. 412.

flesh out definitions of sovereignty that are woefully inadequate in (neo)realist and neoliberal theory. It also helps us understand that sovereignty is not an unchanging empirical fact. But this tells us little about the conditions under which sovereignty changes. Specifically, it doesn't suggest any hypotheses about when and why extraterritorial claims are made.

REGIONAL EXTRATERRITORIALITY: AMERICAN QUASI-COLONIALISM

In this section, I will discuss the regional extraterritorial claims of the United States in Turkey, China, and the Barbary States of Morocco and Libya. I will first document the evolution of the claims, then explain that evolution, focusing on why the claim was first made and why the claim was later abandoned. I will argue that (neo)realist and liberal explanations are useful, but incomplete without understanding the normative context of sovereignty. At this time, the United States believed that international law, and thus sovereignty, did not apply to “uncivilized,” “non-Christian” states. When these states reformed themselves along Western lines, the United States (as well as other Western powers) proved quite willing to renounce their extraterritorial rights. With the development of the principle of self-determination, even the insistence on adherence to Western standards became untenable, and the United States ceased to make it a condition of renouncing extraterritorial rights.

Turkey, 1830 to 1931

American extraterritorial claims in Turkey were established by treaty in 1830. Article IV of that treaty stipulates:

Citizens of the United States of America, quietly pursuing their commerce, and not being charged or convicted, of any crime or offence, shall not be molested; and even when they may have committed some offence, they shall not be arrested and put in prison, by the local authorities, but they shall be tried by their Minister or Consul, and punished according to their offence, following in this respect, the usage observed towards other Franks.²³

According to the treaty then, American consular officials had jurisdiction only over Americans accused of crimes; that is, over American criminal *defendants*. Turkish criminal defendants, even when accused of crimes against Americans, were subject to Turkish jurisdiction. The treaty also stipulated that in civil disputes, American plaintiffs and defendants were subject to Turkish authority. Despite these apparent limitations on American extraterritorial jurisdiction, in practice

the system was very different. In the mid-nineteenth century an arrangement evolved among several of the great powers in which a mixed tribunal of European, American, and Turkish officials sat in judgment over disputes between their citizens and Turks.²⁴

In 1874, the United States conceded some judicial authority to Turkey. In an effort to establish the right of Americans to purchase land, the United States conceded legal jurisdiction over Americans in matters regarding landholding. Americans could be tried by Turkish officials in land matters without even the assistance of their consuls, when consuls were more than nine hours distant.²⁵ However, the United States did not renounce its other rights: “The law granting foreigners the right of holding real estate does not interfere with the immunities specified by treaties, and which will continue to protect the person and moveable property of foreigners who may become owners of real estate.”²⁶

The United States did not formally renounce extraterritoriality in Turkey until the Treaty of 1931. Article I of this treaty states, “With reference to the conditions of establishment and sojourn which shall be applicable to the nationals and corporations of either country in the territories of the other, as well as to fiscal charges and judicial competence, the United States of America will accord to Turkey and Turkey will accord to the United States of America the same treatment in all cases as that which is accorded or shall be accorded to the most favored third country.”²⁷ The meaning of this treaty is somewhat vague because of the reference to “most favored third country.” As noted above, the United States was not alone in demanding and receiving extraterritorial jurisdiction in Turkey. Britain, France, Russia, and others had similar rights.²⁸ Despite this ambiguity, “The Department of State considered the acceptance of this

²³ In this context, “Franks” refers not just to the French, but to all Europeans, and their extraterritorial rights in Turkey. See below for a further discussion of other states’ extraterritorial claims. *Treaties and Other International Agreements of the United States of America: 1776-1949*, Vol. 10, pp. 619-622. Henceforth known as *TIA*.

²⁴ “Letter from the Secretary of State, Relative to the Exercise of Judicial Extraterritorial Rights Conferred upon the United States” (29 April 1882). *Serial Set*, 1993 S.misdoc.89, p. 11.

²⁵ This concession was also a reflection of the problems involved with the size of Turkey and the limited number of American officials available to preside over consular courts. Congress was fairly stingy with the money needed for personnel to carry out its extraterritorial jurisdiction, not only in Turkey, but in China and other countries as well. For laws governing the judicial functions of American consuls, see 9 Stat. 276 (11 August 1848) and 12 Stat. 72 (22 June 1860).

²⁶ *TIA*, Vol. 10, pp. 637-641.

²⁷ *TIA*, Vol. 11, pp. 1127-1128.

²⁸ Other countries included, Austria, Belgium, Brazil, Denmark, Germany, Greece, Holland, Italy, Portugal, Spain, and Sweden. “Letter from the Secretary of State, Relative to the Exercise of Judicial Extraterritorial Rights Conferred upon the United States” (29 April 1882). *Serial Set*, 1993 S.misdoc.89, p. 3.

treaty as effectively terminating the 1830 agreement containing the capitulatory rights of the United States.”²⁹

We are left with two important questions: why the United States made extraterritorial claims against Turkey, and why it later renounced them. One possible explanation is balance of power. The United States certainly had more relative power than Turkey. Moreover, the United States was not the only country with extraterritorial rights in Turkey. Indeed, the United States secured its rights *after* many of the great European powers. In order to establish an equal footing with Europeans in Turkey, the United States had to secure similar extraterritorial protections. However, this is at best a partial explanation, for it only helps us understand why the United States *established* extraterritorial jurisdiction, not why it later *renounced* it. In addition, the United States gave up its extraterritorial claims before most other powers did, despite the most favored nation clause that allowed it to retain them.

Another possible explanation is economic interest. Turkish “capitulations” were a rather small portion of larger commercial treaties, suggesting that trade was an important concern. It may be argued that in order to protect the economic interests of Americans in Turkey, it was necessary to secure extraterritorial judicial protections. After World War I, American economic interests in Turkey were quite limited, as was the number of Americans residing there.³⁰ Renouncing extraterritoriality would therefore have had little impact on American interests. While this is another important part of the explanation, it is incomplete. American reports on Turkey very rarely linked economic rights with extraterritorial rights. The United States also relinquished some of its extraterritorial rights in order to gain economic concessions. The primary concern was what the United States perceived as the injustice of the Turkish legal system:

The rule of the “sacred law’ making Christians incompetent as witnesses against Turks is one of the marvels of Mussulman jurisprudence. Hearing such a rule actually existed I had Mr. ___ look up the volume containing the law upon the subject.... I take the liberty of quoting from it points of plainest application.... “Thus, in the category of the inadmissible (as witnesses), I find the following: Players of backgammon, though chess-players are admissible under certain conditions.... So, wine-drinkers and pork-eaters, because of the prohibition in the Koran; so of those who eat bread in the streets; so of those who utter blasphemies against Mahomet and his disciples; so of those who make water standing, because in doing so the urine may spatter upon their legs and they be made unclean, so that they cannot go into a mosque for prayers; so, Jews may testify against Christians, and Christians against Jews, and foreigners against non-

²⁹ Roger R. Trask. *The United States Response to Turkish Nationalism and Reform, 1914-1939* (Minneapolis: University of Minnesota Press, 1971), p. 198.

³⁰ Trask (1971), p. 242.

Mussulmans; but under this permission is couched the prohibition forbidding any of them testifying against a Mussulman. So, the testimony of a woman counts for but half; that is to say, two women are required to make one witness.”³¹

This remarkable report is noteworthy not so much for its accuracy (or inaccuracy), but for its astonishment at the legal system to which Americans would be subject if under Turkish jurisdiction. That extraterritoriality violated sovereignty and international law was not of concern to the United States because in its view, international law did not apply to Turkey:

The intercourse of the Christian world with the Mohammedan world is not founded upon the principles of the law of nations. International law, as professed by the civilized nations of Christendom, is the offspring of the communion of ideas subsisting between them, and is based upon a common origin, and an almost identical religious faith. Between the peoples of Islâm and those of Europe there exists no such communion of ideas and principles from which could grow a true international law between them; their relations one with the other had to be regulated solely with a view to political expediency and in accordance with treaties entered into by them.³²

The belief that Turkish legal standards did not meet western, Christian standards under the law of nations had two interrelated implications. First, if Americans were to enjoy the legal protections of “Christendom” within Turkey, the Turkish legal system had to be reformed or extraterritorial jurisdiction had to be established. Second, the United States would not be violating the law of nations by establishing extraterritorial jurisdiction in Turkey, because Turkey was outside the law of nations. American conceptions of Turkey’s place in international law didn’t just legitimate extraterritorial claims, it helped facilitate them. This also helps explain why the United States claimed jurisdiction over Turkish plaintiffs and American defendants, but not Turkish defendants and American plaintiffs – because the “Christian” law of nations had nothing to say about protecting the rights of non-Christians

Turkey underwent dramatic changes in the early twentieth century – social, political, and legal. Kemal Attaturk’s nationalist revival and secularization of Turkey helped transform the legal system, granting non-Muslims more legal equality with Muslims. With these reforms, extraterritorial jurisdiction did not seem necessary to protect the legal rights of Americans in Turkey, so the United States was willing to renounce it. As Ambassador Joseph Grew told Turkish Foreign Minister Tevfik Aras, during the negotiation of the Treaty of 1931:

³¹ “Letter from the Secretary of State, Relative to the Exercise of Judicial Extraterritorial Rights Conferred upon the United States” (29 April 1882). *Serial Set*, 1993 S.misdoc.89, p. 2.

³² “Report for 1880 by Ed. A. Van Dyck, U.S. Consular Clerk at Cairo” (6 April 1881). *Serial Set*, 1943 S.exdoc.3, p. 8.

The government of the United States of America is fully alive to the changes which have taken place in Turkey. Its sole desire is that the development of the relations between the two countries should proceed upon the basis of these changed conditions.³³

“Wilsonian” notions of anti-colonialism and support for the principle of self-determination only served to reinforce the need to renounce extraterritorial claims in Turkey. This combination of legal reform and development of the principle of self-determination is central to understanding the renunciation of many of the United States’ extraterritorial claims.

China, 1844 to 1943

American extraterritorial jurisdiction in China developed in an atmosphere considerably different from that of Turkey. American economic interests in China were considerably more advanced, and American competition with Europe (as well as Japan) was considerably more intense. However, as will be shown, differing legal standards, changing conceptions of sovereignty, and the principle of self-determination are also important in understanding American extraterritorial claims in China, as well as their abrogation.

The United States established extraterritorial jurisdiction in China in 1844. Article XXI of the Treaty of Wang Hiya stipulated: “Subjects of China who may be guilty of any criminal acts towards citizens of the United States, shall be arrested and punished by the Chinese authorities according to the laws of China: and citizens of the United States, who may commit any crime in China, shall be subject to be tried and punished only by the Consul, or other public functionary of the United States, thereto authorized according to the laws of the United States.” Article XXIV provided for shared jurisdiction between American consular officials and the Chinese government in civil conflicts between Americans and Chinese: “[I]f controversies arise between citizens of the United States and subjects in China, which cannot be amicably settled otherwise, the same shall be examined and decided conformably to justice and equity by the public officers of the two nations acting in conjunction.” Article XXV excluded China from jurisdiction in conflicts between Americans and between Americans and non-Chinese.³⁴ American extraterritorial rights in China were reaffirmed in 1858 and 1868, but not significantly changed.³⁵ It should be noted that in all of these treaties, American extraterritorial jurisdiction

³³ “Letter from Joseph Grew to Tevfic Aras” (28 October 1931). *Papers Relating to the Foreign Relations of the United States*, 1931, Vol. II, pp. 1042-1043. (Henceforth, *FRUS*)

³⁴ *TIA*, Vol. 7, pp. 647-658.

³⁵ *TIA*, Vol. 7, pp. 659-670; 680-684.

was limited to Americans in the so-called “free ports.” Americans accused of crimes outside these ports were subject to Chinese jurisdiction.

The process of renouncing American extraterritorial rights began in 1903. In a treaty of that year, the United States conferred upon China more jurisdiction over domestic affairs, including mineral rights, coinage, and the regulation of trademarks, patents, and copyrights. Article XV conditioned the renunciation of extraterritorial rights on the “Westernization” of Chinese legal standards: “The Government of China having expressed a strong desire to reform its judicial system and to bring it into accord with that of Western nations, the United States agrees to give every assistance to such reform and will also be prepared to relinquish extraterritorial rights when satisfied that the state of Chinese laws, the arrangements for their administration, and other considerations warrant it in so doing.”³⁶ In 1921, the United States extended the principles of the Treaty of 1903 to encompass other countries with extraterritorial rights in China. These states “agreed to give every assistance towards the attainment by the Chinese Government of its expressed desire to reform its judicial system and to bring it into accord with that of Western nations, and have declared that they are also ‘prepared to relinquish extraterritorial rights when satisfied that the state of the Chinese laws, the arrangements for their administration, and other considerations warrant’ them in so doing.”³⁷ In 1930, the Agreement Relating to the Chinese Courts in the International Settlement at Shanghai established procedures, guidelines, and supervision for the transition to Chinese judicial sovereignty.³⁸ However, the Japanese invasion of China and World War II interrupted what was to be a three-year transition period, and the United States did not formally abrogate its extraterritorial jurisdiction until 1943. Article I of the Treaty for the Relinquishment of Extraterritorial Rights in China states:

All those provisions of treaties or agreements in force between the United States of America and the Republic of China which authorize the Government of the United States of America or its representatives to exercise jurisdiction over nationals of the United States of America in the territory of the Republic of China are hereby abrogated. Nationals of the United States of America in such territory shall be subject to the jurisdiction of the Government of the Republic of China in accordance with the principles of international law and practice.³⁹

³⁶ *TIA*, Vol. 7, pp. 695-708.

³⁷ These countries included Belgium, Britain, France, Italy, Japan, the Netherlands, and Portugal. *TIA*, Vol. 3, pp. 329-331.

³⁸ *TIA*, Vol. 3, pp. 1040-1048

³⁹ *TIA*, Vol. 7, pp. 739-745.

It should be noted however, that because of the war, the United States hardly exercised any real jurisdiction in China at this time.

Again, the question is why the United States claimed extraterritorial jurisdiction in China and why it relinquished it. Economic interest and balance of power explanations appear to be more persuasive in China than in Turkey. American trade with China was much larger. Furthermore, the U.S. “open door” policy in China was designed not only to secure American economic interests in China, but to prevent other states from securing advantages greater than those of the United States. Even before the “open door” policy, the United States was concerned about its relative position in China, including extraterritorial rights. American consul Caleb Cushing wrote that he negotiated the Treaty of Wang Hiya after learning about British and Portuguese extraterritorial rights in China:

And, in addition to all the other considerations affecting the question, I reflected how ignominious would be the condition of Americans in China, if subjected to the local jurisdiction, whilst the English and the Portuguese around them were exempt from it. I deemed it, therefore, my duty, for all the reasons assigned, to assert a similar exemption in [sic] behalf of citizens of the United States.⁴⁰

Most favored nation clauses in the treaties assured that any extraterritorial concessions China made to other states would be conferred upon the United States as well. Finally, wartime concessions to the Chinese nationalists, it was hoped, would further American interests in the war against Japan. However, these explanations remain incomplete without understanding the normative context of Western versus non-Western cultures.

As in Turkey, American officials showed great concern about the inequities of the Chinese legal system. In 1880, Ambassador George Seward reported:

There can be no doubt that the state of the Chinese judicial establishment, as it affects foreigners, is unsatisfactory. No code of procedure, worthy to be called such, exists. The magistrates, secretaries, and constables are often corrupt. Judgments are secured only after a great deal of exertion, and persistent efforts have to be made to secure their execution.⁴¹

In a report written after the renunciation of American extraterritorial rights in China, Senator Elbert Thomas prepared a report that stated:

The reluctance of the western governments to submit their nationals to the control of the Chinese authorities in accordance with the western principle of territorial sovereignty grew out of differences both of substance and procedure. Experience indicated that the Chinese magistrates

⁴⁰ On the other hand, the United States could have insisted on the restoration of Chinese jurisdiction over all foreigners, British, Portuguese, and American, as it did years later. That it did not suggests that there was something more to American policy than economic interest and balance of power. “Caleb Cushing to John Calhoun” (29 September 1844). *Serial Set*, 464 H.doc.69, p. 13.

⁴¹ *FRUS*, 1880, p. 155.

were solely concerned with punishment for offenses committed rather than with ascertainment, by defined legal processes, of the guilt or innocence of individuals accused of an offense.... There was little attempt to distinguish degrees of offense.... Beyond this, it was recognized that punishments in China were excessively severe for relatively minor offenses, and that they were frequently barbarous, as measured even by western standards.... Without pushing the examination further it is apparent that *the reasons for the institution of the extraterritorial regime in China are to be found in the differences in the legal and judicial conceptions and development in England and the United States as compared with China.*⁴²

As in Turkey, American officials argued that the “law of nations” did not apply to non-Christian China:

Thus, among the elementary writers on the law of nations, the most approved – such as Vattel and Kluber – omit to place in a proper light the all-important fact, that what they denominate the law of nations, as if it were the law of *all* nations, is, in truth, only the international law of *Christendom*.... Nothing, it would seem, correspondent to our law of nations, is recognised or understood in China.⁴³

The absence of Western legal standards showed that China was not subject to the "Christian" law of nations. Since China could not possibly protect the rights of "Christians," extraterritorial jurisdiction had to be extended. But jurisdiction was established only over American defendants, not Chinese defendants, because "Christian" legal protection did not apply to non-Christians. In other words, Chinese legal standards both required and legitimated regional extraterritorial jurisdiction.

As noted above, the United States began paving the way towards the restoration of Chinese sovereignty in 1903. It was not the first to renounce extraterritoriality; indeed it was among the last.⁴⁴ China had long opposed extraterritoriality, especially after the establishment of the Republic in 1912. However, their approach to eliminating extraterritoriality was different from that of the United States: “[T]he Chinese sought to take the question out of the context of judicial reform and bring it exclusively within that of national sovereignty, whereas the western governments, while willing to relinquish their extraterritorial rights, continued to feel that it would not be proper to give them up except gradually in step with actual changes in law and judicial methods.”⁴⁵ In other words, China sought the right of self-determination, and they argued self-determination precluded the imposition of conditions on the renunciation of extraterritoriality. While the Nationalist government in China did engage in some legal reform, progress was interrupted by the Japanese invasion of Manchuria. After the United States entered

⁴² “Extraterritoriality in China” (6 October 1943). *Serial Set*, 10773 S.doc.102, pp. 4-5. Emphasis added.

⁴³ “Caleb Cushing to John Calhoun” (29 September 1844). *Serial Set*, 464 H.doc.69, pp. 5, 10.

⁴⁴ Russia renounced its extraterritorial claims in 1919. Belgium, Denmark, Italy, Portugal, and Spain renounced their claims in 1928.

the war and began fighting with China against Japan, renunciation of extraterritoriality in China became more an issue of self-determination than legal reform. In the Senate debate on the ratification of the Treaty of 1943, Senator Connally declared:

In taking this action the United States is performing, I think, nothing more than a real act of justice toward China. The extraterritorial rights which we have enjoyed are extraordinary. They are beyond our rights in international law. They were secured from China because of the disturbed and chaotic conditions in that country, because of the fact that China was not a strong military or naval power; and under the tremendous pressure of great interests the obligations were extorted from China.⁴⁶

This is a remarkable statement. Not only was China *then* a subject of international law, *it had apparently always been one*. Legal reform took a back seat to the universal principle of self-determination. Legal reform in China was not as important as it had been in Turkey. Self-determination gained more legitimacy in the twelve years between the abrogation of American extraterritorial claims in Turkey and China.

The Barbary States: Morocco (1786 to 1956) & Libya (1805 to 1912)

American extraterritorial claims in the Barbary states – Algeria, Morocco, Tunis, and Libya – are somewhat different from those discussed above. First, they were the first countries against which the United States made regional extraterritorial claims, and in the case of Morocco, the last. Second, the treaties establishing American extraterritorial rights were not part of larger commercial treaties, but of treaties attempting to prevent piracy against American shipping. Third, with the exception of Morocco, the United States ceded extraterritorial rights when the countries became formal colonies of European states; France in the case of Algeria and Tunis, Italy in the case of Libya. In this section, I will focus on Morocco and Libya.

The United States signed its first treaty with Libya in 1796, but did not secure extraterritorial jurisdiction until 1805. Article 18 of the Treaty of 1805 secured American consular jurisdiction over all disputes between Americans in Libya. Article 19 somewhat vaguely stipulated: “If a Citizen of the United States should kill or wound a Tripoline, or, on the contrary, if a Tripoline shall kill or wound a Citizen of the United States, the law of the Country shall take place, and equal justice shall be rendered, the Consul assisting at trial...”⁴⁷ Though the language of the treaty is less than clear about *which* country’s laws “shall take place,” in practice

⁴⁵ “Extraterritoriality in China” (6 October 1943). *Serial Set*, 10773 S.doc.102, p. 10

⁴⁶ *Congressional Record*. Senate (1943), p. 839.

⁴⁷ *TIA*, Vol. 11, pp. 1081-1087.

it meant extraterritorial rights similar to those in Turkey and China – only Americans accused of crimes against Libyans were subject to American jurisdiction. When Libya later came under Turkish jurisdiction, American extraterritorial rights were governed by the treaties with Turkey. The United States relinquished its extraterritorial rights in Libya in 1913, a year after Libya became a colony of Italy.

The American extraterritorial treaties with Morocco were very similar to those with Libya. Article 20 of the Treaty of 1796 dealt with American consular jurisdiction over disputes between Americans. Article 21 dealt with American consular jurisdiction over crimes by Americans against “Moors.”⁴⁸ The Treaty of 1836 duplicated the language of the Treaty of 1786.⁴⁹ However, abrogation of American extraterritorial jurisdiction in Morocco was a far more complicated matter than in Libya. France established a protectorate in Morocco in 1912, stipulating special zones for Spain and an “international zone” in Tangiers. After the establishment of the protectorate, France began pressing the United States to renounce its extraterritorial rights. In 1917, Secretary of State Robert Lansing renounced American extraterritorial jurisdiction in French Morocco, but Congress never adopted legislation to that effect.⁵⁰ As a result, American extraterritorial claims persisted in their entirety until 1952, when the International Court of Justice restricted them to conflicts between Americans, except in the international zone of Tangier, where the United States still retained jurisdiction over American defendants.⁵¹ Not until 1956, when Morocco began independence negotiations with France, did the United States stop exercising its extraterritorial rights.⁵²

As noted above, the extraterritorial treaties with the Barbary states were not directly concerned with commercial relations like the treaties with Turkey and China were. Rather, they

⁴⁸ *TIA*, Vol. 9, pp. 1278-1285.

⁴⁹ *TIA*, Vol. 9, pp. 1286-1290.

⁵⁰ The United States refused to renounce jurisdiction in the Spanish zones, though in practice the United States never exercised that jurisdiction. See “Robert Lansing to Spanish Ambassador” (20 August 1917). *FRUS*, 1917, p. 1096. For Lansing’s renunciations, see “Robert Lansing to Jusserand” (15 January 1917) *FRUS*, 1917, p. 1094; “Robert Lansing to Jusserand” (20 October 1917). *FRUS*, 1917, p. 1096. For an American statement on the requirement that Congress accede to renunciation, see “Robert Lansing to Jusserand” (22 January 1913). *FRUS*, 1914, pp. 905-906.

⁵¹ Interestingly, one of the reasons the I.C.J. ruled against the United States was that all other European countries had long renounced their claims. See “Relinquishment of Consular Jurisdiction in Morocco” (19 June 1956). *Serial Set*, 11889 S.rp.2274, pp. 1-2.

⁵² “Note from the Ambassador Cannon to Minister of Foreign Affairs Balafrej” (6 October 1956). *FRUS*, 1955-1957, Vol. XVIII, pp. 541-542.

focused on the piracy against American shipping in the Mediterranean.⁵³ To be sure, this was a largely economic concern, but it did not involve direct commerce between the United States and the Barbary states. It should be noted also that extraterritorial rights did not really help the United States against the Barbary pirates. The United States secured jurisdiction over Americans within the territories of the Barbary states, not over the high seas where the pirates operated. While it may be argued that extraterritoriality in China and Turkey helped facilitate American commerce by protecting American traders from local authority, the same cannot be said of extraterritoriality in the Barbary states.

So how do we explain the assertion and abrogation of American extraterritorial jurisdiction in Morocco and Libya? One point to bear in mind is that they were Muslim states, and therefore subject to views like those held with respect to Turkey.⁵⁴ The United States was very concerned about the rights of Christians under Islamic law. It also did not consider these states “civilized” enough to be considered subjects of international law and thus sovereign. As the American Consul in Libya reported in 1873, “The political status of Mahommedan governments in all the countries bordering on the Mediterranean Sea is very different from that of Christian states, as least as far as regards the former’s diplomatic relations with civilized nations.”⁵⁵ As in Turkey and China, the United States asserted extraterritorial jurisdiction in the Barbary states because of its interest in protecting the rights of Americans in “uncivilized” countries and because “Christian” international law denied these states their sovereignty.

When Libya became an Italian colony in 1912, Italy began pressing the United States for renunciation of its extraterritorial rights. The United States did not appear concerned at all with

⁵³ After the abolition of slavery in the United States, the slave trade in the Barbary states also became a concern. However, unless slaves became American citizens or protégés, there were not subject to American jurisdiction. “United States Consul Vidal to Hunter” (29 May 1871). *FRUS*, 1873, Vol. II, pp. 1141-1144. For an interesting analysis of American and European responses to the Barbary pirates, see Janice E. Thomson. *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (Princeton: Princeton University Press, 1994). The word “extraterritoriality” in the title is something of a misnomer. Thomson is concerned not with extraterritorial jurisdiction, but with non-state violence.

⁵⁴ In some respects, American officials considered Libyan Muslims even worse than Turkish Muslims. In 1873, the U.S. Consul to Libya described the Tripoline Muslims: “But the Koran creed, as understood by those ignorant people, is not what its founder meant it to be; for while they bow to Allah, they never fail, on every occasion, to appeal to the intercession of heathenish evil geniuses. Either black or white the Mohammedans of this country are generally ignorant, indolent, dirty, cowardly, stupid, of a thievish and lying disposition, cringing before their Turkish rulers, and, in presence of Frankish consuls, hiding under an apparent abjection the deep hatred and ferocious contempt which they nurse at the bottom of their hearts for all Nazarenes.” See “United States Consul Vidal to Hunter” (14 February 1873). *FRUS*, 1873, Vol. II, p. 1147.

⁵⁵ “United States Consul Vidal to Hunter” (25 February 1873). *FRUS*, 1873, Vol. II, p. 1162.

the changed situation. With virtually no negotiation or consultation, the United States renounced its extraterritorial rights five months after Italy's request. When Morocco became a French colony in 1912 and the French began requesting that the United States renounce its extraterritorial rights, the United States raised three objections. The first was economic, and involved the settlement of old claims by Americans against Moroccans and foreign nationals in Morocco. The second was political, stemming largely from confusion about the relative status of Spaniards in Morocco. Though all other European states eventually renounced their claims in Morocco, the United States was apparently reluctant to do so if Spain still had extraterritorial rights. The third objection was judicial. The United States was adamant about insuring that Americans in Morocco would lose accustomed rights under French jurisdiction. To satisfy the United States, France made repeated assurances that American legal rights would be protected. However, the outbreak of WW I led France to transfer jurisdiction of certain cases from French civil courts to military tribunals in 1915. The United States strenuously objected to this. Two years later, after much negotiation, Secretary of State Lansing renounced American extraterritorial rights in Morocco, but as noted above, the United States continued to exercise its rights since Congress never confirmed Lansing action.⁵⁶

When the United States finally did give up its extraterritorial jurisdiction in Morocco in 1956, American concerns were very different. One issue was the desire to support Arab nationalism without antagonizing France. Another issue was the danger that the Soviet Union might exploit Moroccan irritation with American extraterritorial rights. Finally, the United States wanted preserve American military bases in Morocco and increase in the number of American troops. However, the United States refused to use the renunciation of extraterritoriality as a means of gaining concessions from Morocco: "The use of extra-territorial rights as a bargaining piece...does not appear desirable or possible."⁵⁷ A State Department report on whether the United States should renounce its extraterritorial jurisdiction concluded:

Extraterritorial jurisdiction has, for a long time, been a symbol of colonialism. The United States has renounced its right of extraterritorial jurisdiction in all other countries of the world where it

⁵⁶ See *FRUS*, 1914, pp. 905-923; 1915, pp. 1097-1098; 1916, pp. 800-810; 1917, pp. 1092-1096.

⁵⁷ The United States did have other levers with Morocco, such as economic aid. See "Progress Report on United States Policy in North Africa (Tunisia, Morocco, and Algeria) (NSC 5436/1) (4 April 1956). *FRUS*, 1955-1957, Vol. XVIII, pp. 124-125, 129.

possessed them.... With the French already committed to leading Morocco to independent status, we cannot afford to lag behind by hanging onto this vestige of colonialism....⁵⁸

This appears to be the first time the United States equated extraterritoriality with colonialism. With this admission, the United States seems to have fully embraced the principle of self-determination. In January 1956, the United States abrogated its extraterritorial rights in Morocco, before France granted independence, and without conditions on Morocco. The age of regional extraterritorial claims had come to an end.

Conclusions

I have argued that the United States made regional extraterritorial claims against Turkey, China, Morocco, and Libya because it did not see them as sovereign subjects under “Christian” international law. When this situation was remedied either by domestic legal and institutional reform or by colonization by a European state, the United States usually abandoned its claims. When it delayed, as in Morocco and to a lesser degree, China, principles of self-determination, which held such distinctions in international law to be invalid, eventually prevailed. Robert Jackson and Carl Rosberg have argued that the principle of self-determination elevated “juridical” statehood over that of “empirical” statehood, hastening the end of colonialism even before many former colonies were capable of exercising sovereignty.⁵⁹ In a sense the same dynamic that Jackson and Rosberg argue delegitimated colonialism, also served to delegitimize regional extraterritoriality.

None of this is to say that the (neo)realism’s emphasis on power interest is irrelevant. Clearly, the United States and others perceived an interest in protecting the legal rights of their citizens in these countries. Nevertheless, such an explanation is incomplete for three reasons. First, from where does this interest come? As I have argued, this interest came, at least in part, from American conceptions of international law. Christian states had a right and an obligation to protect their citizens in non-sovereign, non-Christian states. Second, why didn’t the United States claim jurisdiction over native defendants? The United States (and to an even greater degree, European states) likely had the power to make good such claims if it wanted to, and it is relatively easy to think of cases in which such claims might in the American interest. I suggest

⁵⁸ “Memorandum from the Assistant Secretary of State for Near Eastern, South Asian, and African Affairs (Allen) to the Secretary of State” (5 January 1956). *FRUS*, 1955-1957, Vol. XVIII, pp. 520-521.

that while American conceptions of non-Christian sovereignty facilitated claims over American defendants, they delegitimated claims over native defendants. Finally, (neo)realism fails to explain why the United States no longer makes regional extraterritorial claims. It is unlikely to be a matter of balance of power, for it would be difficult to argue that the United States has less relative power today than it did in the nineteenth century. It could be argued that such an exercise of power would not be worth the effort because of the strenuous objection of the subject states. But such an argument begs the question, because one of the reasons such a claim would be opposed is because of the evolution of sovereignty norms along the lines of juridical equality and self-determination. To the degree that regional extraterritoriality can be viewed as an international regime – with rules, norms, and procedures devised by and adhered to by the United States and Europe – these explanations are compatible with neoliberalism. However, as will be shown below, such an approach to global extraterritoriality is much more problematic.

Today, regional extraterritorial claims are hardly conceived of by American policymakers. Consider the case of Michael Fay, the American teenager caned by the Singaporean government for the crime of vandalism. This was just the kind of thing that the United States worked hard to prevent in the nineteenth century with its regional extraterritorial claims. But here in the late twentieth century, the United States took no action beyond describing the sentence against Fay as “excessive,” voting against Singapore as a host for the first meeting of the W.T.O., and warning Americans traveling to Singapore that they are “subject to harsh punishment.” It imposed no sanctions and extraterritorial claims were not even contemplated.⁶⁰

GLOBAL EXTRATERRITORIALITY: AMERICAN ANTITRUST ENFORCEMENT ABROAD

The abandonment by the United States of regional extraterritoriality did not mean the abandonment of all extraterritorial claims. Beginning in 1945, American courts began redefining their sovereign jurisdiction. In this section, I will focus on federal court rulings in the area of antitrust. My intent is not so much to analyze the extraterritorial aspects of American antitrust law, but to use antitrust court cases to explore how American thinking on extraterritoriality has changed over time.

⁵⁹ Robert H. Jackson and Carl G. Rosberg. “Why Africa’s Weak States Persist: The Empirical and the Juridical in Statehood.” *World Politics*, Vol. 35, No. 1 (1982), pp. 1-24.

American Banana, 1909

The Sherman Act of 1890 was designed to prohibit anti-competitive behavior by limiting the ability of American companies to monopolize sectors of the American market.⁶¹ Nineteen years later, the Supreme Court heard its first case on the extraterritorial application of that law: *American Banana Co. v. United Fruit Co.* (213 U.S. 347). In that case, American Banana alleged that the Costa Rican military seized its plantation in newly independent Panama at the request of United Fruit. Soonafter, a Costa Rican court ruled that the property of American Banana belonged to United Fruit. In its brief before the Supreme Court, American Banana claimed that it had been greatly injured by United Fruit; that as an American company, United Fruit's acts abroad were subject to American jurisdiction; and that United Fruit's actions were anti-competitive under the Sherman Act.

The Supreme Court, ruling that American courts had no jurisdiction over the matter, decided in favor of United Fruit:

No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive.... But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act was done... For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations.⁶²

The logic of the Court is based on the act of state doctrine. Even though United Fruit was alleged to have gotten the Costa Rican government to act on its behalf, the actions of the Costa Rican government were nonetheless an "act of state," and therefore not subject to American courts. We also see a clear picture of the Court's conception of legitimate extraterritorial jurisdiction. Extraterritoriality is allowable only on the high seas (where there is no sovereign) or in countries with unjust laws (such as those discussed in the preceding section).⁶³

⁶⁰ *The New York Times*. 10 April 1994, E5; 22 June 1994, A10; 19 May 1994, A25.

⁶¹ 26 Stat. 209 (2 July 1890).

⁶² 213 U.S. at 356.

⁶³ The principal case governing the extraterritorial jurisdiction of American consular courts was *In re Ross* (140 U.S. 453). In that case, John Ross appealed his murder conviction by American consular officials in Japan. Ross claimed that his Constitutional right to a jury trial was violated. In 1891, the Supreme Court denied the appeal, ruling, "The Constitution can have no operation in another country." (140 U.S. at 464). However, the Court still held that consular jurisdiction abroad was legal according to the treaty powers of the executive and the right of Congress to pass laws regarding the enforcement of those treaties.

In addition to their conclusion that state sovereignty precluded American jurisdiction, the Supreme Court found other reasons for denying jurisdiction. First, the Court ruled that the wording of the Sherman Act clearly indicated that it did not apply beyond the borders of the United States. Second, the Court ruled that whether or not Costa Rica acted lawfully was not a matter for the court to decide:

The fundamental reason why persuading a sovereign power to this or that cannot be a tort is not that the sovereign cannot be joined as a defendant or because it must be assumed to be acting lawfully.... The fundamental reason is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be reasonable and proper.... *The very meaning of sovereignty is that the decree of the sovereign makes law.*⁶⁴

Finally, the Court expressed concern about its ability to enforce a ruling against Costa Rica. This point is important from a (neo)realist perspective, and will become important in later years.

It should be noted that these were not novel conceptions for the Supreme Court. In *The Schooner Exchange v. M'Faddon* (11 U.S. (7 Cranch) 116), the Supreme Court held that it had no extraterritorial jurisdiction because of “the general inability of the judicial power to enforce its decisions in case of this description, from the consideration that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic rather than legal discussion, are of great weight, and merit serious discussion.”⁶⁵ In *Underhill v. Hernandez* (168 U.S. 250), the Supreme Court ruled, “Every sovereign State is bound to respect the independence of every other sovereign State, and *the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.*”⁶⁶

ALCOA, 1945

American courts began to move away from this strictly territorial conception of sovereign jurisdiction in 1945. In *United States v. Aluminum Co. of America* (148 F.2d 416), the U.S. Circuit Court of Appeals, Second Circuit held that under certain conditions, antitrust activities outside the borders of the United States could be subject to the American jurisdiction. In that case, the United States government alleged that the Aluminum Co. of America (ALCOA) had

⁶⁴ 213 U.S. at 358. Emphasis added.

⁶⁵ 11 U.S. (7 Cranch) at 489.

⁶⁶ *Underhill* is considered the classic formulation of the act of state doctrine. 168 U.S. at 252. Emphasis added.

sought to monopolize the American aluminum market through its association with a Canadian subsidiary and a cartel formed with foreign aluminum producers.

The Circuit Court overturned the ruling of the U.S. District Court, Southern District of New York that the United States did not have jurisdiction over the case. The central argument of the Circuit Court was that “...*it is settled law*...that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.”⁶⁷ This argument, known as the “effects doctrine,” is quite a novel reconceptualization of sovereign jurisdiction. As noted above, American courts had strictly held not just to the principle of territorial jurisdiction, but to the idea that territorial jurisdiction only governed acts committed *within* the territory. In *ALCOA*, the Circuit Court did not reject the principle of territorial jurisdiction, but reformulated what territorial jurisdiction governs. Territorial jurisdiction now encompassed not only acts that *occurred* within the territory, but acts that had *effects within* the territory. The Circuit Court did not rule that ALCOA’s activities abroad constituted a violation of the Sherman Act, but ordered the District Court to make a decision based on the effects doctrine.

Timberlane, 1976

One of the problems with the Circuit Court’s ruling in *ALCOA* was that it was unclear under what conditions the effects doctrine should apply. Given the great increase in transnational economic activity since WW II, as well as the central position of the United States in the global economy, an unlimited effects doctrine could conceivably give American courts global jurisdiction over all economic activities subject to domestic law. In *Timberlane Lumber Co. v. Bank Of America, N.T. & S.A.* (549 F.2d 597), the United States Court of Appeals, Ninth Circuit attempted to establish guidelines for the application of the effects doctrine.

In this case, Timberlane alleged that Bank of America conspired to prevent it from milling lumber in Honduras and exporting it to the United States. As in *American Banana*, Bank of America was alleged to have made use of power of a foreign government on its behalf. Bank of America therefore argued that the act of state doctrine precluded the jurisdiction of American

courts. The Court of Appeals held a different view. Leaning heavily on the Supreme Court's ruling in *Banco Nacional de Cuba v. Sabbatino* (376 U.S. 398), it concluded that the act of state doctrine "does not bestow a blank-check immunity upon all conduct blessed with some imprimatur of a foreign government."⁶⁸ The Court of Appeals ruled:

[T]he allegedly "sovereign" acts of Honduras consisted of judicial proceedings which were initiated by Caminals [on behalf of Bank of America], a private party and one of the alleged coconspirators, not by the Honduran government itself.... In fact, there is no indication that the actions of the Honduran court and authorities reflected a sovereign decision that Timberlane's efforts be crippled or that trade with the United States should be restrained.⁶⁹

After concluding that the act of state doctrine did not preclude American extraterritorial jurisdiction, the Court of Appeals turned to the effects doctrine. The Court established a "tripartite analysis" based on the presence of an effect in the United States, the size of the effect, and the balance of interests between the United States and the foreign country.⁷⁰

The Court of Appeals' formulation of how American and foreign interests are to be balance is most important: "The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations of the principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad."⁷¹ Though these are significant limitations on the ability of American courts to assert extraterritorial jurisdiction, they should not be exaggerated. In establishing these rules, the Court of Appeals left it up to courts to decide, *on the merits of the case*, whether they had jurisdiction or not. Recall that in *American Banana* the Supreme Court ruled that foreign acts of state were not subject to American judicial authority, regardless of their effects within the United States. In *Timberlane*,

⁶⁷ 148 F.2d at 443. Emphasis in added. Of course, given Supreme Court precedent until this time, the effects doctrine was hardly a matter of "settled law." Moreover, as will be discussed below, other states do not "ordinarily recognize" these "liabilities."

⁶⁸ 549 F.2d at 606. In *Sabbatino*, the Supreme Court ruled that the act of state doctrine is not based on "the inherent nature of sovereignty [or] international law..." as *Underhill* and *American Banana* implied. Rather, it has "constitutional" underpinnings aris[ing] out of the...strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." (376 U.S. at 421, 423).

⁶⁹ 549 F.2d at 608.

⁷⁰ 549 F.2d at 613.

⁷¹ 549 F.2d at 614.

the Court of Appeals ruled that it was up to American courts to decide what was and what was not a true act of state, and determine whether the effects were significant enough to warrant American extraterritorial jurisdiction.

Mannington Mills, 1979

In *Mannington Mills, Inc. v. Congoleum Corp.* (595 F.2d 1287), Mannington Mills alleged that Congoleum secured foreign patents for floor covering by fraud. Congoleum then filed patent infringement suits against Mannington Mills in these countries. Mannington Mills claimed this was a violation of the Sherman Act because it restricted its ability to manufacture floor covering abroad and export it to the United States. The U.S. District Court for the District of New Jersey, dismissed Mannington Mills' complaint, agreeing with Congoleum's contention that the United States had no jurisdiction because foreign patents were an act of state. In 1979, the United States Court of Appeals, Third Circuit rejected the District Court's ruling, arguing that patents did not constitute an act of state:

The grant of patents for floor coverings is not the type of sovereign activity that would be of substantial concern to the executive branch in its conduct of international affairs. Although enforcement of a decree in the present litigation may possibly present problems of international relations...the granting of patents per se, in substance ministerial activity, is not the kind of governmental action contemplated by the act of state doctrine or its correlative, foreign compulsion.⁷²

However, ruling that the act of state doctrine did not apply did not necessarily mean that the United States had jurisdiction. Recognizing that a "judgment against Congoleum in this country would have direct and ripple effects abroad," the Court of Appeals also noted that if "an American company is excluded from competition in a foreign country by fraudulent conduct on the part of another American company, then our national interests are adversely affected."⁷³ The Court of Appeals ruled that the District Court had been in error to deny jurisdiction on the basis of the act of state doctrine, and directed it to apply the test established in *Timberlane* in order to determine whether the United States had jurisdiction.

⁷² 595 F. 2d at 1294. Foreign sovereign compulsion is a corollary of the act of state doctrine, in which a defendant cannot be found liable in one state for activities in another state that were required by that other state. It is also the basis for blocking statutes, which are intended not so much to punish submission to foreign jurisdiction, but to provide a legal justification for not submitting.

⁷³ 595 F.2d at 1296.

Conclusions

How do we explain this change in American conceptions of sovereignty and extraterritorial jurisdiction? Until 1945, American courts adhered to a view of judicial authority based on territorial exclusivity. In the words of the Supreme Court in *American Banana*, “All legislation is *prima facie* territorial.”⁷⁴ Moreover, the act of state doctrine was broadly interpreted to encompass virtually *any* act by a foreign governmental official. Since *ALCOA*, American courts have significantly limited the applicability of the act of state doctrine, and developed a complex test to determine whether, in the absence of a valid act of state, whether extraterritorial jurisdiction can be asserted.

Firm conclusions based solely on Federal court rulings are difficult, but several possibilities are suggested. First, the fact that the United States began to extend its jurisdiction after WW II suggests that power and interdependence are important. Economic interdependence has greatly increased since WW II. The growth of transnational corporations (TNCs) has made strictly territorial conceptions of jurisdiction increasingly problematic. However, while the United States is not the only state confronted with the jurisdictional problems inherent in a transnational economy, it is by far the most active in asserting extraterritorial claims. Here is where power is important. As noted above, American courts have been reluctant to make extraterritorial claims that they cannot enforce. But in addition to being a *political* superpower, the central position of the United States in the post-WW II global economy gives it *economic* enforcement power far beyond that of other states. Virtually every foreign company of significance has some presence in the United States – subsidiaries or offices in the United States, associations with American companies, imports from the United States, or exports to the United States. This helps give the United States what might be termed “market power” to enforce its judicial rulings, at least in the economic realm. Foreign companies have generally been reluctant to go against American extraterritorial rulings against them when the penalty may involve eventual exclusion from the American market.⁷⁵

Just as important is the role American courts have played in the formulation of new conceptions of sovereignty. It is too simplistic to argue that American courts reject sovereignty

⁷⁴ 213 U.S. at 357.

because they reject exclusive territorial jurisdiction. The principle of exclusivity has been eroded by the shared jurisdiction inherent in determining judicial competence based on the location and the effects of an activity. At the same time, the principle of territoriality has been expanded, because it is considered in terms of both the location and the effects of an activity.

CONCLUSIONS

Are the United States' global extraterritorial claims an outgrowth or reflection of its past experience with regional extraterritoriality? Considering the very different concerns and strategies of regional and global extraterritoriality, the answer is probably no. Regional extraterritoriality was primarily concerned with securing the legal rights of Americans in countries where such rights did not exist. Global extraterritoriality is primarily concerned with securing at least partial jurisdiction over transnational economic (as well as criminal) activities that have an effect within the United States. Regional extraterritoriality was based on treaties with countries that were held to be outside "Christendom," and therefore not subject to international legal conceptions of exclusive territorial sovereignty, which prohibited extraterritorial claims against other Christian states. Global extraterritoriality is based on the denial that international law precludes all extraterritorial claims and a reconceptualization of the meaning of sovereignty as exclusive jurisdiction over a territory. This reconceptualization claims jurisdiction not only over activities within the territory, but over activities that have an effect in it.

However, examining both "strains" of extraterritoriality is vital to understanding its evolution. Regional extraterritoriality is dead. Legal reform in the affected countries and/or the rise of the principle of self-determination killed it. Shortly after the end of WW II, the principle of sovereignty based on exclusive territorial jurisdiction was extended to all countries, Christian and non-Christian. Sovereignty changed; will happen again? Will global extraterritoriality suffer the same fate as regional extraterritoriality, or will transnationalism continue to erode jurisdictional boundaries, making the exercise of exclusive territorial jurisdiction fundamentally untenable?

⁷⁵ That Germany is the largest economic power in Europe and perhaps second most active state in asserting extraterritorial jurisdiction, supports the contention that power and interdependence matter, at least to some degree. See Lowe, ed. (1983), p. 63.

As noted above, Anne-Marie Burley argues that the erosion of the act of state doctrine has been part of a trend among Western states toward the creation of a “liberal internationalism” in which states cooperate among themselves to resolve jurisdictional conflicts. Given the degree of hostility of Europe, Canada, Mexico, and others towards American extraterritorial claims, I believe she is far too sanguine about the prospects for the development of a “liberal zone of law.” It may be that there was once an international regime of sovereignty that governed the legitimacy of certain types of extraterritorial claims. If so, the principles of that regime changed, delegitimizing at least regional extraterritorial claims. The United States may be trying to change the principles again, legitimating some global extraterritorial claims. But whether this effort will be successful or not is in doubt. As noted above, many states have enacted blocking statutes to prevent the extension of extraterritorial jurisdiction by establishing an act of state. How will American courts respond to the blocking statutes of Canada and Mexico against Helms-Burton, if that law is fully implemented? Will they be considered acts of state? And how will Canada and Mexico respond if they aren't?

Perhaps a more interesting question is who would lose in a legal battle over Helms-Burton? The United States? Canada and Mexico? I would argue that one or more may lose as the home of transnational corporations, but none would lose as governments or states. The real loser would be those companies caught in the middle. For all the debate on the impending death of the state, states still appear to hold all the cards, if not with respect to each other, then at least with respect to non-state actors. Whether states claim jurisdiction on the basis of the *location* of the activity or the *location of the effect* of the activity, they are still claiming territorial jurisdiction. No matter how mobile non-state actors are or will become, they still have to be someplace to do something, and will thus remain under the territorial jurisdiction (shared or exclusive) of sovereign states.