CHAPTER ONE

Introduction: Legal Orientalism

“Law” . . . is part of a distinctive manner of imagining the real.
—Clifford Geertz, “Local Knowledge: Fact and Law in Comparative Perspective”

With the Chinese law . . . we are carried back to a position whence we can survey, so to speak, a living past, and converse with fossil men.
—Edward Harper Parker, “Comparative Chinese Family Law”

LAW’S ORIENT CONSTITUTES a wide and uneven terrain. This book describes the itinerary of one particular journey across that terrain, with a focus on China and the United States. Law is a key aspect of the political ontology of the modern world. It is exceedingly difficult, if not impossible, for us to think of politics outside of the framework of states, and of states outside of law. At the same time, no understanding of the world today is complete without consideration of China’s place in it. The difficulties begin when we seek to combine the inquiries into law and China. Where is China in law’s world? And why is the United States an important part of the answer to that question?

If there is one image of China that is seared in the collective consciousness of the West, it is that of a solitary man facing a tank in Tiananmen Square on June 4, 1989. Indeed, after the end of the Cold War and the roughly contemporaneous massacre by the Chinese government of its own citizens, China has come to occupy the role of the leading human rights violator in the East—a position left vacant by the collapse of the USSR. While the People’s Republic of China (PRC) has by now secured itself a solid reputation
as a law breaker in chief, the United States has emerged as the world’s chief law enforcer as well as its leading law exporter, administering programs for the promotion of rule-of-law everywhere—and perhaps nowhere as vigorously as in China.

This book starts from the premise that the complex and unstable relationship among China, the United States, and legal modernity is of utmost global significance. To map that relationship, it analyzes law as a fundamental element in the modern worldview that conceives the individual—the singular human being—as the paradigmatic existential, political, and legal subject and the state as the privileged medium for the instantiation of its universal values, through law. More than just a set of rules for regulating behavior, law in this larger sense is a structure of the political imagination—“a distinctive manner of imagining the real,” in Clifford Geertz’s words. One of its most important imagined Others is the Orient, and legal Orientalism is the discourse in which it is imagined.

The remainder of this book sets out to map key elements of that discourse and a historical itinerary of its global development. It is a compara-
tive and historical study about ideas of Chinese and U.S. law, and of how those ideas have produced distinctive subjectivities, articulated social relations, and shaped geopolitical conditions. In terms of its historical narrative, the heart of this book is the extraordinary and virtually forgotten story of how over the course of the nineteenth century a diffuse set of European prejudices about Chinese law developed into an American ideology and practice of empire, entailing the extraterritorial application of a floating body of U.S. law in an otherwise lawless Orient. It is only from a perspective that is both theoretical and historical that we can understand the effect that Orientalism has had on the development of both Chinese law and U.S. law, as well as on international law and Sino-U.S. relations more generally.

GLOBAL CIRCULATIONS OF LEGAL ORIENTALISM

The map of law’s Orient here is a particular one, as is every map. Perhaps most importantly, the scale in the following chapters varies considerably, reflecting changes in the legal topographies they traverse and in the time periods they cover. To name only some of its concerns, this volume explores representations of Oriental despotism in the imagination of Euro-American Enlightenment thinkers; it reinterprets Confucian family law in late imperial China as a kind of corporation law; it examines the so-called United States Court for China, which sought to apply, among other things, pre-Revolutionary common law in early-twentieth-century Shanghai; it investigates the comparative standing of the United States and China in international law by examining the Boston Tea Party and the Opium War; it studies the enduring damage wrought on the U.S. Constitution by the enactment of Chinese Exclusion Laws near the end of the nineteenth century; and it links these historic studies with the legal geography of today’s world by considering the political and phenomenological significance of the post–1978 legal reforms of the People’s Republic of China.

This book brings these varied phenomena together under the compound rubric announced by its subtitle: China, the United States, and modern law. Rather than taking any one of these three categories as a pregiven object of knowledge, or adopting a single disciplinary approach, this book examines how China, the United States, and law are related to each other—historically, conceptually, culturally, and geopolitically. At the outset it is
important to recognize that it is by no means obvious to all observers that the three notions are in fact related in any particularly meaningful way. Indeed, the genesis of this book lies precisely in an examination of the widely shared assumption that law and China exist in an antithetical relationship. Originally this study began with the more modest goal of producing “just” a historical and theoretical analysis of Chinese law—an undertaking that would certainly have been demanding enough on its own. However, as I started my inquiry, I had no choice but to confront the fact that one of the defining cultural and political characteristics of China is law’s putative absence there. In fact, when I am asked what I do for a living and I respond that I study Chinese law, with remarkable frequency my interlocutors inform me that there is no such thing, thereby suggesting politely (and sometimes not so politely) that I have made a category mistake in choosing my academic vocation.

At first such reactions simply irked me, and my responses were not particularly considered. (“People who study French or German law don’t have to convince others that their subject matter exists!” I protested to colleagues.) However, given the consistency and manifest sincerity with which this “truth” about China was being offered, it became evident that it could not be simply ignored. Approaching the notion of Chinese law ethnographically, I decided to examine what motivates the belief in its nonexistence and what makes that belief so intuitively appealing to so many. Pursuing that inquiry has turned out to be both more fascinating and more complicated than I originally anticipated. On the one hand, it has become a study of China’s ambiguous place in legal modernity. On the other hand, the notion of rule-of-law—of which China is seen as the antithesis—is claimed today most insistently by the United States. Hence, a genuinely global understanding of China’s role in law’s world demands a consideration of the United States’ role in the legal production of modernity.

My main framework for exploring the relationship among China, the United States, and modern law is a complex of ideas I call “legal Orientalism.” In his path-breaking monograph, Edward Said uses the term Orientalism to refer to discourses that structure Western understandings of the East. He emphasizes the extent to which the identity of the colonial and postcolonial West is a rhetorical achievement. In a series of imperial gestures, we have reduced “the Orient” to a passive object, to be known by a cognitively privileged subject—ourselves, “the West.” As Said puts it,
“Without examining Orientalism as a discourse one cannot possibly understand the enormously systematic discipline by which European culture was able to manage—and even produce—the Orient politically, sociologically, militarily, ideologically, scientifically, and imaginatively during the post-Enlightenment period.”

By now there are scores of studies of different varieties of Orientalisms. Remarkably, the study of specifically legal forms of Orientalism remains largely unexplored—the ways in which “the Orient,” as well as the Euro-American “West,” have been produced through discourses of law. Given the centrality of law to the political modernity of the West and the fundamental way in which Said’s analysis destabilizes the epistemological status of East–West distinctions, a global study of law’s world cannot afford to ignore Said’s challenge.

By the term legal Orientalism, then, I refer on the most general level to a set of interlocking narratives about what is and is not law, and who are and are not its proper subjects. This book focuses largely on one particular instantiation of legal Orientalism, and the remaining chapters illustrate how its narratives enjoy global circulation and how they have performed a variety of functions in various historical contexts, up to and including the present. Each of the chapters is concerned with defining an Other through its relationship to law. Of course, the West—to use the purposely imprecise term—has many Others, and the Orient is only one of them. At the same time, the Orient itself is a radically determinate category, denoting an entity of the European imagination that extends from Morocco in North Africa to Japan on the eastern edge of Asia. In this book the cultural world of China represents only one instance of Orientalism. It is not exemplary, but it is a historically and politically important case.

Focusing on Chinese law, then, I use the framework of legal Orientalism to ask a number of related, overarching questions: Who has law? Who gets to decide who has law? And, perhaps most importantly, what is at stake in asking the question? A statement that someone has or does not have law is not only a descriptive claim but also a normative assessment of a particular society. Inevitably, not having law implies missing something that one should have. In considering these questions, I examine the ways in which law has been a foundational element in the constitution of the modern Western subject and the nation-state. How, I ask, have ideas of the lack of Chinese legal subjectivity served to mark the conceptual outside of Euro-American
To reiterate, there is indeed a strong cultural tendency to associate the United States with law (even if excessively so at times), and a corresponding historic tendency to associate China with an absence of law (whether that absence be considered a vice or a virtue). The distinction is crucial because the emergence of law, in the sense of rule-of-law, is one of the signal markers of modernity. This rough cultural mapping of the triangulated relationship among China, the United States, and law generates a number of assumptions that provide the framework for scores of comparative studies of China. These include, most notably, the notion that China is traditional—or worse, primitive—while the United States is modern, as is the law that embodies its essential values. From these fundamental oppositions much else ensues, historically and conceptually, as this book aims to show.

It is important to acknowledge at the outset that ever since Said’s classic analysis the term Orientalism has acquired a distinctly pejorative connotation. Calling someone an Orientalist is often regarded as akin to calling someone a racist, and usually it elicits a similar reaction. By designating certain understandings of law and China as Orientalist, I do not mean to level an accusation but simply to open an avenue of inquiry into the field of knowledge in which Chinese law is studied and understood. As I suggest in Chapter 2, in the modern world in which we live there is no pure, un-Orientalist knowledge to be had. More modestly, but vitally importantly, what we can do is understand the history and conceptual parameters of Orientalism and how they structure what can be said, and known, about China and Chinese law—and indeed about the United States and U.S. law as well.

It is vital to emphasize that the discourse of Chinese law is not, and cannot be, a self-contained universe. It is never only about Chinese law, or lack thereof. Chinese law is a concept with a global circulation and with global effects. Although it may be heuristically helpful to begin from a contrast between an (idealized) American law and a (caricatured) Chinese lawlessness, such a juxtaposition is ultimately too simplistic and too static. The ostensibly heterogeneous subject matter of the following pages reflects the dynamic, uneven, and worldwide traffic in ideas of Chinese law, and of Chinese legal perversity.

The point is not necessarily obvious, so it may be useful to support it with an introductory example that also illustrates the development of this
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book. In the early stages of my research, when I still envisioned the project as essentially a historical and theoretical study of Chinese law, I learned that in 1906 the U.S. Congress passed a law entitled “An Act Creating a United States Court for China and prescribing the jurisdiction thereof.” The new court, equivalent to a federal district court, assumed civil and criminal jurisdiction over American citizens within the “District of China,” which in turn was coincident with the Qing Empire. The court sat in the semicolonial port city of Shanghai, and appeals from its judgments were taken to the Ninth Judicial Circuit in San Francisco, with further appeals to the United States Supreme Court in Washington, D.C. Expanding its original mandate, the court eventually construed its jurisdiction to include not only American citizens in the so-called District of China but also American “subjects” from the newly colonized Philippines, and in some cases American citizens who had never set foot in China.

As I studied the court further, I was stunned not only by the improbable fact that it had existed and the vast jurisdiction that it exercised, but also by the plain weirdness of the body of law that it applied in China. That body included English common law as it existed prior to American independence, general congressional acts, the municipal code of the District of Columbia, and the territorial code of Alaska, parts of which continued being applied in China even after they were repealed in Alaska, to mention only some of the main sources of the court’s jurisprudence. The court had only one sitting judge at any one time, and when he was away (either riding circuit in the cities of Hangzhou, Tianjin, or Canton, or being investigated for official misconduct in Washington, D.C.), prisoners sometimes had to wait for months for a trial. Indeed, virtually the only federal law that did not apply in the District of China was the United States Constitution. Hence, there was no right to a jury trial nor to constitutional due process, among other legal niceties.

In sum, all of this struck me as something rather like from Alice in Wonderland, the kind of befuddled jurisprudence one might expect to emerge from the courtroom of the Queen of Hearts, not from a court of the United States—which should not even be sitting in China in the first place. Yet the tribunal operated for several decades and its jurisdiction was not formally abolished until 1943. As I became increasingly fascinated with the extraterritorial operation of American law in China, I pursued the topic as a discrete project. However, as I also continued my prior research into the
historical and cultural representations of Chinese lawlessness, it soon became impossible not to recognize just how oddly disjunctive, yet related, the two projects were. While the District of China may have been full of American law, the way in which the United States Court for China exercised jurisdiction over it was hardly lawful in a more fundamental sense. Paradoxically, that erratic jurisdiction was justified precisely, and perversely, by the United States’ claims of alleged Chinese lawlessness.

In order to understand this paradox, I concluded that an examination of how U.S. law operated in China must proceed simultaneously with a study of how Chinese law has been represented in the United States, which in turn is linked further to global discourses about the nature of Chinese law and justice, or lack thereof. As it turns out, and as Chapter 4 elaborates, those discourses have historic, and enduring, effects even on the domestic structure of U.S. law, not merely on its extraterritorial operation. Notably, a belief in the incapacity of the Chinese to understand, let alone embody, the virtues of individual rights and rule-of-law came to provide a crucial justification for anti-Chinese immigration laws passed by Congress beginning in 1882. When Chinese would-be immigrants contested the laws, the U.S. Supreme Court upheld them on the basis of an extraordinary theory. It held that in certain areas, including immigration, the federal government possesses “plenary powers”: a discretionary authority unconstrained by the Constitution. Ironically, a desire to banish subjects of Oriental despotism outside the borders of the United States resulted in the institutionalization of a kind of legal despotism inside the United States. It is in this sense that ideas of Chinese law constitute, indeed, a transnational discourse with global effects. As Chapter 4 insists, those effects were significant and far-reaching: it is precisely the laws at the margins of a liberal democratic state that define its center.

EXCEPTIONAL EMPIRES OF THE UNIVERSAL
AND THE PARTICULAR

Both China and the United States are, or view themselves as, exceptional in many regards. Perhaps most importantly, they are the last two major empires that remain standing in the beginning of the millennium. The achievement is remarkable, considering the violent collapse of several other empires with whom they shared the global stage at the dawn of the twentieth century,
barely a hundred years ago: the Russian (and subsequently Soviet) Empire, the British Empire, the Ottoman Empire, the Austro-Hungarian Empire, the French Empire, and the German Empire—all are long gone. To be sure, the more or less contiguous nature of the continental territories of the PRC and the United States may make it slightly more difficult to recognize them as empires than, say, the far-flung possessions of the erstwhile British Empire. Nevertheless, the vast territorial footprint of both states is an unmistakably imperial achievement, enabled by a not dissimilar process of continental expansion, whether in the name of a Manifest Destiny or a Confucian civilizing mission.\(^5\)

In the discourse of legal Orientalism, too, both empires occupy an exceptional status, albeit in highly distinctive ways. One way to analyze that distinction is to consider the differential relationship of the United States and China to the universal and the particular—key categories by which Western thought has classified and evaluated knowledges, civilizations, polities, persons, and literally everything else for at least two millennia. For moderns, the state is the primary medium for the articulation of the universal, and law is the privileged language in which that universality is expressed. To put it in phenomenological terms, in the juridified world in which we live our lives, freedom means \textit{rights}. That is precisely why to embody lawlessness is to be lacking something that is, or ought to be, universal, and, consequently, why both the United States and China occupy an exceptional status in the ontology of modern law.

The United States has from its founding regarded its political values as exemplary, not just reflecting the emancipatory values of the Enlightenment on the European model but embodying them even \textit{better} than Europe does, or once did. The American system of government is thus not merely one expression among others of the universal values of democratic rule-of-law but their paradigmatic instance—a model for others to emulate. In short, the political values of the United States are \textit{particularly universal}. At the same time, insofar as China’s legal tradition grows out of an enduring Oriental despotism, its political values are inherently suspect. Worse than simply unlegal, they are in effect antilegal. Hence, while the United States’ legal values are particularly universal, those of China appear as \textit{universally particular}—categorically undemocratic.

It is one of the key contemporary effects of this discursive framework that it sets up the United States as a global enforcer of human rights and
China as one of their preeminent violators. Restated most broadly, then, this book is a global mapping of discourses of world-making and self-making through law. There is no discourse of rule-of-law that is not at the same time a discourse of legal Orientalism—a set of usually unarticulated cultural assumptions about that which is not law, and about those who do not have it. Whether we choose to recognize it or not, there is no world of legal modernity without an illegal, despotic Orient to summon it into existence.

To avoid a possible misreading of the term Orientalism, it is important to note that I use it to refer both to ideational and material practices, which are ultimately indissociable from each other. While the world always and necessarily exceeds discourse, discourse always has a worldly existence and material effects. At the same time, all material practices take place within, and are mediated by, discourses. In terms of the structure of this volume, Chapters 2 and 3 focus on a predominantly discursive analysis of legal Orientalism. What are some of its key assumptions, and how do they permit us to know certain things about China, the United States, and law, while making other things unknowable or unintelligible? That is, these chapters analyze legal Orientalism primarily as an epistemological practice, examining how Western observers of Chinese law—especially but not exclusively within the academic field of comparative legal scholarship—have viewed the object of their study. Their central focus is the construction of China as an object of legal knowledge.

Chapters 4 and 5 of the book turn to legal Orientalism as a material practice, investigating some of the uneven effects produced by the global circulation of ideas of perverse Chinese legality. Of course, even epistemologies do not arise ex nihilo; knowledge, too, is produced in institutions with material support. However, the institutions analyzed in these chapters are primarily legal and judicial institutions rather than academic ones. The main vehicle for translating the knowledge produced by the academic discipline of comparative law into political institutions was the emerging profession of modern international law in the mid-to-late nineteenth century. As self-proclaimed carriers of the universal values of Western civilization, international lawyers developed institutionalized jurisdictional practices to restrict the particularistic operation of Chinese law.

Needless to say, as knowledge of Chinese law was translated into international legal institutions, those institutions both reflected and continued
to transform the epistemologies that supported them. In the end, it is part of the wondrous efficacy of legal discourse that it constructs its own reality. The empirical basis of legal Orientalism is, and always has been, ultimately beside the point. It is a discourse of legal reason rather than of factual truth. Once China’s lawlessness was established as a *legal* rather than veridical fact, that fact came to justify its exclusion as a state from the privileges of international law. And similarly, as noted earlier, it permitted U.S. constitutional lawyers to justify a series of exclusion laws that for nearly sixty years denied Chinese persons admission to the United States (analyzed further in Chapter 4).

Viewed from a wide angle, this book might be described as a global history of China—a history of China and its place in the world, as seen from the point of view of law, epitomized by the U.S. legal order. At the same time, despite the breadth of its subject matter, the book’s main concern is still the analysis of Chinese law—the original project with which it began—as long as we understand the term in its broadest, most global sense. In such a usage, it refers not only to the legal mechanisms by which China has been regulated but also to ideas about Chinese legality, constructed in relation to ideas about Euro-American law; the global traffic in those ideas; and the effects they had both inside and outside of China, for Chinese and others.

Admittedly, a literally global analysis would ultimately entail a study of ideas of Chinese law and their effects far beyond North America and Europe, from South to North Africa, from Peru to Persia, and throughout East Asia. Such a comprehensive investigation would take up several volumes. This book can therefore only begin the task of drawing a global map of Chinese law, by focusing primarily on two outsized and exceptional hemispheric actors, China and the United States. As Jonas Grimheden observes, for better or worse contemporary discourses of Chinese law are “dominated by Americans studying China and by Chinese studying the U.S. legal system.” What, then, does the cultural geography of modernity look like when analyzed through the lens of law, American as well as Chinese?

**RULE-OF-LAW, RULE-OF-MEN, AND ORIENTAL DESPOTISM**

The idea that China suffers from a lack of law was not invented by the global press on June 4, 1989. In 1899, the English consul Ernest Alabaster
observed, melancholically, “To all intents and purposes foreigners are completely in the dark as to what and how law exists in China. Some persons whose reputation for scholarship stands high would deny the right of the Chinese to any law whatsoever—incredible but, to my knowledge, a fact.”\textsuperscript{10} Marcel Granet announced in 1934, “The Chinese notion of Order excludes, in all aspects, the idea of Law.”\textsuperscript{11} In his critical review of the status of law in studies of Chinese society, William Alford concludes that things have not improved markedly—indeed, the very title of Alford’s essay is “Law, Law, What Law?”\textsuperscript{12}

Just what do such oft-repeated claims mean, whether referring to law’s absence in China or its near-total social and political insignificance? Only the most negligent observer could miss the fact that imperial China boasted dynastic legal codes going back to the Tang dynasty (618–907 c.e.), and earlier. The point is indeed usually a subtler one: whatever law China has known is of a particular kind that falls short of “real” law. This view is implicit in the frequently made claim that Chinese law has been historically exclusively penal and associated with criminal sanctions. Especially in the civil law systems of continental Europe, civil law stands at the heart of jurisprudence, and its absence therefore signifies a gaping hole at the center of the Chinese legal tradition. Sometimes the implicit yardstick for authentic law is formal legal rationality in the sense in which Max Weber uses the term.\textsuperscript{13} Perhaps most commonly, the law that China lacks refers to a liberal legal order that constrains the state in a particular way—a configuration often referred to as the rule-of-law. Legal historian Thomas Stephens argues that Chinese law is not even worthy of the term jurisprudence. As a more descriptive term for the study of Chinese non-law, Stephens offers the neologism “obsequiiprudence”—presumably signifying the scholarly study of obsequious submission to authority and hierarchy.\textsuperscript{14} (Stephens’s problematic analysis is considered in greater detail in Chapter 5.)

If what China ultimately lacks is rule-of-law, we must begin by asking what we mean by rule-of-law. Although the discourse of rule-of-law has a long history, its current vogue dates from the early 1990s.\textsuperscript{15} With the end of the Cold War, rule-of-law is not only shorthand for a system of restrictions on state power but has become a ubiquitous by-word for the promotion of freedom, democracy, and market economies more generally. For many, the apparent triumph of neoliberal capitalism over state socialism has consti-
tured nothing less than the End of History. Even though most of the same triumphalists recognize the emergence of a new East–West division, defined by the United States and the People’s Republic of China, that cleavage is often understood as cultural—in contrast to the former rivalry between the United States and the Soviet Union, which is viewed in primarily political terms. In this new East–West discourse, it is no longer politics but civilizations that clash. The promoters of rule-of-law in turn view law as a fundamental element of a democratic culture. When understood in terms of legal Orientalism, this post–Cold War turn to culture is better understood not as the end of politics—let alone History—but as a displacement of what are often political differences onto the terrain of culture. From that perspective, legal Orientalism is the concept that names the cultural distance between East and West, as law reigns as the predominant universal of the post–Cold War world and culture is viewed, increasingly, as a particular difference standing in its way.

Although there is a global consensus on law’s desirability, there is surprisingly little agreement on just what constitutes rule-of-law, culturally or otherwise. Legal theorists have proposed multiple definitions ranging from “thick” to “thin,” from “instrumental” to “substantive.” Such conceptual indeterminacy may be bad for the development of legal theory, but it is precisely the ambiguity of rule-of-law that makes it so appealing politically. Like human rights, to which even human rights violators—including China—pay lip service, rhetorically the rule-of-law is just the kind of “unqualified human good” to which no sane person can object, whether liberal or conservative. At the same time, the term’s ambiguity covers differing, even inconsistent, agendas. In China, for example, the state’s keenness for the rule-of-law seems often driven by a desire for foreign investment and the construction of (state-dominated) markets. In contrast, when political activists call for the establishment of rule-of-law, they typically associate it with the creation of the political institutions of democracy. (Democracy, in turn, is just as elusive of definition, both in China and the West, even while all agree on its standing as the highest political desideratum of modernity.)

Moreover, not only does the rule-of-law hold the promise to cure all manner of social ills from economic corruption to political tyranny, but it promises to do so in a nonpartisan manner. On this popularly held view,
the rule-of-law is a *thing*, the rule of *rules*: a system of neutrally administered legal sanctions and incentives that provide the basis for an orderly modern society.\textsuperscript{20} This is far too modest a view. Rules do not exist apart from the social context that gives them meaning. Whatever else it may be, the rule-of-law is a social practice. At an even deeper level, the rule-of-law constitutes also the political epistemology in which those social practices are grounded. Indeed, it is “a way of being in the world,” with its own particular structure of beliefs.\textsuperscript{21} Stated in Heideggerian parlance, law plays a key role in worlding the modern world.\textsuperscript{22} The world in which we live is a fundamentally legal one.

While there is a rather stunning lack of agreement on what the rule-of-law is, there is an equally overwhelming consensus on what it is *not*: the rule-of-men. As Chief Justice John Marshall stated in *Marbury v. Madison*, the Supreme Court case that opens numerous textbooks on U.S. constitutional law, “The government of the United States has been emphatically termed a government of laws, and not of men.”\textsuperscript{23} The idea that the rule-of-law means precisely *not* the rule-of-men is so fundamental that the two terms are in fact best understood as forming a singular expression, rule-of-law-and-not-of-men, whether or not the two phrases are tagged together. This negative contrast is constitutive of law itself: “Law *is* not the rule of men.”\textsuperscript{24}

Putting aside the fact that the contrast is exaggerated and oversimplified even in terms of the American political self-understanding, it has ruinous analytic consequences for the study of Chinese law. Historically, the Chinese political self-understanding has been premised on the very *ideal* of the rule-of-men (人治), a kind of moral utopia where those in power derive their authority to govern from their superior virtue—either Confucian virtue, in the case of traditional China, or Communist virtue, in the case of socialist China. This self-understanding is no less mythical and self-congratulatory than the American one, but insofar as it provides the traditional normative justification for the Chinese political order, it also means that, from a comparative perspective, any law that we find in that order will not qualify as real, true, universal law. If the rule-of-law means *not* the-rule-of-men, any would-be Chinese law is an oxymoron, a transparent alibi for law’s corruption under Oriental despotism.\textsuperscript{25}

In short, despite their formally symmetrical relationship to each other, the categories rule-of-law and rule-of-men are neither historically neutral
nor culturally equivalent. One is always pre-identified as Western, and hence modern, and the other as non-Western, and hence premodern or traditional. While we in the cultural West are often bemused to learn of Sinocentrism—the Chinese word for China (中国) means the Middle Kingdom, or in a more literal and somewhat less romantic translation, the Central State—we nevertheless accept with utmost unself-consciousness the notion that we are the First World, twice removed from the soi-disant Third World. Admittedly, the distances among the worlds are shrinking, as the Second World has all but disappeared, and even as a new Fourth World, comprised of indigenous peoples, has emerged on the political and legal landscape. (Remarkably, the peoples who claim the longest chain of title to the earth’s surface have been placed at the end of the queue, after the three modern worlds.) But our occidental solipsism aside, cultures and nations do not come labeled with ordinal numbers, ranked by their capacity to embody universal values. The division of Earth into economically and racially segregated worlds denies the essential coevalness of everyone who lives on this planet.

To recognize that European analytic categories are not universal, even while many European practices have become more or less globalized as an ongoing legacy of European imperialism, is a historical conundrum that has no simple exit. As Dipesh Chakrabarty puts it, European categories are “both indispensable and inadequate in helping us to think through the experiences of political modernity in non-Western nations.” Chakrabarty’s response to this predicament is to “provincialize” Europe: to put Europe in its place by decentering Western analytic categories and subjecting them and their particular histories to critical scrutiny.

Provincializing the binary and moralistic rule-of-law versus rule-of-men distinction will not be easy, given how deeply it structures our political vision. At a minimum, we must learn to inhabit its contradictions more candidly. U.S. legal scholars have known how to recognize law’s contradictions and live with them at least since the rise of Legal Realism in the first half of the twentieth century. On the most basic level, one need not be a trained lawyer to recognize that the person of the judge makes a great deal of difference. Otherwise, judicial elections for state and local courts would hardly matter, and confirmation battles over presidential nominees for the Supreme Court would be incomprehensible. Indeed, it is one of the risks inherent in rule-of-law that it is always at risk of becoming rule-by-judges, a
kind of juristocracy. But although the critique of the naïve view of the rule-of-law has been made domestically over and over—epitomized by the Realist aphorism that what the law is depends on what the judge had for breakfast—this critical self-awareness dissipates all too quickly when we turn to analyzing Chinese law. While we can understand, or at least gloss over, the contradictions and shortcomings of the rule-of-law at home, we become far more uncompromising in evaluating traditions elsewhere.

In effect, as this book argues, law’s contradictions cannot be resolved, only managed. One way of managing them is projecting them elsewhere. Peter Fitzpatrick calls this self-congratulatory worldview the “mythology of modern law.” The strategy is far from new. One of its ablest practitioners was Montesquieu, who has likely done more than anyone else to oppose “despotism” to “law” and then exile the former into the Orient. (This is not to say that he did not have important Greek and Roman predecessors who likewise associated the East with despotism.) In *The Spirit of the Laws*, one of the eighteenth century’s most important works of political theory, Montesquieu elaborates a comparative theory of despotism on a global scale. He associates monarchies and republics with Europe (the former being the most desirable political system of all), whereas despotism as a form of government is native to Africa, America, and Asia. Monarchies and despotisms are structurally similar in that they are both ruled by a single person, but in monarchies a spirit of honor ensures rule by means of law, while despotisms are governed solely by a spirit of fear. Although despotism is a generic extra-European form of government, Montesquieu locates its natural home in Asia, with China as one of its Asiatic prototypes.

To be sure, few invoke outright Montesquieu’s disparaging language of Oriental despotism in managing law’s contradictions today. However, those contradictions are likely inevitable, perhaps even productive. In any event, as the remainder of this book argues, they are inherent in the very notion of legality. Legal Orientalism is a discourse and a material practice that manages those contradictions.

**DISCIPLINARY ORIENTATIONS**

The following pages are aimed at multiple audiences. As its subtitle alone makes evident—*China, the United States, and Modern Law*—this book
addresses Chinese studies, American studies, and legal scholarship. More generally, the investigations in this book owe an enormous debt to postcolonial studies. Collectively, they are driven by a set of questions they ask, not by a commitment to a specific method, a particular geographic scope, or even a single historical period. This interdisciplinary orientation is a corollary of the nature of legal Orientalism as a pervasive form of knowledge across numerous fields.

With this caveat, it may nevertheless be helpful to locate the study of legal Orientalism among institutionally organized areas of knowledge. First, where does the book fit in Chinese and American studies? In both fields, as in other fields of area studies, there has been an increasing turn to transnational and comparative approaches. In Chinese studies the transnational turn has been most notable in scholarship on emigration and studies of the Chinese diaspora—areas of inquiry that evidently lend themselves to, and indeed demand, a geographic perspective that extends beyond the boundaries of a single nation-state.

Simultaneously, Chinese law itself has emerged as an increasingly important subject among historians of China. An earlier generation of scholarship on the Chinese legal tradition focused predominantly on orthodox Confucian representations of law. As Alford observes, those are generally negative, given Confucianism’s ideological preference for rule-of-morality over rule-of-law. However, with growing access to judicial archives in the PRC, the last few decades have allowed historians to study not only cultural attitudes and officially promulgated codes but also the mundane adjudications undertaken by county magistrates in the late imperial period. These studies provide a far richer and more complex picture of the operation of Chinese law. Yet their perspective remains typically “China-centered,” to use historian Paul Cohen’s term, in contrast to the turn to transnational approaches in many other areas of Chinese studies. This book seeks to complement existing studies of Chinese law by doing just that, and asking what is at stake globally when we invoke the idea of Chinese law as an object of analysis.

In American studies, too, the turn to the transnational is most evident in analyses of immigration, as a way of overcoming the intellectual tyranny that national borders impose on knowledge. In addition to studies of Latin America, the Caribbean, and elsewhere, these investigations include prominently histories of Chinese immigration. Unsurprisingly, while the movement of
persons from China to the United States has historically appeared as a story of *emigration* in Chinese studies, in American studies it has been narrated as one of *immigration*. Both kinds of histories have certainly been useful, but today we have also genuinely *transnational* studies that employ the two modes of analysis concurrently. In a similar spirit, this book examines the United States’ call for an Open Door policy in China and its contemporaneous enactment of anti-Chinese immigration laws in a single frame, despite their conventional segregation into separate fields of study.

In terms of the projection of American power outward, there is a robust tradition of studies of American empire, in both its formal and informal aspects. Studies of formal empire date their subject matter from the Spanish-American War in 1898, in which the United States acquired the remains of the Spanish empire—Cuba, Puerto Rico, and the Philippines, or what came to be known in constitutional jurisprudence as the nation’s “Insular Possessions.” The study of informal U.S. imperialism in turn is focused largely on Latin America, from the establishment of the Monroe Doctrine to filibustering expeditions to liberal and neoliberal forms of economic imperialism today. Although the study of semicolonialism is an established part of Chinese studies, there is surprisingly little emphasis on the role played by the United States in that history.

As I elaborate in Chapter 4, in Chinese studies the United States is conventionally cast as a “special friend” of China that historically defended it against depredations by Great Britain and other European imperial powers—evidently part of a larger narrative of American exceptionalism. Recently there has been a surge of interest in American studies in the Cold War, with a new focus on U.S. imperial actions in Asia in the post–World War II era, especially in Korea and Southeast Asia. However, as this book insists, there is a far longer history of U.S. empire in Asia, dating back to the cultivation of legal Orientalism as an American ideology of extraterritorial empire in the mid-nineteenth century. There are multiple reasons why this history remains largely unexplored, but certainly one of them is the way in which it straddles both geographic and disciplinary boundaries. In addition to Chinese and American studies, it is a story of international law, comparative law, and U.S. constitutional law. Yet despite its pervasiveness it is easy to miss, for it does not come into full view from the perspective of any one of them. Precisely because of its seemingly peculiar nature, conventional disciplinary lenses render it all but invisible.
Indeed, legal Orientalism belongs under the purview not only of Chinese and American studies but that of legal scholarship as well. In the U.S. legal academy, the study of Chinese law is generally classified under the study of comparative law—an umbrella category that refers to the academic study of foreign legal systems. The historic focus of comparative law has been the comparison between Anglo-American common law tradition, on the one hand, and the civil law tradition of continental Europe, on the other, although the study of non-Western law—to use an inelegant qualifier—has always maintained a small but important presence in the field. Until the end of the Cold War socialist legal systems remained another lesser, yet notable, area of study. Because of its approach to Chinese law as a concept that circulates transnationally rather than as simply a practice localized in China, the analytic method of the following chapters extends beyond comparative law as such (even broadly defined) into the study of the significance of Chinese law from the additional perspectives of both international law and even U.S. domestic law. As I argue later, it has played constitutive roles in both.

As the thematic opposition between the universal and the particular is one that unfolds through all classificatory schemas of Western thought, it is possible to map it also in terms of the conventional division of labor between comparative law and international law. While comparative law is a purely academic study of “other” legal systems, international law refers to the body of law that regulates relations among states and protects the human rights of individuals irrespective of their national identity. At least according to some conventional wisdom, international law tends to focus on the universal, the supranational, while comparativists tend to focus on the local, the particular. As noted above, this study too began as a comparative study of Chinese law. However, over time I have come to recognize that a truly comparative understanding of China must in fact account for it in terms of international law as well. No comparative study of China is complete until it considers China itself as a legal subject—how, when, and why China was recognized, or not, as a full member of international society. To tell this story is, indeed, a way to provincialize the study of both international law and comparative law, by locating them within a particular history of the universal.

As I have already suggested, this book’s concern with the geopolitical and historical determination of what counts as universal and particular is
greatly indebted to postcolonial theory. At its heart lies a concern with the constitution of modernity and its universal subjects: citizens within nation-states. Postcolonial scholars have challenged the ways in which we imagine both. Approaching legal Orientalism as a geopolitics of knowledge—a study in the unequal global distribution of universality and particularity, achieved by and reflected in law—is thus a fundamentally postcolonial approach.

This book seeks also to contribute to, not only benefit from, postcolonial studies. There is already an impressive body of work that examines the legal and disciplinary structures of colonialism as well as the colonial history of international law. What is still largely missing is a recognition and study of the role of law even in the operation of informal imperialism—imperial practices that fall short of formal territorial colonialism. The notion of informal empire itself is of course not new. However, in American studies, most notably, the vocabulary for analyzing U.S. power overseas is primarily military and economic, evidenced by the very terms in which it is commonly described, such as “gunboat diplomacy” and “dollar diplomacy.” Nevertheless, the exercise of American power has never been based solely on the assertion of sheer military and economic might. From the beginning, it has been mediated through the language of law, as a matter of right. Hence, we witness the putatively exceptional character of American imperialism, often cast as an imperialism in the service of anti-imperialism (as in the United States’ “liberation” of Spain’s colonies in 1898).

It may strike some as odd to turn to the field of postcolonial studies to understand China, given that the country as a whole was never reduced to the status of a formal colony. Yet the very fact that China was not colonized formally may be considered an important event within the larger field of colonialism and can be analyzed as such. The question becomes: How was China not-colonized? The United States’ invocation of extraterritorial jurisdiction in China and throughout the Orient constitutes a prime example of the kind of nonterritorial colonialism that law can become—a form of jurisdictional imperialism this book characterizes as extraterritorial empire. An understanding of this empire of U.S. law enhances not only our understanding of China’s semicolonial past but also rewrites the history of American empire. Although the beginning of U.S. imperialism in Asia is conventionally dated from the United States’ acquisition of the Philippines in 1898 (followed shortly by the United States’ colonization of Hawaii), it is a
central argument of this book that the history of American legal imperialism in the Orient begins more than half a century before the Spanish-American War.

It is important to emphasize that a postcolonial perspective on law’s history in the Orient unsettles not only our view of Chinese law but the study of U.S. law as well. The nature and extent of U.S. extraterritorial jurisdiction in the Orient are woefully unknown not only among scholars of American empire but also among students of American law. This is hardly surprising, as American law is, by definition, associated with the territory of the United States (even while the emancipatory appeal of its ideals is routinely regarded as universal). To be sure, there is an important emerging body of scholarship on the adoption, and adaptation, of American law in the U.S. colonial possessions from the Philippines to Hawaii to Puerto Rico. However, the diasporic travels of American law in non-U.S. territories remain all but unknown. Chapter 4 sets out for the first time a detailed jurisprudential analysis of the extraterritorial operation of U.S. law in the Orient—an empire that ranged from China to Japan, from Korea to Siam, from Borneo to Tonga, and beyond, and reached its most highly articulated expression in the jurisprudence of the United States Court for China.

Finally, before proceeding to chapter descriptions, it may be useful to state what this book is not saying. First, while I do insist that law’s world is indeed not any more or less universal than other regimes of the political—and while I admit to harboring a certain utopian longing for recovering some of law’s alternatives—this book is in the end not an argument against law, only a historical and conceptual study of it. That law is neither particularly universal nor universally particular does not make it either useful or useless as such, for the simple reason that there is no such thing as “law as such.” Law only exists in concrete historical and political conjunctures and cannot be evaluated apart from them.

To be sure, in the particular world we have created—that of modern centralized states with unprecedented power at their disposal—it may be that life without rights would be literally unlivable. As the concluding chapter suggests, this constrained modern notion of politics recognizes ultimately only two authentic subjects, as it were: the state and the individual. However, whatever the critical limitations of rule-of-law as a meta-discourse
of global governance may be, I want to emphasize at the outset that I am certainly not opposed to law reform in China. There is no doubt that in a legal order that at least officially still prioritizes (the ideological fiction of) “the people” over (the ideological fiction of) the “individual,” the language of individual rights retains a progressive potential—especially as the PRC has modernized itself on the model of the centralized Euro-American state and exercises far greater power than the imperial state ever did. Today there are numerous sensitive and sensible advocates of specific law reform initiatives who are in fact aware of their roles as “assisting Chinese reformers in doing their work, not coming in as a great savior.” Nevertheless, my goal in this book is neither to prescribe nor to evaluate specific legal policies but, rather, to understand the nature, history, and political and cultural significance of Chinese law reform more generally.

Concomitantly, the point of analyzing legal Orientalism as a discourse is emphatically neither to prove nor disprove either the historical or theoretical existence of Chinese law. To be sure, one is inclined to agree with Mirjan Damška who observes that a definition of law so narrow as to exclude China from the legal universe “smacks of the dogmatism of the untraveled.” Ultimately, however, the answer to the question of whether there is, or has been, law in China is always already embedded in the premises of the questioner. It necessarily depends on the observer’s definition of law.

The second caveat is equally significant. Although this study situates its subject matter expressly within a global frame, it does not, and indeed cannot, fill in that frame in its entirety. Because of its specific comparative focus, the bulk of this book analyzes China’s legal interactions with Europe and, especially, with the United States, in the nineteenth and twentieth centuries. Within that context, Euro-American law indeed typically functions in imperial modes. However, none of that is to suggest that China is today, always has been, and always will be only a victim. A world that consisted solely of victims and victimizers, victors and losers, would be wonderfully easy to navigate morally, but it is simply not the world in which we live. (Admittedly, it is often the world that law imagines—but that is part of the story that follows.)

To state the obvious, it is an incontrovertible historical fact that China is an empire in its own right, with territorial and political ambitions that have been realized to varying degrees at various times, especially in China’s relationships with its own neighbors. While this book focuses on the circula-
tion of ideas of Chinese law in Europe and especially the United States, there is an entire other circuit of uneven imperial legal exchange: the Confucian world of East Asia, consisting most notably of China, Korea, Japan, and Vietnam. Within that world, the classical Chinese language of statecraft and Chinese legal codes enjoyed widespread cultural and political hegemony. Indeed, just as the putatively universal foundations of Euro-American international law in fact reflect the particular values of its progenitors, so Chinese political and cultural values pretended to a universal status in East Asia—prescribing a normative standard of civilization in the form of a set of constitutional norms for a properly administered polity, and guidelines for interactions among such polities. We might call this an East Asian law of nations, roughly similar to the European tradition of *ius gentium*. Both traditions claimed universality, while each in fact embodied a particular set of imperial norms—Roman and Chinese, respectively.49

Evidently the universal and the particular are little more than functions of one’s historic, cultural, and geopolitical viewpoint. As Gayatri Chakravorty Spivak remarks, “There is something Eurocentric about assuming that imperialism began with Europe.”50

**MAP OF LEGAL ORIENTALISM**

Chapters 2 and 3 of this book approach Orientalism as a structure of legal knowledge, especially in terms of scholarly representations of Chinese law. Chapter 2 begins the mapping of Orientalist epistemologies by considering the role of law in the construction of modern subjects and their unlegal Others. To be a modern subject—a person who *owns* one’s body, is *entitled* to the fruits of one’s labor, and has the *right* to political representation—is to be a *legal* subject. The chapter first maps briefly a series of Orientalisms of the classical European variety, analyzing them as a discourse that produces both legal and unlegal subjects, legal and unlegal histories. It then turns to a comparative analysis of the U.S. legal subject and the Chinese nonlegal nonsubject. In the discourse of legal Orientalism, individuals in the American style are the universal subjects of history, while undifferentiated Chinese masses are its objects—witless myrmidons living under the tyranny of tradition, waiting to be emancipated and swept into the global mainstream of political and economic development.
How should a comparative inquiry confront the quandary posed by this logic, writing some of us into universal, progressive legal histories and others into particular, unlawful pasts that are never truly past? Rather than proposing an impossible morality of anti-Orientalism—a hopeless search for universal, pure knowledge—the chapter proposes an ethics of Orientalism. It is a fundamental effect of acts of comparison that they produce the objects that are being compared. Through those acts we create others as well as ourselves. We thus ought to wield that power responsibly, in ways that enable different kinds of subjects to emerge, rather than fix and classify historical subjects on the basis of their universality or particularity.

Representations of Chinese law examined in Chapter 2 inevitably tell us more about Euro-American ideas of law and legality than they tell us about China. It is vital to start with them, as there is no unmediated access to Chinese law as such, no direct route that simply bypasses the history of legal Orientalism. Chapter 3 moves us beyond Euro-American representations of Chinese law. It puts the ethics of comparison into practice in a specific legal field, the history of corporation law in China.

According to a long-standing Western—and indeed also Chinese—scholarly tradition, China has no genuine native predecessors to the modern business corporation. Purportedly, in the absence of corporate legal forms most Chinese enterprises have been family businesses. This is typically offered as a key explanation why capitalism “failed” to develop indigenously in China—as if the emergence of capitalism were simply part of history’s natural unfolding. Importantly, the story about the socioeconomic predominance of the family is also a story about lawlessness. Part of a larger regime of particularism and of attachment to tradition, the family as a home for business organization necessarily impedes the development of economic relations on the universal basis of the market, structured by the laws of contract and property rather than those of kinship. Chapter 3 reinterprets this Orientalist narrative in which China is always a story about the dominance of the collective, and the history of the West becomes a just-so story about the emergence of the individual. It argues that in late imperial China many extended families constituted “clan corporations” in which Confucian family law functioned as a kind of corporation law. In fact, much as the idea of the modern corporation as a legal person, analogous to an individual, is a well-recognized fiction, so it turns out that in Chinese clan corporations too kinship was often little more than a legal fiction, serving to legitimate
business enterprise in a polity where Confucianism was the official legal and economic ideology.

Placing the analysis in an expressly comparative framework, the chapter suggests a different story of U.S. law as well. There are many aspects of contemporary United States corporation law that may be better analogized to the norms of family law than to those of contract law, which has been recently a favored paradigm for theorizing corporation law. In short, the chapter destabilizes the logic of legal Orientalism by offering an antifoundationalist model of comparison, based on reversible analogies—in this instance, reading Chinese family law as a kind of corporation law and analyzing key elements of U.S. corporation law as a kind of family law. Rather than simply re-narrating a universal history of corporation law in a way that would fold China into it—“China, too, has corporation law”—it refuses the priority of either the universal or the particular, contesting instead the Orientalist logic by which the (Western) corporation and (Chinese) family are constructed as oppositional to each other in the first place.

Chapters 4 and 5 of the book examine the processes by which legal Orientalism as a regime of comparative knowledge about China has been transformed historically into a regime of legal institutions. With the expansion of Western imperial adventures in the nineteenth century, legal Orientalism moved beyond its academic home in the North Atlantic, starting to shape the Orient itself. As epistemological imperialism was transformed into imperialism as such, it began literally—and legally—to remake the world. Once comparative scholarship had characterized the Chinese legal order as essentially particular, it became the ground for a variety of institutions seeking to subordinate China to the universal order of legal modernity. Key among them was a system of so-called Unequal Treaties accompanied by extraterritorial courts.

Chapter 4 tells the little-known story of the beginnings of Sino-American legal relations, while also mapping the changing global distribution of claims to universality among Europe, the United States, and China over the course of the nineteenth century. Although the United States began its international legal career in 1776 as an outlaw, a rebel against the European legal order, it soon established itself as a juridical equal among the so-called Family of Nations, consisting of “civilized” European states. Yet it is a remarkable historical fact that when the British launched the Opium War in 1839, most Americans in fact sided with the Chinese, against the British.
With confiscated British opium being flushed into the Canton harbor, the events echoed the still not-so-distant Boston Tea Party—two heroic acts of struggle against British imperial interventions in trade, in China and America, respectively.

Over the course of the nineteenth century the identification of the United States changed, however, from that of an earlier victim of European imperialism to its avowed practitioner. As noted earlier, the transition occurred formally in 1898 when the United States became the custodian of the remains of the Spanish Empire. Chapter 4 argues that this shift was in fact prefigured by the 1844 Treaty of Wanghia—the United States’ first treaty with China—which gave Americans in China the right of extraterritorial jurisdiction. Long before the Spanish-American War, the United States became a global leader in the institutionalization of legal imperialism in the Orient.

Yet the institutional consequences of the global travels of legal Orientalism were not limited to the Orient. As noted above, it provided a justification for the promulgation of anti-Chinese immigration laws in the United States, resulting in a regime of domestic judicial despotism in order to keep the Oriental kind out—a paradox with all too evident contemporary implications, as we witness the daily erosion of constitutional rights in the name of protecting them in a never-ending War against Terrorism.

Chapter 5 turns from the origins of America’s extraterritorial empire in the international legal order of the nineteenth century to its actual operation in China in the early twentieth century. In the end the export of U.S. law to China did not become part of a universal history of law’s unfolding in China but, rather, yet another chapter in a global story of legal Orientalism. In the historic encounter between Chinese and Western legal institutions—as opposed to their divergent depictions in Euro-American legal epistemologies—the purity of their elemental contrast became impossible to maintain.

The bulk of Chapter 5 consists of a close reading of the jurisprudence of the U.S. Court for China and of the contradictions that haunted it. Although the court purported to offer a model of law’s rule for China, what it in fact provided was a despotism of law. Formally, the court was directed to apply the laws of the United States—to treat China as if it were literally part of the continental United States. No judge could bridge the gulf opened up by this massive legal fiction. As noted earlier, among the main
bodies of law the court chose to apply were the codes of the District of Columbia and the Territory of Alaska. Lacking correctional facilities, it also sent American prisoners to the U.S.-occupied Philippines, while bringing back judges and law from the Philippines to China. Effectively, the court turned to the law and institutions of America’s internal and external colonies to provide order in China. Simultaneously, it divested Americans in China even of its ostensibly most universal ideal, the constitutional rights of U.S. citizens. In the end, the leading American court in the Orient overcame the impossible contradictions entailed in its extraterritorial jurisdiction by fabricating a jurisprudence that had no coherent territorial or constitutional referent—an ultimately placeless law justified by the axiom that China itself was a lawless place. In the very institution that was designed to police the boundary between the rule-of-law and Oriental despotism, the distinction collapsed—a process that had already started when the United States denied entry to Chinese persons inside U.S. territory but admitted Oriental despotism inside the U.S. Constitution.

In addition, Chapter 5 examines the International Mixed Court, one of the sister courts of the U.S. Court for China in Shanghai’s International Settlement. The Mixed Court was originally a Chinese court with a Chinese judge, with the authority to apply Chinese law to the Chinese population of the Settlement—a logical corollary of the fact that none of the Unequal Treaties gave foreigners jurisdiction in cases that involved Chinese parties only. However, over time the foreign consular body of Shanghai simply took over the court’s administration. In the International Mixed Court, legal Orientalism thus did not claim merely an epistemological monopoly on how to represent Chinese law to a global audience. It became a political institution with the power to produce Chinese law itself, and to enforce it directly on a Chinese population in China. Any distinction between legal Orientalism as a system of representation and Chinese law as that which it represented simply vanished, as the former became the latter.

From a historical perspective, the story told in Chapters 2 through 5 is a genealogy of the universal. It is a (partial) account of how one particular idea of law has become a global standard for constituting free individual subjects as well as democratic states. In the process, it has remade the world, and human beings’ relationship to it. In a sense, law has clearly won the day. Today, it is universal, at least in the geographic sense of having colonized the entire
planet. Remarkably, while China had to be coerced to join the Western system of “free trade” in the Opium War, at the end of the twentieth century it staged a prolonged struggle to gain admission into the World Trade Organization. But although law has become a privileged contemporary medium for the universal, what remains contested is who has the authority, and power, to speak in its name. As long as global politics continue to be negotiated in legal terms, the Orientalist history of those terms will inform that negotiation.

Chapter 6 is an epilogue. It starts from the premise that if extraterritorial legal imperialism was a kind of colonialism without colonies, today’s neoliberal economic and legal order can be analyzed as a colonialism without even colonizers. The chapter begins by considering the afterlife of America’s extraterritorial empire and its replacement by a range of multilateral institutions after World War II. Today these new organizations—especially the World Trade Organization—have transformed not only China but the entire world in profound ways, legal and otherwise. One consequence of the globalization of liberal and neoliberal political institutions is that discourses of legal Orientalism are embraced as commonly in China as in the United States.

The bulk of the epilogue focuses on legal reforms in the PRC after 1978, examining how law has reconfigured notions of political and legal subjectivity and, indeed, thereby colonized much of the modern Chinese lifeworld. Nevertheless, even the colonized modern Chinese subject is not merely a replica of a legal subject made in the U.S.A. The analysis turns to two sites where different subjects—old and new, legal and nonlegal—continue to live: the “real” world of Chinese business organization and the imaginative world of legal theory.

Finally, the chapter returns to the contemporary status of legal Orientalism in the United States. Remarkably, the U.S. Supreme Court has never overruled the Chinese Exclusion Case, in which it upheld the constitutionality of Chinese Exclusion Laws. In effect, the far-reaching exception the case and its progeny carve to the seemingly universal values of due process remains good law to this very day. This book concludes by speculating on the future of both China and the United States in the world that legal Orientalism has made. Perhaps China can provide not only a target for U.S.-led law reforms but also a source of different visions, legal and otherwise. To stay with the case of economic enterprise, what is a corporation? Is it best lik-
ened to an abstract individual, a kinship group, a mode of government, or something else altogether? Although the answers to such questions about the nature of society and politics need not be found in law, they may well be found in the Orient—as long as we keep in mind, as this book insists throughout, that the Orient itself is a traveling concept, and that whatever else it may be law is, above all, a category of the human imagination.