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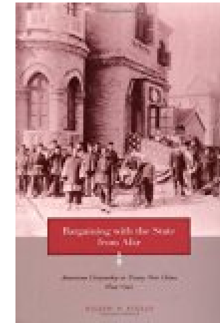
Eileen P. Scully. *Bargaining with the State from Afar: American Citizenship in Treaty Port China, 1844-1942.* New York: Columbia University Press, 2001. x + 306 pp. $52.00 (cloth), ISBN 978-0-231-12109-5.



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American Law as a Sojourner

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Where does American legal history occur? How are the boundaries of American legal history determined? Is American legal history confined by physical territory, by the nation's borders? Is its American-ness determined by the territorial location of American legal actions? Or does American legal history traverse the physical boundaries of the nation-state, and follow instead the actions of the state around the world? Or the actions of any Americans in any global territorial space when taken in the name of American law?

In recent years, historians of the United States have engaged similar questions. Projects on "internationalizing" American history have attempted to remove the borders from American history, and to explore more systematically its transnational character.[1] American legal history, perhaps less self-consciously, has edged in this direction as well. The recent rediscovery of the *Insular Cases*, for example, helps us to explore the role of American constitutional law in facilitating American empire.[2] However, the fuller transnational story of American legal history remains to be told.

Eileen P. Scully's new book, *Bargaining with the State from Afar: American Citizenship in Treaty Port China, 1844-1942*, makes an important intervention into this developing literature. Whereas scholarship on the *Insular Cases* helps us to see the impact of American law on territory held under U.S. power, Scully takes us instead to a non-U.S. territorial space where American law nevertheless operated. We see American law and legal institutions employed in China principally to police Americans in China. The guiding principle was protection of U.S. trade relations with China. Whereas the *Insular Cases* are often thought of as addressing the question of whether the Constitution "follows the flag," in Scully's study U.S. legal rights and obligations, albeit in a modified form, follow Americans themselves. This rich, well-researched and carefully argued book has much to offer legal historians.

As Scully defines it, her study focuses on the relationship between the U.S. government and U.S. nationals sojourning abroad, and the "federal-sojourner struggle over extraterritoriality' in certain colonial areas where the U.S. government reached into foreign lands to exercise direct legal jurisdiction over resident Americans thereby exempting them from native authority" (p. 1). She argues that this was "the central exception to the American insistence that government authority over citizens has strict territorial and constitutional limits" (*id.*).

The American sojourners in Scully's study interacted with the U.S. government when they sought diplomatic protection from the U.S., and also responded to national obligations regarding taxation, military service, and so forth. When the U.S. exerted power over American nationals in such contexts, extra-territorial jurisdiction, or "extrality" as it was called, "functioned as an anomalous zone, 'where the mix of rights and responsibilities for sojourning nationals was uncertain and strenuously nego-

tiated" (p. 2). A feature of imperialism, extrality was also "a citizenship regime" which "affords a window into the process by which ... the state emerged in international politics and legal discourse, as a realm to which one belongs or from which one is banned, whose interests one serves or injures, and whose sovereignty should be respected but is persistently at risk' " (pp. 2-3).[3] "Extrality's courtrooms," Scully argues, "stood at the broad juncture of two historical trajectories running through the eighteenth, nineteenth and early twentieth centuries: the first, the expansion of a Western-centric, capitalist world order to incorporate heretofore autonomous regions; the second, the solidification of the sovereign territorial nation state as the preeminent gatekeeper of power and identity in human affairs" (p. 3).

Through a series of treaties from 1787 through the nineteenth century, the U.S. gained extraterritorial jurisdiction over U.S. nationals in different nations, and most extensively in China. Due to treaties with the U.S. and other western powers, "most foreigners resident in China enjoyed virtual immunity from native law, and were instead under extraterritorial authority of their own home governments" (p. 5). Foreigners in China had "a Midas touch, allowing them to extend their privileges and immunities to employees, proteges, institutions, business and land," exempting them from control by indigenous institutions (*id.*). American authority was initially placed in U.S. State Department personnel until in 1906, when Congress created the U.S. District Court for China. This court, "the only institution of its kind in American diplomatic history," had jurisdiction over all U.S. nationals in China (p. 6). Under this regime, Americans in China were governed not by Chinese law, but "by an array of laws borrowed from the District of Columbia and other territorial codes, as well as [by] local ordinances enacted by and for foreign residents themselves" (p. 6). The origin of the U.S. Court for China lay in concerns that wayward U.S. nationals were harming American interests in China. In addition, a U.S. Court in Shanghai might "inculcate Chinese with an appreciation for American jurisprudence" (p. 7).

In Chapter One, Scully lays out the broader, international history of extraterritoriality up through the nineteenth century, providing a context for her more focused attention to the U.S. Court for China later in the book. American law on extraterritoriality, she emphasizes, was influenced by the law of other nations, and by international law. As it developed in China in the 1840s, "extrality was first and foremost an effort by commercial groups to control the 'more turbulent elements' in the foreign enterprise, so as to insure continued and expanded access to the China trade" (p. 30). Extrality developed on the context of clashes between Chinese authorities and westerners. Western and Chinese ideas of justice clashed, for example in the *Terranova* case, involving a sailor on an American ship who threw a jar overboard, hitting and killing a Chinese boatwoman. Chinese demands that the guilty party be turned over ultimately resulted in an agreement among merchants and ship captains that a trial should be held. When the sailor was found guilty, the Americans refused to turn him over to face a penalty of strangulation, but reversed course after American trade was halted. According to Scully, "Faced with the loss of the China market, such as it was at the time, the preferred strategy among Americans on the scene was to sacrifice one of their more vulnerable members ... in order to propitiate indigenous elites and anti-foreign mobs' " (pp. 37-38). The "Terranova solution"–turning foreigners over to face harsh Chinese criminal sanctions–would not last, however. When five drunken foreign seamen killed a villager in Hong Kong, the British Superintendent of Trade refused to turn them over. They were tried before a British Court of Criminal and Admiralty Jurisdiction, and received fines and short prison terms rather than a death sentence. This case and others influenced the development of extrality in the 19th century.

As described in Chapter Two, American approaches to sojourners were "entangled with domestic struggles over citizenship, federalism, and expansion" (p. 53). Ultimately, different tiers developed for treatment of sojourners in different geographical areas. When it came to Western Europe, Latin America, and the Pacific Islands, conflicts over sojourners turned on "invocation of international law, arbitration, bilateral treaties, and power politics" (p. 59). In the Asia-Pacific region, particularly in China, another approach to extraterritoriality developed. Initially, the U.S. Consul in China was given authority to try Americans in Consular courts. Previously, as one observer put it, some defendants "had so long escaped punishment that they had come to believe that they could take life with impunity. The United States authority was laughed at, and our flag made the cover for villains in China" (p. 69). If the U.S. Consul came down hard on defendants, he would make clear to sojourners and Chinese alike that the U.S. government was working to rein in unruly Americans. As the Consular court developed, "extrality's most important contribution to the American presence in China was that it preempted native elites from using indigenous institutions to control

or extirpate the foreign presence" (p. 72). Nor was the court simply the province of white, male merchants and sailors–women missionaries and American-born blacks in China also sought to redress their grievances in the Consular court.

Scully argues in Chapter Three that "[t]he chief accomplishment of late nineteenth century federal policy in the extraterritorial zone was to unbundle the panoply of rights and responsibilities embedded in domestic citizenship" (p. 87). In *Ross v. United States* (1891), for example, the U.S. Supreme Court held that the Constitution did not apply outside U.S. territory, so "sojourning Americans were entitled only to fundamental rights,' " not the full array of U.S. constitutional rights, such as the right to trial by jury (p. 87). This holding facilitated an effort by the U.S. government to assert more control over sojourners, to "colonize the colonizers," or to "make empire respectable" (p. 88).[4] One focus of reform would be the sex trade. As Secretary of War William Howard Taft put it in 1907, "Americans had rushed through the [open] door [to China] fast enough that in Shanghai, American woman meant prostitute, 'and in going to visit the red light district one said he was going to America'" (p. 96). Concerned that an influx of unruly Americans would undermine U.S.-China relations, and that the U.S. Consul was unable to remedy the situation, "respectable" sojourners lobbied for a court independent of the Consul. Ironically, allies for reform included prostitutes, since they saw a U.S. court as an arena to protect their financial interests.

In Chapter Four, Scully describes the establishment of the U.S. Court for China, and details "how Court officers tried to rein in their troublesome treaty port wards, hoping thereby to gain Chinese cooperation and commercial openness" (p. 109). The purpose of the court, she argues, was "to subordinate treaty port Americans to the national interests, and harness them to an expanding imperial state" (p. 109). Beyond regulating American sojourners, there was another purpose: "to provide Ch'ing constitutional and legal reformers with an object lesson in American-style jurisprudence" (p. 110). Interestingly, Scully argues, the Chinese encountered by this Court in China were largely "an abstraction....They served primarily as an imagined audience for the [court], supposedly just waiting to be shown that U.S. officials were determined to bring their own nationals under control" (p. 132). Struggles over the role of the court plagued its operation in the early years, so that its first two judges were ultimately run out of town, and by World War I only probate matters were firmly under the court's jurisdiction, so that the American sojourners most clearly under court control were those who were dead.

In Chapter Five we see a stronger role for the court under a new judge, Charles S. Lobingier, from 1914 to 1924. Extrality in China during this period was in the service of Woodrow Wilson's vision of internationalism, and his desire to bring the "rule of law" to less economically developed nations. Both Americans and Chinese brought commercial disputes before Lobingier's court, and his rulings were pro-business, rather than favoring parties on the basis of nationality. Corporations were held to a higher standard in exchange for the protections of extrality. In a 1920 case involving improper use of pornography in a Delaware corporation's advertizing in the Chinese press, Judge Lobingier argued, "If the increase of American corporations in China is to continue, and is to receive official encouragement, it is only on the condition that they conform to our best national standards." Especially in a case like this where morals were at issue, "the standards can be none too high" (p. 156). The court's legitimacy came under attack again in the early 1920s, with representatives of some U.S. commercial interests in China arguing that too much power had been vested in one person.

Chapter Six addresses the court's final two decades, when the court was reactive to the breakdown in the interwar years of the treaty relationships upon which it had been based. With the rise of Chinese nationalism, unequal treaties with Western powers were abrogated. Privileged status for foreigners provided by extrality was now seen as a violation of Chinese sovereignty. Before its demise, however, in the court's final years, women, including Chinese women, were more frequent litigants, and American-born Chinese emerged as a distinct constituency. The U.S. Court for China was closed by Japanese forces on December 8, 1941, following the bombing of Pearl Harbor, and in 1943 the U.S. ended extraterritorial jurisdiction in China.

Scully's Epilogue considers the status of sojourning Americans in a post-World War II world in which the U.S. emerged as a superpower. In the 1950s the Supreme Court abandoned the *Ross* case, a lynchpin of extrality. The idea that U.S. citizens abroad, when prosecuted by their own government, lost full constitutional protection now seemed dangerous. As Scully quotes the Court, in a passage that seems prescient in our own day, "If our foreign commitments become of such a nature that the government can no longer satisfactorily operate within the bounds laid down by the Constitution, it becomes time to

rethink those commitments" (p. 198).

Scully's book is so packed with interesting details, and goes to such lengths to embed the story in its broader context, that it is a treasure to scholars with an interest in extraterritoriality. The careful attention to context and detail that are a strength of this work may also make it slow-going for some readers (*i.e.*, my law students). Beyond this work's careful detail is a fascinating story about America in the world. Through Scully's eyes, we see American law and legal institutions as sojourners. Like the merchants and sailors, American law went to China with particular objectives in mind. The U.S. took a particular vision of the "rule of law" to China during the years of extrality, helping us to reflect on American efforts to promote the "rule of law" abroad in later years. In *Bargaining with the State From Afar*, Eileen Scully has given us a model for further explorations of the transnational history of American law.

Notes

[1]. See Thomas Bender, ed., *Rethinking American History in a Global Age* (University of California Press, forthcoming April 2002); David Thelen, ed., "The Nation and Beyond: A Special Issue," *Journal of American History* 86 (1999): 965.

[2]. See generally Christina Duffy Burnett and Burke Marshall, eds., *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution* (Durham, N.C.: Duke University Press, 2001).

[3]. Quoting R. Malley et al., "Constructing the State Extraterritorially," *Harvard Law Review* 103 (1990): 1286.

[4]. Quoting Ann Stoler, "Making Empire Respectable: The Politics of Race and Sexual Morality in 20th Century Colonial Cultures," *American Ethnologist* 16 (1989): 634.

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