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EMPIRE AND EXTRATERRITORIALITY IN 20TH CENTURY AMERICA

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Powerful nations have long sought empires.² The United States is no exception, though our imperial experience is distinctive. In this brief essay I examine the American approach to empire in the 20th century. In the early years of the century the U.S. experienced a brief burst of traditional empire-building. By the Second World War, however, American leaders for the most part foreswore traditional empire, even as the nation became a superpower with

¹ Professor, UCLA Law School & UCLA International Institute; Director, UCLA Burkle Center for International Relations. I thank Gary J. Bass, Christina Burnett, and the participants in the Symposium for helpful comments on this essay.

² For a comprehensive history see MICHAEL DOYLE, *EMPIRES* (1986). Doyle defines empire as “a system of interaction between two political entities, one of which, the dominant metropole, exerts political control over the internal and external policy—the effective sovereignty—of the other, the subordinate periphery.” *Id.* at 12. (1). I am using “empire” in a more expansive fashion, as will become clear, but I think the concept still has resonance here.

global reach and ambition. They instead pioneered a new form of political dominance, which produced many of the effects of empire in a different form.³ This new form of empire had several important features, but the key was that it was essentially extraterritorial in nature.

Traditional empires controlled territory directly or indirectly; that control was reflected in maps that showed, for example, the territorial holdings of the British Empire in red. The postwar American empire, by contrast, projected national power outward without controlling foreign territory directly. It was predicated not on *territorial* control but on *extraterritorial* power and presence. Through military bases sited on the territories of other states, the extension of domestic statutes overseas, and a web of multilateral institutions that embedded and extended American power while creating a favorable environment for American firms, the US achieved many of the ends of empire without the form.

³ There is a longstanding debate on whether the US is an empire, and this debate reached a new level of intensity after the end of the Cold War. I favor the view that we do maintain a kind of empire, though many disagree. Widely read popular works in this area include ANDREW BACEVICH, *AMERICAN EMPIRE* (2002); CHALMERS JOHNSON, *BLOWBACK* (2004); NIAL FERGUSON, *COLUSSUS: THE RISE AND FALL OF AMERICAN EMPIRE* (2005); CULLEN MURPHY, *ARE WE ROME?* (2007). For an earlier work in this vein see WILLIAM APPLEMAN WILLIAMS, *EMPIRE AS A WAY OF LIFE* (1980). (2)

The unusual structure of postwar order the United States created and led reflected the nation's newfound superpower status after 1945. It was, in many respects, an "empire by invitation," since it was welcomed by many states around the world.⁴ But it was also consistent with a wide range of constitutional concerns that had arisen in the Theodore Roosevelt and Taft administrations, largely stemming from the acquisition of the Philippine Islands from Spain. An extraterritorial empire proved more comfortable fit with our constitutional framework, and with our political interests, than traditional territorial empire.

I. 1898

The Spanish-American War of 1898 was a turning point in the long rise of American power, for it made clear—though arguably the Civil War had done so already decades earlier—that the United States was a formidable military power.⁵ For much of the 19th century the U.S. was a sort of sleeping giant and future power. It was clearly a vast and

⁴ Geir Lundestad, *Empire By Invitation? The United States and Western Europe, 1945-1952*, 23 J. Peace Res. 263 (1986).

⁵ KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* 60 (2009). (3)

wealthy nation, and could in theory project significant power overseas. But for the most part it did not do so, until the end of the 19th century.⁶

The Spanish-American War provided an opportunity for the ascendant U.S. to assert itself against a European power—albeit a weak and decaying one. In the war’s aftermath the United States “firmly established hegemony in the Caribbean and became a major power in the Pacific.”⁷ Victory over Spain allowed the nation to assume what many saw as its natural role as a great power.⁸ And at the end of the 19th century, great power status was largely seen as entailing imperial status. While there were some exceptions, the key Western powers had empires, and the era was generally one of imperial growth, not retrenchment. As the influential Senator Henry Cabot Lodge exclaimed,

⁶ FAREED ZAKARIA, *FROM WEALTH TO POWER: THE UNUSUAL ORIGINS OF AMERICA’S WORLD ROLE* (1998). (4) Cf ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* (2002 [1835, 1840])

⁷ Edward P. Crapol and Howard Schonberger, *The Shift to Global Expansion, 1865-1900*, in *FROM COLONY TO EMPIRE: ESSAYS IN THE HISTORY OF AMERICAN FOREIGN RELATIONS* (WILLIAM A. WILLIAMS, ED, 1972).

⁸ EVAN THOMAS, *THE WAR LOVERS: ROOSEVELT, LODGE, HEARST, AND THE RUSH TO EMPIRE, 1898* (2010) provides a significant background in the thinking of key figures at the time. For the larger context see *FROM COLONY TO EMPIRE: ESSAYS IN THE HISTORY OF AMERICAN FOREIGN RELATIONS*, SUPRA. ROBERT BEISNER, *TWELVE AGAINST EMPIRE: THE ANTI-IMPERIALISTS, 1898-1900* (1992) and E. BERKELEY THOMPSON, *ANTI-IMPERIALISM IN THE UNITED STATES: THE GREAT DEBATE, 1890-1920* (1970) provide an account of the opposition, which was large and grew over time. (5)

The great nations are rapidly absorbing for their future expansion and their present defense all the waste places of the earth. It is a movement which makes for civilization and the advancement of the race. As one of the great nations of the world, the United States must not fall out of the line of march.⁹

Victory in the Spanish-American war thus led greatness-seeking Americans—of which there were many at the time—to pursue, or at least accept, the acquisition of overseas colonies.

Consequently, as part of the peace treaty with Spain the U.S. took control of several Caribbean islands, including Puerto Rico and Cuba, and a very large set of Asian islands, the Philippines.¹⁰ The acquisition of all these formerly-Spanish ruled islands led to significant national debate, however. Many Americans felt that traditional empire was not a natural or appropriate fit for a nation founded on revolution and committed to republican values. It

⁹ Lodge, *quoted in* JAMES BRADLEY, *THE IMPERIAL CRUISE: A SECRET HISTORY OF EMPIRE AND WAR* (2009), at 69. (6)

¹⁰ CHRISTINA DUFFY BURNETT & BURKE MARSHALL, EDS., *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION AND THE CONSTITUTION* (2001) [hereinafter BURNETT & MARSHALL, *FOREIGN IN A DOMESTIC SENSE*]; BARTHOLOMEW SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* (2006) [hereinafter SPARROW, *THE INSULAR CASES*]; Christina Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. (2005) [hereinafter Burnett, *United States*]; Krishanti Vignarajah, *THE POLITICAL ROOTS OF JUDICIAL LEGITIMACY: EXPLAINING THE ENDURING VALIDITY OF THE INSULAR CASES*, 77 U. CHI. L. REV. 781, 788 (2010) [hereinafter Vignarajah, *THE POLITICAL ROOTS OF JUDICIAL LEGITIMACY*]. (7)

was one thing to expand westward over North America, displacing Indian tribes and gaining new states. It was another to annex distant islands that were, at the time, many days journey by sea from any American territory and which contained large populations that did not speak English.

Indeed, Rudyard Kipling's poem *The White Man's Burden* was written specifically to implore wavering Americans to embrace overseas colonialism¹¹. The Senate ultimately did approve the treaty with Spain ceding the islands to the U.S.—but by just one vote.¹² A critical point of debate in the United States became the role of the Constitution in these offshore territories. Contemporaries heatedly discussed whether “the Constitution followed the flag.”¹³ In other words, did the federal government have to rule these new possessions consistent with all the prescriptions and proscriptions of the Constitution? Were American sovereignty and constitutional rule inextricably tied? Or could these islands be treated differently than “ordinary” American territory?

¹¹ Raustiala, *supra* note 3 at 3.

¹² GARY BASS, *FREEDOM'S BATTLE: THE ORIGINS OF HUMANITARIAN INTERVENTION* (2008) AT 318.

¹³ RAUSTIALA, *supra* note 3. (8)

This issue became central to the politics of the time. It was pivotal in the presidential election of 1900, in which William McKinley and his challenger, William Jennings Bryan, staked out strongly opposing views on the matter. (McKinley and the Republicans favored empire; Bryan and the Democrats opposed it—Bryan so much so that he declared that an American embrace of colonialism would nullify “every principle set forth in the Declaration of Independence.”)¹⁴ But ultimately the question of the Constitution and the flag landed in the courts. In a set of decisions known as the *Insular Cases*, the Supreme Court announced a series of complex and sometimes contradictory principles about colonial rule.¹⁵

The *Insular Cases* are not easy to summarize, but the key outcome for the purposes of this essay was relatively simple. The Supreme Court established that only *some* constitutional rights applied in the new American colonies—those rights that the Court deemed fundamental. Other important rights, such as trial by jury, did not apply to the colonies unless Congress expressly applied them. The *Insular Cases* were avidly followed by the

¹⁴ Lloyd Gardner, A Progressive Foreign Policy, 1900-1921, in Appleman, ed, *supra*. At 204.

¹⁵ See, e.g., BURNETT & MARSHALL, *supra* note 7; and Juan R. Torruella, The Insular Cases: *The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT’L. L. 283, 286, 303-06 (2007) (discussing the contradictions within the Insular Cases themselves and between the cases and long-standing precedent). (9)

public, but the decisions were not easy for many ordinary Americans to understand. When asked to explain the key result, the great 20th century statesman, lawyer, and wit Elihu Root offered this pithy summary: “as near as I can make out, the Constitution follows the flag, but it doesn’t quite catch up with it.”¹⁶

The *Insular Cases* are one of the most important—if greatly underappreciated—sets of decisions by the 20th century Supreme Court.¹⁷ They go to the heart of what it means to be a constitutional democracy. I would only note here that they also had important and far-reaching implications for the United States’ long term approach to empire.

On the one hand, by ruling that the new island possessions *belonged* to the US, but were not necessarily *part* of the US, the *Insular Cases* helped to make formal empire possible. At the same time, however, the Supreme Court made plain that the United States faced not only the usual costs of imperialism, such as governing distant, often resistant foreign populations, patrolling far-off borders, antagonizing rival powers, and occasionally fighting violent insurrections. We also faced another kind of cost, since our constitutional traditions

¹⁶ Quoted in 1 PHILIP C. JESSUP, ELIHU ROOT, 1845-1909 384 (1938). (10)

¹⁷ See BURNETT & MARSHALL, FOREIGN IN A DOMESTIC SENSE, *supra* note 7, at 1; SPARROW, THE INSULAR CASES, *supra* note 7, at 9; Burnett, *United States*, *supra* note 7, at 801; Vignarajah, THE POLITICAL ROOTS OF JUDICIAL LEGITIMACY, *supra* note 7, at 785, 844.

meant that truly authoritarian or illiberal governance was unavailable.¹⁸ The federal government could not, as a legal matter, treat its colonies in any tyrannical way it saw fit, nor could it deny the inhabitants all the protections of the Constitution. Henry Cabot Lodge's vision of American empire could be realized, in short, but not without some of the fetters of the Constitution getting in the way. Empire was an uncomfortable fit for a system designed to grow by adding new states and citizens, not new colonies and subjects.

Perhaps just as important, the American constitutional order mandated free trade within the nation's borders.¹⁹ Whether goods from the offshore islands could compete with goods from the mainland duty free was a major concern for many farmers, then a huge voting block, and fear about the prospect of competition naturally led to significant opposition from potentially-impacted producers—and litigation. At first the Supreme Court held that Puerto Rico was not subject to the normal tariff rate on foreign goods.²⁰ Then a second decision offered up a cryptic and unsatisfying *defense* of tariffs on goods from the

¹⁸ These difficulties associated were partially foreshadowed by the complexities of federal rule over the contiguous territories—as the case of Dred Scott made clear. *Scott v. Sanford*, 60 U.S. 393 (1856). (12)

¹⁹ U.S. CONST. art. I, § 8: ("The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States. . ."). (13)

²⁰ *De Lima v. Bidwell*, 182 U.S. 1, 200 (1901). (14)

insular possessions, calling the new islands, in a memorable if somewhat oxymoronic phrase, “foreign in a domestic sense.”²¹ In other words, the territories were owned by the United States but were not part of the United States. Many observers, as well as some of the Justices involved, found the results in these decisions contradictory if not schizophrenic²². The reasoning was little better received. None of this could have inspired great confidence in how the critical issue of trade with the islands would ultimately be treated.

Much more could be said about the *Insular Cases*.²³ But in short, although our constitutional order did not cripple the prospects for colonialism, it clearly posed significant barriers. The Supreme Court continued to work out the legal aspects of colonial rule well into the Wilsonian era. Politically, empire faced an increasingly rocky road as well. The insurgency in the Philippines against American rule led to a war that was bloody and extremely brutal, and it made clear to many Americans that imperial rule was messy and required frequent and costly uses of force.²⁴ Empire turned out to be not so grand and

²¹ *Downes v. Bidwell*, 182 U.S. 244, 341 (1901). (15)

²² See Sparrow, *supra*, for a discussion of the reaction.

²³ And I intend to do so in a later work. (16)

²⁴ MAX BOOT, *SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER* 107-125 (2002) (explaining that the war was much longer and arduous than the Americans expected); HENRY GRAFF, *AMERICAN IMPERIALISM AND THE PHILIPPINE INSURRECTION: TESTIMONY TAKEN FROM HEARINGS ON AFFAIRS IN THE PHILIPPINE ISLANDS*

“bully,” to use a phrase of Theodore Roosevelt. As the great historian Walter La Feber later wrote, “by 1907...everyone was sick of the Philippine problem.”²⁵ Growing American opposition to imperialism also reflected more philosophical concerns, such as the belief in the right to self-determination and the historical legacy of the U.S. as a former colony that itself had thrown off oppressive foreign rule. President Woodrow Wilson, of course, made political self-determination a key part of his international agenda and sought to minimize the power and scope of European empires in the aftermath of the First World War.²⁶

Whatever the precise set of causes, it is fair to say that the fever for formal empire in the US abated fairly quickly after the first decade of the century. Nonetheless, this did not stop the United States from interfering in the affairs of other nations, especially in the Caribbean and Latin America, where the United States intervened militarily in places such as Haiti and the Dominican Republic. But these places did not become formal American

BEFORE THE SENATE COMMITTEE ON THE PHILIPPINES - 1902 (1969) (detailing Congressional hearings on the war's prosecution). Boot also describes the Americans' negative reaction towards the war after atrocities against the Filipinos were made public. BOOT, *supra* note 17, at 122-23. (17)

²⁵ Walter La Feber, Book Review, 51 HISP. AM. HIST. REV. 574, 549 (1971) (reviewing Tompkins, *supra* note 5). (18)

²⁶ Michla Pomerance, *The United States and Self-Determination: Perspectives on the Wilsonian Conception*, 70 AM. J. INT'L L. 1 (1976). (19)

possessions.²⁷ However, the US remained in control of all of its existing insular possessions through the end of the Second World War.

II. The Second World War and the New American Empire

Though increasingly criticized here and abroad, traditional imperialism remained a central part of world politics through the interwar period. Independence movements grew in power and size in the 1930s, however, and with the onset of the Second World War the dissolution of European imperialism grew near. The war brought the differences among the U.S. and its European allies on this issue into sharper relief, and as American power grew after our entry into the war, these differences became a key point of contention within the West.

Although his cousin Theodore had been an avid booster of imperialism, convinced that the white race was intended to conquer and rule others, President Franklin Delano

²⁷ Though the U.S. did acquire a few more minor islands in this period, such as the US Virgin Islands, American Samoa, and, after World War II, the Northern Mariana Islands, as a trust territory. See Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14. U. HAW. L. REV. 445, 447 (1992). (20)

Roosevelt made plain to America's allies that traditional imperialism was incompatible with his vision for a peaceful postwar world.²⁸ While foreign leaders resisted—Winston Churchill in particular—ultimately, and for many reasons, not least the exhaustion of the Britain and France in fighting the war, the US view prevailed. For its part, the United States granted the Philippines commonwealth status in 1935 and independence in 1946. And beginning shortly after the war, and accelerating in the 1950s and 1960s, the European empires too quickly unraveled.²⁹

The Second World War also utterly transformed the balance of power in the world. With a massive and seasoned military, sole possession of the atomic bomb, and fifty percent of the world's productive capacity, the U.S. was clearly a hegemonic power, and, it soon became apparent, a power unlike previous great powers. Had it wanted, it could have kept as a spoil of war chunks of Europe, much of the Pacific, and perhaps even attractive parts of the home islands of Japan—which it alone occupied for several years after the end of hostilities. Or the US could have chosen to install puppet regimes closely controlled by

²⁸ See the discussion in Ikenberry, *supra*, Chapter 6. (21).

²⁹ JOHN D. HARGREAVES, *DECOLONIZATION IN AFRICA* (1996); FREDERICK COOPER, *DECOLONIZATION AND AFRICAN SOCIETY: THE LABOR QUESTION IN FRENCH AND BRITISH AFRICA* (1996); MILES KAHLER, *DECOLONIZATION IN BRITAIN AND FRANCE* (1984). (22). The Soviet empire, of course, remained intact for many more years and arguably grew thanks to the war.

Washington, as was done by the Soviet Union in Eastern Europe.³⁰ But these were not the routes chosen. Instead, the US chose to create a new kind of international order, one that avoided the high costs of traditional empire but offered many of imperial advantages. This new, more informal empire was not territorial, as older empires had been.³¹ It was instead primarily extraterritorial.

This extraterritorial approach to empire had three key facets. The first was military: the U.S. built (or retained) a vast global network of bases on foreign lands, and concluded special treaties that inoculated American troops on these bases from local control and applied American law to them extraterritorially. Again, the U.S. did not formally annex much foreign territory, aside from a handful of strategic islands in the Pacific. However, the

³⁰ Our approach, as exemplified by Japan, was instead to rewrite the domestic constitution and reorder society, and then hand over power while maintaining a powerful and close military presence. See JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II*, 364, 366 (1999); MICHAEL SCHALLER, *THE AMERICAN OCCUPATION OF JAPAN* 41-43 (1987). (23)

³¹ I am cognizant that the British Empire was partly an informal empire, and that there is debate among historians over whether a hegemonic power is incentivized to obtain “ordinary” empire or simply pursue informal empire. That said, the British controlled and annexed territory in a traditional manner in many parts of the globe in the nineteenth century as well as the twentieth century. In their path-breaking article on the subject, Gallagher and Robinson state at the outset that “Great Britain during the nineteenth century expanded overseas by means of ‘informal empire’ as much as by acquiring dominion in the strict constitutional sense.” (emphasis added). And throughout they highlight the continuities between late nineteenth century empire and early nineteenth century empire. John Gallagher & Ronald Robinson, *The Imperialism of Free Trade*, 6 *ECON. HIST. REV.* 1 (1953). (24)

Comment [KM1]: The footnote as currently written contains a direct quote with no original source citation. The quoted language comes from John Gallagher & Ronald Robinson, *The Imperialism of Free Trade*, 6 *ECON. HISTORY REV.* 1 (1953).

Please consider an addition of this citation in the footnote after the quoted language and before the “emphasis added” parenthetical. If this is acceptable, the second citation to the Gallagher article at the end of the footnote sentence will become a *supra* citation.

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U.S. *controlled* important foreign territory by siting large and important military installations around the world. The result was a massive and unprecedentedly-global network of military bases, which ultimately contained a giant peacetime army and navy. Today, depending on how one counts, there are hundreds of these facilities, straddling the entire globe.³² Unlike the British Empire's similar, though much smaller, global network of bases, these bases are not sited in offshore colonies. Instead, in nearly all cases they sit directly within the territory of other sovereign states.

Accompanying these bases were "Status of Forces Agreements" (or "SOFAs"), treaties between the U.S. and the host nation that accorded special rights to American troops and often protected them from the jurisdiction of local authorities.³³ SOFAs are functionally similar to the "unequal treaties" of the nineteenth century, in that they create an extraterritorial legal regime in a foreign state for the benefit of American citizens who are present on that state's territory. In the case of the postwar SOFAs, these Americans were soldiers, sailors, and airmen and women, rather than traders and missionaries, but the basic

³² See Department of Defense, Base Structure Report, at www.acq.osd.mil/ie/download/bsr/BSR2010Baseline.pdf

³³ Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4.2 U.S.T. 1792, 199 U.N.T.S. 67. See also R. Chuck Mason, Status of Forces Agreement: What is it, and How Has it Been Utilized?, Cong. Research Serv., RL34531, at 1 Dec. 1, 2008. (26)

structure is very similar. SOFAs made large and permanent troop deployments on foreign territory possible; they were a necessary concomitant to the strategy of placing bases on foreign soil rather than annexing that soil directly. In turn, overseas troops and bases gave the U.S. the ability to truly project power globally.

The second facet of the postwar American approach was institutional: the U.S. created and led a system of rule-based multilateral institutions to harmonize policies among the advanced industrial democracies, and over time, other states in the West and elsewhere, such as Japan and South Korea. The key building block in this regard was probably the General Agreement on Tariffs and Trade, or GATT. GATT, as its name implies, worked to lower trade barriers around the world, and did so successfully, tying nations together through free trade.³⁴ But other important institutions included the International Monetary Fund, the World Bank, and, of course the United Nations itself, which had both economic and security dimensions.³⁵ Alliances were also a central part of this system, most notably the North Atlantic Treaty Organization.³⁶

³⁴ General Agreement on Tariffs and Trade, Oct. 30 1947, 61 Stat. A3, 55 U.N.T.S. 187;

³⁵ Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39; Articles of Agreement of the International Bank for Reconstruction and Development Articles of Agreement, Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134; Articles of Agreement of the International

As John Ikenberry has most extensively argued, this panoply of multilateral institutions was a critical part of the postwar American-led order.³⁷ These institutions constituted a system that benefited American allies while also benefiting the United States. And by creating and maintaining an open, liberal economic system, the United States ultimately helped to reduce the value of territorial holdings and, by extension, of traditional imperialism itself. In short, the multilateral order forged after the war favored openness and free trade and disfavored colonies and preferential trading schemes. This strategy, not coincidentally, also worked to the advantage of the most powerful and competitive economy in the world—ours.

The third feature of the postwar extraterritorial empire was avowedly focused on extraterritoriality as we conventionally understand it in the law. Traditionally, the US, like other states, refrained from applying its domestic law extraterritorially. Yet after 1945 it was the U.S. that most aggressively sought to extend its domestic law abroad, often to the ire of

Development Association, *submitted to governments* Jan. 26, 1960, 11 U.S.T. 2284, 439 U.N.T.S. 249; U.N. Charter art. 2, para. 4. See IAN HURD, *INTERNATIONAL ORGANIZATIONS* (2011) (summarizing international institutions). (27)

³⁶ <http://www.nato.int/cps/en/natolive/index.htm>

³⁷ IKENBERRY, *supra* note 21, at 163-66. (28)

our allies in Europe and Asia.³⁸ Beginning with the *Alcoa* decision in 1945, and continuing throughout the subsequent decades, American competition and securities law, as well as other bodies of domestic law, were applied to foreign actors abroad who were deemed to affect American markets.³⁹ To be sure, many areas in which American law diverged from the domestic law of other states were harmonized via multilateral treaties, so as to create a level, or at least more level, economic playing field. But other areas of law were not the subject of multilateral negotiation, and these were often simply imposed on foreign actors by the U.S. when that advantaged American firms and interests. These foreign actors, because they sought to maintain access to the American market, often had little choice but to comply. In this way, the US used the extraterritorial application of our domestic law to create economic and legal stability for American firms.

III. Conclusion

³⁸ See RAUSTIALA, *supra* note 3. At 95 (29)

³⁹ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (upholding extraterritorial application to non-U.S. nationals). See also John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 372 (2010). (30)

Together, these three facets of the postwar empire—a global network of bases, protected by extraterritorial legal arrangements for American troops; a panoply of multilateral institutions aimed at maintaining economic openness; and the selective extraterritorial application of domestic law to benefit American firms and protect American interests—allowed the U.S. to build and maintain an unprecedented level of world power from 1945 onwards. And via this system the U.S. garnered wealth, stability, and control without the direct costs of territorial rule.

Extraterritorial power of this sort—whether exercised via a military base or a legal decision—proved more compatible with postwar norms and American interests than did traditional territorial empire, and was ultimately more effective as well. Why rule foreign societies when one could gain the benefits of control without the costs of conquest? This new extraterritorial empire also did not raise the thorny constitutional and practical problems of direct governance that so divided Americans a century ago. By ruling indirectly, multilaterally, and, most importantly, extraterritorially, our global ambitions could be more readily squared with our constitutional and republican traditions.