CHINA'S ALASKAN JURISPRUDENCE

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ABSTRACT

The United States Court for China ("U.S. Court for China" or "Court") was a United States federal court ("U.S. federal court") of extraterritorial jurisdiction based in Shanghai. As a court of extraterritorial jurisdiction, its primary concern was governing Americans in China. One major question for the Court, however, was what law to apply. Unlike several United States ("U.S.") states, the District of China had neither a general common law, nor a substantive law code passed by the U.S. Congress. In searching for law for the District, the judges of the U.S. Court for China drew from unexpected sources, including the Code of the District of Columbia and the Territorial Code of Alaska. This Article specifically explores some of the Alaskan law applied by the U.S. Court for China. In doing so, the judges of the Court revealed a conception of China that existed within the Western legal mind, that of a legal wilderness. From the analogy of legal wilderness of a lawless China, the judges of the Court responded with constructing a law suitable for such a situation.

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I. INTRODUCTION

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a court is hereby established, to be called the United States court for China, which shall have exclusive jurisdiction in all cases and judicial proceedings whereof jurisdiction may now be exercised by United States consuls and ministers by law and by virtue of treaties between the United States and China ...[1]

Described by the late Emory University Professor David Bederman as the "strangest federal tribunal ever constituted by Congress," the U.S. Court for China was a federal court holding extraterritorial jurisdiction over American citizens in China.[2] It was established in 1906 and lasted until 1943.[3] While the Court existed for a lengthy period of time, scholarship on the Court is sparse, and unfortunately, many of the Court's records no longer exist.[4]

"Extraterritoriality" refers to the practice of Western nations negotiating treaties with Near Eastern and Far Eastern nations which "exempt[ed] European [and in this case, American] nationals living abroad from the application of local laws."[5] The Treaty of Nanking, signed on August 29,

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[1] Act of June 30, 1906, ch. 3934, 34 Stat. 814 (repealed 1948).

[2] David J. Bederman, *Extraterritorial Domicile and the Constitution*, 28 VA. J. INT'L L. 451, 452 (1988), https://heinonline.org/HOL/LandingPage?handle=hein.journals/vajint28&div=18&id=&page=.

[3] Tahirih V. Lee, *The United States Court for China: A Triumph of Local Law*, 52 BUFFALO L. REV. 923, 933 (2004).

[4] *See* TEEMU RUSKOLA, LEGAL ORIENTALISM 160 (2013). *But see* Robert M. Jarvis, *Charles A. Biddle, Gambling, and the U.S. Court for China*, 17 GAMING L. REV. & ECON. 728, 730 (2013).

[5] Bederman, *supra* note 2, at 451.

1842, ended the Opium War between Britain and China.[6] Subsequently, the Treaty of the Bogue, signed in 1843, "supplement[ed] and clarif[ied] the Treaty of Nanking."[7] In the Treaty of the Bogue, British diplomat and colonial administrator Sir Henry Pottinger introduced an extraterritoriality clause, allowing British subjects in China to remain governed by British, rather than local Chinese, law.[8] The Treaty of the Bogue specified that "[r]egarding the punishment of English criminals, the English Government will enact the laws necessary to attain that end, and the Consul will be empowered to put them in force…"[9] Similarly, Article XXI of the Treaty of Wanghia, the treaty signed between China and the U.S., likewise provided that American citizens who had committed crimes in China would also enjoy extraterritorial jurisdiction and could only be "tried and punished … by the consul, or other public functionary of the United States…, according to the laws of the United States."[10]

Established in Shanghai, the Court operated, in most respects, like any other federal court.[11] As an extraterritorial court, however, the U.S. Court for China, or any consular court for that matter, differed from other U.S. federal courts in that it had no duty to recognize rights under the U.S. Constitution.[12] In its landmark 1891 decision, *In re Ross*, the U.S. Supreme Court affirmed trials without a jury in U.S. consular courts in Japan.[13] This ruling also applied to the U.S. Court for China, indicating that not a "hint" of the Constitution was applicable to the District of China.[14]

Judge Lebbeus Wilfley, the first judge of the Court for China, was a great admirer of the British colonial empire.[15] In an article in the *Yale Law Journal*, Judge Wilfley celebrated Britain's record of colonial administration by noting the difference between "Anglo settler colonies and crown colonies inhabited primarily by 'Negroes, Asiatics, and Polynesians.'"[16] This distinction was significant to Judge Wilfley.[17] Colonies with a majority Anglo population

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[6] Mitchell Chan, *Rule of Law and China's Unequal Treaties: Conceptions of the Rule of Law and Its Role in Chinese International Law and Diplomatic Relations in the Early Twentieth Century*, 25 PA. HIST. REV. 9, 18 (2019).

[7] *Id*.

[8] *Id*. at 20.

[9] *Id*. at 21.

[10] Treaty of Peace, Amity, and Commerce, China-U.S., art. 21, July 3, 1844, 8 Stat. 592.

[11] Jarvis, *supra* note 4, at 728–29.

[12] RUSKOLA, *supra* note 4, at 159.

[13] *In re* Ross, 140 U.S. 453 (1891); *see also* Casement v. Squier, 138 F.2d 909 (9th Cir. 1943).

[14] *See* United States v. Furbush, 2 Extraterritorial Cases 74, 85 (U.S. Ct. for China 1921).

[15] *See* RUSKOLA, *supra* note 4, at 170.

[16] *Id*. at 170 (citing Lebbeus R. Wilfley, *How Great Britain Governs Her Colonies*, 9 YALE L.J. 207, 211 (1900)).

[17] *See generally* Wilfley, *supra* note 16, at 211.

could handle the instruments of self-government, such as jury trials, while non-Anglo majority colonies could not be trusted with this civic responsibility.[18] Teemu Ruskola, a law professor at Emory University, notes that this line of thinking was what led Judge Wilfley and his successor, Judge Charles Sumner Lobingier, to dismiss the notion of jury trials in China as unwise given that the non-Anglo population was better off governed "despotically."[19] This is ironic, Ruskola notes, because despite Wilfley's justification to refuse jury trials on this basis, the British Supreme Court for China *did* have jury trials.[20] To Ruskola, the inapplicability of constitutional rights, such as jury trials, to the District of China is central to his "legal Orientalism" thesis, as he notes how this same line of thinking was shared by American lawmakers who also justified their denial of constitutional protections to Chinese immigrants in the U.S. on the basis that a non-Anglo population was better governed despotically.[21]

But, if not the Constitution, then what? What sort of law would be appropriate for an extraterritorial court to apply? The U.S. Congress never established a body of substantive law applicable to China, leaving the judges of the U.S. Court for China with a difficult task—what law would a U.S. court apply to Americans in China?[22]

Among the laws applied by the U.S. Court for China included the English common law immediately preceding the U.S. Declaration of Independence in 1776, general acts of the U.S. Congress, and even Chinese custom, which the Court referred to as "compradore."[23] Most notably, the Court drew substantive law from two general law codes which were established by the U.S. Congress for a specific territory. These two law codes were the Code of the District of Columbia and the Code of the Territory of Alaska. The Court proceeded to apply the laws of the two codes as they saw fit; however, Judge Lobingier, the third judge of the Court, indicated a preference for Alaskan territorial law.[24] This Article examines some of the substantive law applied by the U.S. Court for China through a sample of cases, specifically, the Alaskan law which was applied by the Court. The Court's use of Alaskan law, as will be further discussed, suggests an analogy between China and Alaska based on the legal conditions of the two areas. I call these conditions a "legal wilderness." The notion of China as a legal wilderness was influenced by what Ruskola

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[18] *See id.*

[19] RUSKOLA, *supra* note 4, at 170.

[20] *See id.* at 170.

[21] *Id*. at 169.

[22] *See id*. at 164–65 (noting that Congress recognized that general federal legislation may be deficient and providing that the "common law and the law as established by the decision of the courts of the United States" shall be applied when general federal legislation is insufficient).

[23] *Id*. at 172.

[24] *Id*. at 167–68.

describes as "legal Orientalism," which is the creation of law for China based on the conception of China in the Western mind.[25]

Parts II and III of this Article provides some historical background about the U.S. Court for China. Part IV then identifies specific important cases in which the Court applied Alaskan territorial law with interpretations about why the choice of Alaskan law was preferable. Finally, Part V attempts to show how the discussed cases evidence a notion of China as a legal wilderness which guided the Court's decision-making.

II. HISTORICAL BACKGROUND

Following the Opium War (1839-1842), China was subjected to unequal treaties with various imperialist countries.[26] These treaties were "unequal" in the sense that China often entered into these agreements after a military defeat, resulting in the treaties containing "one-sided terms [that] requir[ed] China to cede land, pay reparations, open treaty ports, or grant extraterritorial privileges to foreign citizens."[27] In 1844, the U.S. and Qing Dynasty China entered into the unequal Treaty of Wanghia.[28] Among the provisions of the Treaty of Wanghia was that the U.S. would be allowed to engage in free trade with five Chinese ports, and that American citizens in China would have extraterritorial jurisdiction.[29] Specifically, Article XXI states:

> Subjects of China who may be guilty of any criminal act towards citizens of the United States, shall be arrested and punished by the Chinese authorities according to the law 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.[30]

After entering into the Treaty of Wanghia, American representative Caleb Cushing immediately urged Congress to establish consular courts in China.[31] However, Congress did not establish these consular courts until 1848.[32] This led to a disturbing period from 1844 to 1848, in which Americans in China existed in what Ruskola calls a "legal vacuum," where they "literally

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[25] *See id.* at 5.

[26] *Id*. at 110.

[27] M. Taylor Fravel, *Regime Insecurity and International Cooperation: Explaining China's Compromises in Territorial Disputes*, 30 INT'L SEC. 46, 47 n.3 (2005).

[28] *See* EILEEN P. SCULLY, BARGAINING WITH THE STATE FROM AFAR: AMERICAN CITIZENSHIP IN CITY PORT CHINA, 1844-1942, at 49–50 (2001).

[29] Treaty of Peace, Amity, and Commerce, *supra* note 10.

[30] *Id*. art. XXI.

[31] RUSKOLA, *supra* note 4, at 158.

[32] *Id*.

got away with murder."[33] Under the treaty, Americans had extraterritorial jurisdiction, meaning they could not be taken to a Chinese court.[34] Nevertheless, there was no alternative, as the U.S. had not yet established courts, and the Americans in China could not be taken to court *anywhere*.[35] The establishment of the consular courts, however, was no panacea.[36] As Ruskola writes, there were major concerns about the quality, and even the constitutionality, of such courts.[37] Indeed, the founding statute of the U.S. Court for China suggests that they were established "to cure the problem of corruption in the American consular courts in Asia."[38]

Eileen Scully, a professor at Bennington College, writes that in the early years of the consular courts, the consuls "could not try, or punish, a U.S. citizen" and that it was only in serious cases that a presidential order enabled the consular courts to deport the accused back to the U.S. for trial.[39] However, even after the enabling legislation of 1848 and 1860 were passed, the State Department still "caution[ed] [consular courts] that their authority was more 'mediatory' than authoritative" and urged arbitration and summary proceedings rather than trials.[40] Eventually, due to lobbying by American merchants in China, the consular courts were empowered to maintain a prison system for the Americans in China around 1875.[41]

The consular courts, however, appear to have had little effect in curbing misbehavior by the Americans in China. Many Americans in China found themselves involved in vice industry, including gambling houses and brothels.[42] Numerous American women went to Shanghai to work as prostitutes.[43] The term "American girl" became a euphemism for a prostitute and the quip "going to America" meant going to a red-light district.[44] The widespread move of Americans into such businesses was combined with the lax governance by the ineffective consular courts.[45] Concerned by the weakness of the consular courts and the activity of their fellow Americans in China, American merchants and missionaries sought to have the government fix the problem.[46] The U.S. government also appeared to be concerned with

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33 *Id*.

34 *See* Treaty of Peace, Amity, and Commerce, *supra* note 10, art. XXV.

35 RUSKOLA, *supra* note 4, at 158.

36 *See id.*

37 *Id*.

38 Lee, *supra* note 3, at 930.

39 SCULLY, *supra* note 28, at 67.

40 *Id*.

41 *Id*. at 67–68.

42 *See* RUSKOLA, *supra* note 4, at 177; *see generally* Jarvis, *supra* note 4.

43 SCULLY, *supra* note 28, at 96; *see also* RUSKOLA, *supra* note 4, at 177.

44 *Id*.

45 *See* SCULLY, *supra* note 28, at 97.

46 *See id.*

the situation, believing that the inefficacy and corruption among the consular courts was detrimental to the overall American foreign policy in China.[47]

III. THE CREATION OF THE U.S. COURT FOR CHINA

Supporters of the U.S. Court for China considered it part of America's "special duty to China."[48] The Far Eastern American Bar Association, for example, noted that institutions such as the Court would "impress upon the Asiatic mind" that Americans are "governed by law and not by an imperial or presidential edict."[49] Scully, therefore, connects the creation of the Court with the Progressive Era in the U.S., a period of social and political reforms spanning from the 1890s to the 1920s.[50] Convinced that the behavior of Americans in China undermined the U.S. government's relations with China, supporters of creating a court, including President Theodore Roosevelt, sought a "tighter jurisdictional rein" over American treaty ports, which they believed were necessary for American ambitions in East Asia.[51] Nevertheless, the spreading of American institutions as models for the Chinese seemed to be a secondary goal. While Washington certainly hoped to "inculcate [the] Chinese with an appreciation for American jurisprudence," the greater mission for the government was to punish U.S. nationals whose "predatory, rapacious behavior" was hindering the project of "indigenous Westernizers."[52]

In 1904, Herbert H. D. Peirce, then-Third Assistant Secretary of State, traveled to China as part of a global inspection tour of U.S. consuls where he investigated charges and rumors of misconduct.[53] Peirce's investigation confirmed the widespread misconduct, and his report led to the removal of many incumbent consuls.[54] Peirce's assessment, however, defended U.S.

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[47] *See id.* at 97–99.

[48] RUSKOLA, *supra* note 4, at 161.

[49] *Id*. (quoting FAR E. AM. BAR ASS'N, UNITED STATES COURT FOR CHINA: DECENNIAL ANNIVERSARY BROCHURE 5 (1916)).

[50] *See generally* JOHN D. BUENKER ET AL., PROGRESSIVISM 3021 (1986).

[51] SCULLY, *supra* note 28, at 7.

[52] *Id*.

[53] *Id*. at 98.

[54] *Id*. Among the persons investigated, John Goodnow, the Consul General of Shanghai was charged with "looting the estates of Americans who had died in China, accepting payoffs to transfer the China Steamship and Navigation Company's vessels fraudulently to American ownership, selling U.S. passports to non-Americans, and extorting money for his judicial services." Rober McWade, the Consul General of Canton was charged with "gross drunkenness upon a public occasion, employment of a convicted felon in the consulate, selling fraudulent certificates to Chinese…laborers seeking admission into the United States and the Philippines under the guise of merchants, illegally extending consular protection to Chinese subjects, interference with the affairs of the government of China, persecution of an American citizen for purposes of revenge, and general corruption." While suspicions were raised about the United

imperialism, claiming that the failures of the system did not stem from the system itself, but by individual "moral lapses" of spoils-system appointees and due to "Congressional resistance to civil service reform."[55] In response to this damning diagnosis, Congress established the U.S. Court for China, and President Theodore Roosevelt appointed Lebbeus Wilfley to serve as the first judge of that Court.[56]

IV. ALASKA LAW FOR CHINA

This section focuses on four important cases made by the Court under Judge Wilfley and Judge Lobingier. Through this sampling, this section will provide background of the facts, examine the Court's decisions, and interpret the decisions as part of the analogy of "legal wilderness."

A. United States v. Biddle (1907)

United States v. Biddle was a landmark case in the U.S. Court for China's search for a substantive law. The case involved Charles A. Biddle, who was charged with "obtaining money under false pretenses."[57] Biddle moved to dismiss the charges on the basis that "false pretenses" is a statutory (and therefore not a common law) offense.[58] Because there was no U.S. statute on the subject applicable to China, the act could not be a crime in China.[59] Judge Wilfley did not accept this argument, however, finding that "false pretenses" was, in fact, a crime at common law.[60] Judge Wilfley supported this contention by citing an English statute promulgated in 1757.[61] The main issue in *Biddle*, then, was whether an English statute enacted in 1757 was part of the "common law," as provided in the 1906 Act establishing the Court.[62] In determining that the statute was part of the "common law" meant to be applied in the Establishing Act, Judge Wilfley determined that:

> The term "common law" as used in the statute is interpreted to mean those principles of the common law of England and those statutes passed in aid thereof, including the law administered in the equity, admiralty, and ecclesiastical tribunals, *which were adapted to the situation and circumstances of the American*

States consulate in Amoy, the consulate "suspiciously" burned to the ground in the midst of Peirce's investigations, hindering conclusive assessment. *Id*. at 98–99.

55 *Id*. at 99–100.

56 *Id*. at 105–06, 110.

57 Jarvis, *supra* note 4, at 731.

58 *Id*.

59 United States v. Biddle, 1 Extraterritorial Cases 84, 84 (U.S. Ct. for China 1907).

60 *Id*.

61 *Id*. at 87.

62 *Id*. at 84–85 (citing 30 Geo. II 91757 c. 24, § 1; Act of June 30, 1906, *supra* note 1, § 4).

> *colonies at the date of the transfer of sovereignty*, as modified, applied and developed generally by the decisions of the State courts and by the decisions of the United States courts, and incorporated generally into the statutes and constitutions of the States.[63]

As each U.S. state maintains its own common law, Judge Wilfley needed to find a common law applicable to *all* states. In doing so, he determined that such a law was English common law applicable to the American colonies immediately before the colonies declared independence.[64]

What led Judge Wilfley to make such a logical leap? Perhaps it was inspired by some of Judge Wilfley's personal animosity toward Biddle. Robert M. Jarvis, a law professor at Nova Southeastern University, analyzed the facts surrounding *Biddle*.[65] First, he notes that it was not until the case was overturned by the U.S. Circuit Court for the Ninth Circuit, that it was revealed that Biddle's crime was related to gambling.[66] Second, Jarvis provides important insight into Judge Lebbeus Wilfley's personal animosity towards Biddle, who was a noted kingpin in Shanghai's gambling and prostitution market.[67] There is evidence to suggest that Judge Wilfley had a personal animosity against Biddle as he convicted Biddle, even when Judge Wilfley expected the case to be overturned, because it meant that Biddle would still be locked up while awaiting review of the case.[68]

With the growing influence of unsavory Americans causing trouble in Shanghai, the Court, and especially Judge Wilfley, sought to crack down on the kingpins that grew rich from the promotion of vice in China.[69] This motivation, it appears, seems to have pushed Judge Wilfley to convict kingpins such as Biddle to ensure some sort of punishment, even if it meant being overturned.[70] Judge Wilfley's expectation of the case being overturned would eventually come true when the decision was reviewed by the appellate court.[71]

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63 *Id*. at 87 (emphasis added).

64 *See* RUSKOLA, *supra* note 4, at 165.

65 Jarvis, *supra* note 4.

66 *Id*. at 731.

67 *Id*. at 732.

68 *Id*. at 736 (citing *Rex v. H. D O'Shea*, N. CHINA HERALD & SUP. CT. & CONSULAR GAZETTE, Nov. 14, 1908, at 398).

69 *See* RUSKOLA, *supra* note 4, at 175–78.

70 Jarvis, *supra* note 4, at 736.

71 *See generally* Biddle v. United States, 156 F. 759 (9th Cir. 1907).

B. Biddle v. United States (1907)

The Court's decision in *United States v. Biddle* was appealed to the U.S. Circuit Court for the Ninth Circuit, based in San Francisco.[72] In this appeal, *Biddle v. United States*, the Circuit Court overturned Judge Wilfley's decision on factual grounds.[73] The Circuit Court ruled that the Court for China could not find Biddle guilty of "false pretenses."[74] As noted above, Jarvis identified that Biddle was the operator of an illegal gambling establishment.[75] Biddle allegedly:

> unlawfully and knowingly…falsely pretend[ed] to Woo Ah Sung, Zung Yu Young, Ng Sih Yiek, and Sz Yung that the municipal authorities of the international settlement of Shanghai, China, would allow and permit in the building…Chinese gambling games to be played during the autumn race meeting of 1906.[76]

Because gambling was known to be illegal in Shanghai, Biddle could not be said to have taken the money under "false pretenses," and thus the decision was reversed.[77]

Despite overturning Judge Wilfley on factual grounds, the Circuit Court ratified the application of the English common law immediately preceding the American Revolution.[78] The Circuit Court specifically determined that

> … we are of opinion that in making the common law applicable to offenses committed by American citizens in China, and the other countries with which we have similar treaties, Congress had reference to the common law in force in the several American colonies at the date of the separation from the mother country, and this included not only the ancient common law, the lex non scripta, but also statutes which had theretofore been passed amendatory of or in aid of the common law.[79]

The Circuit Court further acknowledged that while there was no "general statute applicable to every state in the Union," Congress had legislated for U.S. territories, making obtaining money under false pretense a crime.[80] In support of this, the Circuit Court cited the codes of Alaska and the District of

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72 *Id*. at 760.

73 *Id*. at 764.

74 *Id*.

75 *See generally* Jarvis, *supra* note 4.

76 Biddle, 156 F. at 764.

77 *Id*. at 765.

78 *See* Biddle, 156 F. 759; *see generally* RUSKOLA, *supra* note 4, at 164–65.

79 Biddle, 156 F. at 762.

80 *Id*.

Columbia.[81] Because Congress had included false pretenses as a crime in both the Alaska and District of Columbia codes, the crime was then found to be an offense against the laws of the U.S. within the purview of the statute granting jurisdiction to the Court for China.[82] The selection of these two jurisdictions would become important sources of law for the District of China, which will be further discussed below.

The decision of the appellate court did not overturn Judge Wilfley's decision to apply the common law as it existed in the American colonies immediately preceding independence.[83] Thus, the law applied in Shanghai for many years would be an antiquated law that existed over 130 years before the establishment of the Court. In some respects, the decision is logically defensible.[84] There is a sort of colonial parallel between the experience of the Americans states and China. It was a starting point by which the District of China would begin their own legal development (as if it were an American state).[85] The major difference, of course, is that the District of China did not have a local legislature which could alter its common law.[86] Given that there was no local legislature, the "laws of the United States" would need to be statutes made by the U.S. Congress.[87] With no general code for China, the judges of the Court would find applicable laws by applying applicable statutes of Alaska and the District of Columbia.[88]

C. United States v. Allen (1914)

Judge Wilfley's application of the English common law immediately preceding independence makes initial sense, as the choice of any particular state would allow that state to have legislative control over the District of China.[89] This is a result that the judges of the Court sought to avoid.[90] Without a local legislature, the state analogy could not be made, and a new analogy would need to be crafted. The judges of the Court found these laws in the

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81 *Id*. at 763.

82 *Id*.

83 *Id*. at 762.

84 *See* RUSKOLA, *supra* note 4, at 165. Note however, that in practice, the choice of such a common law was a mess, with many local lawyers "amazed" at the decision. Ruskola notes, importantly, that local lawyers were "amazed" at the application of antiquated law. *Id*.

85 *See id.* at 165.

86 *See id.* at 171 (indicating that there was no general code for China).

87 *See id.* at 165–66.

88 *See id.*

89 *See id.* at 165.

90 *See* United States *ex rel.* Raven v. McRae, 1 Extraterritorial Cases 655 (U.S. Ct. of China 1917) (applying a 1903 Alaskan corporation law created by the United States Congress despite the Alaskan Territorial Legislature's promulgation of a 1914 corporation law. Judge Lobingier justified his decision on the basis that the Alaskan Territorial Legislature should not be allowed to legislate for China).

general law of a territory established by the U.S. Congress that would be "suitable" for China.[91] The Court found two solutions for this problem: the District of Columbia and the Territory of Alaska.[92]

In *United States v. John T. Allen*, the U.S. Court for China was headed by a new judge, Judge Charles Sumner Lobingier. John T. Allen was an African American ex-sailor who operated the Oregon Bar in Shanghai.[93] He was charged with selling "intoxicating liquors" without a license from May 1, 1913 to January 15, 1914.[94] Selling liquor without a license was determined to be prohibited by the treaties between the U.S. and China and was also against the laws of the U.S. in force on June 30, 1906.[95] What were the "laws of the United States in force on June 30, 1906"? To Judge Lobingier, this meant the Act of Congress of March 4, 1913 (District of Columbia Laws) and the Act of Congress of March 3, 1899 (Alaska Penal Code).[96]

The matter before Judge Lobingier was, therefore, whether the statutes penalizing Allen's Acts, passed for the District of Columbia and Alaska, were in force in the District of China.[97] In Judge Lobingier's words:

> …Congress may enact a law for a limited area under its exclusive jurisdiction, such as Alaska or the District of Columbia; by its terms it may have no force whatever outside of such area; but if it is 'necessary to execute such treaties' (with China) and "suitable to carry the same into effect" it becomes operative here by virtue of the acts above cited.[98]

Judge Lobingier's analysis set out a two-factor test by which the Court chose what laws to apply to the District of China.[99] The laws enacted by Congress must first be "necessary" to execute treaties with China and then "suitable" to carry such executions into effect.[100] The importance of this ruling is the role that Judge Lobingier created for himself.[101] Rather than being bound to any specific law code passed by Congress, Judge Lobingier instead gave himself great latitude in first selecting whether a law is "necessary" to execute the treaty and then determining whether it is "suitable" for the

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91 *See* United States v. Allen, 1 Extraterritorial Cases 308, 332 (U.S. Ct. of China 1914).

92 *See id.* at 312–13 (discussing Congress's regulation of the liquor trade in Alaska and the District of Columbia).

93 SCULLY, *supra* note 28, at 247 n.83.

94 *Allen*, 1 Extraterritorial Cases at 308.

95 *Id*.

96 *Id*. at 308–09.

97 *Id*. at 309.

98 *Id*. at 311.

99 *Id*.

100 *Id*.

101 *See* RUSKOLA, *supra* note 4, at 167.

situation in China.[102] The determination of "necessary" and "suitable" is a deeply discretionary standard, affording Judge Lobingier broad powers in applying laws within China.[103] In 1917, the U.S. House of Representatives Foreign Affairs Committee considered implementing a law code to serve as the basis of substantive law applied by the U.S. Court for China.[104] Tahirih Lee, a law professor at Florida State University, notes that in testifying before the committee, Judge Lobingier argued against the implementation of a law code because he was "fearful that the code would constrain the broad discretion he currently enjoyed."[105]

In his testimony, Judge Lobingier presented the law applied by the Court as "more regularized and rational than it actually was."[106] Lee writes that he "portrayed the Alaska code as good for most civil and criminal matters, particularly probate, and the District of Columbia ("D.C.") Code of 1901 as good for supplementing it, particularly in matters of marriage and divorce."[107] His criminal jurisprudence focused on the federal criminal code but that a "section of Maryland law imported into the D.C. Code was good for prosecution of escaped prisoners."[108] Most notably, he requested the power to "retain the discretion to choose between the two codes on a case-by-case basis."[109]

While there is some logic to using Alaska and District of Columbia law, it is clear that Judge Lobingier enjoyed a vast array of substantive law while maintaining discretion over which laws, indeed which parts of laws, he could apply at his discretion.[110] Congress eventually chose to refrain from constructing a law code for the District of China. Lee's speculation was that Congress dismissed the idea for practical reasons, as it would be "too ambitious, too complicated, and too much work."[111] Thus, given the great discretion afforded to Judge Lobingier, it would seem that his jurisprudence would have little effect in realizing the Far Eastern American Bar Association's vision. Americans in China appears to be governed by edict.[112]

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102 *See id.*

103 *See id.*

104 Lee, *supra* note 3, at 1028.

105 *Id*.

106 *Id*.

107 *Id*.

108 *Id*.

109 *Id*.

110 *See* RUSKOLA, *supra* note 4, at 167.

111 Lee, *supra* note 3, at 1030.

112 RUSKOLA, *supra* note 4, at 161.

D. Cavanagh v. Worden (1914)

Cavanagh v. Worden provides a fascinating look at the way the Court established a methodology in determining which law to apply in annulment and divorce cases.[113] Tahmi Hashimoto Cavanagh filed a bill for the annulment of her marriage to W. D. Worden, claiming that the marriage was done "thru [sic] duress and without her consent or subsequent ratification."[114] Cavanagh alleged that Worden had induced her into marriage through threats and "that the clergyman [who married them] then attempted to proceed with the marriage ceremony and did so proceed without her consent…"[115]

This case concerned a matter of jurisdiction, as Worden's attorney argued that the U.S. Court for China did not have jurisdiction in the matter.[116] Nevertheless, Judge Lobingier determined that the Court did, in fact, have jurisdiction.[117] He first noted that Cavanagh was a citizen of the United Kingdom and that Worden was a citizen of the U.S.[118] Given that the choice of court depended on the Defendant's nationality, the Court was the appropriate venue to hear the matter.[119] Further, the Court reasoned that it held jurisdiction in the matter due to (1) the various treaties with China which reserved jurisdiction in "general terms," (2) the various acts of Congress which the Court determined "expressly conferr[ed]" jurisdiction, and from (3) inherent chancery powers.[120]

While the Court initially faced great difficulty finding a body of law to apply, with the decision to apply Alaskan and District of Columbia law, the Court now faced an opposite problem. With a great plethora of Alaskan and District of Columbia law, the laws often conflicted. The Court, therefore, needed to apply some methodology for how to select which among the many laws it would apply. In *Cavanagh v. Worden*, the Court began to develop some semblance of a method.[121] First, if there was a conflict between a special act, meaning a federal law passed for a limited territory, and a general act, meaning a federal act meant to be applied generally, the general act would be applied.[122] Second, when two special acts, referring to federal laws passed for a limited territory such as Alaska or the District of Columbia, conflicted, the Court would apply the later enactment.[123]

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113 *See generally* Cavanagh v. Worden, 1 Extraterritorial Cases 317 (U.S. Ct. of China 1914).

114 *Id*. at 317.

115 Cavanagh v. Worden, 1 Extraterritorial Cases 365, 366 (U.S. Ct. of China 1914).

116 *See* Cavanagh v. Worden, 1 Extraterritorial Cases 317, 319 (U.S. Ct. of China 1914).

117 *Id*. at 325.

118 *Id*. at 318.

119 *Id*.

120 *Id*. at 317.

121 *See* RUSKOLA, *supra* note 4, at 167.

122 *Id*.

123 *Id*.

However, the Court only used this methodology when it suited its purposes. Ruskola writes that under this method, the Court would prefer the "slightly newer" D.C. Code over the Alaska code, since both were passed as "special acts of limited territorial application."[124] Nevertheless, Judge Lobingier preferred the Alaska territorial code over the D.C. code, believing the Alaska code was more suitable for the circumstances in China.[125] Furthermore, Ruskola notes that even while Judge Lobingier preferred the Alaska code to the D.C. code, he did not consistently apply Alaska law over D.C. law, but simply mix-matched both codes in selecting what he deemed to be the better law for certain areas of the law.[126]

Judge Lobingier's wide discretion in deciding which law to apply is notably visible in a second case between the same parties which was also entitled *Cavanagh v. Worden*. With the procedural question decided, the case moved on for a decision on the merits. Cavanagh testified that during the marriage ceremony, when the clergyman asked the "usual question" of whether the plaintiff would take the defendant as her husband, she responded "no."[127] Nevertheless, the Court notes that she was the only witness to report that she had said "no" in the ceremony, and three of the other witnesses claimed she said "yes," and that another witness, as well as the officiating clergyman, testified that she did not respond at all.[128] The Court determined that Cavanagh did not meet her burden of proving that she did not consent to the marriage.[129] The next issue, then, was Worden's cross-bill, which claimed that Cavanagh never cohabited with him after marriage.[130] Thus, Worden sought a divorce from Cavanagh on the basis of cruelty on her part and desertion.[131] Moving away from the matter of selecting law applicable to Cavanagh's motion for annulment, the Court then had to determine which law it would apply in determining the grounds of Worden's motion for divorce. With minimal citation, Judge Lobingier determined that "[o]f the two Acts of Congress above cited 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."[132] Ruskola notes that the U.S. House Committee on Foreign Affairs was "stunned" by this decision, with one congressman expressing incredulity that in divorce cases, Judge

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124 *Id*.

125 *Id*.

126 *Id*.

127 Cavanagh v. Worden, 1 Extraterritorial Cases 365, 367 (U.S. Ct. of China 1914).

128 *Id*.

129 *Id*. at 367–68.

130 *Id*. at 368.

131 *Id*. at 368–69.

132 *Id*. at 371.

Lobingier would use the Code of Alaska for the residence requirement, but would use the code of the District of Columbia for the rest of the case.[133]

The response to *Cavanagh v. Worden* provides an interesting glimpse at responses to the Court's wide discretion from Judge Lobingier's contemporaries. While Judge Lobingier has shown some preference for Alaska law, he was willing to pull from District of Columbia law when he determined it was more "necessary" and "suitable" than Alaska law.[134] While the Court formed some semblance of a methodology, the Court was not shy in its willingness to pull together a mix-matched law code based on the great variety of laws provided from the many laws passed by Congress. In combining law codes, Judge Lobingier appears to have exceeded the scope of his office, acting as both lawmaker and judge.

E. Raven v. McRae (1917)

While the colonial analogy has played a major role in the selection of laws to be applied for China, the major concern for the judges of the U.S. Court for China appears to have been their discretionary role in selecting laws "necessary" and "suitable" for the District of China.[135] Perhaps Judge Lobingier's preference for Alaskan law stemmed from analogical similarities between the District of China and the Territory of Alaska.[136] That is, both were expansive territories governed by a distant legislature, the U.S. Congress. Furthermore, the control of Americans in China appears to be much more reflective of Americans in Alaska than Americans in the District of Columbia.

Nevertheless, the choice of law was not only a matter of space, meaning the physical geography of the territory, but also a matter of time. Alaska would later have a territorial legislature which would enact statutes for the Territory.[137] With the territorial legislature, Alaska was no longer reliant upon laws passed by Congress to govern the territory.[138] Thus, the central question in *United States ex re. Raven et al v. Paul McRae* was whether a federal statute passed for Alaska was still in effect in the District of China even after the territorial legislature of Alaska had superseded the federal law with their own law.[139]

Alaska corporation law was governed by federal statute passed in the Act of March 2, 1903 until it was superseded by a new corporation law passed by

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133 RUSKOLA, *supra* note 4, at 295 n.68 (citing 64th Cong. 19).

134 *Id*. at 167–68.

135 *See id.* at 168.

136 *See id.*

137 *See* United States *ex rel.* Raven v. McRae, 1 Extraterritorial Cases 655, 656 (U.S. Ct. Of China 1917).

138 *See id.*

139 *See generally id*.

the Alaska legislature effective January 2, 1914.[140] In Judge Lobingier's decision, the 1903 law, rather than the 1914 law, would hold in China.[141] Judge Lobingier based this decision on his aversion to what would amount to allowing the territorial legislature of Alaska to determine the law applicable of China, which he described as a "legal and political monstrosity."[142] It is unclear whether this "monstrosity" was due to the notion of allowing Alaskan legislators to make law for China at all or whether allowing Alaskan legislators to do so would infringe on Congress's power to pass law for the District of China.[143] From the decision, it appears that Judge Lobingier was more concerned with the former, as he describes the notion of "Congress delegating to a territorial legislature the power not only to repeal congressional enactments operative in its own territory but also to legislate for the residents of a distant region like China" as a "strange anomaly."[144] The preference for congressional statutes is defensible to some extent, as it acknowledges the national government's primacy in foreign relations, rather than delegating such power to a territorial jurisdiction. However, the process of Judge Lobingier's choice reveals his great discretionary power to select and interpret the law to be applied in the district.[145] To further cement his discretion, Judge Lobingier determined that the contemporary Alaska law would not be "suitable" for the District of China, deciding that it was difficult to analogize necessary offices who would accept incorporation documents in Alaska to offices in China.[146]

Congress appears to have been alarmed by the situation and, in 1922, it passed the China Trade Act, which contained special acts of limited territorial application for creating American corporations for the purposes of doing business in China as a way of constraining Judge Lobingier's decision on the matter of incorporation in China.[147] However, Judge Lobingier still found that the 1922 Act did not completely supersede his application of Alaskan law.[148]

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140 *Id*. at 656.

141 *Id*. at 656, 661.

142 *Id*. at 657.

143 *Id*.

144 *Id*.

145 Judge Lobingier's discretion even extended to local laws. Ruskola notes that the court recognized "compradore" or "Chinese custom" and that in 1933, Judge Lobingier proposed that the Court should adopt "newly enacted modern Chinese codes as the law of the court" in order to maintain a "uniformity of law" within China and to avoid the inherent contradictions of applying American law in China. RUSKOLA, *supra* note 4, at 172 (citing Charles Sumner Lobingier, *Shall China Have an Uniform Legal System?*, 6 CHINA L. REV. 327 (1933)). The Judge's proposal was, however, unsuccessful. *Id*.

146 *Raven*, 1 Extraterritorial Cases at 662–64.

147 RUSKOLA, *supra* note 4, at 168.

148 *See id*. at 167–68.

It was not until Congress finally amended Act in 1925 that the Alaskan Law was expressly superseded by congressional statute.[149]

V. CHINA IN THE AMERICAN LEGAL MIND

> In China, American law is divided into: (a) compradore custom belonging to the Emperor, (b) Unequal Treaties written at gunpoint, (c) anything but the Constitution, (d) the code of the Territory of Alaska, except when not, (e) parts of the code of the District of Columbia (perhaps) but not its penalties (unless we like them), (f) innumerable, (g) the common law, but only if really old, yet not too old, (h) fabulous, (i) again, not the Constitution, (j) prisons in the Philippines, (k) not included in the present classification, (l) et cetera, (m) having just been repealed in Alaska, (n) that from a long way off looks like law.[150]

In creating a general law for the District of China, the judges of the Court analogized China as what this Article calls a "legal wilderness."[151] Judge Wilfley's application of English common law reveals the earliest form of the colonial analogy by the Court, interpreting the common law to be that common law most generally applicable to all the American colonies before

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[149] *Id*. at 168.

[150] *Id*. at 174. This humorous passage was written by Teemu Ruskola in his book, Legal Orientalism. In chapter 2 of the same book, Ruskola cites Michel Foucault's citation to the "Chinese encyclopedia" which lists that animals are divided into: "(a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camelhair brush, (l) et cetera, (m) having just broken the water pitcher, (n) that from a long way off look like flies." *Id*. at 30 (citing MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES xv (1994)). The quotation is actually taken from a fable written by Jorge Luis Borges, which Foucault cites as a way to describe China as a "foil" to Western systems of knowledge, though Ruskola is unaware whether Foucault was self-aware of this. *Id*. at 30–31. Ruskola cites this passage as an example of how China is perceived in the Western mind, as an "Orientalized" subject. Through an "orientalist" lens, a Chinese encyclopedia would list things in a way which, to Western observers, appear to have no semblance of organization according to Western systems of knowledge. Nevertheless, an Orientalist lens simply assumes that such things are organized in a Chinese system of knowledge, with the two systems probably incompatible. It is with a great deal of irony, then, that Ruskola notes how the law applied by the United States Court of China appears to have been picked arbitrarily. In this way, Western lawyers apparently picked together law that would be "suitable" for China based on the Orientalist lenses by which they view China. Selecting suitable law for China through an Orientalist lens thus reflects the disorganized system of knowledge that is not propagated by China itself, but by what Westerns believe to be a Chinese system of knowledge.

[151] *See, e.g.*, RUSKOLA, *supra* note 4, at 174 ("The United States Court for China was, in short, an imperial court that was left to fashion its own peculiarly placeless law, justified by the conviction that China itself was a lawless place.").

their state-specific divergence.[152] To Judge Lobingier, China was more akin to the sparsely populated, primitive society of Alaska than it was to the urbanized society of Washington, D.C.[153]

In his 1919 article, "American Courts in China," Judge Lobingier noted that drawing from the bodies of law passed by the U.S. Congress still posed the difficult task of choosing among laws covering the same subject for more than one jurisdiction.[154] If Congress passed conflicting laws on the same subject matter for two different territories, which should be established as "law" in China? Judge Lobingier writes that "[w]here these are *equally suitable* the court…adopts the later enactment."[155] While Judge Lobingier appears to indicate that later legislation is theoretically better than earlier legislation, this is not always the case, and the law must also be "suitable" for China.[156] Therefore, as Judge Lobingier wrote:

> Thus as between the Alaskan and [the District of] 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, though [sic] each contains desirable features not found in the other.[157]

While the circumstances of China may be comparable with either rural Alaska and the urban District of Columbia, Judge Lobingier's professional experience in China would have been overwhelmingly urban, given that the Court was based in Shanghai with annual sessions in Tianjin, Hankou, and Guangzhou.[158] Nevertheless, the population of China was overwhelmingly rural and China's urban population did not exceed its rural population until 2011.[159] Furthermore, the fact that Congress sat in the District of Columbia, while promulgating substantive laws for both the District of Columbia and the Territory of Alaska, may provide a better analogy between Alaska and China,

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152 This reasoning, however, seems to ignore the local character of the colonial law. The notion of "taxation without representation" was enforced by the belief that certain taxes must be passed by the local legislatures. *See* Aaron Walayat, *Adams and Jefferson: American Religion and the Ancient Constitution*, 11 FAULKNER L. REV. 215 (2020).

153 *See* RUSKOLA, *supra* note 4, at 167.

154 CHARLES B. LOBINGIER, AMERICAN COURTS IN CHINA 13 (1919).

155 *Id*. at 13–14 (citing Cavanagh v. Worden, 1 Extraterritorial Cases 361, 362 (U.S. Ct. for China 1914)).

156 *See* RUSKOLA, *supra* note 4, at 168.

157 LOBINGIER, *supra* note 154, at 14.

158 *Id*. at 5. Ruskola notes the taxing geographical scope of such a model and how the demanding travel associated with the sessions would leave periods of extensive absences for the Court. *See* RUSKOLA, *supra* note 4, at 169.

159 Peter Simpson, *China's Urban Population Exceeds Rural for First Time Ever*, THE TELEGRAPH (Jan. 17, 2012, 2:24 PM), https://www.telegraph.co.uk/news/worldnews/asia/china/9020486/Chinas-urban-population-exceeds-rural-for-first-time-ever.html.

and Judge Lobingier may have preferred Congress's Alaska Code for China because, much like Alaska, Congress developed the law without being geographically present in the territory.[160]

It is notable that Judge Lobingier's preference for Alaskan law was due to Congress's promulgation of law over a "a primitive, frontier community."[161] It seems that, in Judge Lobingier's legal imagination, China was a legal wilderness, akin to that of Alaska, in which a U.S. federal court, geographically located in a greater population center, was needed to reign in the population out in the "frontier."[162] In some sense, China *was* a legal wilderness, for Americans existed in a state of lawlessness given the extraterritoriality provisions of the Treaty of Wanghia and, given extraterritoriality, Americans could not be taken to Chinese courts and Americans geographically out of reach of the U.S. Court for the China in Shanghai as well as law enforcement bodies could act unpunished.[163] But the conception of China as a legal wilderness goes beyond extraterritorial liberty from Chinese laws. The Treaty of Wanghia itself is operated under the assumption that Chinese law was uncivilized and would naturally be unacceptable if applied to Americans.[164] Extraterritoriality did not "create" a Chinese legal wilderness, but simply formalized what American observers of China already believed about the country's law, that China was a "lawless" place and Americans could not be subject to lawless whims.[165]

It is interesting, then, to observe the Court's solution to this apparent problem. The operation of the Court reflected some of the very fears of Americans, fears of being subjected to Chinese laws. The Court's law, as we have seen, did not include constitutional protections and its application of the "laws of the United States" afforded the Judge of the Court extraordinary discretion to apply the laws he saw most fit for China.[166] In doing so, the judges acted as executive, legislator, and judge, amalgamating the three branches of the U.S. government in the way they picked and chose the law it would apply, sometimes combining elements of different Codes of Law to make a suitable law for China.[167]

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160 *See* RUSKOLA, *supra* note 4, at 167.

161 *Id*.

162 *See id.*

163 *See id.* at 158.

164 *See id.* at 131–32.

165 *See id.* at 26–27.

166 *See id.* at 159, 166.

167 Among the critics of this legal "gray area" was United States Secretary of State James G. Blaine, who suggested in 1881 and 1884 that the U.S. replace the consular courts with a proper judicial tribunal "complete with ah jury and a full panoply of constitutional guarantees. Though Secretary Blaine was mainly concerned with the consular courts, it appears that the "strange and incompatible blending of executive, judicial, and legislative functions" continued, even with the

It is within this Orientalized conception of China that existed in the American legal imagination that sought to first liberate Americans from despotism and then to construct a new body of law for a despotic country and through despotic, discretionary means. This image of China guided the U.S. Court for China's development of a "suitable" law for the country.[168] In terms of substantive law, the Court operated within the analogy of a legal wilderness, in which the common law to be applied in China must be developed from the ground up, beginning with the English common law at the moment of American independence with statutory development passed by the U.S. Congress itself.[169] In terms of application, a law must be "necessary" to solve the case at hand and "suitable" for a society such as China.[170] It is this notion of "suitability" that reflected the image of Chinese lawlessness within the American legal mind, for it operated on an image of Chinese despotism and required an even stronger despot to constrain it.[171]

promulgation of a "proper judicial tribunal." RUSKOLA, *supra* note 4, at 158; *see also* LOBINGIER, *supra* note 154, at 4.

168 *See generally* RUSKOLA, *supra* note 4, at 174.

169 *See, e.g.*, United States v. Biddle, 1 Extraterritorial Cases 84, 86 (U.S. Ct. of China 1907).

170 *See, e.g.*, LOBINGIER, *supra* note 154, at 14.

171 *See* RUSKOLA, *supra* note 4, at 8.