

ORIGINAL ARTICLE

The (Almost) Fall of the Legal Fiction of Extraterritoriality in the Nineteenth Century

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Abstract

This article examines the near collapse of the legal fiction of extraterritoriality in nineteenth-century international law. Rather than treating extraterritoriality as a coherent doctrine or a straightforward instrument of imperial domination, it argues that the fiction functioned as a contested and unstable juridical device whose inadequacies exposed deeper tensions within international law. By distinguishing between two strands of critique—restrictive and reconstructive—the article reinterprets nineteenth-century debates as responses to the fiction’s conceptual failure rather than as efforts at technical refinement. Restrictive critiques, advanced primarily by Belgian and Italian jurists, rejected the fiction for legitimizing excessive jurisdictional privileges that conflicted with emerging principles of sovereignty, secularism, and constitutional equality in Europe. Reconstructive critiques, by contrast, abandoned the fiction while seeking to preserve immunity and consular jurisdiction by re-grounding them in treaties, capitulations, or functional necessity. This divergence explains why the decline of fiction did not entail the disappearance of privilege but rather its partial re-foundation on narrower, more positivist grounds. Finally, the article demonstrates how these European debates circulated transnationally, furnishing non-Western actors with conceptual resources to contest unequal treaty regimes. Extraterritoriality thus emerges not as a settled imperial doctrine but as a productive failure that illuminates the structural instability of nineteenth-century international law.

This article explores the diverse critiques that emerged in the mid-to-late nineteenth century concerning the legal fiction of extraterritoriality.¹ The legal

¹ Herbert T. Leyland, “Limitations on the Doctrine of Diplomatic Immunity,” *Kentucky Law Journal* 10 (1921): 26–7; Eileen Young, “The Development of the Law of Diplomatic Relations,” *British Yearbook of International Law* 40 (1964): 170–1; Geoff Berridge and Alan James, *A Dictionary of Diplomacy* (Basingstoke, UK: Palgrave Macmillan, 2003), 100; Veronica L. Maginnis, “Limiting Diplomatic

fiction, which will also be referred to in this article as the “fiction theory,” is one of the principal theories historically used to justify international immunities, particularly in diplomatic relations. Alongside it, two other theories emerged: the “representative character theory,” which grants envoys immunity from the jurisdiction of the receiving state by aligning them with their sovereign, and the “functional necessity theory,” which argues that diplomats are granted immunity to effectively perform their official duties. Together, these three theories provided justification for diplomatic immunity.²

Hugo Grotius (1583–1645), often regarded as the founder of modern international law, is credited with introducing the fiction theory to explain diplomatic immunity, coining the term “extraterritoriality.” This concept asserts that ambassadors should be considered *quasi extra territorium*, or as if they exist outside the host state’s territory.³ In his work *De iure belli ac pacis* (On the Law of War and Peace, 1625), Grotius argued this status exempts ambassadors from local laws, effectively granting them diplomatic immunity.⁴

This theory found acceptance among subsequent jurists, shaping their understanding of diplomatic relations and immunities. For example, Cornelius van Bynkershoek (1673–1743) argued that “if one has a legal claim against an ambassador,” “one should proceed as if he were not present in the location where he carries out his embassy.”⁵ Likewise, Georg Friedrich von Martens (1756–1821), Henry Wheaton (1785–1848), Jean Jacques Gaspard Foelix (1791–1853), Travers Twiss (1809–1897), Robert Phillimore (1810–1885), and Leopold Freiherr von Neumann (1811–1888) recognized the legal fiction as a conceptual tool or assumption employed in international law to establish the immunity of diplomatic agents from local jurisdiction.⁶

Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations,” *Brooklyn Journal of International Law* 28 (2003): 994; John C. Barker, *The Protection of Diplomatic Personnel* (Abingdon, UK: Taylor & Francis, 2016), 55–6.

² Muhammad-Basheer A. Ismail, “Justifications and Principles of Diplomatic Immunity: A Comparison between Islamic International Law and International Law,” *Journal of Islamic State Practice in International Law* 9 (2013): 60–7.

³ Linda S. Frey and Marsha L. Frey, “Diplomatic Immunity,” in *The SAGE Handbook of Diplomacy*, ed. Costas M. Constantinou, Paul Sharp, and Pauline Kerr (London: SAGE Publications, 2016), 200.

⁴ Hugo Grotius, *Hugo Grotius on the Law of War and Peace: Student Edition*, ed. Stephen C. Neff (Cambridge: Cambridge University Press, 2012), 263.

⁵ Cornelius van Bynkershoek, *Traité du juge compétent des ambassadeurs, tant pour le civil que pour le criminel*, trans. Jean Barbeyrac (La Haye: Thomas Johnson, 1723), ch. 8, § 2.

⁶ Georg Friedrich von Martens, *Précis du droit des gens moderne de l’Europe, fondé sur les traités et l’usage* (Göttingen: Dieterich, 1801), § 215; Henry Wheaton, *Elements of International Law*, vol. 1 (London: B. Fellows, 1836), 273; Jean Jacques Gaspard Foelix, *Traité du droit international privé, ou du conflit des lois de différentes nations en matière de droit privé* (Paris: Joubert, 1847), § 209; Travers Twiss, *The Law of Nations Considered as Independent Political Communities*, vol. 1 (Oxford: Oxford University Press, 1861), § 200; Sir Robert Phillimore, *Commentaries Upon International Law*, vol. 2 (London: Butterworths, 1871), § 179; Le Baron Leopold de Neumann, *Droit des gens moderne européen*, trans. Armand de Riedmatten (Paris: Arthur Rousseau, 1886), § 61; James Lorimer, *Institutes of the Law of Nations*, vol. 1 (Edinburgh & London: William Blackwood, 1883), 248.

In the mid-1880s, a notable shift emerged in the viewpoints of legal scholars regarding the fiction theory.⁷ What had previously been approached with caution underwent a substantial transformation, shifting from a cautiously applied concept to an almost outright rejection.⁸ A group of scholars emerged, viewing the fiction theory as causing more issues than providing solutions and categorizing it as an erroneous and flawed legal theory. For instance, Silvestre Pinheiro Ferreira (1769–1846) contended that the “fiction of extraterritoriality, being of no use to science, [could] only lead to errors.”⁹ Similarly, Joseph-Louis-Elzéar Ortolan (1802–1873), Richard Henry Dana, Jr., the editor of Wheaton’s *Elements of International Law* (1866), Giuseppe Carnazza-Amari (1837–1911), Carlos Calvo (1822–1906), William Edward Hall (1835–1894), Henry Bonfils (1835–1897), and Frantz Despagnet (1857–1906) collectively regarded the legal fiction as contradictory, impractical, unnecessary, and often absurd, leading them to assert that it lacked a valid basis for existence.¹⁰

Their objections, however, were not merely rhetorical. They ultimately converged on three principal grounds that became recurrent in legal debates: the excessive scope of the fiction, its inherent unreality, and its incompatibility with positive law. First, the legal fiction was criticized for extending far beyond its original rationale, as envoys invoked immunity to justify activities such as

⁷ Barker, *The Protection of Diplomatic Personnel*, 54–6.

⁸ I am not suggesting that the legal fiction of extraterritoriality was universally deemed obsolete in the nineteenth century nor that it has been entirely abandoned since. Even after the nineteenth century, references to the fiction have persisted as a means of explaining certain immunities from the jurisdiction of the host state. See, for example, Shih Shun Liu, *Extraterritoriality: Its Rise and Its Decline* (New York: Columbia University Press, 1925), 18–19; Jeffrey Walker, “Fiction Versus Function: The Persistence of ‘Representative Character’ in the Law of Diplomatic Immunity,” in *The Psychology of Diplomacy*, ed. Harvey J. Langholtz and Chris E. Stout (Westport, CT: Praeger, 2004), 245; Nina M. Bergmar, “Demanding Accountability Where Accountability Is Due: A Functional Necessity Approach to Diplomatic Immunity under the Vienna Convention,” *Vanderbilt Law Review* 47 (2014): 507–8; Mohammad Zaid Alaneed, “Diplomatic Judicial Immunity,” *Revue Jurisprudence* 11 (2019): 192. The point, rather, is that the fiction came under unusually intense scrutiny during this period.

⁹ Georg Friedrich von Martens, *Précis du droit des gens moderne de l’Europe*, ed. Charles Vergé and with notes by Silvestre Pinheiro Ferreira, vol. 2 (Paris: Guillaumin et Cie, 1864), 106.

¹⁰ Joseph-Louis-Elzéar Ortolan, *Éléments de droit pénal: pénalité, juridiction, procédure*, vol. 1 (1863), § 521; Pietro Esperson, *Diritto diplomatico e giurisdizione internazionale marittima*, vol. 1 (Torino: Loescher, 1872), 92; François Laurent, *Droit civil international*, vol. 3 (Bruxelles: Bruylant-Christophe, 1880), § 11; Giuseppe Carnazza Amari, *Traité de droit international public en temps de paix*, trans. Céleste Montanari-Revest, vol. 2 (Paris: Larose et Forcel, 1882), 193–4; William E. Hall, *A Treatise on International Law* (Oxford: Clarendon Press, 1884), § 57; Pasquale Fiore, *Nouveau droit international public suivant les besoins de la civilisation moderne*, trans., Charles Antoine, vol. 2 (Paris: A. Durand et Pedone, 1885), § 950; Carlos Calvo, *Le droit international théorique et pratique: précédé d’un exposé historique des progrès de la science du droit des gens*, 6th ed., vol. 3 (Paris: Guillaumin et Cie, 1888), § 1503; Henry Bonfils, *Manuel de droit international public (droit des gens)* (Paris: Arthur Rousseau, 1894), § 640; Frantz Despagnet, *Cours de droit international public* (Paris: Larose, 1899), 243; Friedrich F. Martens, *Traité de droit international*, trans. Alfred Léo, vol. 2 (Paris: Librairie A. Marescq Aine, 1886), 68–9; César Droin, “L’extraterritorialité des agents diplomatiques,” PhD diss. (University of Geneva, 1895), 47; Eugène Delepouille, “Exposé théorique de la fiction d’extraterritorialité par rapport aux personnes, en droit international public,” PhD diss. (University of Dijon, 1897), 47.

facilitating contraband trade, thereby revealing its susceptibility to abuse.¹¹ Second, the fiction was faulted for its incongruity with the territorial principle of sovereignty. While the sending state exercised authority over its mission and personnel, essential matters—including the legal title to embassy premises or the prosecution of crimes by local nationals therein—remained within the receiving state's jurisdiction. To represent diplomatic space as wholly insulated from local law thus mischaracterized the overlapping modalities of sovereign authority that operated in practice.¹² Finally, the fiction conflicted with positive law. By treating the diplomat as legally absent from the receiving state's territory, it effectively assimilated the envoy to the status of an ordinary foreigner abroad. On that basis, domestic statutes that extended jurisdiction extraterritorially to aliens could, at least in principle, be applied to diplomats—a result directly at odds with the established rules of diplomatic immunity.¹³ For these reasons, there has been broad consensus since the nineteenth century—sustained in subsequent scholarship—that while the term “extra-territoriality” may be tolerated as a convenient metaphor, it is technically incorrect to describe diplomatic immunities under this label.¹⁴

In historical studies, it has long been the orthodox view that extraterritoriality functioned as a tool of empire.¹⁵ The fiction itself, originally developed to

¹¹ Stephen L. Wright, “Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts,” *Boston University International Law Journal* 5 (1987): 198–200; Mitchell S. Ross, “Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities,” *American University Journal of International Law and Policy* 4 (1989): 177–8; Joshua D. Groff, “A Proposal for Diplomatic Accountability Using the Jurisdiction of the International Criminal Court: The Decline of an Absolute Sovereign Right,” *Temple International and Comparative Law Journal* 14 (2000): 215–16; Maginnis, “Limiting Diplomatic Immunity,” 994–5; Bergmar, “Demanding Accountability,” 507–8; Alaneed, “Diplomatic Judicial Immunity,” 192.

¹² Michael James Langley Hardy, *Modern Diplomatic Law* (Manchester: Manchester University Press, 1968), 10; Eugene M. Zoglio, “Diplomatic Immunity from Local Jurisdiction,” *Forum Law Journal* 7 (1977): 34.

¹³ Lawrence Preuss, “Capacity for Legation and the Theoretical Basis of Diplomatic Immunities,” *New York University Law Quarterly Review* 10 (1932): 182–83.

¹⁴ Ellery C. Stowell, “Diplomatic Privileges and Immunities,” *American Journal of International Law* 20 (1926): 737; Preuss, “Capacity for Legation,” 182–3; Young, “The Development of the Law,” 182; Hardy, *Modern Diplomatic Law*, 10; Zoglio, “Diplomatic Immunity,” 34; Wright, “Diplomatic Immunity,” 200; Ross, “Rethinking Diplomatic Immunity,” 178; Ruth Wedgwood, “Immunity and Prescription,” *Yale Journal of International Law* 14 (1989): 498; Berridge and James, *A Dictionary of Diplomacy*, 100; Walker, “Fiction versus Function,” 245; Ismail, “Justifications and Principles,” 63–4; Barker, *The Protection of Diplomatic Personnel*, 55–6, 64; Olivia M. Carroll Beaty, “Diplomatic Immunity: The History and Enduring Significance,” PhD diss. (Baylor University, 2022), 27–8.

¹⁵ Teemu Ruskola, “Colonialism without Colonies: On the Extraterritorial Jurisprudence of the U.S. Court for China,” *Law and Contemporary Problems* 71 (2008): 237–8; David Markham, “Extraterritoriality,” in *Encyclopedia of the Age of Imperialism, 1800–1914: L–Z*, ed. Carl Cavanagh Hodge (United Kingdom: Greenwood Press, 2008), 213; Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (Cambridge: Cambridge University Press, 2010), 1; Daniel S. Margolies, *Spaces of Law in American Foreign Relations: Extradition and Extraterritoriality in the Borderlands and Beyond, 1877–1898* (Athens, GA: University of Georgia Press, 2011), 7; Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (New York: Cambridge University Press, 2013), 23; Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500–2000* (Cambridge: Cambridge University Press, 2014), 28, n.71;

explain diplomatic immunity, was gradually extended in the nineteenth century to encompass exemptions from local jurisdiction, particularly those claimed by Westerners in non-Christian countries. This extension found its most concrete expression in the institution of consular jurisdiction, which drew on medieval privileges and Ottoman capitulations and was later institutionalized through the treaty port regimes in Qing China, Japan, and Korea. It has been argued that the development of extraterritoriality as a tool of empire began with the rise of legal positivism.¹⁶ In contrast to natural law, which grounded the validity of legal norms in universal and transcendental sources, legal positivism conceptualized law as an artifact of a specific political community, most notably the sovereign state. This positivist conception of law converged with Orientalism, the intellectual tradition that constructed the “Orient” as inherently deficient in nearly all aspects when contrasted with the “Occident.”¹⁷ The interplay of positivist legal doctrine and Orientalist discourse generated a powerful justificatory framework: insofar as non-Western societies were presumed incapable of producing genuine sovereignty or sustaining legitimate law, Western nationals could not be subjected to their jurisdiction.¹⁸ Extraterritoriality thus operated simultaneously as doctrine and practice, institutionalizing Western legal supremacy under the pretense of safeguarding civilized standards while materially entrenching imperial domination.

While earlier interpretations often described extraterritoriality as a unilateral imposition of Western power on non-Western polities, more recent scholarship has drawn attention to the complexities inherent in its operation. Historians increasingly recognize extraterritoriality as a bilateral and adaptive

Li Chen, *Chinese Law in Imperial Eyes: Sovereignty, Justice, and Transcultural Politics* (New York: Columbia University Press, 2016), 26; Martti Koskenniemi, “Introduction: International Law and Empire—Aspects and Approaches,” in *International Law and Empire: Historical Explorations*, ed. Martti Koskenniemi, Walter Rech, and Manuel Jiménez Fonseca (Oxford: Oxford University Press, 2017), 9–10; Inge Van Hulle, “British Protection, Extraterritoriality, and Protectorates in West Africa, 1807–80,” in *Protection and Empire: A Global History*, ed. Lauren Benton, Adam Clulow, and Bain Attwood (Cambridge: Cambridge University Press, 2018), 198; Inge Van Hulle, “Chapter 5: British Humanitarianism, International Law and Human Sacrifice in West Africa,” in *International Law in the Long Nineteenth Century (1776–1914)* (Leiden, The Netherlands: Brill, 2019), 107.

¹⁶ Eileen P. Scully, *Bargaining with the State from Afar: American Citizenship in Treaty Port China, 1844–1942* (New York: Columbia University Press, 2001), 25–6; Kayaoğlu, *Legal Imperialism*, 3–4, 17–18.

¹⁷ Edward W. Said, *Orientalism* (New York: Pantheon Books, 1978).

¹⁸ Amy Gurowitz, “International Law, Politics, and Migrant Rights,” in *The Politics of International Law*, ed. Christian Reus-Smit (Cambridge, UK: Cambridge University Press, 2004), 134; Daniel S. Margolies, “The Ill-Defined Fiction of Extraterritoriality and Sovereignty Exception in Late Nineteenth-Century U.S. Foreign Relations,” *Southwestern Law Review* 40 (2011): 580–1; Luigi Nuzzo, “Territory, Sovereignty, and the Construction of the Colonial Space,” in *International Law and Empire: Historical Explorations*, ed. Martti Koskenniemi, Walter Rech, and Manuel Jiménez Fonseca (Oxford: Oxford University Press, 2017), 271; Andrew Fitzmaurice, “Chapter 4: Equality of Non-European Nations in International Law,” in *International Law in the Long Nineteenth Century (1776–1914)*, ed. Inge Van Hulle and Randall Lesaffer (Leiden, The Netherlands: Brill, 2019), 88–9; Kate Miles, “Uneven Empires: Extraterritoriality and the Early Trading Companies,” in *The Extraterritoriality of Law: History, Theory, Politics*, ed. Sergio Dellavalle (United Kingdom: Taylor & Francis, 2019), 91–2.

institution—one that simultaneously projected imperial authority and responded to local legal, political, and administrative constraints.

First, extraterritoriality functioned as a regulatory technology of governance, allowing states to supervise and discipline their citizens overseas. Eileen Scully demonstrates that in treaty-port China, it became a contested field between American sojourners, who insisted upon the privileges of protection without assuming civic obligations, and a federal government seeking to impose taxation, military service, and public discipline.¹⁹ Similarly, Richard Pennell disputes John Spagnolo's reading of the 1843 *Foreign Jurisdiction Act* as a juridical conquest, arguing that it was conceived to resolve the difficulties British consuls encountered in administering expatriate populations in the Ottoman Empire and North Africa.²⁰ In both cases, extraterritoriality appears less as an external assertion of empire than as a mechanism of citizenship regulation and administrative control.

Second, the consular courts through which extraterritorial jurisdiction operated were not merely instruments of domination but sites of legal negotiation. Richard Chang's quantitative analysis of mixed-court cases in nineteenth-century Japan shows that fewer than one percent of over 3,500 cases were adjudicated unfairly,²¹ while Thomas Stephens observes that the British-run International Mixed Court in Shanghai functioned in practice as a Western-style tribunal.²² Studies of Ottoman legal pluralism similarly reveal that litigants—including non-Muslims—frequently chose Islamic courts when these offered more advantageous rulings.²³ Such evidence complicates the image of the consular court as an imperial imposition, presenting it instead as a hybrid arena of adjudicative pluralism and, at times, impartial justice.

Finally, scholars such as Pär Kristoffer Cassel and Inge Van Hulle have advanced a more synthetic interpretation, conceptualizing extraterritoriality as a negotiated imperial practice. Cassel underscores its dual nature: at once an instrument of imperial imposition and a fluid, plural arrangement emerging from sustained negotiation between Western diplomats and Qing officials.²⁴ Van Hulle's analysis complements this view, interpreting extraterritoriality as a

¹⁹ Scully, *Bargaining with the State from Afar*, 3, 8–9.

²⁰ Richard Pennell, "The Origins of the Foreign Jurisdiction Act and the Extension of British Sovereignty," *Historical Research* 83 (2009): 466–7. See also John Spagnolo, "Portents of Empire in Britain's Ottoman Extraterritorial Jurisdiction," *Middle Eastern Studies* 27 (1991): 257–8.

²¹ Richard T. Chang, *The Justice of the Western Consular Courts in Nineteenth-Century Japan* (New York: Bloomsbury Academic, 1984), 134–5.

²² Thomas B. Stephens, *Order and Discipline in China: The Shanghai Mixed Court, 1911–27* (Seattle and London: University of Washington Press, 1992), 116.

²³ Maurits H. van den Boogert, "Consular Jurisdiction in the Ottoman Legal System in the Eighteenth Century," *Oriente Moderno* 22 (2003): 632–3; Karen Barkey, "Aspects of Legal Pluralism in the Ottoman Empire," in *Legal Pluralism and Empires, 1500–1850*, ed. Lauren Benton and Richard J. Ross (New York: New York University Press, 2013), 85–6, 96–7; Tijl Vanneste, *Intra-European Litigation in Eighteenth-Century Izmir: The Role of the Merchants' Style* (Leiden: Brill, 2021), 14.

²⁴ Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (New York: Oxford University Press, 2012), 5–8; "Extraterritoriality in China: What We Know and What We Don't Know," in *Treaty Ports in Modern China: Law, Land and Power*, ed. Robert Bickers and Isabella Jackson (Abingdon, UK: Routledge, 2016), 31–5.

British legal technology for projecting authority through the languages of “protection” and “civilization,” yet one continually reshaped through local practices and accommodations with African rulers.²⁵ Collectively, these studies illuminate extraterritoriality as a historically contingent formation—an evolving juridical compromise rather than a fixed architecture of domination.

This study, while building on existing legal and historical scholarship, seeks to address persistent gaps that have limited our understanding of extraterritoriality as both a doctrinal construct and a political instrument. On the one hand, legal scholarship has long recognized that the fiction theory underlying extraterritorial jurisdiction faced sustained criticism within nineteenth-century European jurisprudence. Yet these critiques have often been construed too narrowly—as instances of doctrinal inconsistency, conceptual ambiguity, or technical deficiency—rather than analyzed as historically situated interventions embedded within broader political, intellectual, and ideological debates.²⁶ On the other hand, historical scholarship has tended to approach extraterritoriality primarily through its operation outside Europe, highlighting its function as a locus of negotiation between European and non-European actors. As a result, far less attention has been devoted to the ways in which extraterritoriality was conceptualized, debated, and contested within Europe itself.

To address these lacunae, this study treats extraterritoriality as a legal and political concept deeply entangled with both Europe’s internal political dynamics and its external, predominantly imperial, engagements. Understanding the meaning and significance of nineteenth-century debates on extraterritoriality requires situating the concept within this dual context: Europe’s shifting domestic constitutional and legal orders, on the one hand, and its expanding imperial projects, on the other. Moreover, this study proceeds from the premise that a widespread, though rarely articulated, assumption underlying much historical scholarship—that extraterritoriality was readily accepted within Europe because it furnished a convenient legal rationale for imperial expansion—is misleading. Extraterritoriality did not operate as an uncontested juridical instrument simply aligning with imperial interests. Rather, the debates surrounding it within Europe were themselves shaped by, and in turn helped shape, its application abroad.

Accordingly, this study argues that discussions and practices of extraterritoriality within and beyond Europe were mutually constitutive. The ways in which the doctrine was theorized, criticized, and reworked in European legal

²⁵ Inge Van Hulle, *Britain and International Law in West Africa: The Practice of Empire* (Oxford: OUP Oxford, 2020), 163.

²⁶ One of the few exceptions is the study by Linda S. Frey and Marsha L. Frey, who show how the rise of egalitarian and democratic ideals eroded traditional notions of privilege and lent support to functionalist interpretations of diplomatic immunity. In this sense, their discussion engages substantially with the political implications of critics of the fiction theory within Europe, yet some aspects remain underexplored. Furthermore, although they cite critics whose concerns extended beyond Europe, they do not examine in detail the implications of those critiques. Linda S. Frey and Marsha L. Frey, *The History of Diplomatic Immunity* (Columbus: Ohio State University Press, 1999), 339–46, 374–5; “Diplomatic Immunity: An Admittedly Short Survey,” in *Diplomatic Immunity*, ed. Marko Novaković (Singapore: Palgrave Macmillan, 2020), 9.

and political discourse informed its implementation in non-European settings, while administrative challenges and diplomatic encounters outside Europe fed back into metropolitan jurisprudence. By tracing this continuous interplay between European intellectual debates and imperial governance, the study reveals extraterritoriality as a dynamic field of legal contestation whose significance cannot be understood solely through the lens of its external application.

From this analytical vantage point, the study advances two principal contributions. First, it revisits nineteenth-century critiques of extraterritoriality with greater precision by extending the analysis beyond diplomatic immunity to include consular jurisdiction, a dimension often overlooked in earlier accounts. Second, it distinguishes between critiques directed inward—toward European debates on sovereignty and church–state authority—and those directed outward—toward imperial encounters in non-Christian states. While previous scholarship has noted such critiques, it has rarely drawn this distinction or examined how arguments developed in Europe were subsequently reworked to challenge Western claims abroad.

In the following analysis, I divide these critiques into two strands. The first, which I term the restrictive strand and associate mainly with Belgian and Italian jurists, treated the fiction as dangerous because it conferred *too many* privileges. It legitimized excessively broad immunities, echoing monarchical and clerical prerogatives, and therefore had to be curtailed or recalibrated—an argument later appropriated by non-Western jurists to contest Western assertions. The second, which I describe as the reconstructive strand, criticized the fiction for the opposite reason: it provided *too little* support for European privileges. Its proponents highlighted both its practical shortcomings, insofar as it imposed excessive burdens by extending domestic law extraterritorially and obstructing relations with local populations, and its conceptual weakness, insofar as it could not justify the wide range of diplomatic and consular immunities claimed outside Christendom. Their objective was not to abolish these privileges but to rebuild their legal foundation in capitulations, bilateral treaties, or functional necessity, thereby giving them clearer justification and, in some cases, reinforcement or expansion. Thus, while both strands rejected the fiction, they moved in opposite directions: the restrictive sought to limit privileges and the reconstructive to preserve them on firmer grounds. Extraterritoriality must therefore be understood not simply as a tool of imperial expansion but as a contested legal fiction whose meaning was forged at the intersection of intra-European political struggles and imperial governance abroad.

Defying the Legal Fiction: Restrictive Critiques of Jurisdictional Immunities and Other Privileges in Europe and Their Non-Western Reappropriations

Jurists of the Belgian and Italian schools advanced some of the most incisive intra-European critiques of the fiction theory, contending that it conferred unwarranted privileges that eroded the authority of the state. They regarded

the fiction not as a mere metaphor but as a doctrinal construct that, when applied within Europe, legitimized clerical privileges incompatible with the principles of popular sovereignty and secular governance. Among these critics, François Laurent (1810–1887) of Belgium was especially influential. His analysis of the fiction theory mounted a systematic attack on both its internal contradictions—in the realms of diplomacy and contract law—and the potential for abuse it created under the shield of immunity.

Laurent derisively labels the legal fiction as “the most absurd invention of legal experts.”²⁷ His critique highlights two absurd practical consequences resulting from that fiction. The first, as Laurent points out, concerns the ambassador’s indispensable presence for diplomatic activities and contract negotiations. In terms of diplomacy, Laurent argues that the essence of an ambassador’s role requires physical presence in the host nation to fulfill diplomatic obligations, making the legal fiction—which implies legal absence—contradictory and absurd.²⁸ In terms of contract negotiations, Laurent illustrates the absurdity with a hypothetical scenario. Consider a Belgian minister in London who, under the fiction theory, would technically still be “in Belgium.”²⁹ For legal documents to be valid, they would need to adhere to Belgian law. Laurent points out the impracticality of this, especially if the local law differs significantly from Belgian law and the local legal infrastructure, like notaries, is not equipped for Belgian legal formalities. This situation underscores the fiction’s impracticality and contradictions, particularly in its tension with the legal maxim “*locus regit actum*” (the place governs the legal procedures). By requiring adherence to the laws of a jurisdiction where the act is not actually performed, the fiction disrupts established legal principles and creates unnecessary legal complications.

The second consequence Laurent identifies concerns the potential for abuse inherent in the fiction theory. By treating diplomats as legally absent from the host state, the fiction enables them to evade its jurisdiction and thereby creates conditions in which serious offenses—such as robbery or sexual violence—may go unpunished. Laurent illustrates this with the example of a Belgian citizen appointed as the French ambassador to Belgium. Although physically present in Brussels, this individual invokes the fiction to claim that he is, *de jure*, in Paris, the seat of the sovereign he represents. On that basis, he asserts immunity from Belgian courts. Yet if pursued by creditors in Brussels, he insists they must bring suit in Paris. There, however, he has neither domicile, residence, nor attachable property, meaning that under French private law procedure, he does not fall within the ordinary competence of French courts. For Laurent, this example shows that the fiction generates not only impractical difficulties but also legal incoherence.³⁰ It collapses under its own contradictions, creating a

²⁷ Laurent, *Droit civil international*, vol. 3, § 11.

²⁸ *Ibid.*, § 12.

²⁹ *Ibid.*, § 82.

³⁰ *Ibid.*, § 87.

shield behind which individuals may evade responsibility, including in cases of misconduct.³¹

I acknowledge that Laurent's criticism and rejection of the fiction theory were indeed influenced by the conceptual and practical issues associated with it. However, I believe there was a broader agenda at play in Laurent's vocal opposition to the fiction theory. In addition to addressing these issues, he was making a political move within the contemporary European political landscape. Specifically, Laurent's critique of the fiction theory and his call for the end of diplomatic immunity should not be seen in isolation but rather as a strategic move within the larger landscape of political and ideological battles of his time. His actions reflected a commitment to the principles of secularism and the separation of church and state, as well as a rejection of regressive forces seeking to strengthen the ties between religious institutions and political power in Europe.

To substantiate this argument, I will elucidate, firstly, Laurent's conception of an ideal society, characterized by the principles of justice, freedom, and equality. Secondly, I will delve into his understanding of European history and the dynamics of contemporary European politics. This will set the stage for a thorough examination of the significance of the fiction theory and diplomatic immunity as inferred from Laurent's perspective.

Laurent's ideal vision of society is firmly rooted in the core values of justice, freedom, and equality. He envisions a societal structure governed by the sovereignty of a nation-state where there is a distinct separation between the religious and the secular. In his view, the state should retain its secular nature, safeguarding against the excessive influence of religious institutions on governmental affairs, thus preserving the primacy of civil authority. Laurent proposes a legal system where all individuals are equally accountable under the

³¹ *Ibid.*, § 16. Laurent's contention that the legal fiction of extraterritoriality—serving as the juridical foundation of diplomatic immunity—produces the ineffective penalization of criminal conduct by diplomatic agents can be substantiated through historical cases that demonstrate the structural limitations of host-state jurisdiction. For example, in 1584, Don Bernardino de Mendoza, the Spanish ambassador to England, was implicated in the Throckmorton Plot to assassinate Queen Elizabeth I and replace her with Mary, Queen of Scots. Although the Privy Council sought to prosecute him for treason, leading jurists Alberico Gentili and Jean Hotman affirmed that, under the law of nations, even an ambassador accused of serious crimes retained full diplomatic immunity, compelling his expulsion rather than trial (Amos Shartle Hershey, *Diplomatic Agents and Immunities* (Washington, DC: U.S. Government Printing Office, 1919), 107; Carole Levin, *The Reign and Life of Queen Elizabeth I: Politics, Culture, and Society* (Cham, Switzerland: Springer International Publishing, 2022), 135). A similar pattern recurred in the nineteenth century. During the 1856 Crampton Recruitment Affair, British Minister Sir John Crampton and several consuls were implicated in illegal military recruitment in the United States in violation of neutrality laws, and diplomatic immunity foreclosed prosecution. The U.S. response was limited to declaring them *persona non grata* and demanding recall (Hershey, *Diplomatic Agents and Immunities*, 47–8). Likewise, in the Dreyfus Affair, German military attaché Maximilien von Schwartzkoppen and his Italian counterpart Alessandro Panizzardi—both engaged in espionage against France—were shielded from interrogation or trial by their diplomatic status, forcing French authorities to pursue alternative, and ultimately unjust, targets (Ruth Harris, *Dreyfus: Politics, Emotion, and the Scandal of the Century* (New York: Metropolitan Books, Henry Holt and Company, 2010), 330).

same set of laws, effectively eliminating any special immunities for the clergy or diplomats that might lead to a sense of impunity.³² He believes that such a societal structure would cultivate true liberty, with a state that not only respects but actively protects the rights of every citizen without bias.³³

Given this framework for a just society, it is unsurprising that Laurent casts a critical eye on the Middle Ages. He portrays it as an epoch rife with despotism, ignorance, and suffering, an era where the pervasive control of the Church over society quashed any burgeoning progress.³⁴ In Laurent's eyes, the Middle Ages were a time when abstract notions like freedom and equality were alien concepts, as the feudal system was entrenched in privilege, offering true freedom to only a select few.³⁵

This period, according to Laurent, was marked by the Church's overwhelming influence, which hindered the development of more equitable and enlightened societal structures. Laurent argued that during the Middle Ages, the Church functioned as "a state within a state,"³⁶ with its actual status and self-conception aligning with the legal fiction of extraterritoriality. He highlights the extraordinary power of the popes, who could excommunicate and depose kings, asserting dominance over secular rulers. Under the guise of clerical immunities, the Church claimed sovereign-like authority, granting its clergy legal impunity and placing them above common law.³⁷ This status allowed the Church to exercise powers typically reserved for the state, including collecting tithes as taxation, dispensing justice through independent courts, and providing asylum beyond secular jurisdiction, reinforcing its position as a parallel authority that challenged state sovereignty.

Then came the French Revolution of 1789, "a Revolution that brought [people] civil liberty, political freedom, and religious freedom."³⁸ Laurent views the Revolution as a cataclysmic event that uprooted longstanding privileges, challenging the despotism of the old regime and laying the foundation for a new order predicated on respect for nationalities and the sovereignty of peoples.³⁹ Laurent sees the principles of liberty and equality, central to the Revolution's ethos, as fundamental to both the events of 1789 and the subsequent revolutionary wave of 1793.⁴⁰ In his analysis, Laurent notes that the Revolution's aims were to establish freedom, peace, and equality among citizens, alongside the independence of nations. He argues that these ideals were meant to replace the arbitrary and unjust privileges of the past with a more equitable system where justice and equality extended beyond individuals to nations themselves.

³² François Laurent, *L'Église et l'état: La Réforme* (Bruxelles: Imprimerie de E. Guyot, 1860), 199.

³³ Laurent, *Droit civil international*, vol. 3, § 25.

³⁴ François Laurent, *Études sur l'histoire de l'humanité*, vol. 17 (Bruxelles A. Lacroix, 1870), 38–9.

³⁵ *Ibid.*, vol. 18, 401–2.

³⁶ *Ibid.*, 291.

³⁷ *Ibid.*, vol. 16, 278.

³⁸ *Ibid.*, 26.

³⁹ *Ibid.*, vol. 18, 609.

⁴⁰ *Ibid.*, 610.

But the old order clung on stubbornly. With the collapse of the French empire, the papacy, previously “trembling on its shaken foundations,”⁴¹ regained stability, sparking a reactionary wave. It was at this juncture that “the battle between the past and the future began.”⁴² Leading this retrograde movement was Pope Pius VII, whose papacy spanned from 1800 to 1823. Pius VII notably resurrected the Society of Jesus, disbanded by his predecessor Pope Clement XIV (papacy 1769–1774), with the formal abolition occurring in 1773. The Jesuits’ revival started in Russia in 1801, and by 1814, with the promulgation of the bull *Sollicitudo omnium ecclesiarum*, their global reinstatement was accomplished. Laurent depicted Pius’s reestablishment of the Society as an opposition to “the spirit of liberty,” critiquing its aim to assert “the domination of Catholicism” and stifle “the awakening of free thought.”⁴³ Furthermore, Laurent was critical of Pius’s appeal to the Congress of Vienna (1814–1815) for a complete reinstatement of the medieval ecclesiastical regime, including “tithes, ecclesiastical properties, clerical immunities, and the inquisition tribunal.”⁴⁴ Laurent considered such restorations to be “an injustice” bordering on “sacrilege.”⁴⁵

The struggle ensued. During the mid-nineteenth century, a sweeping wave of legislative reforms coursed through several European nations with the common objective of establishing a distinct separation between the state and the church. These laws were meticulously crafted to curb the extensive privileges and influence held by Catholic institutions, particularly in crucial areas such as marriage, education, taxation, and jurisdiction. One noteworthy example is the “Siccardi Laws” of 1850, implemented in the Kingdom of Sardinia, which initiated a series of transformative changes. These reforms included the dissolution of ecclesiastical tribunals, the removal of longstanding clerical immunities from civil laws, the termination of sanctuary rights within church premises, the confiscation of church properties and revenues, the placement of church pulpits under police oversight, the reclassification of marriage as a purely civil contract, and the reduction of official observances of Catholic holidays in Piedmont.⁴⁶ Introduced in 1854 and enacted the following year, the “Rattazzi bill” aimed to suppress a significant number of Catholic Church institutions while simultaneously imposing a substantial tax on the wealthiest

⁴¹ Laurent, *L’Église et l’État: La Réforme*, 149.

⁴² *Ibid.*, 150.

⁴³ Laurent, *Études sur l’histoire de l’humanité*, vol. 16, 32.

⁴⁴ *Ibid.*, 30.

⁴⁵ See also François Laurent, *L’Église et l’État: La Révolution* (Bruxelles: Méline, Cans & Company, 1862), 175.

⁴⁶ Frank J. Coppa, *The Papacy, the Jews, and the Holocaust* (Washington: Catholic University of America Press, 2006), 91. See also Denis Smith, *The Making of Italy, 1796–1866* (London: Palgrave Macmillan, 1988), 172; Ivan Scott, *The Roman Question and the Powers, 1848–1865* (The Hague: Springer Netherlands, 2012), 91; Derek Beales and Eugenio F. Biagini, *The Risorgimento and the Unification of Italy* (London: Routledge, 2014), 111; Francesco Cherubini, *Asylum Law in the European Union* (United London: Routledge, 2014), 5.

members of the clergy.⁴⁷ Meanwhile, in Spain, the “Madoz Law” of 1855 authorized the expropriation of land owned by municipalities and the Catholic Church, subsequently offering these properties for sale.⁴⁸ In 1873, Prussia introduced the “May Laws,” which mandated that clergy members hold university degrees, placed all seminaries under state supervision, and required the Church to notify the State of all appointments. These laws also imposed restrictions on the Church’s authority to excommunicate and impose disciplinary measures, allowing appeals of episcopal rulings before civil courts.⁴⁹

Pius IX, who served as Pope from 1846 to 1878, staunchly opposed the legislative reforms of his era. He issued a series of allocutions condemning these laws as invalid and declared excommunications against those involved in their enactment. In his allocution “Probe meminertis” on January 22, 1855, the Pope vehemently denounced the Sardinian laws for their infringement upon the Church’s sacred immunity, freedom, and venerable rights, as well as their audacious seizure and usurpation of its properties.⁵⁰ Furthermore, in an allocution titled “Nemo vestrum” on July 26, 1855, Pius IX urged the Madrid Government to reject the proposed law on the sale of Church properties and called on Catholics in that country to abstain from purchasing them.⁵¹ In a document called “Syllabus errorum” attached to the encyclical “Quanta cura: Condemning Current Errors” (1864), he declared it erroneous to assert that “[t]he ecclesiastical forum or tribunal for the temporal causes, whether civil or criminal, of clerics, ought by all means to be abolished, even without consulting and against the protest of the Holy See.”⁵² In 1873, within the encyclical “Etsi multa: On the Church in Italy, Germany, and Switzerland,” Pius IX voiced his grievance that “the government of Prussia with harsh, iniquitous laws totally different from previous ones ha[d] subjected the whole institution and education of clerics to lay power.”⁵³

Pius IX’s rejection of the legislative reform efforts, along with his declaration of papal jurisdictional supremacy and infallibility during the First Vatican

⁴⁷ Antonio Gallenga, *The Pope and the King: The War Between Church and State in Italy*, vol. 2 (London: Samuel Tinsley & Company, 1879), 195–6; Frank Coppa, “Italy: The Church and the Risorgimento,” in *The Cambridge History of Christianity*, ed. Sheridan Gilley and Brian Stanley, vol. 8 (Cambridge: Cambridge University Press, 2006), 241–2; Frank J. Coppa, *The Modern Papacy, 1798–1995* (London: Routledge, 2016), 102.

⁴⁸ Eduardo García de Enterría and Ignacio Borrajo Iniesta, “Evolution and Gestalt of the Spanish State,” in *The Max Planck Handbooks in European Public Law: The Administrative State*, ed. Sabino Cassese, Peter W. Huber, and Armin von Bogdandy, vol. 1 (Oxford: Oxford University Press, 2017), 407.

⁴⁹ Owen Chadwick, *A History of the Popes, 1830–1914* (Oxford: Oxford University Press, 2003), 261–2; Roberto De Mattei, *Pius IX* (Leominster: Gracewing, 2004), 84; Michael P. Riccards, *Faith and Leadership: The Papacy and the Roman Catholic Church* (New York: Lexington Books, 2012), 303.

⁵⁰ *Recueil des allocutions consistoriales encycliques et autres lettres apostoliques des souverains pontifes* (Paris: Librairie d’Adrien le Clere et Cie, 1865), 347.

⁵¹ *Ibid.*, 352.

⁵² Pius IX, “Syllabus of Errors,” in *Freedom of Religion: Foundational Documents and Historical Arguments*, ed. Stephen A. Smith (Oxford: Oxbridge Research Associates, 2018), 501.

⁵³ Catholic Church, *The Papal Encyclicals*, ed. Claudia Carlen, vol. 1 (Ann Arbor: Pierian Press, 1990), 429.

Council in December 1869, incited significant ire among anti-Catholic contemporaries, including notably Laurent.⁵⁴ Laurent offered a critical analysis of Pius IX's stance on the relationship between the Catholic Church and modern civilization. He summarized Pius IX's position by stating that "traditional Christianity [was] incompatible with modern civilization,"⁵⁵ highlighting the Pope's discontent with the secularization trends that defined modernity. Laurent argued that the Church's historical claim to "immunities" as "divine rights" was a pursuit of power that clashed with civil sovereignty.⁵⁶ He noted that Pius IX condemned any secular claim over such immunities, seeing them as eternally binding, "as councils and popes ha[d] proclaimed a thousand times."⁵⁷ Furthermore, Laurent illustrated the tension between ecclesiastical claims of a divine right to grant asylum and the secular pursuit of justice, pointing out that Pius IX upheld the Church's right to protect even criminals, challenging state authority and asserting the Church's sovereignty. This sovereignty, according to Pius IX, was divinely ordained, making the Church a "perfect society,"⁵⁸ independent and equivalent to a state, where "human justice [had to] be silent"⁵⁹ in the face of divine law.

Laurent's interpretation of both historical and contemporary events, as referenced above, suggests that he regarded the legal fiction of extraterritoriality as a foundational mechanism underpinning the Church's autonomy. He posited that this fiction enabled the Church to function as a sovereign "state within a state"⁶⁰ during the Middle Ages, effectively insulating its operations from the jurisdictional authority of secular states and facilitating its independent exercise of power. This same fiction, he observed, formed the basis and justification for the contemporary Catholic reactionary movement of his time, signifying an enduring adherence to the notion of the Church's sovereignty and its distinct legal and moral authority within the secular state. Thus, Laurent believed that the persistent invocation of this legal fiction by jurists, to account for or legitimize diplomatic immunities, does more than merely prolong the existence of an archaic legal construct; it also strengthens the Church's enduring assertions of autonomy from governmental power, consequently providing backing to the Catholic reactionary cause.

This interpretation is reinforced by Laurent's occasional analogies between the privileges of diplomatic envoys and those historically claimed by the Church. In one passage, he questions whether the ambassador's need for protection from constraint—both personal and material—truly necessitates

⁵⁴ See also William E. Gladstone, *Vaticanism: An Answer to Replies and Reproofs* (London: John Murray, 1875), 61–4; Thomas Moore and Arthur Brinckman, *The Anglican Brief Against Roman Claims* (London: Simpkin, Marshall, Hamilton, Kent & Co., Ltd., 1893), 495; David B. Ray, *The Papal Controversy Involving the Claim of the Roman Catholic Church to be the Church of God* (St. Louis: National Baptist Publishing Company, 1892), 393–4.

⁵⁵ Laurent, *Études sur l'histoire de l'humanité*, vol. 16, 533.

⁵⁶ *Ibid.*, 586.

⁵⁷ *Ibid.*, 278.

⁵⁸ *Ibid.*, 343.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, 334, 425.

exemption from all legal authority. While acknowledging that an ambassador must act without undue interference, Laurent challenges the notion that this requires placing the envoy outside and above the law. He likens this conception of diplomatic liberty to the kind historically claimed by the Church, arguing that such unchecked liberty ultimately led not to the protection of rights but to a form of tyranny that destroyed the very meaning of liberty itself:

Grotius has yet another justification for extraterritoriality; he aims to prove that the fiction is founded on reason. [...] No doubt, the ambassador must be free—but does this mean he must be outside the law and above the law? This is a conception of liberty such as the Church has always claimed for itself, and we know where the Church's liberty has led: to a tyranny that would have destroyed the very meaning of liberty. It is the same old prejudice of absolute sovereignty.⁶¹

In this passage, Laurent critiques the Church's historical claim to unassailable liberty, arguing that its pursuit of unchecked autonomy ultimately degenerated into tyranny, thereby undermining the very concept of liberty itself. By drawing this analogy, he not only challenges the expansive privileges sustained by the legal fiction of extraterritoriality but also links them to a discredited and dangerous doctrine of absolute sovereignty.

In another argument, Laurent revisits the comparison between diplomatic privileges and those claimed by the Church, asserting that both are grounded more in human conventions than in natural or divine law. Laurent states:

If immunity were a right derived from nature, limiting it would not be permissible. Yet the rights claimed by diplomats, as with the divine rights asserted by clergy, are more akin to a usurpation of nature's law.⁶²

Here, Laurent challenges the legitimacy of diplomatic immunity as an inherent right, contending that if it were truly natural, it would be indisputable and absolute. He parallels this critique with the Church's historical claims to divine rights, framing them as infringements on the natural order rather than legitimate entitlements. Laurent further anticipates a shift in attitudes toward diplomatic immunity, predicting its eventual rejection as a supposed right of nations. Drawing a historical parallel, he observes:

Vain efforts. Divine law has passed away. And the same fate awaits the law of nations, which the diplomatic corps invokes.⁶³

Through this argument, Laurent underscores the tenuous foundation of diplomatic immunity, likening it to the now-discredited claims of divine right,

⁶¹ Laurent, *Droit civil international*, vol. 3, § 15.

⁶² *Ibid.*, § 21.

⁶³ *Ibid.*, § 22.

and anticipates its decline in the face of evolving notions of justice and natural law.

Laurent's critique of the legal fiction of extraterritoriality and his scrutiny of diplomatic immunity, though not widely accepted, were notably recognized in Italy. Italian jurist Pietro Esperson (1833–1917) contested the idea of a diplomat being “legally adhering to the territory of the nation he represents,” deeming it “not necessary for him to freely carry out the entrusted mandate.”⁶⁴ Esperson particularly condemned the use of this fiction to justify asylum for criminals, denouncing it as a “barbaric remnant of the Middle Ages.”⁶⁵ He challenges the fiction theory, arguing that treating a diplomat's residence as part of their home country, thereby sheltering criminals, is a “true insult to modern civilization”⁶⁶ and undermines host state sovereignty. For Esperson, the legal fiction, rather than serving diplomacy, erodes state sovereignty and enables the obstruction of justice. Pasquale Fiore (1837–1914), another Italian jurist, echoing Laurent and citing him,⁶⁷ labeled the legal fiction “unjustifiable”⁶⁸ and advocated for its replacement with “a more rational theory.”⁶⁹ Fiore disparaged the concept as a construct of jurists who endorsed the divine right claims of sovereigns. This link is encapsulated in his statement that the fiction “favored the proud pretensions of the Sovereigns by divine right.”⁷⁰ This critique underscores Fiore's view that the fiction theory originated in an era when monarchs and their envoys were considered above earthly laws, justified by supposed divine sanction.⁷¹ For Fiore, this historical legacy renders the legal fiction not only archaic but also illogical, warranting its rejection in contemporary legal thought.

Italian jurists showed a particular openness to Laurent's critique of the legal fiction of extraterritoriality. I believe this receptiveness was likely motivated, in part, by the critique's potential utility in challenging the pope's prerogatives. These prerogatives were widely regarded as significant hurdles in the path of Italian unification. This period of unification was viewed by many contemporaries not just as a pivotal moment in Italian history but also as

⁶⁴ Esperson, *Diritto diplomatico*, vol. 1, § 150. Esperson's stance on diplomatic immunity aligns with the idea of limitation rather than the complete abolition proposed by Laurent. See Esperson, *Diritto diplomatico*, vol. 1, § 152.

⁶⁵ *Ibid.*, § 261.

⁶⁶ *Ibid.*

⁶⁷ Fiore, *Nouveau droit international public*, vol. 2, § 1146–47, 1154, 1160. Fiore, like Esperson, did not advocate for the complete rejection of diplomatic immunity, differing from Laurent's position, which called for its abandonment. See Fiore, *Nouveau droit international public*, vol. 2, § 1155, 1161.

⁶⁸ *Ibid.*, § 1154.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ See also Fiore, *Nouveau droit international public*, vol. 2, § 1161. The argument that the French Revolution marked a watershed event, effectively dismantling the basis for diplomatic immunities—a concept I refer to as the “big break” argument—was not only employed by Laurent, Esperson, and Fiore but also by another prominent figure in the Italian school of jurisprudence: Giuseppe Carnazza-Amari. See Frey and Frey, *The History of Diplomatic Immunity*, 344.

an event signifying the end of the European ancien régime and a shift away from the dominance of Catholic Europe.⁷²

The capture of Rome by Italian forces on September 20, 1870, signified a historic turning point, concluding a thousand years of papal temporal authority. In an effort to alleviate international concerns about the Pope's status following this significant event, the Italian government enacted the Law of Guarantees in 1871. This law acknowledged the Pope as an independent sovereign and provided him with financial compensation, aiming to balance his spiritual role with the new political landscape of Italy. However, Pope Pius IX, staunch in his position, refused to accept the legitimacy of the newly formed Kingdom of Italy. He saw the Law of Guarantees as insufficient and an infringement on the Church's traditional rights. Pius IX, therefore, chose to remain within the confines of the Vatican, making himself "a voluntary prisoner."⁷³ He vehemently argued that stripping the papacy of its temporal powers severely undermined the Church's spiritual mission and authority. This stance underscored the profound tension between the newly unified Italian state and the Roman Catholic Church, a conflict that significantly influenced the religious and political dynamics of the era.

Consequently, it follows logically that Esperson and Fiore, aligning with Laurent's assertion that the Church should "be merely an association, subject as such to general laws,"⁷⁴ contended that the Pope ceased to be a sovereign following the relinquishment of the Papal States. Esperson's analysis of the Pope's altered role post-annexation of the Papal States highlights a significant shift from political sovereignty to purely spiritual leadership. He asserts that "after the Supreme Pontiff has ceased to be a sovereign and temporal prince,"⁷⁵ the Pope's traditional sovereign prerogatives, such as the "right of legation,"⁷⁶ no longer apply since they are intrinsic to an independent state. Consequently, the papal envoys' duties are restricted to spiritual affairs, marking a departure from conventional diplomatic functions.

Fiore also contends that the Pope should not be seen as a sovereign in legal or political terms. In his 1885 publication, he states, "The Church is not a State, and its Head is neither Sovereign nor King."⁷⁷ This viewpoint separates the religious authority of the Pope from political or legal sovereignty. Charles Antoine, in his translation of Fiore's work, notes this differentiation but downplays its practical significance. While the Holy See, argued Antoine, does

⁷² John A. Davis, "Introduction: Italy's Difficult Modernization," in *Italy in the Nineteenth Century: 1796–1900*, ed. John A. Davis (Oxford: Oxford University Press, 2000), 2; see also Timothy Lang, "Lord Acton and 'the Insanity of Nationality,'" *Journal of the History of Ideas* 63 (2002): 136.

⁷³ Marcellus Donald Alexander R. von Redlich, "Papal Sovereignty," *Social Science* 7 (1932): 241. See also Christopher Duggan, "Politics in the era of Depretis and Crispi, 1870–96," in *Italy in the Nineteenth Century: 1796–1900*, ed. John A. Davis (Oxford: Oxford University Press, 2000), 155–6; John R. Morss, "The International Legal Status of the Vatican/Holy See Complex," *European Journal of International Law* 26 (2015): 940.

⁷⁴ Laurent, *L'Église et l'État: La Réforme*, 152.

⁷⁵ Esperson, *Diritto diplomatico*, vol. 1, § 51.

⁷⁶ *Ibid.*

⁷⁷ Fiore, *Nouveau droit international public*, vol. 2, § 983.

not possess traditional political sovereignty, it still partakes in diplomatic relations with sovereign states, a necessity for practical reasons. Thus, in the current state of affairs, “it is of no interest and without serious foundation to claim that the Pope’s envoys and the foreign ministers accredited to him are not genuine diplomatic agents.”⁷⁸

Antoine may not have fully appreciated the distinction that Fiore and Esperson drew between practical diplomatic arrangements and the theoretical recognition of papal sovereignty. Fiore did not object to the protection of papal envoys or foreign diplomats accredited to the Holy See, acknowledging the practical necessity of such measures, which were duly provided for under Italian law. However, he firmly rejected the notion that these protections implied recognition of the Pope as a sovereign under international law. For Fiore, it was one thing to permit certain privileges in practice, and quite another to ground them in the legal fiction of papal sovereignty—a fiction he viewed as incompatible with the political and legal consolidation of the Italian nation-state. This concern is echoed in Esperson’s reflections on Italy’s relations with the Holy See. While Esperson acknowledges Italy’s continued commitment to protecting foreign envoys to the Vatican as an expression of diplomatic civility, he insists that such protections must not be construed as recognition of papal sovereignty. Rather, they should be understood as part of a reciprocal arrangement—one that requires respect for Italy’s constitutional order and political autonomy in return. This framework of mutual restraint, Esperson suggests, is essential for maintaining the integrity of Italy’s legal and political system.⁷⁹

The case of Carlo Montagnini (1863–1913) vividly illustrates how the immunity of papal representatives under the legal fiction of extraterritoriality substantiated Laurent’s, Esperson’s, and Fiore’s concerns that such a doctrine reinforced ecclesiastical power and sustained Catholic reactionary influence against state sovereignty in Europe. Montagnini served as secretary of the Apostolic Nunciature, the diplomatic mission of the Holy See in France, with the nuncio acting as the Vatican’s official ambassador to the French government. Following the rupture of diplomatic relations between France and the Vatican in 1904, the nunciature was formally closed, and the post of nuncio was left vacant. Despite the absence of official recognition, Montagnini effectively assumed the functions of the Vatican’s representative in France. He continued to manage ecclesiastical affairs and maintained regular correspondence with French bishops, thereby sustaining the operations of the nunciature in all but name. His activities attracted the attention of the French government, which suspected him of coordinating clerical resistance to the Republic’s secularization policies. In 1906, French authorities raided the former premises of the Apostolic Nunciature, where Montagnini was residing, and seized a substantial body of documents—including correspondence with the Vatican and French clergy—that came to be known as the “Montagnini Papers.”⁸⁰

⁷⁸ *Ibid.*, 510n1.

⁷⁹ Esperson, *Diritto diplomatico*, vol. 1, § 251.

⁸⁰ “La Séparation effective,” *L’Avenir républicain: journal démocratique quotidien du Gers*, December 13, 1906; “Comité exécutif: Compte rendu analytique,” *Bulletin du Parti républicain radical et radical-*

The seized papers confirmed that Montagnini operated as a political agent rather than a purely ecclesiastical figure, leveraging his networks to shape political alignments, influence candidacies, and resist secular legislation. As a Vatican liaison, he coordinated with figures such as Cardinal Rafael Merry del Val (1865–1930) and French Catholic leaders, advocating for pro-Catholic candidates, securing financial support for campaigns, and organizing public demonstrations against the 1905 Law of Separation of Churches and State. He also facilitated Vatican efforts to restructure the Catholic press in France to bolster its influence. These activities, seen as a direct affront to French sovereignty, led to his expulsion on November 29, 1906.

Supporters of the Vatican defended Montagnini by emphasizing the legal fiction of extraterritoriality, arguing that the nonciature in Paris and its archives retained their inviolable status despite the rupture of diplomatic relations in 1904. They asserted that the nonciature, as property of the Holy See, functioned as a sovereign space under international custom. Cardinal Merry del Val described the seizure as a violation of “inviolability” and an attack on the “secrecy of diplomatic archives.”⁸¹ Vatican officials further emphasized Montagnini’s role as custodian of the archives, asserting that this responsibility derived from “the right inherent to the office of the supreme head of the Church.”⁸²

Taken together, these events show how the legal fiction of extraterritoriality was invoked to shield ecclesiastical authority even in the absence of formal diplomatic recognition, thereby sustaining clerical interference in political life. The French government’s determination to suppress Montagnini’s activities reflected the broader resistance of modern nation-states to such claims, underscoring that the legal fiction, originally designed to explain diplomatic immunity, could also become a flashpoint in the struggle to defend sovereign authority against ecclesiastical encroachment.

It was precisely this kind of tension that shaped the attitudes of European jurists toward the fiction of extraterritoriality more generally. They recognized that the doctrine, and the privileges it implied, inevitably clashed with the principle of domestic sovereignty. For this reason, many were reluctant to endorse the fiction even when applied outside Europe, wary that any acceptance abroad might eventually undermine sovereignty at home.⁸³ This stance did not mean, however, that they dismissed the institution of consular jurisdiction in non-Christian countries. On the contrary, Laurent, Esperson, and

socialiste, January 19, 1907; “Les Papiers Montagnini: La main dans le sac,” *L’Humanité*, April 4, 1907; “France & l’Église,” *La Bastille: journal antimaçonnique*, March 17, 1907; Julien de Narfon, “Le procès de l’abbé Jouin,” *Le Figaro*, April 12, 1907.

⁸¹ Gilles Ferragu and Hervé Yannou, “Une nonciature sans nonce: Mgr Montagnini en France, sa mission et son expulsion (1904–1906),” *Mélanges de l’École française de Rome. Italie et Méditerranée* 119 (2007): 114–15.

⁸² *Ibid.*

⁸³ François Laurent, *Droit civil international*, vol. 4 (Bruxelles: Bruylant-Christophe, 1880), §§ 247, 252.

Fiore each acknowledged its practical necessity.⁸⁴ Yet they carefully confined its legitimacy to a narrowly delimited, treaty-based exception to territorial sovereignty, unequivocally rejecting its elevation into a universal right of international law. In this way, they reaffirmed the primacy of sovereignty while allowing for limited, negotiated departures from it.

Laurent maintained that consular authority must remain strictly subordinate to national law and operate solely within the legal limits recognized by both the sending and receiving states; he deemed invalid any civil or judicial acts—such as marriages or oaths—conducted without local authorization, cautioning against conflating legal fictions with jurisdictional reality.⁸⁵ Esperson likewise affirmed that all jurisdiction ultimately derived from the territorial sovereign and could be exercised only with their explicit consent, recognizing the legitimacy of consular courts solely when established by formal treaty and *exequatur*. He denounced the extension of consular jurisdiction by custom, particularly in Muslim-majority regions, as a distortion of legal norms that frequently resulted in the denial of justice to local populations.⁸⁶ Fiore similarly understood consular jurisdiction as a legal arrangement confined to non-Christian states, arising from capitulations or bilateral agreements, and expressly rejected the fiction of extraterritoriality as a valid foundation in law.⁸⁷

The critiques advanced by jurists of the Belgian and Italian schools regarding the legal fiction of extraterritoriality—and their correspondingly restrained acceptance of consular jurisdiction—informed legal and political debates in non-European regions. Jurists in non-European states drew upon these European critiques to challenge, and eventually dismantle, the privileges long claimed by European powers abroad, including jurisdictional immunities that exempted their nationals from local authority and other prerogatives considered indispensable for safeguarding European interests and communities beyond the territorial bounds of Europe.

For example, in Japan, interactions with Western powers led to a growing awareness and adoption of European legal concepts like sovereignty to secure equal status in the international order. Traditionally, Japan's foreign relations operated through hierarchical tribute systems, in contrast to the European model of equal, independent nation-states. This shift is evident, for example, in the 1874 *Diplomatic Guide*, compiled by Sameshima Naonobu (鮫島尚信, 1845–1880), who served as Japan's first minister to France from 1870 until his death in 1880. In this work, Sameshima introduced definitions of sovereignty from European jurists, describing it as “the supreme power by which a State is

⁸⁴ Laurent, *Droit civil international*, vol. 4, § 18; Pietro Esperson, *Diritto diplomatico e giurisdizione internazionale marittima*, vol. 2 (Milano: Libreria di Gaetano Brigola, 1874), § 277; Pasquale Fiore, *Traité de droit pénal international et de l'extradition*, trans., Charles Antoine, vol. 1 (Paris: A. Durand et Pedone-Lauriel, 1880), §§ 31–32.

⁸⁵ François Laurent, *Principes de droit civil*, vol. 13 (Paris: A. Durand & Pedone Lauriel, 1874), § 163; *Droit civil international*, vol. 4, §§ 255–57.

⁸⁶ Esperson, *Diritto diplomatico e giurisdizione internazionale marittima*, vol. 2, §§ 67, 102.

⁸⁷ Fiore, *Traité de droit pénal international et de l'extradition*, vol. 1, §§ 25, 31.

governed” and underscoring that “all sovereign States are equal in the eye of international law, whatever may be their relative power.”⁸⁸

The *Diplomatic Guide* identifies Carlos Calvo's *Le droit international théorique et pratique* as a seminal reference in the study of international law.⁸⁹ It is likely that Ishikawa Kin'ichirō, a judge at the Tokyo District Court and author of *International Public Law* (国際公法, 1890)⁹⁰—one of Japan's foundational texts on international law—became familiar with Calvo's theories either directly through the *Diplomatic Guide* or indirectly via other Japanese jurists proficient in European legal thought. Calvo himself provided a critical analysis of the legal fiction of extraterritoriality⁹¹ and, in *Le droit international théorique et pratique*, frequently cited Laurent,⁹² thereby potentially broadening Ishikawa's exposure to European critiques of the concept.

In *International Public Law*, Ishikawa critiques consular jurisdiction in a way that parallels the arguments made by European jurists concerning the legal status of diplomats and clerics as existing outside the jurisdiction of the host state within Europe. While he acknowledges the historical necessity of consular jurisdiction, Ishikawa argues that it fundamentally undermines the principle of sovereignty, which grants states the authority to enforce their laws over all individuals within their borders. By exempting foreign nationals from local legal obligations and placing them under the exclusive authority of their consuls, consular jurisdiction, he contends, disrupts legal equality and perpetuates a system of impunity.⁹³ This critique, reminiscent of Laurent's objections to the legal fiction, underscores Ishikawa's engagement with and reinterpretation of European legal theories to address Japan's challenges under the unequal treaty system.

Similarly, a December 25, 1906, article in the *Hwangseong Sinmun* (皇城新聞), a leading Korean newspaper known for its analytical coverage of domestic and international political affairs, examines the tension between sovereignty and the privileges granted to foreigners in a manner that resonates with the critiques of Laurent, Esperson, and Fiore.⁹⁴ The article explores how the Church's privileges in Italy created a dual authority, dividing national loyalties between the state and the papacy, thereby undermining Italy's efforts toward unification and sovereign consolidation. It further highlights that Camillo Benso, Count of Cavour (1810–1861), prime minister of the Kingdom of Sardinia, viewed the abolition of these privileges as essential for strengthening national

⁸⁸ The Legation of Japan in Paris, *The Diplomatic Guide* (Edinburgh and London: William Blackwood and Sons, 1874), 6–7, 129–30.

⁸⁹ *Ibid.*, 120–3.

⁹⁰ 石川錦一郎 [Ishikawa Kin'ichirō], 国際公法 [*International Public Law*] (Tokyo: 博文館 [Hakubunkan], 1890).

⁹¹ Calvo, *Le droit international théorique et pratique*, vol. 3, § 1503.

⁹² Carlos Calvo, *Le droit international théorique et pratique: précédé d'un exposé historique des progrès de la science du droit des gens*, 4th ed., vol. 2 (Paris: Guillaumin et Cie, 1888), §§ 519, 525, 531, 591, 708, 728, 732, 743, 745 et seq.

⁹³ Ishikawa, 国際公法, 174–5, 180, 183, 186–7, 193–9.

⁹⁴ “讀意大利建國三傑傳 (續)[On Reading the Continuation of the Lives of Italy's Three Founders],” *Hwangseong Sinmun*, December 25, 1906.

power, though his reforms encountered resistance from religious factions and even the royal family. By situating these historical dynamics within a broader critique of foreign privileges, the *Hwangseong Sinmun* underscores that their abolition is often a necessary condition for achieving full national sovereignty.⁹⁵

Beyond the Legal Fiction: Reconstructive Critiques and the Rebuilding of Jurisdictional Immunities and Other Privileges Overseas

Several jurists criticized the legal fiction of extraterritoriality, identifying technical and practical problems similar to those noted by Belgian and Italian scholars. Their aims, however, diverged. While the Belgian and Italian jurists sought to restrict or abolish jurisdictional immunities, clerical privileges, and other exemptions from state authority, the others objected to the fiction precisely because it limited or complicated European activities abroad, and they therefore sought to preserve and expand such privileges on firmer legal foundations. The Belgian and Italian critiques were oriented primarily toward Europe, addressing the implications of diplomatic and clerical immunities as well as the legal fiction that sustained them within European politics. By contrast, the latter group focused on developments beyond Europe, particularly in the Ottoman Empire and Asia. Figures representative of this strand include Friedrich Fromholz Martens (1845–1909), André Weiss (1858–1928), Eugène Delepoulle (1874–1947), and François Piétri (1882–1966).

The discontent of these latter jurists with the legal fiction was threefold. First, they argued that the legal fiction, in certain scenarios, imposed what were perceived as excessive responsibilities on Westerners abroad. Second, they believed that this legal framework unduly restricted Western activities and interactions with local populations in the Ottoman Empire and Asia. Third, they contended that the legal fiction was insufficient to justify the extensive privileges enjoyed by European nationals in these regions. In the following analysis, I will delve into each of these points in greater detail, exploring their implications and the broader geopolitical backdrop within which these jurists operated.

⁹⁵ In *China's Unequal Treaties: Narrating National History*, Dong Wang shows that Chinese nationalists turned the experience of extraterritoriality and the unequal treaties into a core narrative for shaping modern national identity. She explains that although the treaties originally reflected China's diplomatic subordination, late Qing and early Republican reformers reinterpreted them as symbols of collective humiliation that demanded redress. By framing extraterritoriality as the clearest manifestation of lost sovereignty, Chinese intellectuals transformed legal grievances into moral and political arguments for national revival. The call to abolish extraterritorial privileges thus became a central expression of patriotic resistance and a key rhetorical tool in constructing a unified vision of the modern Chinese nation. See Dong Wang, *China's Unequal Treaties: Narrating National History* (London: Bloomsbury Academic, 2005).

Practical critiques: When extraterritoriality became a burden for Westerners abroad

Consider the argument that the legal fiction of extraterritoriality more often placed Europeans at a disadvantage rather than providing them with benefits. This was exemplified on November 17, 1883, when the Court of Aix-en-Provence encountered a legal quandary. The court was set to judge Picard Alphonse, a French citizen and resident of Cairo, who was arrested in Cairo for counterfeiting Egyptian currency.⁹⁶ The dilemma arose because Article 134 of the French Penal Code of 1810 prescribed penalties for counterfeiting foreign currency on French soil,⁹⁷ but Alphonse's crimes occurred abroad, raising questions about jurisdiction. The statute reads:

Any individual who, in France, has counterfeited or altered foreign currency, or participated in the issuance, display, or introduction into France of counterfeit or altered foreign currency, shall be punished with penal servitude for a definite period.⁹⁸

The court's justification for applying French law to Alphonse's counterfeiting activities in Egypt is rooted in the Capitulations, which, since the 16th century, granted the French both legal immunities and commercial privileges within the Ottoman Empire. Originating with a 1535 accord between Francis I of France and Ottoman Sultan Suleiman the Magnificent, these Capitulations empowered French consuls to oversee civil and criminal matters involving French nationals, enforcing French legal standards and practices.⁹⁹ The 1740 Capitulations further clarified that ambassadors and consuls would adjudicate serious crimes committed by French citizens, in line with French judicial customs.¹⁰⁰ This framework was reinforced by Article 75 of the French law dated May 28, 1836, which stated: "Offenses, misdemeanors, and crimes committed by French nationals in the Levant and Barbary shall be punished according to the penalties prescribed by French laws."¹⁰¹

Legal experts who critiqued the fiction of extraterritoriality viewed Alphonse's case as an example of its unfavorable application to French citizens. Piétri criticized the court for judicial overreach, suggesting it had strayed from the text's clear or original intent. He contended that Article 75

⁹⁶ Édouard Clunet, ed., *Journal du droit international privé et de la jurisprudence comparée*, vol. 14 (Paris: Marchal et Billard, 1887), 287.

⁹⁷ "Aix (ch. des mises en accusation)," *La Gazette du Palais et du notariat: Jurisprudence et législation*, 1st sem. (Paris: Marchal, Billard & Cie, 1884), 55.

⁹⁸ *Les Codes des Codes, ou les Seize Codes* (Paris: Didier; Limoges: Martial Ardant et Fils, 1835), 716.

⁹⁹ Le Baron I. de Testa, *Recueil des traités de la Porte ottomane avec les puissances étrangères depuis le premier traité conclu en 1536, entre Suléyman I et François I, jusqu'à nos jours*, vol. 1 (Paris: Amyot, 1864–1911), 16–17. Maurits van den Boogert, *The Capitulations and the Ottoman Legal System: Qadis, Consuls, and Berathlis in the 18th Century* (Leiden: Brill, 2020), 35.

¹⁰⁰ Steven Rosenthal, *The Politics of Dependency: Urban Reform in Istanbul* (Westport: Greenwood Press, 1980), 119.

¹⁰¹ Jean-Baptiste Duvergier, *Collection complète des lois, décrets, ordonnances, règlements avis du Conseil d'état*, vol. 36 (Paris: Guynet et Scribe, 1837), 169.

simply required that crimes by French nationals in North Africa and the Levant be tried under French law, without suggesting such offenses should be considered as occurring in France. Hence, Piétri believed that Article 134 of the Penal Code, which penalized counterfeiting in France, should not apply to Alphonse's act of forging Egyptian currency while in Egypt. However, the court, guided by the fiction theory, broadened the interpretation of Article 75, construing it to mean that crimes by French in the Levant would be tried as if they had happened in France—a reading Piétri viewed as an unwarranted expansion.¹⁰² Similarly, Delepouille found the court's interpretation of Article 75 "remarkable,"¹⁰³ noting that Alphonse might have been exonerated if not for the skewed interpretation influenced by the fiction theory. Originally, local jurisdictions had no authority over French nationals, and French courts had no grounds to punish Alphonse since Article 134 specifically targeted the forgery of foreign currency within France itself.

The adverse implications of the legal fiction were particularly evident in matters of consular jurisdiction. As previously explained, this system was established in the Ottoman Empire through the Capitulations. In Asia, a formal framework for consular jurisdiction emerged in the mid-nineteenth century. The first explicit articulation of this system appeared in *The General Regulation of Trade*, ratified in July 1843 by delegates from the British and Qing empires.¹⁰⁴ In Japan, the Treaty of Amity and Commerce, signed with the United States on July 29, 1858, set a precedent for subsequent agreements with Great Britain, the Netherlands, Russia, and France.¹⁰⁵ This treaty inaugurated the treaty port era, during which consular jurisdiction remained in effect for over four decades, until its abolition in 1899.¹⁰⁶

In addressing the question of which laws consular courts should apply, Piétri argues against an unbridled application of the fiction theory. He warns that such an interpretation could extend domestic laws, like articles 92 and 93 of the French Penal Code concerning the formation of armed groups or usurpation of military authority, to French nationals committing these offenses in non-Christian states such as the Ottoman Empire or Japan. Piétri cautions that this could create a protection gap, as the penal regulations of non-Christian countries might be less comprehensive compared to those of France, which focus on maintaining French public order. Consequently, if French nationals were to commit actions considered criminal under French law but not penalized or treated more leniently under the legal systems of the Ottoman Empire or Japan, enforcing French laws based on the fiction of extraterritoriality could lead to disproportionate or unjust outcomes. Such a far-reaching application of

¹⁰² François Piétri, "Étude critique sur la fiction d'extraterritorialité," PhD diss. (Univ. de Paris, 1895), 320.

¹⁰³ Delepouille, "Exposé théorique de la fiction," 139.

¹⁰⁴ *Ibid.*

¹⁰⁵ Michael R. Auslin, *Negotiating with Imperialism: The Unequal Treaties and the Culture of Japanese Diplomacy* (Cambridge: Harvard University Press, 2009), 1.

¹⁰⁶ Harald Fuess, "Unequal Treaties, Consular Jurisdiction, and Treaty Port Society," in *Routledge Handbook of Modern Japanese History*, ed. Sven Saaler and Christopher W. A. Szpilman (London and New York: Routledge, 2018), 48.

French law, designed for domestic offenses, to acts committed abroad is, Piétri argues, not only inappropriate but also “monstrous.”¹⁰⁷

Practical critiques: When the legal fiction constrained Western interaction with local societies

Turning to the second critique of the legal fiction of extraterritoriality, critics argue that while this construct was designed to protect Western interests, it paradoxically restricted the legal agency and interactions of Westerners within the Ottoman Empire and Asia. Weiss points out that the notion of Westerners remaining under their home country’s jurisdiction abroad often led to unintended constraints. For example, in Muslim countries, requiring Westerners to conduct legal acts exclusively through their consuls could make certain actions—such as marrying a local woman—impossible, as consular jurisdiction typically extended only to their own nationals. Thus, a mechanism intended to serve Western interests ultimately risked limiting their ability to fully participate in the legal and social life of their host society. As Weiss observes, this outcome represents an ironic twist: a fiction originally designed to benefit Westerners ends up working against them.¹⁰⁸

Delepoulle and Piétri offer similar critiques of the legal fiction, emphasizing the complications it introduces in contractual agreements between Western expatriates and local residents. Delepoulle delves into the specific challenges faced by a public minister operating under this legal fiction. He describes a scenario in which a minister, while officially considered to be residing in their home country, actually lives abroad and encounters a legal standoff when trying to form a contract with a local. This impasse, as Delepoulle notes, results from the conflict between the local’s obligation to their national laws and the minister’s theoretical adherence to the laws of their homeland, thus preventing any contractual agreement.¹⁰⁹ Piétri extends this critique to all Western nationals living in the Orient, arguing that the false premise of remaining under one’s own national jurisdiction effectively prevents extraterritorial individuals from forming legal bonds with residents of the host country. Piétri emphasizes this issue with his remark, “[They] cannot even conclude contracts with the inhabitants of the country.”¹¹⁰

The limitations of the legal fiction became starkly evident in the nineteenth century as European influence expanded in regions such as the Ottoman Empire and Asia. Initially, the legal fiction was employed to grant diplomatic agents legal immunities. Since their duty was to represent their government in official

¹⁰⁷ Piétri, “Étude critique sur la fiction,” 321. Piétri did not argue that French nationals should be exempt from French domestic law in non-European countries; rather, he criticized the unqualified extension of that law through the legal fiction of extraterritoriality. While acknowledging that “offenses are punished by the penalties provided under French law” (319) according to the 1836 law, he rejected the notion that this required French criminal law to apply in its entirety and “in all its parts” (318) to French nationals abroad.

¹⁰⁸ André Weiss, *Traité élémentaire de droit international privé* (Paris: L. Larose et Forcel, 1890), 315.

¹⁰⁹ Delepoulle, “Exposé théorique de la fiction,” 55–6.

¹¹⁰ Piétri, “Étude critique sur la fiction,” 77.

negotiations and state affairs, their interactions with local populations were largely incidental. However, this changed with the influx of Western settlers, including missionaries and traders, whose primary objective was direct engagement with local societies—whether through proselytizing, commerce, or land acquisition.¹¹¹ This shift exposed the inadequacy of the legal fiction in accommodating Westerners seeking active and extensive involvement with native populations.

An example of this tension can be seen in the experience of James L. Barton (1855–1936), Foreign Secretary of the American Board of Commissioners for Foreign Missions. On April 3, 1924, Barton wrote to J. V. A. MacMurray, Chief of the Division of Far Eastern Affairs, regarding growing opposition among American missionaries in China to extraterritorial conditions. In his letter, he recalled his experience as a missionary in the Ottoman Empire from 1885 to approximately 1894, when he attempted to reopen a college press that had been sealed by Ottoman authorities. He was informed that he could do so only by relinquishing the legal protections afforded to him as an American citizen and fully submitting to Ottoman jurisdiction. Seeking clarification, he consulted U.S. Secretary of State James G. Blaine (1830–1893), who responded that while he had the right to renounce his American citizenship entirely, “the Department could not recognize [his] right to be in some respects an American citizen and in other respects not.”¹¹² This exchange demonstrates how the legal fiction of extraterritoriality was applied in practice—specifically, the expectation that American citizens abroad remained entirely under U.S. jurisdiction, regardless of their physical location. As a result, the associated privileges—including immunities—were treated as indivisible and not subject to partial waiver or selective application.

As for proselytizing, the special legal protections granted to foreign nationals played an important role in enabling Christian missionaries to operate in Asia with relative autonomy, shielding them from local jurisdiction

¹¹¹ The phenomenon of treaty ports in Asia aptly illustrates this point. Treaty ports were ports in Asian nations, including China, Japan, and Korea, that were forcibly opened to Western countries for trade and residence in the mid-nineteenth century through treaties often regarded as “unequal.” In these ports, trade between Westerners and locals involved regular contractual agreements. For instance, in Japan’s treaty ports, contracts between Western and Japanese merchants emerged as a strategy to mitigate trade risks. Initially relying on auctions, merchants soon found this method inadequate for securing specific goods and deals. Due to the unreliability of contractual compliance in the wholesale market, they shifted toward building relationships and networks, prioritizing stable working partnerships. Both Japanese and Western merchants acted as intermediaries, trading goods such as silk, tea, and handicrafts—items they neither produced nor consumed—underscoring the importance of trust and network-building in these trading environments. Yuki Allyson Honjo, *Japan’s Early Experience of Contract Management in the Treaty Ports* (London: Routledge, 2013), 53. See also George C. Allen and Audrey Donnithorne, *Western Enterprise in Far Eastern Economic Development* (London: George Allen & Unwin, 1954), 39; En-Sai Tai, *Treaty Ports in China: A Study in Diplomacy* (Arlington: University Publications of America, 1976), 95–6; Kevin C. Murphy, *The American Merchant Experience in Nineteenth Century Japan* (London: Routledge, 2004), 43–4, 129–30; Christopher Roberts, *The British Courts and Extra-territoriality in Japan, 1859–1899* (Leiden: Brill, 2014), 200.

¹¹² James L. Barton to John Van Antwerp MacMurray, April 3, 1924, in *Papers Relating to the Foreign Relations of the United States*, vol. 1 (Washington, DC: U.S. Government Printing Office, 1939), 602–3.

and legal restrictions.¹¹³ However, over time, these protections increasingly came to be seen as an obstacle to missionary efforts. Missionaries in treaty ports, particularly in China, sought to expand their reach into the interior to spread Christianity. Their commitment was such that some were even willing to relinquish legal protections in order to establish churches in regions beyond the reach of foreign consular authority.¹¹⁴ Younger Protestant missionaries, in particular, actively campaigned for the abolition of these privileges, arguing that they not only hindered efforts to convert the Chinese but also provoked local resentment.¹¹⁵ Some went further, declaring that “no form of military pressure may be exerted to protect us or our property” and that in the event of harm, “no money be paid for our release, no punitive expedition be sent out, and no indemnity exacted.”¹¹⁶ While this case concerns privileges that ultimately hindered Western activities, those privileges were largely legitimized through the legal fiction of extraterritoriality. Accordingly, some Western observers came to regard the fiction not solely as a mechanism for facilitating foreign presence but also as a structural limitation on Western engagement in non-Christian regions.

In sum, the legal fiction of extraterritoriality, while originally designed to facilitate sovereign operations in foreign lands, ultimately proved to be a double-edged sword, hampering the very Western activities it was meant to protect as the scope of interactions with local populations broadened. The irony lies in a system that, despite its intent to shield Western interests, ended up restricting them, unable to adapt to the evolving needs of a dynamic imperial presence—evidenced by the need for deeper legal and personal engagements in the Ottoman Empire and Asia.

Conceptual critiques: When the legal fiction proved inadequate as a justification for Western privileges

Let's delve deeper into the final critique against the legal fiction of extraterritoriality, which I refer to as “the ‘insufficiency’ claim.” This critique argues that the legal fiction fails to adequately justify the immunities granted to diplomatic agents, as well as the extensive rights afforded to Christians outside Christian countries.

¹¹³ Richard S. Horowitz, “Protégé Problems: Qing Officials, Extraterritoriality, and Global Integration in Nineteenth-Century China,” in *The Extraterritoriality of Law: History, Theory, Politics*, ed. Daniel S. Margolies, Umut Özsü, Maia Pal, and Ntina Tzouvala (London: Routledge, 2019), 105–6.

¹¹⁴ Dorothy Borg, *American Policy and the Chinese Revolution, 1925–1928* (New York: American Institute of Pacific Relations, 1947), 88; Wesley R. Fishel, *The End of Extraterritoriality in China* (Berkeley: University of California Press, 1952), 105. A similar opinion is found among missionaries in Japan; see Kayaoglu, *Legal Imperialism*, 99.

¹¹⁵ Turan Kayaoglu, “The Extension of Westphalian Sovereignty: State Building and the Abolition of Extraterritoriality,” *International Studies Quarterly* 51 (2007): 669–70.

¹¹⁶ James L. Barton to John Van Antwerp MacMurray, February 5, 1916, in *Papers Relating to the Foreign Relations of the United States*, vol. 1 (Washington, DC: U.S. Government Printing Office, 1939), 601–2.

Central to the “insufficiency” claim regarding diplomatic agents is Article 14 of the French Civil Code, which César Droin (1871–1963) examines in detail. His analysis demonstrates that treating diplomats as if they were residing in their home countries does not exempt them from local legal jurisdiction. Article 14 stipulates that foreigners can be summoned before French courts for obligations incurred in France with a French national or for contracts made abroad with French citizens. Consequently, a diplomatic agent entering into a contract with a French citizen, even if presumed to be outside France, could still fall under French legal jurisdiction.¹¹⁷ Piétri expands this discussion beyond France, noting that other European nations like Belgium, England, and Italy have legal norms akin to France’s Article 14.¹¹⁸ He argues that defining diplomatic status through the legal fiction of extraterritoriality is insufficient to justify the exemption of diplomatic agents from civil jurisdiction.¹¹⁹

The critique of the “insufficiency” concerning the immunities of Western consuls and nationals in non-Christian countries is succinctly articulated by Delepouille. He notes that while some legal scholars attribute them to “the fiction of extraterritoriality,”¹²⁰ he believes this explanation is flawed:

It is useless because immunities can be explained without the need to resort to it. It is insufficient in that it cannot justify all the immunities of international law. It is inaccurate in that it leads to unacceptable consequences. It is more rational to explain the legal status abroad of each category of persons by different reasons. [...] Finally, the immunities of consuls and nationals of Christian states in non-Christian countries are based on the texts of capitulations or on the clauses of trade treaties.¹²¹

In this statement, Delepouille emphasizes the inadequacy of using the fiction theory as a blanket explanation for international immunities. He identifies it as not only superfluous but also incapable of accounting for the full scope of immunities recognized by international law. Delepouille promotes a differentiated approach where the legal status abroad is individually determined by each

¹¹⁷ Droin, “L’extraterritorialité des agents diplomatiques,” 48.

¹¹⁸ Piétri, “Étude critique sur la fiction,” 146.

¹¹⁹ *Ibid.*, 146–7. See also Bernhard Slatin, “De la juridiction sur les agents diplomatiques,” *Journal de droit international privé* 11 (1884): 334.

¹²⁰ Delepouille, “Exposé théorique de la fiction,” 133. Delepouille specifically references the work of Weiss, particularly his book *Traité élémentaire de droit international privé* published in 1886. In this work, Weiss notes that Western nations secured privileges as if their nationals had not left their homeland and remained under their own national jurisdiction. However, Weiss immediately adds that for the French, these concessions stem from the capitulations negotiated repeatedly from 1535 to 1740 (André Weiss, *Traité élémentaire de droit international privé* (Paris: L. Larose et Forcel, 1886), 481). This indicates that Weiss views these capitulations, rather than the legal fiction of extraterritoriality, as the foundation for the privileges enjoyed by Europeans in the Orient. Additionally, in the 1890 edition of his treatise, Weiss describes the immunities of diplomatic agents as “ordinarily explained by a fiction, the fiction of extraterritoriality.” However, he critiques this explanation as “not entirely satisfactory” and merely “a metaphor” (Weiss, *Traité élémentaire* (1890), 134).

¹²¹ Delepouille, “Exposé théorique de la fiction,” 154.

person's role and mission. Specifically, he contends that consuls and nationals from Christian states operating in non-Christian countries should look to the historical framework of capitulations and trade treaties to source their immunities.

Moreover, the emphasis placed by jurists on specific legal agreements as the foundation for the immunities and rights of foreigners in non-Christian countries, while excluding the fiction of extraterritoriality as a basis, can be attributed to the ongoing threat posed by the Supreme Porte to the privileges secured by Westerners in the Ottoman Empire through the Capitulations. Western countries were keen to solidify the privileges they had gained through the Capitulations. The challenge, however, was that the Capitulations, being unilateral concessions, were subject to revocation, a power frequently exercised by the Ottoman Empire, leading to considerable international conflicts.

This was starkly evident during Napoleon's 1798 campaign in Egypt, where the Ottomans detained French nationals, including diplomats, and collectively annulled the privileges of French protégés. This action affected the Dutch as well, leading to the closure of consulates and the loss of consular privileges amidst Franco-Ottoman tensions.¹²² In 1806, the Ottoman Empire initiated a policy shift, stripping many dragomans of their *berats*. A sultanic decree mandated that individuals under the protection of France, Great Britain, Austria, Russia, and Prussia not residing near their consulates return to their assigned posts. Many who failed to comply saw their *berats* withdrawn by the Ottoman government.¹²³ Furthermore, on October 11, 1881, a circular announced the abolition of certain longstanding consular privileges. In response, the Powers collectively asserted in joint notes dated December 25, 1881, and February 25, 1882, that the Sultan could not unilaterally revoke these practices without prior discussion and agreement with the affected Powers.¹²⁴

The rise of numerous international conflicts underscored the necessity for Western legal scholars, mindful of their respective national interests, to establish a firmer basis for their privileges within the Ottoman Empire. Consequently, these jurists endeavored to reinterpret the Capitulations, traditionally seen as unilateral concessions, as bilateral international treaties. A notable figure in this effort was Friedrich Fromholz Martens, a prominent international lawyer and diplomat of Baltic-Russian heritage.¹²⁵ Martens emphasized the significance of the Capitulations, stating that "a thorough investigation of" "the rights of the consuls outlined in [the Capitulations]" is "of not only historical interest but also of current legal significance."¹²⁶ He underscored that these Capitulations formed "the basis for the legal status held

¹²² Boogert, *The Capitulations and the Ottoman Legal System*, 27–8.

¹²³ *Ibid.*, 29.

¹²⁴ Shih Shun Liu, *Extraterritoriality: Its Rise and Its Decline* (New York: AMS Press, 1969), 175. See also Alphonse Rivier, *Principes du droit des gens*, vol. 1 (Paris: A. Rousseau, 1896), 544–5.

¹²⁵ See Andreas T. Müller, "Friedrich F. Martens on 'The Office of Consul and Consular Jurisdiction in the East,'" *The European Journal of International Law* 25 (2014): 886, 891.

¹²⁶ Friedrich F. Martens, *Das Consularwesen und die Consularjurisdiction im Orient* [The Consular System and Consular Jurisdiction in the Orient], trans. Herman von Skerst (Berlin: Weidmann, 1874), 106.

by Westerners after the conquest of Constantinople within the borders of the Ottoman Empire.”¹²⁷

Martens engaged with the contentious debate surrounding the binding nature of the Capitulations. He acknowledged the argument posited by some that these documents were not genuine binding treaties but rather unilateral grants or acts of favor bestowed by Muslim rulers upon Christian states. This view stemmed from the belief that Muslims could not form enduring treaties with their so-called “eternal enemies,”¹²⁸ rendering such documents, which were thought to govern mutual relations, as lacking the status of international treaties. As per this interpretation, the Capitulations defining the privileges granted to Western Christian states in the Ottoman Empire could be revoked at any time by the Ottoman authorities, owing to their supposed non-binding nature. Contrary to this perspective, Martens asserted that the Capitulations must be recognized as bona fide international treaties, with implications and obligations applicable to both involved parties.

In essence, Martens was driven by the imperative need to establish a more robust and enduring legal foundation for Western privileges within the Ottoman Empire. Faced with the constant threat of revocations of the Capitulations, grounded in the argument that they were not treaties but rather unilateral concessions, one viable strategy to safeguard these privileges from unilateral revocation was to reframe the Capitulations as bilateral treaties. This strategic shift aimed to redefine Western privileges as treaty-based entitlements, effectively stripping the Supreme Porte of the authority to unilaterally withdraw these privileges. This compelling necessity, coupled with Martens’ conviction that “fictions,” “in general,” “cannot serve as a basis for law,”¹²⁹ motivated him to embark on a mission to reconceptualize the legal characterization of these privileges. Accordingly, while he rejected the fiction of extraterritoriality as an adequate or legitimate legal foundation, he did not reject the substantive privileges—including immunities—that had often been justified through that fiction. Rather, he sought to secure them on the firmer doctrinal ground of treaty law.

Conclusion

This study has argued that the legal fiction of extraterritoriality cannot be adequately understood as a stable doctrine, a neutral explanatory metaphor, or a straightforward instrument of imperial domination. Rather, it functioned in

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ Martens, *Traité de droit international*, vol. 2, § 13. Martens offers a critical examination of what he identifies as a widespread misconception concerning the juridical basis for exempting diplomatic agents from criminal jurisdiction. He notes that many legal scholars erroneously attribute such immunity to the legal fiction of extraterritoriality. Rejecting this view, Martens contends that legal fictions—such as the notion that a diplomat remains, in law, on the territory of their home state—cannot serve as a legitimate foundation for legal privileges. Instead, he insists that the legal status of diplomatic immunity must derive from established legal practice, codified statutes, and judicial precedent, rather than from abstract or symbolic constructs detached from institutional reality.

the nineteenth century as a volatile juridical site in which competing conceptions of sovereignty, legal authority, and legitimate privilege were tested, contested, and reconfigured. Its significance lies less in the persistence of the fiction itself than in the intensity and direction of the struggles that formed around it. By tracing how the fiction was repeatedly criticized, abandoned, reappropriated, or strategically displaced, this article has shown that extraterritoriality operated as a diagnostic register of deeper tensions within international law.

The interpretive payoff of this approach is threefold. First, by recovering restrictive critiques developed within Europe—particularly those articulated by Belgian and Italian jurists—the article demonstrates that opposition to extraterritoriality was not merely a reaction to imperial excess abroad but was rooted in domestic struggles over sovereignty, secularism, and the constitutional limits of privilege. Here, the fiction was rejected not because it failed overseas, but because it threatened to normalize jurisdictional immunities that echoed clerical and monarchical prerogatives incompatible with the modern nation-state. Seen from this vantage point, extraterritoriality appears not as a doctrine that imperial powers unproblematically exported but as one whose very acceptance abroad was constrained by fears of its repercussions at home. This reorientation unsettles assumptions that European international law internalized imperial privilege without resistance and highlights the extent to which liberal, secular legal transformations within Europe shaped the permissible contours of imperial governance beyond it.

Second, by distinguishing reconstructive critiques from restrictive ones, the article clarifies why the nineteenth century witnessed not the simple decline of extraterritorial privilege but its partial re-foundation. Jurists who rejected the fiction did not necessarily oppose immunity, consular jurisdiction, or Western privilege as such; rather, they sought to secure these practices on grounds that appeared more compatible with positivist legality—bilateral treaties, capitulations reinterpreted as binding agreements, or functional necessity. In this sense, the weakening of the legal fiction did not mark a retreat of imperial power but a shift in its justificatory grammar. The legal foundations of these privileges, including immunity, became narrower, more technical, and more explicitly negotiated, even as their material effects often persisted. The fiction's erosion thus illuminates how international law adapted to criticism not by relinquishing privilege, but by rearticulating it in more defensible forms.

Third, the article shows that these European debates were not confined to metropolitan jurisprudence but circulated transnationally, furnishing non-European actors with conceptual resources to contest Western claims. Japanese and Korean engagements with European critiques of extraterritoriality reveal how arguments forged in intra-European struggles over sovereignty and jurisdiction could be redeployed to challenge unequal treaties and assert legal equality. This circulation complicates linear narratives in which ideas flow unidirectionally from a Western “core” to a non-Western “periphery.” Instead, it reveals a mutually constitutive process in which the instability of European legal concepts enabled their appropriation, reinterpretation, and eventual weaponization against imperial privilege.

Taken together, these findings suggest that the legal fiction of extraterritoriality is best understood not as a doctrinal error corrected by modern law, but as a productive failure—a concept whose inadequacy made visible the limits of territorial sovereignty, the fragility of legal universalism, and the contested nature of international authority in the imperial age. The fiction's near-collapse in the nineteenth century did not settle these questions; rather, it displaced them into new legal forms whose tensions continue to shape international law. By situating extraterritoriality at the intersection of intra-European political conflict and imperial negotiation, this article reframes it as an index of international law's structural instability—one that reveals how legal order is forged not through coherence, but through contestation.

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