Regulating the World:
American Law and International Business

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ABSTRACT

This dissertation examines how U.S. policymakers grappled with the rise of multinational business and came to perceive it as something that needed to be regulated by the United States. The first two chapters situate the rise of international business within a larger debate about international law. They show how disagreement between Elihu Root and Woodrow Wilson impeded hopes for new international institutions to address globalization during the early twentieth century. The third and fourth chapters describe the concerns of U.S. officials with international cartels and German corporations during and after World War II. Bypassing the earlier stalemate between Root and Wilson, policymakers adopted a moderate program of national regulation supplemented by the extraterritorial application of U.S. law to business activities abroad. Extraterritoriality succeeded because it preserved U.S. sovereignty and infringed foreign sovereignty only marginally, sustaining the basic structure of the international system. The final chapter describes how lawyers and businesspeople nevertheless complained that extraterritorial enforcement hurt American competitiveness, limited investment, and upset allies. Though these concerns anticipated the neoliberalism of the late twentieth century, extraterritorial jurisdiction endured. Federal judges assumed responsibility for facilitating international economic integration while guarding national sovereignty, much as they had reconciled national economic integration and state sovereignty within the U.S. federal system during the nineteenth and twentieth centuries. As a result, federal courts today have an important role in harmonizing national regulatory regimes. Overall, by tracing the emergence of extraterritoriality, this dissertation highlights the influence of lawyers and legal thought on U.S. foreign relations during the twentieth century.

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In an interview with Gerald Gunther, Judge Learned Hand's law clerk reminisced about *United States v. Alcoa*, the 1945 case that led me to this dissertation topic. "[O]ne day Gus [Augustus Noble Hand, one of the judges on the panel of the Second Circuit that heard the appeal] came into the chambers, looking amusedly at the tables stacked high with the records and exhibits," the clerk recounted. "His comment: 'Look at that—here we're turning out all those mountains of words—and then the whole thing will be taken up by some fellow doing a PH.D. thesis—and he will burrow through it—and he will turn out a silly thesis—and the products of words coming out of all this will be endless.'"

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INTRODUCTION

In a dramatic early-morning raid in Zurich in May 2015, Swiss authorities arrested officials from FIFA, the governing body of international soccer, and extradited them to the United States to face charges for corruption.[1] "Where does the United States get off charging international soccer officials over a bribe allegedly solicited by a Venezuelan citizen from the founder of a Brazilian company at a tournament in Argentina?" asked Ruth Marcus in an op-ed in the *Washington Post*.[2] In fact, U.S. courts have faced "a growing torrent" of litigation involving transnational issues over the past three decades.[3] This torrent has reopened a century-old debate about the extraterritorial scope of U.S. law.[4]

In the 1909 case *American Banana Co. v. United Fruit Co.*, the Supreme Court held that the reach of U.S. law was presumptively confined to U.S. soil. It therefore refused to apply

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[1] Matt Apuzzo et al., "Arrests Sweep Governing Body of Global Soccer," *New York Times*, May 27, 2015, at A1.

[2] Ruth Marcus, "Does the Prosecution Fit?," *Washington Post*, June 3, 2015, at A21; see also David Post, "Got 'em! FIFA and the Double-edged Jurisdictional Sword," *Volokh Conspiracy*, May 27, 2015, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/27/got-em-fifa-and-the-double-edged-jurisdictional-sword/.

[3] Harold Hongju Koh, *Transnational Litigation in United States Courts* (New York: Thomson Reuters/Foundation Press, 2008), v.

[4] For recent discussions, see Kal Raustiala, *Does the Constitution Follow the Flag?: The Evolution of Territoriality in American Law* (New York: Oxford University Press, USA, 2009); Gary B. Born, "A Reappraisal of the Extraterritorial Reach of U.S. Law," *Law and Policy in International Business* 24 (1992): 1–100; Zachary D. Clopton, "Replacing the Presumption Against Extraterritoriality," *Boston University Law Review* 94 (2014): 1–53; William S. Dodge, "Understanding the Presumption against Extraterritoriality," *Berkeley Journal of International Law* 16 (1998): 85–125; John H. Knox, "A Presumption against Extrajurisdictionality," *American Journal of International Law* 104 (2010): 351-396; Larry Kramer, "Vestiges of Beale: Extraterritorial Application of American Law," *Supreme Court Review* (1991): 179–224; Austen Parrish, "The Effects Test: Extraterritoriality's Fifth Business," *Vanderbilt Law Review* 61 (2008): 1455-1505.

the Sherman Act to the conduct of American corporations operating in Central America. Writing for the court, Justice Oliver Wendell Holmes, Jr., declared "in case of doubt, to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power."[5] Congress, in other words, could expressly regulate foreign conduct (subject to ordinary constitutional limitations), but courts would otherwise presume that legislation applied only within the territorial United States. This presumption against extraterritoriality would limit the reach of U.S. law for the next three decades.

But Judge Learned Hand's 1945 opinion in *United States v. Aluminum Co. of America* (*Alcoa*) ushered in a new era. According to the conventional narrative, Hand abandoned *American Banana's* rigid formalism in favor of an "intended effects test" that extended liability to foreign companies whose foreign business activities nevertheless intentionally affected U.S. imports.[6] Hand's more flexible approach spread to other areas of law,[7] and U.S. law became one of the great exports of the American Century, leading Justice William Brennan, Jr., to comment that "our country's three largest exports are now 'rock music, blue jeans, and United States law.'"[8]

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[5] American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909).

[6] United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945) [hereinafter Alcoa]. See generally Spencer Weber Waller, "The Story of *Alcoa*: The Enduring Questions of Market Power, Conduct, and Remedy in Monopolization Cases," in *Antitrust Stories*, ed. Eleanor M. Fox and Daniel A. Crane (New York: Foundation Press, 2007), 121-43.

[7] *See, e.g.*, Steele v. Bulova Watch Co., 344 U.S. 280, 288 (1952) (applying the Lanham Act extraterritorially); Schoenbaum v. Firstbrook, 405 F.2d 200, 208 (2d. Cir. 1968) (applying securities laws extraterritorially), *rev'd en banc on other grounds*, 405 F.2d 215 (2d Cir. 1968); Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir. 1975) (also applying securities laws extraterritorially).

[8] United States v. Verdugo-Urquidez, 494 U.S. 259, 281 (1990) (Brennan, J., dissenting) (quoting V. Rock Grundman, "The New Imperialism: The Extraterritorial Application of United States Law," *International Lawyer (ABA)* 14 (1980): 257). Antitrust law is the paradigmatic example. Before World War II, antitrust law was unique to the United States. European states in particular lacked the large, varied domestic markets that made competition more viable in the United States, and they saw cartels as a praiseworthy alternative to disruptive market capitalism. In particular, the terrible economic disruptions of World War I encouraged

American Banana and *Alcoa*, then, suggest a dramatic transformation in the relation between the U.S. and foreign legal systems. For Holmes in 1909, the idea that U.S. law would apply beyond the territorial United States was "startling" and "surprising."[9] But for Judge Hand in 1945, the idea that U.S. law applied to conduct abroad was "settled law."[10] This evolution demands explanation. How did Holmes's "startling" proposition become "settled law" over the first half of the twentieth century, and what where its implications for the Cold War and a globalizing international economy?

In fact, the scope of U.S. law is again unsettled today. In a series of decisions over the past twenty-five years, the Rehnquist and Roberts Courts have revived *American Banana*'s presumption against extraterritoriality and have sought to require Congress to provide clearer indications of when statutes are meant to govern conduct abroad.[11] Underlying this revival is a particular understanding of history: that the effects-based jurisdiction of *Alcoa* was an aberration, a departure from a deeper tradition of American law embodied by the presumption against extraterritoriality. As Justice Antonin Scalia observed in *Morrison*, "[U]sing congressional silence as a justification for judge-made rules violates the *traditional* principle that silence means no extraterritorial application."[12]

Observers complain that jettisoning these judge-made rules has upended settled law,[13] yet these critics share Justice Scalia's basic understanding of the historical trajectory of

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Europeans to support cartels as a means of restoring economic stability. Wyatt Wells, *Antitrust and the Formation of the Postwar World* (New York: Columbia University Press, 2002), 4–12, 27–37, 216.

[9] *American Banana*, 213 U.S. at 355.

[10] *Alcoa*, 148 F.2d at 443.

[11] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013); Morrison v. Nat'l Australia Bank Ltd, 561 U.S. 247 (2010); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 173-74 (1993); Smith v. United States, 507 U.S. 197, 203-04 (1993); E.E.O.C. v Arabian Am. Oil Co., 499 U.S. 244 (1991) [hereinafter *Aramco*].

[12] *Morrison*, 561 U.S. at 261 (emphasis added).

[13] "Leading Cases: Federal Statutes and Regulations: Alien Tort Statute—Extraterritoriality," *Harvard Law Review* 127 (2013): 314–17; Christopher A. Whytock, "*Kiobel* Insta-Symposium: After *Kiobel*: Human Rights

these decisions. They accept *Alcoa* as a departure from historical practice.[14] For the critics of a revived presumption against extraterritoriality, however, new historical conditions justify the effects-based approach pioneered by Hand. As Justice Stephen Breyer has written, "The increasingly international nature of so many routine transactions, from car and home rentals to major financial investments, along with instantaneous communications and the increased global flow of individuals—all these new realities give rise to legal questions affecting not just foreigners but Americans as well. . . . We no longer have the luxury, even if we once did, of operating solely within the confines of our own country, as if the only law that mattered were our own."[15]

Globalization, then, provides the most obvious explanation for the transformation in U.S. law from 1909 to 1945. It is nevertheless unsatisfying. As Kal Raustiala asks, "If globalization was the motive force behind the dramatic expansion of extraterritorial jurisdiction, why did the effects theory become entrenched in the 1940s, rather than much

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Litigation in State Courts and Under State Law," *Opinio Juris*, Apr. 18, 2013, http://opiniojuris.org/2013/04/18/kiobel-insta-symposium-after-kiobel-human-rights-litigation-in-state-courts-and-under-state-law/.

[14] While modern scholars bring considerable nuance to this story, they nevertheless follow this basic model. Raustiala, *Does the Constitution Follow the Flag?*, 102, 111; Born, "A Reappraisal of the Extraterritorial Reach of U.S. Law," 29–32 (calling *Alcoa* a "watershed decision"); Kramer, "Vestiges of Beale," 179–80, 191–93 (noting *Alcoa's* "quasi-Supreme Court status"); Joseph Jude Norton, "Extraterritorial Jurisdiction of U.S. Antitrust and Securities Laws," *International and Comparative Law Quarterly* 28 (1979): 579 (describing "a new and different interpretation"); Parrish, "Effects Test," 1470–78 ("Often seen as a tool for expanding American hegemony, the effects test gained widespread currency among U.S. courts in the years following *Alcoa*."); Tonya L. Putnam, "Courts Without Borders: Domestic Sources of U.S. Extraterritoriality in the Regulatory Sphere," *International Organization* 63 (July 2009): 463–64 ("In 1945, a U.S. federal court for the first time applied a U.S. statutory provision to a dispute involving wholly extraterritorial conduct."); Christopher Sprigman, "Fix Prices Globally, Get Sued Locally?: U.S. Jurisdiction over International Cartels," *University of Chicago Law Review* 72 (2005): 267–68; Spencer Weber Waller, "The Internationalization of Antitrust Enforcement," *Boston University Law Review* 77 (1997): 375 ("Beginning with *Alcoa*, the United States policed world markets for anticompetitive conduct that affected its markets sufficiently to support jurisdiction to prescribe under the Sherman Act."); Spencer Weber Waller, "National Laws and International Markets: Strategies of Cooperation and Harmonization in the Enforcement of Competition Law," *Cardozo Law Review* 18 (1996): 1112–13 ("Following Alcoa, the United States aggressively asserted versions of the effects test to break up a number of prominent international cartels . . . .").

[15] Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (New York: Alfred A. Knopf, 2015), 281.

earlier?"[16] Indeed, the interdependence highlighted by Breyer had existed since the nineteenth century. "Over the period from 1870-1945 the world became a both a more familiar and a stranger place," Emily Rosenberg writes. "Fast ships, railroads, telegraph lines, inexpensive publications, and film all reached into hinterlands and erased distance."[17]

Contemporary observes agreed. "The extension and use of railroads, steamships, [and] telegraphs, break down nationalities and bring people geographically remote into close connection commercially and politically," observed the famous British explorer David Livingstone. "They make the world one . . . ."[18] Karl Marx and Friedrich Engels concurred, "The need of a constantly expanding market for its products chases the bourgeoisie over the whole surface of the globe. It must nestle everywhere, settle everywhere, establish connexions everywhere."[19] As historian John Darwin has remarked, the idea that the world was connected had become "a commonplace," "a late-Victorian cliché," over a century ago.[20]

International connectivity, however, did not entail harmony. As technological change brought the world together, it also generated competition and conflict. The major European powers, joined by the United States and Japan, brought an unprecedented percentage of the world's land and populations under their control. Indeed, in 1900 the British empire comprised twelve million square miles of land and roughly a quarter of the world's population. While this new imperialism was never as absolute as observers imagined, it was

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[16] Raustiala, *Does the Constitution Follow the Flag?*, 118.

[17] Emily S. Rosenberg, ed., *A World Connecting, 1870-1945* (Cambridge, MA: The Belknap Press of Harvard University Press, 2012), 3.

[18] David Livingstone, *The Last Journals of David Livingstone, in Central Africa, from 1865 to His Death*, ed. Horace Waller (London: John Murray, 1874), 2:215.

[19] Karl Marx and Frederick Engels, *Manifesto of the Communist Party*, trans. Samuel Moore (Chicago Charles H. Kerr, & Co. 1906), 17.

[20] John Darwin, *After Tamerlane: The Rise and Fall of Global Empires, 1400-2000* (New York: Bloomsbury Press, 2008), 300–01.

made possible by and deepened the great divergence of wealth and power that separated the major European states from the rest of the world. For emerging powers like Japan, the consequences of failing to play the imperial game were manifest as the colonial powers carved up Africa and China.[21]

Indeed, industrialization impelled the European powers to seek access to global markets and raw materials. "The intimate jostling to which Europeans were accustomed on their own crowded continent," Darwin explains, "would now be reproduced on a global scale." Anxious that the world was "filling up," imperial leaders sought to seize opportunities before their rivals.[22] If late-nineteenth-century imperialism was "a set of intermittently integrative processes that shared no single common motor, processes that reflected the vagaries of conjuncture and divergence, of appetite and indifference, of intentionality and inertia," as Tony Ballantyne and Antoinette Burton have argued, it was not without a logic. There was "an incipient, if anxious, *imperial world order*."[23]

In the late nineteenth and early twentieth centuries, policymakers in the United States shared these anxieties and sought opportunities for imperial advantage. They acquired Hawaii in 1893; the Philippines, Puerto Rico, and Guam, after the Spanish-American War in 1898; and the Panama Canal Zone in 1903.[24] These new territories raised challenging legal and political questions. To be sure, the United States was not a newcomer to imperialism in

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[21] Jane Burbank and Frederick Cooper, *Empires in World History: Power and the Politics of Difference* (Princeton, NJ: Princeton University Press, 2010), 287, 321, 324–32, 364; Darwin, *After Tamerlane*, 298–304; Charles S. Maier, "Leviathan 2.0: Inventing Modern Statehood," in *A World Connecting*, 179–87; Tony Ballantyne and Antoinette Burton, "Empires and the Reach of the Global," in *A World Connecting*, 285–95, 301, 348–89, 392–400, 430–31; John Darwin, "Imperialism and the Victorians: The Dynamics of Territorial Expansion," *The English Historical Review* 112 (June 1997): 614–42; Paul Kennedy, *The Rise and Fall of the Great Powers: Economic Change and Military Conflict from 1500-2000*, Vintage Books Edition (New York: Vintage Books, 1989), 224.

[22] Darwin, *After Tamerlane*, 301–02.

[23] Ballantyne and Burton, "Empires and the Reach of the Global," 295, 301.

[24] Ibid., 293; Burbank and Cooper, *Empires in World History*, 321–24.

the 1890s. Americans inherited the idea of empire from the British and refashioned it after independence. Expansion across the North American continent required the subordination and differentiation of native and nonwhite peoples. But legally, Americans operated under an assumption that new territories would become coequal states. Applying this model to newly acquired peoples in the tropics, however, would undermine the model of white Christian nationhood that had animated previous U.S. expansionism.[25]

In 1901, the Supreme Court addressed this issue. In a series of decisions known as the Insular Cases, the Court held that Congress could decide whether or not to "incorporate" these territories. Unincorporated territories could be deannexed by the United States and had no promise of future statehood. This provided a legal rationale for the United States to join its European counterparts in ruling colonies abroad. Rather than incorporating new lands and peoples into the homogenous nation-state contemplated by the Northwest Ordinance of 1787, the United States could subordinate them on a more British model.[26] The Constitution, in other words, did not follow the flag, or as then-Secretary of War Elihu Root quipped, it "follows the flag—but doesn't quite catch up with it."[27] As Jane Burbank and Frederick Cooper have argued, empires "differentiate"—they "maintain distinction and

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[25] Anthony Pagden, "Imperialism, Liberalism & the Quest for Perpetual Peace," *Daedalus* 134 (2005): 54-55; Norbert Kilian, "New Wine in Old Skins? American Definitions of Empire and the Emergence of a New Concept," in *Theories of Empire, 1450-1800*, ed. David Armitage (Aldershot: Ashgate, 1998), 307–24; Robert W. Tucker and David C. Hendrickson, *Empire of Liberty: The Statecraft of Thomas Jefferson* (New York: Oxford University Press, 1990); Eric T. Love, *Race over Empire: Racism and U.S. Imperialism, 1865-1900* (Chapel Hill: The University of North Carolina Press, 2004); Frank Ninkovich, *Global Dawn: The Cultural Foundation of American Internationalism, 1865-1890* (Cambridge, MA: Harvard University Press, 2009), 253–62; Burbank and Cooper, *Empires in World History*, 324.

[26] Christina Duffy Burnett and Burke Marshall, "Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented," in *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution*, ed. Christina Duffy Burnett and Burke Marshall (Durham, NC: Duke University Press, 2001), 4–5, 12; Christina Duffy Burnett, "*Untied* States: American Expansion and Territorial Deannexation," *University of Chicago Law Review* 72 (2005): 797–879; Denis P. Duffey, "The Northwest Ordinance as a Constitutional Document," *Columbia Law Review* 95 (1995): 955–58.

[27] Root quoted in Philip C. Jessup, *Elihu Root* (New York: Dodd, Mead & Company, 1938), 1:348.

hierarchy as they incorporate new people"—whereas nation-states "homogenize"—presupposing that the people incorporated are all equal while excluding everyone else from the polity.[28] The Insular Cases sanctioned this model of empire.

As the Insular Cases worked their way through the courts, however, American enthusiasm for formal colonization waned. To longstanding opposition to incorporating non-whites and non-Christians into the polity, the aftermath of the Spanish-American War also exposed the bloody costs of maintaining empire.[29] As Charles Bright and Michael Geyer explain, "The United States tangled with, but was not carried away by the 'new imperialism.' Rather sovereignty—as the guarantor of security and prosperity—was redefined around integrated territories of production, built on an infrastructure with global reach and capable of projecting force, commodities, and images."[30] While continuing to seek imperial advantage in an interconnecting world, in other words, the United States turned to strategies besides formal colonialism.

Above all, informal economic expansionism offered a means of extending U.S. power while avoiding the costs of colonialism—an ideology that William Appleman Williams labeled "imperial anticolonialism." The 1880s and 1890s had witnessed the rise of large industrial enterprises devoted to mass production. They grew large by extending control forward over distribution and marketing and then backwards into raw materials. Seeking

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[28] Burbank and Cooper, *Empires in World History*, 8; Frederick Cooper, *Colonialism in Question: Theory, Knowledge, History* (Berkeley, CA: University of California Press, 2005), 26–27.

[29] E. Berkeley Tompkins, *Anti-Imperialism in the United States: The Great Debate, 1890-1920* (Philadelphia: University of Pennsylvania Press, 1970), 272–75; Richard E. Welch, Jr., *Response to Imperialism: The United States and the Philippine-American War, 1899-1902* (Chapel Hill: The University of North Carolina Press, 1979), 147–49, 153–59; Daniel B. Schirmer, *Republic or Empire: American Resistance to the Philippine War* (Cambridge, MA: Schenkman Publishing Company, Inc., 1972), 258–59; Paul A. Kramer, *The Blood of Government: Race, Empire, the United States, & the Philippines* (Chapel Hill: The University of North Carolina Press, 2006).

[30] Charles Bright and Michael Geyer, "Where in the World Is America? The History of the United States in the Global Age," in *Rethinking American History in a Global Age*, ed. Thomas Bender (Berkeley: University of California Press, 2002), 80.

more reliable access to raw materials and additional markets for their products, many corporations then extended operations internationally by marketing and then producing products overseas.[31] Both governmental and business leaders sought access to the fabled markets in Asia, which would help to relieve overproduction, a condition which allegedly contributed to the wrenching depression and industrial strife of the 1890s.[32] While national economies remained the "basic building-blocks" of capitalism, the economy became "steadily" more global.[33]

By the early twentieth century, courts faced questions about how laws regulating corporations in the United States affected their operations overseas, particularly after the federal government enacted new legislation like the Sherman Act. As legal scholar Owen Fiss has written, "By 1905 the real question was not whether the Constitution would follow the

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[31] Alfred D. Chandler, Jr., "Technological and Organizational Underpinnings of Modern Industrial Multinational Enterprise: The Dynamics of Competitive Advantage," in *Multinational Enterprise in Historical Perspective*, ed. Alice Teichova et al. (Cambridge: Cambridge University Press, 1986), 31–36; Alice Teichova, "Multinationals in Perspective," in ibid., 366.

[32] On the open door and economic expansionism motivated by desire for access to Asia and fears of overproduction, see generally William Appleman Williams, *The Tragedy of American Diplomacy*, 50th Anniversary ed. (New York: W. W. Norton & Company, 2009); Walter LaFeber, *The New Empire: An Interpretation of American Expansion, 1860-1898*, 35th Anniversary ed. (Ithaca, NY: Cornell University Press, 1998); Emily S. Rosenberg, *Spreading the American Dream: American Economic and Cultural Expansion, 1890-1945* (New York: Hill and Wang, 1982); Howard B Schonberger, *Transportation to the Seaboard: The "Communication Revolution" and American Foreign Policy, 1860-1900* (Westport, CT: Greenwood Publishing Corporation, 1971); Thomas J. McCormick, *China Market: America's Quest for Informal Empire, 1893-1901* (Chicago: Quadrangle Books, 1967); Jerry Israel, *Progressivism and the Open Door: America and China, 1905-1921* (Pittsburgh: University of Pittsburgh Press, 1971); Carl Parrini, "Charles A. Conant, Economic Crises and Foreign Policy, 1896-1903," in *Behind the Throne: Servants of Power to Imperial Presidents, 1898-1968*, ed. Thomas J. McCormick and Walter LaFeber (Madison: The University of Wisconsin Press, 1993), 35–66; Carl P. Parrini and Martin J. Sklar, "New Thinking about the Market, 1896-1904: Some American Economists on Investment and the Theory of Surplus Capital," *The Journal of Economic History* 43 (Sept. 1983): 559–78. For a critique of this literature, see William H. Becker, "1899-1920: America Adjusts to World Power," in *Economics and World Power: An Assessment of American Diplomacy Since 1789*, ed. William H. Becker and Samuel F. Wells, Jr. (New York: Columbia University Press, 1984), 173–223; Paul S. Holbo, "Economics, Emotion, and Expansion: An Emerging Foreign Policy," in *The Gilded Age*, ed. H. Wayne Morgan, rev. and enlarged ed. (Syracuse, NY: Syracuse University Press, 1970). And for a recent challenge to the open door literature making the case for an "imperialism of economic nationalism" rather than an "imperialism of free trade," see Marc-William Palen, "The Imperialism of Economic Nationalism, 1890–1913," *Diplomatic History* 39 (2015): 157-85.

[33] See E. J. Hobsbawm, *The Age of Empire, 1875-1914* (New York: Pantheon Books, 1987), 40–41.

flag, but whether it would follow the United Fruit Company."[34] In answering this question, government officials, lawyers, businesspeople, and judges sought to promote international economic integration while preserving national sovereignty. They therefore regarded corporations both as instruments of U.S. power and influence and as impediments that might come into conflict with foreign states and undermine strategic goals.

Subjects Without a Sovereign: Federalism as a Pattern for Empire

For a model of how to reconcile these competing goals, they did not have to look far. Promoting national economic integration while preserving the sovereignty of the several states was one of the defining issues of U.S. constitutionalism.[35] Over the course of the nineteenth century, American statesmen, judges, and lawyers developed a sophisticated system of "dual federalism" to reconcile the competing goals of sovereignty and integration. Today, dual federalism has acquired a negative connotation, and scholars use the term to mean radically different things.[36] Thus, it is necessary to explain clearly federalism's basic features in the domestic United States before outlining its implications for regulating international business. These features would influence how policymakers structured the global economy.

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[34] Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888-1910*, vol. 8 of *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States* (New York: Macmillan Publishing Company, 1993), 252. "Everyone knew the answer to that question," Fiss adds. "Fiss's comment," writes Brooks Thomas, "suggests that in order to understand the forces of United States imperialism at this time, we need to look not only at the *Insular Cases* but also at legal decisions making way for the rise of what Martin Sklar has called 'corporate liberalism.'" Brook Thomas, "A Constitution Led by the Flag: The *Insular Cases* and the Metaphor of Incorporation," in *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution*, ed. Christina Duffy Burnett and Burke Marshall (Durham, NC: Duke University Press, 2001), 96.

[35] On the "symbiotic" relationship between nationalism and internationalism, see generally Glenda Sluga, *Internationalism in the Age of Nationalism* (Philadelphia: University of Pennsylvania Press, 2013).

[36] See Ernest A. Young, "The Puzzling Persistence of Dual Federalism," in *Federalism and Subsidiarity*, ed. James E. Fleming and Jacob T. Levy (New York: New York University Press, 2014), 34–35.

The theory of federalism that reached its apex during the late nineteenth century had its origins in the law and politics of the antebellum era.[37] Jacksonians like Roger B. Taney sought to encourage the creation of a national market while preserving the sovereignty of the states and their power to exclude hated corporations like the Bank of the United States. In a series of decisions in the 1830s and 1840s, the Taney Court developed a jurisprudence that balanced these objectives.

In *Bank of Augusta v. Earle*, the Bank of Augusta, a corporation chartered in Georgia, brought an action on a bill of exchange against Joseph B. Earle, a citizen of Alabama. The case hinged on the rights of corporations under the U.S. Constitution. In *Dartmouth College v. Woodward*, Chief Justice John Marshall had maintained that a corporation was "an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it."[38] According to Earle, an artificial entity existing only in Georgia law had no right to conduct business in Alabama, and thus he was not liable for the money he owed.

By contrast, the bank urged the Supreme Court treat corporations as citizens of the states in which their shareholders lived. Since Alabama citizens had a right to purchase bills of exchange in Alabama, the privileges and immunities clause guaranteed that citizens of other states could do so, too. The bank urged the Supreme Court to extend this right to

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[37] The account that follows sets forth the brilliant analysis of nineteenth-century caselaw developed but never published by Charles McCurdy. Edward S. Corwin also captures many of its essential elements. See Edward S. Corwin, "The Passing of Dual Federalism," *Virginia Law Review* 36 (1950): 1–24.

[38] Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 636 (1819).

corporations. But giving corporations the benefit of the privileges and immunities clause would deprive the states of sovereignty to exclude out-of-state corporations.[39]

Taney split the difference between these two approaches. A corporation, he agreed, "exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the co[r]poration can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."[40] But this did not mean that corporations could only conduct business in the states that had chartered them, a result which would have had a deleterious effect on interstate commerce. Instead, Taney presumed that out-of-state corporations were welcome in other states:

> But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognised in other places; and its residence in one state creates no insuperable objection to its power of contracting in another. [W]e can perceive no sufficient reason for excluding them, when they are not contrary to the known policy of the state, or injurious to its interests. . . . It is but the usual comity of recognising the law of another state.[41]

Absent "the known policy of a state" indicating otherwise, corporations chartered in one state were welcome in another state. After examining Alabama's policy towards out-of-state corporations, Taney found no law restricting them. A private citizen, not the state itself, was objecting to the Bank of Augusta's presence in Alabama. The presumption that the Bank of Augusta was welcome to make contracts in Alabama therefore held.[42] *Bank of Augusta* reconciled the sovereignty of the states over their own economies with the goal of advancing the creation of a national market in the United States.

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[39] Bank of Augusta v. Earle, 38 U.S. 519, 586–87 (1839) (citing Bank of the United States v. Deveaux, 9 U.S. 61 (1809)).

[40] Bank of Augusta v. Earle, 38 U.S. at 588 (1839).

[41] *Id.* at 588–590.

[42] *Id.* at 596–97.

Three years later, the Supreme Court made another important contribution toward balancing state sovereignty and national economic integration. In *Swift v. Tyson*, the Supreme Court faced a question of whether a preexisting debt was valid consideration for a negotiable instrument. The case was in federal court because of the parties' diversity of citizenship, and Section 34 of the Judiciary Act of 1789 required federal courts to apply "the laws of the several states" to decide diversity cases. The Supreme Court had to determine what this provision meant before it considered the substantive question about consideration. New York had passed no legislation that addressed this question, but its courts had held that a preexisting debt was not valid consideration. If the laws of the several states included the decisions of state courts interpreting the common law, federal courts would be bound to apply those decisions. In this case, the Supreme Court would have to accept the rule of New York courts that preexisting debts were not valid consideration.

Writing for the Court, Justice Joseph Story determined that the language in the Judiciary Act referred only to state statutes enacted by the legislature and to uniquely local law, not to the decisions of state judges interpreting legal questions of a more general nature. When a state legislature had not expressly addressed a question by legislation, federal judges were free to "express [their] own opinion" on "the general principles and doctrines of commercial jurisprudence." Surmising that a rule treating preexisting debts as valid consideration would advance "the benefit and convenience of the commercial world," Story ignored the conclusion of the New York courts and adopted this contrary rule.[43]

Two years later, the Taney Court returned to the question of corporate citizenship that had come up in *Bank of Augusta*. In that case, Taney had decided that corporations

[43] Swift v. Tyson, 41 U.S. 1, 18–20 (1842).

would not be treated as citizens of the states in which their shareholders lived for purposes of the privileges and immunities clause, a decision that had preserved the freedom of states to restrict or even exclude out-of-state corporations if they chose to do so. But corporate citizenship had other implications as well. In particular, diversity jurisdiction—that is the power of federal courts to hear cases between citizens of different states—required complete diversity of citizenship. No party that brought the lawsuit could share state citizenship with a party against whom the lawsuit was brought.[44] In *Bank of the United States v. Deveaux*, the Supreme Court decided that for the purposes of suing and being sued, federal courts would look to the citizenship of the corporation's shareholders.[45]

This made sense in a world of closely held corporations in which shareholders all resided in the same state. But in the expanding U.S. economy, shareholders were likely to come from a range of states. If any one of the plaintiff's shareholders resided in the same state as the defendant's shareholders, complete diversity would be destroyed and the federal courts would not be able to exercise diversity jurisdiction to hear the case. The power of federal judges to develop a federal common law for "the benefit and convenience of the commercial world" would mean little if corporations lacked a realistic ability to bring their cases to federal court.

As a result, the U.S. Supreme Court reversed itself for the first time (and overturned an opinion written by John Marshall, no less). In *Louisville, Cincinnati & Charleston Railroad Company v. Letson*, the Court held that for purposes of diversity jurisdiction a corporation was a citizen of the state that chartered it. This ensured that corporations could more easily sue

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[44] Strawbridge v. Curtiss, 7 U.S. 267 (1806).
[45] Bank of the United States v. Deveaux, 9 U.S. 61, 91–92 (1809).

and be sued in federal court and better allowed them to take advantage of the general commercial law recognized by Justice Story's opinion in *Swift v. Tyson*.[46]

Bank of Augusta v. Earle, *Swift v. Tyson*, and *Louisville, Cincinnati & Charleston Railroad Company v. Letson* worked together to balance the goals of national economic integration and state sovereignty. They preserved the freedom of the states to legislate to limit out-of-state corporations. But in the absence of such legislation, the federal courts would presume that out-of-state corporations were welcome to do business like any other citizen. When controversies arose, moreover, federal judges would employ their own interpretation of the common law, furthering a national rather than a parochial outlook.

The constitutional scholar Edward S. Corwin identified the key features of this system and labeled them "dual federalism": the federal government was one of enumerated powers, the federal and state governments were each sovereign and equal within their respective spheres, and their relation was "one of tension rather than collaboration." Nonetheless, the Taney Court mitigated the "anarchic implications" of this tension by establishing a "final judge" of the extent of each sovereign's power. "This was the function of the Supreme Court of the United States," Corwin explained, "which for this purpose was regarded by the Constitution as standing outside of and over both the National Government and the States, and vested with authority to apportion impartially to each center its proper powers in accordance with the Constitution's intention."[47]

After the Civil War, dual federalism's nationalizing impulse began to outweigh its regard for state sovereignty. Beginning with *Welton v. Missouri* in 1875, the Supreme Court began to use the commerce clause to overcome state and local restrictions on out-of-state

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[46] Louisville, Cincinnati & Charleston R.R. Co. v. Letson, 43 U.S. 497, 558–59 (1844).
[47] Corwin, "Passing of Dual Federalism," 4, 15.

corporations.[48] As railroads and other technological transformations made a truly national market possible, *Welton* launched a series of decisions striking down local taxes or police power regulations that forced foreign corporations to compete on unequal terms. As Charles W. McCurdy explains, "[T]he post-Civil War Court eagerly embraced the opportunity to deduce from the commerce clause a new and fundamentally important constitutional right: the right of foreign corporations, even without express congressional license, to engage in interstate transactions on terms of equality with local firms."[49] The Supreme Court recognized other corporate rights as well. In *Santa Clara v. Southern Pacific Railroad Company*, for instance, it determined that the equal protection process clause of the Fourteenth Amendment protected corporate as well as natural persons.[50]

Nonetheless, the basic Jacksonian framework of dual federalism endured, and the Supreme Court continued to defend within limits the power of the several states over corporations. This power rested on the Supreme Court's distinction between commerce and production. As McCurdy has pointed out, states could not prohibit foreign corporations from selling their products made elsewhere (commerce), but they could prohibit them establishing factories (production). States could prohibit corporations from owning property for production or establishing a corporate office, and when corporations did own property within a state, they were required to register and became subject to taxation and regulation.

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[48] Welton v. Missouri, 91 U.S. 275 (1875); Charles W. McCurdy, "The *Knight* Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903," *Business History Review* 53 (Autumn 1979): 309–11.

[49] McCurdy, "*Knight* Sugar Decision, " 314.

[50] Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886). ("The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a state to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."). As Morton Horwitz has argued, this was not the sweeping, pro-business break with tradition that later commentators perceived it to be. Morton J. Horwitz, "*Santa Clara* Revisited: The Development of Corporate Theory," *West Virginia Law Review* 88 (1985): 173–224.

As McCurdy writes, "[T]he Court protected the mobility of foreign goods but not the mobility of foreign corporations." Whereas the federal government had exclusive authority to regulate commerce, corporate law was left to the several states.[51]

Even with the rise of the great trusts in the late nineteenth century, a majority of the Supreme Court continued to believe that this framework was sufficient to manage a changing economy. Although the enactment of the Interstate Commerce Act in 1887 and the Sherman Act in 1890 augured a greater federal role in regulating the economy, the Supreme Court interpreted these new statutes using the framework of dual federalism and ensured that the federal and state governments stayed within their proper spheres of authority.

This framework explains the Supreme Court's otherwise puzzling decision in *United States v. E. C. Knight Company*, the government's first attempt to enforce the Sherman Act. In early 1892, the American Sugar Refining Company sought to purchase the stock of four refineries in Pennsylvania. The company already controlled close to two-thirds of the sugar market, and the deal would have brought its market share to 98 percent. Facing public pressure to take action against the giant "New Jersey corporations," Attorney General Richard Olney set aside his misgivings and brought suit to block the deal. As Olney expected, the government lost the case.[52]

Chief Justice Melville W. Fuller's opinion for the court rested on the distinction between manufacture/production and commerce. Though Congress had authority to regulate commerce between states, manufacture was an intrastate activity that remained the responsibility of the states. Under dual federalism, each level of government was sovereign

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[51] McCurdy, "*Knight* Sugar Decision," 314–316.
[52] Ibid., 328; Fiss, *Troubled Beginnings*, 111–12.

within its sphere of authority. Congress's power over commerce worked "to the exclusion of the states." Accepting Congress's authority over intrastate production would destroy the states' autonomy to set policy for their own corporations, the autonomy that Taney had been so careful to preserve in *Bank of Augusta*. Boundaries would be impossible to maintain, and Congress's authority would extend over "every branch of human industry." Manufacturing did affect interstate commerce, but only indirectly. Congress's power to regulate interstate commerce required a direct relation to commerce.[53]

Because the companies acquired by the American Sugar Refining Company were chartered in Pennsylvania, however, a straightforward remedy lay at hand. The state of Pennsylvania could bring a quo warranto action against those companies for exceeding their powers under their charters, which they had done by purchasing the stock of out-of-state corporations. As McCurdy puts it, it was "a simple problem in corporation law."[54] But, federalism complicated this simple problem. New Jersey had loosened its own corporation laws, inducing companies to incorporate there. Knowing that they could flee to more welcoming environments, no single state wanted to risk taking action against its own companies.[55] In other words, collective action problems made states unwilling to use their authority over corporations. The state autonomy that Taney had been so careful to preserve was proving increasingly meaningless in practice.

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[53] United States v. E. C. Knight Co., 156 U.S. 1, 12-13, 14–17 (1895) (quoting Kidd v. Pearson, 128 U.S. 1, 21 (1888)); see Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998), 142.

[54] McCurdy, "*Knight* Sugar Decision," 334–35.

[55] Ibid., 336–342; see also Herbert Hovenkamp, *Enterprise and American Law, 1836-1937* (Cambridge, MA: Harvard University Press, 1991), 241–267; James May, "Antitrust Practice and Procedure In the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918," *University of Pennsylvania Law Review* 135 (1987): 495–593.

Calls therefore arose to bring production within Congress's power to regulate commerce, even if that change sundered the symmetries of dual federalism and destroyed the power of states to regulate or exclude foreign corporations.[56] As President Theodore Roosevelt declared in his 1905 Message to Congress,

> [T]here at present exists a very unfortunate condition of things, under which these great corporations doing an interstate business occupy the position of subjects without a sovereign, neither any State government nor the National Government having effective control over them. Our steady aim should be by legislation, cautiously and carefully undertaken, but resolutely persevered in, to assert the sovereignty of the National Government by affirmative action.[57]

Dual federalism, Roosevelt was suggesting, no longer allowed for "effective control" of the economy.

Outline and Themes

For the next half-century, the U.S. Supreme Court struggled to maintain the boundary between the federal and state governments as doctrinal exceptions threatened to destroy "the pristine, symmetrical rules of dual federalism" by "transform[ing] the local into the national." The distinction between direct and indirect effects on commerce weakened, and though it did not disappear, it was becoming less "rigidly categorical."[58] At the same time, multinational enterprise became an increasing important economic reality.[59] And just as it was unclear whose law—that of the federal government or that of several states—applied to corporations within the United States, it was also unclear what law applied to corporations

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[56] McCurdy, "Knight Sugar Decision," 335–336.

[57] Theodore Roosevelt, Fifth Annual Message, Dec. 5, 1905, in Theodore Roosevelt, *The Works of Theodore Roosevelt*, vol. 15, *State Papers as Governor and President, 1899-1909*, ed. Hermann Hagedorn, National ed., (New York: Charles Scribner's Sons, 1926), 273.

[58] Cushman, *Rethinking the New Deal Court*, 152–53, 169.

[59] Mira Wilkins, *The Emergence of Multinational Enterprise: American Business Abroad from the Colonial Era to 1914* (Cambridge, MA: Harvard University Press, 1970), 207, 214.

operating across national jurisdictions. To some extent, historical actors were conscious of these parallels and explicitly pointed to domestic models, both as sources of ideas and as ways to justify controversial policies. More often, the ideological assumptions that shaped how they thought about domestic legal problems also influenced how they viewed analogous international ones. Either way, lawyers, judges, and policymakers had to balance sovereignty and economic integration internationally just as they did domestically.

Chapter 1 examines Secretary of State Elihu Root's approach to these issues in Latin America. A leading corporate lawyer and proponent of international law, Root became secretary of state in 1905, as the initial enthusiasm for formal colonialism diminished. Root envisioned international law as an alternative to imperial competition. First, Root emphasized national sovereignty as the basic principle of the international order. Sovereignty would protect the United States' less-developed neighbors in Latin America from their European creditors, limiting European incursions in the Western Hemisphere and vindicating the Monroe Doctrine. Second, Root also presupposed a complementary economic relationship between the United States and Latin America that would transcend sovereign boundaries. While states were sovereign over their own territory, private actors—businesspeople and corporations—would forge ever-deepening relationships. Finally, Root envisioned an international judiciary to perform the function that the federal courts performed under dual federalism: keeping sovereigns within their proper spheres of authority.

Root's vision, in other words, rested on the same jurisprudential foundations as dual federalism. He presupposed a distinction between law and politics and assumed that a formalist international judiciary could delineate the boundaries between the United States

and other nations. Because he perceived economic complementarity between the U.S. and foreign economies, he also expected that Latin Americans would welcome powerful U.S. corporations. Sovereignty would preserve the geopolitical status quo and block European colonialism, but natural economic complementarity would open Latin American markets to U.S. goods.

American Banana, decided shortly after Root stepped down as secretary of state, accorded with Root's program. The presumption against extraterritoriality and the act of state doctrine announced by Holmes combined to limit Congress' and the courts' involvement in these questions. U.S. law would apply only within the territorial United States (unless Congress expressly stipulated otherwise). And U.S. courts would not adjudicate claims involving foreign sovereigns. This ceded the field to the executive branch. If disputes did arise on account of U.S. corporations, they would be diplomatic disputes to be handled by the State Department and foreign governments—and, if Root's program of international law took hold, by an international judiciary—rather than questions for national courts applying national legislation.

As Chapter 2 explains, however, the First World War posed a major challenge to Root's program. Root assumed that international conflict arose from legal ambiguities. Wars occurred because it was unclear when one nation's sovereignty began and another's ended. But as Root himself acknowledged, World War I erupted despite the belligerents' clear international legal obligations. A judiciary developing and applying principles of international law was inadequate for this world in which states blatantly disregarded their obligations. Rather than abandoning their ideas, however, Root's supporters supplemented them with economic and military sanctions for states that violated their legal obligations. They

remained committed to international courts and international law as the bulwarks of international order.

As Chapter 2 also argues, however, President Woodrow Wilson rejected these ideas. He had a very different vision of law, shaped by the sociological jurists' critique of the legal formalism underlying dual federalism (and Root's conception of international law). Sociological jurists rejected the idea of settling disputes judicially through courts, which they believed favored capital over labor. They instead wanted legislatures to craft solutions using economics, sociology, and other forms of expertise. Wilson extended their ideas to international affairs. He believed that the formalists failed to understand that modern problems were transnational in scope and could not be adequately addressed by international courts delineating boundaries. Modern problems were political rather than legal and needed to be addressed flexibly by the international community, not by a few judges ruling by analogy from a set of legal principles. Wilson therefore turned to a global parliament: the League of Nations. Through the League, the international community, drawing on expertise, could flexibly craft solutions to modern problems that spilled beyond national borders.

Thus, by 1919, a stalemate emerged: Root's formalist scheme of international law preserved national sovereignty but no longer seemed adequate for an interconnected world. Wilson recognized that private actors, as much as states, generated instability and war, and because private actors transcended national boundaries, he believed that the international community needed to address these issues collectively. But his response sacrificed national sovereignty to a global parliament and could not garner support in the U.S. Congress.

Chapter 3 shows how extraterritoriality emerged as a way around this impasse. Influenced by Social Democratic émigrés from Nazi Germany, New Deal lawyers in the

Antitrust Division of the U.S. Justice Department came to perceive international cartels and Nazi corporations as a source of Hitler's power. Arguing that cartels enabled Germany to amass the resources needed to wage aggressive war while limiting free world production, these lawyers cast them as a fundamental threat to U.S. security, a threat which ultimately endangered the United States' political economy of democratic capitalism at home. As antimonopoly emerged as a key component of Roosevelt's New Deal coalition, decartelization became a major element of Allied postwar policy. Antimonopolists planned to reform the German and Japanese economies to eradicate concentrated economic power and to create a new International Trade Organization that would promote free trade (public economic restrictions) and eliminate cartels (private economic restrictions). In essence, New Deal antimonopolists resurrected Wilson's thinking about collective security, but limited the purview of a new international organization to certain economic issues.

Nonetheless, Congress concluded that the International Trade Organization entailed too radical a surrender of U.S. sovereignty. The extraterritorial application of U.S. law to foreign conduct was a less intrusive alternative. By applying statutes like the Sherman Act extraterritorially to regulate foreign companies and cartels, the United States could confront the realities of an interconnected world without sacrificing its sovereignty in any significant way. Judge Learned Hand, then, was not making such a radical break in the *Alcoa* case because the intended effects test accorded with traditional understandings of sovereignty rooted in territorial sovereignty. Indeed, effects-based jurisdiction itself originated in dual federalism.

As victory in World War II gave way to the Cold War, moreover, U.S. policymakers came to perceive that foreign sovereignty mattered, too. By looking at the origins of the

anticartel provisions of the treaty establishing the European Coal and Steel Community, Chapter 4 shows how the preoccupation with U.S. sovereignty that blocked the International Trade Organization extended to foreign states as well. As mentioned, the United States planned to reform the German economy to eliminate cartels and powerful companies like IG Farben. But in 1950, five years after the war had ended, these plans remained unfulfilled. The United States hoped that the German economy would fuel a wider European recovery, making officials hesitant to impose disruptive reforms, and jurisdictional divisions among the various occupation zones also impeded efforts at reform. The outbreak of war in Korea made the choices even starker. The United States expected West Germany to contribute to the defense of Western Europe against potential Soviet aggression. But if Germany were to bear the burdens of defense, it demanded equal treatment as a sovereign state. This, in turn, alarmed the French, who feared the revival of German power.

Law offered a solution. Seeking to allay French concerns, Schuman Plan architect Jean Monnet incorporated U.S.-style antitrust provisions into the proposed treaty. Monnet assumed that France could use the anticartel powers of the supranational high authority as a further check on Germany. Because antitrust law rested on open-ended statutes whose meaning had to be worked out on a case-by-case basis, each side could point to its gains while leaving difficult issues about the shape of the German economy unresolved.

Thus, by the 1950s, extraterritoriality—applying U.S. law beyond the territorial United States to regulate the activities of U.S. and sometimes even foreign corporations—had emerged as the antimonopolists' main achievement. More ambitious plans for an International Trade Organization or for a radical restructuring of the German economy had failed. Chapter 5 shows how lawyers and businesspeople in the 1950s argued that even

extraterritoriality went too far and tried to roll back the extraterritorial enforcement of U.S. law. On the one hand, they failed. The Eisenhower administration was unwilling to seek legislation or provide exemptions that would have reversed *Alcoa.* On the other hand, conservatives turned the World War II discourse about competition on its head. During the war, New Deal lawyers argued that combating monopoly furthered U.S. security. During the 1950s, conservatives contended that combating cartels impeded the United States' ability to invest abroad, endangering U.S. security. The United States was imposing restrictions on its companies that other countries were not imposing on theirs. While extraterritoriality itself endured and continued to shape U.S. law, this conservative backlash defeated the antimonopoly coalition that emerged during World War II. Dismantling public barriers to trade (tariffs) became a priority. Challenging private barriers to trade (cartels) came to be seen as a nuisance that interfered with this goal of trade liberalization.

This dissertation is thus organized into two main parts, which center on the two major antitrust cases. The first two chapters situate *American Banana* within a broader framework of thinking about law (classical legal thought), which was increasingly challenged by reformers who found it inadequate for dealing with the problems of industrial capitalism (sociological jurists). The second part focuses on *Alcoa* and traces how U.S. courts began to apply U.S. law to business activities overseas, even as policymakers and legislators rejected a more sweeping reform of the international economy.

As the United States grappled with the rise of international business in the first half of the twentieth century, three major themes emerge. The first is the persistence of national sovereignty as a way of organizing international affairs. To be sure, *Alcoa* marked an important break. The legal developments of the Great Depression and World War II made

possible the world described by Justice Brennan, in which companies around the globe had to consider the consequences of U.S. law. But this change depended upon continuity. Extraterritoriality succeeded where other alternatives—the International Trade Organization, radically reforming West Germany—failed because it upheld national sovereignty as the defining feature of the international system. Just as an effects test helped the U.S. Supreme Court to preserve a role for the states, effects-based jurisdiction allowed U.S. courts to regulate some types of overseas conduct while largely leaving the sovereignty of the United States and other nations undisturbed.

Second, my research highlights the importance of law and legal thought for understanding the history of U.S. foreign relations. In a series of lectures in the early 1950s, the diplomat George Kennan famously decried the legalism of U.S. foreign policy. From the arbitration treaties of the late nineteenth century through the League of Nations to the United Nations, Kennan argued that a "legalistic-moralistic approach . . . runs like a red skein through our foreign policy."[60] Yet, as historian Mary Dudziak has recently pointed out, scholars have tended to dismiss law's significance as a causal force in U.S. foreign relations. Perhaps because of the success of Kennan's realist critique, diplomatic historians ignored law and focused instead on more "fundamental determinants" like power and interest.[61] The tremendous rise of legal history over the past few decades, and the growing interest of historians in empire and the mechanisms that sustain it, however, have again brought law to the fore. The principal architects of U.S. foreign policy were lawyers, and legal thought

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[60] George F. Kennan, *American Diplomacy, 1900-1950*, (Chicago: The University of Chicago Press, 1951), 95; see also George F. Kennan, "Lectures on Foreign Policy," *Illinois Law Review* 45 (1951): 736–38.

[61] Mary L. Dudziak, "Legal History as Foreign Relations History," in *Explaining the History of American Foreign Relations*, ed. Michael J. Hogan et al., 3rd ed. (New York: Cambridge University Press, 2016), 135–36, 143.

shaped the way they perceived the U.S. role in the world.[62] In other words, I contend that Kennan was right. U.S. foreign policy in the early twentieth century was legalistic. But Kennan's concept of legalism conflated diverse and competing legal influences and was mistakenly linked to moralism.

Finally, by midcentury economics joined law as a way of understanding and addressing global challenges. Law continued to matter, and the failure of more radical reforms meant that federal courts and federal judges had to perform functions that reformers would have shifted to international institutions. But as American lawyers and policymakers grappled with the problem of how to rebuild the international economy after World War II, law no longer exerted as evident an influence in the executive branch as it did a few decades earlier, and economics moved in to fill the void. Indeed, by the 1950s, as trade liberalization began to have an effect, policymakers became increasingly sensitive to the competitive pressures of the global economy. Like the several states in the late nineteenth century, which were reluctant to take action against the trusts because corporations might relocate elsewhere, government officials worried that regulation put U.S. companies at a disadvantage. By looking at international antitrust policy, this dissertation shows how "the old days" gave way to the competitive global economy of the present.[63]

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[62] Jonathan Zasloff, "Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era," *New York University Law Review* 78 (2003): 239–373.

[63] Samuel Moyn, "Stewart Mini-Symposium: The Ambitious Past of Corporate Regulation," *Opinio Juris*, Nov. 24, 2014, http://opiniojuris.org/2014/11/24/stewart-mini-symposium-ambitious-past-corporate-regulation/.

CHAPTER ONE

Internationalizing Federalism:

Elihu Root and *American Banana*

Boundaries permeated the nineteenth century world. According to historian Charles S. Maier, "No culture obsessed more about borders than the one taking shape by the mid-nineteenth century, insisting on national, racial, gender, and class lines. The modern world was gripped by the episteme of separation."[1] Boundaries were particularly important for law at the turn of the century, the peak of the classical legal era. "Perhaps the most fundamental architectural idea of legal orthodoxy was embodied in its faith in the coherence and integrity of bright-line boundaries."[2] In the United States, boundaries distinguished the powers of the federal government from those of the states, set one state apart from another, and separated the powers of the legislature from the rights of individual citizens and property owners. Both

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[1] Charles S. Maier, "Consigning the Twentieth Century to History: Alternative Narratives for the Modern Era," *American Historical Review* 105 (June 2000): 819; ibid., 823; ibid., 809.

[2] Morton J Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), 199.

As Duncan Kennedy points out, developments in the United States reflected wider transnational developments. German thinkers drove rise of classical legal thought in the nineteenth century and shaped the American preoccupation with boundaries. The unique American contribution was to extend the classical paradigm to public law. Duncan Kennedy, "Three Globalizations of Law and Legal Thought: 1850-2000," in *The New Law and Economic Development: A Critical Appraisal*, ed. David M. Trubek and Alvaro Santos (New York: Cambridge University Press, 2006), 25 n.6; Thomas C. Grey, "Langdell's Orthodoxy," *University of Pittsburgh Law Review* 45 (1984 1983): 5n.17; Anglo-American thinkers influenced by Adam Smith were another important influence. Herbert J. Hovenkamp, *Inventing the Classical Constitution*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, Aug. 25, 2014), 4, http://papers.ssrn.com/abstract=2486612.

governmental and nongovernmental actors enjoyed full freedom as long as they stayed within their proper spheres.[3]

Policing these boundaries, meanwhile, was the task of the judiciary, whose "function was to prevent the various kinds of usurpation" "between neighbors, between sovereigns, or between citizen and legislature."[4] As legal scholar G. Edward White has written, "Sometimes the cases involved separation of powers issues, sometimes issues of federalism, but the search in both cases was for the appropriate sphere of constitutional autonomy. Boundary pricking . . . was the essence of guardian judicial review in constitutional law."[5] Judges were well suited to this task of boundary pricking because law was "an objective, quasi-scientific" discipline whose general principles ensured that judges themselves did not become usurpers. The classical legal period was therefore an era of legal formalism, in which judges worked by analogy and deduction from general principles and considered which principles best applied to a given set of facts.[6]

U.S. foreign policy was in the hands of lawyers steeped in this way of thinking about law. Elihu Root, the most important of these lawyer-statesmen, had been a leading New York corporate lawyer when President William McKinley called on him to serve as secretary of war in the wake of the Spanish-American War. Root's unfamiliarity with the military made him a surprising choice, but Root recollected that McKinley sought his skills as a lawyer. "[McKinley] has got to have a lawyer to direct the government of these Spanish islands," the

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[3] Duncan Kennedy, "Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940," *Research in Law and Sociology* 3 (1980): 7–8; Horwitz, *Transformation of American Law, 1870-1960*, 17–19; Thomas C. Grey, "Langdell's Orthodoxy," 5.

[4] Duncan Kennedy, "Toward an Historical Understanding of Legal Consciousness," 7–8.

[5] G. Edward White, *The Constitution and the New Deal* (Cambridge, MA: Harvard University Press, 2000), 36.

[6] Duncan Kennedy, "Toward an Historical Understanding of Legal Consciousness," 7–8; Horwitz, *Transformation of American Law, 1870-1960*, 16–20.

president's representative had said, "and you are the lawyer he wants."[7] After Theodore Roosevelt's own election as president and John Hay's death, Root became secretary of state in 1905.

For Root, the legal formalism that ordered relations among the federal government and the several states provided a model for organizing international relations between the United States and foreign nations. Root believed that national governments should manage their own internal affairs. But he also expected that corporations would transcend these formal boundaries and promote economic integration. Extending the principles of federalism to regulate the relationship between the United States and foreign nations would secure a stable climate for international business, one that would also assuage the security concerns of the U.S. government and preserve peace in a competitive world.

Because this system entailed territorial sovereignty of nation-states on the one hand, and economic integration on the other hand, Root concluded that international peace required an impartial umpire that could play the role that the judiciary played within the United States. International law would delineate the boundaries within which nation-states were sovereign, and the umpire would ensure that no nation-state encroached upon the domain of another state. While Root shared the formalist belief that law was an objective science, he believed that national judiciaries lacked the impartiality to administer international law. Instead, he sought to build an international judiciary and to develop international tribunals that would use legal expertise to resolve international disagreements.

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[7] Root, "The Lawyer of Today," Address Before the New York County Lawyers Association, New York City, Mar. 13, 1915, in Elihu Root, *Addresses on Government and Citizenship*, ed. Robert Bacon and James Brown Scott (Cambridge, MA: Harvard University Press, 1916), 503–504.

Root's international law framework, however, failed to address an increasingly important question. International law regulated only sovereign nation-states, not individuals, corporations, or other non-state entities.[8] As corporations such as Standard Oil and the United Fruit Company expanded operations overseas, were they still subject to U.S. law? How did their obligations under foreign legal systems affect their responsibilities under U.S. law?[9] Because his ideology treated multinational enterprise as a harmonizing force that brought nations together, rather than as a likely source of friction, Root largely ignored this question.

But in the 1909 case *American Banana v. United Fruit Company*, it came before the U.S. Supreme Court. The American Banana Company had brought suit under the Sherman Act alleging that the United Fruit Company was monopolizing the banana trade in Central America.[10] In addition to driving purchasers from the market, acquiring the companies that remained, and undermining the American Banana Company's efforts to compete, United Fruit had induced Costa Rican troops to seize a banana plantation in a disputed area of territory. Writing for the Supreme Court, Justice Oliver Wendell Holmes, Jr., held that the Sherman Act applied only on U.S. soil—the presumption against extraterritoriality—and that

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[8] Duncan Kennedy, "Three Globalizations," 31; David Kennedy, "Primitive Legal Scholarship," *Harvard International Law Journal* 27 (1986): 8. For a contrary argument, see Jordan J. Paust, "Nonstate Actor Participation in International Law and the Pretense of Exclusion," *Virginia Journal of International Law* 51 (2011): 977–1004 (arguing that international law has formally recognized non-state actors for centuries).

[9] Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888-1910*, vol. 8, The Oliver Wendell Holmes Devise History of the Supreme Court of the United States (New York: Macmillan Publishing Company, 1993), 22.

[10] On the United Fruit Company's activities in Central America, see Jason M. Colby, *The Business of Empire: United Fruit, Race, and U.S. Expansion in Central America* (Ithaca: Cornell University Press, 2011); Marcelo Bucheli, *Bananas and Business: The United Fruit Company in Colombia, 1899-2000* (NYU Press, 2005).

U.S. courts could not consider the propriety of the Costa Rican government's actions—the act of state doctrine. The United Fruit Company thus escaped liability.[11]

By confining U.S. law to U.S. soil, *American Banana* accepted national sovereignty as the foundational principle of international law. And by limiting legislative and judicial interference, Holmes's decision promoted executive discretion over foreign economic relations. Unless Congress explicitly overrode the presumption against extraterritoriality, its statutes would not govern activities overseas. U.S. courts, meanwhile, would not decide cases implicating the acts of foreign governments. As a result, companies facing disputes abroad were left to turn to the executive branch to advance their interests, and the State Department would assume responsibility for negotiating with foreign governments. In other words, disagreements pitting U.S. companies against other nations would in the first instance be diplomatic rather than legal disputes.

This dynamic in turn furthered Elihu Root's campaign for an international court. Leaving these disagreements to ad hoc diplomatic resolution might lead to war, and it would produce confusion as different cases produced diverging solutions. But an international tribunal would provide an impartial forum for peacefully resolving disputes and would develop systematic principles of international law that would apply to future quarrels. But the checks and balances of U.S. constitutionalism complicated this dynamic. The system would not work if Congress, the courts, and the several states could set aside the decisions of international tribunals. The need for finality therefore encouraged a unitary foreign policy and favored a shift to executive/diplomatic over congressional and (national) judicial power for resolving international disputes and monitoring international businesses.

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[11] American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

In practice, then, *American Banana* reinforced Root's vision of a world of sovereign nation-states governed by law. But Justice Holmes's underlying reasoning emerged from his longstanding critique of classical legal thought. Holmes was resisting the formalist idea that there was general law rooted in reason, that law was "a brooding omnipresence in the sky" rather than "the articulate voice of some sovereign or quasi-sovereign that can be identified."[12] All law, he was insisting, was positive and local. Holmes's reasoning challenged the intellectual foundations of Root's program for developing international law and set the stage for alternative theories of international order.

I. Elihu Root's Alternative Imperialism

Elihu Root returned to Washington to serve as secretary of state under President Roosevelt in 1905. Root sought to develop a system for foreign commerce like the one that Taney and Story had developed for the domestic interstate market. Root's program incorporated many key features of dual federalism: it promoted the sovereignty of nation-states and discouraged interference in their internal spheres; it looked to corporations to bridge the formal boundaries established by sovereignty; and it sought an umpire to smooth the inevitable tensions that would arise. Whereas the Jacksonians turned to the U.S. Supreme Court to serve this function within the United States, Root strove to find a similar institution to manage international conflict.

Root was in many ways a surprising architect of this project. As secretary of war from 1899 until early 1904, Root oversaw the administration of Puerto Rico and Cuba and

[12] Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

the war in the Philippines.[13] Campaigning for McKinley in 1900, Root denounced William Jennings Bryan's anti-imperialism and ridiculed the possibility of Philippine self-government. "The testimony is absolutely overwhelming," Root said in a campaign speech, "that the people inhabiting the Philippine Archipelago are incapable of self-government . . . ."[14] Indeed, Root shared the racial assumptions prevalent in the early twentieth century. Like Roosevelt, he viewed races as discrete cultural groups that evolved over the course of history.[15] "Every great nation seems to pass at some period through a storm belt of incapacity to unite," Root wrote in 1907. "The races that are capable of developing beyond that point rule the world; the races that are not capable of it go down."[16]

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[13] While many scholars acknowledge Root's importance, his life has produced only two full-length biographies. Though written in 1938, Philip C. Jessup's two-volume biography remains the best, particularly because of its rich and lengthy quotations from Root's letters and speeches. Richard W. Leopold's 1954 *Elihu Root and the Conservative Tradition* emphasizes Root's status as a conservative in a progressive age. More recently, Jonathan Zasloff has used Root to examine the influence of classical legal ideology on U.S. diplomacy. Jessup, *Elihu Root*; Richard W. Leopold, *Elihu Root and the Conservative Tradition* (Boston: Little, Brown and Company, 1954); Jonathan Zasloff, "Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era," *New York University Law Review* 78 (2003): 239–373.

For a concise overview of Root's tenure as secretary of war that emphasizes his "constructive conservatism," see Richard W. Leopold, *Elihu Root and the Conservative Tradition*, 24–46. On Root's role in Cuban policy and in drafting the Platt Amendment, see Lejeune Cummins, "The Formulation of the 'Platt' Amendment," *The Americas* 23 (Apr. 1967): 370–89; Louis A. Pérez, *Cuba and the United States: Ties of Singular Intimacy*, 3rd ed. (Athens: University of Georgia Press, 1997), 106–11; Robert E. Hannigan, *The New World Power: American Foreign Policy, 1898-1917* (Philadelphia: University of Pennsylvania Press, 2002), 24–25.

[14] Philip C. Jessup, *Elihu Root*, 2 vols. (New York: Dodd, Mead & Company, 1938); Richard W. Leopold, *Elihu Root and the Conservative Tradition* (Boston: Little, Brown and Company, 1954); Jonathan Zasloff, "Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era," *New York University Law Review* 78 (2003): 239–373; Richard W. Leopold, *Elihu Root and the Conservative Tradition*, 24–46; Lejeune Cummins, "The Formulation of the 'Platt' Amendment," *The Americas* 23 (Apr. 1, 1967): 370–89; Louis A. Pérez, *Cuba and the United States: Ties of Singular Intimacy*, 3rd ed. (Athens: University of Georgia Press, 1997), 106–11; Robert E. Hannigan, *The New World Power: American Foreign Policy, 1898-1917* (Philadelphia: University of Pennsylvania Press, 2002), 24–25.

[15] Frank Ninkovich, *Global Dawn: The Cultural Foundation of American Internationalism, 1865-1890* (Cambridge, MA: Harvard University Press, 2009), 132–66; Hannigan, *New World Power*, 1–11; Emily S. Rosenberg, *Financial Missionaries to the World: The Politics and Culture of Dollar Diplomacy, 1900-1930* (Durham NC: Duke University Press, 2003), 38–39; Richard H. Collin, *Theodore Roosevelt's Caribbean: The Panama Canal, the Monroe Doctrine, and the Latin American Context* (Baton Rouge: Louisiana State University Press, 1990), 550–553; Howard K. Beale, *Theodore Roosevelt and the Rise of America to World Power* (Baltimore: Johns Hopkins University Press, 1956), 26–34; Frank Ninkovich, "Theodore Roosevelt: Civilization as Ideology," *Diplomatic History* 10 (Summer 1986): 232–233; Paul A. Kramer, *The Blood of Government: Race, Empire, the United States, & the Philippines* (Chapel Hill: University of North Carolina Press, 2006), 198–201.

[16] Root to Silas McBee, Apr. 10, 1907, Elihu Root Papers, Library of Congress, Box 188, Part 1.

After resigning as secretary of war, Root returned to New York in early 1904.[17] In Latin America, widespread borrowing had preceded the global economic turmoil of the 1890s, and Great Britain and Germany prepared to collect payments forcibly when Venezuela defaulted on its debts. Initially inclined to step aside and let them have their way, the Roosevelt administration began to worry that Great Britain and Germany might have more ambitious goals. The matter was submitted to the Hague Permanent Court of Arbitration, but American fears about European intentions deepened when the tribunal ruled that the claims of nations that used force had precedence. This standard seemed likely to increase European military involvement in the Western Hemisphere, and a worried Roosevelt administration responded with the Roosevelt Corollary to the Monroe Doctrine.[18]

Though now a private citizen, Root served as Roosevelt's conduit for announcing the new policy. At a New York banquet celebrating Cuban independence, Root read a letter from President Roosevelt. "Brutal wrongdoing, or an impotence which results in a general loosening of the ties of civilized society," the president had written, "may finally require intervention by some civilized nation, and in the Western Hemisphere the United States cannot ignore this duty . . . ." A few weeks later, Roosevelt expressed his amusement at the "yell" his letter had generated. He protested that his words were merely "the simplest comment sense." As the president explained, "If we are willing to let Germany or England act as the policeman of the Caribbean, then we can afford not to interfere when gross

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[17] Jessup, *Elihu Root*, 1:447–48.

[18] See Rosenberg, *Financial Missionaries to the World*, 40–41; Lars Schoultz, *Beneath the United States: A History of U.S. Policy toward Latin America* (Cambridge, MA: Harvard University Press, 1998), 177–85; David Healy, *Drive to Hegemony: The United States in the Caribbean, 1898-1917* (Madison: University of Wisconsin Press, 1988), 100–109; Hannigan, *New World Power*, 29–31. On the Hague Permanent Court of Arbitration, see Calvin DeArmond Davis, *The United States and the Second Hague Peace Conference: American Diplomacy and International Organization, 1899-1914* (Durham, NC: Duke University Press, 1975), 4.

wrongdoing occurs. But if we intend to say 'Hands off' to the powers of Europe, then sooner or later we must keep order ourselves."[19]

After the unexpected death of John Hay, Roosevelt convinced Root to return to government service as secretary of state in July 1905.[20] His deep involvement in the U.S. imperialist project, his disdain for the prospects of Philippine self-government, and his role in articulating the Roosevelt Corollary make Root's subsequent tenure as secretary of state surprising. His major initiative was to recast the United States as good neighbor to Latin America.[21]

Amid the bloody war in the Philippines and Roosevelt's brazen acquisition of land for the Panama Canal, popular enthusiasm for U.S. imperialism was waning.[22] Congress and the public were opposed to further adventures abroad—or they at had at least returned to apathy.[23] As Roosevelt told Taft in 1907, "[T]he public is very shortsighted. It is interested in things at home and not in the Philippines or the Canal . . . ."[24] A year later, Roosevelt again remembered the challenges:

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[19] Roosevelt to Root, May 20, 1904, in Theodore Roosevelt, *The Letters of Theodore Roosevelt*, ed. Elting Elmore Morison (Cambridge, MA: Harvard University Press, 1951), 801; Roosevelt to Root, June 7, 1904, in ibid., 4:821–822; Jessup, *Elihu Root*, 1:469–470. Roosevelt reiterated this point in his Fourth Annual Message to Congress on December 6, 1904. Roosevelt, Fourth Annual Message, December 6, 1904, in Theodore Roosevelt, *Works of TR*, 15:257.

[20] Jessup, *Elihu Root*, 1:447–448.

[21] Root himself used the phrase good neighbor to describe U.S. relations with Santo Domingo. Ibid., 1:563.

[22] The literature on imperialism and anti-imperialism is abundant. See Kristin L. Hoganson, *Fighting for American Manhood: How Gender Politics Provoked the Spanish-American and Philippine-American Wars* (New Haven: Yale University Press, 1998), 248 n. 2; Eric T. Love, *Race over Empire: Racism and U.S. Imperialism, 1865-1900* (Chapel Hill: University of North Carolina Press, 2004); Rubin Francis Weston, *Racism in U.S. Imperialism: The Influence of Racial Assumptions on American Foreign Policy, 1893-1946*. (Columbia: University of South Carolina Press, 1972).

[23] Rosenberg, *Financial Missionaries to the World*, 31–32; Richard D. Challener, *Admirals, Generals, and American Foreign Policy, 1898-1914* (Princeton: Princeton University Press, 1973); William C. Widenor, *Henry Cabot Lodge and the Search for an American Foreign Policy* (Berkeley: University of California Press, 1980), 122–123, 131, 150–154.

[24] Roosevelt to William Howard Taft, Sept. 3, 1907, in *Letters of TR*, 5:782.

> In Cuba, Santo Domingo and Panama we have interfered in various different ways, and in each case for the immeasurable betterment of the people. I would have interfered in some similar fashion in Venezuela, in at least one Central American State, and in Haiti already, simply in the interest of civilization, if I could have waked up our people so that they would back a reasonable and intelligent foreign policy which should put a stop to crying disorders at our very doors. . . . But in each case where I have actually interfered—Cuba, Santo Domingo, and Panama, for instance—I have had to exercise the greatest care in order to keep public opinion here with me so as to make my interference effective, and I may have been able to lead it along as it ought to be led only by minimizing my interference and showing the clearest necessity for it.[25]

Likewise, Root told one correspondent that it was "quite evident that forcible measures would merely react on the Administration."[26] As a result, Roosevelt needed other means of exerting influence abroad.

Root's assessment of international politics convinced him that Latin America would be a fruitful avenue for reform. "It has seemed doubtful whether the Latin Americans would ever acquire any more than the most rudimentary capacity for consistent organization," Root wrote. "There are, however, now strong indications that they are beginning to . . . acquire that capacity, with Central America lagging behind."[27] Respect for this capacity might bear fruit in improved relations. "The South Americans now hate us," he wrote in 1905, "largely because they think we despise them and try to bully them. . . . I think their friendship is really important to the United States, and that the best way to secure it is by treating them like gentlemen."[28]

A report from U.S. diplomat John Barrett pushed Roosevelt and Root in this new direction and made them more conscious of the United States' image in Latin America. As

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[25] Roosevelt to William Bayard Hale, December 3, 1908, in ibid., 6:1408; see generally Widenor, *Henry Cabot Lodge*, 118–68.

[26] Root to Whitelaw Reid, May 22, 1908. Elihu Root Papers, Library of Congress, Box 189, Part 1.

[27] Root to Silas McBee, Apr. 10, 1907, Elihu Root Papers, Library of Congress, Box 188, Part 1; see also Schoultz, *Beneath the United States*, 192.

[28] Root to Benjamin R. Tillman, Dec. 13, 1905, Elihu Root Papers, Library of Congress, Box 186, Part 1.

U.S. minister to Argentina, Panama, and Colombia, and later as head of the Bureau of American Republics and the Pan American Union—forerunners to the Organization of American States—Barrett was a major advocate of collective approaches to hemispheric security. In late September 1905, Barrett sent Roosevelt and later Root a confidential memorandum that he thought might be useful in the president's upcoming message to Congress. Barrett declared that Europe was winning the contest for South American markets. Europeans already had stronger cultural ties, and they also possessed better communications links.[29]

Barrett then castigated the United States' "holier than thou" attitude toward Latin America. "In other words the people of the United States have too much and too long 'patronized' the peoples, institutions, and governments of their sister Republics," he wrote. Instead, the United States "should give South America more credit for its actual progress in national and municipal government, in education, in literature, in science, in solving social and economic problems, and in generally striving under adverse conditions to reach a higher standard of civilization." He suggested a number of concrete steps the United States could take to improve ties. Emphasizing the importance of having a competent ambassador in Rio de Janeiro, he maintained that a seasoned diplomat could forge connections that would be useful throughout the region. He urged Roosevelt "to make some particular and new references in his forthcoming message that will be pleasing to South American nations and gratifying to the pride of their peoples. . . . The more such references could be kept apart

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[29] John Barrett to William Loeb, Jr., Sept. 27, 1905, Papers of Theodore Roosevelt, Library of Congress, Series 1; Jessup, *Elihu Root*, 1:472; Salvatore Prisco III, *John Barrett, Progressive Era Diplomat: A Study of a Commercial Expansionist, 1887-1920* (Tuscaloosa: University of Alabama Press, 1973), 57–58; Hannigan, *New World Power*, 65–66. On Barrett, see also Salvatore Prisco III, "John Barrett and Collective Approaches to United States Foreign Policy in Latin America, 1907-20," *Diplomacy & Statecraft* 14 (Sept. 2003): 57–69.

from any discussion of the Monroe doctrine, the more effective and well received they would be."[30]

Roosevelt's Fifth Annual Message did seek to reassure Latin Americans that they had nothing to fear from the United States. Despite Barrett's advice, Roosevelt linked his discussion of Latin America to the Monroe Doctrine and defended the exercise of police powers. The president argued that nations could not assert rights without fulfilling their responsibilities to foreigners, a formulation that both justified U.S. intervention and reminded Latin American nations of the need to pay their debts. Roosevelt cited the Panama Canal as a reason for special vigilance in the Caribbean. Nevertheless, Roosevelt both acknowledged the criticism the corollary was receiving in Latin America and suggested that many Latin American nations could join the United States in guaranteeing the Monroe Doctrine:

> We must recognize the fact that in some South American countries there has been much suspicion lest we should interpret the Monroe Doctrine as in some way inimical to their interests, and we must try to convince all the other nations of this continent once and for all that no just and orderly government has anything to fear from us. There are certain republics to the south of us which have already reached such a point of stability, order, and prosperity that they themselves, though as yet hardly consciously, are among the guarantors of this doctrine. These republics we now meet not only on a basis of entire equality, but in a spirit of frank and respectful friendship, which we hope is mutual. If all of the republics to the south of us will only grow as those to which I allude have already grown, all need for us to be the especial champion of the doctrine will disappear, for no stable and growing American republic wishes to see some great non-American military power acquire territory in its neighborhood.[31]

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[30] John Barrett to William Loeb, Jr., Sept. 27, 1905, Papers of Theodore Roosevelt, Library of Congress, Series 1 (emphasis omitted).

[31] Roosevelt, Fifth Annual Message, December 5, 1905, in *Works of TR*, 15:15:300–303. It is worth comparing Roosevelt's remarks to Root's a few months later: "We have been treating those gentlemen like yellow dogs, and they resent it. I want to show them distinguished consideration, but I do not want to be too gushing about it. As to the Monroe Doctrine, I lose no convenient opportunity to impress upon them that it is a matter of our own concern, not theirs." Root to Henry Watterson, May 16, 1906, Elihu Root Papers, Library of Congress, Box 186, Part 2.

Equality could replace the hierarchy that now characterized international relations in the Western Hemisphere.

Roosevelt's words also evoked the principal distinctions in turn-of-the-century international law. As Antony Anghie has argued, nineteenth century European theorists formulated a new positivist account of international law against the backdrop of renewed imperialism and its civilizing mission.[32] Under this conception, states enjoyed the full protections of international law and could organize their territory as they saw fit. As Lassa Oppenheim, a renowned German jurist and the leading theorist of international law, explained "[A]ll individuals and all property within the territory of a State are under the latter's dominion and sway, and even foreign individuals and property fall at once under the territorial supremacy of a State when they cross its frontier."[33]

But this strong formulation of state sovereignty was in tension with the Roosevelt Corollary and recent U.S. interventionism overseas, not to mention the ongoing efforts of European powers to carve up Asia and Africa. To resolve this tension, Roosevelt could point to another principle of international law: uncivilized and civilizing peoples did not enjoy law's full protections. Instead, as international law scholar John Westlake explained in 1894, non-Europeans first had to meet a minimum standard of civilization. Though non-European governments did not have to be the equivalent of the European governments in all things, "the prime necessity is a government under the protection of which [Europeans] may carry on the complex life to which they have been accustomed." According to Westlake,

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[32] Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge, UK: Cambridge University Press, 2005), 4, 35–37, 65–100, http://search.lib.virginia.edu/catalog/u4234241; Erik A. Moore, "Imperial International Law: Elihu Root and the Legalist Approach to American Empire," *Essays in History*, 2013, http://www.essaysinhistory.com/articles/2013/172.

[33] Lassa Oppenheim, *International Law: A Treatise* (New York: Longmans, Green, and Co., 1905), 1:171–172.

"If even the natives could furnish such a government after the manner of the Asiatic empires, that would be sufficient." Otherwise, Europeans would have to create such a government for their own good and the good of the peoples they had encountered. After all, Westlake explained, "The inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied." Without a minimum threshold of law, conflict would become inevitable amid unstoppable European expansionism.[34]

Latin Americans, however, were heirs of European civilization. They were not the native tribes Westlake was thinking about as he formulated these distinctions. But the principles of international law also accounted for the situation in Latin America as U.S. and European governments perceived it, where foreigners faced unfair treatment and instability was frequent. As Westlake explained (after invoking U.S.-Haitian relations as an example),

> [I]n spite of the common civilisation, cases arise in which unfair discrimination is attempted, or in which other circumstances arise to prevent the normal rule of non-interference applying. The civilisation has grown up by degrees, and populations have become included in it among whom it did not originate. It may not everywhere have adequately permeated institutions and habits of action. Even where its normal reign is assured, political religious or other excitements may rouse the passions to break through the crust which has been formed over them. If, from whatever cause, the security promised by the common civilisation is flagrantly wanting, the fact must override the presumption.

When the rule of law broke down, the presumption of sovereign equality and inviolability no longer applied. Westlake emphasized that the violation had to be grave and had to affect a principle common across civilization. Disregarding a right to trial by jury, for instance, was not sufficient, as that right was not common to all civilized peoples. But when it was "very

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[34] John Westlake, *Chapters on the Principles of International Law* (Cambridge, UK: University Press, 1894), 141–143; Anghie, *Imperialism*, 84.

evident and palpable" that "the law of a country . . . is violated towards foreigners, there is in ordinary circumstances a right of interference on their behalf."[35]

The Roosevelt Corollary had linked these principles of interference/non-interference to the traditional U.S. policy expressed in the Monroe Doctrine. But now, amid public pressure to cut back on imperial entanglements, Roosevelt had hinted at a shift in his thinking about the state of Latin American civilization. Latin Americans were ready to assume their responsibilities as sovereign states, opening the door to equality and cooperation in place of tutelage. As Latin Americans governed themselves more effectively, the presumption of non-interference would carry the day, freeing the United States from the obligation to intervene.

In a sense, Roosevelt's thinking about international relations was developing inversely to his views about federalism within the United States. Under federalism, the police powers are the several states' general powers to legislate to protect the health, safety, welfare, and morals of their citizens. But there was no general federal police power; the federal government had only the powers enumerated by the constitutional text. Roosevelt's New Nationalism sought to address what he saw as a resulting vacuum: "[W]henever the states cannot act, because the need to be met is not one merely of a single locality, then the national government, representing all the people, should have complete power to act."[36] In the realm of foreign relations, President Roosevelt had advocated the United States' responsibility to exercise a hemispheric police power. Indeed, the Roosevelt Corollary could be restated along lines similar to Roosevelt's New Nationalism: whenever foreign states

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[35] Westlake, *Chapters*, 104–105.

[36] Roosevelt, Speech at Osawatomie, Kansas, Aug. 31, 1910, quoted in Robert Eugene Cushman, "National Police Power under the Commerce Clause of the Constitution," *Minnesota Law Review* 3 (1919): 294. Later commentators like Cushman interpreted Roosevelt as advocating a national police power.

cannot act, then the U.S. government, representing all the people of the hemisphere (particularly against European powers), should have the power to act. Roosevelt's Fifth Annual Message, however, marked a shift away from this idea that United States should uniquely intervene to promote hemispheric welfare. Instead, each nation in the hemisphere would honor its own obligations.

A. Good Formalist Fences Make Good Sovereign Neighbors

Implementing this shift was the primary objective of Root's tenure as secretary of state, and he devoted his energy to establishing a new relationship between the United States and Latin America based on sovereignty and equality rather than armed intervention and U.S. domination.[37] Barrett had touted the importance of Brazil in his memorandum to the president, and one of Root's first steps to reorient U.S. policy was to cultivate Joaquim Nabuco, Brazil's ambassador to the United States, as well as other Latin American diplomats in Washington. Although Washington society often shunned Latin Americans, Root urged colleagues to welcome them and to accept their invitations. These relationships led to Root's decision to make an unprecedented tour of South America. As he later recalled, he had been dining with a group of diplomats to discuss the upcoming Pan American Conference, which would be held in Rio de Janeiro in July 1906. Root surprised his guests by announcing that he would attend personally.[38]

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[37] For excellent analyses of the Roosevelt administration's search for alternatives to armed interventions, see Healy, *Drive to Hegemony*, 126–144; Lester D. Langley, *The United States and the Caribbean, 1900-1970*, 4th ed. (Athens: University of Georgia Press, 1980), 44–49; Rosenberg, *Financial Missionaries to the World*, 31–60; Hannigan, *New World Power*, 11, 15–16, 34–35, 65, 215–18.

[38] Jessup, *Elihu Root*, 1:473–477; see also Elihu Root, *Latin America and the United States*, ed. Robert Bacon and James Brown Scott (Cambridge, MA: Harvard University Press, 1917), xiii. On U.S.-Brazilian relations during this period, see Joseph Smith, *Unequal Giants: Diplomatic Relations between the United States and Brazil, 1889-1930* (Pittsburgh: University of Pittsburgh Press, 1991), 35–76; E. Bradford Burns, *The Unwritten Alliance: Rio-Branco and Brazilian-American Relations* (New York: Columbia University Press, 1966). For examples of Root urging U.S. officials to accept a Brazilian dinner invitation, see Root to the Admiral of the Navy

For the U.S. delegation, the symbolic import of Root's visit overshadowed the actual work of the conference.[39] After being welcomed by Brazil's Nabuco, Root delivered the most important address of his journey on July 31, 1906.[40] "That is the only speech made by me which was prepared beforehand," Root noted afterwards, "and it was designed as a formulation of our policy towards South America . . . and it will doubtless be referred to often in years to come as fixing a standard which the United States is bound to live up to. I meant to have it so, for I think we ought to live up to that standard."[41] Root began his speech by noting the worldwide trend toward democratic government, and he linked the Latin American struggle for self-government to the United States' own. He praised "mutual interchange and assistance between the American republics" as the means to progress, and he declared that the conference's real achievement would be laying a foundation for future growth and cooperation. Implicitly acknowledging Latin America's mistrust of the United States, Root declared, "We wish for no victories but those of peace; for no territory except our own; for no sovereignty except over ourselves. . . . We neither claim nor desire any rights or privileges or powers that we do not freely concede to every American republic."[42]

Root concluded his speech by urging Latin American nations to participate in the upcoming Hague Conference, an invitation that emphasized their equality with the civilized states of Europe. Of American nations, only the United States, Brazil, and Mexico had participated in the First Hague Conference in 1899, and the United States had since worked

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(Dewey), Jan. 6, 1906, Elihu Root Papers, Library of Congress, Box 186, Part 1, and Root to Henry Cabot Lodge, Jan. 6, 1906, ibid.

[39] See Jessup, *Elihu Root*, 1:482; and Report of the Delegates of the United States to the Secretary of State in U.S. Department of State, *Foreign Relations of the United States: 1906* (Washington, DC: Government Printing Office, 1909), 2;1576–1594.

[40] Speech of the Secretary of State, July 31, 1906, in Root, *Latin America and the United States*, 6–11.

[41] Root to Albert Shaw, Oct. 8, 1906, Elihu Root Papers, Library of Congress, Box 186, Part 2; see also Root to Roosevelt, Aug. 2, 1906, Library of Congress, Series 1.

[42] Speech of the Secretary of State, July 31, 1906, in Root, *Latin America and the United States*, 6–11.

to secure invitations for the other nations of the Western Hemisphere. Their participation, Root declared in Brazil, would serve as "the world's formal and final acceptance of the declaration that no part of the American continents is to be deemed subject to colonization."[43] Root thought that his speech was "exceedingly well received" and that it would "serve to clarify the ideas of a good many people in the Conference and out of it."[44]

Some of the more important discussions during Root's time in South America concerned the upcoming Second Hague Conference. As the U.S. delegates' report noted, the armed collection of debts "overshadowed in interest all other topics before the [Pan American] conference." In 1902, Argentine Foreign Minister Luis María Drago had proposed a prohibition on the use of force to collect debts. Now, the Pan American Conference recommended that participants invite the Hague Conference to consider this question. The Pan American delegates refrained from making more definite recommendations lest they pit a bloc of Latin American debtors against European creditors.[45] In an August 17, 1906, speech in Buenos Aires, Root endorsed the Drago Doctrine. "The United States of America has never deemed it to be suitable that she should use her army and navy for the collection of ordinary contract debts of foreign governments to her citizens," he declared. "We deem it to be inconsistent with that respect for the sovereignty of weaker powers which is essential to their protection against the aggression of the strong."[46]

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[43] Ibid., 10; Jessup, *Elihu Root*, 2:68–69; Healy, *Drive to Hegemony*, 137; Collin, *Theodore Roosevelt's Caribbean*, 497.

[44] Root to Roosevelt, Aug. 2, 1904, Library of Congress, Series 1.

[45] Report of Delegates, in *FRUS, 1906*, 2:1583–1584; James Brown Scott, ed., *The Hague Peace Conferences of 1899 and 1907* (Baltimore: Johns Hopkins Press, 1909), 392–400; Jessup, *Elihu Root*, 2:73–75.

[46] Reply of Mr. Root to Speech of Dr. Luis M. Drago, Aug. 17, 1906, in Root, *Latin America and the United States*, 98. At the Second Hague Conference, however, the United States took a different position, and Root's efforts to improve hemispheric solidarity by defending national sovereignty gave way to the need to

Nonetheless, U.S. intervention in Cuba while Root was on his tour undermined this message. Rival factions battling for control of Cuba exploited the prospect of U.S. intervention under the Platt Amendment, and eventually Roosevelt felt compelled to send in marines.[47] "This unwanted and unforeseen episode represented a breakdown in the United States plan for that island, and boded ill for Washington's schemes of political reformism in the Caribbean," David Healy observes. "Yet Roosevelt and his advisers felt that they had had no choice but to intervene, especially given the terms and intent of the Platt Amendment."[48] Events in Cuba had overtaken U.S. policy in the Caribbean, belying Root's efforts to change the United States' image in Latin America.[49]

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maintain some means of redress for delinquency. The Hague Conference adopted the Porter resolution, which prohibited the forcible collection of debts except in cases when the debtor nation refused to arbitrate. Feeling that the exception swallowed the rule, the Latin American delegations rejected this compromise, which nevertheless passed. Scott, *Hague Peace Conferences*, 1:1400–1422; Collin, *Theodore Roosevelt's Caribbean*, 495–500; David S. Patterson, *Toward a Warless World: The Travail of the American Peace Movement, 1887-1914* (Bloomington: Indiana University Press, 1976), 155; Healy, *Drive to Hegemony*, 137–139; Jessup, *Elihu Root*, 73–75. "A peculiarity of the Latin races," Root complained, "is that they pursue every line of thought to a strict, logical conclusion and are unwilling to stop and achieve a practical benefit as the Anglo Saxons do." Root to Elbert F. Baldwin, Nov. 1, 1907, Elihu Root Papers, Library of Congress, Box 188, Part 2.

[47] Healy, *Drive to Hegemony*, 127–133; Collin, *Theodore Roosevelt's Caribbean*, 529–542; Pérez, *Cuba and the United States*, 152–158; Allan Reed Millett, *The Politics of Intervention: The Military Occupation of Cuba, 1906-1909*. (Columbus: Ohio State University Press, 1968).

[48] Healy, *Drive to Hegemony*, 127, 132.

[49] A major problem was the inexperience of those in Washington attempting to deal with the situation. Root was in South America as events unfolded, and Edwin V. Morgan, the U.S. ambassador to Havana, was on vacation. Ibid., 130. Secretary of War William Howard Taft wrote Root expressing regret that he lacked the secretary of state's thorough knowledge of the Cuban situation. Taft to Root, Sept. 15, 1906, Elihu Root Papers, Library of Congress, Box 166. Root himself cabled the president from Lima conveying similar sentiments: "I am especially disturbed over the situation in Cuba as to which my knowledge of conditions and persons might enable me to be of help if I were at home." Root to Roosevelt quoted in Jessup, *Elihu Root*, 1:531; see also Root to James H. Wilson, Oct. 24, 1906, Elihu Root Papers, Library of Congress, Box 187, Part 2; Root to Leonard Wood, Oct. 31, 1906, ibid. Root's associates also assumed that Root would have handled the matter more competently. "I am not satisfied," Assistant Secretary of State Robert Bacon said. "I shall be ashamed to look Mr. Root in the face. This intervention is contrary to his policy and what he has been preaching in South America." Bacon quoted in James Brown Scott, *Robert Bacon: Life and Letters* (Garden City, NY: Doubleday, Page & Co., 1923), 118. Taft similarly wrote Root that "Bacon and I have suffered much from the thought of your disappointment keen and deep." Taft hoped that "this Cuban business will not interference with the success of your South American trip," optimistically wishing that it would be obvious that the intervention "was against our will." Taft to Root, Oct. 4, 1906, quoted in Jessup, *Elihu Root*, 1:535.

While the Cuban intervention undercut the message Root hoped to convey, Roosevelt was nevertheless happy with the results of Root's mission. "Root is back from his wonderful trip," the president wrote to Henry Cabot Lodge. "We in this country do not realize how wonderful it was and how much good he has done."[50] In August, he had written Root in Panama that he thought Root's trip "marks a permanent epoch in the relations of this country with the other American republics."[51] Root himself wrote the president from South America at the conclusion of the conference: "Of course this is evanescent, but I have no doubt there will be a residuum of friendly feeling and of confidence in our kindly feelings, left in place of the wide spread [sic] distrust which seems to characterize South American opinion regarding the purposes and attitude of the United States."[52]

B. Economic Interdependence and the Open Door

But genuine respect for Latin American sovereignty came at a cost. As international law theorist Lassa Oppenheim put it, "In consequence of its internal independence and territorial supremacy, a State can adopt any Constitution it likes, arrange its administration in a way it thinks fit, make use of legislature as it pleases, organize its forces on land and sea, build and pull down fortresses, adopt any commercial policy it likes, and so on."[53] Under dual federalism in the United States, the several states could choose to exclude foreign corporations, and state sovereignty could easily give way to efforts to impede competition, as the Supreme Court's post-*Welton v. Missouri* commerce clause jurisprudence revealed.[54] Taney had dealt with this problem by establishing a presumption that states welcomed foreign

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[50] Roosevelt to Lodge, Oct. 2, 1906, in Theodore Roosevelt, *Letters of TR*, 5:440.
[51] Roosevelt to Root, Aug. 18, 1905, in ibid., 5:367.
[52] Root to Roosevelt, Aug. 2, 1904, Library of Congress, Series 1.
[53] Oppenheim, *International Law: A Treatise*, 1:171–172.
[54] Alison Frank, "The Petroleum War of 1910: Standard Oil, Austria, and the Limits of the Multinational Corporation," *American Historical Review* 114 (Feb. 2009): 16–18.

corporations unless they expressly legislated otherwise. Root likewise balanced his emphasis on Latin American sovereignty with a similar presumption that Latin Americans desired commerce with the United States and that the U.S. and Latin American economies were in natural harmony.[55]

Root developed these ideas in speeches across the United States on his return from South America. In a November 20, 1906, speech at the Trans-Mississippi Commercial Congress in Kansas City, Missouri, Root outlined how trade would bridge the formal divisions resulting from national sovereignty.[56] At the heart of Root's speech was an evolutionary view of civilization. For most of its history, he argued, the United States had been inwardly focused, using all available resources to foster the nation's internal development. Now, it faced an era "of distinct and radical change," as the nation poured its surplus capital into the rest of the world. Latin America, too, had evolved. "Coincident with this change in the United States," Root said, "the progress of political development has been carrying the neighboring continent of South America out of the stage of militarism into the stage of industrialism." This coincided with a rejection of revolution—"of the revolutionary general and the dictator"—and a new embrace of stability.[57]

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[55] These ideas were not unique to Root. For description of similar rhetoric from before the Spanish-American War that combined ideas of U.S.-Latin American equality with a notion of U.S. superiority, see Benjamin A. Coates, "The Pan-American Lobbyist: William Eleroy Curtis and U.S. Empire, 1884–1899," *Diplomatic History* 38 (Jan. 2014): 34–43. Like John Barrett, Curtis was also an important influence on Root. According to Jessup, Curtis helped convince Root of the importance of cultivating the press. Jessup, *Elihu Root*, 1:224.

[56] "How to Develop South American Commerce," Address Before the Trans-Mississippi Commercial Congress, Kansas City, MO, Nov. 20, 1906, in Root, *Latin America and the United States*, 245–267; see also Jessup, *Elihu Root*, 1:489–492; Walter LaFeber, "Technology and U.S. Foreign Relations," *Diplomatic History* 24 (Winter 2000): 1–19.

[57] "How to Develop South American Commerce," in Root, *Latin America and the United States*, 245–247.

Thus, Root contended that U.S. and Latin American interests were in perfect harmony: "Immediately before us, at exactly the right time, just as we are ready for it, great opportunities for peaceful commercial and industrial expansion to the south are presented." He argued that the two continents were complementary in material resources and in people. South Americans, for example, were "polite, refined, [and] cultivated" where the North Americans were "strenuous, intense, [and] utilitarian."[58] Thus, trade would benefit both regions, and Root saw himself continuing the Pan Americanism inaugurated by Secretary of State James G. Blaine.[59]

For Root, however, Pan Americanism depended not upon the actions of governments, but upon the efforts of private U.S. citizens. Root outlined a number of concrete steps that needed to be taken. The U.S. merchant, Root advised, "should learn what the South Americans want and conform his product to their wants." He should learn Spanish and Portuguese. He "should arrange to conform his credit system to that prevailing in the country where he wishes to sell his goods." He "should himself acquire, if he has not already done so, and should impress upon all his agents that respect for the South American to which he is justly entitled and which is the essential requisite to respect from the South American." Banks should be opened and capital invested under the direction of experts. Above all, better networks of communications—mail, passenger, and freight—needed to be established.[60]

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[58] Ibid., 247, 250.

[59] Ibid., 250–253. On Pan Americanism, see Carolyn M. Shaw, *Cooperation, Conflict, and Consensus in the Organization of American States* (New York: Palgrave Macmillan, 2004), 45–48; David Sheinin, ed., *Beyond the Ideal: Pan Americanism in Inter-American Affairs* (Westport, CT: Greenwood Press, 2000).

[60] "How to Develop South American Commerce," in Root, *Latin America and the United States*, 253–267.

Root's speech was a textbook illustration of William Appleman Williams's "imperialism of idealism." What was good for the United States was good for the world; there was no tension between ideals and interests.[61] Root reiterated this theme in a January 14, 1907, speech in Washington, D.C., before the National Convention for the Extension of the Foreign Commerce of the United States. There he addressed the particular problem posed by the smaller nations of the Caribbean. "Some of them have had a pretty hard time," he admitted. "The conditions of their lives have been such that it has been difficult for them to maintain stable and orderly governments. They have been cursed, some of them, by frequent revolution." U.S. policy towards these countries, Root said, rested on three core elements: "First. We do not want to take them for ourselves. Second. We do not want any foreign nations to take them for themselves. Third. We want to help them."[62]

Reality, of course, belied Root's optimistic outlook. At times, Root sounded very modern in his prescriptions: North Americans should learn local languages, respect local cultures, and should follow the Golden Rule. Yet the underlying equality that Root presupposed was absent. Just as workers lacked equal bargaining power with corporations despite a contract system that presupposed such equality, Latin American governments lacked the political, economic, and military strength of the United States.[63] The

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[61] Williams, *Tragedy*, 58–89; cp. Robert Endicott Osgood, *Ideals and Self-Interest in America's Foreign Relations; the Great Transformation of the Twentieth Century.* (Chicago: University of Chicago Press, 1953).

[62] "South American Commerce," Address at the National Convention for the Extension of the Foreign Commerce of the United States, Washington, DC, Jan. 14, 1907, in Root, *Latin America and the United States*, 274–275.

[63] On the role of contract in masking bargaining disadvantages, see generally Rosenberg, *Financial Missionaries to the World*, 72–76; Emily S. Rosenberg and Norman L. Rosenberg, "From Colonialism to Professionalism: The Public-Private Dynamic in United States Foreign Financial Advising, 1898-1929," *The Journal of American History* 74 (June 1, 1987): 60–61, 65–66, doi:10.2307/1908505; Horwitz, *Transformation of American Law, 1870-1960*, 10–11; William M. Wiecek, *The Lost World of Classical Legal Thought Law and Ideology in America, 1886-1937* (New York: Oxford University Press, 1998), 10, 48, 87, 91, 102–105, 152–156, 183, 192, 230, 248–49.

complementarities that Root imagined ran into the reality of Latin American resentment of North American hegemony and North American frustration at Latin American backwardness. Economic subjugation would supplant armed interventionism.[64]

Root's gendered rhetoric helped to mask these problems and suggested that North American corporations could successfully bridge the Western hemisphere.[65] As Michael Hunt has observed, U.S. depictions of Latin Americans ranged from the lazy male to the "fair-skinned and comely" señorita. In times of peace, when "Americans saw themselves acting benevolently, they liked to picture the Latino as a white maiden passively awaiting salvation or seduction."[66] Root's rhetoric of muscular Anglo-Saxon productivity meeting Latin American passivity and receptivity fit this pattern. Indeed, an Argentine cartoon from later in his trip depicted a kneeling Root proposing to Argentina beneath a stern portrait of Theodore Roosevelt. "I love you, I adore you, Miss Argentina, and I want to unite my heart . . ." the caption read. "Yes, yes; you have just told my sisters the same thing. Pure sweet nothings and pure foreign relations."[67]

While Root called on U.S. business to assume primary responsibility for linking the two continents, the U.S. government had a supporting role to play. To this end, Root helped the Roosevelt administration to pioneer financial advising.[68] Responding to requests from Dominican officials desperate for U.S. help to stave off bankruptcy and maintain their hold on power, the U.S. government took over Dominican customs houses and sent Jacob

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[64] Root to Melville K. Stone, Mar. 7, 1907, Elihu Root Papers, Library of Congress, Box 188, Part 1.

[65] See generally Rosenberg, *Financial Missionaries to the World*, 33; Hoganson, *Fighting for American Manhood*, 3–4; Hannigan, *New World Power*, 3–4.

[66] Michael H. Hunt, *Ideology and U.S. Foreign Policy* (New Haven: Yale University Press, 1987), 58–62.

[67] Cartoon reprinted in Jessup, *Elihu Root*, 1:484–485 (cartoon between these two pages).

[68] See Cyrus Veeser, *A World Safe for Capitalism: Dollar Diplomacy and America's Rise to Global Power* (New York: Columbia University Press, 2002); Rosenberg, *Financial Missionaries to the World*, 41–47; Healy, *Drive to Hegemony*, 110–125; Hannigan, *New World Power*, 31–34.

Hollander to develop a plan that would return the nation to a sound financial footing. When its initial treaty failed to receive Senate approval, the Roosevelt administration forged ahead anyway, bypassing the Senate as Dominican officials agreed to a modus vivendi in place of a formal treaty. Eventually, Root came up with a clever solution. An investment bank would create a receivership and assume responsibility for Dominican debts. The U.S. government would manage customs collection without assuming any financial obligations. Root arranged for Kuhn, Loeb, and Company to serve as the bank. Thus, two agreements were signed. Kuhn, Loeb and the Dominican Republic signed a loan contract, while the Dominican Republic and the United States signed a treaty committing the United States to administer Dominican customs houses. The Senate now ratified the treaty because "it committed the United States only to collecting and administering the debt, not to adjusting or assuming it."[69] While the development of dollar diplomacy was a major innovation in U.S. foreign policy, the use of financial advising as an instrument of foreign policy would not take off until the Taft and Wilson administrations.[70]

C. An International Judiciary

The struggle over treaty ratification pointed to the final, most challenging problem in Root's efforts to reframe U.S. policy in Latin America. During his trip to Latin America, Root had made strong statements of U.S. respect for Latin American sovereignty. On his return home, he shared his expectations that American business would bridge national boundaries and that his vision of U.S.-Latin American complementarity that would minimize conflict. But conflict undoubtedly would arise, just as it did within the United States. Under

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[69] Rosenberg, *Financial Missionaries to the World*, 43–47; see also Root to Hollander, May 7, 1906, Elihu Root Papers, Library of Congress, Box 186, Part 2.

[70] Indeed, Emily Rosenberg's excellent account of dollar diplomacy in *Financial Missionaries to the World* jumps from the Dominican Republic in 1907 to Taft's presidency in 1909.

dual federalism the Supreme Court served as the umpire that kept the federal and state governments in their proper spheres. When international disagreements arose, however, there was no comparable institution to fulfill this role. An obvious solution was force: the stronger power could impose its way on its weaker. Root's final endeavor was to find a more principled way of resolving international conflict.

Root's desire for institutions capable of resolving international disagreements peacefully reflected wider trends. The beginning of the twentieth century witnessed a tremendous growth in internationalist organizations committed to ending war and to promoting world organization. One of the most important was the American Society of International Law, with its accompanying publication, the *American Journal of International Law*. The society's officers and the publication's editors were a who's who of U.S. government officials. Officers included Root, who was the society's president; Supreme Court Chief Justice Melville Fuller and Justices William R. Day and David J. Brewer; cabinet secretaries John W. Foster, Richard Olney, John William Griggs, and William Howard Taft; and industrialist and philanthropist Andrew Carnegie. The editorial board included James Brown Scott, solicitor to the State Department, delegate to the Second Hague Conference, and trustee and secretary of the Carnegie Endowment for International Peace; future Secretary of State Robert Lansing; and State Department adviser and law professor John Bassett Moore.[71] (Roosevelt himself, absent from this list, sometimes sided with the international lawyers, but tended to view their project more instrumentally.)[72]

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[71] Carl Landauer, "The Ambivalences of Power: Launching the American Journal of International Law in an Era of Empire and Globalization," *Leiden Journal of International Law* 20 (2007): 326–327.

[72] John P. Campbell, "Taft, Roosevelt, and the Arbitration Treaties of 1911," *The Journal of American History* 53 (Sept. 1966): 293.

As this catalog suggests, many of the same policymakers who championed imperialism and sought to expand American military power aligned themselves with an organization committed to the peaceful resolution of international disputes.[73] Their commitment to international law was not simply a mask for power politics.[74] They genuinely worked to build international institutions that would bind the United States. The centrality of legal formalism in their thinking helps to explain what might otherwise seem a troubling paradox. International legal institutions were essential for monitoring the boundaries by which they organized the world. Steeped in the world of classical legal thought, international courts and the judges who would sit on them did not threaten frightening incursions on sovereignty but instead offered a means of globalizing the ordered, rational system that ensured stability and social peace at home.

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[73] Davis, *United States and the Second Hague Peace Conference*, 19, 55, 72; Patterson, *Toward a Warless World*, 257–259; Landauer, "The Ambivalences of Power"; Campbell, "Taft, Roosevelt, and the Arbitration Treaties."

Warren F. Kuehl distinguishes generalists, who were committed to the ideal of an international organization but did not specify its content; arbitrationists, who promoted organization through treaties of arbitration; legalists, who went further and called for an international court of justice; and federationists, who wanted international political union and some form of world government. Warren F. Kuehl, *Seeking World Order: The United States and International Organization to 1920,* (Nashville: Vanderbilt University Press, 1969), vii–viii;

These categories are all examples of what Sondra R. Herman calls "polity internationalism." Polity internationalists sought peace through institutions. As Social Darwinists, they saw the United States as a society in which inherently unequal individuals and corporations competed for power and in which the strong triumphed, and they extended this framework to a world in which unequal nations grappled for power. According to Herman, "They tended to believe that the competition of individuals or of businesses or of nations, and the emergence of the strongest in that competition, while sometimes dangerous, served the interests of the whole society. They placed a high value on stabilizing this competition and on pacifying it." Institutions served as a means of keeping competition within acceptable bounds. Sondra R Herman, *Eleven against War: Studies in American Internationalist Thought, 1898-1921* (Stanford: Hoover Institution Press, Stanford University, 1969), viii–ix. Herman distinguishes polity internationalists from community internationalists like Jane Addams, who rejected the individualism and competition inherent in polity internationalism. Peace would come through changes that developed human consciousness of organic unity. Ibid., ix, 9–10, 87.

[74] Nor was arbitration was not an end in itself, however. It also served strategic goals, such as keeping European competitors out of the Western Hemisphere. "We must not on any account sacrifice our position of asserting the national equality of American states with the other powers of the earth," Root said during the Hague Conference. "It is far more important to us than the whole court scheme." By accepting the Latin Americans as sovereign equals at the Hague Conference, the European powers would concede the logic underlying the Monroe Doctrine: there would be no basis for European colonization in a Western Hemisphere full of sovereign states. Root quoted in Jessup, *Elihu Root*, 2:77; Speech of the Secretary of State, July 31, 1906, in Root, *Latin America and the United States*, 10.

International arbitration presented the most basic avenue for advancing international law. The First Hague Conference in 1899 had created a Permanent Court of Arbitration, which at first was little more than a list of judges from which nations could choose arbitrators. Internationalists hoped to expand its power at successive Hague conferences.[75] Roosevelt's Fifth Annual Message had promoted international arbitration and called on The Hague conference to adopt a general arbitration treaty.[76] Meanwhile, a series of treaties required the pacific settlement of international disputes with particular nations, including the 1897 Olney-Pauncefote Treaty, the 1905 Hay treaties, the 1908-1909 Root treaties, and the 1911 Taft treaties.[77]

Nonetheless, arbitration presented a difficult conceptual problem for these legal positivists. In the municipal context, the power of the state enforced the law. But in international law, there was no supreme sovereign power backing up legal obligations. Observing that people obeyed laws for reasons other than fear of punishment, Root championed the power of public opinion as a solution: "The force of law is in the public opinion which prescribes it."[78] In the international arena, states avoid "the moral isolation created by general adverse opinion" and instead seek "general approval." But, Root noted, this logic only worked with "comparatively simple questions and clearly ascertained and understood rights." These conditions made international arbitration promising, however. If neutral means of resolving disputes existed, public opinion could rally behind the

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[75] Davis, *United States and the Second Hague Peace Conference*, 4.

[76] Roosevelt, Fifth Annual Message, December 5, 1905, in Theodore Roosevelt, *Works of TR*, 15:15:295–300. The president also championed an "organization of the civilized nations, because as the world becomes more highly organized the need for navies and armies will diminish."

[77] Campbell, "Taft, Roosevelt, and the Arbitration Treaties," 279–280.

[78] "The Sanction of International Law," Presidential Address at the Second Annual Meeting of the American Society of International Law, Apr. 28, 1908, in Elihu Root, *Addresses on International Subjects*, ed. Robert Bacon and James Brown Scott (Cambridge, MA: Harvard University Press, 1916), 27–28.

"exceedingly simple" idea of arbitration, thereby channeling the underlying questions into peaceful resolution. The public's moral clamor, in other words, would force the parties to arbitrate, which would stall the momentum for war and provide a forum for dispassionate experts to work through the more complicated issues.[79]

But international arbitration was only the first step toward a peaceful world of law. Internationalists like Root grew frustrated with arbitration because arbitrators tended to favor the side that chose them, rendering arbitration political rather than impartial. Root instead wanted a permanent court of neutral judges, which, like the U.S. Supreme Court, theoretically would be immune from popular pressure.[80] Recognizing the limitations of arbitration, Root maintained the need to move beyond "these extemporized tribunals, picked at haphazard" and to establish "real courts." In such permanent tribunals, "judges, acting under the sanctity of the judicial oath, [would] pass upon the rights of countries, as judges pass upon the rights of individuals, in accordance with the facts as found and the law as established."

Such professional judges, moreover, would exert an important influence on international law itself, which was "still quite vague and undetermined," with "different countries tak[ing] different views as to what the law is and ought to be." But professional judges working for permanent tribunals would produce "a bench composed of men who have become familiar with the ways in which the people of every country do their business

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[79] Ibid., 30–32.

[80] Patterson, *Toward a Warless World*, 153–155; According to Herman, "A veneration of law itself was so basic in their thinking that they conceived of international reform as purely legal. The ground was thus laid for their pervasive distrust of any international system that was not primarily juridical." Herman, *Eleven Against War*, 31. "I am just a lawyer, from the ground up," Root declared in a speech in 1916, "and everything that I have done in my life has been as an incident to a lawyer's career, responding to the calls made upon a lawyer under the responsibilities of his oath and his conception of a lawyer's duty." "Individual Liberty and the Responsibility of the Bar," "Individual Liberty and the Responsibility of the Bar," Address at the Annual Dinner of the New York State Bar Association, Jan. 15, 1916, in Root, *Government and Citizenship*, 511.

and do their thinking, and you will have a gradual growth of definite rules, of fixed interpretation, and of established precedents, according to which you may know your case will be decided." Eventually, international affairs would come under the sway of an objective science of law just like the federal common law that guided domestic affairs.[81]

The three planks of Root's program worked together to compensate for the existing deficiencies of international law. He recognized that his commitment to national sovereignty required limits on arbitration and the international adjudication of disputes. Nations viewed certain matters—the Monroe Doctrine, for example—as so tied to their safety, independence, and sovereignty that they could never consent to let citizens of other nations decide them. As Root explained in his 1912 Nobel Peace Prize address, "[Q]uestions of public policy supposed to be vital cannot be submitted to arbitration, because that would be an abdication of independence and the placing of government *pro tanto* in the hands of others. The independence of a state involves that state's right to determine its own domestic policy and to decide what is essential to its own safety."

But Root remained optimistic nonetheless. In the first place, states willing to wage aggressive war for some reason of national policy would not do so without a pretext. And international law could peacefully resolve these pretextual disputes. And where it could not, the second element of his program offered hope. The growth of international commerce had created a web of interconnections and changed the nature of self-interest. "[T]he prize of aggression must be rich indeed," Root declared, "to counterbalance the injury sustained by the interference of war with both production and commerce." More generally, the bases of

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[81] "The Importance of Judicial Settlement," Opening Address at the International Conference of the American Society for Judicial Settlement of International Disputes, December 15, 1910, in Root, *International Subjects*, 148–149; "The Hague Peace Conferences," Address in Opening the National Arbitration and Peace Congress, Apr. 15, 1907, in ibid., 142.

international public opinion had broadened, raising the costs to would-be aggressors. Social and economic change was creating "an international community of knowledge and interest, of thought and feeling."[82] And that community would make war more and more unlikely.

Root's program for refashioning international relations between the United States and Latin America reflected the turn-of-the-century legal culture from which it emerged. At its core, Root's vision rested on the sovereign equality of nation-states, which had the exclusive right to govern their own territory. Because the evolutionary course of development had brought about a natural harmony of economic interests among the states making up the hemisphere, moreover, such sovereignty posed little threat to trade and economic integration. Nevertheless, Root was not naïve; he recognized that sovereign nation-states often came into disagreement with one another. Arbitration and eventually an international court would play the role that the U.S. Supreme Court served in the United States: they would ensure that no nation-state stepped beyond the boundaries that the law assigned it and usurped the powers of another nation-state. And just as the federal courts had developed a general commercial law for the United States, furthering commerce and deepening the ties of Union, international judges, sensitive to diverse national traditions, would develop a scientific system of international law that synthesized the customs and practices of civilized nations.

But, dual federalism's carefully drawn boundaries within the United States were already facing a sustained assault from progressives, who charged that they favored a rentier class at the expense of workers and other less powerful groups in society. Moreover, Root's assumption of hemispheric harmony failed to foresee the rise of the revolutionary

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[82] Elihu Root, Nobel Peace Prize Address, in Root, *International Subjects*, 165–69.

nationalism that would engulf the hemisphere and the world within a decade.[83] In addition, he was unwilling to give international courts jurisdiction over matters of vital national interest, an exception that threatened to swallow his entire program. Recognizing this limitation, he turned, not unreasonably, to nebulous abstractions like international public opinion and the emergence of an international community, concepts that he himself privately condemned as insufficient to keep peace.[84] As a result, Root's program was unlikely to deliver peace and promote economic integration in the way that he expected. Still, Root was not a utopian; he expected law to mitigate conflict, not to end it. Despite its questionable foundations, Root's program attracted the support of the legal and foreign policy elite and achieved concrete victories through arbitration treaties and the creation of institutions like the Central American Court of Justice.[85]

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[83] Healy, *Drive to Hegemony*, 171; Carl P. Parrini, *Heir to Empire: United States Economic Diplomacy, 1916-1923*, 1st edition (Pittsburgh: University of Pittsburgh Press, 1969), 251–252. Root did predict "troublous times for Mexico" when "the strong, wise leadership of President Diaz is withdrawn." Root to Enrique C. Creel, Nov. 23, 1908, Elihu Root Papers, Library of Congress, Box 189, Part 2.

[84] Elihu Root, "Nobel Peace Prize Address," in Root, *International Subjects*, 155.

[85] In August 1907, after conflict had erupted in Central America, Roosevelt and Mexican President Porfirio Díaz summoned the Central American states to a peace conference. Although the State Department wanted the conference to be held in Mexico, Guatemalan mistrust of their northern neighbor brought the conference to Washington, D.C. There, Root hoped to devise institutions that would end the region's endless violence. After a month of deliberations, the Washington Conference produced a number of agreements. The Central American participants signed a ten-year peace treaty, neutralized Honduras, agreed to compulsory arbitration, banned political refugees from residing on borders where they might cause trouble, and decided to refuse recognition to governments that came to power through revolution. The cornerstone was the creation of the Central American Court of Justice. "The Nobel prize for next year is yours certain," Andrew Carnegie wrote Secretary of State Elihu Root on hearing of the creation of the court. Carnegie even donated $100,000 for a palace to house the court in Costa Rica. Root did eventually win the Nobel Peace Prize, although not until 1912. Healy, *Drive to Hegemony*, 141–142; Collin, *Theodore Roosevelt's Caribbean*, 487–488; Thomas L. Karnes, *The Failure of Union: Central America, 1824-1960*. (Chapel Hill: University of North Carolina Press, 1961), 188–193; Jessup, *Elihu Root*, 1:509–512; Hannigan, *New World Power*, 38; Ralph Lee Woodward, *Central America: A Nation Divided*, 3rd ed. (New York: Oxford University Press, 1999), 192–193; For the U.S. delegate's report, see U.S. Department of State, *Foreign Relations of the United States: 1907* (Washington, DC: Government Printing Office, 1910), 2:665–727; Carnegie quoted in Jessup, *Elihu Root*, 1:512. The Nobel Foundation's website today touts the court as one of the reasons Root deserved the prize. "Elihu Root: The Nobel Peace Prize 1912," http://nobelprize.org/nobel_prizes/peace/laureates/1912/root-bio.html.

II. *American Banana*: "A Hard Extension of the Rules"

But, unlike domestic law, by which nations governed their citizens, international law regulated only sovereign nation-states, not individuals, corporations, or other non-state entities.[86] Root recognized the importance of non-state actors in international affairs, and he saw them as the engine of economic integration. As secretary of state, moreover, he handled petitions from U.S. corporations and businesspeople asking for government support in dealing with foreign nations. He also turned to private banks as instruments of U.S. dollar diplomacy. But these non-state entities had no independent legal standing in international law and were instead subject to municipal law. "[T]here is but one nation, acting in direct relation to and representation of every citizen in every state," Root had said in 1907, and his logic extended to corporate persons as much as private citizens.[87]

As international commerce developed and multinational enterprise became increasingly common, lawyers needed to determine which nation's municipal law applied to companies operating internationally and to resolve conflicts arising between different legal systems. As a result, Root's framework faced the sorts of questions that had always plagued dual federalism within the United States. At home, the question whether business activity fell under Congress's commerce power or under the corporate law and police powers of the

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[86] Duncan Kennedy, "Three Globalizations of Law and Legal Thought: 1850-2000," in *The New Law and Economic Development: A Critical Appraisal*, ed. David M. Trubek and Alvaro Santos (New York: Cambridge University Press, 2006), 31; David Kennedy, "Primitive Legal Scholarship," *Harvard International Law Journal* 27 (1986): 8; For a contrary argument, see generally Jordan J. Paust, "Nonstate Actor Participation in International Law and the Pretense of Exclusion," *Virginia Journal of International Law* 51 (2011 2010): 977 (arguing that international law has formally recognized non-state actors for centuries).

[87] "The Real Questions Under the Japanese-Treaty and the San Francisco School Board Resolution," Presidential Address at the First Annual Meeting of the American Society of International Law, Apr. 19, 1907, in Elihu Root, *Addresses on International Subjects*, ed. Robert Bacon and James Brown Scott (Cambridge, MA: Harvard University Press, 1916), 14, 20–21.

several states became increasingly contentious, and progressive jurists challenged the idea that judges could ascertain such boundaries apolitically.[88]

For a while, Root's ideology helped to mask analogous choice-of-law questions for companies operating abroad. In general, Root saw business as a cause of harmony rather than division. His gendered vision of the masculine U.S. economy pouring goods into a receptive, feminine Latin America obscured economic conflict. Instead, Root argued, multinational enterprise brought about "the recognition of interdependence of the peoples of different nations [and] their dependence upon each other for the supply of their needs and for the profitable disposal of their products."[89] But as Congress and the courts grappled with the problem of the trusts at home through new legislation like the Sherman Act, the question whether U.S. law regulated companies operating overseas became impossible to avoid: When companies had operations in more than one country, whose laws regulated their behavior? Did the Constitution (or laws passed pursuant to it) follow the United Fruit Company?[90]

A. The Path to the Supreme Court

In the spring of 1909, after the Taft administration took office and Root stepped aside as secretary of state, the U.S. Supreme Court addressed this question. The events

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[88] See, e.g., United States v. E. C. Knight Co., 156 U.S. 1 (1895). Even when activity fell within the power of the state, moreover, the Supreme Court increasingly identified constitutional limitations on the police power, generating frustration as the Court seemed to limit the states' power to deal with changing social conditions. Led by Justice Oliver Wendell Holmes, Jr., jurists increasingly challenged classical legal thought's idea of law as distinct from politics and the corresponding idea that neutral judges could fairly prick boundaries. Unless "a rational and fair man" had no doubt that legislation "would infringe fundamental principles," judges should accept "the right of a majority to embody their opinions in law." Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (New York: Oxford University Press, 1993), 487.

[89] Elihu Root, Nobel Peace Prize Address, Root, *International Subjects*, 167.

[90] Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888-1910*, vol. 8, The Oliver Wendell Holmes Devise History of the Supreme Court of the United States (New York: Macmillan Publishing Company, 1993), 22.

leading to the U.S. Supreme Court's decision in *American Banana Company v. United Fruit Company* began in July 1899, when American businessman Herbert Lee McConnell formed a partnership to grow and export Central American bananas to the United States. Within six months, the United Fruit Company, which was consolidating its hold on the banana trade, acquired McConnell's business and incorporated it in New Jersey. United Fruit's Andrew Preston held a controlling number of shares. McConnell signed an agreement promising not to compete in the banana business and was made president of United Fruit's newest subsidiary.[91]

In the spring of 1903, however, McConnell decided to resume growing bananas on his own. He chose some land along the Sixoala River, on disputed territory that separated Costa Rica from Panama, then still under Colombian sovereignty. According to McConnell, an arbitrator had given the land to Colombia, and it merely remained under Costa Rican control until it could be surveyed. Recognizing that he needed an outlet on the Caribbean to ship the bananas to the United States, McConnell also obtained a railroad concession leading to the coast from Ricardo Roman Romero, a Colombian citizen. But Costa Rican soldiers, perhaps at the instigation of United Fruit, were interfering with his new plantation.[92]

In September 1903, after Costa Rica again blocked his efforts to establish a plantation, McConnell wrote Secretary of State John Hay asking for assistance. Hay told William J. Merry, the American minister in Costa Rica, to look into the matter. Costa Rica then left McConnell alone for the time being. Meanwhile, instigated by the United States,

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[91] The basic narrative for the account that follows is provided by B. W. Palmer, *The American Banana Company* (Boston: Geo. H. Ellis Co., 1907), i–xxix His introductory explanation is obviously biased against McConnell but nevertheless provides a helpful outline of the key events. McConnell's side of the story emerges in his correspondence and in litigation. See John T. Noonan, *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks* (New York: Farrar, Straus and Giroux, 1976), 93.

[92] McConnell to T. D. Nettles, Apr. 23, 1903, in Palmer, *American Banana Company*, A–B.

Panama revolted from Colombia and became an independent nation. The disputed land now lay on the border between Costa Rica and a sovereign Panama.[93]

In June 1904, McConnell transferred his interests in his new endeavor to the American Banana Company, an Alabama corporation that he controlled.[94] That summer, Costa Rican officials again hindered his operations. According to the American Banana Company, the United Fruit Company's leverage was to blame. As American Banana's Amended Complaint against United Fruit later alleged,

> Nevertheless, in said month of July, 1904, Costa Rican soldiers and officials were instigated and induced by said defendant company, as plaintiff is informed and believes, to seize, and they did in fact seize, the portion of the plantation of the plaintiff herein lying on the northerly side of the Sixola River, which flowed through said plantation, and a cargo of railroad and other supplies, which had been landed from a vessel chartered by the said McConnell for the plaintiff—the steamship Orn, under the superintendence of Panama Customs officials.[95]

As a result, McConnell again turned to the State Department for help. Costa Rican Foreign Minister José Astua Aguilar explained to the American minister that Costa Rica exercised sovereignty over the land in question, with Panama's consent. Moreover, he disputed McConnell's characterization of events. Astua Aguilar complained that McConnell had seized the lands without permission and ignored Costa Rican customs requirements. "The Government of Costa Rica," he explained "desiring to put an end to those acts of manifest usurpation of ownership and disregard of national sovereignty, and at the same time to

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[93] McConnell to Hay, Sept. 24, 1903, in ibid., 55–57; Hay to Merry, Nov. 12, 1903, in ibid; Amended Complaint, par. 24, printed as part of the Record in American Banana v. United Fruit Company, 213 U.S. 347 (1909), [hereinafter Complaint].

[94] Complaint, par. 26.

[95] Ibid., par. 27

enforce our customs laws, sent . . . not a military force, but a small section of the customs officers . . . ."[96]

Later that fall, the Camors-McConnell Company, McConnell's old company now controlled by United Fruit, opened another front in the battle and brought suit against McConnell in the U.S. Circuit Court for the Southern District of Alabama to enforce the non-compete agreement that he had signed. Rejecting McConnell's defense that the non-compete agreement was executed to restrain trade and therefore unenforceable, the judge enjoined McConnell from running a rival business.[97] The Fifth Circuit overturned the decision in 1907. The defense that the contract was for the purpose of forming an illegal trust "was a very dishonest one," it held, but "to refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly to reducing the number of such transactions to a minimum." McConnell's old company had placed itself "outside the protection of the law."[98]

In the meantime, McConnell made a formal appeal to the U.S. State Department asking for assistance. Though he had "too strongly" pressed certain of his claims before, he now sought to make a "proper presentation."[99] Secretary of State John Hay directed the U.S. minister in Costa Rica to arrange a modus vivendi.[100] Costa Rican Foreign Minister Astua Aguilar denounced McConnell's behavior and asserted Costa Rican sovereignty over the territory in question. Pointing out that McConnell had only now requested a concession

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[96] José Astua Aguilar to Merry, Sept. 21, 1904, encl. to Merry to Adee, Sept. 21, 1904, in Palmer, *American Banana Company*, 63–65.

[97] Camors-McConnell v. McConnell, 140 F. 412 (1905 (Cir. Ct. D. Ala. 1905)), judgment affirmed Camors McConnell Co. v. McConnell, 140 F. 987 (5th Cir. 1906).

[98] Camors-McConnell v. McConnell, 152 F. 321, 321 (5th Cir. 1907).

[99] First Memorial to the State Department, December 21, 1904, in Palmer, *American Banana Company*, 71–84.

[100] Hay to Merry, Feb. 8, 1905, in ibid., 85–88.

from the Costa Rican government, he complained that McConnell was offering no compensation "in return for such valuable grant."[101]

The American minister informed the State Department that "no effort has been spared" to resolve the controversy, but explained that McConnell's refusal to withdraw his claim for damages prevented an agreement.[102] In October 1905, McConnell submitted another petition to the State Department. Since efforts to achieve a modus vivendi had failed, he argued, it was time for the United States to inform Costa Rica that further interference with American (i.e. his own private) interests would be treated as an "unfriendly act" by the United States.[103]

In response, Elihu Root, now secretary of state, sent a cable to Astua Aguilar stipulating that the boundary dispute needed to be settled and rival claims adjudicated in court before the rights of American citizens were prejudiced.[104] Minister William Merry forwarded Root Costa Rica's "prolix and discursive response," explaining that that Astua Aguilar likely did not understand that Root had merely sought to "reserve the rights of any American citizen as against the ultimate sovereignty of that territory, whenever that sovereignty may be decisively settled." Merry added that McConnell had "decided to insist upon the right to place an additional area under cultivation, thus changing the *modus vivendi* for a *modus crescendi*."[105]

On April 16, 1906, Root cabled the U.S. ministers in Costa Rica and Panama and laid out the U.S. government's position. Root largely sided with McConnell. He declared that

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[101] José Astua Aguilar to McConnell, Apr. 12, 1905, in ibid., 93–99.
[102] Merry to Loomis, June 11, 1905, in ibid., 128–129.
[103] Second Memorial, Oct. 18, 1905, in ibid., 132–150.
[104] Merry to Astua Aguilar, Jan. 1, 1906, in ibid., 152–153.
[105] Merry to Root, Mar. 7, 1906, in ibid., 153–154.

arbitration had awarded the disputed land to Colombia (and thus Panama), that McConnell had "expended large sums" cultivating the land on the basis of Colombian laws, and that a pending treaty was likely to give it to Panama. Acknowledging that Panama and Costa Rica had an understanding that Costa Rica would exercise de facto control, it was nonetheless "undeniable" that Panama had de jure sovereignty over the land in question. Costa Rica's de facto sovereignty thus put it "in the position of a usufructary." Whereas it was "entitled to the fruits and profits of the territory during the period of tenure," it could "rightfully exercise no jurisdiction within the territory which Panama could not exercise," including the right to deprive someone of property without due process. Nonetheless, "[A]s long as [Costa Rica] is the sovereign in possession, whatever attributes that accompany or attend possession should be conceded to her . . . . But the ultimate attributes of sovereignty belong to the ultimate owner, and for this reason it is proper that Panama should see to it that rights and titles which have accrued concerning lands within this area should not be prejudiced by the State having accidental and temporary jurisdiction." Root recommended that Panama proceed diplomatically rather than by force. In conclusion, he instructed the diplomats to insist that Panama and Costa Rica respect McConnell's claims until they could be decided by the courts. He added that his message was not to be construed to prejudice the United Fruit Company or other U.S. interests in the region.[106]

In September 1906, McConnell brought suit against the United Fruit Company in the Southern District of New York, beginning the proceedings that would bring the issue to the U.S. Supreme Court. McConnell alleged that the United Fruit Company's campaign to

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[106] Root to Merry and Magoon, Apr. 16, 1906, in ibid., 163–166. Proceedings begun in the Costa Rican courts had determined that the disputed territory belonged to the Northern Railway Company, a company with ties to the United Fruit Company. Complaint, pars. 28-29.

consolidate control over the Central American banana business violated the Sherman Act. It had destroyed the market, restrained trade, monopolized the banana trade, and prevented the American Banana Company from competing. The company alleged that it sustained $2 million in damages. If it won, the Sherman Act would allow it to recover triple that amount.[107]

On March 4, 1908, District Court Judge Charles Hough granted the United Fruit Company judgment on the pleadings for most of its claims. American Banana had failed to state a justiciable claim because the alleged Sherman Act violation hinged on the actions of Costa Rica. "Who actually deprived the plaintiff of its property? The answer is clear—the Republic of Costa Rica . . . . If the act complained of was done by Costa Rica, it is of no moment that the defendant and that Republic were joint tort feasors. There was but one tort, and if one offender can be sued it is of the essence of the doctrine that the other must be equally suable." But according to the act of state doctrine set forth in *Underhill v. Hernandez*, U.S. courts could not pronounce on the actions of foreign sovereigns, and Root's letter had established Costa Rica's de facto sovereignty. Because it was "impossible to adjudicate this matter without sitting in judgment on the *right* of Costa Rica to do what was done," the claim had to be dismissed "on grounds of highest public policy." As another ground for sustaining the defendant's demurrer, Judge Hough pointed out that American Banana sought damages for *prospective* profits. But the Sherman Act, he opined, only allowed

[107] Complaint, pars. 34-37.

a cause of action for those deprived of existing profits. Because American Banana had never established its banana business, its claim had to fail.[108]

On appeal to the Second Circuit, Judge Walter C. Noyes rejected Hough's second ground for throwing out American Banana's claim. His opinion therefore hinged on Costa Rica's role in shutting down the McConnell plantation. Like Hough, Judge Noyes based his opinion on Root's letter, which acknowledged Costa Rica's de facto sovereignty, and he likewise invoked *Underhill v. Hernandez*. "The validity of an act adopted by a sovereign State," he explained, "cannot be inquired into at all—directly or collaterally—by the courts of another state. Relief must be sought in the courts of the former State or through diplomatic channels." Nor could United Fruit be held liable as a joint tort feasor: "That relation, too, is wholly inconsistent with the relation of a sovereign government acting in its political capacity—as the government of Costa Rica did—to an informer . . . ." Judge Hough was therefore right to dismiss the complaint for failure to state a cause of action.[109]

B. "Startling Propositions": *American Banana* at the Supreme Court

The case now reached the U.S. Supreme Court, which heard arguments and decided the case in April 1909. Writing for the Court, Justice Holmes affirmed the Second Circuit's decision. But Holmes's opinion began from a different standpoint. "It is obvious," Holmes wrote, "that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by acts of Congress." To be sure, Holmes

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[108] American Banana Co. v. United Fruit Co., 160 F. 184 (Cir. Ct. S.D.N.Y. 1908) (citing Underhill v. Hernandez, 168 U.S. 250 (1897)). Hough did allow a claim that United Fruit abused its position as a common carrier in preventing the plaintiff from using its transportation line.

[109] American Banana Co. v. United Fruit Co., 166 F. 261 (2nd Cir. 1908).

acknowledged, states can exercise jurisdiction on the high seas or over lawless areas, or in cases affecting important national interests beyond their borders. "But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act was done."[110]

Holmes then preceded to more general reflections on the nature of law: "Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts. But the word is commonly confined to such prophecies or threats when addressed to persons living within the power of the courts." This declaration brought Holmes to what has come to be known as the presumption against extraterritoriality: "in case of doubt to [construe] any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power."[111] That is, unless Congress expressly specified that a statute applied extraterritorially, courts would interpret it as only applying within the territorial United States.

Holmes's decision also rested on another foundation: "For again, not only were the acts of the defendant in Panama or Costa Rica not within the Sherman Act, but they were not torts by the law of the place and therefore were not torts at all . . . ." Here, Holmes cited *Underhill v. Hernandez* and invoked the act of state doctrine. It did not matter that Panama was the de jure sovereign. Sovereignty, wrote Holmes, "is pure fact." It would be absurd to say that it was a tort to persuade a sovereign power to do something, for "it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. . . . It

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[110] American Banana Co. v. United Fruit Co., 213 U.S. 347, 355–356 (1909). As Kramer points out, Holmes's analysis here rested on the vested rights theory developed by Joseph Beale. Kramer, "Vestiges of Beale," 186.

[111] *American Banana*, 213 U.S. at 356.

makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law."[112] American Banana's challenge ignored Costa Rica's right to determine what was legal and illegal within its jurisdiction.

Holmes distinguished an English case (relied on by the American Banana Company), which held that an Indian Nabob who was technically sovereign was nonetheless liable because he was "a mere tool of the defendant, an English Governor. . . . But of course it is not alleged that Costa Rica stands in that relation to the United Fruit Company." And because the plaintiff's injuries were "the direct effect of the acts of the Costa Rican government," American Banana's claim failed: "A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by local law."[113]

Contemporary commentary was surprisingly hostile to Holmes's opinion. Political scientist Warren B. Hunting, for example, argued that the focus on the seizure of the plantation in Costa Rica misstated the issue in a case arising under the Sherman Act. "The essence of the offense is not the unlawful seizure of the property . . . . The criminal act is restraining the foreign commerce of the United States. It takes effect *in* the United States, and, therefore, may be punished *by* the United States." This case was essentially the same as if the defendant had fired a gun from Mexico into the United States. Recognizing that the true violation was restraining trade also resolved the problem of Costa Rica's sovereignty:

> It is immaterial that the particular means used in restraining trade are lawful in themselves. . . . It is an elemental proposition, laid down in the early case of *U.S. v. Trans-Missouri Freight Association*, that acts may be otherwise absolutely lawful, and yet be unlawful, under the act, because they restrain trade. In final analysis, the particular act of the defendant which was unlawful was the persuasion of the Costa Rican

[112] Ibid., 357–358.
[113] Ibid., 358–359.

> government to act so as to put the plaintiff out of business, and so restrain the foreign trade of the United States of which it had or planned to have a part.[114]

Similarly, a brief analysis of the case in the *Harvard Law Review* noted that inducing governmental action was often tortious, as in cases of malicious prosecution.[115]

Chief Justice Melville Fuller unwittingly set the stage for the most potent modern-day objection. Scrawling a note on Holmes's opinion, he wrote, "Yes, but very hard extension of the rules. Panama is no more an independent state than Nabob— But this is a fine opinion and worthy of the writer, which is saying a good deal."[116] For judge and legal scholar John T. Noonan, Jr., Fuller's remark encapsulates all that is wrong with Holmes's opinion. In the first place, Fuller could not even keep his Latin American countries straight, since Costa Rica was the nation whose sovereignty was at issue, a mistake that "showed as pointedly as possible how these dependencies of American empire were fungible from the perspective of Washington."[117] But more significantly, fixating on rules allowed Holmes to ignore the true issue in the case: "the story of domination of a small country's government by a predatory American business which had brutally suppressed a challenge to its monopoly." According to Noonan, sovereignty was a mask that allowed Holmes to ignore the real human beings affected by the litigation.[118]

For Noonan, then, the presumption against extraterritoriality and the act of state doctrine created a legal vacuum that gave the United Fruit Company free rein to extend its power overseas in Latin America. Holmes's decision that the Sherman Act did not apply

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[114] Warren B. Hunting, "Extra-Territorial Effect of the Sherman Act American Banana Company Versus United Fruit Company," *Illinois Law Review* 6 (1911): 42–43 (citing United States v. Trans-Missouri Freight Assn., 166 U.S. 290 (1897)); "Recent Cases," *Harvard Law Review* 22 (1909): 615.

[115] "Recent Cases," 615.

[116] Holmes Bound Opinions, Holmes Papers, Harvard Law School Library, quoted in Noonan, *Persons and Masks of the Law*, 103.

[117] Ibid., 103–104.

[118] Ibid., 19–20, 106–110.

extraterritorially freed U.S. corporations from governmental regulation. This understanding finds support in Holmes's disdain for antitrust regulation. Holmes hated the Sherman Act, calling it "a humbug based on economic ignorance and incompetence" and "a foolish law."[119] After *American Banana*, corporations operating abroad could ignore its provisions without fear of litigation.

Noonan's critique mirrors the progressive assault on classical legal thought. For generations, scholars have assumed that legal formalism enabled and masked a commitment to laissez-faire capitalism. Critics increasingly complained that judges applied not objective, scientific principles of law, but controversial social theories that supported capitalists and entrepreneurs at the expense of workers and other less powerful groups in society. According to Edward S. Corwin, moreover, the fixation on boundaries created a legal "twilight zone" giving free rein to big business. These ideas anticipate the essence of Noonan's critique of *American Banana*.[120]

More recent scholarship, however, has challenged the laissez-faire characterization of the classical era. Though not denying that Gilded Age capitalists often benefitted from legal formalism at the expense of other groups of society, legal historians have shown that judges and elite lawyers were not mere pawns for their class. As Robert Gordon points out, "[T]heir vision was often broader, more cosmopolitan, and more farsighted in anticipating that

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[119] Holmes to Pollock, Apr. 23, 1910, in Mark DeWolfe Howe, ed., *Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874-1932.* (Cambridge, MA: Belknap Press of Harvard University Press, 1961), 1:163; Holmes to Laski, Mar. 4, 1920, in Mark DeWolfe Howe, ed., *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916-1935,* (Cambridge, MA: Harvard University Press, 1953), 1:248–249; see also Fiss, *Troubled Beginnings*, 8:143.

[120] See Edward S. Corwin, *The Twilight of the Supreme Court; a History of Our Constitutional Theory,* (New Haven: Yale University Press, 1934), 20.

compromises would have to be made for the sake of industrial peace."[121] They instead sought to preserve longstanding legal principles that, for instance, prohibited laws from benefitting one class of society at the expense of others.[122]

Although Noonan is right that these legal principles often reduced individuals to judicial abstractions, his understanding of *American Banana* risks reinforcing the "all too common laissez-faire mischaracterization of the American turn of the century."[123] Rather than creating a twilight zone for American companies overseas, Holmes's commitment to sovereignty reinforced the system of international law that Root and likeminded lawyers were developing to govern international relations in the Western Hemisphere. Though this vision of sovereignty freed American corporations operating overseas from laws like the Sherman Act, it also presupposed the right of foreign sovereigns to issue their own regulations. Indeed, their sovereignty over their territory was supposed to be absolute—involving "the right to determine one's own actions—to pay or not to pay, to redress injury or not to redress it, at the will of the sovereign."[124]

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[121] Robert W. Gordon, "The American Legal Profession," in *The Cambridge History of Law in America, Vol. 3, The Twentieth Century and After (1920-)*, ed. Michael Grossberg and Christopher Tomlins (New York: Cambridge University Press, 2008), 96.

[122] See, for example, Howard Gillman, *The Constitution Besieged: The Rise & Demise of Lochner Era Police Powers Jurisprudence* (Durham, North Carolina: Duke University Press Books, 1992); Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897," *The Journal of American History* 61 (Mar. 1, 1975): 970–1005.

[123] Marc-William Palen, "The Imperialism of Economic Nationalism, 1890–1913," *Diplomatic History*, 2014, 5, http://dh.oxfordjournals.org/content/early/2014/02/07/dh.dht135; Charles S. Maier, "Consigning the Twentieth Century to History: Alternative Narratives for the Modern Era," *American Historical Review* 105 (June 2000): 822.

[124] Root, "The Relations Between International Tribunals of Arbitration and the Jurisdiction of National Courts," Presidential Address at the Third Annual Meeting of the American Society of International Law, Apr. 23, 1909, in Root, *International Subjects*, 33–34.

C. Instigate, Urge, and Persuade: Government-Business Relations After *American Banana*

In practice, however, U.S. policymakers were unwilling to give foreign nations that degree of autonomy. Though Root sought to instill greater respect for Latin American sovereignty in U.S. foreign policy, he also insisted upon limits to sovereignty, using an analogy with municipal law. As Root argued, "The conditions under which this sovereign power is exercised among civilized nations do, however, impose upon it important limitations, just as the conditions under which individual liberty is enjoyed in a free civil community." Although municipal law generally didn't compel citizens to be virtuous, Root explained that domestic peace required "the existence of a community standard of conduct" apart from law itself. Citizens who failed to live up to that standard would be ostracized and would open themselves to harm by enabling others to ignore it, too. According to Root, the international system similarly required "a standard of international conduct."

This standard had the character of natural law. As Root explained, "The chief principle entering into this standard of conduct is that every sovereign nation is willing at all times and under all circumstances to do what is just. That is the universal postulate of all modern diplomatic discussion." And this was also the basis of international law: "This obligation is by universal consent interpreted according to established and accepted rules as to what constitutes justice under certain known and frequently recurring conditions; and these accepted rules we call international law." Thus, governments negotiated a tension

between sovereignty and principles of justice embodied in the particular rules of international law, principles that qualified that supposedly supreme sovereignty.[125]

In certain circumstances, these principles allowed individuals and corporations operating abroad to complain about mistreatment at the hands of foreign authorities. Even when a government acted entirely within its own territory, it had to comply with the international standard of justice embodied by international law. Because this system only recognized states as legal entities, however, private actors had only limited legal recourse. Unless the foreign nation consented to adjudicate the dispute, individuals and corporations had to turn to their own government to vindicate their rights. Legally, in other words, the alleged wrong became a dispute between nations. As Root wrote, "So far as questions arise out of alleged wrongs by one government against a citizen of another, the sovereignty of one nation is merely confronted by another sovereignty . . . ."[126]

Because Americans abroad needed the sovereignty of the United States to uphold their interests against foreign governments, *American Banana* was not a blueprint for laissez-faire. Instead, the case tied American corporations operating overseas more closely to the U.S. government. "But seizure by a state is not a thing that can be complained of elsewhere in the courts," Holmes wrote in *American Banana*, citing *Underhill v. Hernandez*.[127] This was because U.S. courts would not sit in judgment of the acts of foreign states. *Underhill* pointed to the alternative: "Redress of grievances by reason of such acts must be obtained through

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[125] Root, "The Relations Between International Tribunals of Arbitration and the Jurisdiction of National Courts," Presidential Address at the Third Annual Meeting of the American Society of International Law, Apr. 23, 1909, in ibid., 34–36.

[126] Root, "The Relations Between International Tribunals of Arbitration and the Jurisdiction of National Courts," Presidential Address at the Third Annual Meeting of the American Society of International Law, Apr. 23, 1909, in ibid., 33–34.

[127] American Banana Co. v. United Fruit Co., 213 U.S. 347, 357–358 (1909), 213:357–358.

the means open to be availed of by sovereign powers as between themselves."[128] If the courts were not the proper venue, diplomatic negotiations were. And such diplomatic solutions required corporations to cultivate government support.

This theme runs through the documentation generated by the *American Banana* litigation and is driven home in United Fruit's brief to the U.S. Supreme Court. The brief highlighted many of the words used in American Banana's complaint to connect the United Fruit Company to the Costa Rican government actions: instigated, induced, urged, persuaded. But such words equally described American Banana's relationship to the U.S. government. United Fruit

> is connected with these acts of Costa Rica only as it is charged with *instigation*, *urgency*, and *persuasion* addressed to the governments and officials of the United States and Costa Rica. The word "induce" must mean the same thing when used to describe the acts of the plaintiff and the defendant. Thus . . . the plaintiff [American Banana] says it "has been diligent to *induce* the Government of the United States to interfere on its behalf." Had it succeeded, the interference would have been the act of the government, not of the plaintiff.[129]

From the standpoint of understanding multinational enterprise in this era, the passage is revealing. Without a reliable and impartial tribunal to resolve overseas disagreements, corporations were dependent on their governments to take up their complaints. American Banana had turned to the U.S. State Department for help again and again. Indeed, in the diplomatic context, Root's letter championed the company's rights against Costa Rica. It was only when McConnell turned from the State Department to the courts of the United States that Root's letter began to be used against him, as judges used its acknowledgment of Costa Rica's de facto sovereignty to invoke the act of state doctrine.

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[128] Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

[129] Brief for the Defendant in Error, at 5, American Banana Co. v. United Fruit Co. 213 U.S. 347 (1909). Of course, American Banana's claim turned on what was induced rather than the act of inducing itself.

By favoring diplomatic solutions and closing the courts to disputes involving foreign states, *Underhill* and *American Banana* meant that Americans overseas were dependent on the State Department. As the United Fruit Company argued, "If the plaintiff has suffered any wrongs at the hands of the Costa Rican authorities which they will not redress, its proper course is to ask the executive department of this government to interpose its influence."[130] To be sure, the interests of the U.S. government and those of business were never fully in line. As John Braeman argues, "The United States government was most activist in supporting business abroad when such action coincided with its strategic needs, political goals, or ideological values . . . ." American companies, meanwhile, tended to seek U.S. government support in less developed markets.[131]

But although the government was dependent on corporations to bridge sovereign boundaries and promote a growing international market, corporations remained dependent on the government, too.[132] Alison Frank has uncovered an especially remarkable example of this cooperation. Even as the Justice Department prosecuted Standard Oil for antitrust violations in the courts of the United States, it vigorously advanced the company's interests overseas. As Frank explains, "[M]obility of capital did not always mean that corporations were more powerful than states. Sometimes it meant that they needed states' help more than ever before."[133]

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[130] Ibid., at 19.

[131] John Braeman, "The New Left and American Foreign Policy during the Age of Normalcy: A Re-Examination," *Business History Review* 57 (Mar. 1983): 94–99.

[132] Mira Wilkins, *The Emergence of Multinational Enterprise: American Business Abroad from the Colonial Era to 1914* (Cambridge, MA: Harvard University Press, 1970), 166; Matthew F. Jacobs, "World War I: A War (and Peace?) for the Middle East," *Diplomatic History* 38 (Sept. 2014): 782–83.

[133] Alison Frank, "The Petroleum War of 1910: Standard Oil, Austria, and the Limits of the Multinational Corporation," *American Historical Review* 114 (Feb. 2009): 41. "Austria's expectation that it could challenge Standard with impunity," Frank adds, "was based on its mistaken assumption that the State

Ideally, U.S. diplomats in such situations would negotiate the sorts of modi vivendi that Minister Merry sought for McConnell in Costa Rica. But when these sorts of informal approaches failed, there was a strong incentive to do what McConnell's lawyer Everett Wheeler urged in the second memorial to the State Department: to turn unfavorable foreign acts from the standpoint of the company into "unfriendly acts" against the United States.[134]

In turn, this pressure to turn private disagreements into diplomatic disputes between nations made it all the more important to develop impartial institutions to manage disputes between states. The U.S. Constitution provided a model. Because even a well-meaning state court judge would struggle to be impartial when a case pitted a citizen of his own state against the citizen of a different state, the framers of the U.S. Constitution gave federal courts jurisdiction over cases between citizens of different states. The "liability of courts to be affected by local sentiment, prejudice, and pressure" likewise drove Root's support for international arbitration. Just as federal judges promoted national harmony by overcoming the narrower interests and prejudices of the particular states, international judges would further international harmony by impartially applying the principles of international law.[135] Root drew on American federalism and diversity jurisdiction as a solution to the sort of disputes driving the *American Banana* litigation.

D. International Law, Federalism, and the Separation of Powers

The increasing importance of international law also contributed to constitutional change within the United States. Dual federalism regulated relations between (and among) two primary sets of sovereigns: the federal government and the several states. Root's

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Department would tolerate—or even appreciate—foreign attacks on a company targeted for prosecution at home. The State Department could not allow such presumption to stand."

[134] See supra note 102 and accompanying text.

[135] Root, *International Subjects*, 36–41.

conception of an internationalized federalism, meanwhile, governed a different set of sovereigns: the United States and other civilized nation-states. Root's program raised challenging questions about how these two systems—the system of dual federalism within the United States and the emerging system of international law abroad—related to one another.

As legal scholar G. Edward White points out, the prevailing "orthodox" regime did not draw a sharp dichotomy between foreign relations and other fields of law. It saw all exercises of federal power as limited by the enumerated and reserved powers in the Constitution. It assumed that Congress would play an active role in foreign affairs, particularly through the Senate's responsibility for ratifying treaties, and it presupposed that the judiciary would police the boundaries of issues touching foreign affairs just as it did in issues concerning domestic matters. The orthodox regime also recognized the autonomy of the states in a federal system, and it assumed that their sovereignty limited the power of the federal government in the realm of foreign affairs.[136]

At least on the surface, proponents of international law remained wedded to this orthodox vision. Root acknowledged, for example, "certain implied limitations arising from the nature of our government and from other provisions of the Constitution," and conceded

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[136] See White, *Constitution and the New Deal*, 33–93. Contrast David Kennedy's assessment about traditional international law scholarship:

> The traditional scholar tends to distinguish municipal and international law quite sharply. The two legal orders are different as well as separate. The traditional scholar views the municipal realm as a vertical legal order of sovereign powers and citizen rights. The international order, by contrast, is a horizontal order among sovereign authorities, concerned with allocating jurisdictions and building order among independent sovereigns. The international legal order is contractual, while the municipal order is a matter of public authority. As a result, the sovereign plays a far more central role in traditional thought, for he is the source of vertical authority and has the capacity for horizontal contract. The sovereign is the boundary between two major legal spheres.

David Kennedy, "Primitive Legal Scholarship," *Harvard International Law Journal* 27 (1986): 8.

that in principle "states rights" imposed limitations on international agreements. But Root's internationalism undermined these limitations. Root admitted, for example, that state officials did have authority over certain aspects of international affairs, and this authority sometimes created "a supposed or apparent clashing of interests." But he countered that the federal government and state governments "could not be really in conflict; for the best interest of the whole country is always the true interest of every state and city, and the protection of the interests of every locality in the country is always the true interest of the nation." In practice, the local therefore gave way before the national. As Root declared in 1907, "In international affairs there are no states; there is but one nation, acting in direct relation to and representation of every citizen in every state."[137] *American Banana* likewise concluded that there was but one sovereign acting over a given territory, that "the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act was done."[138]

In addition to shifting authority from the state governments to the federal government, this need for a unitary national voice in foreign affairs had implications for the separation of powers within the federal government. In the first place, Root questioned the capacity of federal judges to decide international legal questions. Instead, Root hoped that international tribunals would supplant national ones for such purposes. Judges "trained under different systems of law, with different ways of thinking and of looking at matters," lacked the breadth of vision needed to adjudicate sensitive international matters, especially given the "very wide difference between the way in which a civil lawyer and a common-law

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[137] "The Real Questions Under the Japanese-Treaty and the San Francisco School Board Resolution," Presidential Address at the First Annual Meeting of the American Society of International Law, Apr. 19, 1907, in Root, *International Subjects*, 14, 20–21.

[138] American Banana Co. v. United Fruit Co., 213 U.S. 347, 355–356 (1909).

lawyer will approach a subject."[139] Just as Justice Joseph Story's opinion in *Swift v. Tyson* assumed that federal judges might bring a broader outlook than state court judges to matters of general commercial law, Root favored international judges whose outlook would transcend the parochial limitations of judges tied to national systems of law.

Committing the United States to arbitration or to an international court also raised questions about Congress's power over U.S. foreign relations, particularly the responsibility of the Senate to ratify treaties. International tribunals would make little difference if the Senate could reject decisions that it did not like. The U.S. Constitution's requirement that the two-thirds of the Senate ratify treaties came to be seen as an obstacle to smooth diplomacy. It was hard to negotiate with foreign governments or commit to arbitration when matters also had to be submitted to the Senate for approval. As White writes, "The obvious practical difficulties in involving the Senate in the settlement of any claim by an American citizen against a foreign government, and the discrete implications of the claims themselves, contributed to the unproblematic status of executive hegemony."[140]

Root maintained a formal commitment to the Senate's power to approve arbitration agreements, but in practice he sought to minimize the chamber's interference by promoting general arbitration agreements that committed the United States to submit a class of controversies to arbitration. The Senate would debate such treaties after they were signed by the president, but afterwards power no longer remained in its hands: "The difference between a special treaty of arbitration and a general treaty of arbitration is that, in a special treaty the President and Senate agree that a particular case shall be submitted to arbitration,

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[139] "The Importance of Judicial Settlement," Opening Address at the International Conference of the American Society for Judicial Settlement of International Disputes, December 15, 1910, in Root, *International Subjects*, 148.

[140] White, *Constitution and the New Deal*, 37–40.

while in a general treaty the President and Senate agree that all cases falling within certain described classes shall be submitted."[141] In other words, Root wanted Congress to delegate part of its power over foreign affairs to international institutions.

As Root's internationalist vision took shape in the first decade of the twentieth century, Senator George Sutherland of Utah was laying the intellectual foundations for a new foreign relations law that would culminate in the robust assertion of executive power over foreign relations announced in *United States v. Curtiss-Wright Corporation* and *United States v. Belmont* in the 1930s.[142] "These changes," G. Edward White explains, "included not only the continued employment of executive agreements as principal mechanisms of foreign relations policymaking but also the virtual disappearance of consideration for the reserved powers of the states in constitutional foreign affairs jurisprudence and, perhaps most startlingly, the sharply reduced role of not only the states and the Senate, but of the courts, as significant overseers of executive foreign policy decisions."[143] The erosion of these various constitutional checks would clear the field for presidential power.

Root was not a proponent of an unbridled executive, and in his rhetoric and probably in his own mind he continued to support traditional constitutional checks and balances. Pre-committing the nation to arbitration could be done through a valid exercise of the treaty power, and it limited the president along with the Senate and the judiciary. Root's goal was for a viable international judiciary to decide international questions, which would

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[141] Senate Committee on Foreign Relations, Report on General Arbitration Treaties with Great Britain and France, Aug. 21, 1911, 62nd Cong., 1st Sess., S. Doc. 98, p. 9. Root would mitigate this consequence by excluding "any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, or other purely governmental policy" from the class of issues eligible for arbitration.

[142] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); United States v. Belmont, 301 U.S. 324 (1937). These cases are the paradigmatic statements of the constitutional primacy of the executive branch in foreign affairs. See generally White, *Constitution and the New Deal*, 33–93.

[143] Ibid., 47.

curtail presidential discretion, too. "What we need for the further development of arbitration," Root explained, "is the substitution of judicial action for diplomatic action, the substitution of judicial sense of responsibility for diplomatic sense of responsibility."[144]

The logic of Root's internationalism, however, anticipated Sutherland's argument that the limits on national power in the domestic affairs did not apply to the realm of foreign affairs.[145] Judicial decisions required finality, and congressional, judicial, and state authority to second-guess the United States' international commitments would hinder the credibility of American internationalism. If there were but one nation in foreign affairs, the president was its natural voice. Root's diplomacy looked backwards to nineteenth-century law, but it also pushed forward towards the imperial presidency of the twentieth century.

E. Holmes, Sovereignty, and the Road to *Erie Railroad v. Tompkins*

Because *American Banana* shared Root's emphasis on national sovereignty and promoted executive over legislative and judicial action in U.S. foreign relations, the case offered an early judicial imprimatur to these shifts in U.S. constitutionalism. *American Banana* therefore represents a seeming anomaly in Justice Holmes's jurisprudence, in which the key forerunner of legal realism embraced a formalist conception of sovereignty that aligned him with conservative lawyers like Elihu Root. Like Noonan, other scholars have highlighted Holmes's fixation with sovereignty.[146] In 1939, law professor G. Kenneth Reiblich observed "the extent to which the ideas of territorial sovereignty and state power to act within (but only within) its territory were firmly embedded in the mind of Mr. Justice Holmes from his

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[144] "The Hague Peace Conferences," Address in Opening the National Arbitration and Peace Congress, Apr. 15, 1907, in Root, *International Subjects*, 142.

[145] George Sutherland, "The Internal and External Powers of the National Government," *The North American Review* 191 (Mar. 1, 1910): 389.

[146] Noonan, *Persons and Masks of the Law*, 106–109.

first days on the bench and how, accepted as *a priori* truths, they influenced and perhaps controlled his decisions."[147]

Given Holmes's status as a critic of legal formalism, his formalist approach to sovereignty has long troubled commentators. Larry Kramer admits that it "is surprising is to see this formalistic reasoning invoked by the author of *The Common Law* and *The Path of the Law*." Kramer's complaint echoes Reiblich's earlier puzzlement. "One might have expected from Mr. Justice Holmes in the latter case some reference to the purpose of the Sherman Anti-Trust Act and the need for applying it to the instant facts in order to accomplish that purpose," Reiblich wrote. "But Mr. Justice Holmes seems to have been blinded by what he sub-consciously accepted as eternally true—his interpretations of the concepts of territorial sovereignty and power."[148]

In fact, although *American Banana's* outcome accorded with Root's diplomacy in key respects, Holmes was approaching law in a very different way. Rather than a puzzling inconsistency, Holmes's embrace of sovereignty flowed from his efforts to forge an alternative to formalism, and his reasoning links him to the jurisprudence of his future partner on the Supreme Court, Louis D. Brandeis, who developed Holmes's thinking in *Erie Railroad v. Tompkins*.[149] Their different conception of law, in turn, raised questions about the foundations of Root's conception of international law.

By the beginning of the twentieth century, Holmes rejected a distinction between law and politics and saw law as nothing more than what judges and legislators said it was.[150] This

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[147] G. Kenneth Reiblich, "Conflict of Laws Philosophy of Mr. Justice Holmes," *Georgetown Law Journal* 28 (1939): 6.

[148] Ibid.; Kramer, "Vestiges of Beale," 189 n.34.

[149] Melvin I. Urofsky, *Louis D. Brandeis: A Life* (New York: Pantheon Books, 2009), 566–570.

[150] Horwitz, *The Transformation of American Law, 1870-1960*, 142.

idea lay at the heart of Holmes's opinion in *American Banana*. "Law," Holmes had written in *American Banana*, "is a statement of the circumstances in which the public force will be brought to bear upon men through the courts." Over the course of his career, Holmes consistently cited the definition of law he laid out in *American Banana* as best capturing his understanding of what law is.[151] Whereas Holmes's earlier work had referred to rules, consistent with his hope that jurists could ascertain objective, external rules that judges could apply across different cases, he now referred only to circumstances not limited by reason, natural law, or even custom.[152] In *American Banana*, Holmes added a jurisdictional gloss to his definition of law: "But the word is commonly confined to such prophecies or threats when addressed to persons living within the power of the courts." This statement too followed from his understanding of law, for it made no sense (at least to Holmes) to imagine that two sovereigns governed the same territory. Holmes's critique of formalism had paradoxically driven him to sovereignty, the concept at the heart of classical legal thought and legal formalism.

And once Holmes embraced sovereignty as the foundational principle, Holmes's presumption against extraterritoriality entailed the act of state doctrine, and vice versa. The presumption against extraterritoriality simply reflected Holmes's assumption that each territory had one sovereign, which had absolute power over its own territory but would not normally legislate in the territory of other sovereigns. But judges also made law when they interpreted cases. As Holmes's biographer G. Edward White has written,

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[151] See Holmes to Frankfurter, Nov. 4, 1915, in . Robert M. Mennel and Christine L. Compston, eds., *Holmes and Frankfurter: Their Correspondence, 1912-1934* (Hanover, NH: University Press of New England for the University of New Hampshire, 1996), 36–37; John Chipman Gray to Holmes (undated), Holmes Papers, Harvard Law Library, box 33, folder 23; Letter from Holmes to Gray, Oct. 27, 1914, Holmes Papers, box 33, folder 26, Harvard Law Library.

[152] Patrick J. Kelley, "The Life of Oliver Wendell Holmes, Jr.," *Washington University Law Quarterly* 68 (1990): 439 n.40.

> In short, everywhere in his exploration of jurisprudential issues Holmes saw the "fact" of sovereignty. Even where no legislative or constitutional mandate appeared to exist—the sphere of the common law—judges exercised a "sovereign prerogative of choice." Their choices were "sovereign" because the common law they created was itself the creature of the state. . . . The great fallacy in jurisprudential thinking, Holmes believed, was the idea that judicial authority came from somewhere other than the sovereignty of the state. Common law was not the product of some independent system of reason ("logic") or the innate wisdom of judges.[153]

As a result, a U.S. court should not set aside rules established by another sovereign in its own territory by applying its own, contrary U.S. law. This reasoning underlay the act of state doctrine. Together, the presumption against extraterritoriality and the act of state doctrine stipulated that Congress and the courts should not make law for other jurisdictions.

If it remains puzzling that Holmes's critique of formalism would lead him to such a rigid conception of sovereignty, Holmes's reasoning becomes more understandable when we consider his attack on the thinking that underlay *Swift v. Tyson*. This attack paved the way for the rejection in *Erie Railroad v. Tompkins* of "an independent, transcendent body of federal common law" three decades later.[154] Indeed, connecting *American Banana* to the demise of *Swift* makes clear the consistency of *American Banana* with Holmes's larger jurisprudential commitments.

As the Introduction discusses, *Swift v. Tyson* had led federal judges to develop a federal common law that could promote unity in an expanding interstate economy. Story's 1842 opinion hinged on a distinction between local and general law, a distinction that implicated the relative competence of federal and state courts to make decisions. State courts were best suited to interpret matters unique to that particular state. Thus, federal courts hearing state law claims in diversity cases had to follow state statutes, state court

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[153] White, *Justice Oliver Wendell Holmes*, 379–381.
[154] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

interpretations of those statues, and local law, that is customs peculiar to the locality, such as real estate, that were "immovable and intraterritorial in their nature and character."

By contrast, state courts and legislatures had no special insight into "questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation," such as basic questions of contract interpretation. For these matters of general law, state courts were "called upon to perform the like functions as [federal courts,] that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition . . . or what is the just rule." Because federal courts were equally competent, federal judges sitting in diversity cases could make these determinations on their own, setting aside state court precedents if they so chose. Indeed, because federal judges encountered these issues in a broader range of circumstances, they might even be better suited than state court judges to decide matters of general law. And at the very least, they could promote uniform rules across the entire nation.[155]

Although some commentators maintain that this general law remained state law despite its general nature, Story's language suggested that federal judges were interpreting a federal common law, distinct from state law. Holmes, by contrast, was adamant that this made no sense. "The law of a state does not become something outside of the state court, and independent of it, by being called the common law," he wrote in in 1910 in *Kuhn v. Fairmount Coal. Co.* In fact, what judges did when they decided cases was analogous to what legislatures did when they enacted statutes. In both cases, law was being made—or as

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[155] Swift v. Tyson, 41 U.S. 1, 18-20 (1842); Caleb Nelson, "A Critical Guide to Erie Railroad Co. v. Tompkins," *William & Mary Law Review* 54 (2012): 922–949; John Harrison, "Power of Congress over the Rules of Precedent, The," *Duke Law Journal* 50 (2000): 526–527; William A. Fletcher, "General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance," *Harvard Law Review* 97 (1984 1983): 1513.

Holmes put it in *Kuhn*, law "does issue, and has been recognized by this Court as issuing, from the state courts as well as from the state legislatures." Because Congress had no authority under the Constitution to legislate on matters reserved to the states, legislation at issue in diversity cases must be the law of the state. And if federal courts had to follow state law in the form of statutes, Holmes could think of no compelling reason that they should not also have to follow state law as articulated by state courts. Because Holmes collapsed the distinction between judging and legislating, *Swift's* distinction between general law and local law no longer made sense to him.[156]

Over time, as progressive reformers came to perceive the federal courts as obstacles to needed change because they were wedded to formalism, opposition to *Swift v. Tyson* began to grow, burnished by the scholarship of Charles Warren purporting to show that Justice Story had misconstrued the original meaning of the Judiciary Act of 1789. Reformers complained that the idea of a federal common law promoted pro-business forum shopping, for savvy plaintiffs could easily find a judge who would interpret the law in their favor.[157] Though Holmes himself had been unwilling to overturn a "settled" precedent like *Swift*,[158] Justice Brandeis swept *Swift* aside in *Erie*, decided after Holmes's death in 1938.[159]

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[156] Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910); Nelson, "A Critical Guide to Erie Railroad Co. v. Tompkins," 975. Holmes's conviction that law "does issue, and has been recognized by this Court as issuing, from the state courts as well as from the state legislatures," was aided by municipal bond cases like Gelpcke v. Dubuque. The Supreme Court had held that state court decisions overruling prior constructions of state law could violate the Contracts Clause. For Holmes, this was proof that the Court had recognized that judges make law and do not merely discover it. Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (citing Gelpcke v. Dubuque, 68 U.S. 175 (1864)).

[157] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 73-75, 79-80 (1938); Urofsky, *Louis D. Brandeis*, 743–747.

[158] See, Black & White Taxicab & Transfer Company v. Brown & Yellow Taxicab & Transfer Company, 276 U.S. 518, 533-534 (1928) (citing Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370-372 (1910)).

[159] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 72 (1938).

In his 1938 opinion in *Erie*, Justice Brandeis drew repeatedly on Justice Holmes's understanding of the nature of law. "If," Holmes had written in his dissent in *Black & White Taxicab & Transfer Company v. Brown & Yellow Taxicab & Transfer Company*,

> there were such a transcendental body of law outside of any particular state but obligatory within it unless and until changed by statute, the courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law, so far as it is enforced in a state, whether called common law or not, is not the common law generally, but the law of that state existing by the authority of that state without regard to what it may have been in England or anywhere else.[160]

The roots of this thinking in Holmes's earlier definition of law in *American Banana* are obvious. Though Holmes and Brandeis had somewhat different motivations—with Holmes bristling at any idea of transcendental general law and Brandeis more eager to erase what he saw as *Swift's* perverse effects on litigants[161]—resistance to general law had generated similar conclusions. Their frustration with the concept of general law led to a seemingly formalistic embrace of sovereignty—of the several states in Brandeis's case and of the nation-state in Holmes's case. Ironically, however, this commitment stemmed directly from their efforts to combat prevailing classical orthodoxy.

Holmes's hostility to general law, in turn, raised important questions about Root's project to develop international law, questions first raised by the positivism of John Austin in the early nineteenth century that would not become acute for international law until after

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[160] Black & White Taxicab, 276 U.S. at 533-534; Nelson, "A Critical Guide to Erie Railroad Co. v. Tompkins," 978–981.

[161] Urofsky, *Louis D. Brandeis*, 746.

the First World War.[162] Root envisioned a world in which impartial international tribunals applied international law to resolve many of the disputes that otherwise might lead to war. As discussed above, Root argued that international law embodied nations' "universal consent" to rules that embodied an international standard of just conduct.[163] By speaking of a standard rather than a law, and by emphasizing its voluntary nature, Root sought to evade the Austinian challenge. But in so doing, he cast international law as the sort of "brooding omnipresence in the sky" that provoked Holmes to write *American Banana*.

By contrast, Holmes insisted that law was not "something outside of the state court [or legislature], and independent of it." Law did not express a general standard of conduct—of justice or natural law—but reflected the sovereign will of legislatures and courts. There was no reason that a law declaring x could not be reversed to declare y as opinion changed. Because nation-states were sovereign, however, no sovereign rested above them to issue and enforce one set of rules rather than another. The reasoning underlying Holmes's opinion in *American Banana* raised the question whether international law was even law at all.

III. Conclusion: Monsters of Two Natures?

Modern scholars tend to remember *American Banana* for establishing a presumption against extraterritoriality. But the case was not just about extraterritoriality. Holmes's opinion was a mini-treatise on sovereignty, one that also invoked *Underhill v. Hernandez's* act of state doctrine. These two strands—the presumption against extraterritoriality and the act of state

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[162] David Kennedy, "International Law and the Nineteenth Century: History of an Illusion," *Nordic Journal of International Law* 65 (1996): 396–397, 403–406, 415–416.

[163] Root, "The Relations Between International Tribunals of Arbitration and the Jurisdiction of National Courts," Presidential Address at the Third Annual Meeting of the American Society of International Law, Apr. 23, 1909, in Root, *International Subjects*, 34–36.

doctrine—point to the decision's wider implications for separation of powers in foreign affairs. *Underhill* established that courts would not intervene if acts of foreign nation-states were at issue. *American Banana* established a strong presumption that statutes enacted by Congress did not apply overseas. The Court had therefore ceded the floor to the executive branch, channeling the path of the law from *Underhill* and *American Banana* to the robust assertions of executive power over foreign relations announced in *United States v. Curtiss-Wright Corporation* and *United States v. Belmont*.[164]

The case also had major implications for the relationship of the federal government to foreign states. The framework of dual federalism weakened within the United States over the course of the early twentieth century, as reformers called for greater federal power to deal with a changing economy. Overseas, however, dual federalism provided a legal model for informal expansionism. The United Fruit Company made this connection explicit by urging the Supreme Court to apply *United States v. E. C. Knight's* distinction between commerce and production to the *American Banana* case to order U.S. foreign economic relations: "No statute of the United States can regulate trade in a foreign country. The power of Congress extends only to the regulation of commerce 'among the several states or with foreign nations.' Trade within the limits of a state is beyond its jurisdiction, and *a fortiori* must this be true of trade wholly in a foreign country."[165] Holmes did not cite *E. C. Knight*, but the presumption against extraterritoriality achieved a similar outcome. In both cases, the

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[164] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); United States v. Belmont, 301 U.S. 324 (1937). These cases are the paradigmatic statements of the constitutional primacy of the executive branch in foreign affairs.

[165] Brief for the Defendant in Error, at 42, American Banana Co. v. United Fruit Co. 213 U.S. 347 (1908).

existence of other sovereigns imposed a limit on the scope of federal power. *American Banana* therefore contributed to the internationalization of dual federalism advocated by Root.

This internationalization augured a "twilight zone" that would free corporations abroad from the sorts of legal obligation they faced (or should have faced) at home. From their beginnings, after all, corporations have played an important role in imperial expansion, giving them an ambiguous relationship to state power. As Lord Macaulay wrote,

> the transformation of the [British East India] Company from a trading body, which possessed some sovereign prerogatives for the purposes of trade, into a sovereign body, the trade of which was auxiliary to its sovereignty, was effected by degrees and under disguise. . . . The existence of such a body as this gigantic corporation, this political monster of two natures, subject in one hemisphere, sovereign in another, had never been contemplated by the legislators or judges of former ages.[166]

Maculalay thus anticipated Roosevelt's complaint about the trusts in the United States: that they exploited the two levels of government to evade regulation. And now the presumption of extraterritoriality seemed to turn corporations into sovereigns overseas by further freeing them from such responsibilities.[167]

But the shift in power to the executive branch and the development of international law ensured that corporations remained subjects—or rather citizens—both at home and overseas. For whereas Congress's statutes were presumptively limited to the territorial United States, and whereas courts would stay out of any controversy involving the acts of foreign governments, the executive branch remained to protect the interests of corporations overseas and to challenge protectionism or unfair treatment. This executive influence created

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[166] Thomas Babington Macaulay, Government of India, A Speech Delivered in the House of Commons, July 10, 1833, in Thomas Babington Macaulay, *The Miscellaneous Works of Lord Macaulay*, vol. 19 (Philadelphia: University Library Association, 1910), 142–154, 162–153.

[167] Though interestingly, even in the foreign policy context the possibility that the states who chartered corporations could act to regulate them remained. Cf. Dennis James Palumbo, "The States and American Foreign Relations" (Unpublished Ph.D. Dissertation, University of Chicago, 1960), 48–88.

a certain affinity between government and business that ensured corporations continued to operate under the flag. In these respects, *American Banana* supported and furthered the goals of Root's foreign policy.

Nevertheless, Root and Holmes disagreed on the nature and sources of law, and Holmes's critique of formalism raised questions about the jurisprudential foundations of Root's program for international law. As Chapter 2 explains, jurists frustrated by classical legal thought's inability to deal with the social problems generated by industrialization developed Holmes's critique of formalism and created radically new approaches to jurisprudence. Their critique carried important implications for law's place in U.S. foreign relations. Inspired by this jurisprudential revolution, President Woodrow Wilson rejected Root's faith in court-administered international law, in the harmonizing power of economic interdependence, and even in the centrality of sovereignty itself. *American Banana* therefore stands at a juncture in the U.S. foreign relations, advancing Root's vision of an international system rooted in law but resting on an alternative jurisprudential framework.

CHAPTER TWO

The Higher Legalism of Woodrow Wilson

The outbreak of the First World War cast Elihu Root's tenure as secretary of state in a different light. "[T]hose were the days of small things," Root admitted in 1917 after the U.S. entry into the war. "Nevertheless, it is very gratifying to feel that in what the United States did during those years with Cuba and the Philippines and China and the Panama Canal we were qualifying ourselves to go into this War with clean hands."[1] In reality, of course, the United States's occupation of Cuba and the Philippines and its seizure of land for the Panama Canal were not so clean. But Root wanted to put U.S. empire on a different footing. As Chapter 1 argues, Root's system of international law sought to reconcile national sovereignty and economic integration. In place of military interventionism and colonialism, he worked to build a world ordered by law, in which an international court might peacefully resolve most sources of conflict.

The Great War posed a fundamental challenge to this vision. The war weakened Root's key assumptions and undermined his belief that a clearer and more professional system of international law could eliminate war. In fact, the outbreak of war in 1914 offered what seemed like definitive proof that law was inadequate for resolving international conflict. "No code, convention or treaty, could establish rights any more clearly than the rights of

[1] Root to Joseph Buffington, Sept. 8, 1917, Elihu Root Papers, Library of Congress, Box 136.

Belgium were established, or, indeed, the rights of Ser[b]ia," Root confessed. "Yet Germany overran Belgium's rights in confessed violation of law, and Austria overran Ser[b]ia's rights under a perfectly transparent pretence [sic]."[2]

Rather than abandoning law, however, the war deepened Root's commitment to it. Over the course of the war, Root addressed international law's apparent shortcomings and showed how it could provide a stable foundation for a more hopeful future. Having represented New York in the U.S. Senate after stepping down as secretary of state, Root was a leading conservative and elder statesman of the Republican Party, which ensured a hearing for his views on the peace conference and League of Nations. While Root sought to stay above the fray for most of the war, by the spring of 1919 he became a leading critic of President Woodrow Wilson, and he penned two public letters objecting to the League that helped organize opposition to the Covenant of the League Nations.

Root was not immune to partisanship. He felt that Wilson's arrogant handling of the treaty negotiations justified "a perfectly natural rage" among his former Senate colleagues. "The offensively arrogant way in which the subject was presented here produced a very disagreeable effect upon me," he wrote Harvard President Lawrence Lowell, "and it took considerable time for me to get into the right frame of mind for a dispassionate consideration of the document."[3] The heart of Root's opposition, however, stemmed from Wilson's failure to support the key features of Root's own program for peace: an

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[2] Root to George Gibbons, Dec. 8, 1916, Elihu Root Papers, Library of Congress, Box 136.

[3] Elihu Root to A. Lawrence Lowell, Apr. 29, 1919, Abbott Lawrence Lowell Papers, Harvard University Archives, Box 71.

international court and a series of international conferences to define and develop international law.[4]

Indeed, Wilson's postwar vision for the League of Nations rejected the three core elements of Root's effort to create a system of international law that mirrored federalism within the United States. First, Wilson questioned the continuing worth of sovereignty, arguing that nations needed to sacrifice their autonomy and independence for the sake of peace. This stemmed in large part from disagreement with the second element of Root's vision: the belief that trade prevented conflict. Wilson recognized that trade created common interests that bridged national divisions. But in a world of revolutionary nationalism, Bolshevism, and conflict between labor and capital, Wilson did not share Root's faith in harmonic economic interdependence. For Wilson, global connectivity also brought the specter of communism, revolution, and labor strife.

This is turn, carried over to Wilson's rejection of the third and most important hallmark of Root's program: an international court. For Root, most conflicts occurred between sovereign states, which enjoyed sovereignty over their own internal affairs. A superintending court could demarcate the boundaries that separated one state from another and ensure that no state intruded upon the rights of its counterparts. Root's vision of international law, in other words, rested on legal orthodoxy's preoccupation with clear borders.

In designing the League, Wilson replaced Root's idea of a court with his own vision of a more flexible council. This complicates conventional understandings that regard

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[4] Stephen Wertheim, "The League That Wasn't: American Designs for a Legalist-Sanctionist League of Nations and the Intellectual Origins of International Organization, 1914–1920," *Diplomatic History* 35, no. 5 (Nov. 2011): 797–836.

international law as a hallmark of Wilsonianism.[5] Indeed, some scholars have dismissed law as a component of Wilson's project altogether. "Wilson's program was unquestionably visionary," Stephen Wertheim has written. "But international law was peripheral to the vision. The new league was to protect territorial integrity but not to obligate or enforce judicial settlement or to develop a legal code."[6]

Wertheim's conception of law is too narrow, however. To be sure, there were many influences on the postwar program that emerged in Paris in 1919. But the debate over the League of Nations within the United States stemmed in part from debates about the nature of law. Wilson's postwar vision shared key features with the attack on the classical legal tradition increasingly advocated by many U.S. jurists. This new approach to law, which Harvard Law School Dean Roscoe Pound labeled sociological jurisprudence, rested on an increasing sense that law in books differed from law in action. Formalist reasoning by deduction and analogy no longer served the needs of society. Whereas legal formalists sought to maintain a coherent system of law, the proponents of sociological jurisprudence wanted to adapt law to meet the needs of a changing society. Their theory of law was more pragmatic and less systematic, and it promoted legislative and administrative lawmaking over courts.[7]

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[5] See, for example, George F. Kennan, *American Diplomacy*, Sixtieth-Anniversary Expanded Edition (Chicago: University of Chicago Press, 2012), 82–83; Walter Russell Mead, *Special Providence: American Foreign Policy and How It Changed the World* (New York: Routledge, 2002), 9, 92. As Kennan writes, "I see the most serious fault of our past policy formulation to lie in something that I might call the legalistic-moralistic approach to international problems. This approach runs like a red skein through our foreign policy of the last fifty years. It has in it something of the old emphasis on arbitration treaties, something of the more ambitious American concepts of the role of international law, something of the League of Nations and the United Nations, something of the Kellogg Pact, something of the idea of a universal 'Article 51' pact, something of the belief in World Law and World Government."

[6] Wertheim, "The League That Wasn't," 801, 818.

[7] Roscoe Pound, "Law in Books and Law in Action," *American Law Review* 12–36 (1910): 15; Roscoe Pound, "Scope and Purpose of Sociological Jurisprudence," *Harvard Law Review* 24 (1911): 591–619; Roscoe Pound, "Scope and Purpose of Sociological Jurisprudence," *Harvard Law Review* 25 (1912): 489–516; Morton J.

In other words, Wilson's diplomacy was part of a wider shift in American society, which was revolutionizing U.S. law and undermining the boundary-focused approached that Root drew upon in his diplomacy. Wilson's critique of sovereignty reflected the sociological critique of orthodoxy's boundaries and categorical thinking. His efforts to address Bolshevism, labor strife, and other domestic problems through international institutions and transnational cooperation reflected the sociological jurists' disillusionment with the self-executing efficiency of the market economy and their corporatist impulse to focus on groups rather than individuals. And his preference for a parliament instead of a court reflected the sociological jurists' belief that judges were ill-suited to deal with the problems of modern society and that legislators were more flexible and better able to assess the reality of social problems. If, as Arthur S. Link has argued, Wilson advocated a "higher realism," then we might also think of his diplomacy as reflecting a higher legalism.[8] The battle over American law shaped the fight over the League of Nations.

I. Elihu Root, the League to Enforce Peace, and the First World War

Between the fall of 1914 and the spring of 1915, Anglo-American opinion was converging around the idea of a new international institution that would prevent future wars. In the United Kingdom, a group of critics of British diplomacy under former British Ambassador to the United States Lord Bryce distributed their "Proposals for the Avoidance

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Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), 169–212; Duncan Kennedy, "Three Globalizations of Law and Legal Thought: 1850-2000," in *The New Law and Economic Development: A Critical Appraisal*, ed. David M. Trubek and Alvaro Santos (New York: Cambridge University Press, 2006), 38–43; G. Edward White, "From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America," *Virginia Law Review* 58 (1972): 999–1028.

[8] Arthur S. Link, "The Higher Realism of Woodrow Wilson," Journal of Presbyterian History, vol. 41 (Mar. 1963), 1-13, reprinted in Arthur S. Link, *The Higher Realism of Woodrow Wilson, and Other Essays* (Nashville: Vanderbilt University Press, 1971), 127–139.

of War." This document called for a moratorium on war, for the submission of justiciable disputes to arbitration, for a multilateral council that would resolve political disputes, and for a regular conference to develop international law.[9] The Proposals, in turn, influenced American visions for an institution to end war. The most prominent association, the League to Enforce Peace (LEP), was founded in 1915 under the leadership of former U.S. President William H. Taft and current Harvard President A. Lawrence Lowell.[10]

To Root's call for arbitration for justiciable questions, the LEP added the Bryce group's idea of a council of conciliation for non-justiciable disputes. Most important, the LEP advocated a sanction to make its dispute resolution provisions effective. The LEP's third proposal stipulated that members of a league of nations "shall jointly use forthwith both their economic and military forces against any one of their number that goes to war, or commits acts of hostility against another of the signatories" before submitting the matter to the judicial tribunal or the council of conciliation. Though members could ignore the league's decisions and recommendations, failure to at least submit a dispute for peaceful resolution would trigger an economic boycott and then would authorize military force against the offending party.[11]

In letters to Lowell in the summer of 1915 and winter of 1916, Root expressed both enthusiasm and hesitation for the LEP's core ideas, which went beyond Root's basic program for international law. In the first place, he strongly rejected Taft's idea that the

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[9] Martin David Dubin, "Toward the Concept of Collective Security: The Bryce Group's 'Proposals for the Avoidance of War,' 1914-1917," *International Organization* 24 (Apr. 1970): 288–297.

[10] Ibid., 299–301; Coates, "Transatlantic Advocates," 380–381, 385–392; Lloyd E. Ambrosius, *Woodrow Wilson and the American Diplomatic Tradition : The Treaty Fight in Perspective* (New York: Cambridge University Press, 1987), 6.

[11] League to Enforce Peace, *Enforced Peace: Proceedings of the First Annual National Assemblage of the League to Enforce Peace, Washington, May 26-27, 1916* (New York: The League to Enforce Peace, 1916), 189–190; Coates, "Transatlantic Advocates," 386–388; Dubin, "Toward the Concept of Collective Security," 300–301.

tribunal should decide its own jurisdiction. Instead, Root defended the continuing relevance of national sovereignty. "With the individual, the right to decide unconstrained is the essence of individual freedom," Root told Lowell. "With a country, the right to decide such questions free from the compulsion of any court composed of citizens of other countries is the essence of independence."[12]

Root also objected to the obligation to use force against any member that refused to submit a dispute to the tribunals, warning that it entailed "an entire abandonment of the American policy against entangling alliances" and an "absolute entanglement in the international politics of Europe" that would require expanding the army and navy. If the United States were ready to commit to such a program, Root argued, there was no reason it should not enter the war against Germany given Berlin's clear violation of international law in invading Belgium.[13] Nonetheless, Root acknowledged his basic support for the four major ideas embodied in the League's proposals: a tribunal for justiciable questions, a council of conciliation for political disputes, processes for further developing international law, and "some kind of sanction for the enforcement of the judgment of the court."[14]

Lowell countered that the League's third article requiring members to enforce the arbitration requirement "was the essential point of the whole plan. Of course it means an entire abandonment of the American policy of keeping aloof from European quarrels, but can we keep aloof in the future?" Lowell insisted that the plan's enforcement provisions

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[12] Elihu Root to A. Lawrence Lowell, Aug. 9, 1915, Abbott Lawrence Lowell Papers, Harvard University Archives, Box 71; Elihu Root to A. Lawrence Lowell, Jan. 14, 1916, Abbott Lawrence Lowell Papers, Harvard University Archives, Box 71.

[13] Elihu Root to A. Lawrence Lowell, Aug. 9, 1915, Abbott Lawrence Lowell Papers, Harvard University Archives, Box 71; Elihu Root to A. Lawrence Lowell, Jan. 14, 1916, Abbott Lawrence Lowell Papers, Harvard University Archives, Box 71.

[14] Elihu Root to A. Lawrence Lowell, Aug. 9, 1915, Abbott Lawrence Lowell Papers, Harvard University Archives, Box 71; Elihu Root to A. Lawrence Lowell, Jan. 14, 1916, Abbott Lawrence Lowell Papers, Harvard University Archives, Box 71.

supplied the one thing lacking from previous schemes: some sort of sanction. Nevertheless, the LEP's call for "an international police (perhaps it would be better to say a vigilance committee)" went too far for Root.[15] Unwilling to commit to its detailed program, Root refused requests to join the LEP, though he did allow the league to publish a letter expressing his support for its broad goals.[16]

Nonetheless, the outbreak of war revealed a tension in Root's program that he had previously managed to overlook. During his tenure as secretary of state, it seemed as the developing world was converging toward shared European values. This general agreement on the basic principles of civilization masked some of the contradictions in Root's program. He regarded national sovereignty as the foundation of the international order, yet also sought to establish a tribunal that would adjudicate disputes between sovereign states. In a world in which all states accepted common principles and were willing to live by a basic set of norms, this mechanism of dispute resolution was plausible. Germany's march through Belgium, however, shattered this illusion. Clarifying legal obligations was not enough to keep the peace. At times, legal norms needed the backing of armed force.

But a workable sanction entailed limitations on sovereignty. It required states to commit to enforcing norms against aggression, generating the sorts of entangling alliances the United States was supposed to avoid. Lowell and the LEP were willing to make that commitment as a down payment on a peaceful future. Root, however, clung to his belief that mandatory arbitration could work without sacrificing robust sovereignty. As the war

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[15] A. Lawrence Lowell to Elihu Root, Aug. 18, 1915, Abbott Lawrence Lowell Papers, Harvard University Archives, Box 71.

[16] Elihu Root to A. Lawrence Lowell, Feb. 10, 1916, Abbott Lawrence Lowell Papers, Harvard University Archives, Box 71.

continued, he therefore faced continuing pressure to reconcile his beliefs about international law with the reality observable in Europe.

Root's main solution was to emphasize the gradual development of international law.[17] The LEP's program sought too much too soon. As Root remarked in a speech at the end of 1915, "[T]he formation of international law, still in its infancy, is a process only just begun, and it has not reached a point where the rules can be embodied in a code. On the other hand, codification, considered not as a result but as a process, seems to me plainly should be attempted . . . ."[18] A process of codification was necessary because the rules of international law were indeterminate, and they were established not by legislatures making law or judges interpreting it but by the customary practices of nations. Customary international law required agreement between nations, but in the absence of codification it was not clear to what states had agreed. The war made this evident. As Root observed, "Recent events—or, rather, the realization of the truth which comes from a great war in Europe—compel us to consider how vague and uncertain it is within its own field, and how difficult it is to compel in any way a recognition of its rules of right conduct." Modern developments, Root suggested, had outstripped the growth of law.[19] In emphasizing the vagueness of international law, its gradual working out through the practices of states, and the need for clearer statements of international obligations, Root set to the side the problem that Germany and Austria had violated clear norms. Emphasizing the vague and

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[17] See also John Bassett Moore, "Outline—Symposium on International Law: Its Origin, Obligation, and Future," *Proceedings of the American Philosophical Society* 60, no. 4 (1916): 295–296; see also Benjamin Allen Coates, "Transatlantic Advocates: American International Law and U.S. Foreign Relations, 1898-1919" (Unpublished Ph.D. Dissertation, Columbia University, 2010), 393–396.

[18] Address of Hon. Elihu Root at the Joint Meeting of the Subsection on International Law and the American Institute of International Law, Dec. 30, 1915, Elihu Root Papers, Library of Congress, Box 220.

[19] Ibid.

evolutionary nature of international law let Root maintain his commitments to both mandatory arbitration and state sovereignty.

Just as he reconciled the tensions between sovereignty and economic integration in Latin America in the century's first decade by calling upon businesspeople and merchants to forge relationships with their counterparts abroad, he also turned to private individuals to begin the process of codifying international law. Independent jurists, he suggested, would work out a basic framework of codification, and governments could then ratify their finished work.[20] In the spring of 1916, Root commented upon the American Society of International Law's "Declaration of the Rights and Duties of Nations." Root began his remarks by noting how much the world had changed in the decade since the society's founding. "Ten years ago all the governments of the world professed unqualified respect and obedience to the law of nations, and a very small number of persons not directly connected with government knew or cared anything about it." The breakdown in this consensus brought about by the war had paradoxically convinced ordinary people that international law mattered.[21] The declaration restated the basic principles of international law and (in an accompanying commentary) connected them to accepted principles of American jurisprudence espoused by the U.S. Supreme Court. Such a declaration was necessary because the war had brought into question the Old World's commitment to these principles.[22]

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[20] Ibid.

[21] Root, "The Declaration of the Rights and Duties of Nations of the American Institute of International Law," Presidential Address at the Tenth Annual Meeting of the American Society of International Law, Apr. 27, 1916, in Elihu Root, *Addresses on International Subjects*, ed. Robert Bacon and James Brown Scott (Cambridge, MA: Harvard University Press, 1916), 413–414.

[22] Root, "The Declaration of the Rights and Duties of Nations of the American Institute of International Law," Presidential Address at the Tenth Annual Meeting of the American Society of International Law, Apr. 27, 1916, in ibid., 416–417.

As secretary of state, Root's emphasis on sovereignty rested on the need to limit the United States's imperial overreaching abroad and to find a more sustainable way to maintain U.S. hegemony in the Western Hemisphere. Root's remarks to the ASIL, however, suggested that he was starting to swing—if slightly—in a more interventionist direction. For Root, the war undermined the principle of sovereignty upon which international law was based. The principle of sovereignty entailed a principle of non-interference, which Root admitted was often hard for Americans to accept, for the actions of other states offended American "ideas of liberty, of morality, of humanity, of fair business conduct." But international peace required resisting the temptation to intervene, because an intervention in any one case undermined the wider principle and suggested other states could interfere in other cases. As a lawyer, Root defended " the barrier which the principle of the independent equality of states presents against the evils of foreign domination."[23]

Nevertheless, Root acknowledged a key exception to this foundational principle in his speech to the ASIL. Since every state benefited from the principle of national sovereignty, any attack on a state's sovereignty implicated other states, even those not directly affected. "All other equally independent states," Root explained, "have a right to insist that the international rule shall be observed, and such insistence is not interfering with the quarrels of others but is an assertion of their own rights. There can, however, be no doubt of the international right to interfere in behalf of the maintenance of the law." For the adherents of the American Institute's declaration, this right had become a duty. In words Root would attack three years later when uttered by President Wilson, Root insisted that this was not a legal obligation but a "moral obligation." The war, Root concluded, revealed "that

[23] Ibid., 417–421.

correlative to each nation's individual right is that nation's duty to insist upon the observance of the principles of public right throughout the community of nations."[24]

Though the problem of enforcing international law pushed Root toward sympathy with both the LEP's support for an international sanction and President Wilson's emphasis on community, the bedrock of his vision remained the same as it had been before the war. "I think there is good reason to hope that the terrible lesson of the present war will make the nations willing to attempt some practical system to prevent a recurrence of the same experience," he told one correspondent in late 1916. But this practical system required a "real court" and a more adequate system of law for it to apply. "The trouble," Root conceded, "is not so much to make treaties which define rights as to prevent the treaties from being violated."[25] But his vision remained fundamentally juridical, rooted in the boundary pricking of classical legal thought.

The American entry into World War I in April 1917 changed the parameters of the debate. Now Root spoke not as an observer to an Old World conflict but as a patriotic citizen of a belligerent. Root's first and most basic desire was therefore to beat Germany and win the war. The U.S. entry into the war diminished one continuing source of division. Theodore Roosevelt had been especially critical of President Wilson's diplomacy, especially continued American neutrality after Germany's invasion of Belgium.[26] As Roosevelt had written

> To violate these conventions, to violate neutrality treaties, as Germany has done in the case of Belgium, is a dreadful wrong. It represents the gravest kind of

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[24] Ibid., 421–422, 424–426.

[25] Root to George Gibbons, Dec. 8, 1916, Elihu Root Papers, Library of Congress, Box 136.

[26] See Ross A. Kennedy, *The Will to Believe : Woodrow Wilson, World War I, and America's Strategy for Peace and Security* (Kent, OH: Kent State University Press, 2009), 110–114, 174–177; Kennedy links Root, Roosevelt, and Lodge as Atlanticists, overlooking Root's more legalist bent. Ibid., xii.

> international wrongdoing, but it is really not quite so contemptible, it does not show . . . such selfish indifference to the cause of permanent and righteous peace, as has been shown by the United States (thanks to President Wilson and Secretary Bryan) in refusing to fulfill its solemn obligations by taking whatever action was necessary in order to clear our skirts from the guilt of tame acquiescence in a wrong which we had solemnly undertaken to oppose.[27]

Roosevelt would continue to mock Wilson's diplomacy until the United States entered the fight. "Peace without victory," he insisted, "is the natural ideal of the man who is too proud to fight."[28]

Roosevelt's pugnacity put him at odds with the legalists in the LEP. Responding to Roosevelt's criticism of the LEP for incorporating pacifists, Lowell asked him what he would make of a vigilance committee that had incorporated Quakers in its struggle against bandits out West.[29] Roosevelt replied that he had formed just such a committee when he worked as a rancher. "The worst obstacle we had to encounter was the number of respectable, timid people who were willing to make all kinds of promises about the *future*, but who would not act in the dangerous present," Roosevelt explained. "I respected the malefactors as much as I respected these people—in some cases more."[30]

Now that the United States was in the war against Germany, however, the gap between Roosevelt's desire to win the present war and the LEP's desire to prevent future wars narrowed. Implementing any postwar plan first required victory on the battlefield. Lowell joined Roosevelt in condemning any settlement short of victory.[31] U.S. belligerency also masked divisions with President Wilson. "The American people," Roosevelt wrote,

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[27] Theodore Roosevelt, "Utopia or Hell," *The Independent* 81 (Jan. 4, 1915): 16.

[28] "Roosevelt Renews Attack on Wilson," *New York Times*, Jan. 29, 1917, 6.

[29] A Lawrence Lowell to Theodore Roosevelt, Jan. 3, 1917, Abbott Lawrence Lowell Papers, Harvard University Archives, Box 20.

[30] Theodore Roosevelt to A Lawrence Lowell, Jan. 6, 1917, Abbott Lawrence Lowell Papers, Harvard University Archives, Box 20.

[31] A. Lawrence Lowell to Roosevelt, May 6, 1918, Abbott Lawrence Lowell Papers, Harvard University Archives, Box 20.

"must support President Wilson unflinchingly in the stand to which he is thus committed, against any slackening of effort, and against accepting any premature peace or any peace other than the peace of overwhelming victory . . . ."[32]

Root joined this anti-German chorus. He blamed "Prussian influence" for undermining German society. "I do not think the soul of Germany is lost," he told one correspondent, "but I think the Germany of Goethe, of Francis Lieber, of the liberty-loving men of 1815 and 1848, has sunk far out of sight under pride and arrogance and brutal materialism, and that only a spiritual revolution induced by a tremendous shock can restore the old Germany." The United States, he added, might furnish that shock.[33] Moreover, Root agreed that any postwar plan required the United States to defeat Germany decisively on the battlefield. As he wrote Stanwood Menken, the president of the National Security League, a lobbying organization that favored strong defense preparedness, "It is moreover perfectly clear that Germany will not . . . recede to a position which will make peace negotiation possible until she has had a thorough whipping, which we and our Allies must give her, and will give her . . . ." Root pointed to Germany's harsh terms on Russia in the Brest-Litovsk Treaty as evidence of what would happen if the United States negotiated with Germany without first winning the war.[34]

The historian Ross Kennedy has argued that the United States' entry into the Great War stemmed from fear of what a German victory would mean for U.S. society at home. The fear was not that Germany would directly threaten the United States, for the Atlantic Ocean continued to provide a modicum of security. Instead, a German victory would require

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[32] Theodore Roosevelt, "The Dangers of a Premature Peace," ibid.

[33] Root to Joseph Buffington, Sept. 8, 1917, Elihu Root Papers, Library of Congress, Box 136.

[34] Root to S. Stanwood Menken, Feb. 16, 1918, Elihu Root Papers, Library of Congress, Box 136. On the National Security League, see Kennedy, *Will to Believe*, xiii.

the United States to keep a watchful eye on Europe and to increase its level of military preparedness. By requiring measures like a large standing army, the United States would develop a garrison state that would undermine liberty at home, from within.[35]

At times, Root characterized the threat as more immediate and dire. "If Germany wins this war," he warned, "we shall all be dominated by her, and her domination over other countries is practical and oppressive. . . . . There will be no such thing as national freedom anywhere under the overlordship of Germany which is sure to come unless she is beaten now."[36] His fears, in turn, made him wary of German-language instruction. "[O]ne does not intentionally introduce the young to bad company, or subject them to demoralizing influences that can be avoided," Root told one man who had written him. The German language had become "the vehicle for the expression of a gross and brutal philosophy of life which involves the negation of the Christian morality of modern civilization."[37] He told Colonel Edward House that he favored disarmament and supported "wiping out the military autocracies who have brought on this War."

But Root also shared the concerns about a garrison state. The problem now was not so much a direct threat of German overlordship as the continuing specter of future wars. "So long as the Hohenzollerns and the Hapsburgs remain on the throne," Root predicted, "we shall have to be perpetually on the alert against unrepentant professional criminals. Their agreements will always be worthless; their purpose will always be sinister; and, while

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[35] Kennedy, *Will to Believe*; Kennedy applies Melvyn P. Leffler's argument about the origins of the Cold War to the First World War. Melvyn P. Leffler, *A Preponderance of Power: National Security, the Truman Administration and the Cold War* (Stanford: Stanford University Press, 1992).

[36] Root to B. Lorenzo Hill, Mar. 5, 1918, Elihu Root Papers, Library of Congress, Box 136.

[37] Root to Richard J. Biggs, May 31, 1918. Elihu Root Papers, Library of Congress, Box 136.

we can make it much more difficult, we can never make it impossible for them to start again to shoot up the world."[38]

While Root urged victory on the battlefield, he also contributed to debates about how to shape the peace. On April 11, 1918, Root joined House for lunch along with Taft, Lowell, and others. House shared a letter from President Wilson as well as from Secretary of State Robert Lansing.[39] Wilson's letter reflected the president's thinking on a league and illustrated his differences with Root as the war continued to rage.[40] "My own conviction," Wilson wrote, "is that the administrative *constitution* of the League must *grow* and not be made; that we must *begin* with solemn covenants, covering mutual guarantees of political independence and territorial integrity . . . but that the method of carrying those mutual pledges out should be left to develop of itself, case by case." Mindful that any agreement needed Senate approval, Wilson scoffed at the idea of starting with a more comprehensive scheme that would put "executive authority in the hands of any particular group of powers." This, he insisted would "sow a harvest of jealousy and distrust which would spring up at once and choke the whole thing." Instead, it was important to be more patient, to "plant a system which will slowly but surely ripen into fruition."[41]

Lansing, meanwhile, who had been unable to attend the luncheon, argued for a League of Democracies rather than a League of Nations. For Lansing, the viability of any postwar league required its members to act in good faith. As a result, "the character of the membership of the league should be of first consideration." In Lansing's mind, no people

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[38] Root to House, Aug. 16, 1918, Elihu Root Papers, Library of Congress, Box 136.

[39] From the Diary of Colonel House, Apr. 11, 1918, in Arthur S. Link, ed., *The Papers of Woodrow Wilson* (Princeton: Princeton University Press, 1966), 47:323.

[40] On the evolution of Wilson's thought, see Frank A Ninkovich, *Modernity and Power: A History of the Domino Theory in the Twentieth Century* (Chicago: University of Chicago Press, 1994), 44.

[41] Wilson to Edward Mandell House, Mar. 22, 1918, in Link, *PWW*, 47:105.

would want to wage aggressive war, and as a result a democratic nation would favor peace rather than war. Since the people would never support conflict if a nation's institutions heeded their will, war had to be the result of autocracy. "A League, on the other hand which numbers among its members autocratic governments, possesses the elements of personal ambition, of intrigue and discord, which are the seeds of future wars." Thus a league that combined democratic and non-democratic regimes was "unreliable" while a league limited only to democracies would be "an efficient surety of peace." This meant that all the maneuvering over the nature of a league was misguided. The real goal had to be to get "the chief powers of the world" to accept democratic governments, "to make democracy universal." The first goal was therefore to beat Germany: "we must crush Prussianism so completely that it can never rise again, and we must end Autocracy in every other nation as well. . . . Let us uproot the whole miserable system and have done with it." There could be no "temporizing or compromising with the ruffians who brought on this horror."[42]

Everyone present at the luncheon rejected Lansing's ideas, and House pointed to recent wars between democracies to refute Lansing's version of democratic peace theory. As to Wilson's letter, Root and the other guests agreed that the president's program did not go far enough. Root was assigned to draft a memorandum elaborating three key themes: 1) that war anywhere interested all nations everywhere; 2) that a conference of nations should be established to address threats of war; and 3) that a court or arbitration bureau should also be established.[43]

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[42] U.S. Department of State, *Papers Relating to the Foreign Relations of the United States: The Lansing Papers, 1914-1920* (Washington: Government Printing Office, 1939), 2:118–120.

[43] From the Diary of Colonel House, Apr. 18, 1918, in *PWW*, 47:323.

Root sent his follow-up memorandum to House the following August. Perhaps because of his audience, Root's ideas came as close to Wilson's as they ever would, particularly in light of the bitterness that would soon emerge during the League fight. Root admitted that a league required a "fundamental change" in international law. Previously, conflicts were thought to affect only nations with a "specific interest" in a dispute. But since the war, it was clear that every nation possessed sufficient interest in any controversy. "The requisite change," Root explained, "is . . . a universal formal and irrevocable acceptance and declaration of the view that an international breach of the peace is a matter which concerns every member of the Community of Nations,—a matter in which every nation has a direct interest, and to which every nation has a right to object." This conception of a community of nations, in turn, led Root to new metaphors. If he previously patterned international relations on U.S. federalism, he now turned to criminal law. International relations should move from a civil liability conception to criminal liability model rooted in community's right to preserve peace.[44]

According to Root, the United States had always conceived of relations in the Western Hemisphere along these lines through the Monroe Doctrine, and when President Wilson suggested extending the Monroe Doctrine to the entire world, he was embracing substance of Root's idea. Root therefore admitted that the war required limits on sovereignty, a principle that had been at the foundation of his efforts to reform hemispheric relations and limit Latin American mistrust of the Monroe Doctrine. "The change involves a

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[44] Ibid., 49:269–70; Root's criminal analogy predated the war and appeared in his Nobel Peace Prize address in 1912. Root hoped that humanity would arrive at "a condition of permanent peace in which war will be regarded as criminal conduct, just as civilized communities have been brought to a condition of permanent order, broken only by criminals who war against society." Elihu Root, "Nobel Peace Prize Address," in Root, *International Subjects*, 155–59.

limitation of sovereignty," Root wrote, "making every sovereign state subject to the superior right of a community of sovereign states to have the peace preserved, just as individual liberty is limited by being made subject to the superior right of the civil community to have the peace preserved." Unlike Lansing who had insisted a true international community required democracy, Root thought a meaningful community would arise when nations recognized that the good of the whole trumped the rights of any one nation. As Root told House, "[T]he practical results which will naturally develop will be as different from those which have come from the old view of national irresponsibility as are the results which flow from the American Declaration of Independence compared with the results which flow from the Divine Right of Kings." But like Lansing, he agreed that the idea of an international community was "fatal to the whole Prussian theory of the state."[45]

Root next discussed the importance of institutions for keeping peace. Public opinion against war needed to be channeled into concrete responsibilities to overcome collective action problems. Like Wilson, Root conceded that the exact nature of the institutions did not matter, because they would grow, just as American institutions had grown. In Root's words, "The original form of the institutions created to give effect to popular opinion is not so important." Under existing international practice, there were many such institutions designed to resolve conflicts peacefully. The problem was that they depended upon "individual national initiative." Root called instead for "an agreement upon someone or some group whose duty it will be to speak for the whole community in calling upon any two nations who appear to be about to fight to submit their claims to the consideration." Refusal to participate would make a nation a pariah. Root then emphasized that this agreement

[45] Link, *PWW*, 47:270.

required a sanction: "*Behind such a demand of course should stand also an agreement by the powers to act together in support of the demand made in their name and in dealing with the consequences of it.*"[46]

Root's third and final point, however, foreshadowed the disagreement that was to emerge. Root warned against any agreement "which will probably not be kept when the time comes for acting under it. Nothing can be worse in international affairs than to make agreements and break them." In other words, Root was qualifying his earlier statement that the precise nature of institutions did not matter with a warning that whatever institutions were established had to act credibly. Root therefore warned the president against signing any "hard and fast agreement" requiring the United States to go to war "upon the happening of some future international event beyond the control of the United States." Root thought the time for such a system might arise sometime in the future—even during the present war, depending upon how things developed. Root admitted that the United States was closer to making that sort of commitment than it had been a couple of years earlier. But the time was not ripe for that sort of commitment.[47]

Root's letter to House reveals the ways in which Root's thinking had and had not changed in response to the war. Early in the war, before U.S. entry, he had been careful to defend sovereignty. He agreed in principle with the LEP's program of adding a sanction to make a system of international dispute resolution meaningful in practice. But he hovered above the fray, keeping his suggestions vague, refusing to endorse any detailed program. His letter to Wilson followed this pattern. He made a few striking concessions, accepting the need for limitations on sovereignty and reformulating his conception of international relations along a model of criminal law. Root insisted that the United States needed to

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[46] Ibid., 49:270–272.
[47] Ibid., 49:272.

commit to enforcing the decrees international tribunal or conference. But he also opposed any such commitment that required the use of force. In the end, it was unclear that Root was calling for anything other than the international tribunals he had always supported.

House showed Root's letter to Wilson, who read it aloud and marked it up. The president disagreed with Root but suggested that House could convince him to support the president.[48] Ultimately, however, the president decided to shun Root's advice, as well as that of other Republicans like Roosevelt, Taft, or Charles Evans Hughes, his opponent in the 1916 election. Indeed, Wilson decided to represent the United States in Paris himself and declined to appoint any prominent Republicans to the peace delegation. As president, he saw himself as responsible for the nation's foreign relations, and he distrusted men like Root with whom he disagreed.[49]

II. Wilson's Sociological Approach to Law

Despite Root's stature and his influence, the ultimate fate of the League of Nations hinged above all on the actions of Woodrow Wilson. While the structure of the postwar settlement required agreement among a range of actors and reflected the input of countless sources,[50] Wilson was central and indispensible.[51]

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[48] From the Diary of Colonel House, Aug. 18, 1918 ibid., 49:286.

[49] John Milton Cooper, *Breaking the Heart of the World: Woodrow Wilson and the Fight for the League of Nations* (New York: Cambridge University Press, 2001), 35–37; Norman A. Graebner and Edward M. Bennett, *The Versailles Treaty and Its Legacy: The Failure of the Wilsonian Vision* (New York: Cambridge University Press, 2011) .37.

[50] As Mark Mazower has emphasized, for example, South Africa's Jan Smuts was instrumental in using the postwar settlement to burnish fledgling empires. Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton: Princeton University Press, 2009), 39–46. Quincy Wright has cast Wilson's diplomacy as a pragmatic "middle road." As Wright explains, "Wilson's addresses from May 1916 to April 1917 merged freedom of the seas into economic sanctions against aggression; the equity of neutral mediation into evidence of German aggressiveness after mediation had been rejected; the Monroe Doctrine and opposition to 'entangling alliances' into the idea of the League of Nations; and finally 'peace without victory' into war to suppress aggression and to establish a League to 'make the world safe for

Wilson took a dim view of the LEP, even after the U.S. entry into the war had generated a surge of patriotism and backing for the president. After Wilson urged the LEP to cancel its convention, which he felt infringed on his own executive prerogative, Taft wrote Lowell complaining that the enigmatic president allowed personal perceptions of others to influence his public duties. Taft envisioned Wilson "alone, solemnly closeted with a typewriter in the White House," drafting the treaty "until he gets stuck and then calls in those eminent statesmen and international jurists, Col. House and Mr. Creel."[52] Taft's sarcasm highlighted an important facet of Wilson's postwar planning. For over a decade, leading American jurists had pondered how to eliminate war and forge institutions that would keep the peace. While the war had undermined some of their assumptions, it also added urgency to their project. Yet rather than calling upon these statesmen and jurists, men like Root, John Bassett Moore, and James Brown Scott, Wilson actively rejected their input. The president's leading legal adviser at the Paris Peace Conference was David Hunter Miller, a member of the Inquiry whom Benjamin Coates has labeled "a virtual unknown in international law circles."[53]

House suggested that the president include Roosevelt, Taft, or Root in the peace delegation. Wilson rejected Taft and Roosevelt out of hand, and told House that Root had a "lawyer's mind and since he was getting old his mind was narrowing rather than broadening."[54] Lawyers *within* Wilson's administration received similar treatment. Secretary

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democracy' by assuring peace and security for all. By these syntheses he won overwhelming acceptance of war." Wright adds that Wilson continued this pragmatic blending during and after the war. Quincy Wright, "Woodrow Wilson and the League of Nations," *Social Research* 24 (Jan. 1957): 82–83.

[51] Cooper, *Breaking the Heart of the World*, 2.

[52] William H. Taft to A. Lawrence Lowell, Mar. 19, 1918, Abbott Lawrence Lowell Papers, Harvard University Archives, Box 71.

[53] Coates, "Transatlantic Advocates," 413–414.

[54] From the Diary of Colonel House, Aug. 15, 1918, in *PWW*, 49: 267.

of State Robert Lansing, who had ties to Root and other international lawyers through the American Society of International Law, offered Wilson some advice in Paris on a draft of the covenant. The president informed Lansing that he was uninterested in any of his suggestions. "He also said with great candor and emphasis," Lansing added, "that he did not intend to have lawyers drafting the treaty of peace."[55] In November 1917, Wilson told Swiss envoy William Emmanuel Rappard that the league's constitution was "a matter of moral persuasion more than of legal organization."[56]

Many scholars have identified Wilson's rejection of law and lawyers as an important reason for the failure of Wilson's plans for a postwar international organization.[57] As Stephen Wertheim writes, "Even though embracing legalistic ideas might have won him the backing of key Republicans, Wilson refused. He sidestepped Root's overtures, dismissing lawyers as relics."[58] Wertheim attributes the president's disdain for law to his "organicist and evolutionary understanding of political development," which entailed "an anti-institutional institution—never too fixed, constantly remolding itself around the vital forces of society," and which sought a "radical transformation" of the international system. According to Wertheim, this desire for a "plastic enough" League reflected the influence of Edmund Burke, Walter Bagehot, and G. W. F. Hegel on Wilson's constitutional thought, along with

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[55] Robert Lansing, *The Peace Negotiations: A Personal Narrative* (Boston: Houghton Mifflin Company, 1921), 107.

[56] William E. Rappard, "Woodrow Wilson, La Suisse et Genève," in *Centenaire Woodrow Wilson, 1856-1956* (Geneve, Switzerland : Centre Europeen de la Dotation Carnegie, 1956).

[57] Thomas J Knock, *To End All Wars: Woodrow Wilson and the Quest for a New World Order* (Princeton: Princeton University Press, 1995); David S. Patterson, *Toward a Warless World: The Travail of the American Peace Movement, 1887-1914* (Bloomington: Indiana University Press, 1976), 254–255; Warren F. Kuehl, *Seeking World Order: The United States and International Organization to 1920* (Nashville: Vanderbilt University Press, 1969), 332–335.

[58] Wertheim, "The League That Wasn't," 799; Niels Thorsen, *The Political Thought of Woodrow Wilson, 1875-1910* (Princeton: Princeton University Press, 1988), 89–116; John A. Thompson, "Woodrow Wilson and a World Governed by Evolving Law," *Journal of Policy History* 20 (Jan. 2008): 113–25.

his "quintessentially American rejection of European power politics."[59] As John Thompson has written, "Fundamental to Wilson's conception of politics, then, was a belief in the gradual, evolutionary nature of historical development, a view of law as ratifying social practice rather than originating it, and a Burkean ideal of statesmanship as a pragmatic adjustment to circumstances."[60]

Wilson's disdain for lawyers and his insistence that the league was a moral rather than legal endeavor suggest that law was peripheral to his vision for the League of Nations.[61] But if Wilson's plan for the league "was actually the product of specific political and diplomatic circumstances," it was also the product of particular legal circumstances.[62] For over a decade, men like Root had shaped the parameters of the debate. They had envisioned a world in which the sorts of institutions that made democracy work in the United States would bring about a peaceful world.

Classical legal thought lay at the foundation of this vision. Root's internationalism rested on a conviction that peace was a matter of drawing proper boundaries. By delineating each nation's proper sphere of sovereignty in a dispute, an international court could prevent war. The First World War suggested that this approach was inadequate, for war arose despite clear international legal obligations. Germany had invaded Belgium even though it had pledged to respect Belgian neutrality. There was no ambiguity for a court to resolve. The LEP arose to address this difficulty, and it advocated a coercive sanction to ensure that such wars did not arise again.

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[59] Wertheim, "The League That Wasn't," 828–830.
[60] Thompson, "Woodrow Wilson and a World Governed by Evolving Law," 119.
[61] Wertheim, "The League That Wasn't," 801, 818.
[62] Thompson, "Woodrow Wilson and a World Governed by Evolving Law," 119.

Root had been slow to come along, but in his letter to House in August 1918 he conceded that the war necessitated a new way of thinking about law. His earlier vision had presupposed states' good faith: states would comply with their obligations as long as they understood them (which a court applying and refining international law would ensure). Now that it was clear that sovereigns would do wrong, and that these wrongs had potentially global ramifications, he began to conceive of states as subordinate to the wider international community, at least when they transgressed their obligations. Such violations implicated community as a whole, not just the individual nation harmed directly. Though Root's thinking had evolved, legal formalism continued to lie at its core. His criminal-law framework still rested on national sovereignty. Peace remained a matter of nations staying within their national boundaries, and as a result an international tribunal remained the continuing focus of Root's postwar vision.

A. Sociological Jurisprudence

But legal formalism was under strident attack. As Chapter 1 discussed, *American Banana*'s presumption against extraterritoriality had emerged from Holmes's critique of the prevailing legal orthodoxy. And as Root promoted international law, other American lawyers questioned classical legal thought and laid the foundations for a new approach to thinking about law that would culminate in legal realism in the 1930s.[63]

Law professor and Harvard Law School Dean Roscoe Pound was the foremost exponent of this new "sociological jurisprudence." It aimed to enable legislators and judges "to take more account, and more intelligent account, of the social facts upon which law must

[63] On the differences between sociological jurisprudence and legal realism, see White, "From Sociological Jurisprudence to Realism"; Duncan Kennedy, "Three Globalizations," 25; Horwitz, *The Transformation of American Law, 1870-1960*, 169–171.

proceed and to which it must be applied." This first involved "study of the actual social effects of legal institutions and legal doctrines."[64] Pound therefore rejected "a jurisprudence of conceptions, in which new situations are to be met always by deduction from old principles," and he decried judges who "aim at thorough development of the logical content of established principles through rigid deduction, seeking thereby a certainty which shall permit judicial decision to be predicted in detail with absolute assurance." Instead, he believed law was "a practical matter" and urged judges to set aside "a mechanical administration of justice" and to think about justice in "in concrete cases."[65]

Sociological jurisprudence began with Pound's realization that law was out of touch with reality, that law in the books did not accord with law in action."[66] Social and economic change had created "gaps" that the law needed to fill. Whereas legal formalists regarded themselves as "logically compelled" by the need for coherent principles to fill these gaps in a certain way, sociological jurists complained that this kept them from honestly adapting law to changing conditions. Formalist judges merely pretended to be objective as they adapted law to fill those gaps. In reality, they took sides in social struggles under a veneer of objectivity.[67]

The sociological jurists also rejected orthodoxy's preoccupation with boundaries. They tended to "transform differences of kind into differences of degree, replacing formalism's black and white with new shades of grey.[68] They called into question not just deduction from general principles to more specific ones, but also the analogical reasoning

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[64] Pound, "Scope and Purpose of Sociological Jurisprudence," 1912, 512–513.

[65] Pound, "Scope and Purpose of Sociological Jurisprudence," 1911, 596.

[66] Pound, "Law in Books and Law in Action"; Horwitz, *The Transformation of American Law, 1870-1960*, 187–188.

[67] Duncan Kennedy, "Three Globalizations," 39–40.

[68] Horwitz, *The Transformation of American Law, 1870-1960*, 199.

from one case to a similar category of cases. As Horwitz argues, "Analogical reasoning—the ability to say that one case was like another—was central to all theories that distinguished legal reasoning from political reasoning or sought to show that judging was a function of reason, not of will." If judges simply applied settled principles to analogous situations, then judging was not legislating and judges could plausibly claim neutrality.[69]

Pound charged that legal formalism generated a misplaced focus on the appellate judges "employed in working out a consistent, logical, minutely precise body of precedents." Echoing Holmes, Pound countered that "the life of the law is in its enforcement." The trial judge who actually dealt with litigations deserved more serious attention.[70] For many critics of legal formalism, the fixation on courts was misplaced to begin with. As Pound explained, common law judging served a purpose when judges stood between the crown and the people. But in twentieth-century America, there was no longer any need for judges to do the work of the legislature. As Pound wrote, "Today, when [a court] assumes to stand between the legislature and the public and thus again to protect the individual from the state, it really stands between the public and what the public needs and desires, and protects individuals who need no protection against society which does need it. Hence the side of the courts is no longer the popular side."[71]

Sociological jurists concluded that courts were ill-suited to regulating a modern society. "They have the experience of the past," Pound declared. "But they do not have the facts of the present." Legislation was more democratic, and legislatures could put "the

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[69] Ibid., 202–203.
[70] Pound, "Scope and Purpose of Sociological Jurisprudence," 1912, 514.
[71] Roscoe Pound, "Common Law and Legislation," *Harvard Law Review* 21 (1908): 403–407.

sanction of society on what has been worked out in the sociological laboratory."[72] Sociological jurists therefore turned to the social sciences to inform law, to sociology, economics, and psychology. One of their favorite tools was the "study," which sought to alert the middle class to pressing social problems in the belief that they would then advocate for change.[73]

Louis D. Brandeis, whom Wilson appointed to the Supreme Court in 1916, observed that the industrial revolution had wrought a dramatic change in American society. While slavery had ended, workers began to toil in factories, and inequality between worker and employer prevailed. According to Brandeis, political scientists and economics heeded these changes and began to prescribe remedies to alleviate the new dangers to liberty wrought by large corporations. But law stood in the way. "In the course of relatively few years," Brandeis explained, "hundreds of statutes which embodied attempts (often very crude) to adjust legal rights to the demands of social justice were nullified by the courts, on the grounds that the statutes violated the constitutional guaranties of liberty or property." By 1912, a full-blown assault on the judiciary was under way.[74]

Brandeis rejected calls to set aside judges and courts. "What we need is not to displace the courts, but to make them efficient instruments of justice; not to displace the lawyer, but to fit him for his official or judicial task."[75] Brandeis called for an "alliance between the social sciences and the movement for legal reform," an alliance embodied by his 1908 brief in *Muller v. Oregon* presenting the Supreme Court with social science rather than

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[72] Ibid.
[73] Duncan Kennedy, "Three Globalizations," 43.
[74] Louis D. Brandeis, "The Living Law," *Illinois Law Review* 10 (1916): 463–464.
[75] Ibid., 468.

legal citation.[76] According to Brandeis, lawyers and judges needed to study economics, politics, and sociology, fields "which embody the facts and present the problems of today." The result would be a "living law."[77]

Pound's and Brandeis' ideas revealed the sociological jurists' belief that a better understanding of social realities would drive legal reform. This view, in turn, called into question the legal formalists' assumption that law was "natural, neutral, and apolitical."[78] As Morton Horwitz has argued, the sociological attack on formalism entailed a critique of the efficacy and efficiency of the market: "This vision of a self-executing, competitive market constituted the foundation of all efforts to create a sharp separation in legal thought between processes and outcomes, between means and ends, and between law and politics." Faith in a global market had reconciled Root's commitment to national sovereignty and his belief in international economic integration. The sociological jurists replaced the formalists' faith in processes with a new consequentialism that instead examined actual outcomes. Instrumentalists, they viewed legal rules as means to social purposes.[79] Sociological jurists also attacked the formalists' distinction between a public realm of law and a private realm in which individuals were free to operate without constraint.[80] Root's conception of sovereignty rested on an analogous distinction between a "public" realm governed by international law and a "private" realm in which nation-states could act as they pleased.

The breakdown of the public-private distinction was not unique to the United States. As Duncan Kennedy argues, it was part of a global transformation in which the

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[76] Horwitz, *The Transformation of American Law, 1870-1960*, 209; Duncan Kennedy, "Three Globalizations," 43 Muller v. Oregon involved the constitutionality of a maximum hour requirement for women workers. Muller v. Oregon, 208 U.S. 412 (1908).

[77] Brandeis, "The Living Law," 470.

[78] Horwitz, *The Transformation of American Law, 1870-1960*, 188–189.

[79] Ibid., 194–195; Duncan Kennedy, "Three Globalizations," 39.

[80] Horwitz, *The Transformation of American Law, 1870-1960*, 206–207.

preeminence of German legal science gave way to new intellectual influences, particularly from France.[81] One consequence of this shift was a changing conception of society. Sociological jurists rejected the individualist ethos of classical legal thought and placed a new emphasis on interdependence brought about by urbanization, industrialization, and globalization.[82]

In addition to a general emphasis on interdependence, sociological jurists no longer conceived of society as atomized individuals living in a nation-state. Instead, they began to argue that intervening groupings of individuals in society—groupings like class, labor and capital, and national minorities—also mattered for law. As Duncan Kennedy writes, "So the social people were against the tendency in [classical legal thought] to deny the juristic reality of anything other than an individual or a state." These non-state entities contributed to the health of the entire body politic, and they had developed their own norms. Instead of letting individuals vote in order to aggregate the preferences of individuals composing society, sociological jurists believed that the state should simply coordinate these preexisting groups to ensure that they fit together harmoniously, deferring to their own norms. Unlike Marxists who predicted inherent conflict among these different groups, sociological jurists assumed these groups could work together. Their thinking tended toward corporatism.[83]

The struggle between labor and capital was perhaps the paradigmatic example of the move away from individualism. The growing interdependence of society meant that "industrial warfare" entailed dire consequences for society. Whereas the legal formalists would have deferred to the sanctity of the contract between a worker and his employer,

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[81] Duncan Kennedy, "Three Globalizations," 37–38.
[82] Ibid.
[83] Duncan Kennedy, "Three Globalizations," 41–42.

sociological jurists claimed that the public's interest in social cohesion and industrial peace trumped private law notions of contract.[84] They expanded law into "the domain of right, will, and fault," the heretofore prevailing conception of law that gave free scope to individuals' freedom to act so long as they did not impede the right of others to do the same. With the outbreak of World War I, thinking about industrial peace spilled over into thinking about international law and led to "the self-conscious rejection of the 'logic of sovereignty.'" According to Kennedy, "[Sociological jurists] were inspired by and in turn inspired . . . innovations in labor law . . . ('industrial warfare' contained in ways analogous to 'real' warfare; flaws of the logic of property parallel the flaws of the logic of sovereignty)."[85]

In other words, sociological jurisprudence, like classical legal thought, bore important implications for international law and offered powerful analogies with which to think about international problems.[86] "Holmes, and later Roscoe Pound, would be the great theorists of sociological jurisprudence, but Louis Brandeis would be its great practitioner," observes Brandeis' biographer Melvin Urofsky.[87] And Woodrow Wilson would be its great practitioner in the realm of international affairs.

B. Wilson's Sociological Background

Wilson had an above-average familiarity with debates about law. He had taught at New York Law School, and as a professor of politics at Princeton University, Wilson had taught classes on legal history and jurisprudence. In 1894, the *Daily Princetonian* published a list prepared by Wilson of recommended books on law and jurisprudence. Wilson's list was a mixture of German, English, and American scholarship and included Puchta, Maine, Austin,

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[84] Ibid., 42–43.
[85] Ibid., 57.
[86] Perhaps ironically, given sociological jurists' attacks on analogical reasoning.
[87] Melvin I. Urofsky, *Louis D. Brandeis: A Life* (New York: Pantheon Books, 2009), 76n.

and Holmes.[88] But Wilson's administrative responsibilities as Princeton's president cut back on his ability to stay abreast of emerging legal scholarship. "My days are full of business," he wrote to Mary Hulbert Peck, with whom he reportedly had an affair, "my head goes round with the confused whirl of university politics; I read no books, no, nor anything else that might renew my mind or quicken my imagination . . . ."[89] "I don't have time, either, to keep up with the present books," he told the *New York World*, "though I get some idea of the best of them from what my friends tell me."[90]

One of those friends was Brandeis. When Lowell informed him that most judges in Massachusetts did not think highly of Brandeis, Wilson responded that he "had formed a very high opinion of him, and many of his ideas have made a deep impression on me."[91] As House told Wilson, "His mind and mine are in accord concerning most of the questions that are now to the fore."[92] Brandeis' views particularly shaped Wilson's antitrust platform in the 1912 election.[93] Whereas Theodore Roosevelt had advocated more robust government regulation to ensure that large corporations did not abuse their power, Brandeis advised Wilson to "restore" competition by breaking up trusts.[94]

As a scholar, Wilson also expressed sympathy and familiarity with key tenets of sociological jurisprudence. For instance, Wilson's 1910 presidential address to the American Political Science Association maintained that law

> is subsequent to fact; it takes its origin and energy from the actual circumstances of social experience. Law is an effort to fix in definite practice what has been found to

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[88] Recommending Reading in Jurisprudence and the History of Law, Jan. 9, 1894, in *PWW*, 8:421.
[89] Wilson to Mary Allen Hulbert Peck, June 19, 1909, in ibid., 19:261.
[90] Interview with the New York World, Sept. 18, 1910, in ibid., 21:136.
[91] Wilson to Abbott Lawrence Lowell, Nov. 12, 1912, in ibid., 25:541.
[92] Edward Mandell House to Wilson, Nov. 22, 1912, in ibid., 25:558.
[93] Urofsky, *Louis D. Brandeis*, 341–352, 384–396; John Milton Cooper, *Woodrow Wilson: A Biography* (New York: Alfred A. Knopf, 2009), 162–163, 167.
[94] See Brandeis to Wilson, Sept. 30, 2012, in Link, *PWW*, 25:287–304.

> be convenient, expedient, adapted to the circumstances of the actual world. Law in a moving, vital society grows old, obsolete, impossible, item by item. It is not necessary to repeal it or to set it formally aside. It will die of itself,—for lack of breath, —because it is no longer sustained by the facts or by the moral or practical judgments of the community whose life it has attempted to embody.

Wilson shared the sociological jurists' belief that the public-private distinction had broken down amid society's greater interdependence. He declared that "Business is no longer in any proper sense a private matter . . . conducted by independent individuals, each acting upon his own initiative in the natural pursuit of his own economic wants." Instead, the large companies that composed the economy "exist only by express license of law and for the convenience of society, and which are themselves, as it were, little segments of society." Law thus managed not individuals but aggregations. "As experience becomes more and more aggregate," Wilson insisted, "law must be more and more organic, institutional, constructive. It is a study in the correlation of forces."[95]

For all his talk of disdaining lawyers, moreover, Wilson also sounded strong notes in defense of law. "[L]et us show ourselves Americans by showing that we . . . want to cooperate with all other classes and all other groups in the common enterprise which is to release the spirits of the world from bondage," Wilson told the American Federation of Labor in 1917. "There are some organizations in this country whose object is anarchy and the destruction of law, but I would not meet their efforts by making myself partner in destroying the law."[96] Yet Wilson also shared the sociological jurists mistrust of judges. "The Constitution, like the Sabbath, was made for man and not man for the Constitution," Wilson declared in 1916. Many judges, however, "seemed to think that the Constitution was a

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[95] Woodrow Wilson, "The Law and the Facts: Presidential Address, Seventh Annual Meeting of the American Political Science Association," *The American Political Science Review* 5, no. 1 (Feb. 1911): 1, 9.

[96] An Address in Buffalo to the American Federation of Labor, Nov. 12, 1917, in *PWW*, 45:16.

straitjacket into which the life of the nation must be forced, whether it could be with a true regard to the laws of life or not." Such judges would soon "pass noticed from the stage. And men must be put forward whose whole comprehension is that law is subservient to life and not to law. The world must learn that lesson—the international world, the whole world of mankind."[97]

III. The Sociological Roots of the League of Nations

Through the League of Nations, Wilson sought to teach the world this lesson that law must serve society's needs. Wilson's program for the League rejected each of the core elements of Root's vision of international law: he rejected national sovereignty as the basic principle of international relations, he eschewed Root's rosy faith in the inevitability of harmonious economic integration, and he rejected an international court as a cornerstone of the hope for peace.

A. Interdependence over Sovereignty

The origins and evolution of Article X illuminate Wilson's radically different conception of sovereignty. For Wilson, Article X "constitute[d] the very backbone of the whole covenant. Without it the league would be hardly more than an influential debating society."[98] In Article X, the League's signatories pledged "to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League." Though the article presupposed sovereignty as a foundation of international order, members of the League agreed to limit their own sovereignty to uphold this

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[97] An After-Dinner Talk to the Gridiron Club, Dec. 9, 1916, in ibid., 40:196.

[98] A Conversation with Members of the Senate Foreign Relations Committee, Aug. 19, 1919, in ibid., 62:343.

framework. As Root complained to Henry Cabot Lodge, "It stands upon its own footing as an independent alliance for the preservation of the status quo."[99] The final version therefore contained a certain tension, which opponents of the League exploited in 1919. Wilson himself, of course, tried to cut through this tension by insisting that the commitment under Article X "is a moral, not a legal obligation, and leaves our Congress absolutely free to put its own interpretation upon it in all cases that call for action. It is binding in conscience only, not in law."[100]

Wilson's original vision, however, was far more radical. Article X was only a shell of the provision contained in Wilson's First Paris Draft. This draft, produced around January 8, 1919, amended an earlier draft that Wilson had worked out in the summer and fall, "the most important document that he would take with him to the Paris Peace Conference."[101] Wilson's First Paris Draft incorporated the ideas of South Africa's Jan Smuts laid out in a December 26 memorandum, such as Smuts's mandate proposal and basic structure for the League.[102] But Wilson left Article III unchanged. "The Contracting Powers," it read

> unite in guaranteeing to each other political independence and territorial integrity; but it is understood between them that such territorial readjustments, if any, as may in the future become necessary by reason of changes in present racial conditions and aspirations or present social and political relationships, pursuant to the principle of self-determination and also such territorial readjustments as may be in the judgment of three-fourths of the Delegates be demanded by the welfare and manifest interest of the peoples concerned, may be effected, if agreeable to those peoples; and that territorial changes may in equity involve material compensation. The Contracting

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[99] Root to Henry Cabot Lodge, June 19, 1919, Elihu Root Papers, Library of Congress, Box 161.

[100] A Conversation with Members of the Senate Foreign Relations Committee, Aug. 19, 1919, in *PWW*, 62:343.

[101] Wilson to House with enclosure, Sept. 7, 1918, in ibid., 49:467–471; A Draft of a Covenant of a League of Nations, c. Jan. 8, 1919, in ibid., 53:655 n.1; Knock, *To End All Wars*, 153–154; Cooper, *Breaking the Heart of the World*, 29–30.

[102] A Memorandum, Dec. 26, 1918, in *PWW*, 53:515; Peter Raffo, "The Anglo-American Preliminary Negotiations for a League of Nations," *Journal of Contemporary History* 9, no. 4 (Oct. 1, 1974): 167.

> Powers accept without reservation the principle that the peace of the world is superior in importance to every question of political jurisdiction or boundary.[103]

This eventually became Article X. But whereas Article X enshrined political independence and territorial integrity, Wilson's original version gave the League a substantial and continuing power to readjust borders, and it elevated "the peace of the world" at the expense of sovereignty.

Not surprisingly, this radical proposal generated considerable opposition. David Hunter Miller, Wilson's legal adviser, thought it went too far. With respect to the first sentence, Miller agreed that nations should pledge to respect the independence and integrity of other states, but requiring them to guarantee against the acts of other states "looks towards intervention and war by one or more of the guarantors, and is in accord only with the spirit of the old diplomacy." He accepted the rationale for the rest of Article III; after all, the peace conference could not solve all the territorial claims generated by the breakup of the major empires. But he thought that Wilson's draft language was counterproductive. Article III would make "dissatisfaction permanent" and would "legalize irredentist agitation in at least all of Eastern Europe." Miller instead urged Wilson to downplay the redrawing of borders and instead emphasize the rights of minorities. His revised provision abandoned collective security and added a provision codifying the Monroe Doctrine.[104]

Despite Miller's misgivings, Wilson retained the provision in his revised Second Paris Draft.[105] A complicated series of negotiations with the British then ensued. First, Miller met Lord Robert Cecil, the head of the League of Nations section of the British delegation, and

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[103] A Draft of a Covenant of a League of Nations, c. Jan. 8, 1919, in *PWW*, 53:656–657.

[104] Wilson's Second Draft or First Paris Draft, Jan. 10, 1919, with Comments and Suggestions by D. H. M. in David Hunter Miller, *The Drafting of the Covenant* (New York: G.P. Putnam's Sons, 1928), 2:70–72.

[105] Wilson's Second "Paris Draft" of the Covenant, Jan. 18, 1919, in *PWW*, 54:140.

they produced a revised draft based on Wilson's Second Paris Draft that rested on Wilson's underlying ideas. Miller developed another draft with his British counterpart Sir Cecil Hurst in another attempt at compromise; this draft, based on Hurst's own draft, was thus more British in nature. In the process, Wilson's objectionable language in Article III about border revision was set aside, and only the initial clause about political independence and territorial integrity remained. As Peter Raffo has observed, "The article became, therefore, a straightforward, unqualified, guarantee of territorial integrity and political independence. In effect, what was to become the infamous Article X sort of sneaked into the Covenant!"[106]

Wilson, however, was not happy with the Hurst-Miller Draft and rewrote his Second Paris Draft. This Third Paris Draft now contained an abridged form of Article III: "The Contracting Powers undertake to respect and to protect as against external aggression the political independence and territorial integrity of all States members of the League.[107] Having won considerable concessions from the Americans, the British reacted with fury as Wilson sought to backtrack on the Hurst-Miller Draft. Just before the opening of the first meeting of the Commission of the League of Nations, Wilson agreed to reinstate the Hurst-Miller Draft.[108] A confused Miller had arrived with copies of Wilson's Third Paris Draft and had to rush back to obtain copies of the Hurst-Miller Draft.[109]

The Hurst-Miller draft therefore became the basis of negotiations at Versailles. Three provisions of this draft were "undeniably Wilsonian": Article VIII on disarmament, Article X's territorial guarantee, and Article XI's stipulation that threats of war implicated all

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[106] Raffo, "The Anglo-American Preliminary Negotiations for a League of Nations," 168–171; For the Hurst-Miller's version of Article III (now Article VII), see The Hurst-Miller Draft of the Covenant of the League of Nations, Feb. 2, 1919, in *PWW*, 54:435.

[107] The First Version of the Third "Paris Draft" of the Covenant of the League of Nations, Feb. 2, 1919, in *PWW*, 54:442.

[108] Raffo, "The Anglo-American Preliminary Negotiations for a League of Nations," 174.

[109] Miller, *The Drafting of the Covenant*, 1:30.

members of the league. The rest of the provisions bore the imprint of Jan Smuts or the Phillimore Report, an earlier British report focused on arbitration.[110] Wilson's Article III (now Article X) had been gutted. As Erez Manela observes, "After insisting on the retention of the offending paragraphs in several consecutive drafts, he finally allowed the legal experts—despite his famous quip that he would never allow the League to be designed by lawyers—to delete everything but the first section of the article . . . ."[111]

Although Wilson gave way on Article X's actual language, he still did not concede the broader point. For one thing, Article XI still recognized "the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends." As Manela points out, this theme appeared often in Wilson's public speeches in support of the League, and Wilson regarded it as "a back door" for his original version of Article X.[112]

Speaking in Kansas City in early September 1919, for example, Wilson emphasized that it would be "the privilege of any member state to call attention to anything, anywhere, that is likely to disturb the peace of the world or the good understanding between nations upon which the peace of the world depends." Wilson did not hide the radical nature of such a provision: "And every people in the world that have not got what they think they ought to have is thereby given a world forum in which they can bring the thing to the bar of mankind. An incomparable thing, a thing that never was dreamed of before." Wilson underscored that

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[110] Raffo, "The Anglo-American Preliminary Negotiations for a League of Nations," 159, 175 There was a provision calling for the creation of a court, which was originally proposed by House but ultimately made its way into the treaty at the insistence of the British.

[111] Erez Manela, "A Man Ahead of His Time? Wilsonian Globalism and the Doctrine of Preemption," *International Journal* 60, no. 4 (Oct. 2005): 1120.

[112] Ibid., 1122.

this right applied "within the confines of another empire which was disturbing the peace of the world and good understanding between nations." Wilson sought to subject traditional sovereignty to the "common judgment of mankind."[113]

Later that month in Salt Lake City, Wilson again championed Article XI: "[I]t is made the right of any member of the League to call attention to anything, anywhere, which is likely to affect the peace of the world or the good understanding between nations upon which the peace of the world depends." Wilson pointed to the Shantung controversy as an example of the salutary nature of this provision. Wilson explained that the United States had not protested Germany's acquisition of the province from China because international law required that the action implicate the United States's own material or political interests. American diplomats "could not lift a little finger to help China. They could only try to help the trade of the United States." Thereafter, China was carved up by England, Russia, France, and Japan. Article XI would change this situation, and Articles X and XI worked together to preserve peace.[114] In Colorado, Wilson reiterated the complementary nature of Articles X and XI. "You will see that international law is revolutionized by putting morals into it," the president declared. He again used China as an example of a country that would benefit. The obligation of League members to respect one another's territorial and political independence and the members' right to call attention to any threat to world peace meant that "China is for the first time in the history of mankind afforded a standing before the jury of the world."[115]

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[113] An Address in Convention Hall in Kansas City, Sept. 6, 1919, in *PWW*, 63:72.
[114] An Address in the Tabernacle in Salt Lake City, Sept. 23, 1919, in ibid., 63:460–461.
[115] An Address in the City Auditorium in Pueblo, Colorado, Sept. 25, 1919, in ibid., 63:507–508.

B. The Dangers of Interdependence

Root, shaped by legal formalism, had turned to sovereignty as an alternative to interventionism. Root's reliance on sovereignty, in turn, rested on his faith that commerce generated international harmony. Though borders would continue to separate peoples, trade would bring them together. Wilson's alternative to state sovereignty revealed a very different view of interdependence.[116] "[T]he seed of war in the modern world is industrial and commercial rivalry," Wilson argued.[117] Global connectivity brought new dangers, including aggression, Bolshevism, and labor strife. For Wilson, the League would have a *continuing* role in managing these dangers. In other words, just as Wilson set aside Root's view of sovereignty, he also ignored Root's faith that businesspeople would bridge national differences. Instead, Wilson insisted, the international community had to assume an active role in countering threats to peace and promoting international harmony.

Wilson argued that, without the League, smaller and weaker nations continually would be at the mercy of larger and more powerful nations. Root himself conceded that something like the League might be necessary to deal with the breakdown of empires in Central and Eastern Europe, which is now "filled with turbulent masses without stable government, unaccustomed to self-control and fighting among themselves like children of the dragon's teeth." Article X was fine for the purpose of restoring order—but only in the

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[116] As Manela writes, "He wanted—he thought it imperative for international peace—to challenge the primacy of state sovereignty in international relations, and to institute a world council that would have the authority to intervene in the internal affairs of states, redraw boundaries, and rearrange sovereignties in the interests of peace." Manela, "A Man Ahead of His Time?," 1122.

[117] An Address in the St. Louis Coliseum, Sept. 5, 1919, in *PWW*, 63:45.

short term. Once the system began working normally again, Root believed, there would be no need for anything like the League.[118]

Wilson had a less rosy view of the international system. For Wilson, minorities and weaker nations depended upon the League's constant and continuing vigilance. For example, Wilson explained that Italy's military situation dictated that it seek a foothold on the other side of the Adriatic, in areas populated by Slavs. Without the League, therefore, Italy's security would be in tension with these Slavic peoples' right to self-determination. Because Italy could depend on the League's security guarantees, however, it could relinquish its claims to the disputed territory.[119] "[I]t is our business to prevent war," Wilson insisted, "and if we don't take care of the weak nations of the world, there will be war."[120]

Wilson pointed out that the very states that Germany and Austria had tried to dominate now were being given their independence. "We are giving them what they never could have got with their own strength . . . ." Wilson insisted. "But we have not made them strong by making them independent. We have given them what I called their land titles." But this new situation required continuing attention. "If you do not guarantee the titles that you are setting up in these treaties, you leave the whole ground fallow in which again to sow the dragon's teeth with the harvest of armed men."[121]

Even as preventing war was the League's most obvious function, it also served other important goals. For instance, the League also was a safeguard against revolution.[122]

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[118] Root to Will H. Hays, Mar. 29, 1919, Elihu Root Papers, Library of Congress, Box 137.
[119] An Address to the Columbus Chamber of Commerce, Sept. 4, 1919, in *PWW*, 4:11–12.
[120] A Luncheon Address to the St. Louis Chamber of Commerce, Sept. 5, 1919, in ibid., 63:35.
[121] An Address at Coeur d'Alene, Sept. 12, 1919, in ibid., 63:215.
[122] On Wilsonianism as a response to Bolshevism and revolution, see Norman Gordon Levin, *Woodrow Wilson and World Politics: America's Response to War and Revolution* (New York: Oxford University Press, 1968); Arno J Mayer, *Wilson vs. Lenin: Political Origins of the New Diplomacy, 1917-1918* (Cleveland: World Pub. Co., 1964).

"Revolutions don't spring up overnight," Wilson explained. "Revolutions come because men know that they have rights and that they are disregarded. And . . . one of the chief efforts of those who made this treaty was to remove that anger from the heart of great peoples . . . ." It was necessary to "right the history of Europe."[123] At times, Wilson explicitly acknowledged the Bolshevik threat in Russia. More generally, he cast the Bolsheviks as autocrats not unlike the Germans and warned his audiences about the need to stand against such minority rule. "The danger to the world, my fellow citizens, against which we must absolutely lock the door in this country, is that some government of minorities may be set up here as elsewhere."[124] The League of Nations offered a mechanism for ensuring that minority factions could not seize power. "I want to declare that I am an enemy of the rulership of any minority, however constituted," the president said in Tacoma. "Minorities have often been right, majorities wrong, but minorities cease to be right when they use the wrong means to make their opinions prevail. We must have peaceful means; we must have discussion; we must have frank discussion: we must have friendly discussion. And these are the very things that are offered to use by the Covenant of the League of Nations."[125]

One of the basic pillars of sociological jurisprudence was the "study." It presupposed that gathering data on social problems and presenting it to the public would induce the people to rally to fix them.[126] The League would serve this function for the international community. Members would submit disagreements to the council, "laying all the documents, all the facts, before the Council, and consenting that the Council shall publish all the facts, so as to take the world into is confidence for the formation of a correct judgment concerning

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[123] An Address to the Columbus Chamber of Commerce, Sept. 4, 1919, in *PWW*, 63:13.
[124] An Address in the Minneapolis Armory, Sept. 9, 1919, in ibid., 63:134.
[125] An Address in the Tacoma Armory, Sept. 13, 1919, in ibid., 63:245.
[126] Duncan Kennedy, "Three Globalizations," 43.

it." Wilson praised the "illuminating process of public knowledge and public discussion," calling it "a 98 per cent insurance against war."[127] The League's purpose was not just to prevent war and revolution. It would also bring the world's collective expertise to bear on such problems as the drug trade, human trafficking, arms trafficking, combating illness and disease through organizations like the Red Cross, and regulating international commerce by promoting communications and transportation.[128]

Managing relations between labor and capital was one of the League's most important functions, and the peace conference had established an International Labor Organization to promote the interests of workers and ensure international industrial peace.[129] Wilson recognized that labor relations were a global and transnational phenomenon, not simply a national one. As the president declared in Minnesota, "[W]e have got to realize that we are face to face with a great industrial problem which does not center in the United States. It centers elsewhere, but we share it with the other countries of the world. That is the relation between capital and labor, between those who employ and those who are employed. . . . Everywhere there is dissatisfaction, much more on the other side of the water than on this side." Wilson insisted that the treaty contained "a Magna Carta of labor" that would alleviate this problem.[130]

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[127] An Address in the Tacoma Armory, Sept. 13, 1919, in Link, *PWW*, 63:245.

[128] An Address to the Columbus Chamber of Commerce, Sept. 4, 1919, in ibid., 63:16; An Address in the Minneapolis Armory, Sept. 9, 1919, in ibid., 63:137; An Address in the Seattle Arena, Sept. 13, 1919, in ibid., 63:262.

[129] Elizabeth McKillen, *Making the World Safe for Workers: Labor, the Left, and Wilsonian Internationalism* (Urbana: University of Illinois Press, 2013). For many workers, however, the ILO merely served the interests of the capitalist class. Ibid., 3.

[130] An Address to the Columbus Chamber of Commerce, Sept. 4, 1919, in *PWW*, 63:14; An Address in the Des Moines Coliseum, Sept. 6, 1919, in ibid., 63:78; An Address in St. Paul to a Joint Session of the Legislature of Minnesota, Sept. 9, 1919, in ibid., 63:127.

Wilson's solution to address these questions was "to lift them into the light, . . . to lift them out of the haze and distraction of passion, of hostility, into the calm spaces where men look at things without passion."[131] This attention would be transformative. The League of Nations enshrined political democracy around the world. But the world needed more. "[O]ur civilization is not satisfactory," Wilson announced in Tacoma. "It is an industrial civilization, and at the heart of it is antagonism between those who labor with their hands and those who direct labor. You . . . cannot advance civilization unless you have a peace of which you make the peaceful and fullest use of bringing these elements of civilization together into a common partnership . . . ."[132] The League of Nations would bring about this common partnership. "What the world now insists upon," Wilson declared

> is the establishment of industrial democracy, is the establishment of such relationships between those who direct labor and those who perform labor as shall make a real community of interests, as shall make a real community of purpose, and shall lift the whole level of industrial achievement above bargain and sale into a great method of cooperation by which men, purposing the same thing, justly organizing the same thing, may bring about a state of happiness and of prosperity such as the world has never known before.[133]

The League of Nations would end industrial warfare at home just as it ended political warfare overseas.[134]

Root's fixation on the nation-state as the primary unit in international affairs led him to overlook revolutionary nationalism, Bolshevism, and labor strife as transnational problems that needed to be addressed multilaterally. Root viewed these issues as matters for states to handle on their own. The goal of international law was to regulate relations between states, not to regulate transnational actors directly. To a large extent, Root just did not grasp

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[131] An Address in the City Auditorium in Pueblo, Colorado, Sept. 25, 1919, in Link, *PWW*, 63:502.
[132] An Address in the Tacoma Armory, Sept. 13, 1919, in ibid., 63:244.
[133] An Address in the Tabernacle in Salt Lake City, Sept. 23, 1919, in ibid., 63:463.
[134] Cf. Duncan Kennedy, "Three Globalizations," 57.

the extent to which transnational movements transformed international politics. In 1917, Wilson dispatched Root as an envoy to Russia, then in the midst of revolution.[135] In August 1918, just after Root had sent his letter to House, Secretary of State Lansing forwarded Wilson an assessment of Root's mission from the explorer George Kennan, cousin twice removed of the later diplomat who shared his name. According to Kennan, Root

> did not seem to me to have grasped the significance of the events that he had witnessed, nor to have foreseen the results that the forces in operation would almost certainly bring about. Consequently, he was unduly hopeful and optimistic. Whether he could have influenced the course of events if he had regarded them rightly and had appreciated their significance, I do not know; but he seemed to me to have lacked the information or the judgment that he ought to have had. In an automobile, efficiency depends very largely, if not wholly, upon the mixture of air and gas in the carburetor, and the Root carburetor the American air and the Russian gas did not mix at all—they did not even come into contact.[136]

Root's legalism rested on this undue hope and optimism. Yet as Carl Parrini has suggested, the world in which Root had developed his views was changing faster than he could adapt: "[F]or the first time in a century the fundamental system of values shared by the nations of Europe and North America were dangerously challenged by the Bolshevik Revolution and, to an alarming extent, by the Nationalist revolutionary movements . . . ."[137] As revolutionary nationalism developed, Root's evolutionary vision of greater world harmony was no longer tenable. The idealism with which he reconciled sovereignty, integration, and law became harder and harder to maintain.

Root sensed these changes and did try to compensate for them. In a speech to the New York State Bar Association in early 1916, Root admitted that he was struggling to reconcile classical legal orthodoxy with a changing world. In the past, Root declared, law

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[135] See Philip C. Jessup, *Elihu Root* (New York: Dodd, Mead & Company, 1938), 2:353–371.

[136] Robert Lansing to Wilson, with enclosure, Aug. 22, 1918, in Link, *PWW*, 49:320–321.

[137] Carl P Parrini, *Heir to Empire: United States Economic Diplomacy, 1916-1923* (Pittsburgh: University of Pittsburg Press, 1969), 251–252.

rested on "established and unquestioned principles" and served as an "an established, firm, impregnable barrier." Now, however, lawyers lacked such a sure foundation. "Fundamental principles are questioned, doubted, discussed, possibly endangered," Root asserted.[138] At the heart of these changes lay the war in Europe and the rise of global interconnectivity:

> Our country, which seemed then so secure, so peaceful, so certain in its prospect of prosperity and peace and order, is passing in under the shadow of great responsibilities and great dangers to its institutions. We are no longer isolated. The ever-flowing stream of ocean which surrounds us is no longer a barrier. We have grown so great, the bonds that unite us in trade, in influence, in power, with the rest of the world have become so strong and compelling that we cannot live unto ourselves alone.

These changes had generated "new questions . . . upon which we have little or no precedent to guide us."[139]

While recognizing that law needed to adapt to meet these changing conditions, Root worried that Americans were losing their moorings, forgetting the basic principles of law and liberty upon which American prosperity rested. The struggle between a system rooted in individual liberty and a system rooted in the supremacy of the state underlay the war in Europe.[140] As Americans expanded the scope of the regulatory state to deal with changing conditions, they "naturally turn in the creation of these new and necessary regulations to those governments which have been most efficient in regulation, and those are the governments which sacrifice individual liberty for the purpose of regulating the conduct of men; and so the tendency is away from the old American principles toward the principles of bureaucratic and governmental control over individual life." This was "a dangerous road for

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[138] Root, "Individual Liberty and the Responsibility of the Bar," Address at the Annual Dinner of the New York State Bar Association, Jan. 15, 1916, in Elihu Root, *Addresses on Government and Citizenship*, ed. Robert Bacon and James Brown Scott (Cambridge, MA: Harvard University Press, 1916), 512.

[139] Ibid., 512–513.

[140] Ibid., 513–514.

a free people to travel," one which risked losing sight of the individual freedom at the heart of the American experiment.[141]

But it was not just imitation of more centralized European states that posed a risk. For Root, immigration from Eastern and Central European countries also undermined U.S. law and its foundation in Anglo-Saxon liberty. Root castigated the "many professors who think they know better what law ought to be, and what the principles of jurisprudence ought to be, and what the political institutions of the country ought to be, than the people of England and America, working out their laws through centuries of life." As Root lamented, "[T]hese men, who think they know it all, these half baked and conceited theorists, are teaching the boys in our law schools and in our colleges to despise American institutions."[142] Root's nativism clothed his sense that American jurisprudence was changing for the worst.

C. A Parliament Rather than a Court

In crafting a postwar organization, Wilson had traveled down this dangerous road paved by critics of Root's legal vision like Holmes, Pound, and Brandeis, "half baked and conceited theorists" who were teaching Americans to ignore the settled principles of U.S. law. Wilson's call for a community of power rather than a balance of power recognized new threats to the stable order in which democracy and liberal capitalism would flourish. For Wilson, these threats called into question Root's rosy optimism about economic interdependence and demanded a proactive and flexible response. Wilson therefore called for a dramatic transformation in the international system.[143]

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[141] Ibid., 515.
[142] Ibid., 515–517.
[143] Cf. Wertheim, "The League That Wasn't," 829.

Through the League of Nations, the international community would come together to address new dangers. To be sure, the American role would be unique; the world required American leadership.[144] But the United States would lead through a multilateral league that would guide and harmonize the competing elements of international society. The League would study problems, generate facts, and ensure that international law accorded with international realities.[145]

The League of Nations therefore marked a major break with previous conceptions of international law. Earlier efforts to promote international law envisioned new an international court burnishing national autonomy by policing boundaries. Wilson instead argued that transnational problems required ceding autonomy to an international institution, conceived not as a world court but as a global parliament. If the autonomy of the states in the United States was giving way to greater national power to deal with such problems as the trusts, Wilson's approached ceded an important chunk of that national power to an international League of Nations.

These progressive impulses were the hallmarks of sociological jurisprudence. Wilson's diplomacy in Paris in 1919 occurred against the backdrop of Root's and others' decades-long campaign to invigorate international law. But as Part II of this chapter describes, the assumptions underlying that effort no longer prevailed for many American jurists and political scientists. Wilson incorporated their new vision and turned to a legislative rather than a judicial model for organizing international society, one that could flexibly adapt

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[144] See, for example, An Address at Bismarck, Sept. 10, 1919, in Link, *PWW*, 63:160–162.

[145] As Wilson explained in 1911, "Society is too various to see itself as a whole, and the vision of those who study it is confused. Interests have their own separate and complicated development, and must, it has seemed, be made separately and individually the subject of legal regulation and adjustment. The relations which have come to rule in our day in the field of law seem to be the relations of interests, of vast and powerful economic sections of society, rather than of individuals." Wilson, "The Law and the Facts," 4.

to unexpected conditions.[146] As Wilson said at the League of Nation's unveiling, "I was unable to foresee the variety of circumstances with which this League would have to deal. I was unable, therefore, to plan all the machinery that might be necessary to meet differing and unexpected contingencies. Therefore, I should say of this document that it is not a straitjacket, but a vehicle of life." The League could therefore "be used for cooperation in any international matter," particularly labor relations.[147]

It is illuminating, in this respect, to compare Wilson's thinking with Brandeis's. In 1918, Brandeis dissented in the case of *International News Service v. Associated Press*, which had arisen when INS began appropriating AP news bulletins after its own news collection infrastructure was shut down by the war. While Brandeis had earlier defended the continuing importance of judges educated in the social sciences, his dissent in *INS v. AP* emphasized the limitations of courts compared to legislatures. "But to give relief against it would involve more than the application of existing rules of law to new facts. It would require the making of a new rule in analogy to existing ones," Brandeis explained. While this system had generally worked so far, "with the increasing complexity of society, the public interest tends to become omnipresent; and the problems presented by new demands for justice cease to be simple." As Brandeis continued, "It is largely for this reason that, in the effort to meet the many new demands for justice incident to a rapidly changing civilization, resort to legislation has latterly been had with increasing frequency." In the paragraphs that followed, Brandeis then cataloged the reasons why a legislature was better suited than a court to this type of

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[146] Wilson had always shown a lifelong fascination with parliamentary and legislative organization. See Mark Benbow, "Wilson the Man," in *A Companion to Woodrow Wilson*, ed. Ross A. Kennedy (New York: Wiley-Blackwell, 2013), 16.

[147] An Address to the Third Plenary Session of the Peace Conference, Feb. 14, 1919, in *PWW*, 55:175–177.

problem-solving. Above all, legislatures could make the sorts of investigations that courts were "ill-equipped to make" and could "prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement."[148] Brandeis' opinion is a perfect summary of some of the key themes of sociological jurisprudence. It encapsulates the rationale underlying Wilson's rejection of a world court in favor of the League of Nation's more political constitution.

In sum, Wilson's diplomacy carried major implications for American law. Wilson was arguing that nations work together to develop a common, international legal regime to regulate transnational actors. Whereas Root had focused on business, however, Wilson assumed that this new regime would cover a range of subjects: business, labor, health, transportation, communications, and security. It would implicate the American Federation of Labor and the United Fruit Company alike. International matters would now be subject to international regulation just as national matters would remain subject to national regulation.

IV. Root, Wilson, and the League Fight

Because Republicans like Root spoke a different legal language, they only partially grasped the revolution Wilson was advocating. Instead, they tended to examine the League in light of their own prior proposals and predilections. In his letter to House in August 1918, Root had conceded the need for a new model of international relations grounded in the idea of an international community. But Root's conception of this community was nothing like Wilson's. For Root, it meant that all nations had an interest in war or the threat of war, even

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[148] 248 U.S. 215, 262-267 (1918) (Brandeis, J., dissenting); see Horwitz, *The Transformation of American Law, 1870-1960*, 203–205.

when they were not parties to the dispute. While this justified international action to keep the peace, the nation-state remained the basic unit in international affairs.

Wilson, by contrast, advocated shifting responsibility for international problems to the League of Nations. Nation-states would remain to govern national matters, but anyone could bring an issue affecting the international community to the League's attention, and its institutions would commence fact-finding and address the problem. To be sure, states would continue to play a major role in international affairs, and the United States would serve as the League's undoubted leader. But with time, the League could assume more and more responsibility, for Wilson had left the League room to grow. As the president said in Paris in February 1919, the League was "a vehicle in which power may be varied at the discretion of those who exercise it and in accordance with the changing circumstances of the time. And yet, while elastic, while it is general in its terms, it is definite in the one thing that we are called upon to make definite. It is a definite guarantee of peace."[149]

The divergence between Root and Wilson reflected different understandings about the best way to organize the international system at a time when law shaped thinking about international politics. For over a decade, Root had advocated internationalizing the U.S. constitutional framework embodied by dual federalism. The LEP sought to adjust Root's vision in light of the war's lessons about the need for some sanction. Wilson's program, meanwhile, incorporated the main elements of the critique of legal orthodoxy. The split between Root and Wilson, in other words, was in part a result of the differences between legal orthodoxy and sociological jurisprudence. It was about two different visions of law and what they meant for the United States's place in the world. These differing conceptions of

[149] An Address to the Third Plenary Session of the Peace Conference, Feb. 14, 1919, in *PWW*, 175.

law in turn reflected different understandings of threat. For Root, nation-states were responsible for aggression. For Wilson, revolutionary nationalism, Bolshevism, and labor strife constituted additional, transnational threats.

Having been ignored by Wilson in Paris, Root played an important role in the Republican campaign against the League of Nations. In March 1919, Root wrote a public letter to Republican National Committee Chairman Will H. Hays critiquing the Covenant of the League of Nations, part of the GOP's attempt to coordinate a response to Wilson that balanced opposition but left open a door to compromise.[150] Root began by complaining about the way Wilson had cut the Senate out of the treaty process. In this case, there was an additional reason for Senate involvement. Usually, the president dispatched diplomats to negotiate a treaty, and he and the secretary of state could supervise and amend their work. Because the president and secretary of state were not directly involved in the negotiations, they possessed necessary independence and could identify issues the negotiators had overlooked. But in this case, the president himself had negotiated the treaty. As a result, the Senate was the only body that could provide an independent assessment of the president's work.[151]

Root then turned to the substance of the treaty. Echoing themes he had long articulated, he explained that there were two causes of war. The first category consisted of "controversies about rights under the law of nations and under treaties," and these controversies were "justiciable or judicial questions" and "cover by far the greater number of questions upon which controversies between nations arise." Arbitration could resolve these sorts of issues. The problem was that under the old Hague system, arbitration was voluntary.

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[150] See Lloyd E. Ambrosius, *Woodrow Wilson and the American Diplomatic Tradition*, 101–104.
[151] Root to Will H. Hays, Mar. 29, 1919, Elihu Root Papers, Library of Congress, Box 137.

Over the past decade, public opinion had led a drive for obligatory arbitration treaties and eventually a general court. As Root put it, "It became evident that the world was ready for obligatory arbitration of justiciable questions." Arbitration had therefore been the League to Enforce Peace's first plank.[152]

But there was another class of disputes, "clashes between conflicting national policies, as distinguished from claims of legal right." As Root explained, "They do not depend upon questions of law or treaty, but upon one nation or ruler undertaking to do something that another nation or ruler wishes to prevent. Such questions are a part of international politics. They are similar to the questions as to which our courts say, 'This is a political question, not a judicial question, and we have no concern with it.'" These sorts of controversies were prevalent in the Old World, and the Europeans often called conferences to resolve them peacefully. But like arbitration, these conferences were ad hoc and voluntary. "The great and essential thing about the plan contained in this 'Constitution for a League of Nations,'" Root argued, "is that it makes international conferences on political questions compulsory in times of danger; that it brings together such conferences upon the call of officers who represent all the powers, and makes it practically impossible for any nation to keep out of them." Thus rather than Article X or Article XI, Root saw Article XV as the "the central and controlling Article of the agreement."[153] On the whole, then, Root liked the League, which "developed naturally from the international practice of the past" and provided a forum for the peaceful resolution of political disputes.

But for the justiciable questions, the treaty was a step backwards. "The scheme practically abandons all effort to promote or maintain anything like a system of international

[152] Ibid.
[153] Ibid.

law, or a system of arbitration, or of judicial settlement through which a nation can assert its legal rights in lieu of war," Root complained. "Instead of perfecting and putting teeth into the system of arbitration provided for by the Hague Conventions, it throws those Conventions upon the scrap heap." As Root recognized, the covenant adopted a legislative rather than a judicial approach. "[N]either the Executive Council nor the body of delegates to whom disputes are to be submitted under Article 15. of the agreement is in any sense whatever a judicial body or an arbitral body. Its function is not to decide upon anybody's right. It is to investigate, to consider, and to make recommendations." Since justiciable questions of right composed the major part of international disputes, Root found the system inadequate.[154]

For a decade, Root had also sought to develop the body of international law that his desired court would apply. After complaining about its lack of judicial institutions, Root turned to lament the treaty's neglect of international law. The covenant envisioned no process of clarifying and refining international rules. Instead, it assumed that political bodies would decide questions on an ad hoc basis. As Root put it, "All questions of right are relegated to the investigation and recommendation of a political body to be determined as matters of expediency." This was fine for political questions, but unacceptable overall. Ever the legal formalist, Root "insist[ed] upon rules of international conduct founded on principles. . . . I should have little confidence in the growth or permanence of an international organization which applied no test to the conduct of millions except the expediency of the moment."[155]

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[154] Ibid.
[155] Ibid.

Root therefore proposed five amendments, which embodied the key themes of his program for international law and his effort to internationalize dual federalism. First, he would make arbitration obligatory for justiciable questions, using the U.S Supreme Court as a model. As Root explained, "The term 'Justiciable Questions' should be carefully defined, so as to exclude all questions of policy, and to describe the same kind of questions the Supreme Court of the United States has been deciding for more than a century." Next, Root wanted the covenant to require a conference that would define international law over time. This entailed a (slight) sacrifice of sovereignty: "We should be willing to submit our legal rights to judicial decision, and to abide by the decision. We have shown that we are willing to do that by the numerous treaties that we have made with the greater part of the world agreeing to do that, and we should be willing to have the same thing provided for in this general agreement."[156]

But not all questions were justiciable, and Root insisted that the treaty explicitly distinguish political issues like the Monroe Doctrine from justiciable ones. Root's concern about the Monroe Doctrine exposed something of an international double standard. According to Root, it remained wise for the United States to follow Washington, Jefferson, and Monroe's tradition of non-entanglement in European affairs. The United States had no "direct" interest there. Nonetheless, the war had exposed a "powerful secondary interest in the affairs of Europe coming from the fact that the war in Europe and the Near East threatens to involve the entire world, and the peaceable nations of Europe need outside help to put out the fire and keep it from starting again." But since the New World faced no such

[156] Ibid.

fires, the treaty needed to make clear that Europeans should not interfere in the Americas even as the United States deepened its engagement in Europe.[157]

As to Article X, Root acknowledged that it served a purpose in the short term for extinguishing these European fires. But he insisted that the United States have an unmistakable right to withdraw from Article X once this task was done and to allow more natural processes of national evolution to take effect:

> If perpetual, it would be an attempt to preserve for all time unchanged the distribution of power and territory made in accordance with the views and exigencies of the Allies in this present juncture of affairs. It would necessarily be futile. . . . Change and growth are the law of life, and no generation can impose its will in regard to the growth of nations and the distribution of power upon succeeding generations.

In addition to amendments 1) providing for a court, 2) calling for a conference to develop international law, 3) reserving purely American questions, and 4) allowing a party to withdraw from Article X once the European situation settled, Root suggested 5) adding a disarmament provision and 6) scheduling a conference of revision to adjust the treaty after the league operated for a few years.[158]

In theory, at least, Root's letter was constructive. His goal was not to torpedo the covenant but to reform it, and he found much in it that he liked. But as his letter makes clear, his worldview fundamentally differed from the president's. Because Wilson did not share his formalist assumptions, Root's amendments made little sense to Wilson. While praising Root's seriousness in contrast to the President's vanity and the Senate's bombast,

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[157] Ibid.
[158] Ibid.

Lowell nonetheless suggested that he had gone too far, seeking to rewrite the treaty to make it perfect rather than tweaking it to achieve "the minimum" that would make it acceptable.[159]

Overlooking the ideological gulf between Wilson and Root, moreover, Lowell found it rather ridiculous that Wilson had turned Republicans against their own policy. He pointed out that the idea for a League began with Roosevelt and Taft and noted that the LEP's advocacy predated Wilson's involvement. As Lowell explained, "[T]he President, by pushing himself into public notice in connection with the question and by irritating Republican leaders, has made this policy appear to the world as his own, and thrown the Republicans into opposition and into disowning what might well be called their own child." Root, Lowell suggested, might turn this tide and allow Republicans to support their own ideas.[160]

As Lowell and Root both recognized, the president had seized the initiative and thrown the Republicans on the defensive. "People are grasping, uncertain; they are going to follow some affirmative," Root conceded. "The President gives affirmatives."[161] In June 1919, Root, Hays, and Lodge sought to channel the Republican opposition into more productive channels. Lodge and Root therefore drafted a public letter, which Root sent Lodge on June 19.[162] This letter largely echoed the themes of Root's letter to Hays in March. Root again complained about the lack of judicial mechanisms. As Root put it, "In these respects, principles maintained by the United States without variation for half a century are still ignored, and we are left with a program which rests the hope of the world for future peace in a government of men and not of laws, following the dictates of expedience, and not

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[159] A. Lawrence Lowell to Root, Apr. 2, 1919, Elihu Root Papers, Library of Congress, Box 137. A. Lawrence Lowell to Root, Apr. 2, 1919, Abbott Lawrence Lowell Papers, Box 20.

[160] A. Lawrence Lowell to Elihu Root, May 1, 1919, Abbott Lawrence Lowell Papers, Harvard University Archives, Box 71.

[161] Root to Brandagee, June 8, 1919, Elihu Root Papers, Library of Congress, Box 137.

[162] Lloyd E. Ambrosius, *Woodrow Wilson and the American Diplomatic Tradition*, 148–151.

of right." But Root conceded that it was too late to fix these deficiencies, and he praised the covenant's provisions requiring automatic conferences and cooling off periods in times of war; its recognition "of racial and popular rights to local self-government"; and its "plan, indispensable in some form, for setting up governments in the vast regions deprived by war of the autocratic rule which had maintained order."[163]

Unlike three months earlier, however, Root now took a firm stand against Article X. Whereas Root's earlier letter had accepted a limited need for the provision, he now complained about "the vast and incalculable obligation" it imposed and advocated dropping it from the treaty altogether. Indeed, Root claimed that Article X did not fit with the other provisions in the treaty. As Root wrote, channeling Lodge, "It is an independent and indefinite alliance which may involve the parties to it in war against powers which have in every respect complied with the provisions of the League of Peace. It was not included in General Smuts' plan, the provisions of which have been reproduced almost textually in the League covenant."[164]

According to Root, the American people would not comply with Article X, and it was wrong for the United States to make commitments that it would not keep. If peace required a guarantee of French security, then so be it. But a general collective security provision went too far and threatened the cohesiveness of American society. As he pointed out, one reason for Swiss neutrality was its mixture of French, German, and Italian citizens. The United States was a similar hodgepodge of different nationalities. Their loyalty was not assured when the United States intervened in crises affecting their ancestral homelands in

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[163] Root to Henry Cabot Lodge, June 19, 1919, Elihu Root Papers, Library of Congress, Box 161.

[164] Ibid. On Lodge, see William C. Widenor, *Henry Cabot Lodge and the Search for an American Foreign Policy* (Berkeley: University of California Press, 1980).

which no direct U.S. interest was at stake. As Root asked, "How can we prevent dissension, and hatred among our own inhabitants of foreign origin when this country interferes on foreign grounds between the races from which they spring? How can we prevent bitterness and disloyalty towards our own government on the part of those against whose friends in their old homes we have intervened for no cause of our own?" Root argued that the United States should go "just so far as it is necessary" beyond George Washington's policy of neutrality. Article X went too far.[165]

Root's letter united both Republican proponents of a league and irreconcilables opposed to it in support of the idea of reservations (to improve the treaty or as a means to kill it).[166] Trying to find a silver lining, Wilson's advisers noted that Root's letter "has this advantage: that it practically limits field of debate to points made by [R]oot. We consider the letter adroitly put and requires answer." Their cables added that the contradiction on Article X between Root's March 29 letter and his June 19 was the letter's "chief weakness."[167] The problem, they suggested, was that Root had successfully shifted debate from the League's general worth to questions about particular clauses.[168] For Wilson, however, this distinction was irrelevant. He recognized that Root's reservations were in fact amendments. As amendments rather than reservations, they destroyed the entire meaning of Article X and thus the Covenant as a whole as he conceived it.[169]

By the end of the year, as the treaty headed toward defeat, Root admitted that he was "much distressed by the whole business." The war had raised hopes that international

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[165] Root to Henry Cabot Lodge, June 19, 1919, Elihu Root Papers, Library of Congress, Box 161.

[166] Lloyd E. Ambrosius, *Woodrow Wilson and the American Diplomatic Tradition*, 149–151.

[167] Enclosure for Auchincloss from Strauss and Miller attached to House to Wilson, June 24, 1919, in *PWW*, 61:137.

[168] Enclosure for Auchincloss from Miller attached to House to Wilson, June 25, 1919, in ibid., 61:181.

[169] A Report of a Press Conference by Charles Thaddeus Thompson, June 27, 1919, in ibid., 61:247.

society might rest on a new, sturdier foundation. Root saw no evidence that this was the case. "[The covenant] differs in machinery and in some details but not in essence from the agreements which the Powers have been making with each other ever since the end of the Thirty Years' War," he wrote, "and it practically omits the one thing which seems to me essential to the maintenance and development of a real Society of Nations, that is, insistence upon the rule of law and provision for the development and application of law."[170] For Wilson, meanwhile, "The League of Nations was not merely an instrument to adjust and remedy old wrongs under a new treaty of peace; it was the only hope for mankind." In rejecting the treaty, the United States was rejecting its "great duty" and "break[ing] the heart of the world."[171]

IV. Conclusion

During the First World War, a new conception of international law challenged Root's framework. Whereas Root regarded nation-states as the subjects of international law, Wilson focused on transnational factors in international affairs, many of them new, which augured disorder. These factors included revolutionary nationalism, Bolshevism, the struggle between international labor and international capital, multinational corporations, and disease. Because these challenges were international and transnational in nature, Wilson rejected Root's assumption that sovereign nation-states could manage them effectively. Instead, Wilson advocated an international League of Nations to deal with international/transnational problems, while leaving the previous model of state sovereignty for domestic/national ones. In Wilson's conception, international law did not simply manage

[170] Root to George Gray, Dec. 1, 1919, Elihu Root Papers, Library of Congress, Box 137.
[171] An Address to the Senate, July 10, 1919, in *PWW*, 61:434.

relations between nation-states; instead, it applied directly to all international issues. Because labor strife involved multinational companies and international unions, for example, labor relations were subject to international regulation by the League. It would also regulate more traditional areas of international politics, such as threats of war.

These two conceptions of international law mirrored the two main ways of thinking about law within the United States. Root's view reflected classical legal thought, with its fixation on drawing boundaries and its faith in a self-executing market. Wilson's view, in turn, embodied the sociological critique of classical legal thought as incapable of dealing with new social and economic conditions. Just as both conceptions of law coexisted in American jurisprudence at home, neither model of international law predominated in U.S. foreign relations. If the first view seemed inadequate for dealing with transnational problems, the second view seemed to sacrifice too much sovereignty. Wilson's Republican successors would devise creative ways to cut through this stalemate in the 1920s, turning to private business to engage Europe while avoiding the entanglement entailed in Wilson's vision.[172] But the suffering and destruction wrought by the Great Depression and the Second World War would renew tensions between nationalism and internationalism left unresolved in the fight over the League of Nations.

[172] See, for example, Melvyn P. Leffler, "Political Isolationism, Economic Expansionism, or Diplomatic Realism: American Policy Toward Western Europe, 1921-1933," *Perspectives in American History* 8 (1974): 413–61.

CHAPTER THREE

United States v. Alcoa and the Spread of American Law

The Great Depression and the Second World War reignited concerns about transnational and non-state actors, concerns that President Woodrow Wilson had sought to address through the League of Nations. Given years of wrenching economic crisis, it was unsurprising that policymakers and pundits looked to economic factors to understand the origins of fascism and the causes of the war.[1] Many New Dealers came to see big business and international cartels as a key cause of the conflict. They concluded that the United States needed to do something about the private actors that they believed had enabled Hitler to assume power and to amass the industrial capacity needed to wage war.[2]

These concerns, in turn, reopened the debate about American internationalism embodied by the fight over the League of Nations. For Wilson, the League of Nations could prevent traditional conflicts between states while also providing a flexible forum for regulating newer threats that spilled across national borders. He envisioned states' ceding their authority over transnational and international problems to the League of Nations while retaining responsibility for their own internal affairs. By contrast, former Secretary of State

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[1] Alan Dawley, *Struggles for Justice: Social Responsibility and the Liberal State* (Cambridge, MA: Belknap Press of Harvard University Press, 1991), 386–387; David M. Kennedy, *Freedom from Fear: The American People in Depression and War, 1929-1945* (New York: Oxford University Press, 1999), 245–47, 362–65.

[2] For a useful introduction to these concerns, see Wyatt C. Wells, *Antitrust and the Formation of the Postwar World* (New York: Columbia University Press, 2002).

Elihu Root and other opponents of the League of Nations supported the existing international order rooted in territorial sovereignty. They promoted international law to better delineate the proper boundaries between states, presuming that this would be sufficient to preserve peace.

At first, the Great Depression seemed to vindicate the misgivings of Wilson's opponents who had prioritized national sovereignty over Wilsonian multilateralism. The deflationary monetary policy necessitated by the international gold standard transmitted the economic crisis across the world, and President Franklin Roosevelt's 1933 decision to abandon the gold standard and devalue the dollar was a crucial step for the American recovery. But by prioritizing the American economy over international cooperation and exporting the depression, the president withheld needed American leadership. Roosevelt's subversion of the World Economic Conference in June 1933 epitomized American unilateralism. The policy of beggar thy neighbor fueled an economic crisis that soon erupted in the Second World War.[3]

During the war, American lawyers pioneered a third approach to international economic problems: they sought to extend U.S. law overseas to reform foreign legal systems and to regulate foreign actors directly. Both Root's and Wilson's approaches had rested on perceived limits to U.S. power. They assumed that overseas threats to peace were best addressed by the foreign nations where they occurred or by the international community acting collectively, not primarily by the United States itself. Many elements of the U.S.

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[3] Barry Eichengreen, *Golden Fetters: The Gold Standard and the Great Depression, 1919-1939* (New York: Oxford University Press, 1996); Dietmar Rothermund, "War-Depression-War: The Fatal Sequence in a Global Perspective," *Diplomatic History* 38 (Sept. 2014): 850–851; Patricia Clavin, "Explaining the Failure of the London World Economic Conference," in *The Interwar Depression in an International Context*, ed. Harold James (München: Oldenbourg, 2002), 77–98.

government's postwar planning—such as the idea for an International Trade Organization to promote free trade and to eliminate cartels—followed the Wilsonian model. But disregarding such limits on American capabilities, New Deal lawyers also sought to extend U.S. law beyond American borders to regulate international threats to peace directly, without the sacrifice of American sovereignty entailed by Wilson's more multilateral approach.

This new approach to international economic problems reflected two major transformations in American society brought about by the Great Depression and World War II: an expanding conception of the threats to the American way of life and the belief that it was the government's responsibility to address these threats and guarantee the security of its citizens. Franklin Roosevelt's initial emphasis on social and economic security broadened into a new ideology of national security that linked traditional regard for the nation's territorial integrity with a broader emphasis on protecting core values. As the world again descended into war, the Roosevelt administration made the case that U.S. national security encompassed the Atlantic (and Pacific).[4] Meanwhile, Americans increasingly turned from private associations to the government to guarantee their welfare, and the government assumed direct responsibility for managing risk.[5]

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[4] Andrew Preston, "Monsters Everywhere: A Genealogy of National Security," *Diplomatic History* 38, no. 3 (June 1, 2014): 479–80, 487–98; Melvyn P. Leffler, "National Security," in *Explaining the History of American Foreign Relations*, ed. Michael J. Hogan and Thomas G. Paterson, 2nd ed. (New York: Cambridge University Press, 2004), 123; Melvyn P. Leffler, "The American Conception of National Security and the Beginnings of the Cold War, 1945-48," *The American Historical Review* 89, no. 2 (Apr. 1984): 346; David Reynolds, *From Munich to Pearl Harbor: Roosevelt's America and the Origins of the Second World War* (Chicago: Ivan R. Dee, 2002), 182–184.

[5] Jonathan Levy, *Freaks of Fortune: The Emerging World of Capitalism and Risk in America* (Cambridge, MA: Harvard University Press, 2012), 313–14; Preston, "Monsters Everywhere," 488–490; Lizabeth Cohen, *Making a New Deal: Industrial Workers in Chicago, 1919-1939* (New York: Cambridge University Press, 2008), 251–90.

The resulting explosion of New Deal regulation was not limited to American soil, but also spilled overseas in "a New Deal for the world."[6] As Andrew Preston explains, "Just as laissez-faire economics had produced the Depression, unregulated world politics had produced the rise of the dictators and the collapse of international security. And just as the solution to the Depression was the management of economic life, the key to global stability, and therefore to U.S. national security, was the regulation of international affairs."[7]

Like Wilson's plans for the League of Nations a generation earlier, the expanding reach of the regulatory state rested in part on a revolution in American jurisprudence. The New Deal raised profound constitutional questions. The unprecedented array of legislation passed by Congress and the host of new agencies required to administer it undercut the limits on government power that the Supreme Court had painstakingly worked to maintain in the face of progressive pressure for reform.[8] It became increasingly difficult for the U.S. Supreme Court to maintain traditional legal distinctions between public/private and production/commerce.[9]

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[6] Elizabeth Borgwardt, *A New Deal for the World: America's Vision for Human Rights* (Cambridge, MA: The Belknap Press of Harvard University Press, 2005). Indeed, some scholars have argued that frustrated New Dealers sought to implement their programs in more hospitable environments overseas. See John W. Dower, *Embracing Defeat: Japan in the Wake of World War II* (New York: W. W. Norton & Company, 2000), 26. Other scholars, however, have suggested that American efforts to construct an American order abroad stemmed not from New Dealers' frustration with a conservative backlash at home but rather from the success of the ideas of New Dealers and their predecessors. See, e.g., David Ekbladh, *The Great American Mission: Modernization and the Construction of an American World Order* (Princeton: Princeton University Press, 2011), 1–4; Sarah T. Phillips, *This Land, This Nation: Conservation, Rural America, and the New Deal* (New York: Cambridge University Press, 2007), 242–47, 281; Michael J. Hogan, *The Marshall Plan: America, Britain and the Reconstruction of Western Europe, 1947-1952* (New York: Cambridge University Press, 1989), 1–4, 18; Alonzo L. Hamby, *Beyond the New Deal: Harry S. Truman and American Liberalism* (New York: Columbia University Press, 1976), 4, 12–15.

[7] Preston, "Monsters Everywhere," 490–91.

[8] Barry Cushman, "The Great Depression and the New Deal," in *The Cambridge History of Law in America*, ed. Michael Grossberg and Christopher Tomlins (New York: Cambridge University Press, 2008), 268–318; Nonetheless, the tremendous rise of federal power often enhanced, rather than diminished, local and state responsibilities. See Mason B. Williams, *City of Ambition: FDR, LaGuardia, and the Making of Modern New York* (New York: W. W. Norton & Company, 2014).

[9] On these distinctions, see Barry Cushman, "Formalism and Realism in Commerce Clause Jurisprudence," *University of Chicago Law Review* 67 (2000): 1089.

No case underscored the resulting constitutional transformation more than Justice Robert Jackson's 1942 opinion in *Wickard v. Filburn*. Giving broad sweep to Congress' power to regulate interstate commerce, the Supreme Court upheld regulations issued under the Amended Agricultural Adjustment Act of 1938 that penalized Roscoe Filburn for growing excess wheat for his own consumption on his own farm.[10] As G. Edward White has written, "Only an eccentric student of Contract, Commerce, and Due Process Clause decisions between 1933 and 1943 would deny that the Court significantly altered its doctrinal posture in those areas." This "'revolutionary' interval," White adds, "ushered in a far more extensive role for the federal and state governments as regulators of economic activity or redistributors of economic benefits."[11]

The constitutional changes that permitted Congress's unprecedented regulatory authority over the domestic economy likewise undermined legal limits on the international scope of American power. The 1909 case of *American Banana Co. v. United Fruit Co.* had held that the reach of U.S. law was presumptively confined to U.S. soil. Justice Holmes refused to apply the Sherman Act to the conduct of American corporations operating in Central America.[12] But in the 1945 case of *United States v. Aluminum Co. of America* (*Alcoa*), the Second Circuit reconsidered the issue.[13] Like *Wickard v. Filburn*—which involved Congress' power to regulate a farmer growing his own wheat on his own farm for his own consumption—*Alcoa* involved a dramatic question: could U.S. law apply to a *foreign* cartel consisting entirely of *foreign* companies that had agreed to stay *out of* the U.S. market? And like Justice Jackson's

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[10] Wickard v. Filburn, 317 U.S. 111 (1942).

[11] White, *Constitution and the New Deal*, 199.

[12] American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

[13] United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945) [hereinafter Alcoa]. See generally Spencer Weber Waller, "The Story of Alcoa: The Enduring Questions of Market Power, Conduct, and Remedy in Monopolization Cases," in *Fox and Crane's Antitrust Stories*, ed. Eleanor M. Fox and Daniel A. Crane (New York: Foundation Press, 2007).

opinion in *Wickard,* which jettisoned a judicially maintained distinction between commerce and production, Judge Learned Hand's opinion abandoned conventional views about the territoriality of law.

But a more careful reading of *Alcoa* reveals greater continuity with the classical era of American law than this narrative suggests. In *Wickard*, Justice Jackson decided Congress, and not the courts, should determine whether a statute involved a constitutional regulation of commerce. Congress, and not the courts, would decide whether the activity to be regulated sufficiently affected commerce to fall under Congress' power under Article I, Section 8. The Supreme Court, in other words, would no longer maintain the constitutional boundary between the federal government and the states , trusting the political process instead.[14] Even as it broadened the reach of American law, however, Hand's intended effects test presupposed a *judicially maintained* distinction between domestic and foreign jurisdictions. The courts would continue to determine whether acts overseas were intended to affect American commerce and thus within the purview of statutes like the Sherman Act.

In short, while New Deal lawyers advocated a dramatic expansion of law beyond U.S. borders, national sovereignty remained the foundational principle of the American-led international order. By examining *Alcoa* and connecting it to the wider campaign against cartels, this chapter shows how the Great Depression and Second World War entailed both change and continuity. Government lawyers applied U.S. law in dramatically new ways to defend an expanded conception of American security and economic interests, but they did so within a continuing framework of national sovereignty that insulated the United States and left local actors with the primary responsibility for their own affairs.

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[14] Cushman, "Formalism and Realism in Commerce Clause Jurisprudence," 1137–50.

I. Breaking the Aluminum Cartel

In the fall of 1933, Attorney General Homer Cummings hired lawyer John Wattawa to investigate the aluminum industry. At the conclusion of his investigation two years later, Wattawa recommended that the Justice Department sue Alcoa. The company, he concluded, had illegally obtained and maintained a monopoly, and regardless of any illegal conduct on Alcoa's part, the mere existence of such a large monopoly constituted a per se violation of the Sherman Act. Aluminum had become "indispensable in the economic and industrial life of the Nation and in its military and naval defense," giving Alcoa "inordinate power." Such a situation left the government little choice: "Whether such power was obtained through legitimate development, or was obtained through illegal restraints and combinations, its potentialities for evil are the same. Such a situation is unwholesome in the economic life of the Nation." Alcoa needed to be dissolved.[15]

The early years of the Franklin Roosevelt administration, however, were not good for antitrust. Despite a series of key antitrust victories during the Taft administration, and the strengthening of the antitrust laws with the Clayton Act and the creation of the Federal Trade Commission in 1914, American entry into the First World War undercut antitrust enforcement in the United States. The government suspended the antitrust laws during the war, and government-directed coordination fostered cooperation over competition among businesses and left a legacy of associationalism that lasted through the 1920s. Though the Justice Department created an Antitrust Division in 1933, the early New Deal favored the

[15] Wattawa to AG, July 3, 1935, Section 1, Box 171, Case 60-13-0, Entry # A1 COR 60, RG 60, NARA; Memo for the AG, Dec. 30, 1936, Box 77, Robert H. Jackson Papers, Library of Congress; Wattawa to Jackson, Apr. 19, 1937, ibid.

government-sponsored planning and cartelization of the National Industrial Recovery Act, even after the Supreme Court struck down the law in 1935.[16]

The Roosevelt Recession of 1937-1938, however, created a new opening for antimonopoly advocates. A rising government lawyer named Robert H. Jackson had assumed the helm of the Antitrust Department, and he quickly laid ground for antitrust's revival. Jackson rejected Theodore Roosevelt's ideas that bigness was inevitable, to be contained only by robust government regulation. Refusing "to abandon the hope of maintaining in America a system of competitive independent enterprises," Jackson critiqued both Marxists and capitalists who assumed that centralization and concentration were inherent in a modern economy. Jackson warned that business was "plunging headlong down the road that leads to government control." If businessmen did not want a planned economy, they needed to support the government's efforts to combat monopoly, for "American industry regimented from Wall Street" was "the first step in regimentation from Washington." But with a national policy to combat monopoly and an amenable judiciary, free enterprise would continue to thrive.[17]

Desperate to alleviate the recession, President Roosevelt soon adopted Jackson's ideas.[18] On April 29, 1938, the president made the case before Congress: "Once it is realized

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[16] Alan Brinkley, *The End Of Reform: New Deal Liberalism in Recession and War* (New York: Alfred A. Knopf, 1995), 34–39; Ellis W. Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence*, Reissue Edition (New York: Fordham University Press, 1995), 12–16, 373; William Kolasky, "Robert H. Jackson: How a 'Country Lawyer' Converted Franklin Roosevelt into a Trustbuster," *Antitrust* 27, no. 2 (Spring 2013): 85–87; Wells, *Antitrust and the Formation of the Postwar World*, 54.

[17] Robert H. Jackson, "The Struggle Against Monopoly," Address at the Annual Meeting of the Georgia Bar Association, May 27, 1937, Box 44, Wendell Berge Papers, LC; Robert H. Jackson, "Financial Monopoly: The Road to Socialism," *The Forum* 100 (1938): 303, 307.

[18] Hawley, *The New Deal and the Problem of Monopoly*, 360, 373–76, 383–455; Brinkley, *The End Of Reform*, 48–49, 56–58; Kolasky, "Robert H. Jackson: How a 'Country Lawyer' Converted Franklin Roosevelt into a Trustbuster," 87–90; R. Hewitt Pate, "Robert H. Jackson at the Antitrust Division," *Albany Law Review* 68 (2005): 787–99.

that business monopoly in America paralyzes the system of free enterprise on which it is grafted, and is as fatal to those who manipulate it as to the people who suffer beneath its impositions, action by the government to eliminate these artificial restraints will be welcomed by industry throughout the nation. For idle factories and idle workers profit no man." Though lamenting that the antitrust laws were "powerless" amid new financial conditions, Roosevelt called for additional funding for the Antitrust Division and for "a thorough study of the concentration of economic power in American industry and the effect of that concentration upon the decline of competition."[19]

Congress acceded to these requests, and it created the Temporary National Economic Committee (TNEC) in 1938. Composed of members of the executive and legislative branches, it investigated the concentration of economic power. While many thought that it offered the most promising avenue for reform, its detailed reports failed to achieve dramatic legislative change. Nevertheless, TNEC's detailed studies of the economy helped lay the groundwork for enhanced antitrust enforcement.[20]

Antitrust's biggest boost came when Thurman Arnold arrived to replace Jackson, who became solicitor general in 1938. A Wyoming lawyer who had become a celebrated legal realist professor at Yale Law School, Arnold was an unlikely candidate to head the Antitrust Division. He had just published a book charging that the antitrust laws were nothing but "a great moral gesture" and "a pure ritual" that "promote[d] the growth of great industrial

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[19] Franklin D. Roosevelt, Recommendations to Congress to Curb Monopolies and the Concentration of Economic Power, Apr. 29, 1938, in Franklin D. Roosevelt, *The Public Papers and Addresses of Franklin D. Roosevelt: 1938*, ed. Samuel Irving Rosenman (New York: MacMillan Company, 1941), 305–22; Kolasky, "Robert H. Jackson: How a 'Country Lawyer' Converted Franklin Roosevelt into a Trustbuster," 90.

[20] Wells, *Antitrust and the Formation of the Postwar World*, 38–40; Spencer Weber Waller, *Thurman Arnold: A Biography* (New York: New York University Press, 2005), 88–91; Theodore Philip Kovaleff, *Business and Government during the Eisenhower Administration: A Study of the Antitrust Policy of the Antitrust Division of the Justice Department* (Athens: Ohio University Press, 1980), 8–9.

organizations by deflecting the attack on them into purely moral and ceremonial channels" without stopping the concentration of economic power.[21]

After assuming the reins at the Antitrust Division, however, Arnold brought unprecedented energy to the battle against monopoly. Thanks in large part to Arnold's expert salesmanship with Congress and the public, Arnold quadrupled the Antitrust Division's budget and increased the staff from the few dozen employees at its creation to a few hundred. Moreover, Wendell Berge, Arnold's top deputy, brought in talented lawyers like future Supreme Court Justice Tom Clark and future Attorney General Edward Levi. In 1938, the department had brought eleven new cases; by 1940, the number had expanded to ninety-two.[22] "A dog talks by barking," Arnold remarked, "but we talk by litigation."[23] As a result, the Antitrust Division was a far cry from the "backwater" it had been during the early New Deal.[24] As Berge put it, "Prior to 1938 there were not sufficient funds or personnel available to make much more than a gesture at enforcing the antitrust laws. Since 1938 the Antitrust Division has had the funds and personnel to undertake the enforcement of the antitrust laws on a wider front."[25]

The case against Alcoa predated Arnold, for it was Jackson who initiated legal action. On April 23, 1937, the United States filed suit in the Southern District of New York against Alcoa, its subsidiaries and affiliated companies, and various officers, directors, and shareholders. The petition described Alcoa's monopolistic control of the aluminum market, its agreements with foreign producers to maintain this monopoly, and the illegal means

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[21] Thurman W. Arnold, *The Folklore of Capitalism* (New Haven: Yale University Press, 1937), 207–08, 212, 217.

[22] Wells, *Antitrust and the Formation of the Postwar World*, 40; Waller, *Thurman Arnold*, 80, 83–87; William Kolasky, "Thurman Arnold: An American Original," *Antitrust* 27, no. 3 (Summer 2013): 89–96.

[23] "Maps Trust Drive in Building Trades," *N.Y. Times*, July 8, 1939, at 8.

[24] Waller, *Thurman Arnold*, 80.

[25] Berge to Ayers, Apr. 4, 1944, Box 28, WBP, LC.

Alcoa employed to acquire its monopoly, which it used to fix unreasonable prices and hurt other manufacturers. The government sought the company's dissolution.[26]

The stakes were enormous. As Spencer Weber Waller has observed, "The case was no ordinary trial. . . . Alcoa was the most important case in a generation, rivaling those against *Standard Oil* and *U.S. Steel* in the past and the much later cases against *AT&T* and *Microsoft*."[27] For Jackson's Antitrust Division, the case would resolve an existing ambiguity in the law and set an important precedent. According to Jackson, the courts construed the Sherman Act in the wrong way. They focused on the "intent" or "state of mind" of a "fictitious corporate individual," further requiring that a monopoly be "unreasonable." Jackson, by contrast, advocated that the courts should focus on "results," that is, "whether a combination is in fact one which will tend to produce economies of scale or whether it will in actual operation tend to give an opportunity for monopoly profits."[28] But though the Justice Department wanted to avoid a trial that hinged on Alcoa's intent, it was also not eager for a victory that depended on proving the pernicious results of Alcoa's monopoly. Instead, the trustbusters sought a ruling that a 100% monopoly of the sort Alcoa had was illegal per se. The government hoped to win simply by proving that Alcoa controlled an overwhelming share the market, regardless of Alcoa's (mis)conduct.[29]

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[26] Press Release, Apr. 23, 1937, Box 77, RHJP, LC; Memo for the AG, Mar. 16, 1937, Section 1, Box 171, Case 60-13-0, Entry # A1 COR 60, RG 60, NARA.

[27] Waller, "Story of Alcoa," 127.

[28] Robert H. Jackson, "Report of Assistant Attorney General Robert H. Jackson in Charge of the Antitrust Division," in *Annual Report of the Attorney General of the United States for the Fiscal Year 1937*, by U.S. Department of Justice (Government Printing Office, 1938), 38–39. Alan Brinkley credits Arnold for shifting antitrust enforcement to a new focus on the technocratic lowering of consumer prices in place of a more moral and political vision. Jackson's emphasis on "results" reflected this same impulse. Brinkley, *The End Of Reform*, 113–17; Alan Brinkley, "The Antimonopoly Ideal and the Liberal State: The Case of Thurman Arnold," *Journal of American History* 80, no. 2 (Sept. 1993): 557–79.

[29] Memo for the AG, Mar. 16, 1937, Section 1, Box 171, Case 60-13-0, Entry # A1 COR 60, RG 60, NARA.

While commentators would seize upon the market power and conduct facets of *Alcoa*, its international dimension was also central. As Spencer Weber Waller points out, Alcoa's domestic monopoly was only possible because it faced no foreign competition: "Large European competitors existed which were capable of exporting to the United States if prices rose enough to make exports profitable given the existing transportation costs and customs tariffs. Nonetheless, imports remained negligible through the World War II era, not counting US-Canada transactions between Alcoa affiliates."[30] According to the government's petition, this was not a coincidence. Beginning in 1902, Alcoa devised ways to limit foreign competition. It purchased interests in raw materials and aluminum plants in Europe, threatening "destructive competition" to "intimidate" European producers against entering the American market. And it entered into cartel arrangements that the government suspected limited production and allocated markets, reducing aluminum shipments to the United States. In short, the government alleged that Alcoa's "100 per cent control of virgin aluminum"—"an illegal monopoly irrespective of the method whereby the monopolistic control of the domestic market was originally obtained"—depended upon "activities designed to protect its monopoly from foreign competition."[31]

As soon as the government filed its petition, however, its case hit a roadblock. A judge in Pittsburgh enjoined the Justice Department from litigating in New York. He declared that the suit covered the same matter as a 1912 consent decree Alcoa had entered with the government and that the government therefore had to bring further claims in the

[30] Waller, "Story of Alcoa," 135.

[31] Press Release, Apr. 23, 1937, Box 77, RHJP, LC; Memo for the AG, Mar. 16, 1937, Section 1, Box 171, Case 60-13-0, Entry # A1 COR 60, RG 60, NARA.

Western District of Pennsylvania.[32] The Justice Department was livid. The judge's injunction, the attorney general wrote the president, had "little or no apparent justification," constituted "an unwarranted use of the judicial power to interfere with and obstruct executive functions and defeat legislation enacted by Congress," and "illustrate[d] the abuses of the injunctive power and disclose[d] a fundamental and alarming weakness in the machinery for expeditious enforcement of the laws against monopoly and restraint of trade." It was ridiculous that a case from over a quarter of a century ago was "substantially identical" to the government's current lawsuit.[33] The attorney general filed an expediting certificate reserved for cases of "general public importance" to resolve the impasse. After victories in a special expediting court and then at the Supreme Court in December 1937, the government's case was at last allowed to proceed.[34]

While the government worked to overturn the injunction, it turned to the State Department for assistance in gathering evidence against Alcoa. According to the government's theory of the case, in 1928 Alcoa created Aluminium Limited (Limited), an independent Canadian corporation, and transferred its foreign properties to this new company. Limited then joined British, French, German, and Swiss aluminum companies in forming a Swiss cartel corporation called Alliance Aluminium Compagnie (the Alliance) in 1931. While Alcoa itself was not part of the cartel, Alcoa tacitly participated through Limited. The Alliance agreed to limit aluminum exports to the United States, preserving Alcoa's

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[32] Memo for Jackson, Apr. 29, 1937, Box 77, RHJP, LC; memo for Jackson, Apr. 29, 1937, Box 23, WBP, LC; United States v. Aluminum Company of Am., Equity No. 159 (W.D. Pa. 1912), reprinted in Roger Shale, ed., *Decrees and Judgments in Federal Anti-Trust Cases, July 2, 1890-January 1, 1918* (Washington, DC: Government Printing Office, 1918), 341–50.

[33] Letter, AG to President Roosevelt, June 1, 1937, Box 77, RHJP, LC.

[34] Statement dated June 7, 1937, Section 1, Box 171, Case 60-13-0, Entry # A1 COR 60, RG 60, NARA; Aluminum Monopoly Trial, May 20 1941, Section 5, Box 172, ibid.; Ulmer to Jackson, Dec. 9, 1937, RHJP, Library of Congress, Box 77.

monopoly. The attorney general therefore asked that the State Department compile evidence overseas to support the government's theory.[35] The government's investigation now spanned the globe. And because the government had personal jurisdiction over Limited, government lawyers believed they could require the Canadian corporation to turn over documents "even though production of the documents requires performance of an act outside the jurisdiction of our courts."[36]

The trial began the following June, a few months after Arnold had replaced Jackson in the Antitrust Division. It lasted two years and two months, from June 1, 1938, until August 14, 1940, with the court sitting twenty-five hours a week for roughly forty weeks a year. It featured 160 witnesses, and Alcoa Chairman Arthur V. Davis and Limited President Edward K. Davis (his brother) each testified for six weeks. It was said to be the longest court trial in American history, with 40,000 pages of testimony and an additional 10,000 pages of exhibits.[37] Alcoa's lawyer complained that the government "had not limited [itself] to a 'guinea-pig' experiment to determine the legal question as to whether a 100 per cent monopoly of virgin aluminum was illegal *per se*, but had included the unjust accusations of wrong-doing."[38]

Throughout the trial, the Justice Department's lawyers found themselves frustrated with Judge Francis G. Caffey, who presided over the trial, and whose rulings on the government's objections seemed "wholly capricious." But the Antitrust Division appeared to

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[35] AG to Secretary of State and attached memo, Aug. 17, 1937, Box 77, RHJP, LC.

[36] Memo for Jackson, Aug. 27, 1937, ibid.

[37] Aluminum Monopoly Trial, May 20 1941, Section 5, Box 172, Case 60-13-0, Entry # A1 COR 60, RG 60, NARA; Telegram, Rice to Arnold, Aug. 14, 1940, ibid.; Arnold to Leavy, Aug. 9, 1940, Box 171, Section 1, Box 171, ibid.; John T. Cahill, "Some Recent Trends and Developments in the Anti-Trust Laws," *Record of the Association of the Bar of the City of New York* 1 (1946): 204.

[38] Memo for Jackson, Dec. 17, 1937, Box 77, RHJP, LC.

make headway in its effort to prove an international conspiracy. As a government lawyer Walter L. Rice explained to Arnold,

> If Judge Caffey is consistent, I have difficulty in seeing how he can avoid finding conspiracy between Alcoa and Aluminium Limited when that issue is pressed. . . . Our evidence on conspiracy is infinitely stronger than we anticipated it would be when suit was filed. We have shown a total absence of competition between Alcoa and Aluminium Limited. Alcoa sells exclusively in the United States and Aluminium Limited sells exclusively outside the United States. Although Aluminium Limited could obtain a higher price by selling in the United States, it chooses to market its product in distant markets such as Japan where it obtains a substantially lower price, pays a higher freight rate and a higher tariff. The two corporations supplement each other. Although Aluminium Limited sells a substantial part of its Canadian output to Alcoa, it has refused to sell to others in the United States.

If the United States could establish a prima facie conspiracy between Alcoa, Limited, and the other foreign producers, the statements of the alleged conspirators could be admitted into evidence against the defendants, easing the government's case.[39]

On November 1, 1939, Judge Caffey found that the government offered sufficient proof to warrant a jury in finding a conspiracy between Alcoa, Limited, and other foreign producers. Because the government had made a prima facie case for the conspiracy, evidence from the other conspirators could be admitted against Alcoa and Limited. Indeed, the evidence for the conspiracy seemed strong. Arthur V. Davis, Andrew W. Mellon, and other Alcoa shareholders held over 80% of Limited stock, the two companies' leaders were brothers, they had offices in the same New York and Pittsburgh buildings, Limited used Alcoa's law firm and accounting firm, and Alcoa's lawyers advised Limited on a draft of the Alliance cartel agreement. Moreover, the government made a plausible case that Alcoa had used Canadian corporations to evade the antitrust laws for years. At first, Alcoa had resorted to a Canadian subsidiary, known as Northern, to participate in international cartels, until the

[39] Rice to Arnold, Apr. 15, 1939, Section 1, Box 171, Case 60-13-0, Entry # A1 COR 60, RG 60, NARA.

1912 consent decree shut down this arrangement. In 1928, it had transferred its foreign properties to an independent Limited, which then joined the Alliance in 1931. As a government memorandum explained,

> Although Arthur V. Davis did not directly discuss the agreement with the foreigners, it is the Government's contention that every means was adopted to impress upon their minds that the Aluminum Company would silently cooperate with the cartel. The Government emphasizes the fact that the cartel's restriction of world production and fixing of a world price could not possibly have succeeded if the Aluminum Company had sold its huge surplus outside the United States. It points to the fact that the Europeans restricted their shipments to the United States to limited quotas which they sold at prices fixed by the Aluminum Company, and that in turn the Aluminum Company for years refrained from selling aluminum ingot outside the United States.

The Alliance, meanwhile, fixed production and prices among its British, French, Swiss, German, and Canadian members.[40]

In the end, however, Judge Caffey rejected the government's arguments. A few weeks after the trial concluded, he delivered his lengthy opinion from the bench over the course of ten days, from September 30 to October 9, 1941, and the United States suffered a rout.[41] Caffey held that the government failed to prove any of its allegations of monopolization.[42] He likewise explained that the government failed to prove that Alcoa had entered into a conspiracy with Aluminium Limited or with any of the foreign producers.[43] As one of the government's lawyers explained to Arnold, Caffey concluded that Limited's higher production costs, its preferential status within the British empire as a Canadian corporation, and U.S. tariffs explained its decision to stay out of the U.S. market. If Limited

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[40] Aluminum Monopoly Trial, May 20 1941, Section 5, Box 172, Case 60-13-0, Entry # A1 COR 60, RG 60, NARA; see also Rice to Kemper, Sept. 25, 1940, ibid.; Rice to Kemper, Oct. 2, 1940, ibid.; Walter L. Rice to James S. Kemper Jr., Oct. 2, 1940, ibid.

[41] United States v. Aluminum Co. of Am., 44 F. Supp. 97 (S.D.N.Y. 1941); Arnold to O'Mahoney, Nov. 24, 1941, Section 6, Box 172, Case 60-13-0, Entry # A1 COR 60, RG 60, NARA.

[42] *Alcoa*, 44 F. Supp. at 224.

[43] *Id.* at 285-86.

leaned on Alcoa at first, Caffey maintained, "gradually Aluminium has become a complete and independent organization." He added that "it would be little short of preposterous to infer that the failure of Alcoa and Aluminium to sell in substantial quantities in the home territory of the other was attributable to agreement between them not to do so."

But what about the government's initial victory on the prima facie case of conspiracy? Caffey maintained that it only dealt with the admissibility of evidence and that a great deal of testimony had come later. More than anything else, the Davis brothers' testimony sunk the government's case. As Caffey put it, "I feel that no more reliable or candid witness than Mr. Edward K. Davis has testified in this case. I accept his account of what happened. This means that I reject the contention that there was any conspiracy, such as charged by the Government, in the organization or in the conduct of the Alliance."[44]

The furious Antitrust Division had one further frustration with Judge Caffey. To finalize his opinion, he had to issue findings of fact and conclusions of law, giving the parties time to make proposals and comments. The case had already lasted over four years, and the government felt Caffey was proceeding too slowly, undermining the government's right to an expeditious appeal. After contemplating a request to the U.S. Supreme Court for a writ of mandamus to compel Judge Caffey to expedite the process, Alcoa and the Justice Department found a way to bring the district court proceedings to a reasonable conclusion.[45]

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[44] *Id.* at 273, 277, 282; Herberg to Arnold, Oct. 8, 1941, Section 6, Box 172, Case 60-13-0, Entry # A1 COR 60, RG 60, NARA; Waller, "Story of Alcoa," 129.

[45] Arnold to O'Mahoney, Nov. 24, 1941, Section 6, Box 172, Case 60-13-0, Entry # A1 COR 60, RG 60, NARA; Arnold to Caffey, Nov. 3, 1941, ibid.; Government's Objections to Defendants' Requests for Findings of Fact and Conclusions of Law, and Government's Waiver of Privilege to Request Findings of Fact and Conclusions of Law, Section 11, Box 173, ibid.; Herberg to Andresen, Mar. 19, 1942, and accompanying memo, ibid.

On July 23, 1942, over five years after the case was first filed, Judge Caffey issued his final judgment. Having lost at trial, the government now appealed to the Supreme Court.[46]

II. "Handmaidens of Fascism": World War II and the Struggle Against Cartels

The Justice Department had brought suit because it was worried about the aluminum industry in the United States. The international cartel mattered because it helped Alcoa retain its domestic monopoly. But in five years, the world changed dramatically, providing a new prism for assessing the case. With the outbreak of World War II, the government now emphasized that its lawsuit furthered national defense, aluminum being crucial for aircraft production. "In addition to the exorbitant prices of aluminum, which will add millions to our defense bill," a memorandum for Arnold explained, "the monopoly has created the most serious bottleneck in raw materials essential to national defense." The Antitrust Division complained that an "effective lobby" was impeding its lawsuit and preventing wider aluminum production.[47]

But World War II introduced new challenges and complicated the government's narrative. "The officials of Alcoa should have been spending all their time during the last three years increasing the output of aluminum," a 1942 article in *The New Yorker* contended, "but they have been compelled to devote half their time to disproving Arnold's charges."[48] Competition provided a valuable rallying cry during the Roosevelt Recession, but the government needed the full support and cooperation of business to mobilize for war. It was

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[46] Waller, "Story of Alcoa," 129.

[47] "Aluminum Monopoly and National Defense," Memo for Arnold, Jan. 9, 1941, Section 3, Box 171, Case 60-13-0, Entry # A1 COR 60, RG 60, NARA.

[48] Alva Johnston, "Thurman Arnold's Biggest Case," *New Yorker*, Jan. 24, 1942, 25.

unclear how continued antitrust enforcement would fit into this new political context. All-out mobilization required economic coordination between firms and with the government, which was at odds with the vision of competition underlying the antitrust laws. Moreover, fighting off antitrust investigations was a time-consuming and costly process, which could potentially divert executives from paying necessary attention to wartime production. The antitrust laws had been suspended during World War I, and many advocated setting them aside once more.[49]

But even amid "an inevitable shifting of emphasis from a peacetime policy of free competition to an immediate war production under Government supervision," the antitrust laws remained in force.[50] Nonetheless, in the spring of 1942, Secretary of War Henry Stimson, Secretary of the Navy Frank Knox, Attorney General Francis Biddle, and Arnold signed a memorandum to deal with the tension between a competitive economy and the exigencies of war. If consultation failed to produce an agreement, the service secretaries could force the attorney general to drop any investigation or action that would seriously interfere with defense.[51] Having won a "protracted battle," the military did not hesitate to use this new authority and stopped many antitrust cases. In fiscal year 1943, for example, twenty-four cases were postponed at the request of the secretaries of the Army and the Navy.[52]

Arnold did not submit meekly. By attacking international cartels and blaming them for wartime shortages of vital war materials, he hoped to make the Antitrust Division a key

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[49] Wells, *Antitrust and the Formation of the Postwar World*, 54.

[50] Memo for Wechsler, Dec. 27, 1943, Box 27, WBP, LC.

[51] Wells, *Antitrust and the Formation of the Postwar World*, 80.

[52] Ibid., 54; Richard Lee Strout, "The Folklore of Thurman Arnold," *New Republic* 106, no. 17 (Apr. 27, 1942): 570; Memo for Wechsler, Dec. 27, 1943, Box 27, WBP, LC.

part of the U.S. war effort.[53] The public, rather than judge and jury, was the key audience.[54] As an article in *The New Republic* put it, "Unable to use its administrative and court machinery, anti-trust has had to content itself with a publicity campaign against the firms which have used their patent monopolies to obstruct war production, and which have clung to cartel arrangements with German corporations in the Nazi command economy."[55]

From the very beginning of his tenure at the Justice Department, Arnold depicted antitrust as crucial to democratic government. Concentrated economic power, he claimed in a 1938 article in the *New York Times*, was "a dictatorial power" and "the antithesis of our democratic tradition."[56] Even before World War II began in Europe, he blamed cartelization for the rise of Nazi Germany: "Germany became organized to such an extent that a Fuehrer was inevitable; had it not been Hitler it would have been someone else." While he did not think the situation was as drastic, he nevertheless warned that the depression had exacerbated a similar tendency in the United States.[57]

After war broke out in Europe, Arnold continued to sound the alarm, linking general warnings against cartels with complaints about specific industries, such as the aluminum industry at issue in *Alcoa*. Arnold claimed that the Nazis had increased aluminum production while the rest of the world's output remained low as a result of monopoly agreements. Antitrust enforcement was necessary to break up such agreements and ensure American readiness. "Within the last year," he claimed, "the clamor to set aside the antitrust laws has

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[53] Wells, *Antitrust and the Formation of the Postwar World*, 52.

[54] Waller, *Thurman Arnold*, 86.

[55] Max Lerner, "Economic Strategy in a Democracy," *New Republic* 106, no. 25 (June 22, 1942): 858.

[56] Thurman W. Arnold, "An Inquiry into the Monopoly Issue," *New York Times*, Aug. 31, 1938, at B1.

[57] Thurman W. Arnold, "How Far Should Government Control Business: Competition Requires a Referee," Address at Meeting of the Economic Club of New York (Feb. 2, 1939), *Vital Speeches of the Day* 5, no. 10 (Mar. 1, 1939): 291.

died away and been replaced by an awareness that the Antitrust Division is one of the nation's vital defense agencies."[58]

Arnold continued to develop these themes after the United States entered the war. Addressing the Illinois State Bar in 1942, he castigated cartels. "To these international cartels we owe the peace of Munich," he argued. "To these same cartels we owe the failure to expand American industry prior to Pearl Harbor. To the interests of these cartels in stabilizing prices and restricting production we owe our present industrial unpreparedness." Already looking ahead to the war's end, Arnold also warned of "peace without victory" if cartels suspended during the war resumed operation. He challenged his audience of lawyers to "speak with a united voice that national security for the future cannot depend upon ideals, [but] must be based upon power to prevent militant nations from arising and again threatening our institutions with attack." The United States' "greatest mistake was the illusion that we were safe from attack."[59]

Ever the salesman, Arnold sought to leverage the war into increased funding for the Antitrust Division. In early 1940, he wrote Robert Jackson, now the incoming attorney general, urging him to bring to the president's attention the need for antitrust investigations of industries that produced war materials. The Antitrust Division, he told Arnold, had made "certain startling discoveries," but lacked the funds and personnel to investigate further. "We have reason to believe that a number of foreign interests, and in particular German interests, have entered into restrictive agreements with American producers, with the effect, if not

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[58] Thurman W. Arnold, "Defense and Restraints of Trade," *New Republic* 104, no. 20 (May 19, 1941): 686–87.

[59] Thurman W. Arnold, "Confidence Must Replace Fear: Importance of Efficiency in Production and Distribution," Address Before the Illinois State Bar Association (June 3, 1942), *Vital Speeches of the Day* 8, no. 18 (July 1, 1942): 557–59.

with the deliberate purpose, of throttling American capacity to produce essential war materials," he explained, listing companies like Krupp and IG Farben that would soon obtain notoriety. For Arnold, the solution was straightforward: more funding.[60]

A few months later, Arnold again wrote Jackson, alleging that the U.S. government was being charged excessive prices, that U.S. and foreign companies were dividing markets, and that patent agreements were restricting U.S. government access to essential war materials and information while providing secrets to foreign governments.[61] J. Edgar Hoover, however, cast doubt on Arnold's claims. With one exception, he was unaware of Arnold's allegations, and in the case with which he was familiar the company had only proceeded with the approval of the Department of the Navy. The FBI, Hoover added, was more than capable of conducting the necessary investigations without additional funding.[62] Arnold, however, continued to press for more funding and a larger staff, sending Jackson memoranda on a range of industries on which Antitrust Division expertise might prove useful. In 1941, after the Senate Appropriations Committee cut an additional $750,000 appropriation, Arnold even wrote Roosevelt himself and asked the president to intervene to restore the funding.[63]

But this was not simply salesmanship and rhetoric. The sense that concentrated economic power threatened U.S. security shaped the Antitrust Division's approach to companies like Alcoa, whose case was then on appeal. The Antitrust Division detailed how Hitler had used the Alliance cartel to overtake the United States in aluminum production. In 1934, the German company in the Alliance threatened to leave the cartel unless it was

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[60] Arnold to Jackson, Jan. 15, 1940, Box 85, RHJP, LC.
[61] Arnold to Jackson, May 16, 1940, ibid.
[62] Hoover to Jackson, May 23, 1940, ibid.
[63] See Arnold to Jackson, May 17, 1941, ibid.

permitted to increase its domestic production. The other members acceded. As an Antitrust Division memorandum explained, "This protected world markets from German competition and thereby satisfied the monopolistic objective but it enabled the Germans to expand their capacity until they became the world's largest producers of aluminum and airplanes." The memorandum included a reminder that cases like Alcoa could not be tried without "ample funds" for the Antitrust Division.[64]

In the most dramatic charge of the war, Arnold blamed Standard Oil's relationship with Germany's IG Farben for critical shortages of rubber. Though Standard Oil settled the case through a consent decree, Arnold took the matter to Senator Harry S. Truman's defense preparedness committee to put the company's misdeeds in the public spotlight.[65] In fact, Arnold's charges were overblown. As Wyatt Wells writes, "It is hard to escape the conclusion that, in the case of rubber, Arnold either did not know what he was talking about or did not care." Nonetheless, Arnold damaged Standard Oil's reputation.[66]

In leaving no sector of the U.S. economy untouched, Arnold upset allies. He even alienated labor by using the antitrust laws against unions, depriving himself of liberal support.[67] As a result, Arnold's antitrust campaign enjoyed only limited success. In 1943, Roosevelt got rid of him by appointing him to serve on the U.S. Court of Appeals for the District of Columbia.[68] Referring to a story that Alcoa's political influence had led President Calvin Coolidge to appoint his crusading Attorney General Harlan Stone to the Supreme

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[64] Aluminum Monopoly and National Defense, May 1941, Section 5, Box 172, Case 60-13-0, Entry # A1 COR 60, RG 60, NARA.

[65] Wells, *Antitrust and the Formation of the Postwar World*, 73–78.

[66] Ibid., 78–80.

[67] Waller, *Thurman Arnold*, 110; cf. Brinkley, "The Antimonopoly Ideal and the Liberal State," 572.

[68] Wells, *Antitrust and the Formation of the Postwar World*, 82.

Court in an effort to get him off the company's back, I. F. Stone quipped, "It is difficult to determine to which monopoly we owe the new Circuit Court justice, Thurman Arnold."[69]

Nevertheless, Arnold's successor Wendell Berge continued to sound the alarm. Berge had arrived in the Justice Department during the Hoover administration, and served as first assistant to Robert Jackson at the Antitrust Division before moving on to the Criminal Division. Arnold brought him back. As one reporter put it, "When Thurman Arnold arrived to put new life into the lethargic anti-trust division, Berge was the old soldier who served as his man Friday."[70] After succeeding Arnold, Berge sought to keep antitrust relevant to the war effort. The division placed "priority" on investigating and trying cases concerning war agencies. The division brought 315 cases from 1941-1946 while forbearing many other prosecutions because of the war. It also supplied reports on industry to the Board of Economic Warfare. But Berge placed the division's "greatest emphasis" on international cartel and patent cases, bringing seventy cases from 1939-1947. "One of the most startling disclosures resulting from antitrust investigations," a report declared after the war, "was the extent to which international cartels, particularly German industrial monopolies, had penetrated and secured control of the destinies of American business."[71]

Like Arnold, Berge saw cartels at the root of World War II. "Totalitarianism," Berge claimed in his 1944 book *Cartels: Challenge to a Free World*, "represents simply the ultimate consummation of cartelism—the final, full expression of the reactionary forces stemming from special privilege." Monopoly was no longer a domestic problem, he advised, but a

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[69] I. F. Stone, "Thurman Arnold and the Railroads," *The Nation*, Mar. 6, 1943, 331; James Wechsler, "United States v. Alcoa," *The Nation*, Oct. 8, 1938, 347 (recounting the story about Harlan Stone). I. F. Stone blamed the railroad industry for Arnold's appointment.

[70] Volta Torrey, "Berge vs Cartels," *PM Magazine*, Dec. 26, 1943, m2.

[71] "Antitrust Enforcement in the War Emergency," Memo for Berge, Apr. 22, 1947, Box 43, WBP, LC; Memo for the AG, Dec. 19, 1944, Box 28, ibid.

foreign policy problem as well. "Diamonds discovered in Arkansas may prompt agitated conferences within 48 hours in London and the Belgian Congo; a lawsuit in New York challenging the aluminum monopoly brings simultaneous outburst of oratory in the House of Lords and of vituperation on the Axis radio."[72] In a 1943 law review article, Berge argued "that the United States can never have a foreign policy based upon principles of democracy, international good-will and free enterprise so long as international trade is dominated by private industrial governments."[73] And as an especially evocative statement Berge sent to the Writers' War Board declared, "Cartelism, the handmaiden of Fascism, is a modern streamlined version of the abominable mercantilism against which the common people fought the American Revolution. It must be destroyed."[74]

Government investigations amplified these warnings. Senator Truman's committee considered how monopolies in key industries like aluminum undermined U.S. defense preparedness.[75] Senator Harley M. Kilgore of West Virginia also conducted an investigation which trumpeted the danger of cartels as abettors of Nazi Germany and a danger to U.S. national security: "The rapid growth of cartels during the late 1920's and early 1930's coincided with the onset of a world-wide depression. The impact of economic crisis in Germany was severe; it led to the adoption of Nazi totalitarianism. The role which the cartels played in abetting Hitler's seizure of power has been recounted at length in testimony before Congress." Combating cartels was therefore necessary to ensure "political security,

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[72] Wendell Berge, *Cartels: Challenge to a Free World* (Washington, D.C.: Public Affairs Press, 1944), 1, 3.

[73] Wendell Berge, "Antitrust Enforcement in the War and Postwar Period," *George Washington Law Review* 12 (1944): 384.

[74] Statement on International Cartels attached to Stout to Berge, Dec. 29, 1944, Box 28, WBP, LC.

[75] Investigation of the National Defense Program, Part 3: Aluminum: Hearings Before a Special Comm. Investigating the National Defense Program Pursuant to S. Res. 71, 77th Cong. (1941).

full production and employment, and the expansion of world trade."[76] The resulting publicity generated considerable embarrassment for companies like Alcoa.[77]

Indeed, the press amplified the message connecting cartels and totalitarianism and highlighted the Antitrust Division's role in U.S. defense. *The New Republic*, for example, warned that the nation again confronted trusts as in the Gilded Age. The problem, however, was no longer confined to the United States. Instead, the American people now "confront an octopus that crosses international boundaries and straddles the world." Linking concentrated economic power to totalitarianism, the magazine claimed that a Corporate International now joined the Communist International and the Fascist International.[78] Moreover, a Berge-influenced article in *PM Magazine* maintained that economic appeasement went hand in hand with political appeasement: "There was a peace made at Düsseldorf as well as one at Munich, before this war." German and British industrialists had agreed to "eliminate destructive competition" at Düsseldorf after Hitler's invasion of Czechoslovakia. "The spirit of Düsseldorf is not dead," the article warned.[79]

Joseph Borkin and Charles A. Welsh's 1943 book *Germany's Master Plan*, for which Arnold provided an introduction, perhaps most popularized these themes.[80] Borkin was the first chief of the Antitrust Division's Patent and Cartel Section, which Arnold created in 1938.[81] Borkin and Welsh explained how cartelization almost produced a German victory. "Without aluminum, magnesium, tin, tungsten, molybdenum, quinine, those who would

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[76] Cartels and National Security: Report from the Subcommittee on War Mobilization to the Committee on Military Affairs, United States Senate, Pursuant to S. Res. 107, 78th Cong (1944), Part I, 6, 10.

[77] I. F. Stone, "Making Defense Safe for Alcoa (I)," *The Nation*, Sept. 27, 1941, 271–73; I. F. Stone, "Making Defense Safe for Alcoa (II)," *The Nation*, Oct. 4, 1941, 299–301; I. F. Stone, "Making Defense Safe for Alcoa (III)," *The Nation*, Oct. 18, 1941, 363–64.

[78] "The Threat to Democracy," *New Republic* 110, no. 7 (Feb. 14, 1944): 199–200.

[79] Torrey, "Berge vs Cartels," m3.

[80] Wells, *Antitrust and the Formation of the Postwar World*, 90–91.

[81] Kolasky, "Thurman Arnold: An American Original," 93–94.

fight a global war cannot long survive," the authors explained. "The buttress of our strategy rested secure in the knowledge that we, not they, commanded these resources." This, the authors claimed, was "the grand illusion."[82] For Germany had shrewdly exploited cartelization. Cartels aided the German war machine by limiting the rest of the world's output while Germany prepared for war.[83] Fortunately, Germany also miscalculated. "Germany struck too soon." Borkin and Welsh declared. "Her new machine was not quite ready: it could demolish a decadent France, but it could not leap the Channel; it could provide all German needs if victory came fast; it could not touch Detroit."[84]

Meanwhile, as victory in the war became increasingly certain, attention turned to postwar competition policy. "Having won its fight to save the Sherman Act for the war," an article in *The Saturday Evening Post* explained, "the department is girding to save the antitrust laws for peace."[85] President Roosevelt had embraced antitrust enforcement as a solution to the Roosevelt Recession in 1937-1938, but the war had intervened. As the 1944 election neared, however, Roosevelt again turned to competition policy as a way of retaining the loyalty of his New Deal coalition.[86] In his 1944 State of the Union message, he touted the "right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad."[87] In September 1944, he wrote Secretary of State Cordell Hull about the dangers of cartels. Observing that

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[82] Joseph Borkin and Charles A. Welsh, *Germany's Master Plan; the Story of Industrial Offensive* (New York: Duell, Sloan and Pearce, 1943), 4.

[83] Ibid., 14–15.

[84] Ibid., 10.

[85] Lester Velie, "They Want to Save Capitalism--They Say!," *Saturday Evening Post* 217, no. 10 (Sept. 2, 1944): 22, 77.

[86] Wells, *Antitrust and the Formation of the Postwar World*, 97.

[87] Franklin D. Roosevelt, "Unless There is Security Here at Home, There Cannot Be Lasting Peace in the World"—Message to the Congress on the State of the Union, Jan. 11, 1944, in Franklin D. Roosevelt, *The Public Papers and Addresses of Franklin D. Roosevelt, 1944-1945*, ed. Samuel Irving Rosenman (New York: Macmillan, 1945), 32, 41.

other nations lacked the United States' tradition of antitrust, he advised Hull to begin to think about postwar competition. Like Arnold, Roosevelt pointed to Nazi Germany as the paramount example of the dangers of cartels. "The defeat of the Nazi armies will have to be followed by the eradication of these weapons of economic warfare," the president wrote. "But more than the elimination of the political activities of German cartels will be required. Cartel practices which restrict the free flow of goods in foreign commerce will have to be curbed."[88]

But how? Continued antitrust enforcement offered one avenue for shaping the postwar world. "I think there is a fair chance that we can have some influence on the post war pattern of international trade if we enforce the Sherman Act in this field [international cartels], as well as in regard to domestic commerce," Berge wrote in 1944.[89] He also anticipated Hand's opinion in *Alcoa*, arguing that the location of a cartel agreement did not preclude the application of U.S. law. The practical difficulty of obtaining personal jurisdiction, he contended, should not limit the international scope of U.S. antitrust law.[90]

But Berge also looked ahead to a reformed international system, one in which free trade and economic openness replaced autarky and division. "Each nation," declared a statement on international cartels Berge sent to the Writers' War Board, "will naturally have to decide its own domestic policy. But the American people have come to see more clearly than ever before that a vigorous repression of private monopolistic controls is indispensable to the preservation of its democratic way of life. Not only private barriers to international

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[88] Franklin D. Roosevelt, Letter to the Secretary of State Relating to the Elimination of Cartels, Sept. 6, 1944, in ibid., 255–56.

[89] Berge to Colton, Mar. 16, 1944, Box 28, WBP, LC.

[90] Berge, "Antitrust Enforcement in the War and Postwar Period," 387–88.

trade but governmental barriers should be moderated and if possible eliminated.**"**[91] Berge saw "a fighting chance of imposing an American pattern rather than a cartel pattern on international business after this war." The aggressive use of antitrust enforcement could open the door to foreign markets and thereby promote international trade. And the United States had other potential remedies to address the cartel threat: "The United States will be one of the world's greatest powers in the molding of the postwar world. It can set an example. And it has many means, such as reciprocal trade agreements, of encouraging free enterprise and of discouraging monopolization in international business."[92]

Multilateral institutions were also important. In his letter to Hull, Roosevelt, had declared that the fight against cartels required the cooperation of the United Nations.[93] As an Antitrust Division statement explained, "To win the peace . . . requires therefore that the United Nations adopt a coordinate program by which each nation will undertake to prohibit at least those restrictive cartel practices which constrict international trade. Private economic governments governing world markets and operating in secret without responsibility to the public can no longer be tolerated."[94]

For a while, an international agreement seemed likely to achieve these goals. In late 1945, the United States proposed an International Trade Organization to promote free trade. This new regime would include a ban on cartels, although intergovernmental commodity agreements would be permitted to deal with surpluses. But the ITO's free trade provisions generated opposition from countries hoping to use protection to industrialize. Moreover, the

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[91] Statement on International Cartels attached to Stout to Berge, Dec. 29, 1944, Box 28, WBP, LC.

[92] Torrey, "Berge vs Cartels," m3; Berge, "Antitrust Enforcement in the War and Postwar Period," 390.

[93] Franklin D. Roosevelt, Letter to the Secretary of State Relating to the Elimination of Cartels, Sept. 6, 1944, in Roosevelt, *Public Papers and Addresses of FDR, 1944-45*, 255–56.

[94] Statement on International Cartels attached to Stout to Berge, Dec. 29, 1944, Box 28, WBP, LC.

difficulty of postwar recovery and the onset of the Cold War also impeded agreement. Still, a charter was created at a conference in Havana, and its cartel provisions largely matched the U.S. proposals, reflecting both the influence of American opposition to cartels and the indifference of much of the world to the issue. Nevertheless, protectionist sentiment was too strong, and the charter never entered into force. Though it was submitted to the Senate for ratification, it paled before other priorities like the Marshall Plan and failed to win approval. Instead, the General Agreement on Tariffs and Trade, which proceeded in a more piecemeal and reciprocal fashion, became the preferred mechanism for trade liberalization.[95]

As an occupying power, moreover, the United States also sought to break up cartels and zaibatsu in defeated Germany and Japan.[96] As Ben W. Lewis argued, "Because we seek the elimination of all private international cartels and because Germany has been their home, their principal source, their driving force and inspiration, we should take advantage of an opportunity that can come only rarely on this earth—the chance which the fact of a completely conquered Germany will afford us to pull up the whole institution of international cartels by the roots."[97] The most dramatic outcome of this policy was the breakup of Germany's IG Farben.[98] Nevertheless, the United States' deconcentration campaign in Germany and Japan met mixed success. Policymakers had to balance the belief that concentrated economic power contributed to the war with the demands of rebuilding

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[95] Wells, *Antitrust and the Formation of the Postwar World*, 116–25. But see Douglas A. Irwin, "The GATT in Historical Perspective," *American Economic Review* 85, no. 2 (May 1995): 323–28.

[96] Ben W. Lewis, "The Status of Cartels in Post-War Europe," in *A Cartel Policy for the United Nations,* ed. Corwin D. Edwards (New York: Columbia University Press, 1945), 25, 45.

[97] Ibid., 35.

[98] Rein. Wesseling, *The Modernisation of EC Antitrust Law* (Portland, OR: Hart Pub., 2000), 13. On I.G. Farben, see Peter Hayes, *Industry and Ideology: IG Farben in the Nazi Era* (New York: Cambridge University Press, 1987).

tattered economies. Disagreements with the other allies and fears of Soviet communism compounded this problem.[99]

As these debates played out, the Antitrust Division continued to use the press to defend antitrust's relevance.[100] In an August 5, 1945, piece in *The New York Times*, for example, Wendell Berge took on those who claimed "that the rest of the world is irrevocably committed to the cartel system." Berge pointed to the United States' economic clout as evidence that concentration was not inevitable and that the United States could shape a new liberal economic order. "It is crucial to the peace of the future and to the survival of the democratic way of life," he concluded, "that we throw our whole weight in favor of a free enterprise system both for international trade and domestic trade."[101]

During the war, Roosevelt, Arnold, Berge, and many popular publications had linked cartels to totalitarianism; indeed, at his most dramatic, Arnold had framed antitrust as a form of defense against military aggression now that the United States was no longer secure between the oceans. Writing after the war, Berge extended this theme to economic security: "Thus, the Monroe Doctrine and the Good Neighbor Policy have certain economic as well as diplomatic connotations." While trade formed only a small component of U.S. national income, what happened abroad had economic effects at home.[102] He also sought to marshal interest in the new atomic bomb to his cause. Like the bomb, U.S. trade policy would "also cause a chain reaction for good or ill through the world economy."[103]

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[99] Wells, *Antitrust and the Formation of the Postwar World*, 137–86; James C. Van Hook, *Rebuilding Germany the Creation of the Social Market Economy, 1945-1957* (New York: Cambridge University Press, 2004), 81–84.

[100] Velie, "They Want to Save Capitalism--They Say!," 77.

[101] Wendell Berge, "The Challenge of the Cartel," *New York* Times, Aug. 5, 1945, at 13-14.

[102] Wendell Berge, "Cartels as Barriers to International Trade," *Law and Contemporary Problems* 11 (1946): 689.

[103] Ibid., 684.

Not everyone agreed that cartels were harmful. Economics professor Ervin Hexner sought to provide a more "dispassionate" analysis of cartels as a basis for developing a postwar strategy.[104] Harvard Business School professor J. Anton deHaas suggested that cartels had a postwar role. "No condemnation on the part of the United States Department of Justice can possibly change these fundamental facts," he wrote. "Nor can it change the fact that international coordination is an absolute necessity. Unless the rehabilitation of Germany and that of the occupied countries is carefully directed and controlled, disastrous results may be expected."[105] In a piece in *Harper's*, Board of Economic Warfare Executive Director Milo Perkins cautioned against hasty conclusions about the future of competition. While he thought it possible that the United Nations might create a meaningful environment for competition, he also acknowledged that cartels might remain necessary if free trade did not materialize. He outlined a number of steps that could be taken in the meantime, including the registration of cartels; the establishment of a State Department board to review and approve potential cartels in light of economic, political, and military considerations; and the creation of international commodity agreements—that is, intergovernmental cartels—to deal with problems of oversupply.[106] The National Foreign Trade Council outlined a similar proposal.[107]

Harvard economics professor Edward S. Mason also saw a future for cartels, and, contra Berge, he argued that issues like tariffs and intergovernmental commodity agreements

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[104] Ervin Hexner, *International Cartels* (Chapel Hill: University of North Carolina Press, 1945), viii, 12.

[105] J. Anton DeHaas, *International Cartels in the Postwar World* (New York: American Enterprise Association, 1944), 17.

[106] Milo Perkins, "Cartels: What Shall We Do About Them?," *Harper's Magazine*, Nov. 1, 1944, 575–78.

[107] See Edward S. Mason, *Controlling World Trade: Cartels and Commodity Agreements* (New York; London: McGraw-Hill, 1946), 81 & n.1.

were more pressing than cartels.[108] "If cartel arrangements are limited to areas in which such agreements are tolerated, approved, or even imposed, and in which there are local sources of supply of the regulated commodities," Mason contended, "there seems no reason for us to object to our nationals' participation. At best, it would be difficult to exercise an extraterritorial jurisdiction; at worst, it would involve a serious interference with business practices customary abroad."[109] If foreign cartels directly limited imports into the United States or attempted to carve up third-country markets, by contrast, Mason opposed American firms' participation. Given the complexity of the problem and the difficulty of enforcement, he advocated an international agreement.[110]

Meanwhile, opponents of the Antitrust Division's crusade hoped that an international agreement would transfer international antitrust enforcement from the hands of the Justice Department to those of a more responsible State Department. For instance, New York lawyer John T. Cahill condemned the Justice Department's "vigorous drive against certain international agreements." In contrast with prior practice, he alleged, the Department of Justice attacked any agreement between domestic and foreign manufacturers as a cartel. Cahill derided this tendency "to apply the antitrust laws . . . without taking into account the numerous and very different considerations which are not present in our domestic cases." He noted that the Department of Justice's policy had "been viewed in some quarters as an attempt to force the American antitrust laws upon the rest of the world." Cahill increasingly doubted whether the domestic antitrust laws made sense in foreign contexts, whether litigation was the best way to resolve foreign trade problems, and whether

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[108] Ibid., 16–17.
[109] Ibid., 77.
[110] Ibid., 79, 83.

it might not make sense to turn over the regulation of foreign business to the State or Commerce Departments which had experience overseeing foreign economic and political policy.[111]

New York lawyers John E. Lockwood, who worked at the State Department during the war, and William C. Schmeisser, Jr., who worked for the Board of Economic Warfare, provided a more nuanced but similar argument. They identified a tension between the short-term objective of staving off catastrophe in the aftermath of the war and the long-term goal of developing institutions that would promote lasting order in the postwar world. They reminded readers that the war had left most nations in desperate condition; consequently, the more powerful United States needed to be flexible in crafting a long-term proposal that accommodated immediate exigencies.[112] "The success of all our foreign policies, political as well as economic, will be dependent upon whether or not the practical needs of a war-torn world are met," they concluded. Thus, the United States needed to be reasonable in exporting antitrust to a world that lacked the United States' antitrust tradition. As they reminded readers, "Even Great Britain whose legal tradition is the same as ours places a very different and much narrower interpretation upon the phrase 'restraint of trade.'"[113]

The Justice Department's Walter K. Bennett responded to this "counter movement . . . in opposition to the drive by the Department of Justice against cartels." He attributed this opposition to business interests. According to Bennett, they advocated either waiting until there was international consensus against cartels or creating a State Department agency to provide immunity for businessman participating in foreign cartels. He felt these

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[111] Cahill, "Some Recent Trends and Developments in the Anti-Trust Laws," 215–18.

[112] John E. Lockwood and William C. Schmeisser, Jr., "Restrictive Business Practices in International Trade," *Law and Contemporary Problems* 11 (1946): 663–66.

[113] Ibid., 682–83.

"manoeuvers on the part of business" reflected a "flank attack" to try to change the law. This was unacceptable. "Whatever the commercial advantages long or short time of cartel arrangements," he argued, "the possibility of their use to suppress invention, to curtail production to an extent sufficient to retard national defense or to form the basis for an economic or military system of espionage prevents their acceptance as an innocent device to facilitate trade in foreign countries."[114]

Bennett continued the Justice Department's campaign of linking cartels to totalitarianism. "Nothing provides a finer weapon for the budding dictator than a concentration of economic power which he can take over at the top," he claimed. "The required regimentation of industry for the successful prosecution of the war with its strengthening of the strong has created a danger of monopoly which must be kept within bounds of reason if we are to continue to enjoy the 'American Way of Life'."[115] In the *Yale Law Journal* Henrich Kronstein of the Justice Department and Gertrude Leighton expressed a similar sentiment. "It should not be forgotten that . . . ideas shape the difference between one society and another. If, then, the United States were to abandon the idea of a free market, . . . American civil polity would surely seem to have lost one of its most distinguished and traditional characteristics."[116]

It is tempting to dismiss such language—and that of Arnold, Berge, Roosevelt, and the others—as a sensational campaign to frighten the public into supporting the Antitrust Division's agenda at a time when other priorities threatened antitrust. But their language is

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[114] Walter K. Bennett, "Some Reflections on the Interpretation of the Sherman Act Since the Emergency," *Federal Bar Journal* 8 (1947): 323.

[115] Ibid., 317.

[116] Heinrich Kronstein and Gertrude Leighton, "Cartel Control: A Record of Failure," *Yale Law Journal* 55 (1946): 335.

consistent with the deeper anxieties of government officials after the second catastrophic war of a generation. The Justice Department's rhetoric reflected the emerging concept of national security. Pearl Harbor had shattered the notion that the United States was separate and thus secure, and leaders like Franklin Roosevelt espoused a "new globalism" in which threats could come from anywhere.[117] "[T]o protect the national security," observes Andrew Preston, "he first had to stoke Americans' sense of insecurity. This paradoxical approach was typical of the New Deal, which was riddled with uncomfortable compromises with private corporations and Jim Crow segregationists. . . . And so, in response to the world crisis and in the face of domestic opposition to intervention, he declared that the United States was under threat."[118]

Japan and Nazi Germany seemed to provide real-world examples of how cartels contributed to totalitarian conquest. And after the war, this connection between cartels and totalitarianism remained relevant as fear of Germany and Japan gave way to renewed worries about the Soviet Union. Indeed, the historian Melvyn Leffler has shown the how fears about concentrated power helped to create the Cold War. According to Leffler, a Soviet attack on the United States was not the only concern. Instead, the USSR posed a more insidious threat. "Soviet/Communist domination of the preponderant resources of Eurasia would force the United States to alter its political and economic system," Leffler explains, describing the views of President Truman and his advisers. "The U.S. government would have to restructure the nation's domestic economy, regiment its foreign trade, and monitor its domestic foes. [Policymakers] were driven . . . by an ideological conviction that their own political economy of freedom would be jeopardized if a totalitarian foe became too

[117] Reynolds, *From Munich to Pearl Harbor*, 106, 128–29, 179, 183–84.
[118] Preston, "Monsters Everywhere," 492.

powerful."[119] Similarly, Alonzo L. Hamby has described American liberals' fear of fascism at home. "Closely linked to the specter of fascism were the images of monopoly and corporate power," he observes.[120]

Cartels thus embodied the fundamental fears of the early Cold War. If Truman and his advisers feared that the Soviet Union would take control of the preponderant resources of Eurasia and force the United States to become a garrison state, World War II had seemingly shown that cartels could limit free world production and ease the Soviet Union's path to domination. In the eyes of many, cartels had deprived the United States of vital resources and thereby contributed to the initial German advantage. After Pearl Harbor, it was hard to deny that agreements between foreign corporations overseas—even agreements that said nothing about the United States—affected U.S. national security and played into the hands of America's totalitarian foes.

But stoking Americans' fears was only a prelude. It was also the government's responsibility to defend Americans from these new global threats. For the lawyers in the Antitrust Division, reordering the legal architecture of the international system to eliminate cartels and other economic barriers would keep totalitarian foes from acquiring the capabilities to threaten the United States. Law might forestall the need for overseas bases or nuclear stockpiles. Lawyers like Berge and Arnold offered a way to protect American security while containing the growth of the national security state.[121]

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[119] Melvyn P Leffler, *A Preponderance of Power: National Security, the Truman Administration and the Cold War* (Stanford: Stanford University Press, 1992), 13.

[120] Hamby, *Beyond the New Deal*, 5–6.

[121] Michael J. Hogan, *A Cross of Iron: Harry S. Truman and the Origins of the National Security State, 1945-1954* (New York: Cambridge University Press, 2000), 475; Aaron L. Friedberg, *In the Shadow of the Garrison State* (Princeton: Princeton University Press, 2000).

III. *Alcoa* on Appeal

As the Justice Department appealed *Alcoa* to the Supreme Court, the case was no longer merely about the price of aluminum or the competitiveness of the industry.[122] It also implicated defense preparedness, international economic openness and free trade, and the peace and security of a world still in the throes of a global conflict. Unfortunately, the government faced a problem. Already short a justice after James Byrnes had stepped down in 1942, the Supreme Court could not muster a quorum after four justices recused themselves. Justices Robert Jackson, Stanley Reed, and Frank Murphy had all worked in Roosevelt's Justice Department, and Chief Justice Harlan Stone had earlier represented the United States against Alcoa as Calvin Coolidge's attorney general in the 1920s. Given the case's importance, this complication was unacceptable for the government. Congress passed a special statute allowing the Second Circuit to step in for the Supreme Court. A distinguished panel of Learned Hand, his cousin Augustus Noble Hand, and Thomas Swan heard the government's appeal.[123] Despite its unusual nature, the government decided to handle the appeal like any other Circuit Court appeal, aside from having the solicitor general review and comment on its brief.[124] The opinion, written by Learned Hand, came down on March 12, 1945.

The question of whether Alcoa had an unlawful monopoly in violation of § 2 of the Sherman Act was the case's most important issue.[125] The government wanted the court to declare that mere existence of a monopoly violated the Sherman Act. This raised the corollary question of how to calculate Alcoa's market share to ascertain whether it had a

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[122] The case went straight to the Supreme Court under a special expediting statute. 32 Stat. 823 (1903).
[123] 58 Stat. 272 (1944) (codified as amended at 15 U.S.C. § 29 (2006)); Waller, "Story of Alcoa," 129.
[124] Berge to Apsey, June 8, 1944, Box 28, WBP, LC.
[125] As Hand himself stated. *Alcoa*, 148 F. 2d at 422-23.

monopoly. Alcoa produced 100 percent of virgin aluminum ingot in the United States, but if scrap and secondary aluminum and other metals were also included, and if the aluminum Alcoa itself fabricated was excluded, Alcoa's market share dramatically diminished.[126]

Hand sided with the government on both issues, calculating Alcoa's monopoly at over 90 percent and holding that it was irrelevant that Alcoa did not abuse its monopoly position. The Sherman Act had "wider purposes," and Congress "did not condone 'good trusts' and condemn 'bad' ones; it forbad all. Moreover, in so doing it was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few." Hand allowed a narrow exception for a company that had monopoly "thrust upon it," but Alcoa had reached its current dominance freely.[127]

But as discussed above, foreign aluminum production complicated Hand's analysis of the domestic market. Because there was "a practically unlimited supply of imports as the price of ingot rose," Alcoa's monopoly was sustained by the Alliance Aluminium Compagnie, the international cartel that kept foreign aluminum out of the American market. The very purpose of the Justice Department's suit—breaking Alcoa's hold on the domestic aluminum market—in many ways turned on the question of the cartel.[128] While Alcoa itself was not directly involved in the cartel, the government alleged it participated through

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[126] Memo for Avery, Mar. 4, 1942, Section 11, Box 173, Case 60-13-0, Entry # A1 COR 60, RG 60, NARA.

[127] Alcoa, 148 F. 2d at 423-32. These issues are discussed at length in Waller, "Story of Alcoa," 130–34. "'Some are born monopolists; some achieve monopoly; others have monopoly thrust upon them.' Alcoa is not in the third class," Hand quipped in a memorandum to the other judges, later including part of this formulation in his opinion. Learned Hand Memo, Feb. 3, 1945, CCA Memoranda, 1944 Term, Box 207, Learned Hand Papers, Harvard Law Library.

[128] Alcoa, 148. F. 2d, at 426; Wells, *Antitrust and the Formation of the Postwar World*, 60; Waller, "Story of Alcoa," 135.

Aluminium Limited (the Canadian corporation formed from Alcoa's properties outside the United States in 1928). Hand upheld the district court's findings that Alcoa and Limited were in fact separate and that Alcoa did not participate in the Alliance cartel. To do otherwise would only have been possible if the Davis brothers had perjured themselves.[129] Having accepted the lower court's findings that Alcoa did not participate in the cartel, Hand would have to find another way to bring the cartel under the ambit of the Sherman Act if the Department of Justice's suit was to succeed.

This issue turned on the Sherman Act's jurisdictional reach beyond the United States.[130] Limited was a Canadian corporation participating in a foreign cartel (technically a Swiss corporation) consisting entirely of non-U.S. corporations that agreed to refrain (by a quota system) from doing business in the United States. Hand had to determine whether the Sherman Act applied given these tenuous connections to the United States.[131] This question hinged on the legislative intent of the Sherman Act.[132] As Hand stated the issue, "[T]he only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so: as a court of the United States, we cannot look beyond our own law."[133]

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[129] *Alcoa* 148 F. 2d. at 439-42. Judge Swan strongly supported the trial court's findings of fact on the alleged international conspiracy. Swan Memo, Jan. 29, 1945, CCA Memoranda, 1944 Term, Box 207, LHP, HLL.

[130] Hand assigned Judge Thomas Swan primary responsibility for this issue. Max Goldman Interview with Gerald Gunther, Jan. 13, 1973, Box 233, LHP, HLL. Judge Swan was disdainful of the Department of Justice's motivation in bringing the appeal. "[T]his whole appeal is merely shadow-boxing by the Department or Justice in order to 'save face' with the public," he complained in a memorandum to the other judges. "It is disgusting and maddening to spend weeks of futile labor on such a case." Swan Memo, Jan. 29, 1945, CCA Memoranda, 1944 Term, Box 207, ibid.

[131] Cf. Arthur H. Dean, "Advising the Client," *ABA Section of Antitrust Law* 11 (1957): 100.

[132] Raustiala, *Does the Constitution Follow the Flag?*, 99, 269. n.20.

[133] See Alcoa, 148 F. 2d at 443-44. Here is it important to distinguish legislative jurisdiction from adjudicative jurisdiction. Legislative jurisdiction is a state's authority to "prescribe or regulate conduct." Adjudicative jurisdiction, by contrast, concerns the power of a court over persons or things (personal and subject matter jurisdiction are examples of this kind of jurisdiction). See Parrish, "Effects Test," 1462 The

With these words, Hand referenced a major debate in conflict of laws jurisprudence in which Hand himself played a central part. Conflict of laws scholars had long been concerned with justifying a court's use of another jurisdiction's law. The predominant approach had been the vested rights theory, which held that the forum enforced a right which had vested under foreign law. Hand and other scholars, such as Walter Wheeler Cook, found this unsatisfactory, for as Hand stated in *Alcoa*, a court cannot enforce any law but that of its own sovereign. As an alternative, Hand helped to formulate the local law theory, which held that a judge simply imposed a rule of its own sovereign as near as possible to the foreign law.[134]

Hand's reference to this debate reveals that he was well aware of *Alcoa's* conflict of laws implications. U.S. courts had historically enforced *American Banana's* presumption against the extraterritorial enforcement of U.S. law. "Nevertheless," Hand wrote, "it is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.'" He then cited *American Banana* and two other Supreme Court cases.[135] But Hand—a mere a circuit court judge—rejected Holmes' *American Banana* rule. "On the other hand," he added next, "it is settled law—as 'Limited' itself agrees—that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize."[136]

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court had adjudicative jurisdiction over Limited. See Alcoa, 148 F. 2d at 421. The issue Hand faced concerned legislative jurisdiction.

[134] David F. Cavers, "Two Local Law Theories, The," *Harvard Law Review* 63 (1950): 822–25.

[135] *Alcoa*, 148 F. 2d at 443.

[136] *Id.*

Hand formulated three categories of such liabilities: those involving agreements not intended to affect U.S. imports, which did affect U.S. imports or exports; those involving agreements intended to affect U.S. imports which did not affect them; and those intended to affect imports and which did in fact affect them. Hand decided Congress could not have intended to apply U.S. antitrust law to the first category of cases in which imports were affected without the intent to do so. As he explained, "the international complications likely to arise from an effort in this country to treat such agreements as unlawful" made it clear that these sorts of cases were outside the purview of the Sherman Act. The second category—in which there was intent, but no effect—was more complicated. Since acts in this category were not at issue, Hand assumed the antitrust laws did not apply and moved on.[137]

The third category provided the basis for Hand's intended effects test. Agreements "were unlawful, though made abroad, if they were intended to affect imports and did affect them."[138] Under this test, however, Aluminium Limited might still escape liability. While it was clear that Aluminium Limited intended to affect U.S. imports, it was not clear from the record whether they in fact did so. As Judge Thomas Swan—who was also sitting with Hand on the three-judge panel hearing the case—wrote in a memorandum, "I rather think [Judge] Caffey was right in concluding that the Alliance or anything done under it did not 'directly and materially' affect the foreign commerce of the United States."[139] Hand resolved this problem by shifting the burden to Aluminium Limited: "We think, however, that, after the intent to affect imports was proved, the burden of proof shifted to 'Limited.'"[140] Thus, to restate the effects test as formulated by Learned Hand, agreements made outside the United

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[137] *Id.* at 443-44.
[138] *Id.* at 444.
[139] Swan Memo, Jan. 29, 1945, CCA Memoranda, 1944 Term, Box 207, LHP, HLL.
[140] *Alcoa*, 148 F. 2d at 444.

States violated the Sherman Act if they were intended to affect imports and did affect them, and once the plaintiff showed intent the burden shifted to the defendant to show lack of effect.[141]

Why did Hand replace Holmes' presumption against extraterritoriality with his own intended effects test? Part of the problem, as one federal judge observed in 1953, was that Hand was "cabined by the findings of the District Court," leading Hand to focus on economic analysis and market control rather than Alcoa's "coercive or immoral practices."[142] As the journalist I. F. Stone pointed out when the case was decided, Justice Department lawyers complained that the trial court "sweepingly granted the findings and conclusions of law requested by the appellees [Alcoa] upon virtually every issue." Stone complained that Hand accorded the trial judge's findings "a respect they rarely deserved" and mocked Hand's statement that "one whopper . . . 'was not so patently implausible an explanation that the Judge was bound to reject it.'"[143] As the case worked its way through the court system, Thurman Arnold told one correspondent that Alcoa's claim not to belong to the cartel was a "red herring." For Arnold, Aluminium Limited was clearly a member, and it was an affiliate of Alcoa, "owned by the identical people." The idea that Alcoa did not know what Limited

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[141] Sprigman, "Fix Prices Globally, Get Sued Locally: U.S. Jurisdiction over International Cartels," 267–68; Lockwood and William C. Schmeisser, Jr., "Restrictive Business Practices in International Trade," 672.

[142] United States v. United Shoe Mach. Corp. 110 F. Supp. 295, 341 (D. Mass 1953), *aff'd* 347 U.S. 521 (1954) (per curiam).

[143] I. F. Stone, "Alcoa in Wonderland," *The Nation*, Mar. 24, 1945, 323.

was doing was "childish."[144] In short, these critics suggest that the opinion would seem less revolutionary if Hand had been honest about what he was doing.[145]

A memorandum to Learned Hand from his cousin Augustus Noble Hand, who was also on the three-judge panel hearing the case, helps explain why the panel did not more aggressively review the findings of fact below. "I do not see how we can do anything but recognize [Judge] Caffey's findings of fact as binding on us," he wrote. "We could never in a lifetime scrutinize them and the vast record sufficiently to justify different conclusions. Possibly 500 or 600 pages of briefs in the aggregate with abstemious references to the testimony and exhibits would have enabled us to deal intelligently with the details on which his findings are founded." Indeed, Augustus Hand complained that "stenographers, typewriters and printers" had turned the record into "such a mess as to overwhelm everybody who does not have a century to live with the monstrous brood."[146] And Learned Hand's law clerk from the term, Max Goldman, later confirmed that Learned Hand himself felt that he would have made different findings of fact had he served as the judge below.[147]

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[144] Letter from Arnold to Payne, Aug. 21 1941, in Thurman W. Arnold, *Voltaire and the Cowboy: The Letters of Thurman Arnold*, ed. Gene M. Gressley (Boulder: Colorado Associated University Press, 1977), 322, 324; Corwin D. Edwards, *Maintaining Competition: Requisites of a Governmental Policy* (New York: McGraw-Hill, 1949), 300 n.9.

[145] Holmes's opinion in American Banana has undergone similar criticism. John T. Noonan, *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks* (New York: Farrar, Straus and Giroux, 1976), 20, 104, 109–110 (criticizing Holmes' use of sovereignty to mask the humanity of individuals affected by American Banana); Heinrich Kronstein, "Crisis of Conflict of Laws," *Georgetown Law Journal* 37 (1949): 484 ("We are told that adherence to 'tests' worked out by these 'scientists' are more important than a just decision in particular cases. [In American Banana,] the court completely ignored the facts and the moral effect of its ruling. It denied, because of a scientific test . . . protection to an American firm against . . . ."); Sigmund Timberg, "Problems of International Business," *ABA Section of Antitrust Law* 2 (1953): 113 ("Justice Holmes allowed two galley pages of logic to substitute for the volume of pertinent economic history that was being unfolded before him.").

[146] Augustus Noble Hand Memo, Feb. 5, 1945, CCA Memoranda, 1944 Term, Box 207, LHP, HLL.

[147] Max Goldman Interview with Gerald Gunther, Jan. 13, 1973, Box 233, LHP, HLL.

But even as they deferred to the findings of fact below, the judges were nevertheless under considerable pressure to give the government a victory. Hand himself acknowledged this situation in a memorandum to the other judges:

> If we hold that it is not a monopoly, deliberately planned and maintained, everyone who does not get entangled in legal niceties, and in the incredible nonsense that has emanated from the Supreme Court, will, quite rightly I think, write us down as asses. Wherever the line of size should be drawn, it must include such a company as this, if the Act is to be fully enforced. I despise the whole method of dealing with a very real and serious problem in our industrial life; but this is the way we have chosen, and we ought not to wince, because of the vagueness of the outlines, when we are faced with so clear an instance.[148]

Given that the equities lay with the government, it was easy to tweak the "legal niceties" to produce the outcome that "everyone" knew should have resulted from a proper decision below. In this sense, Hand was not trying to make a dramatic departure from *American Banana* but simply used a different approach to reach the right result.

Other critics have made a similar—albeit countervailing—claim. They have condemned Hand's unfaithful adherence to precedent, which masked what was in fact a dramatic shift in legal doctrine. Hand gave only "a brief judicial nod" to the extent to which his opinion rejected Holmes' presumption against extraterritoriality from *American Banana*,[149]

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[148] Learned Hand Memo, Jan. 29, 1945, ibid. Judge Augustus Hand shared Learned's frustrations with using litigation to manage monopoly: "The futility of any belief that the Sherman Act will restore small shopkeepers to their former business status, or that any considerable proportion of our people would be satisfied with such a Jefferson-Brandeis form of society will, I believe, be shown by future experience. Such abuses as are generally inherent in monopoly will not be effectually ameliorated by any such instrumentality as an anti-trust suit." He advocated "something like an Industrial Interstate Commerce Commission" to address the problem. Augustus Noble Hand Memo, Feb. 5, 1945, in ibid. Gerald Gunther discusses Learned Hand's ambivalence about using courts to address the problems of monopoly on a case-by-case basis. Gerald Gunther, *Learned Hand: The Man and the Judge* (New York: Alfred A. Knopf, 1994), 206–09.

[149] Dean, "Advising the Client," 89.

even though many scholars immediately grasped the transformative nature of the case.[150] Rather than accepting Holmes' rule, Hand misstated precedent to supplant it with a new test.

To be sure, Hand's opinion did not come out of nowhere; it was well recognized even before Hand's opinion that cracks had emerged in *American Banana's* façade. In its deliberations, moreover, the Justice Department pointed to a 1910 opinion of the attorney general, published in 1920, to support the idea of liability for an agreement in a foreign country between foreign citizens that was nevertheless carried out in the United States.[151] Hand, moreover, cited the key cases that had eroded Holmes's presumption against extraterritoriality.[152] Yet as a note in the *Harvard Law Review* complained, these cases "involved situations in which all the principal consequences occurred in the territory whose laws were being applied, whereas the marketing arrangements involved in the *Alcoa* case significantly affected many countries. Furthermore, the cases cited do not appear closely related to international antitrust problems because two involved interstate criminal activity . . . and the third relied in part on a treaty between the nations concerned."[153]

By his own admission, Hand was aware of these problems, pointing out that the law on which he was relying involved agents acting on U.S. soil. But he considered such

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[150] See, e.g., Walter K. Bennett, "Some Reflections on the Interpretation of the Sherman Act Since the Emergency," *Federal Bar Journal* 8 (1947): 319 (announcing "a new test"); John E. Lockwood, "Proposed International Legislation with Respect to Business Practices," *American Journal of International Law* 41 (1947): 617. But see "Committee Reports of International Law Division," *American Bar Association. Section of International and Comparative Law. Proceedings* 1945 (1945): 95 (suggesting the effects test was "well-known").

[151] Memo for Berge from Weston on Pooling Proposals, Dec. 1, 1938, Box 23, WBP, LC; George W. Wickersham, "Potash Mined in Germany--Antitrust Laws--Discriminatory Export Duty, Oct. 5, 1910," *Official Opinions of the Attorneys General of the United States* 31 (1920): 545–57.

[152] United States v. Pacific & Artic R. & Navigation Co., 228 U.S. 87 (1913); Thomsen v. Cayser, 243 U.S. 66 (1917); United States v. Sisal Sales Corporation, 274 U.S. 268 (1927). As a 1940 note in the Yale Law Journal argued, "Soon after the Banana case, however, the Supreme Court began to direct its attention to the factor of effect on American commerce. Robert T. Molloy, "Application of the Anti-Trust Laws to Extra-Territorial Conspiracies," *Yale Law Journal* 49 (1940): 1316; see also Harry Aubrey Toulmin, Jr., "Law of International Private Agreements, The," *Virginia Law Review* 32 (1946): 379; Lockwood and William C. Schmeisser, Jr., "Restrictive Business Practices in International Trade," 671–73.

[153] "Note, Extraterritorial Application of the Antitrust Laws," *Harvard Law Review* 69 (1956): 1455–46.

distinctions to be purely formal: "It is true that in those cases the persons held liable had sent agents into the United States to perform part of the agreement; but an agent is merely an animate means of executing his principal's purposes, and, for the purposes of this case, he does not differ from an inanimate means . . . ."[154] Thus, as legal scholar Larry Kramer has pointed out, "Hand's reasoning probably seemed quite natural in context. [I]n reinterpreting cases like *Thomsen v Cayser* and *Sisal Sales Corp.*, Learned Hand was simply doing what great judges have always done: reshaping the law to preserve its sense and rationality in light of evolving understandings."[155]

Nonetheless, Hand's use of an intended effects text was significant. Analyzing the case before the Antitrust Section of the American Bar Association in 1957, Sullivan & Cromwell's Arthur Dean speculated on Hand's use of intent. For Dean, Hand's real focus seemed to be effects, a principle Dean attributed to international law. Dean surmised that since American nationals were not implicated, there were "fewer 'contacts' in the domestic conflict of laws sense, and to redress this lack, he had to find another element tying the transaction to the United States. And for this purpose he adopted the intent test."[156] More recently, legal scholars have emphasized intent's limiting function. As Christopher Sprigman has pointed out, "the intent element marked a concern with principles of comity missing from a purely objective test."[157] In other words, his goal was not to undo Holmes' territoriality principle and open the doors of U.S. courts to all manner of extraterritorial claims. Instead, within the constraints of the district court's findings of fact, he hoped to

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[154] Alcoa, 148 F. 2d at 444; cf. John Quattrocchi, Jr., "Note, Conflict of Laws—Jurisdiction over Individuals Based on Allegiance," *Boston University Law Review* 17 (1937): 403 n.10.

[155] Kramer, "Vestiges of Beale," 192–93.

[156] Dean, "Advising the Client," 100.

[157] Sprigman, "Fix Prices Globally, Get Sued Locally: U.S. Jurisdiction over International Cartels," 268; Dean, "Advising the Client," 91.

bring the aluminum cartel into the ambit of his decision while limiting an expansive extension of U.S. law.

From this standpoint, Kramer's observation that Hand was simply adapting the law to new circumstances—as good judges do—is compelling. (As Arthur Dean joked, Hand was "by no means an unlearned judge."[158]) For Hand, the *American Banana* doctrine had eroded, and the current state of the law was to set the presumption against extraterritoriality aside when there were acts within the United States, even when agreements were made abroad. And if that was the case, Hand saw no compelling reason to keep agreements having equivalent effects within the United States outside the purview of the Sherman Act merely because they involved no physical act on U.S. soil. Such a distinction between animate and inanimate means was entirely formalistic in Hand's eyes.[159] The implication that the cartel was hurting the war effort, the possibility that the separation between Alcoa and Aluminium Limited was not as complete in practice as the defendants wanted the court to believe, and the other limits imposed by the trial court's findings of fact reinforced this reasoning. Yet Hand, like Holmes, saw a need to find some limit to reduce the international friction that would result from clashing sovereigns, and requiring intent as well as effect seemed like a reasonable way to do this.[160]

But the wedge these observers draw between effects and intent misses something important for assessing *Alcoa's* significance for American law and foreign relations. Hand's intended effects test has a much deeper pedigree than the handful of conflict of law cases

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158 Dean, "Advising the Client," 91.

159 *See supra* note 154 and accompanying text.

160 As Holmes explained in *American Banana*, "For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent." 213 U.S. 347, 356 (1909).

cited by Hand and seized by Kramer as the source of Hand's "inadvertent reformulation."[161] In fact, Chief Justice Melville Fuller used an intended effects test in the *Knight Sugar Case*, the paradigmatic formalist opinion.[162]

Fuller's decision rested on the distinction between manufacture/production and commerce. Congress could regulate commerce between states, but not intrastate production, which remained the responsibility of the states. There was a good reason for this. Under dormant commerce clause doctrine at the time, federal authority worked to the exclusion of the states, and Congress left most matters to local regulation. As Barry Cushman has argued, "[A] definition of commerce that included 'local' productive enterprise would have deprived states of the power to regulate such enterprise, even in the absence of congressional action. This would not merely have worked a revolution in federalism—it would have been the single greatest act of deregulation in American history." Fuller therefore turned to intent to help limit the scope of federal authority. For activities that only indirectly affected commerce to fall under federal rather than state authority, the government had to establish intent. And as Cushman points out, in cases like *Standard Oil* and *American Tobacco* where the government did prove intent, the Supreme Court had no trouble upholding liability under the Sherman Act.[163]

In *American Banana*, the United Fruit Company urged the Supreme Court to extend *Knight's* distinction between commerce and production within the United States to U.S. *foreign* economic relations: "No statute of the United States can regulate trade in a foreign country.

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[161] Kramer, "Vestiges of Beale," 191.

[162] United States v. E. C. Knight Co., 156 U.S. 1, 17 (1895) ("There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree.").

[163] Cushman, "Formalism and Realism in Commerce Clause Jurisprudence," 1095–1096, 1124.

The power of Congress extends only to the regulation of commerce 'among the several states or with foreign nations.' Trade within the limits of a state is beyond its jurisdiction, and *a fortiori* must this be true of trade wholly in a foreign country."[164] As Chapter 1 argues, however, Holmes did not cite *Knight*, instead formulating the presumption against extraterritoriality to make a philosophical statement against the idea of general law. But for commerce within the United States, the Supreme Court would continue to embrace *Knight's* intended effects test through the late 1930s.[165]

In the 1942 case of *Wickard v. Filburn*, however, it at last cast the test aside. The Amended Agricultural Adjustment Act of 1938 established quotas on the acreage a farmer could devote to wheat production and the quantity of wheat he could produce. Excess production incurred a penalty. Roscoe Filburn violated the requirements, but rather than selling his excess wheat on the market, he intended it for his own consumption on his own farm. He brought suit, seeking an injunction to prevent the government from collecting the penalty and a declaratory judgment that the quota provisions were unconstitutional.[166]

Robert Jackson was assigned the opinion. As he explained in a memorandum to his law clerk, he saw three ways to decide the case. Under *Knight*, Filburn's production had only an indirect effect on interstate commerce, and it was therefore not subject to congressional regulation under the commerce clause. Jackson dismissed this "formalistic" option. A second possibility, to which Jackson was initially was inclined, was that local production was "normally within the control of the state but is transferred to federal control upon judicial findings that is necessary to protect exercise of the commerce power." This would have

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[164] Brief for the Defendant in Error, at 42, American Banana Co. v. United Fruit Co., 213 U.S. 347 (1908) (citing United States v. E. C. Knight Co., 151 U.S. 1 (1895)).

[165] Cushman, "Formalism and Realism in Commerce Clause Jurisprudence," 1147.

[166] Wickard v. Filburn, 317 U.S. 111 (1942).

required Jackson to remand the case to the trial court to make such findings. Jackson also raised a third possibility: "That it is normally within the control of the state but that it is transferred to federal control upon a mere Congressional assumption of control."[167]

Over the course of 1942, Jackson's thinking shifted. He no longer thought it made any sense for judges to make the determinations contemplated in the second option. As Jackson wrote, "At what point these effects have enough vitality to confer federal jurisdiction and at what point they have passed outside it, we have no standards to determine, and I am not at all sure of our capacity to invent such a standard that would have any validity upon the immediate case to which it is applied." The distinction was "not one of constitutional law, but one of economic policy. . . . We cannot say that there is no economic relationship between the growth of wheat for home consumption and interstate commerce in wheat. As to the weight to be given the effects, we have no legal standards by which to set our own judgment against the policy judgment of Congress." So Jackson chose the third option. Henceforth, scrutiny over whether Congress' regulation of a given activity fell within its commerce power would be left to the political process, not the courts.[168]

As Barry Cushman has argued, Jackson's embrace of the political process as the only limit on Congress' commerce power introduced an anomaly into the law. *Knight Sugar's* distinction between direct and indirect effects had served to maintain symmetry between the court's dormant commerce clause doctrine (i.e. the inferred limits on the states' ability to impede interstate commerce) and its affirmative commerce clause doctrine. This symmetry was necessary because authority was generally exclusive under dual federalism. If something

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[167] Memo for Mr. Costelloe, Re Wickard Case, June 19, 1942, Box 125, RHJP, LC; Cushman, "Formalism and Realism in Commerce Clause Jurisprudence," 1138–41.

[168] Memo for Mr. Costelloe, Re Wickard Case, July 10, 1942, Box 125, RHJP, LC; Cushman, "Formalism and Realism in Commerce Clause Jurisprudence," 1141–46.

fell under Congress' commerce power, the states could not regulate it, even if Congress had not. Likewise, if something fell within the police powers of the states, Congress could not regulate it under its commerce power. Now that the Supreme Court had given up on policing constitutional limits on Congress' commerce authority, however, the scope of Congress' authority no longer had a clear limit. In order to preserve a regulatory role for the states, the federal government and the states would have to have concurrent rather than exclusive authority.[169]

Hand's opinion in *Alcoa* introduced an additional anomaly, between Congress' regulation of domestic commerce and its regulation of foreign commerce. For Hand, the question of the international scope of U.S. law hinged on two questions: "whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so."[170] The New Deal revolution in American constitutionalism had swept away judicially administered *constitutional* limitations on the scope of Congress' power to regulate commerce. This was the essence of Jackson's opinion in *Wickard*. Hand therefore turned to the separate question of whether Congress *intended* for a particular statute to apply abroad.[171] In *American Banana*, Holmes had presumed that the answer was no. By contrast, Judge Hand instead used *Knight Sugar's* intended effects test to answer this question, the very test Jackson had dismissed as "formalistic" and jettisoned in *Wickard*. In other words, Hand adopted the traditional test of a measure's *constitutional* permissibility under the commerce clause to

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[169] Cushman, "Formalism and Realism in Commerce Clause Jurisprudence," 1146–49.

[170] *Alcoa*, 145. F.2d at 443.

[171] In an interesting article, Caleb Nelson has observed that federal courts have this question differently from state courts. He suggests that efforts to avoid the effects of Erie Railroad Co. v Tompkins and Klaxon v. Stentor Manufacturing Co. led federal judges to turn choice-of-law questions into matters of statutory interpretation ("assum[ing] that the statute itself controls all questions about its applicability") rather than "freestanding common law," thereby precluding the possibility that state law would determine the applicability of a federal statute under Erie. Caleb Nelson, "State and Federal Models of the Interaction between Statutes and Unwritten Law," *University of Chicago Law Review* 80 (2013): 723–28.

answer the question of whether Congress *intended* for it to apply abroad. Whereas the judiciary would no longer scrutinize statutes intended to regulate the domestic economy to determine whether they usurped powers reserved to the states, the courts would continue to examine statutes that implicated foreign commerce to see whether they invaded the sovereignty of foreign states.

Seen in this light, Hand's goal was as much to limit disruptive incursions of U.S. law abroad as to bring foreign cases under the ambit of federal power. Rather than providing a blank check for international trustbusting, Hand accepted the merits of the Justice Department's case against *Alcoa* while also imposing an important limit: only foreign agreements intended to affect the United States fell under the Sherman Act's purview. Even as New Deal lawyers sought to redefine the relationship between the United States and the world, assuming regulatory responsibilities overseas, territorial sovereignty continued to be the foundational principle about which Americans conceived of relations with the wider world.

IV. Conclusion

World War II made the government's case against Alcoa somewhat moot. Given Alcoa's importance in producing aluminum for the war, the Justice Department decided it would no longer be appropriate to ask the Second Circuit for dissolution. "All with whom I have spoken," a government memorandum explained, "are agreed that it would be unwise to ask the Supreme Court to direct the present dissolution of Alcoa, not only because they believe it would seriously hamper the war effort, but also for fear it would predispose the

Court to find against us on the facts."[172] As to the international cartel, Judges Augustus Noble Hand and Thomas Swan, at least, thought that the Aluminium Limited issue was largely moot since the original rationale of the cartel to restrict the import of aluminum into the United States no longer made sense, even if the cartel still technically existed. As Augustus Hand put it, "I imagine that, in the words of J. Milton, Aluminium Ltd. no longer 'swinges the scaly horror of her tail' and a gentle injunction at most will be enough to 'pander to the better element.'"[173]

The war had indeed transformed the aluminum industry. As Berge told the attorney general in early 1946, ingot production capacity had expanded six times since the end of trial. Two thirds of these new facilities were government-owned, and would be leased or sold after the war to Reynolds and Kaiser to encourage competition. Given the uncertainty in the industry, Hand deferred on a remedy, sending the case back to the trial court for further investigation. (Nonetheless, Hand did enjoin Aluminium Limited from entering into future cartels.) In the end, Alcoa did not escape judicial scrutiny until 1957. The government failed to dissolve the company, as it had originally sought, but the wartime expansion of the industry had at last produced a competitive aluminum industry. Reynolds, Kaiser, and Alcan (the successor to Limited) now provided meaningful competition, ending Alcoa's unrivaled dominance.[174]

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[172] Memo to Cox, Aug. 18, 1942, Section 10, Box 173, Case 60-13-0, Entry # A1 COR 60, RG 60, NARA; Memo to Mr. Cox, Aug. 27, 1942, ibid.

[173] Augustus Noble Hand Memo, Feb. 5, 1945, & Swan Memo, Jan. 29, 1945, CCA Memoranda, 1944 Term, Box 207, LHP, HLL.

[174] Alcoa, 145 F. 2d at 445-48; Memo for the AG, Mar. 28, 1946, Box 29, WBP, LC; Waller, "Story of Alcoa," 137–41; Wells, *Antitrust and the Formation of the Postwar World*, 63–64; Waller, *Thurman Arnold*, 235 n.122; One observer called it "one of the longest, most expensive and, on the whole, most futile court actions in our history." James Stewart Martin, "The High Cost of Aluminum," *New Republic*, Aug. 1, 1949, 13.

Though the *Alcoa* case itself played only a supporting role in introducing competition into the aluminum industry, its legal legacy was nonetheless significant. Favorable decisions like *Alcoa* provided leverage for future antitrust actions, where they would be adapted to new circumstances. In a 1966 letter, Thurman Arnold referenced the "series of decisions which put a new arsenal of weapons in the hands of the Government."[175] In similar manner, despite his considerable misgivings about the effectiveness of using the courts to break up monopoly, I. F. Stone conceded that the Justice Department had "gained some toe-holds in the ancient battle."[176]

While *Alcoa* would come to be seen as an example of American and judicial overreaching (as Chapter 5 will recount), Hands' intended effects test in fact preserved the judiciary's role of limiting the scope of Congress' authority to regulate commerce and maintaining a boundary between the United States and other sovereigns. The case illuminates both the profound changes and the deep continuities that marked the relationship between American law and foreign relations during the Second World War.

Concerns about multinational business were not new, but the wartime Justice Department made an unprecedented case that the security of Americans within the United States depended upon regulating international business arrangements abroad. Arnold, Berge, and others linked to the Justice Department made a powerful argument that cartels and totalitarianism went hand in hand. Lack of competition fueled fascism and limited the ability of free peoples to combat it. But through a combination of lawsuits and international cooperation, the United States could reform the international economy and prevent business concentration from again generating war. Openness and integration would replace cartels

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[175] Letter from Arnold to Larson, June 6, 1966, in Arnold, *Voltaire and the Cowboy*, 461, 463.
[176] Stone, "Alcoa in Wonderland," 322.

and autarky. While this view encountered fierce opposition, particularly from those who felt that regulation impeded wartime production, no less a figure than President Roosevelt sounded the themes introduced by Arnold and Berge.

By urging the United States to regulate and reshape the global economy, the trustbusters found a way around the impasse that blocked the Senate's ratification of the League of Nations. Wilson recognized that an international system rooted in the territorial sovereignty of nation states was inadequate for preserving peace and for dealing with transnational problems like Bolshevism, the struggle between labor and capital, and the spread of disease. He therefore wanted to shift responsibility for these matters to the League of Nations. His opponents, however, were unwilling to accept the surrender of sovereignty Wilson's vision entailed. Cases like *Alcoa* suggested the United States could have its cake and eat it too. By regulating certain behaviors of companies overseas, the United States could achieve greater security without the costs to U.S. sovereignty.

CHAPTER FOUR

In a European Idiom:

Antitrust Law in European Integration

The *Alcoa* case revealed a new willingness to ignore traditional legal constraints on U.S. power and to use American law to forge a more liberal and competitive postwar order. Yet even as it sided with the U.S. government against Alcoa and Aluminium Limited, Judge Hand's opinion also pointed to the persistence of sovereignty as a limit on U.S. power. The Allied victory in World War II, however, offered a way around this constraint. As economist Ben W. Lewis argued, "Because we seek the elimination of all private international cartels and because Germany has been their home, their principal source, their driving force and inspiration, we should take advantage of an opportunity that can come only rarely on this earth—the chance which the fact of a completely conquered Germany will afford us to pull up the whole institution of international cartels by the roots."[1]

By linking cartels to fascism and aggression, the Antitrust Division had sought to make decartelization a foreign policy priority. And through the salesmanship of men like Thurman Arnold, they managed to bring the cartel problem to the attention of the highest levels of the government. In September 1944, President Franklin D. Roosevelt wrote Secretary of State Cordell Hull and ordered him to begin to thinking about ways to promote

[1] Ben W. Lewis, "The Status of Cartels in Post-War Europe," in *A Cartel Policy for the United Nations,* ed. Corwin D. Edwards (New York: Columbia University Press, 1945), 35.

postwar competition: "The defeat of the Nazi armies will have to be followed by the eradication of these weapons of economic warfare," the president wrote. "But more than the elimination of the political activities of German cartels will be required. Cartel practices which restrict the free flow of goods in foreign commerce will have to be curbed."[2] The Soviet Union and Great Britain also endorsed this objective in the agreements at Potsdam: "At the earliest practicable date, the German economy shall be decentralized for the purpose of eliminating the present excessive concentration of economic power as exemplified in particular by cartels, syndicates, trusts and other monopolistic arrangements."[3] With the end of the war in Europe, it seemed that the Allies could use their authority in occupied Germany to implement the decartelization agenda laid out at Potsdam.

In reality, reforming the German economy and eliminating cartels and other concentrations of economic power would prove to be a difficult and complicated task. The United States had been alone among industrialized nations in prohibiting cartels.[4] In Europe, "international cartel euphoria" during the interwar period had produced "a dense network" of cartels.[5] In Germany in particular, many industries were heavily concentrated, and vertical links between them supplemented horizontal cartel agreements. The *Verbundwirtschaft* linked

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[2] Franklin D. Roosevelt, Letter to the Secretary of State Relating to the Elimination of Cartels, Sept. 6 1944, in Franklin D. Roosevelt, *The Public Papers and Addresses of Franklin D. Roosevelt; 1944-45 Volume: Victory and the Threshold of Peace*, ed. Samuel I. Rosenman (New York: Harper and Brothers Pub., 1950), 255–56.

[3] Protocol of the Proceedings of the Berlin Conference, 1 Aug. 1945, in U.S. Department of State, *Foreign Relations of the United States 1945: The Conference of Berlin (The Potsdam Conference)* (Washington, DC: Government Printing Office, 1960), 2:1483.

[4] Wyatt C. Wells, *Antitrust and the Formation of the Postwar World* (New York: Columbia University Press, 2002), 1, 4, 27–37 There were important exceptions to American opposition to cartels; in particular, the 1918 Webb-Pomerane Act tolerated American involvement in overseas cartels.

[5] Volker Rolf Berghahn, *The Americanisation of West German Industry, 1945-1973* (Leamington Spa: Berg, 1986), 23–24, 31–33, 100; Louis Lister, *Europe's Coal and Steel Community: An Experiment in Economic Union* (New York: Twentieth Century Fund, 1960), 127–28.

the coal and steel industries and integrated the production process.[6] In addition to qualms about further disrupting the German economy and undermining Germany's contribution to the recovery of a European continent devastated by war, decartelization faced a further hurdle. The other Allies regarded decartelization as an American preoccupation. In particular, the American vision of competition conflicted with the British Labour government's goal of socialization.[7]

In 1951, however, the treaty creating the European Coal and Steel Community (ECSC) established "Europe's first strong anti-cartel law."[8] In addition to cartels, the ECSC's competition provisions addressed other restrictive agreements, concentrations of economic power, and abuses by dominant firms, which together laid a foundation for the robust competition policy of today's European Union.[9] These provisions, moreover, were not mere appendages to the treaty. They were fiercely contested, and their inclusion was central to the wrangling to make the Coal and Steel Community a reality.

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[6] Berghahn, *The Americanisation of West German Industry, 1945-1973*, 22; Lister, *Europe's Coal and Steel Community*, 127–28; Albert Diegmann, "American Deconcentration Policy in the Ruhr Coal Industry," in *American Policy and the Reconstruction of West Germany, 1945-1955*, ed. Jeffry M. Diefendorf (Washington, DC: German Historical Institute, 1993), 197. Berghahn points out that scholars have not always carefully distinguished decartelization, which Americans widely supported, and deconcentration, about which they had more complicated views. Americanisation, 89, 100. Nevertheless, it was common to use the term decartelization to include deconcentration, and I will do so as well. U.S. Federal Trade Commission, Report of the Committee Appointed to Review the Decartelization Program in Germany to the Honorable Secretary of the Army (Washington, DC: Federal Trade Commission, 1949), 5 n.1 [hereinafter Ferguson Report].

[7] James C. Van Hook, *Rebuilding Germany the Creation of the Social Market Economy, 1945-1957* (New York: Cambridge University Press, 2004), 81–84; J. F. J. Gillen, Deconcentration and Decartelization in West Germany, 1945-1953, Preliminary Draft, June 1953, Historical Division, Office of the High Commissioner for Germany, pp. 12-16, in box 6, Decartelization Division, Office of the General Counsel, NA [hereinafter Gillen Report].

[8] François Duchêne, *Jean Monnet: The First Statesman of Interdependence* (New York: W. W. Norton, 1994), 214.

[9] Corwin D. Edwards, *Control of Cartels and Monopolies: An International Comparison* (Dobbs Ferry, NY: Oceana Publications, 1967), 245–76; Wells, *Antitrust and the Formation of the Postwar World*, 2–3; David J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (New York: Clarendon Press, 1993), 335–42; Christopher Harding and Julian Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* (New York: Oxford University Press, 2003), 94.

Scholars have divided in explaining the emergence of European competition law. Many see a process of Americanization at work as the persistent efforts of "a relatively small group of Americans working in the 1940s and early 1950s overcame "deeply ingrained mentalities" to "convince [European] industrialists and businessmen of the benefits of the American model and to persuade them to adopt it."[10] Others, however, have countered that the emerging Cold War led the United States to abandon its commitment to reorganizing the West European economy in the late 1940s. Instead, the Americans accepted cartels and concentration as engines of the economic growth needed to withstand the communist threat. These scholars tend to dismiss the effectiveness of the European anticartel legislation that was introduced, pointing, for example, to the wave of reconcentration and mergers in the late 1950s.[11]

Though in considerable tension, both schools of thought have an important similarity: they each emphasize ideology.[12] Under both approaches, U.S. policy toward European cartels rested on a struggle between competing visions of political economy. Under one understanding, the American model of competition overcame the European commitment to a more managed economy. Under the other understanding, American anticommunism supplanted New Deal antimonopoly theories. Though ideology is

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[10] Wells, *Antitrust and the Formation of the Postwar World*, 3, 173, 212–13; Berghahn, *The Americanisation of West German Industry, 1945-1973*, 5, 38–39, 84–85, 103, 131–32, 181.

[11] James Stewart Martin, *All Honorable Men* (Boston: Little, Brown, 1950), vii–viii, 279, 291–92, 296–300; Van Hook, *Rebuilding Germany the Creation of the Social Market Economy, 1945-1957*, 5, 19–20, 54–56, 268, 288; Carolyn Woods Eisenberg, *Drawing the Line: The American Decision to Divide Germany, 1944-1949* (New York: Cambridge University Press, 1998), 139–51, 374–78. The erosion of antimonopoly does not necessarily mean an end of Americanization, however. The idea that antimonopoly gave way to productivity is compatible with an idea of Americanization. Maier, for examples, argues that West Germany was a place "where the United States' politics of productivity could be transplanted most triumphantly." Charles S. Maier, *In Search of Stability : Explorations in Historical Political Economy* (New Rochelle, NY: Cambridge University Press, 1987), 145.

[12] Van Hook, *Rebuilding Germany the Creation of the Social Market Economy, 1945-1957*, 22 As Van Hook, points out, by creating dichotomies between reformers and conservatives, ideology obscures the extent to which debates in fact concerned different visions of reform. Ideologies also had to be adapted to deal with the practical problems of German reconstruction and with the need to maintain Allied cooperation. Ibid., 22, 235.

important, however, ideas about political economy and about security did not operate in a geopolitical vacuum. The international politics of the early 1950s are crucial to understanding why the Schuman Plan included anticartel provisions.[13]

Antitrust law became so important not because it was a coherent body of doctrine to be exported but because it provided a flexible body of ideas that policymakers could use in diverse, often conflicting ways as they attempted to solve postwar European problems. Antitrust law was vague, and the same provisions could mean different things to different readers. As a result, the ECSC's anticartel provisions offered something for everyone. American lawyers believed that they were making important headway against European cartelization. French diplomats saw themselves as introducing another safeguard against German industry. German officials, meanwhile, could downplay these understandings and tolerate ambiguous language as a price for restored sovereignty. In other words, it is no wonder that some scholars see a successful diffusion of American legal concepts while others see antitrust as a casualty of the Cold War.

As a result, it is a mistake to see American antitrust law as a successful "export" to Europe. Instead, it is necessary to grasp the more complicated process of *translation* that was at work.[14] The American lawyer George Ball, who was then working for Jean Monnet,

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[13] Heeding this injunction, many of the best works on decartelization and deconcentration in Europe during this period focus on international politics. See, e.g., John Gillingham, *Coal, Steel, and the Rebirth of Europe, 1945-1955: The Germans and French from Ruhr Conflict to Economic Community* (Cambridge University Press, 1991); John Gillingham, "Solving the Ruhr Problem: German Heavy Industry and the Schuman Plan," in *Die Anfänge Des Schuman-Plans 1950/51*, ed. Klaus Schwabe (Baden-Baden: Nomos Verlagsgesellschaft, 1988); Isabel Warner, *Steel and Sovereignty: The Deconcentration of the West German Steel Industry, 1949-54* (Mainz: Verlag Philipp von Zabern, 1996).

[14] Contrast Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd edition (Athens: University of Georgia Press, 1993), with Pierre Legrand, "The Impossibility of 'Legal Transplants," *Maastricht Journal of European and Comparative Law* 4 (1997): 111. Watson responded again in Alan Watson, "Legal Transplants and European Private Law," *Electronic Journal of Comparative Law* 4 (December 2000), http://www.ejcl.org/44/art44-2.html.

recalled how American lawyers drafted the treaty provisions concerning competition. According to Ball, these were then "rewritten in a European idiom" by the French. As a result, the anticartel provisions "embodied the most advanced American antitrust thinking, enunciated in language that the Europeans could understand."[15] Ball's account frames translation more as a matter of style than of substance. But American law played an important role because it could substantively mean different things at the same time. Policymakers could convince themselves and their publics back home that they were obtaining what they wanted, while bypassing difficult and often unresolvable disagreements for the time being. Antitrust law provided a way to reach an agreement while delaying more difficult questions about what such agreement actually meant. This ambiguity was crucial for containing what John Foster Dulles called "the most dangerous problem of our time, namely the relationship of Germany's industrial power to France and the West."[16]

I. The Problem of Cartels

To implement the decartelization program enshrined by the Potsdam agreements, the U.S. Office of Military Government for Germany (OMGUS) created a Decartelization Branch within its Economics Branch. During the first few years of the Allied occupation, however, it lacked a legislative basis on which to act. The Allied Control Council by which

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[15] George W. Ball, *The Past Has Another Pattern: Memoirs* (New York: W. W. Norton & Company, 1983). Other scholars give the Europeans themselves more credit. One early observer suggested that the provisions "blend several European approaches to cartel questions with elements drawn from American practice and experience." Diebold, Schuman Plan, 352. While Monnet's chief deputy Etienne Hirsch was right in claiming that there was no direct American participation in the initial proposal, the Americans now brought their country's antitrust experience to bear as the French sought to strengthen the treaty's competition provisions. Etienne Hirsch, oral history interview by Theodore A. Wilson, 30 June 1970, Truman Presidential Library, 26-27, available at http://www.trumanlibrary.org/oralhist/hirsche.htm#transcript.

[16] The Acting Secretary of State to the Secretary of State, May 10, 1950, in U.S. Department of State, *Foreign Relations of the United States, 1950: Western Europe* (Washington, DC: Government Printing Office, 1977), 3:695.

the United States, Great Britain, and the Soviet Union governed Germany could not agree on a decartelization measure, as the British objected to breaking up German companies that they preferred to turn over to government control.[17]As the diplomats wrangled, the Decartelization Branch set about conducting detailed studies of the German economy.[18] The Americans considered adopting a unilateral law, but these plans were overtaken by the American and British negotiations over fusing their zones, which produced the new Bizone at the beginning of 1947. Shortly thereafter, the Americans and British agreed on a bizonal decartelization law (Law 56 in the American zone, Law 78 in the British).[19]

As OMGUS set about to reorganize the Germany economy under the new legislation, its plans ran aground amid the realities of the emerging Cold War. U.S. officials recognized that cold and hungry people were susceptible to communism. Reviving the West European economy was therefore crucial to Western security, but the Americans quickly came to realize German industry and especially German coal were essential to the health of the West European economy as a whole.[20] General Lucius Clay therefore blocked the more ambitious schemes of the "extremists" within the Decartelization Branch, triggering resignations, negative publicity, and a congressional investigation. Unlike the stalwart antimonopolists, many of whom had worked in the wartime Justice Department, Clay preferred interpreting the decartelization legislation "with a rule of reason in view of the Germany economy and the necessity for the maintenance and stimulation of that economy

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[17] Van Hook, *Rebuilding Germany the Creation of the Social Market Economy, 1945-1957*, 81–84; Gillen Report, 12-16.

[18] Gillen Report, 16-20.

[19] Ibid., 23-26; Van Hook, *Rebuilding Germany*, 83.

[20] Melvyn P. Leffler, *A Preponderance of Power: National Security, the Truman Administration and the Cold War* (Stanford: Stanford University Press, 1992), 64–68; 116–18.

and the increase of production."[21] As Clay complained in 1948, "Recent press accounts that we have stopped decartelization is [sic] another outburst of disloyalty from the same old crowd who want their views accepted. I found they were planning break-ups without reason except to make small units." While asserting "no change in policy," Clay wanted to "restrain the eager beavers."[22]

In December 1948, an investigatory committee led by Federal Trade Commissioner Garland S. Ferguson traveled to Germany to investigate the status of decartelization. "The Decartelization program," the committee's report concluded, "despite unconverted policies and clear directives, has not been effectively carried out. After almost four years of occupation and more than two years of operation under an adequate law [Law 56 of February 1947], the program has not proceeded very far." The committee considered uncooperative allies and the Cold War need to maximize West German production as explanations, but it rejected the view that changing circumstances justified inaction: "Implicit in them is the thought that the German economy cannot be fully productive unless it is one that is based on excessive concentrations of industry. The experience of the United States is just the contrary."[23] Clay strongly disagreed with these findings, arguing that the United States had broken up the concentrations of economic power which had enabled German militarism while ensuring that German enterprise remained able to compete in a global economy.[24]

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[21] Gillen Report, 48-64; Van Hook, *Rebuilding Germany the Creation of the Social Market Economy, 1945-1957*, 84–85; Lucius D. Clay, *Decision in Germany* (Garden City, NY: Doubleday, 1950), 331.

[22] Clay to Draper, Mar. 14, 1948, in Lucius D. Clay and Jean Edward Smith, *The Papers of General Lucius D. Clay: Germany, 1945-1949. Volume Two. Edited by Jean Edward Smith* (Bloomington: Indiana University Press, 1974), 2:579.

[23] *Ferguson Report*, 89-92, 119.

[24] Clay to Voorhees, Apr. 24, 1949, in Clay and Smith, *Clay Papers*, 2:1129–32.

In his 1950 book *All Honorable Men*, James Martin, a disgruntled occupation official charged with investigating German business practices after the Nazi defeat, rebuked Clay's defense and penned a scathing critique of U.S. competition policy in Germany. He blamed powerful business interests in the United States for undercutting official decartelization policy and reopening the door for the continuation of German cartels. Martin argued that these men were not Nazis but "honorable men." It was the shape of the economy that produced fascism, and without proper government control even the United States could succumb. "The occupation of Germany must be put back on the track," Martin wrote. "But more than that, we have to reassert public goals in the United States which will prevent the already apparent concentration of economic power in our own country from reaching the end it did in Germany."[25]

By this time, however, the State Department had taken over responsibility for managing occupied Germany, and a new Decartelization and Deconcentration Division was created within the general counsel's office of the new Office of the U.S. High Commissioner for Germany. Despite Clay's decision for a less radical program of decartelization, the Americans continued to extol the benefits of competition. While High Commissioner John J. McCloy was himself a moderate, the British nicknamed Robert R. Bowie, his general counsel, the "mad mullah of decartelisation."[26] Though acknowledging the demise of the

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[25] Martin, *All Honorable Men*, 279, 291–92, 296–300 Martin rejected arguments that the emerging Cold War led the United States to abandon decartelization: "Some people assume that everything is somehow connected with the cold war, and that any other course than the one we are pursuing has been rendered impossible by disagreements with Russia. This is surely an oversimplification. Disagreements with Russia have been a major issue for only twenty or thirty years, whereas the pattern I have traced in this book has been unfolding for a much longer period. Ibid., vii-vii.

[26] Letter from Wilson to Pitblado, Feb. 27, 1951, in Roger Bullen and M. E. Pelley, eds., *Documents on British Policy Overseas* (London: Her Majesty's Stationery Office, 1986), Series II, 1:416; Warner, *Steel and Sovereignty*, 24–25; Gillingham, *Coal, Steel, and the Rebirth of Europe*, 260; On McCloy, see Thomas Alan Schwartz, *America's Germany: John J. McCloy and the Federal Republic of Germany*, (Cambridge, MA: Harvard University Press,

"Jeffersonian ideal of a society of small individual producers," Bowie warned of the dangers of cartels. "[W]hen competition is suppressed and prices artificially raised," he said, "this reduces the amount of goods and of work. If this process becomes widespread, the cumulative effect may be depression and unemployment. Democracy cannot long survive under such conditions. In Germany, they led directly to Hitler."[27]

But the Decartelization and Deconcentration Division continued to pursue Clay's more modest program of reorganizing the German economy, focusing on trade practices and the reorganization of the coal, iron, and steel industries, the I.G. Farben complex, and the film industry, in lieu of the earlier "crusade against German industry."[28] Nonetheless, considerable drift characterized U.S. policy. One report for McCloy proposed the creation of a new court lest antitrust "continue to drag and . . . not make sense either here or at home." Citing the attitude of the Military Government, British opposition, and American inefficiency, it noted the "few" deconcentration and decartelization proceedings that had been brought. In addition, there was little cooperation with the Department of Justice back in the United States.[29] Even after McCloy and his staff had time to get their bearings, they proceeded slowly.[30]

German heavy industry had been exempted from Law 56. Because the Ruhr industrial area lay in the British zone, in fact, the Americans initially had little power over coal and steel. The Labour government's desire for public ownership drove British policy.

1991); Kai Bird, *The Chairman: John J. McCloy - The Making of the American Establishment* (New York: Simon and Schuster, 1992).

[27] Robert R. Bowie, "Freedom of Trade," *Information Bulletin* (Oct. 1950): 67.

[28] Gillen Report, 72-73.

[29] Notes for Messrs. McCloy and McLain on Antitrust Enforcement in Germany, Oct. 3, 1949, box 5, Decartelization Division, Office of the General Counsel, NA.

[30] See McCloy Cable, Aug. 26, 1950, D(50)2061, box 18, General Classified Records, McCloy Papers, RG 466, NA. Albert Diegmann has described American policy "as consistent decartelization and moderate deconcentration." Diegmann, "American Deconcentration Policy in the Ruhr Coal Industry," 212.

The creation of the Bizone and British financial difficulties, however, gave the United States considerably more leverage. In November 1948, the Americans and British finally agreed to a bipartite law to reorganize Germany's coal and steel industries. Law 75's preamble declared that only a representative of a freely-elected German government should settle the ownership question, giving the Americans an important victory by delaying the question of socialization. Little progress was made in developing a plan for reorganization, however, and matters grew even more complicated when the French joined the coal and steel control groups. Because of the transition from military to civilian administration in Germany, and because of the inclusion of the French, a new law was passed on May 16, 1950. Like its predecessor, AHC Law 27 called for the liquidation of excessive concentrations of power and their reorganization into new unit companies. A Combined Steel Group and a Combined Coal Control Group would oversee the process. While the Americans, British, and French had managed to enact a harmonized law, the real work remained to be done in the regulations that would bring Law 27 into effect.[31] Just days earlier, moreover, an important announcement transformed the climate in which the allies would go to work.

II. The Schuman Plan: A Giant Cartel?

On May 9, 1950, French Foreign Minister Robert Schuman proposed pooling French and German coal and steel production under a supranational high authority, creating an organization that would be open to other European nations.[32] Pooling coal and steel meant establishing a common market. Member states would eliminate the tariffs, import and

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[31] Warner, *Steel and Sovereignty*, 5–9; Diegmann, "American Deconcentration Policy in the Ruhr Coal Industry," 203–11; Van Hook, *Rebuilding Germany the Creation of the Social Market Economy, 1945-1957*, 84–85.

[32] Chargé in France (Bonbright) to the Acting Secretary of State, May 9, 1950, in *FRUS, 1950*, 3:692–94.

export quotas, exchange restrictions, discrimination, subsidies, and other barriers that hampered trade in coal, steel, and related products within Europe. States would cede sovereignty over these industries to the high authority, which would regulate the common market, modernize production, develop joint exports, and equalize working and living conditions.[33]

Such an organization, Schuman argued, would render another war between France and Germany impossible and would further economic European economic development by making coal and steel—"the fundamental elements of industrial development"—available to all nations "on equal terms." Anticipating American objections, Schuman emphasized that the new organization would rationalize production while expanding productivity. "Unlike an international cartel whose purpose is to divide up and exploit national markets through restrictive practices, and the maintenance of high profits, the projected organization will insure the fusion of markets and the expansion of production."[34] Indeed, the foreign ministry released an additional statement explaining how the ECSC would differ from a cartel. Whereas a cartel bound private companies, the new organization would impose obligations on the participating governments themselves. And it sought to replicate conditions of perfect competition that would otherwise be impossible.[35]

The Schuman Plan seemed to offer a way past the postwar deadlock over what to do about Germany. With good reason, France's greatest preoccupation was ensuring that

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[33] Alan S. Milward, *The Reconstruction of Western Europe, 1945-51* (Berkeley: University of California Press, 1984), 3, 9, 13–15; William Diebold, *The Schuman Plan: A Study in Economic Cooperation, 1950-1959* (New York: Frederick A. Praeger, 1959), 78–81. As Milward points out, an investment plan, price equalization, a reconversion fund permitting closures of inefficient producers, and the standardization of freight rates would help to obtain these ends, though many of these goals would fail to come into effect. In particular, coal prices would equalize, but unequal freight rates and unequal wages would persist.

[34] Chargé in France (Bonbright) to the Acting Secretary of State, May 9, 1950, in *FRUS, 1950*, 3:692–94.

[35] Note sur le cartels, May 9, 1950, 81 AJ 131, Archives nationales, Pierrefitte-sur-Seine, France.

German troops would never again invade France. The revival of West German industry and the prospect of West German rearmament therefore stoked France's deepest fears. Yet France's vision for the postwar order was not merely reactive. The 1946 Monnet Plan had sought to revive French industry and stimulate exports in order to advance France's own recovery. This program depended on French access to German raw materials and coal.[36] Whereas the Americans wanted to use German resources to revive Germany first, presuming the benefits would spillover to Western Europe as a whole, the French wanted to use those resources to pursue their own vision of national recovery.

The years 1949 and 1950 marked a crucial turning point. American officials finally accepted the primacy of the sterling bloc in British foreign policy. They abandoned hopes that Great Britain would anchor an integrated European Continent and allay French fears of Germany. This shifted the onus of developing a solution onto the French.[37] The French rose to the occasion with the Schuman Plan. By pooling coal and steel production on equal terms, they had at last found an acceptable basis for German revival that allayed their security concerns and ensured access to resources needed for their own domestic objectives. As Alan Milward puts it, "The Schuman Plan was called into existence to save the Monnet Plan."[38] This point is critical. The French vision involved competition "on equal terms." A coal and steel organization dominated by Germany or German producers was unacceptable, and the

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[36] William I. Hitchcock, *France Restored: Cold War Diplomacy and the Quest for Leadership in Europe, 1944-1954* (Chapel Hill: The University of North Carolina Press, 1998), 2–5; Milward, *The Reconstruction of Western Europe, 1945-51*, 267–68.

[37] Michael J. Hogan, *The Marshall Plan: America, Britain and the Reconstruction of Western Europe, 1947-1952* (New York: Cambridge University Press, 1989), 293–95, 366, 440–42.

[38] Milward, *The Reconstruction of Western Europe, 1945-51*, 475.

French saw oversight of the proposed high authority as a means of preserving rough equality.[39]

The initial American reaction to Schuman's proposal was cautious. The Schuman Plan was a genuine French initiative, and the Americans had not received a detailed heads up. Secretary of State Dean Acheson cabled Washington from London on the morning of May 10 in order to provide his initial assessment. Though crediting France's "conscious and far reaching effort to advance Franco-German *rapprochement* and European integration," Acheson worried that the new organization was susceptible to the "vices of monopoly control." Indeed, the "possible cartel aspect" meant that it was too soon to give approval.[40] John Foster Dulles, working as a consultant to Acheson, was more optimistic, calling the proposal "brilliantly creative."[41]

As the Americans came to better appreciate the merits of Schuman's proposal, their fears diminished.[42] While they remained wary of the proposed organization's monopolistic potential, they identified a number of benefits. By giving the French a say in German heavy industry, it would alleviate French security concerns. Since the high authority would bind all participants equally, it would help restore Germany's sense of sovereign equality. It also offered a framework for boosting German production for NATO and would "go further than anything hitherto contemplated in tying Ger[many] economically to West."[43] In sum, the Schuman Plan finally brought the United States and France together. As William I. Hitchcock writes, "Indeed, it is not too much to say that the Schuman Plan constituted a

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[39] Gillingham, *Coal, Steel, and the Rebirth of Europe*, 240–41; Ambassador in the United Kingdom to the Secretary of State, June 6, 1950, in *FRUS, 1950*, 3:723.

[40] Secretary of State to the Acting Secretary of State, May 10, 1950, in *FRUS, 1950*, 694–95.

[41] Acting Secretary of State to the Secretary of State, May 10, 1950, in *FRUS, 1950*.

[42] Leffler, *A Preponderance of Power*, 348–49.

[43] Acting Secretary of State to the Secretary of State, May 11, 1950, in U.S. Department of State, *FRUS, 1950*, 3:696–97.

diplomatic revolution in Europe. It brought American and France strongly together on the future of Germany, reversing five long hard years of Franco-American antagonism."[44]

Indeed, as American Ambassador to Paris David K. E. Bruce pointed out, the proposal "changes all aspects of present problems." Bruce's contacts in France downplayed the American worries about the organization's monopolistic potential. Instead, they suggested that "pooling coal and steel industries on basis of equality will lead to real economic integration . . . by eliminating real reasons for restrictions on trade and in establishing conditions of competition." As a memorandum used in French cabinet discussions noted, France could not compete with the German steel industry because of the price of coal. It therefore warned of "the following train of events: dumping by Germany, protection of French industry, trade liberation irrevocably reversed, pre-war cartels, economic orientation of Germany to the east leading to political commitments with east, and France will resume Malthusian policy of high protection and limited production." The only alternative was to give the French and other European coal and steel industries "the same point of departure as German industry" and then to pursue the U.S.-favored policy of "expansion based on competition but without domination."[45]

Monnet's planning group prepared another memorandum outlining reasons why the pooling of coal and steel would not create a cartel. The new organization's objectives were increased production and productivity, wider markets, and rationalized production—not high and stable profits sought by price fixing, production quotas, and the division of

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[44] Hitchcock, *France Restored*, 129. The only loser was Great Britain, who would be forced to cede European primacy to France. But the British did not see it as politically viable to object and the Schuman Plan's limited objectives seemed likely to allay British concerns of marginalization. Milward, *The Reconstruction of Western Europe, 1945-51*, 475.

[45] Secretary of State to the Acting Secretary of State, May 12, 1950, in *FRUS, 1950*, 3:697–700.

markets. Unlike the secret cartel agreements of the interwar period, the high authority would operate under public scrutiny and would be run by "independent personalities" rather than industry insiders. Finally, the new organization had broader objectives than the success of a certain industry. Coal and steel were chosen because of their significance for the wider economy, and the organization would also have obligations to workers and to the economy as a whole. Indeed, participating countries were even willing to sacrifice sovereignty to achieve the goal of economic expansion. The goal, in short, was to "produce same effect which would result from perfect competition" but to do so it was necessary to "pass through necessary steps without which establishment of this competition would run up against insurmountable resistance."[46] Bruce also pointed out that Jean Monnet, the plan's architect, was a genuine believer in anticartel legislation and favored expanded production, a fact which leant some credibility to the proposals.[47]

While the Americans responded enthusiastically to Monnet's language about competition, they were not naïve. They recognized that the French were not acting out of altruism. Lewis W. Douglas, the U.S. ambassador in London, warned that "Germany's organizational abilities, industrial skills, national tenacity, and natural resources" could once again make it rather than France the dominant power in Western Europe. "It was in recognition of this danger probably," Douglas added, "that Schuman in his original scheme proposed appeal machinery, representation 'on an equal basis', and for impartial public reports to the UN."[48]

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[46] Ibid., 701.
[47] Ibid., 699.
[48] Ambassador in the United Kingdom to the Secretary of State, June 6, 1950, in ibid., 723.

At this stage, then, the Americans were very much worried about competition. But rather than seeing the Schuman Plan as a means of exporting antitrust principles to Europe, they feared that the new organization itself might constitute a cartel. They were thus grateful for the proposal's "emphasis on objectives of cost reduction through increased productivity, [for its] benefits to consumers and workers[,] and [for its] recognition of desirability of retaining benefits of competitive process."[49] It also fueled deeper American dreams about economic integration. In the long run, the pooling of coal and steel was a "great step towards the ultimate formation of [a] single European market for all commodities."[50]

Schuman's original proposal acknowledged "the obligations of every kind imposed upon Germany," but in the late spring of 1950, policymakers had given little thought to how pooling coal and steel would affect Allied decartelization and deconcentration efforts in the Federal Republic of Germany. In a June 16 speech to Ruhr industrialists, political leaders, and bankers, however, High Commissioner McCloy did frame Allied plans to reorganize the coal and steel industries under Law 27 as "part of a larger program to eliminate all restrictions on competition which stand in the way of an expanding and developing German economy." McCloy went on to describe the Schuman Plan as a "vital new factor."[51] It was not yet clear, however, how it would affect Allied deconcentration plans within Germany.

III. Monnet's Embrace of Antitrust

France, Germany, Italy, and the Benelux countries met in Paris beginning on June 20, 1950, to work out the details of Schuman's proposal, and the French released a working

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[49] Secretary of State to Certain Diplomatic Offices, June 2, 1950, in ibid., 714.
[50] Ambassador in the United Kingdom to the Secretary of State, June 6, 1950, in ibid., 723.
[51] John J. McCloy, "Ruhr Industry's Problems," *Information Bulletin*, Aug. 1950: 23-25.

document that became the basis of negotiations. The working document said little about cartels, containing only general language authorizing the high authority to take action to promote competition. Like Schuman's original proposal, it also acknowledged the "obligations of every nature imposed on Germany."[52]

As John Gillingham explains, the "negotiations followed a tedious, meandering downhill path which by fall had led to swamps of bureaucratic maneuvering in the national self-interest."[53] The State Department's German expert observed that the weaker coal and steel producers were seeking "various means of checking and cushioning too rapid adjustment to the conditions of competition in a single market."[54] Meanwhile, the Germans took up a Dutch proposal for a Council of Ministers with veto authority as a national counterweight to the supranational High Authority—the "centerpiece" of the French working document. By the fall, Monnet's original vision had taken a beating, but it nevertheless survived in its essential features.[55]

But the outbreak of war in Korea emboldened the Germans and threatened to undo the progress that had been made towards Franco-German rapprochement. Communist aggression in Korea had convinced the United States to boost its military presence around the globe. Despite their misgivings about German rearmament, the French now faced

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[52] Ambassador in France to the Secretary of State, June 24, 1950, in *FRUS, 1950*, 3:737; Richard T. Griffiths, "The Schuman Plan Negotiations: The Economic Clauses," in *Die Anfänge Des Schuman-Plans 1950/51*, ed. Klaus Schwabe (Baden-Baden: Nomos Verlagsgesellschaft, 1988), 61.

[53] Gillingham, *Coal, Steel, and the Rebirth of Europe*, 240–41; ; Secretary of State to Certain Diplomatic Offices, July 25, 1950, in *FRUS, 1950*.

[54] Memorandum by the Director of the Bureau of German Affairs to the Assistant Secretary of State for European Affairs and the Assistant Secretary of State for Economic Affairs, Sept. 9, 1950, in *FRUS, 1950*, 747; Acting Secretary of State to the Embassy in France, Oct. 3, 1950, in ibid., 754–56; Paris to Frankfurt, Cable Number 38680, 25 Oct. 1950, box 13, General Classified Records, McCloy Papers, RG 466, NA; Gillingham, *Coal, Steel, and the Rebirth of Europe*, 247–50.

[55] Gillingham, *Coal, Steel, and the Rebirth of Europe*, 240–41, 243; Acting Secretary of State to the Embassy in France, Oct. 3, 1950, in *FRUS, 1950*, 754–56; Secretary of State to Certain Diplomatic Offices, Dec. 8, 1950, in ibid., 762.

tremendous Anglo-American pressure to bring the West Germans into a common European defense force.[56] As McCloy told Acheson in early August, "At one step [creating a European army] would fully integrate Germany into Western Europe and be the best possible insurance against further German aggression. [But i]nevitably this course would imply profound effects on the position of Germany. She could not be expected to furnish resources and men for a European army except as a substantial equal in Europe within a very limited time."[57] Acheson concurred: "It seems to me that we are really at the crossroads with Germany at this present time, and Germany seems to me to be in a state where it will either come along and be a good member of the western community and be allowed to come into it and take a full part and help, or it will begin to hedge and begin to have defeatism, and other forms of internal dry-rot in morale will take place."[58]

Events bore out their recognition that rearmament would transform Germany's position. On September 21, 1950, Ambassador Bruce cabled Washington. "Feeling their international positions strengthened by Korean events and talk of German rearmament," he said, "and acquiring outside of the Schuman proposal framework the desired increase in steel capacity limit, Germans now have stronger bargaining position and are trying to use it to retain national competitive advantage within single market." Bruce observed that the Germans sought a higher tariff for the new single market, wanted to block increases in labor expenditures, and hoped to avoid raising the price of (more competitive) German coal by

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[56] Leffler, *A Preponderance of Power*, 361, 383–90; Hitchcock, *France Restored*, 133–47.

[57] The United States High Commissioner for Germany to the Secretary of State, Aug. 3, 1950, in *FRUS, 1950*, 3:180–82.

[58] Secretary of State to the Acting Secretary of State, Sept. 17, 1950, in ibid., 320.

having to make payments to a fund for the benefit of less efficient coal producers.[59] The French were worried.[60] Many Germans, as Charles Bohlen put it, thought "that they would quickly receive the advantages and equality offered by the Schuman Proposal without accepting the commitments and limitations . . . impose[d] to all participants."[61] The British High Commissioner in Germany observed that "German enthusiasm for the Schuman plan is evaporating."[62] The State Department suggested that McCloy advise Adenauer that the decision to bring Germany into a common defense scheme after the outbreak of Korea merely reinforced the Schuman Plan's importance.[63]

The Schuman Plan negotiations themselves reinforced the impact of the Korean War and the desire for a European army that included West Germany. France and the United States were invested in the treaty's success, and the need for German assent gave the Federal Republic relative equality at the negotiating table. This created opportunities for the West Germans. They could bring issues like deconcentration into international negotiations over the Schuman Plan to get around the continuing authority of the Allied High Commission within Germany, and German officials pointed out contradictions between the cooperation envisioned by the Schuman Plan and the continuing Allied occupation of Germany.[64] In other words, they gained a voice on the *international* stage that they had lacked given Allied power at the *national* level.

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[59] Ambassador in France to the Secretary of State, Sept. 21 1950, in ibid., 749; Leffler, *A Preponderance of Power*, 387.

[60] La Politique Allemande du Plan Schuman, Sept. 8, 1950, AMI 3/4/5, Jean Monnet Papers, Lausanne, Switzerland; Memorandum a. M. Schuman a l'occasion des entretiens de Washington, Sept. 9, 1950, AMI 4/4/1, ibid..

[61] Chargé in France to the Secretary of State, Oct. 25, 1950, in *FRUS, 1950*, 3:760–61.

[62] Kirkpatrick to Atlee, Oct. 4, 1950, in *DBPO*, Series II, 1:312.

[63] Acting Secretary of State to the United States High Commissioner for Germany, Sept. 29, 1950, in *FRUS, 1950*, 3:752.

[64] Note Monnet to Schuman recounting visit of Erhard, Sept. 28, 1950, 81 AJ 137, AN; Coal and Steel Community and Law of Occupation, Memorandum sent by Hallstein, Oct. 13, 1950, 81 AJ 137, AN.

And for Monnet, German rearmament raised the specter that Germany would again give in to "traditional temptations" and pursue a recovery through a national rather than supranational framework.[65] Many Ruhr industrialists saw "an opportunity to slip the noose placed around their collective neck in 1945."[66] As the French complained, "the Chancellor seeks to use the Schuman Plan to evade Law 27 and Law 27 to evade the Schuman Plan."[67] Indeed, Adenauer used his newfound leverage to challenge two regulations issued under the Allied Law 27. The regulations concerned the liquidation of businesses scheduled to be deconcentrated, and the chancellor argued that it made no sense to proceed until there was a plan for reorganized enterprises to take their place. He also complained that the regulations were issued "without consultation" and that they "upset conditions under which Fed Rep had entered into negotiations on Schuman plan." Moreover, Adenauer even threatened to recall his Schuman negotiators.[68]

Despite the emboldened German stance, the United States remained committed to integrating West Germany into European defense. As the High Commissioner's office mused in a mid-October cable cleared by McCloy, "Restoration continental Europe's faith in worth and future is continuing US objective but right now Europeans' chief concern is their external security. Most urgent problem, which US meeting head on, is to produce armed strength and will to resist on a united basis. These problems all bound up together but we feel action proposed in political field less urgent than coping with external security danger."

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[65] Telegramme à M. Robert Schuman, Sept. 14, 1950, AMI 4/4/2, Monnet Papers; Monnet to Schuman, Sept. 16, 1950, 4/4/3, ibid; Memorandum à Monsieur Robert Schuman, Sept. 16, 1950, 4/4/3bis, ibid.

[66] Gillingham, *Coal, Steel, and the Rebirth of Europe*, 233, 242, 257.

[67] Letter Bureau to Monnet, Jan. 6, 1951, 81 AJ 137, AN.

[68] McCloy to Department, Sept. 24, 1950, D(50)2215, and Minutes of the Twentieth Meeting of the Council of the Allied High Commission, Sept. 23, 1950, D(50)2216, box 19, General Classified Records, McCloy Papers, RG 466, NA; see also Griffiths, "The Schuman Plan Negotiations: The Economic Clauses," 61–62.

The cable went on to consider what approach the United States should take to achieving its objectives:

> Despite good deal of support among individual Europeans (and Americans) for thesis that US should use its power and crack whip to compel slow-witted Europe to do what reasonable people know must be done, we believe advocates of high pressure diplomacy lose sight of fact such methods sometimes retard rather than hasten ultimate attainment of goal. . . . In short we believe exercise of power or "leadership" involving knocking heads together to force early creation of continental European union might not only fail to achieve immediate purpose but could have serious effects on US security by damaging great fund of confidence US now enjoys in free world and on which it heavily relies.[69]

Though the Schuman negotiations were beginning to drag on, the United States needed some alternative to knocking heads if it were to realize its goal of an integrated Europe.

France responded to these developments by proposing its own European army in an effort to delay German rearmament.[70] After receiving comments from the American embassy in Paris which worried about the "cartel dangers" inherent in the Paris conference's existing work,[71] the French also turned to antitrust law. On October 4, 1950, Monnet "'to the great surprise of all . . . in a tone which he did not usually employ', condemned the existing provisions as totally inadequate and 'launched into a vigorous attack on cartels and agreements in general.'" He promised to supply new measures to address the problems of cartels.[72]

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[69] Cable, Oct. 13, 1950, D(50)2278a, box 20, General Classified Records, McCloy Papers, RG 466, NA.

[70] Hitchcock, *France Restored*, 144–47.

[71] Ambassador in France to the Secretary of State, Oct. 2, 1950, Acting Secretary of State to the Embassy in France, Oct. 3, 1950, & Acting Secretary of State to the Embassy in France, Oct. 5, 1950, in U.S. Department of State, *FRUS, 1950*, 3:752–59.

[72] Griffiths, "The Schuman Plan Negotiations: The Economic Clauses," 62; Duchêne, *Jean Monnet*, 213; Observations sur le Memorandum du 28 Septembre 1950, Oct. 4, 1950, AMG 8/1/5, Monnet Papers. For the text of those measures, see Paris to Department, 24 Oct. 1950, Cable Number 38607, box 13, General Classified Records, McCloy Papers, RG 466, NA. They are described in Griffiths, "Economic Clauses," 62–63.

Monnet turned to American lawyers to craft these provisions.[73] His memoirs acknowledge the role of High Commission General Counsel Robert Bowie. The two treaty articles concerning antitrust law, Monnet wrote, "had been drafted by Robert Bowie, with meticulous care. For Europe they were a fundamental innovation: the extensive anti-trust legislation now applied by the European Community essentially derives from those few lines in the Schuman Treaty."[74] A native of Baltimore, Bowie had worked as a Harvard Law School professor before coming to work as general counsel to McCloy, where he was in charge of implementing Law 27. Sent to Paris by McCloy to work with Monnet, the two quickly became lifelong friends.[75]

Working as a lawyer for his friend Jean Monnet, George Ball was also privy to the drafting of the Schuman Plan and the accompanying diplomacy.[76] Ball pointed to Monnet's familiarity with American antitrust legislation because of his time in the United States and his collaboration with McCloy. Ball also highlighted the role of Bowie, whom Ball claimed to have encountered "on several occasions when he arrived in Paris with drafts and redrafts of proposed anticartel articles." As mentioned earlier, these were then translated to mask their

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[73] McCloy to Secretary of State, Dec. 9, 1950, Cable Number 8642, box 5, Decartelization Division, Office of the General Counsel, NA At an American Bar Association conference in 1963, ECSC High Authority Vice President Albert Coppé playfully warned those gathered against any criticism of Articles 65 and 66 of the ECSC Treaty because the competition provisions were "written in Washington and exported with Marshall Aid about 1951 to Europe." The Europeans, Coppé added, remained wary of this "Anglo-Saxon legislation." Albert Coppé, "Welcoming Remarks on Behalf of the High Authority of the European Coal and Steel Community," in American Bar Association, Conference on Antitrust and the European Communities, Section on Antitrust Law, ed., *Proceedings: Conference on Antitrust and the European Communities* (New York]: American Bar Association, Section of Antitrust Law, 1963), 239; Edwards, *Control of Cartels and Monopolies*, 246.

[74] Duchêne, *Jean Monnet*, 352–53.

[75] Sherrill Brown Wells, "Monnet and 'The Insiders': Nathan, Tomlinson, Bowie, and Schaetzel," in *Monnet and the Americans: The Father of a United Europe and His U.S. Supporters*, ed. Clifford P. Hackett (Washington, DC: Jean Monnet Council, 1995), 211–13; "Personnel Notes" Information Bulletin (March 1950): 73.

[76] On their relationship, see David L. DiLeo, "Catch the Night Plane for Paris: George Ball and Jean Monnet," in *Monnet and the Americans: The Father of a United Europe and His U.S. Supporters*, ed. Clifford P. Hackett (Washington, DC: Jean Monnet Council, 1995), 141–69.

American origins. Indeed, Ball claimed to have sneaked out a back staircase of Monnet's house when Europeans arrived.[77]

It is therefore no surprise that the State Department considered the new cartel language to be "excellent."[78] After it came out in late October, the American embassy in Paris reported that "Monnet intends to defend vigorously position on cartel question; however, French expect serious opposition and undoubtedly will be forced to negotiate out some of extreme language in present draft."[79] In fact, Richard T. Griffiths points out, the proposed cartel provisions "went too far. Aimed at preventing monopolies, they had the effect of banning virtually any merger or agreement."[80] These provisions became the subject of the "most serious objections so far raised by other delegates."[81]

As the delegates negotiated over the proper language, the Americans worried about a compromise in which the high authority could approve certain cartel arrangements in advance. Acheson argued that a screening process to distinguish good cartels from bad cartels had never worked before. It was "virtually impossible to determine in advance, on basis of text alone, what exact economic consequences of restrictive clauses of any contract will be." Moreover, weak cartel provisions would undermine U.S. domestic support for the

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[77] Ball, *The Past Has Another Pattern*, 338–40; Gerber, *Law and Competition in Twentieth Century Europe*, 338–40. Other scholars give the Europeans themselves more credit. One early observer suggested that the provisions "blend several European approaches to cartel questions with elements drawn from American practice and experience." Diebold, *The Schuman Plan*, 352 While Monnet's chief deputy Etienne Hirsch was right in claiming that there was no direct American participation in the initial proposal, the Americans now brought their country's antitrust experience to bear as the French sought to strengthen the treaty's competition provisions. Etienne Hirsch, oral history interview June 30, 1970, at 26-27.

[78] Department to Paris, Oct. 26, 1950, Cable Number 38861, box 13, General Classified Records, McCloy Papers, RG 466, NA.

[79] Chargé in France to the Secretary of State, Oct. 25 1950, in U.S. Department of State, *FRUS, 1950*, 3:760–61.

[80] Griffiths, "The Schuman Plan Negotiations: The Economic Clauses," 63.

[81] Paris to Various Diplomatic Offices, Nov. 14, 1950, Cable Number 40189, box 13, General Classified Records, McCloy Papers, RG 466, NA.

Schuman Plan and convince the American people that the new organization was itself a giant cartel.[82]

IV. Forcing the Germans to Come Along

The Schuman Plan's cartel provisions remained under debate, particularly after the French reiterated their October proposal. But Monnet's introduction of anticartel provisions shifted attention to the deconcentration efforts under Law 27 within West Germany.[83] The French presupposed the deconcentration of Ruhr industry within West Germany by the High Commission.[84] When Bowie and other American officials met with Monnet and his team in Paris at the end of 1950, both sides reaffirmed that "the deconcentration program under Law 27 and the Schuman Plan are wholly consistent and complementary in that the deconcentration program under Law 27 is a necessary precondition to the achievement of the objectives of the Schuman Plan and the operation of the Schuman Plan will serve to safeguard the objectives of the deconcentration program under Law 27 and furnish the conditions under which the projected independent competitive units can effectively operate."[85] Nonetheless, the Americans, French, and Germans struggled over how to balance their competing goals.[86]

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[82] Ibid.; Secretary of State to Paris, Nov. 17, 1950, Cable Number 40568, ibid.; Secretary of State to Certain Diplomatic Offices, Dec. 8, 1950, in *FRUS, 1950*, 3:762–63; Note Tomlinson, Observations on the Treaty, Nov. 1950, AMG 9/3/15, Monnet Papers.

[83] Gillingham, *Coal, Steel, and the Rebirth of Europe*, 262, 266–68; Griffiths, "The Schuman Plan Negotiations: The Economic Clauses," 63.

[84] Note sur l'Article 61 et la Deconentration de la Ruhr, Feb. 25, 1951, AMG 13/2/8, Monnet Papers.

[85] Memo of Meeting Held 19 December at the Office of M. Monnet, Dec. 20, 1950, box 2, Decartelization Division, Office of the General Counsel, NA; Memo of Meeting Held 19 December on Coal and Steel Problems, Dec. 29, 1950, D(50)2852-A, box 23, General Classified Records, McCloy Papers, RG 466, NA.

[86] See, e.g., Délégation Francaise au Groupe de Contrôle de lAcier, Liaison Charbon-Acier Plan Schuman: Entretiens du 21 Décembre au Petersberg, Dec. 22, 1950, 81 AJ 137, AN.

In November, Adenauer had given the allies West Germany's own suggestions for the reorganization of coal and steel, which were incorporated into the Combined Steel Group's own proposal.[87] The Germans insisted that the reorganization of the Ruhr industries precede agreement on the Schuman Plan's cartel provisions.[88] The Americans continued to worry about Germany's enhanced bargaining position in the wake of Korea and rearmament. As one memorandum warned, "[T]he Germans appear to be on the verge of demanding that they be relieved of the requirement to deconcentrate the Ruhr coal and steel industries, as a condition of joining the Plan. This position has not yet fully emerged, but it is becoming more prominent in comments from Frankfurt and Paris."[89]

Debate hinged on three key issues. First, the Germans disagreed with the allied plans for reorganizing the steel industry. The allies had liquidated the assets of the major Ruhr steel combines and were now forging new steel companies. The Germans argued that a slightly different composition for some of the larger companies would enhance efficiency.[90]

Second, the Germans desired vertical integration between the coal and steel industries (the *Verbundwirtschaft*). By linking the two industries, steel producers would have closer control over their supply of coke, ensuring the regular delivery of the proper quality. The Ruhr industrialists pointed to "the widely differing qualities of iron ore available" to justify this requirement. In the United States, the automobile industry had pioneered vertical

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[87] Secretary General to Economics Committee Chairman, Nov. 8, 1950, D(50)2472, box 13, General Classified Records, McCloy Papers, RG 466, NA; Warner, *Steel and Sovereignty*, 18–22.

[88] Paris to Department, Dec. 18, 1950, Cable Number 42880, ibid.; Briefing Paper Drafted in the Office of the United States High Commissioner for Germany, Feb. 2, 1951, in U.S. Department of State, *Foreign Relations of the United States, 1951: Europe: Political and Economic Developments* (Washington, DC: Government Printing Office, 1985), 4:87.

[89] Memorandum by the Assistant Secretary of State for Economic Affairs to the Secretary of State, Dec. 14, 1950, in *FRUS, 1950*, 3:766.

[90] Briefing Paper Drafted in the Office of the United States High Commissioner for Germany, Feb. 2 1951, in *FRUS, 1951*, 4:87–88; Warner, *Steel and Sovereignty: The Deconcentration of the West German Steel Industry, 1949-54*, 25–28.

integration to rationalize the acquisition of parts in the supply chain. Though admitting the German argument was "not easy to evaluate," the Americans recognized a similar logic in this case.[91]

The Germans insisted that the *Verbundwirtschaft* was essential. As one Christian Democratic Union expert and steel industry official put it, the Germans felt that deconcentration was "for the purpose of weakening future German partner." He claimed that even Adenaeur's own CDU would find it hard to support an agreement that did not include some steel industry control of the coal mines.[92] Indeed, one reason many Ruhr industrialists objected to reorganization under Law 27 and to the Schuman Plan was the sense that the French were trying to gain "hegemony over German steel as part of their plan to assure their political preeminence on the Continent." German coal was cheaper, and they felt the French wanted to force its price higher in order to compete. The Schuman Plan was simply an effort to introduce dirigiste methods.[93] The opposition Social Democratic Party within West Germany made similar objections to the Schuman Plan. Its leader Kurt Schumacher alleged that the plan was "an unconcealed French attempt to gain control of German Ruhr industry" and a means "to exploit German potential through equalization."[94]

In early January 1951, the West German government laid out its rationale in a memorandum. The West Germans argued that vertical integration was essential for both increasing German production and allowing it to compete in the world market on an equal footing with foreign iron producers, which it maintained were themselves linked with raw

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[91] Briefing Paper Drafted in the Office of the United States High Commissioner for Germany, Feb. 2 1951, in *FRUS, 1951*, 4:88–89; Jeffry A. Frieden, *Global Capitalism: Its Fall and Rise in the Twentieth Century* (New York: W. W. Norton, 2007), 160–65.

[92] Bonn to Frankfurt, Dec. 1, 1950, Cable Number 41499, box 13, General Classified Records, McCloy Papers, RG 466, NA.

[93] Paris to Department, Oct. 18, 1950, Cable Number 38193, ibid.

[94] Bonn to Frankfurt, Dec. 7, 1950, Cable Number 42025, ibid.

materials suppliers. The Germans explained that integration was necessary for the regular and uniform supply of raw materials. German steel companies used iron ores of varying quality relative to the standardized ores used in other countries. This raised the question, however, of why the German steel companies could not contract around this problem through delivery contracts. The Germans explained that delivery contracts could only cover certain qualities of coke and failed to account for other benefits of integration, like sharing energy. Integration, by contrast, created a common interest that allowed for greater flexibility. Blocking integration "would mean a permanent discrimination against German steel works," endangering the very success of the Schuman Plan.

In addition, the Germans emphasized that they were only asking that 25% of their coal output be subject to this arrangement, instead of the 56% of the past. This 25% amounted to only 5% of the whole European coal output. Because this was such a small fraction, there was no danger that foreign producers would be dependent on their German rivals. They concluded by pointing to the heavily integrated structure of American steel, against which Germany's proposals "seem very modest." The memorandum concluded by underscoring that the German interpretation was permissible under Law 27.[95]

For the French, the German government was simply advancing the same old arguments of the German Konzerne, masking their true motivations behind unconvincing technical arguments.[96] Still, the Americans did not want "to give the Germans any impression that the Allies are deliberately lowering the efficiency of the Ruhr steel industry for their own advantage" by blocking vertical integration. Yet the French were using the

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[95] Memorandum on the Integration of the Coal, Iron, and Steel Industries Pursuant to Law No. 27, Jan. 8, 1951, 81 AJ 137, AN; Memorandum Wilner, Mar. 4, 1951, ibid.

[96] Report by Bureau of meeting between the Steel Control Group and German experts, Jan. 16, 1951, 81 AJ 137, AN.

negotiations to advance the relative position of their own steel industry. They sought to use the Schuman Plan to ensure the success of the Monnet Plan, and they were dependent on German coke. The French did not want a situation where coal-steel integration gave Germans access to coke that the French did not have. The entire purpose of the Schuman Plan was to "create an *equal basis for competition*."[97] As a French memorandum explained, there was nothing wrong with vertical integration per se. For example, it made sense that a single company produce pig iron, raw steel, and then sheet steel, with each product being the basis for the next stage. But it was different when "an enterprise furnishes at the same time both itself and its competitors," as with coal mines that supplied the steel industry and also other buyers. Such an arrangement would endanger competition.[98]

The Americans were well aware of the French desire for German coal—after all, it was one of the fundamental purposes of the Schuman Plan. Ambassador Bruce warned the State Department that the French doubted American willingness to break up the vertical concentrations within the German coal and steel industry. This had implications for competition within Europe. "It is very doubtful that French government can break power of its steel cartel and convince its public that equal treatment is being granted," Bruce cabled, "if German steel industry is permitted to maintain what in French mind is an overwhelming advantage." Monnet was under considerable domestic pressure to show that he was procuring the French "equitable access" to German coking coal.[99]

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[97] Briefing Paper Drafted in the Office of the United States High Commissioner for Germany, Feb. 2, 1951, in *FRUS, 1951*, 4:88–89 (emphasis added).

[98] Paris to Secretary of State, Dec. 9, 1950, Cable Number 42759, box 13, General Classified Records, McCloy Papers, RG 466, NA.

[99] Paris to Department, Dec. 18, 1950, Cable Number 42875, and Paris to Secretary of State, Jan. 8, 1951, Cable Number 44002 RG 466, ibid. Germany was not alone in favoring cartels. In 1946, French steel producers concerned about Monnet's efforts to modernize French industry had reconstituted a cartel, the

The third issue precluding an agreement with the Germans concerned the dissolution of the Deutscher Kohlenverkauf (DKV), a coal sales agency set up by the allies in 1948 to regulate the sale of coal as a successor to German coal syndicates.[100] The DKV had a monopoly on the sale of coal, whereas Law 27 contemplated the creation of many independent sellers. Though initially finding a single agency convenient for facilitating the Ruhr Authority's and the High Commission's supervision, the French had come to oppose the DKV, reasoning that a single seller of coal would lead German steel producers to push for a single buying agency, leading to "the kind of supercartelization which the plan is intended to do away with." Convenience gave way before the overriding objective of ensuring the separation of the German coal and steel industries, for the French saw a connection between the sales agency and integration.[101]

The German mining industry argued that the DKV furthered the Schuman Plan. While the DKV could prospectively ensure an adequate and regular supply of coal for the common market, the High Authority would have only retroactive authority to deal with shortages and was likely to disrupt and undermine contracts. They thought it was foolish to abandon existing institutions for ineffective new mechanisms.[102] German trade unions were especially worried that without a single agency to regulate coal sales, marginal mines would have to be shut down and their workers would lose their jobs. The trade unions were nevertheless more supportive of the Schuman Plan and more willing to compromise than

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Comptoir Français des Produits Sidérurgiques. It would lose its monopoly position in 1952. Gillingham, *Coal, Steel, and the Rebirth of Europe*, 137–43; Diebold, *The Schuman Plan*, 125, 127, 351.

[100] Warner, *Steel and Sovereignty*, 22–24, 29.

[101] Briefing Paper Drafted in the Office of the United States High Commissioner for Germany, Feb. 2, 1951, in *FRUS, 1951*, 4:89 Note de Valery, Oct. 24, 1950, 81 AJ 137, AN; Telegram, Direction des Affaires Economiques, Affaires Etrangères, to Bonn, Oct. 26, 1950, ibid; Projet d'instructions proposé par Monnet to Schuman, Dec. 22, 1950, ibid.

[102] DKBL to Adenauer & Annex, Feb. 7, 1951, 81 AJ 137, AN; Prise de position au sujet de l'organisme de vente commun, Feb. 7, 1951, ibid.

the leadership of the Social Democratic Party, whom they traditionally supported.[103] The Americans saw no way that a blatant monopoly like the DKV could continue—especially as the High Authority of the ECSC would have the authority to deal with the sorts of problems that worried union leaders.[104]

As Monnet pointed out to Schuman, the Americans were already convinced of the need to break up the DKV and it was simply a matter of convincing the Germans. On the question of vertical integration, however, the American views were more nuanced. According to Monnet, the French had struggled to bring the reluctant Americans around to an acceptable compromise that would satisfy French concerns.[105] Adenauer, in turn, recognized the divergences between the United States and France, and he told the French economist Pierre Paul Leroy-Beaulieu that he thought a compromise was more feasible on the question of vertical integration than on the question of the DKV.[106]

In early 1951, McCloy struggled to find a solution to "this very delicate situation." For Ambassador Bruce in Paris, letting the Germans sign the ECSC treaty without resolving the antitrust issues would constitute the "abandonment of [the] whole project." The United States needed to be firm. "We should not permit Germans to use creation of Schuman Plan as a device to avoid deconcentration of Ruhr industry under Law 27, particularly when failure to deconcentrate Ruhr industry would seriously jeopardize success of Schuman Plan," he wrote. "Even after deconcentration, size of industrial units in Ruhr will be among largest in Europe and they will have completely equal status with other industrial units under

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[103] Bonn to Frankfurt, Dec. 21, 1950, Cable Number 43137, box 13, General Classified Records, McCloy Papers, RG 466, NA; Adenauer to McCloy, Feb. 28, 1951, 81 AJ 137, AN.

[104] Briefing Paper Drafted in the Office of the United States High Commissioner for Germany, Feb. 2, 1951, in U.S. Department of State, *FRUS, 1951*, 4:89.

[105] Monnet to Schuman, Dec. 22, 1950, 81 AJ 137, AN.

[106] Letter of Leroy-Beaulieu Concerning Interview with Adenauer, Jan. 17, 1951, 81 AJ 137, AN.

Schuman Plan."[107] Collaborating closely with Bowie, Tommy Tomlinson, and other Americans, Monnet also emphasized that it was unacceptable for the Germans to claim that antitrust provisions were imposed upon them as an excuse to wiggle out of their commitments later on: "It cannot be black, and semi-white, and semi-black. Now is the time to decide."[108]

The U.S. desire to see the Schuman Plan succeed meant that "the problem of deconcentration of the Ruhr coal and steel industries can be treated somewhat differently than would otherwise be the case." The Americans in Germany worked with West German Economics Minister Ludwig Erhard to develop acceptable solutions to the outstanding issues.[109] On the question of the appropriate composition of the unit steel companies, the Americans were willing to make some concessions and to permit some combinations requested by the Germans.[110] Recognizing the merits of the German position on integration, yet also sympathetic to French concerns for equalization, McCloy's office also suggested a compromise on vertical integration: the Germans could have partial integration, but not to an extent that they would be fully independent of the coal shortages which could hamper producers in other countries.[111]The Americans settled on permitting the German steel producers to form ties to coal mines providing for up to 75% of their coking coal

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[107] Paris to Department, Jan. 20, 1951, Cable Number 44915, box 24, General Classified Records, McCloy Papers, RG 466, NA.

[108] Extract of Telephone Conversation between Monnet and Bowie, Jan. 15, 1951, 81 AJ 137.

[109] McCloy to Adenauer, Feb. 12, 1951, D(51)190B, box 25, General Classified Records, McCloy Papers, RG 466, NA; Memorandum sur la Deconcentration de la Ruhr et la Conclusion des Negociations sur le Plan Schuman, Mar. 9, 1951, 81 AJ 137, AN..

[110] McCloy to Adenauer, Feb. 12, 1951, D(51)190B, box 25, General Classified Records, McCloy Papers, RG 466, NA; Warner, *Steel and Sovereignty*, 25–28, 41.

[111] Briefing Paper Drafted in the Office of the United States High Commissioner for Germany, Feb. 2, 1951, in U.S. Department of State, *FRUS, 1951*, 4:88–89.

requirements—a figure that was higher than the French would have liked.[112] This would "permit[] the German steel enterprises to own coal in sufficient amounts to permit quality control . . . but at the same time to limit their ownership so that at times of capacity or near capacity operation, they, like the other steel producing enterprises, would have to compete in the market for Ruhr coal."[113] Finally, they were willing to disband the DKV gradually, allowing a transition period for adjustment.[114] In addition, a provision was added to the proposed treaty prohibition national discrimination over the size of a business.[115]

Even this, however, did not settle the matter, as the Americans blamed the "uncompromising attitude of the Ruhr industrialists" for blocking "approval of compromises already agreed to by Minister Erhard as reasonable." Vertical integration posed the biggest problem. McCloy argued that the compromise proposal allowing the Ruhr steel companies to own 75% of their coking needs was more than enough. "Thus their insistence on their full demands supports French and our own fear that purpose is to attain artificially preferred position for German steel which will enable its growth at expense of normal growth of competing European industry," McCloy wrote.[116] The French concurred with this assessment. As Monnet's deputy Etienne Hirsch told the West German chancellor, "French government had accepted fact that Schuman Plan would give an important advantage to German coal and steel industries because of their favorable conditions of production; no

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[112] McCloy to Adenauer, Feb. 12, 1951, D(51)193/B, box 25, General Classified Records, McCloy Papers, RG 466, NA; Note Relating to Conversations Between American and German Experts, Jan. 31, 1951, 81 AJ 137, AN; Warner, *Steel and Sovereignty*, 29–35.

[113] Memorandum Wilner, Mar. 4, 1951, 81 AJ 137, AN.

[114] Briefing Paper Drafted in the Office of the United States High Commissioner for Germany, 2 Feb. 1951, in *FRUS, 1951*, 4:89; McCloy to Adenauer, Feb. 12, 1951, D(51)193/B, box 25, General Classified Records, McCloy Papers, RG 466, NA; Note Relating to Conversations Between American and German Experts, Jan. 31, 1951, 81 AJ 137, AN.

[115] Le Plan Schuman et la Deconcentration des Industries de la Ruhr, 81 AJ 137, AN.

[116] United States high Commissioner for Germany to the Secretary of State, Feb. 19, 1951, in *FRUS, 1951*, 4:91–93.

one however could accept the undue artificial advantages which would result from the excessive degree of vertical concentration which the Ruhr industry was demanding."[117]

Adenauer, however, continued to stall. On February 24, 1951, he wrote McCloy: "[I] do not believe that the arrangement proposed on the German side, with regard to the structure of an integration of industrial operations (Verbundwirtschaft), would result in any dislocations even in periods of a possible coal shortage, nor that it would be inconsistent with the spirit of Law No. 27." Adenauer nevertheless promised to "very carefully review the whole situation."[118]

Despite their frustration with the German position, the Americans grasped its logic. Ambassador Bruce laid out the issues in a February 21 cable to Acheson. "The basic premise of the plan," Bruce wrote, "is that customers and resources in common market are open to every industry without discrimination and under terms which permit most efficient producers to draw maximum benefits from their efficiency." It was unacceptable for Ruhr industry to have priority access to coal and thereby "regain its previous artificially predominant role in Europe." But why was Ruhr dominance "artificial?" As Bruce acknowledged, "Without Schuman Plan, Ruhr steel would eventually control coking requirements anyway, and French and European steel industry would not even have hope of equitable treatment. In addition, anti-trust provision (article 61) of Schuman Plan treaty as weakened in recent negotiations would almost certainly permit Ruhr steel industrialists to acquire control of coal production in addition to that permitted under McCloy-Erhard compromise." And given that the High Authority could step in and allocate resources

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[117] Paris to State, Feb. 27, 1951, Cable Number 47454, D(51)244, box 25, General Classified Records, McCloy Papers, RG 466, NA.

[118] Adenauer to McCloy, Feb. 20, 1951, D(51)225/A, ibid.

equitably in case of a shortage, it was not obvious why the German demands for integration were problematic. The Germans were pressing so aggressively because their position had considerable merit.[119]

The Germans, in short, had "managed to keep questions open to their advantage by swinging back and forth between conversations in Germany on deconcentration and negotiations [in Paris] on Schuman Plan." The French wanted to hurry and wrap things up. Bruce suggested that their only real bargaining chip was the threat of Monnet's resignation from the conference. But he also pointed to one further option. The High Commissioner could use his authority within Germany to force a decision.[120] Back in June 1950, Acheson had considered the possibility that U.S. influence might be needed to ensure that the outcome of negotiations accorded with the vision Schuman had announced in May 1950.[121] The Americans, however, had hesitated to impose a solution on the Federal Republic.[122]

Now, however, McCloy felt that he had no choice. On March 2—after receiving a letter from the chancellor that suggested little progress—McCloy met with Adenauer. "After extended discussion of our approach and supporting data," the high commissioner reported, "Chancellor indicated he would accept our 75 percent formula as basis for solution and suggested further discussions . . . to work out details." Adenauer also asked McCloy to meet with trade union representatives and Ruhr industrialists. McCloy left the meeting optimistic that a solution was at hand.[123]After McCloy's meeting with the trade union representatives

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[119] United States high Commissioner for Germany to the Secretary of State, Feb. 19, 1951, in *FRUS, 1951*, 4:93–94.

[120] Ibid., 95–96.

[121] Secretary of State to Certain Diplomatic Offices, June 2, 1950, in *FRUS, 1950*, 3:715.

[122] McCloy to Adenauer, Feb. 12, 1951, D(51)190B, box 25, General Classified Records, McCloy Papers, RG 466, NA.

[123] Secretary of State to Certain Diplomatic Offices, June 2, 1950, in U.S. Department of State, *FRUS, 1951*, 4:97–98; Memorandum, Mar. 1, 1951, AMG 13/2/9, Monnet Papers.

and Ruhr industrialists, who "bowed to the inevitable and . . . accepted the United States views on these two matters," the chancellor sent the high commissioner a March 14 letter accepting the compromise.[124] The Americans had "won the battle" and McCloy's German antagonists would "not do anything which might endanger the conclusion of the Schuman Plan."[125] With a plan for reorganization under Law 27 within the Federal Republic now set, attention once against shifted to the Schuman Plan. The treaty establishing the European Coal and Steel Community was initialed on March 19, 1951, and formally signed a month later on April 18.[126]

In pressing the Germans on deconcentration, the primary American concern was geopolitical, yet officials recognized that geopolitical concerns were intimately connected to economic ones. As Economic Cooperation Administrator Paul Hoffman put it, the "major objective is to harmonize French-German relations by reducing threat that individual nations will artificially stimulate development of national coal and steel industries." Within the

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[124] United States High Commissioner for German to the Secretary of State, Mar. 15, 1951, in ibid., 102; Kirkpatrick to Bevin, Mar. 8, 1951, in *DBPO*, Series II, 1:420–21.

[125] Oppenheimer to Bowie, 6 Mar. 1951, D(51)289/C, box 25, General Classified Records, McCloy Papers, RG 466, NA.

Historians have disagreed over just how much pressure McCloy brought to bear. According to Gillingham, McCloy "shov[ed] deconcentration under Law 27 down Chancellor Adenauer's throat" in order to allay French fears and to save the Schuman Plan. Gillingham, "Solving the Ruhr Problem: German Heavy Industry and the Schuman Plan," 423. He also characterizes McCloy's meeting with Adenauer as a "dressing-down." Gillingham, *Coal, Steel, and the Rebirth of Europe*, 260, 266, 279–80. Thomas Schwartz tends to take a more moderate view, playing up McCloy's "personal diplomacy" and his "long discussion" preceding Adenauer's willingness to compromise. Schwartz, *America's Germany*, 195–97. Reacting to early German historiography that tended to see Adenauer accepting unfavorable terms, Isabel Warner sets herself against Gillingham and focuses on the considerable concessions that the West Germans won. She argues that Adenauer was able to stay above the fray by forcing McCloy to negotiate directly with steel industrialists, moreover. Warner, *Steel and Sovereignty*, 41–42.

But Gillingham's and Warner's arguments are not as different as they seem. U.S. support for France's position on deconcentration (Gillingham's emphasis) followed from West Germany's considerable leverage (Warner's position). Moreover, Gillingham believes the combination of the Schuman Plan and Law 27 failed to deconcentrate Ruhr industry and instead restored its power over the long run. As he writes, "Yet Monnet did not win: The settlement bought at such a high price could not be maintained; the treaty was full of holes; and in defending itself against the Franco-Americans the Ruhr gained both the foreign and the domestic supported needed in order to burst the bonds placed upon it." Gillingham, *Coal, Steel, and the Rebirth of Europe*, xi, 266.

[126] Ambassador in France to the Secretary of State, Mar. 20, 1951, in *FRUS, 1951*, 4:106 n.2.

resulting single market, "emphasis should be on increased productivity, lower prices, and competition." But these were subsidiary considerations since "we consider the principle of the single market secondly to the supranational principle in overall importance."[127]

V. Conclusion

With the signing of the treaty establishing the ECSC, a major document of European law included significant antitrust provisions drafted by the American legal experts. To ensure its success, moreover, the Americans had received the Federal Republic's assent to the deconcentration and reorganization of Germany's coal and steel industries. Clearly, the U.S. effort to promote competition in Europe had not died with the emergence of the Cold War in the late 1940s. But was this a successful example of Americanization?

The British suggested not. As officials in the Economic Section of the Cabinet Office wrote in March 1951, "The Americans appear to have taken the initiative to force a compromise between the French and the Germans on some outstanding points, and in the course of it to have sacrificed some of their own doctrines."[128] McCloy and the French High Commissioner conceded as much.[129] In all the areas of the dispute with the West Germans, the Americans had made considerable compromises. They had left steel combinations intact, they had accepted considerable vertical integration, and they agreed to a transition period before disbanding the DKV. Why were the Americans willing to compromise? Why did they not adopt a harder line?

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[127] Ambassador in France to the Secretary of State, Mar. 20, 1951, in *DBPO*, Series II, 1:445.

[128] Minute from Mr. Butt to Mr. Hall (Cabinet Office), Mar. 20, 1951, in *DBPO*, Series II, 1:445.

[129] Extraits du Proces-Verbal de la 5ème Reunion du Conseil de la Haute Commission Alliée, Mar. 29 1951, 81 AJ 137, AN.

The historian Charles Maier has identified antimonopoly and productivity as the two principles at the heart of American thinking about the economy during this period. In the 1930s, monopoly had again become a major political concern. This theme weakened, however, with the economic mobilization for World War II, which produced a countervailing emphasis on productivity rooted in increased output and economic growth. "Thus by 1945 the two themes of productivity and monopoly formed the conceptual axes along which Americans located economic institutions." The tension between these two approaches would color the way Americans approached postwar reconstruction overseas, and American policymakers would draw on their domestic experiences as they sought to reconstruct the international economy after the war.[130] "[T]he stress on productivity and economic growth [overseas] arose out of the very terms in which Americans resolved their own organization of economic power," Maier writes. "Americans asked foreigners to subordinate their domestic and international conflicts for the sake of higher steel tonnage or kilowatt hours precisely because agreement on production and efficiency had helped bridge deep divisions at home."[131]

The Schuman Plan bears clear traces of the politics of productivity. Schuman had tailored his original May 9 proposal on just those terms, in part to allay American fears that the ECSC was merely a giant cartel. By pooling resources and creating healthy competition, France, Germany, and the other members of the community would have to set aside their differences and focus on working together. The reward would come through expanded production, lower prices, and increased employment. As the member states came to

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[130] Maier, *In Search of Stability*, 123, 130–34.
[131] Ibid., 123.

appreciate the benefits of working together, the divisions that had produced two world wars would disappear.

Creating an institutional framework within Europe that could turn such a vision into reality proved difficult, however. For France, the Schuman Plan needed to provide equal access to German coal, thereby ensuring France the resources needed to make the Monnet Plan's vision of industrialization a success. To the Germans, however, this vision promoted inefficient French steel production at the expense of more efficient German production. With the onset of the Korean War and the decision to rearm West Germany, moreover, the Federal Republic's major objectives—above all treatment as an independent and sovereign nation—seemed within reach without such a process of equalization.

While the centripetal forces pulling France and Germany together had seemed promising in May 1950, by the fall it seemed that centrifugal, nationalist tendencies might keep them apart. For the United States, it was crucial to find a way to bring Western Europe together. "In US view," Acheson had cabled in March 1951, just after the Germans had capitulated on Law 27, "Western Eur can only be strong if sources of longstanding tensions between Ger and its neighbors are eliminated[;] Schuman Plan holds promise of far-reaching results in that direction. Questions of immed advantages or disadvantages accruing to individual countries as a result institution Plan wld appear be insignificant by comparison with this major consideration."[132]

For Monnet and for his American supporters, the antimonopoly principle became a means to this goal. American antitrust law would serve as a safeguard that could constrain German industry until the rewards of increased productivity spilled over and eradicated

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[132] Secretary of State to the Embassy in the Netherlands, Mar. 16, 1951, in *FRUS, 1951*, 4:104.

mutual suspicion. It was an instrument by which the high authority could adjust the industrial balance to make sure the benefits of economic recovery flowed to all members of the community.

But American antitrust law was an effective instrument because it was able to accommodate both values, those of productivity and those of antimonopoly. Through the Schuman Plan's anticartel provisions and through reform of Germany industry under Law 27, the French could convince themselves that they had found a means to contain and control the economic bases of German power. Outright restrictions on German industry would have upset their American allies, however, who were convinced that a German recovery was a prerequisite for a European recovery. By using American antitrust law to impose such limits, however, they could convince the Americans that their goal was not to hamstring Germany but instead to reform its economy, making it both more democratic and more efficient. By framing limits in terms of antitrust and competition, the French ensured American support in their negotiations with Germany, and they succeeded in getting McCloy to advance their position to Adenauer and the Germany industrialists.

Yet the Federal Republic of Germany emerged better than before. In the first place, the West Germans got what they most wanted: to be treated like a sovereign nation and respected as an equal partner. In the process, they used American policymakers' increasing reliance on the politics of productivity to undercut the French turn to antimonopoly. At a time when lawyers and economists were increasingly thinking about competition in economic terms rather than moral ones, they made powerful arguments that the status quo

made economic sense.[133] The ultimate agreement reflected these economic considerations, ensuring that the German industrialists could turn anticartel provisions against the French even as the French sought to use them to constrain Germany. The ultimate meaning and effect of these provisions would have to be worked out over time.

Indeed, men like Robert Bowie and John McCloy were not Brandeisians committed to a European coal and steel industry dominated by small producers. They did feel that the DKV was an unacceptable monopoly, but they saw merit in the German position on vertical integration and compromised with the Germans on the number of unit steel companies. Ultimately, the question was not between competition and concentration, but how best to reconcile the two.[134] As William Diebold put it in a 1950 *Foreign Affairs* essay, "Perhaps the Schuman Plan will create what Raymond Aron calls 'semi-private, semi-public dirigisme.' This would not be incompatible with a certain amount of competition which might be limited in type and scope. In any case, as Americans should know, competition among steel plants is not the same as competition among grocery stores."[135]

For the Americans, the primary purpose of the Schuman Plan was to reconcile France and Germany, integrating West Germany into the Western bloc and consolidating the alliance against the Soviet Union in a Cold War that had recently turned hot. As a result, decartelization and deconcentration were used to create the basic conditions in the Ruhr coal and steel industries necessary to make the Schuman Plan acceptable to both France and

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[133] Alan Brinkley, "The Antimonopoly Ideal and the Liberal State: The Case of Thurman Arnold," *Journal of American History* 80 (Sept. 1993): 557–79.

[134] As Louis Lister has written, "Efficiency is . . . so closely related to large-scale operations in the coal and steel industries that concentrations can be prevented only by sacrificing some of the cost advantages to the greater long-term advantage of competition. . . . The practical alternative in industries like steel or coal is therefore between different degrees of oligopoly, not between oligopoly and perfect competition." Lister, *Europe's Coal and Steel Community*, 174.

[135] William Diebold, Jr., "Imponderables of the Schuman Plan," *Foreign Affairs* 29 (October 1950): 129.

Germany. U.S. policymakers put equality before efficiency for the sake of resolving the major political problem in Western Europe. They put geopolitics first. But because American antitrust law was a means of achieving this settlement, the Americans could tell themselves that they had been faithful to their economic traditions and had advanced the program of economic reform enshrined at Potsdam. In short, law allowed everyone—French, German, and American—to focus on what they were gaining and to minimize what they might be giving up. Its ambiguity made it a useful instrument of foreign policy for each of the three nations.

CHAPTER FIVE

Eisenhower and Antitrust in a Globalizing World

On January 20, 1953, Dwight Eisenhower took the oath of office and became president of the United States. For the first time since the Great Depression, a Republican occupied the White House. In his memoirs, Eisenhower claimed that his legacy hinged on the fate of the New Deal state. His administration would either represent "the first great break with the political philosophy of the decades beginning in 1933," or "only a slight impediment to the trend begun in 1933 under the New Deal."[1] Eisenhower's task, as he defined it, was to lead the United States away from the "creeping socialism" of his Democratic predecessors, to rein in spending and centralized federal control, and to thereby secure a more sustainable future for the country in which "work and sweat" would replace "a paternalistic state to guide our steps from cradle to grave."[2]

But while Eisenhower reviled the New Deal, and surrounded himself with conservative opponents of FDR's policies, he was not a radical.[3] When his brother Edgar suggested that Eisenhower's policies were indistinguishable from his Democratic

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[1] Dwight D. Eisenhower, *The White House Years: Waging Peace, 1956-1961* (Garden City, NY: Doubleday & Company, Inc., 1965), 654.

[2] The President's News Conference of June 17, 1953, in Dwight D. Eisenhower, *Public Papers of the Presidents of the United States: Dwight D. Eisenhower,* vol. 1, *1953-1960,* (Washington, DC: Government Printing Office, 1960), 433; Nov. 28, 1959, in Dwight D. Eisenhower, *The Eisenhower Diaries*, ed. Robert H. Ferrell (New York: W. W. Norton & Company, 1981), 374.

[3] William E. Leuchtenburg, *In the Shadow of FDR: From Harry Truman to Barack Obama*, 4th ed. (Ithaca: Cornell University Press, 2009), 49–57; see also Gary W. Reichard, *The Reaffirmation of Republicanism: Eisenhower and the Eighty-Third Congress* (Knoxville: The University of Tennessee Press, 1975), 229–37.

predecessors, Ike objected. Unlike certain "Texas oil millionaires" who wanted to eliminate New Deal programs, Eisenhower recognized political limits. "Should any political party attempt to abolish social security, unemployment insurance, and eliminate labor laws and farm programs," he famously wrote, "you would not hear of that party again in our political history." But Eisenhower insisted that he was no New Deal liberal.[4] He sought a "middle-of-the-road" approach that slowed the growth of government even if he knew better than to "turn back the clock."[5]

This middle-of-the-road approach extended to foreign policy, too. While sharing many of Truman's assumptions about the dangers of the Soviet Union, Eisenhower complained that shortsighted thinking and a lack of strategic vision had led to wasteful and unsustainable Cold War spending. As in the domestic context, Ike sought that "some middle line be determined between desirable strength and unbearable cost." By identifying "proper priorities," the United States could achieve "defensive strength under limited budgets."[6] "I most firmly believe," Eisenhower emphasized, "that *the financial solvency and the economic soundness of the United States constitute together the first requisite to collective security in the free world.* That comes before all else."[7] According to Robert R. Bowie—who served as general counsel under John McCloy in Germany and headed Policy Planning at the State Department under

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[4] Eisenhower to Edgar Newton Eisenhower, Nov. 8, 1954, in Dwight David Eisenhower, *The Papers of Dwight David Eisenhower*, ed. Louis Galambos and Daun Van Ee, vol. 15, *The Presidency: The Middle Way* (Baltimore: The Johns Hopkins University Press, 1996), 1386.

[5] The President's News Conference of June 17, 1953, in Eisenhower, *PPP, 1953*, 433; Nov. 28, 1959, in Eisenhower, *Eisenhower Diaries*, 374. On Eisenhower's moderate conservatism, see David L. Stebenne, *Modern Republican: Arthur Larson and the Eisenhower Years* (Bloomington, IN: Indiana University Press, 2006).

[6] Eisenhower to Edward Everett Hazlett, Jr., Apr. 27, 1949, in Eisenhower, *Papers of Dwight David Eisenhower*, ed. Louis Galambos, vol. 10: *Columbia University* (Baltimore: The Johns Hopkins University Press, 1984), 564.

[7] Eisenhower to Lewis Williams Douglas, May 20, 1952, in Eisenhower, *Papers of Dwight David Eisenhower*, ed. Louis Galambos, vol. 13: *NATO and the Campaign of 1952* (Baltimore: The Johns Hopkins University Press, 1989), 1230.

Eisenhower—and historian Richard H. Immerman, Eisenhower sought "a comprehensive, integrated, and coherent strategy that established objectives for the long and short term, set priorities, exploited opportunities and assets, and took into account America's finite resources and the limits on what it could expect to accomplish."[8]

Over the past few decades, revisionist historians have abandoned a conventional portrait of a passive and weak chief executive, and have recast Eisenhower as an effective conservative in battles over fiscal and monetary policy and in his efforts to constrain the military-industrial state.[9] As historians William M. McClenahan, Jr., and William H. Becker have argued, "He recognized that the international and domestic circumstances of the postwar world were significantly different from those faced by his three immediate predecessors, Herbert Hoover, Franklin D. Roosevelt, and Harry S. Truman." Drawing on "traditional conservative precepts of fiscal management," Eisenhower sought to restrain "a federal government grown large because of the Depression of the 1930s, a global war, and the beginnings of the Cold War" while honoring the United States' new international obligations.[10]

Yet Eisenhower could only do so much to slow the trends begun in 1933. He may have "*thought* that he could restrain the growth of government," but the conventional wisdom holds: "Eisenhower's chief contribution was to make the New Deal permanent by

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[8] Robert R. Bowie and Richard H. Immerman, *Waging Peace: How Eisenhower Shaped an Enduring Cold War Strategy* (New York: Oxford University Press, 1998), 49, 75, 78–79.

[9] William M. McClenahan, Jr., and William H. Becker, *Eisenhower and the Cold War Economy* (Baltimore: The Johns Hopkins University Press, 2011), xiii–xiv; Leuchtenburg, *In the Shadow of FDR*, 53; Iwan W. Morgan, *Eisenhower Versus "The Spenders": The Eisenhower Administration, the Democrats and the Budget 1953-60* (New York: St. Martin's Press, 1990), 177–81; John W. Sloan, *Eisenhower and the Management of Prosperity* (Lawrence, KS: University Press of Kansas, 1991), 3; Gerard Clarfield, *Security with Solvency: Dwight D. Eisenhower and the Shaping of the American Military Establishment* (Westport, CT: Praeger, 1999).

[10] McClenahan and Becker, *Eisenhower and the Cold War Economy*, x–xi, xiv; Bowie and Immerman, *Waging Peace*, 70–80.

incorporating it in a bipartisan consensus." Though he did dramatically reduce defense spending over the course of his two terms, Ike also expanded Social Security, increased federal spending on education, and created the largest public works project in U.S. history, the interstate highway system.[11] Ike's conservative vision was more coherent and effective than scholars have traditionally thought. But as William E. Leuchtenburg ultimately concluded, Eisenhower's presidency was in the end "merely an interlude in an era of Democratic dominance rather than, as the general hoped, the beginning of a Republican epoch."[12]

Perhaps nothing underscores Eisenhower's mixed conservative record than his appointment of Earl Warren and William Brennan to the U.S. Supreme Court. As Chapter 3 discusses, the New Deal Court had sanctioned a dramatic shift of power to the federal government. After decades of trying to maintain traditional limits on Congress' commerce power, the Supreme Court began to defer to congressional judgments about economic policy.[13] Building from this New Deal foundation, the Warren Court turned its attention to enforcing fundamental rights using the Bill of Rights and the Fourteenth Amendment, dramatically expanding judicial power.[14]

Though the Supreme Court accepted broad congressional authority over the economy, the federal courts still had a central role in shaping economic policy, particularly

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[11] Leuchtenburg, *In the Shadow of FDR*, 48–49; McClenahan and Becker, *Eisenhower and the Cold War Economy*, xiv (emphasis added); Kevin M. Kruse, *One Nation Under God: How Corporate America Invented Christian America* (New York: Basic Books, 2015), 87. This is not to say that Eisenhower was "*trying* to be a farsighted consolidator of past social legislation." Recognizing the outcome of Eisenhower's tenure is different from "assign[ing] historic credit to a man for achievements he never attempted." Emmet John Hughes, *The Ordeal of Power: A Political Memoir of the Eisenhower Years* (New York: Atheneum, 1963), 333–34.

[12] Leuchtenburg, *In the Shadow of FDR*, 60.

[13] G. Edward White, *The Constitution and the New Deal* (Cambridge, MA: Harvard University Press, 2000), 199. But local governments would continue to have a powerful role. Mason B. Williams, *City of Ambition: FDR, La Guardia, and the Making of Modern New York* (New York: W. W. Norton & Company, 2013).

[14] United States v. Carolene Products Co., 304 U.S. 144, 152 & n.4 (1938).

competition. In the first place, the Justice Department was making headway against cartels. Overall, Thurman Arnold and Wendell Berge's antimonopoly vision achieved only partial success. Congress rejected an International Trade Organization designed to promote free trade and eliminate cartels. Occupation authorities in Germany and Japan introduced new antimonopoly norms but left intact the basic structure of major industries. Nonetheless, they also made real gains. In addition to *Alcoa*, a successful suit against the National Lead Company in 1945 generated series of cases that undermined patent accords, joint ventures, and other legal arrangements that allowed U.S. companies to participate in international cartels.[15]

Moreover, in 1950, Congress passed the Celler-Kefauver Act, the most important antimerger statute since the 1914 Clayton Act. This legislation sought to close major loopholes that allowed corporations to bypass the Clayton Act's ban on stock acquisitions by acquiring a competitor's physical assets. Underlying the act was the antimonopoly sentiment that had invigorated antitrust enforcement during the late New Deal. Proponents believed that large companies within industries reduced competition and led to monopoly. There was a general hostility to large firms: aligned with the state, they would lead to fascism; set against the state, the government would have to assume control, leading to communism. While Eisenhower never regarded antitrust as a priority, his administration was committed to

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[15] United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945), aff'd 332 U.S. 319 (1947); Graham D. Taylor, "Debate in the United States over the Control of International Cartels, 1942-1950," *International History Review* 3 (July 1981): 397–98; Wyatt C. Wells, *Antitrust and the Formation of the Postwar World* (New York: Columbia University Press, 2002), 125–36; 201–05; McClenahan and Becker, *Eisenhower and the Cold War Economy*, 158–59; John Gillingham, *Coal, Steel, and the Rebirth of Europe, 1945-1955: The Germans and French from Ruhr Conflict to Economic Community* (New York: Cambridge University Press, 1991), 352–55, 366–67.

enforcing the law and giving the untested Celler-Kefauver Act teeth by establishing its effectiveness in the courts.[16]

The resulting cases had a profound effect on corporate merger policy. As Tony Freyer has observed, "The period from the end of World War II to 1970 witnessed the most active antitrust enforcement yet." This reshaped corporate decision-making. In particular, the Eisenhower Justice Department won important victories against horizontal and vertical mergers within industries. As a result, large companies turned to conglomerate mergers, in which the two companies are in unrelated lines of business. As Neil Fligstein explains, "The unintended consequence of the Celler-Kefauver Act was that it set up the preconditions for the third large merger movement [in U.S. history, during the 1950s and 1960s]. But the mergers of the late 1950s and 1960s did not produce monopolies or oligopolies. Instead they produced conglomerates and the large modern diversified multinational firm."[17]

These legal developments occurred against the backdrop of major changes in the global economy. By the 1950s, the industrialized economies left devastated by war had begun to recover, and the United States faced growing competition from Western Europe and increasingly Japan. To be sure, trade remained a relatively insignificant part of U.S. GDP. Indeed, the GATT made little progress in reducing trade barriers in its first fifteen years of existence. But as the United States' trade position began to decline, protectionist sentiment grew. Moreover, growing imports were only one concern. The 1957 Treaty of

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[16] McClenahan and Becker, *Eisenhower and the Cold War Economy*, 152–53, 155–56; Neil Fligstein, *The Transformation of Corporate Control* (Cambridge, MA: Harvard University Press, 1990), 163–64; Theodore Philip Kovaleff, *Business and Government During the Eisenhower Administration: A Study of the Antitrust Policy of the Antitrust Division of the Justice Department* (Athens: Ohio University Press, 1980), 71, 85.

[17] McClenahan and Becker, *Eisenhower and the Cold War Economy*, 169–74; Tony A. Freyer, *Antitrust and Global Capitalism, 1930–2004* (New York: Cambridge University Press, 2006), 112, 134; Tony Freyer, *Regulating Big Business: Antitrust in Great Britain and America, 1880-1990* (New York: Cambridge University Press, 1992), 6, 281–82; Fligstein, *Transformation of Corporate Control*, 29, 216–18.

Rome established a European Common Market and offered a new boon to economic openness within Europe, but this raised concerns that the United States might be excluded by a new "regionalism" as Europe reduced internal barriers only to raise them externally.[18]

Moreover, though overall levels of trade and investment remained low compared to what would happen in the coming decades,[19] foreign direct investment became an increasingly important part of how companies did business. The end of the Second World War through the 1960s witnessed "unprecedented" FDI, driven by U.S. companies establishing subsidiaries in other developed economies.[20] Concerns about the European Economic Community helped to drive this process. To get around the Common Market's tariff and to take advantage of the possibilities engendered by a wider European market, U.S. companies sought footholds in Europe.[21] Most importantly, in 1958 Great Britain

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[18] Harold G. Vatter, *The U.S. Economy in the 1950's: An Economic History* (New York: W. W. Norton & Co., 1963), 17–21; Thomas W. Zeiler, *American Trade and Power in the 1960s* (New York: Columbia University Press, 1992), 26–30; Douglas A. Irwin, "The GATT in Historical Perspective," *American Economic Review* 85 (May 1995): 325; Paul Krugman, "The Europe-in-Rubble Excuse," The Conscience of a Liberal, *New York Times*, Nov. 19, 2012, http://krugman.blogs.nytimes.com/2012/11/19/the-europe-in-rubble-excuse/; McClenahan and Becker, *Eisenhower and the Cold War Economy*, 201–04; Geoffrey Jones, *Multinationals and Global Capitalism: From the Nineteenth to the Twenty-First Century* (New York: Oxford University Press, 2005), 32; Barry Eichengreen, *The European Economy Since 1945: Coordinated Capitalism and Beyond* (Princeton: Princeton University Press, 2007), 178–82; Alfred E. Eckes, Jr., and Thomas W. Zeiler, *Globalization and the American Century* (New York: Cambridge University Press, 2003), 168–69; Pascaline Winand, *Eisenhower, Kennedy, and the United States of Europe* (New York: St. Martin's Press, 1996), 81–82; Memorandum for the Files, Mar. 9, 1955, CFEP 521 GATT Negotiations, Box 4, Policy Papers Series, U.S. Council on Foreign Economic Policy Records, Dwight D. Eisenhower Library [DDEL].

[19] See Horst Siebert, *The World Economy: A Global Analysis*, Rev. and enlarged 3rd ed. (New York: Routledge, 2007), 13–14.

[20] Neil Rollings, *British Business in the Formative Years of European Integration, 1945-1973* (New York: Cambridge University Press, 2007), 45–46; Jeffry A. Frieden, *Global Capitalism: Its Fall and Rise in the Twentieth Century* (New York: W. W. Norton, 2006), 292–96. Yet in 1979, the level of multinational investment as a share of the global economy was still smaller than in 1914. Jones, *Multinationals and Global Capitalism*, 34.

[21] Rollings, *British Business*, 45–46; George N. Yannopoulos, "Foreign Direct Investment and European Integration: The Evidence from the Formative Years of the European Community," *Journal of Common Market Studies* 28 (Mar. 1990): 235–59; Geoffrey S. Browne, "Changing Trends in World Markets," in *American Business Looks Abroad: Proceedings of the 19th Annual Stanford Business Conference, September 1960*, ed. Robert E. Mangan (Stanford: Stanford University Graduate School of Business, 1961), 16–22; William R. Hewlett, "International Expansion—A Case Study," in ibid., 94–103; Elizabeth Marting, ed., *The European Common Market: New Frontier for American Business.* (New York: American Management Association, 1958); Laurence P. Dowd, ed., *The European Economic Community: Implications for Michigan Business* (Ann Arbor: Bureau of Business

announced the end of restrictions on the convertibility of the pound sterling by nonresidents, and was followed by West Europeans nations on the European continent. Investors could therefore repatriate their earnings.[22]

Decolonization compounded these fears. As more and more nations gained independence, they became battlegrounds in the ideological struggle between the United States and the Soviet Union. Promoting economic development was a way to win and maintain Cold War allies. While Europe remained the center of the Cold War struggle during the 1950s, attention began to shift to the Global South.[23] In consequence, Eisenhower promoted private investment and foreign aid in the developing world, further encouraging the growth in overseas investment.[24]

The multinational corporation emerged from this constellation of legal and economic incentives. But the underlying developments in antitrust law generated considerable opposition from the legal and business community. In particular, business executives and their lawyers complained that global outlook of antitrust regulators was limiting the United States' ability to prevail in the Cold War. Evaluating U.S. policy in 1953, a committee of the American Bar Association observed that "diplomatic efforts to close this gap [between U.S. and foreign values] by imposing our standards of competitive practices

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Research, School of Business Administration, The University of Michigan, 1961); Frieden, *Global Capitalism*, 295–96.

[22] Mira Wilkins, *The Maturing of Multinational Enterprise: American Business Abroad from 1914 to 1970* (Cambridge, MA: Harvard University Press, 1974), 342–43; Jones, *Multinationals and Global Capitalism*, 32; Zeiler, *American Trade and Power in the 1960s*, 24.

[23] Odd Arne Westad, *The Global Cold War: Third World Interventions and the Making of Our Times*, (New York: Cambridge University Press, 2007).

[24] McClenahan and Becker, *Eisenhower and the Cold War Economy*, 185–95; Wilkins, *The Maturing of Multinational Enterprise*, 328, 331–32; Burton I. Kaufman, *Trade and Aid: Eisenhower's Foreign Economic Policy, 1953-1961* (Baltimore: The Johns Hopkins University Press, 1982); Eckes and Zeiler, *Globalization and the American Century*, 176–77; Vatter, *The U.S. Economy in the 1950's*, 17–18; Zeiler, *American Trade and Power in the 1960s*, 30–32.

upon foreign governments have occupied this government's representatives for some eight years, but without much definite result."[25] *Alcoa*, as I. F. Stone suggested, was but a toe-hold.[26] "We cannot by legislative fiat or court decision extend our system to other countries," the ABA committee concluded. "Attempts to do so produce jurisdictional conflicts, offend the rules of comity, and create difficulties for our foreign investors."[27]

These were strong criticisms to level against the foreign economic policy of the United States. For President Eisenhower, victory against the Soviet Union was not enough. How the United States carried on the struggle was also crucial. As McClenahan and Becker have asked, channeling Eisenhower, "How was the United States to engage in that struggle without undermining American political democracy *and* a market economy? Preserving the American way of life was, to Eisenhower, the preeminent objective of the Cold War." As a result, economic policy was inextricably linked to national security policy. Fiscal and monetary policy, the budget, trade and the balance of payments, agriculture, energy, transportation, labor relations, antitrust—all these issues were important components of Eisenhower's vision of national security.[28]

By the 1950s, the debates about antitrust abroad—primarily to regulate the activities of U.S.-based companies, but also affecting foreign companies engaged in joint ventures with U.S. firms or exporting to the United States—that emerged in the *American Banana* case

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[25] American Bar Association, Section of International and Comparative Law, "Report of the Committee on International Trade Regulation: Impact of Antitrust Laws on Foreign Trade," *Proceedings* (Aug. 1953), 81.

[26] I. F. Stone, "Alcoa in Wonderland," *The Nation*, Mar. 24, 1945, 322.

[27] American Bar Association, Section of International and Comparative Law, "Report of the Committee on International Trade Regulation," 78.

[28] McClenahan and Becker, *Eisenhower and the Cold War Economy*, ix, xiv–xv; see also Handbook on United States Foreign Economic Policy, CFEP 510/1, CFEP 510 Overall Foreign Economic Policy (2), Box 3, Policy Papers Series, U.S. Council on Foreign Economic Policy Records, DDEL; cf. Melvyn P. Leffler, "National Security," in in *Explaining the History of American Foreign Relations*, ed. Michael J. Hogan et al., 3rd ed. (New York: Cambridge University Press, 2016), 25–41.

in 1909 and exploded during the Great Depression and World War II had become fully entangled in the politics of the Cold War. Lawyers and business organizations complained that the growing reach of U.S. law impeded the ability of U.S. companies to organize ventures that could compete against the USSR. Lawyers lamented that applying U.S. law to U.S. and foreign companies abroad antagonized allies, whose own legal standards were disregarded. Acknowledging and accepting many elements of this critique, the Eisenhower administration set out to reexamine and reform U.S. policy.

After careful study, however, the Eisenhower administration reaffirmed the policies it had inherited. U.S. courts would continue to exercise jurisdiction in cases involving foreign parties and transactions, and the administration would not generally exempt U.S. companies engaged in overseas business from the antitrust laws. But these debates clarified that something fundamental had changed. Policymakers abandoned the more radical vision of the state's role in regulating corporations, which though never decisive, had led antitrust authorities to cast their attention abroad. By the late 1950s, they no longer shared their New Deal counterparts' sense of urgency about combating *private* restrictive practices like cartels. As joint ventures and mergers and acquisitions constituted an increasing part of U.S. investment abroad, policymakers focus on the *public* barriers to trade, not on the anticompetitive practices of private corporations. The 1950s, therefore, mark an important transition paving the way for the neoliberal policies that would define the late twentieth century.

I. Extraterritorial Backlash

By the 1950s, the antimonopoly sentiment galvanized by the Great Depression had generated a backlash. Many business executives protested that antitrust enforcement had become politicized, and that the Justice Departments of Roosevelt and Truman had used antitrust prosecutions to punish opposition to the New Deal. In a letter during the 1952 campaign, Eisenhower called for antitrust laws that were "fearless, impartially and energetically maintained and enforced. I am for such necessary rules of fair play because they preserve and strengthen free and fair competition, as opposed to monopolies which mean the end of competition. I am for a realistic enforcement of them which they have not had during the past twenty years." Eisenhower was promising to address the complaints of many of his supporters that antitrust enforcement had become a political weapon.[29]

In addition, corporate lawyers expressed concern about the expanding international reach of U.S. antitrust law. A recurring complaint was uncertainty. Lawyers representing business interests had difficulty explaining the law to their clients. As Economist Rosemary D. Hale and lawyer G. E. Hale pointed out, "When foreign commerce is involved all the uncertainties of domestic law are equally present. In addition, however, it is far from clear to what extent our legislation reaches conduct in foreign areas."[30] Sullivan & Cromwell's Arthur Dean echoed this concern in a 1957 address to the Antitrust Law Section of the American Bar Association. "Now, since I am devoted neither to the ostrich school of jurisprudence nor to the practice of making test cases out of my client's affairs as a matter of principle but

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[29] Eisenhower to the National Association of Retail Druggists, Oct. 16, 1952, quoted in *Price Discrimination: The Robinson-Patman Act and Related Matters: Hearings Before the H. Select Comm. on Small Business*, 84th Cong., part 1, 318 (1955); McClenahan and Becker, *Eisenhower and the Cold War Economy*, 152–53. 161.

[30] Rosemary D. Hale and G. E. Hale, "Monopoly Abroad: The Antitrust Laws and Commerce in Foreign Areas," *Texas Law Review* 31 (1953): 493.

at their expense," Dean explained, "I believe that advice to clients on foreign transactions . . . must start with the proposition that the transactions may, and I underscore *may*, be held subject to the operation of United States antitrust laws."[31]

Other commentators warned that this uncertainty was impeding the United States' ability to compete with the Soviet Union. A comment in the *Yale Law Journal* predicted that antitrust liability for business ventures abroad was likely to obstruct U.S. companies' participation in foreign policy initiatives like Truman's Point Four Program, a foreign aid program for developing nations announced in Truman's 1949 inaugural address.[32] Former New York Governor Thomas E. Dewey imagined the decision-making process of a corporate executive trying to decide whether to take on a venture in the developing world. For Dewey, the antitrust laws provided an additional hurdle that was likely to deter foreign investment. "Our Soviet competitors have no such handicaps," he pointed out. The question was stark: "Are we as a nation prepared to risk losing the race to our Communist opponents in this economic war of survival because of a mechanical transference of domestic antitrust doctrine?"[33] Dewey thus turned the Justice Department's wartime rhetoric about cartels and totalitarianism on its head: decartelization helped the United States' totalitarian foes.

These complaints were primarily made by lawyers, to whom business executives looked to explain the law and to predict what types of activity would subject their companies to legal action.[34] But business and trade organizations also joined the chorus against enforcing the antitrust laws abroad. In 1955, the American Chamber of Commerce in

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[31] Arthur H. Dean, "Advising the Client," *ABA Section of Antitrust Law* 11 (1957): 89.

[32] " Point Four: A Re-Examination of Ends and Means," *Yale Law Journal* 59 (1950): 1301–02.

[33] Thomas E. Dewey, "Antitrust Barriers to Foreign Policy Goals," *New York State Bar Journal* 33 (1961): 22–24.

[34] Fligstein, *The Transformation of Corporate Control*, 212, 217; Freyer, *Regulating Big Business*, 281–82.

London expressed "grave misgivings" about the effect of antitrust on U.S. trade and foreign investment and concluded that "our present antitrust policies are misconceived and are highly damaging to our national interests." As its report explained, foreign commerce was shifting from imports and exports to investment in production and distribution overseas: "Currency restrictions, tariffs and quota limitations have forced us to develop our foreign trade along the line of participation in local production and manufacture rather than in the exportation of American-made goods." This had shifted U.S. commerce into "new channels."[35]

In making this adjustment, U.S. companies faced "one great handicap." According to the report, "No other nation prevents its nationals from operating abroad in accordance with the laws and customs of the place where the trade is carried on." Citing *American Banana*, the report insisted that it was absurd that a company should have to comply with rival legal systems at the same time, which was the consequence of extraterritorial antitrust enforcement. Even if this was sometimes necessary in the case of criminal matters, antitrust violations were "not by their nature wrongs against the moral order."[36]

The "radical departure" from the presumption against extraterritoriality whenever commerce affected the United States ultimately admitted no limit:

> When it is realised that hardly a commercial event anywhere in the world today does not have some impact on trade in every other part (so extensive is modern international trade, so effective are international communications and so dependent are the nations of the world on each other), one can understand the fears raised abroad that antitrust has become a weapon of a new imperialism, a means by which

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[35] American Chamber of Commerce in London, "The American Antitrust Laws and American Business Abroad" (London, Dec. 30, 1955), 1–2; American Chambers of Commerce in Paris and Rome made similar arguments. See Sol M. Linowitz, "Antitrust Laws: A Damper on American Foreign Trade?," *American Bar Association Journal* 44 (Sept. 1958), 854.

[36] Ibid., 2–5.

> to impose our ethical concepts on the rest of the world, a useful device in the aggressive development of our trade in other countries.[37]

U.S. companies were "no longer at the mercy of foreign cartels," as they had been during the war, when wartime "hysteria" meant that "foreign cartels were regarded as among the greatest evils that could be found in the field of foreign commerce." Now the situation had reversed: the rest of the world feared the economic power of the United States. To curb this new imperialism, Congress needed to free the American companies from the "double obligation" to obey both U.S. and foreign laws and return to the "sound principles" of *American Banana*: "arrangements made abroad must be immune to the extent that they operate abroad." Indeed, if other nations started applying their laws extraterritorially, it "would lead to the most fantastic legal chaos that the world has probably ever seen."[38] Ultimately, the government could trust businesspeople, constrained by the profit motive, to act appropriately. In words that might have been uttered by Elihu Root, the report insisted that "The American businessman is our best ambassador."[39]

As lawyers and business organizations complained about antitrust enforcement against American companies abroad, the *Alcoa* case attracted considerable ire. A series of articles in the *Yale Law Journal* made the case for a renewed commitment to territoriality. International law expert George Winthrop Haight argued that extraterritorial jurisdiction violated international law.[40] William Dwight Whitney, who had practiced law at Cravath until the war, agreed and contended that a "dangerous conflict" between extraterritoriality and national sovereignty existed which was responsible for the unpopularity of U.S. policy

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[37] Ibid., 12–13.

[38] Ibid., 16, 21, 26–27.

[39] Ibid., 29.

[40] George Winthrop Haight, "International Law and Extraterritorial Application of the Antitrust Laws," *Yale Law Journal* 63 (1954): 640.

abroad.[41] For Whitney, the dramatic growth of federal power over commerce needed to be confined to the United States. The "anti-cartel crusade . . . led us into neglect of the heretofore well-established limitations on sovereignty" and was responsible for U.S. indifference to the concerns of the rest of the world.[42]

One of the most fascinating features of these articles is their authors' reading of Judge Hand's opinion in *Alcoa*. Haight, for example, correctly quoted Hand's language that foreign agreements were unlawful if "they were intended to affect imports and did affect them."[43] But in his analysis of the case, the issue of intent dropped out. "If a State can take jurisdiction over acts committed abroad by foreigners because they have 'consequences' within its territory and it 'reprehends' such acts," he wrote, "the door is open to an almost unlimited extension of extraterritorial jurisdiction."[44] Again ignoring the intent provision, he wrote, "When foreigners agree abroad to fix prices, to limit production, to allocate territories or otherwise 'restrain trade' (in the United States sense), they may have no intention or expectation that their arrangements will operate in the United States; as in the case of the . . . Swiss aluminum cartel, they may even exclude the United States from the operative provisions."[45] Hand's intended effects test was supposed to exclude these sorts of activities from U.S. jurisdiction by making intent a prerequisite for jurisdiction. Whitney too set aside the intent part of the test.[46]

Versed in conflict of laws and aware of *Alcoa's* international implications, Hand had anticipated the sort of objections they raised. But in Hand's view, the intended effects test

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[41] William Dwight Whitney, "Sources of Conflict between International Law and the Antitrust Laws," *Yale Law Journal* 63 (1954): 655–56.

[42] Ibid., 661–62.

[43] Haight, "International Law and Extraterritorial Application of the Antitrust Laws," 641, 654.

[44] Ibid., 643.

[45] Ibid., 648.

[46] Whitney, "Sources of Conflict between International Law and the Antitrust Laws," 655.

would limit the potentially expansive implications of his conclusion that the Sherman Act applied to a foreign corporation participating in a foreign cartel that refrained from doing business in the United States. But as the Justice Department brought other cases, and as the Antitrust Division continued its campaign against monopoly abroad, Hand's concern for comity began to be forgotten. The intended effects test became the effects test.[47] According to legal scholar Larry Kramer, the case became "notorious" because it "went too far." Because it subjected foreign agreements to U.S. law, Kramer explains, "*Alcoa* thus did precisely what the territorial principle was designed to prevent: create conflicts with foreign nations that caused tension in international relations."[48]

In addition to *Alcoa*, other cases contributed to corporate frustration with the law.[49] For example, in *United States v. Imperial Chemical Industries*, a district court found that the DuPont Company, the British Imperial Chemical Industries, and other companies and individuals had conspired to divide markets. In crafting a remedy for this violation of the antitrust laws, the court issued a decree requiring I.C.I. not to use a patent to restrict imports of nylon into Great Britain. But I.C.I. had already licensed this patent to another company in Britain, the British Nylon Spinners. The Nylon Spinners brought suit in a British court and obtained an injunction preventing I.C.I. from complying with the U.S. court's decree. The case raised the specter that companies operating internationally might find themselves

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[47] As the Hales wrote, "It may, in addition, be necessary to prove that the actor intended to have an effect upon the commerce of the United States. That requirement of intention, however, probably goes to the policy of the antitrust laws rather than to the jurisdiction of the United States." Hale and Hale, "Monopoly Abroad," 502.

[48] Larry Kramer, "Vestiges of Beale: Extraterritorial Application of American Law," *Supreme Court Review* (1991): 180, 193.

[49] See McClenahan and Becker, *Eisenhower and the Cold War Economy*, 163.

caught between two competing legal obligations, creating a legal Catch-22 from which there was no easy escape.[50]

Likewise, in 1951, the U.S. Supreme Court heard a case involving the Timken Roller Bearings Company of Ohio.[51] Timken had acquired partial ownership stakes in British and French counterparts and had made agreements with these companies to restrict the market for roller bearings. Although Timken maintained that trade barriers had prevented it from selling its products abroad and forced it to acquire an ownership stake in foreign companies to gain access to the European market, the justices held that a partial ownership stake did not allow a U.S. company to collude with a competitor.[52] But the court's language suggested that the Sherman Act might be read to prohibit U.S. overseas investment, on the theory that it reduced exports from manufacturers within the United States. Justice Jackson's dissenting opinion, moreover, suggested that the court's decision prevented parent companies from making business decisions for their *wholly owned* subsidiaries.[53]

In an analysis for the Antitrust Law Symposium of the New York State Bar Association's Section on Antitrust Law in early 1952, William Dwight Whitney complained that *Timken* "substitutes form for substance." Whitney focused on the decision's tax implications, noting that companies often had reason to operate through local subsidiaries rather than opening their own branches abroad. By casting these arrangements under a legal

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[50] United States v. Imperial Chem. Indus., 100 F. Supp. 504 (S.D.N.Y. 1951), decree 105 F. Supp. 215, 231 (S.D.N.Y. 1952); Attorney General's National Committee to Study the Antitrust Laws, *Report of the Attorney General's National Committee to Study the Antitrust Laws* (Washington, DC: Government Printing Office, 1955), 74–75; American Bar Association, Section of International and Comparative Law, "Report of the Committee on International Trade Regulation," 84–85.

[51] Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

[52] *Id.* at 597–99.

[53] *Id.* at 606–07; *Report of the Attorney General's National Committee to Study the Antitrust Laws*, 77–79, 88–90; American Bar Association, Section of International and Comparative Law, "Report of the Committee on International Trade Regulation," 85–86, 90–92.

cloud through a "blind enthusiasm" for per se rules, the *Timken* decision would hamper the ability of American corporations to compete abroad.[54] For Whitney, the problem of antitrust enforcement abroad was caught up in the broader problem of international trade. He saw the relationship as "one of irresistible conflict." Antitrust promoted competition, but trade policy sometimes entailed protectionist restrictions on competition. Even the United States imposed such restrictions. "If we need defense for our economy, how much the more does each of the other foreign nations need the same." Adapting the antitrust laws to the exigencies of trade required lawyers "to reconcile the irreconcilable."[55]

Thus, by the 1950s, legal commentators were seeking to roll back the modest internationalization of antitrust enforcement achieved by Thurman Arnold and Wendell Berge, both to protect U.S. companies operating abroad from legal liability and to ensure smooth diplomatic relations with foreign sovereigns. "A missionary zeal for antitrust must co-exist with a decent respect for the contrary opinions of friendly foreign nations," wrote Victor H. Kramer. "We should avoid—at least until we have the sanction of a treaty—transforming the Sherman Act from a charter of liberty for American businessmen into an international economic crusade for free competitive enterprise."[56]

A committee of the American Bar Association concurred: "The only concern of this government should be that . . . restrictive practices [abroad] should not directly and substantially restrain the commerce of the United States. It is neither realistic nor logical for this government to attempt to confer upon the consumer abroad the advantages of a

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[54] William Dwight Whitney, "Foreign Commerce," in *Antitrust Law Symposium, 1952: Proceedings of the Fourth Annual Meeting Section on Antitrust Law, New York State Bar Association* (New York: Commerce Clearing House, Inc., 1952), 22–23.

[55] Ibid., 21.

[56] Victor H. Kramer, "The Application of the Sherman Act to Foreign Commerce," *Marquette Law Review* 41 (1957-1958): 283.

competition which that consumer's own government is either not interested in or regards as undesirable." While conceding that Congress could give extraterritorial effect to U.S. law in some circumstances, the report argued that it was foolish to subject U.S. companies to legal requirements that their foreign competitors could evade. The report concluded with a number of concrete recommendations that would make it easier for American companies to compete in a world that was often hostile to American values: agreements between parents and subsidiaries abroad should be permitted, American companies should be able to work with competitors and even participate in foreign cartels so long as they did not substantially restrain U.S. commerce, companies convicted of violating the antitrust laws should not have to divest property overseas, and American companies should be able to license patents abroad. The ABA committee also called for procedures to clear agreements ex ante and provide immunity from antitrust liability.[57]

Perhaps the most important analysis of the question was organized by the Special Committee on Antitrust Laws and Foreign Trade of the Association of the Bar of the City of New York. The committee selected Harvard Law Professor and future Yale President Kingman Brewster to lead a thorough study of these issues.[58] In a preliminary report published in 1957 without Brewster's involvement, the committee expressed frustration with antitrust enforcement abroad. Noting considerable foreign resentment, the report charged that the United States was mingling legal questions suitable for courts and political questions touching on national security that should be handled by the president. It called for Congress

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[57] American Bar Association, Section of International and Comparative Law, "Report of the Committee on International Trade Regulation," 84, 88–89, 98–99.

[58] On Brewster, see Geoffrey Kabaservice, *The Guardians: Kingman Brewster, His Circle, and the Rise of the Liberal Establishment* (New York: Henry Holt and Company, 2004).

to allow the president to exempt companies engaged in foreign commerce from the antitrust laws for national security reasons as a means of "segregat[ing] the political issues."[59]

The preliminary report is a revealing example of how far the pendulum had swung from World War II. Arnold and Berge had argued that combating cartels abroad was necessary to protect American democracy at home. Cartelization overseas could lead to cartelization—and fascism—at home. The sovereignty of foreign states had to give way to the United States' ability to protect its way of life. For the special committee, however, this way of thinking—in which the United States might need to transform the political economy of foreign states to protect its own political economy at home—contravened "established principles of public international law." Whereas New Deal antimonopolists had sought to universalize American principles of antitrust, and to change the acceptable forms of business organization abroad, the committee declared that "there is no universal approach to the problem of antitrust regulation." By explaining the resentment the United States had generated in foreign nations, the committee pushed back against the idea that the New Deal's transformation of the relationship between the federal government and states also entailed a new relationship between the United States and foreign states. "The use of the antitrust laws against foreigners acting abroad is considered by them to be as much an invasion of their territory as if the United States were to regulate the operation of railroads within such foreign country or interfere with the processes of government." Not intending to address the propriety of extraterritoriality itself, the preliminary report stopped short of

[59] The Special Committee on Antitrust Laws and Foreign Trade of the Association of the Bar of the City of New York, *National Security and Foreign Policy in the Application of American Antitrust Laws to Commerce with Foreign Nations* (New York: The Association of the Bar of the City of New York, 1957), 6–7 18, 24–25, 29.

endorsing this idea that extraterritoriality wrongly invaded foreign sovereignty, but its sympathy was evident.[60]

The problem, however, was that the Constitution gave Congress authority to regulate both interstate and foreign commerce, which necessarily implicated other nations. Given the United States' undisputed economic leadership and dramatic increases in foreign aid, the preliminary report's vision of territorial sovereignty was unrealistic. Indeed, the regulation of railroads in a foreign country or interference with the processes of government was no longer unthinkable. Indeed, in Iran and Guatemala, the United States would orchestrate coups to instill new leaders, exercising the sort of power that the committee found preposterous.[61]

When Kingman Brewster published his own study a year later, he adopted a more nuanced position that recognized the United States' global interests while seeking to minimize friction with foreign states. For Brewster antitrust was "a fundamental article of the American political and economic tradition," and relaxing the laws when they affected foreign commerce made it more difficult to enforce the laws at home and undermined confidence in the basic fairness of the economy. In some cases, for example, foreign competition prevented a domestic firm from dominating the American market. But Brewster also recognized that the United States needlessly antagonized foreign interests and sometimes deterred American businesses from expanding abroad through aggressive antitrust enforcement abroad, against U.S. and sometimes even foreign companies.

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[60] Ibid., 11–12.

[61] See, for example, Stephen Kinzer, *All the Shah's Men: An American Coup and the Roots of Middle East Terror* (New York: John Wiley & Sons, Inc., 2011); Nick Cullather, *Secret History: The CIA's Classified Account of Its Operations in Guatemala, 1952-1954*, 2nd ed. (Stanford, CA: Stanford University Press, 2006).

Moreover, there was no clear procedure for determining when the antitrust laws should give way to national security imperatives.[62]

According to Brewster, World War II and the Cold War had dramatically changed the U.S. economy. U.S. foreign economic policy was traditionally motivated by two main goals. At home, the United States protected domestic producers through tariffs limiting foreign competition but otherwise deferred to private economic decisions. The goal of antitrust was to preserve the integrity of this process. Meanwhile, overseas the United States promoted the open door. While certain exemptions permitted cooperative arrangements as a way of evading foreign trade barriers, the open door also presupposed the sort of competition abroad that existed at home.[63] By the 1950s, however, new conditions complicated this basic orientation. Above all, the United States had become dependent upon imports of raw materials. On the one hand, Brewster expected that competition would lower prices and improve supplies of raw materials. But he also recognized smooth relationships with foreign states and business-friendly regulations would help to expand foreign investment, goals not necessarily served by attempting to force U.S. and foreign companies to compete on domestic terms. The need for raw materials therefore gave the United States reason to promote competition abroad but also cause to subordinate competition for the sake of harmonious foreign relations.[64]

The Cold War heightened the stakes. Robust economies would better resist communist subversion. On the one hand, cartels and other restraints prevented the efficient allocation of resources and undermined the economic vitality of the free world. But the

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[62] Kingman Brewster, Jr., *Antitrust and American Business Abroad* (New York: McGraw-Hill Book Company, Inc., 1958), 442–44.

[63] Ibid., 5–6.

[64] Ibid., 7–8.

United States also needed businesspeople to transfer capital and know-how abroad, and uncertain antitrust laws could deter investment and limit the foreign operations of U.S. firms. As Brewster explained,

> [W]e have an urgent interest in preventing practices and concentrations of private power which prevent the free-market private-enterprise economy from functioning properly. Abroad no less than at home, tolerance of "private government" may invite popular demand for centralized socialism. But, because we have economic power that invites resentment and material privileges that invite envy, we have a special concern lest unilateral extension of our legal power give credence to accusations of imperialism. . . . A reevaluation of foreign commerce antitrust policy and law must take into account its incidence on the economic development of our allies and the uncommitted world and the role of American foreign investment in contributing to that development.[65]

Brewster's vision echoed the warnings raised by Arnold and Berge. Cartelization at home and abroad could lead to totalitarianism—in this case socialism rather than fascism—and thus private agreements were an appropriate subject for regulation. And like Arnold and Berge, Brewster recognized that cartels impaired U.S. access to raw materials, a major theme of wartime analyses.

But the emphasis had shifted, and antitrust issues operated within a wider constellation of foreign trade and economic policy. Private restraints were now seen as one element of a more complicated puzzle. As Brewster noted, "In the area of foreign business activity generally, antitrust has been somewhat submerged by more dramatic postwar developments in foreign economic policy, centering around technical and capital aid programs." The result was a "wide divergence of views" and "dramatic zigzags of official policy" in the field of competition.[66]

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[65] Ibid., 8–11.
[66] Ibid., 3–4.

In place of the aggressive focus on cartels promoted by Arnold and Berge, Brewster advocated a more measured approach. For instance, with regard to the jurisdictional issues at issue in *Alcoa*, he proposed a balancing test, the "jurisdictional rule of reason," to determine when U.S. antitrust law had extraterritorial effect on business activities occurring overseas. Brewster suggested the courts could assess a range of factors on a case-by-case basis in determining whether to subject the activities of U.S. and foreign companies occurring abroad to U.S. law.[67] Brewster's approach would allay the diplomatic costs of extraterritoriality by taking foreign interests into account in assessing the scope of U.S. jurisdiction, though a court-centered, case-by-case approach would perpetuate uncertainty for U.S. businesses about the scope of U.S. law.

The tendency to see monopoly as merely one element of a more complicated foreign policy puzzle, in which countervailing considerations militated against decisive action, came to define the Eisenhower administration's approach to the antitrust issue. Heeding the opponents of antitrust enforcement abroad and returning to the strict territoriality of *American Banana* risked entrenching private restrictions on the allocation of capital. But aggressively combating those restrictions, as Arnold and Berge had advocated, risked antagonizing allies and discouraging American entrepreneurs from investing overseas.

II. Weighing Alternatives

A. The Randall Commission

The antitrust concerns raised by lawyers, business organizations, and scholars also occupied the attention of the Eisenhower administration. Though never a priority, the

[67] Ibid., 446.

concerns of the legal and business community intruded as the administration developed a foreign economic policy that would allow the United States to prevail in the Cold War at a sustainable cost. In August 1953, President Eisenhower appointed Clarence Randall, the chairman of the Inland Steel Company, to lead a Commission on Foreign Economic Policy. Composed of presidential appointees and members of Congress assisted by a professional staff, the Randall Commission examined the foreign economic policy of the United States and made recommendations for improvement. After interviewing witnesses and preparing studies of various aspects of U.S. foreign economic policy, it finished its work and submitted its report in January 1954. In general, it promoted freer trade and investment as alternatives to foreign aid.[68]

A staff study prepared for the commission examined prior U.S. policies on cartels and their effects on productivity and trade. The study explained how the United States' commitment to open trade at the end of World War II included a commitment to decartelization. "In developing this policy," the study explained, "it was recognized that private restrictions on trade could be as harmful as government barriers, such as tariffs and quotas, and could frequently defeat the objectives of reduced governmental restrictions by merely replacing them." After the war, given the communist threat, U.S. officials were particularly worried about the capacity of cartels to limit European productivity and endanger economic recovery.

As the study explained, U.S. foreign competition policy had three main elements. First, the U.S. government used procurement contracts to promote competition abroad.

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[68] Editorial Note, U.S. Department of State, *Foreign Relations of the United States, 1952-1954*, vol. 1: *General Economic and Political Matters* (Washington, DC: Government Printing Office, 1983), part 1:49; Bowie and Immerman, *Waging Peace*, 211.

Second, the government encouraged foreign countries to adopt their own antitrust laws, and bilateral aid agreements gave the United States leverage to pressure other countries to adopt reforms. Finally, the United States turned to regional organizations like the European Coal and Steel Community and the Organization for European Economic Cooperation to promote competition among their members, and U.S. policymakers were also exploring an international agreement at the United Nations.[69] In 1951, the United States had introduced a resolution in the United Nations Economic and Social Council calling for an end to restrictive business practices, and an international committee was created to develop a proposal.[70]

Having traced existing policy, the Randall Commission study concluded that "[s]ome vehicle" was necessary to further international cooperation in this area. Pointing to the DuPont-I.C.I. case mentioned earlier, it argued that unilateral efforts to promote competition could easily backfire, producing "irritating frictions." Moreover, collective action problems required an international solution. The "thesis that it takes a cartel to compete with a cartel" remained powerful, and no one nation had the proper incentives to act without assurances that others would follow. An international agreement would provide the necessary assurance for participating nations to pass competition legislation of their own. And finally, a solution to the problem of cartels would be a boon for U.S. business by dismantling restrictions that prevented U.S. companies from manufacturing and selling products overseas.[71]

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[69] Staff Study, Restrictive Business Practices—Their Effect on Productivity and Trade, Oct. 15, 1953, SP 41, Box 66, Commission on Foreign Economic Policy: Records, 1953-54 (Randall Commission), DDEL.

[70] See Section II.C below.

[71] Staff Study, Restrictive Business Practices.

The study illuminated the place of antimonopoly in the foreign economic policy of the United States. The idea expressed by Arnold and Berge that fighting cartels was fundamental to U.S. national security was absent.[72] But antitrust policy was seen as an important component of U.S. trade and investment policy, which affected issues ranging from the dollar gap to military preparedness vis-à-vis the Soviet bloc. The study also took the pulse of the business community and concluded it was of two minds on this issue. On the one hand, there was little support for restrictive practices. The study quoted an article in *Fortune* magazine which observed that "it is startling to listen to an American business man just returned from Europe; almost invariably he will so revile its low-wage, high mark-up, monopoly economies, that he sounds much more the howling revolutionist than European socialists, who so mistrust him." But there was also skepticism about efforts to fix these problems. Businesspeople recognized that nations had divergent views on these issues, and they worried that efforts to promote competition would end up imposing new requirements on U.S. business that would be ignored in other parts of the world.[73]

The Randall Commission also published a collection of staff papers on various aspects of U.S. foreign economic policy. A paper on private investment abroad included a brief discussion of antitrust, which documented the frustration of many lawyers and businesspeople. The conflicting norms encountered by businesses operating overseas, it warned, constituted "a serious deterrent" to investment abroad. It reported that investors

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[72] For all their talk of the importance of antitrust, overall antitrust prosecutions declined during World War II and the early Truman administration, except for the high-profile cases against international cartels. McClenahan and Becker, *Eisenhower and the Cold War Economy*, 155; Alan Brinkley, "The New Deal and the Idea of the State," in *The Rise and Fall of the New Deal Order, 1930-1980*, ed. Steve Fraser and Gary Gerstle (Princeton: Princeton University Press, 1989), 89–94.

[73] Staff Study, Restrictive Business Practices.

surveyed by the Department of Commerce were calling for "an early restatement and clarification" of U.S. antitrust policy abroad.[74]

These conclusions did not make their way into the Randall Commission's official report, however, which generally ignored the issue. It advised restating U.S. antitrust policy to acknowledge the sovereignty of foreign countries and their freedom to set their own policies. And it asserted that the United States needed to make clear that restrictive arrangements would reduce U.S. investment overseas and harm foreign countries. In other words, it treated the antitrust issues primarily as a matter of better information, as if other countries would adopt U.S.-style competition policies if they were simply made aware of the benefits.[75] Congressmen Daniel A. Reed and Richard M. Simpson authored a dissenting minority report, which paid antitrust enforcement abroad even less attention. Reed and Simpson objected to lowering trade barriers for "foreign producers operating under practices which in this country would be illegal[.] . . . To force United States producers to do business within the borders of this country against this type of competition from abroad would be the grossest kind of discrimination by a government against its own citizens."[76] In other words, they looked to protectionism, rather than antitrust. Otherwise, the Randall Commission was silent on the issue.

B. The Attorney General's National Committee to Study the Antitrust Laws

But both at home and abroad, antitrust remained a major issue. "Public visibility of the issue and the partisan feelings that surrounded it," McClenahan and Becker write, "were

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[74] *Staff Papers Presented to the Commission on Foreign Economic Policy* (Washington, DC: Government Printing Office, 1954), 91–92.

[75] *Report to the President and the Congress: Commission on Foreign Economic Policy* (Washington, DC: Government Printing Office, 1954), 18.

[76] Daniel A. Reed and Richard M. Simpson, *Minority Report: Commission on Foreign Economic Policy* (Washington, DC: Government Printing Office, 1954), 15.

probably greater during this era than they have ever been since, despite widespread public acceptance of the basic tenets of antitrust principles."[77] But keen to avoid the charge of political meddling that his Republican supporters had leveled against President Truman, Eisenhower remained detached from antitrust controversies.[78]

Instead, Attorney General Herbert Brownell, Jr., established a committee of leading experts to provide a sweeping reassessment of U.S. antitrust laws, touching everything from the basic provisions of the Sherman Act to mergers, patent agreements, and foreign commerce.[79] While the committee explored both the domestic and international dimensions of U.S. antitrust policy, its work was tied up in an ongoing debate about what to do about the oil cartel that dominated the emerging Middle Eastern oil industry. The seven major U.S. and European oil companies—the seven sisters—were colluding to develop the vast new oil fields of the Middle East. A study by the Federal Trade Commission had documented the operations of this international oil cartel, and when Congress forced publication of the report in 1952, President Truman's Justice Department decided to bring a criminal suit.[80]

The prosecution aroused major opposition from the national security establishment. Because the government was targeting Anglo-Iranian and Royal Dutch as well as the U.S.-based companies, the British and Dutch governments vehemently objected to the suit,

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[77] McClenahan and Becker, *Eisenhower and the Cold War Economy*, 153. By contrast, Alan Brinkley emphasizes that liberals were losing interest in antitrust and turning their focus instead to increasing consumer purchasing power. Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (New York: Alfred A. Knopf, 1995), 135–36.

[78] McClenahan and Becker, *Eisenhower and the Cold War Economy*, 162–63.

[79] *Report of the Attorney General's National Committee to Study the Antitrust Laws*, iv–vi.

[80] For recent and more sympathetic accounts of the government's handling of the oil cartel case, see Wells, *Antitrust and the Formation of the Postwar World*, 187–201; Daniel Yergin, *The Prize: The Epic Quest for Oil, Money, and Power* (New York: Simon & Schuster, 1991), 472–78; McClenahan and Becker, *Eisenhower and the Cold War Economy*, 176–82. For older and more critical accounts, see Burton I. Kaufman, *The Oil Cartel Case: A Documentary Study of Antitrust Activity in the Cold War Era* (Westport, CT: Praeger, 1978); John Malcolm Blair, *The Control of Oil* (New York: Pantheon Books, 1976), 71–76.

raising the sorts of international complications lawyers and business organizations were increasingly complaining about. More importantly, litigation threatened to disrupt supply of a vital strategic resource during the Korean War. Government agencies worried that the publicity resulting from a criminal proceeding would "add fuel to the flame" of anti-Westernism in the Middle East and other regions and further perceptions that "capitalism is synonymous with predatory exploitation."[81] The Justice Department countered that the cartel was responsible for declining oil reserves and low supplies of aviation gasoline. National security, it argued, required aggressive enforcement of the antitrust laws to stop the cartel, an "authoritarian, dominating power over a great and vital world industry, in private hands."[82]

In the waning weeks of his administration, President Truman concluded that the State and Defense Departments had made the better case, and he decided to end criminal proceedings and to direct the Justice Department to begin a less disruptive civil lawsuit.[83] The Eisenhower administration continued this policy, over the strong objection of Secretary of State John Foster Dulles, who opposed even a civil suit. In addition, the attorney general

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[81] Report to the National Security Council by the Departments of State, Defense, the Interior and Justice, NSC 138/1, Jan. 6, 1953, in *FRUS, 1952-1954*, vol. 1, *General Economic and Political Matters*, 1325–26; Wells, *Antitrust and the Formation of the Postwar World*, 197–98.

[82] Report to the National Security Council by the Departments of State, Defense, the Interior and Justice, NSC 138/1, Jan. 6, 1953, in *FRUS, 1952-1954*, vol. 1, *General Economic and Political Matters*, 1336; Memorandum of Discussion at the 128th Meeting of the National Security Council on Friday, Jan. 9, 1953, in ibid., 1339.

[83] Report to the National Security Council by the Departments of State, Defense, the Interior and Justice, NSC 138/1, Jan. 6, 1953, in *FRUS, 1952-1954*, vol. 1, *General Economic and Political Matters*, 1329; Memorandum of Discussion at the 128th Meeting of the National Security Council on Friday, Jan. 9, 1953, in ibid., 1344; Letter to the Attorney General on the Grand Jury Investigation of the International Oil Cartels, Jan. 12, 1953, in Harry S. Truman, *Public Papers of the Presidents of the United States: Harry S. Truman*, vol. 8: *1952-1953* (Washington, DC: Government Printing Office, 1966), 1168–69.

promised to submit a study of the antitrust laws with special attention to their impact on U.S. foreign relations.[84]

Meanwhile, the U.S.-orchestrated coup against Mohammad Mosaddegh made even civil proceedings problematic. The National Security Council was eager to develop Iranian oil to generate revenue for the new government and decided to establish a consortium of the major oil companies, which otherwise had little incentive to bring new Iranian oil onto the market. Given that the companies would not participate if they faced antitrust liability, such an arrangement would only be possible if the Justice Department stayed its hand. Attorney General Brownell accordingly sent a letter to President Eisenhower expressing his opinion that participation in the consortium would not violate the antitrust laws. Brownell's letter applied only to production, refining, and acquisition—not to subsequent marketing and distribution. And the agreement did not technically end the civil suit, which continued until 1968. But the Iranian oil consortium decision took the teeth out of the civil proceeding.[85]

In exempting the oil companies that participated in the consortium from antitrust liability, the administration was conceding the thrust of the complaints levied against antitrust enforcement abroad by the business community: the antitrust laws could deter useful investment abroad that furthered U.S. security interests. Not everyone agreed with the

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[84] Memorandum of Discussion at the 139th Meeting of the National Security Council on Apr. 8, 1953, in *FRUS, 1952-1954*, vol. 1, *General Economic and Political Matters*, 1346–48; Memorandum of Discussion at the 140th Meeting of the National Security Council on Apr. 22, 1953, in ibid., 1:1351–53; Memorandum of Discussion at the 210th Meeting of the National Security Council, Aug. 12, 1954, in ibid., 1:1365–66.

[85] See Editorial Note, in *FRUS, 1952-1954*, vol. 1, *General Economic and Political Matters*, 1354–55; Memorandum of Discussion at the 180th Meeting of the National Security Council, Jan. 14, 1954, in *Foreign Relations of the United States, 1952–1954,* vol. 10: *Iran, 1951–1954* (Washington, DC: Government Printing Office, 1989), 897–98; The Attorney General (Brownell) to the National Security Council, Jan. 20, 1954, in ibid., 901–04; Memorandum by the Consultant to the Secretary of State (Hoover) to the Secretary of State, Jan. 21, 1954, in ibid., 1905; Memorandum of Discussion at the 181st Meeting of the National Security Council, Jan. 21, 1954, in ibid., 907–11; McClenahan and Becker, *Eisenhower and the Cold War Economy*, 179–82; Kaufman, *The Oil Cartel Case*, 56–60, 80–101.

decision, however. Legal scholar Louis B. Schwartz and several other members of the Attorney General's National Committee to Study the Antitrust Laws complained that the Iranian oil consortium exemption was an "extraordinary dispensation granted by the executive department, without sanction of any statute of Congress," a decision that would transfer Iranian mistrust from the British to the United States and that reflected a more general "tendency" to let companies avoid the law.[86] But members of National Security Council shared this sentiment. Having the president give exemptions in exceptional cases like the oil consortium case, they argued, entailed too much uncertainty. At the very least, the 1950 Defense Production Act, which authorized limited antitrust exemptions for voluntary agreements necessary for national defense, needed to be extended and expanded when it expired in 1955.[87]

Given the widespread complaints about antitrust enforcement abroad, and its bearing on the crisis in Iran, it should come as no surprise that when the Report of the Attorney General's National Committee to Study the Antitrust Laws was released in 1955, it devoted over fifty of its pages to international issues, compared with only fifteen to mergers.[88] The report was a frustrating document. The committee refused to act as a "fact-finding body" that would consider the actual effect of the antitrust laws and recommend improvements. Instead, it focused almost entirely on court cases, summarizing and restating

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[86] *Report of the Attorney General's National Committee to Study the Antitrust Laws*, 291–93.

[87] Memorandum of Discussion at the 223d Meeting of the National Security Council on Nov. 9, 1954, in *FRUS, 1952-1954*, vol. 1, *General Economic and Political Matters*, 1375–78; The Assistant Attorney General (Barnes) to the Executive Secretary of the National Security Council (Lay), Oct. 29, 1954, in ibid., 1374.

[88] Thomas E. Kauper, "The Report of the Attorney General's National Committee to Study the Antitrust Laws: A Retrospective," *Michigan Law Review* 100 (2002): 1870–71, 1888–89.

the law to make it more coherent and to minimize apparent inconsistencies.[89] As Yale Law Professor Eugene Rostow explained in a partial dissent, the report was "largely a review and restatement of the substantive doctrines of antitrust law." While Rostow agreed with its general conclusion that the antitrust laws were "adequate," he "deplore[d] the failure of the Committee to have carried it forward in certain respects, in order to provide clear-cut answers as to ways in which the antitrust law needs modernizing and strengthening" to deal with new issues.[90] Instead, as antitrust scholar Thomas E. Kauper has observed, "reasonableness" was the report's hallmark. "[91] In the realm of foreign commerce, however, this perpetuated the uncertainty that businesspeople, lawyers, and government officials had been complaining about: the proliferation of vague standards in place of clear rules supposedly discouraged overseas ventures and arguably increased conflicts with foreign states.

For the majority of the committee, however, these concerns were understandable but overblown. Having eschewed "independent factual study," the committee was in no position to assess the actual impact of antitrust laws on foreign commerce. The committee instead devoted its energy to the "clarification and improvement" of existing laws by closely reading, synthesizing, and restating the principles of major cases. For the committee, the Sherman Act's "generality" was its great strength, providing the "desired flexibility" to accommodate the unique problems of foreign commerce. Thus, the report spurned "any proposal for blanket exemption of foreign commerce from the antitrust laws." It also saw no need to

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[89] The Assistant Attorney General (Barnes) to the Executive Secretary of the National Security Council (Lay), Oct. 29, 1954, in *FRUS, 1952-1954*, vol. 1, *General Economic and Political Matters*, 1368; Kauper, "Retrospective," 1869–71, 1889.

[90] *Report of the Attorney General's National Committee to Study the Antitrust Laws*, 388–89.

[91] Kauper, "Retrospective," 1871–72.

revise the antitrust laws to provide more definite guidelines for U.S. businesses operating overseas.[92]

On the question of extraterritorial jurisdiction, for instance, the committee read Judge Hand's opinion in *Alcoa*—correctly, as I argue in Chapter 3—in a way that minimized the break with *American Banana* and provided significant limits on the reach of U.S. law.[93] Synthesizing the major cases since *American Banana*, the committee concluded that it was "clear" that the Sherman Act applied to U.S. companies operating overseas when there were "substantial anticompetitive effects" on U.S. commerce. Agreements between *foreign* competitors likewise fell within the Sherman Act "where they are intended to, and actually do, result in substantial anticompetitive effects on our foreign commerce." Quoting Judge Hand, however, the committee affirmed that the "international complications likely to arise" prevented U.S. law from having a more sweeping reach abroad. The report also cited *Alcoa* to argue that Sherman Act must not be read "without regard to the limitations customarily observed by nations upon the exercise of their powers." The committee therefore dismissed the concerns arising from the *I.C.I.* case in which a British company faced conflicting decrees from U.S. and British courts. Noting that the U.S. district court decree included a "saving clause" that offered the company a way out, the committee was confident that courts could include appropriate "safeguards."[94]

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[92] *Report of the Attorney General's National Committee to Study the Antitrust Laws*, 66.

[93] Thomas Kauper has found the committee's treatment of *American Banana* more problematic: "In working its way through a number of decided cases, the Report puts to one side the baffling decision of the Supreme Court in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), which can clearly be read as rejecting the whole concept of extraterritoriality in antitrust cases, and relies instead on the 'effects' test set forth in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). Given the fact that the Supreme Court had not then clearly stated a simple 'effects' standard, the Committee here was pushing the law more than it did in some other areas. " Kauper, "Retrospective," 1889 n.107.

[94] *Report of the Attorney General's National Committee to Study the Antitrust Laws*, 66–77.

Likewise, despite dismissing the controversial passages of *Timken* as "doubtful" dicta, the report gave "careful consideration" to the idea that investment abroad substituted for and therefore restrained exports, running afoul of the Sherman Act. It was only by taking certain statements "out of context" that the caselaw could be read to support "a mercantilist policy of discouraging [direct] American investment abroad in the name of protecting American manufacturing [exports]." The Sherman Act's "operative hypothesis should be to encourage the competitive allocation of American resources to investment either at home or abroad . . . in the interest of maximizing the long-run economic welfare of the United States." Since investment and exports both figured in the balance of payments, it made no sense to interpret the Sherman Act to limit overseas investment. Similarly, the committee acknowledged that Justice Jackson's dissent in *Timken* implied that the Court was prohibiting parent companies and their wholly owned subsidiaries from coordinating with one another. While the Court's opinion "might logically lead to such a conclusion . . . neither the facts of the case nor the majority opinion need do so."[95]

In short, for foreign commerce as for domestic commerce, the committee favored a rule of reason approach that required courts to take into account a range of factors. Activities that would indisputably restrain trade at home might be permissible abroad if the defendant showed trade was otherwise impossible or nonexistent. Likewise, defendants who set prices mandated by local law abroad should be able use this fact as a defense. On the other hand, the rule of reason would not let companies point to overseas conditions as a pretext to, say, fix prices or divide markets.[96]

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[95] Kauper, "Retrospective," 77–80, 88–90.
[96] *Report of the Attorney General's National Committee to Study the Antitrust Laws*, 83.

The committee thus held the line against the businesspeople, lawyers, and government officials who sought statutory exemptions for companies operating overseas. This meant that the committee ignored the recommendations of many of the government agencies it had consulted. Pointing to the uncertainties in antitrust enforcement that undermined defense procurement and foreign investment, the Department of Defense, the Department of Commerce, and the Foreign Operations Administration (FOA) had urged a more formal process of consultation between business and government, recommended limited exemptions for companies operating overseas to further national security priorities, and requested other clarifying procedures that would provide businesses a measure of immunity. But the attorney general's report instead affirmed the status quo. The Justice Department should continue to consult with other government agencies before initiating antitrust actions, the report concluded, but formal review procedures and exemptions were unnecessary.[97]

Just as the Attorney General's National Committee rejected the efforts of many to roll back the antitrust laws, it also eschewed calls to expand them. The State Department, which had responsibility for promoting competition abroad, generally supported the attorney general's committee's conclusions. It was satisfied with existing consultation practices and suggested that a "clarifying statement" would address concerns about the impact of antitrust on foreign investment. But the State Department also went further and suggested "the desirability of developing some means of international cooperation in dealing with restrictive practices affecting international trade." This would enable small countries to make reforms by ensuring that larger countries did likewise. And it would also address collective action

[97] Ibid., 92, 94–98. It did state that legislation to limit private antitrust suits might be necessary, since consultation among various government agencies would not be able to keep private parties from bringing suit.

problems since "no country by itself has jurisdiction to deal with these practices in their entirety."[98]

C. United Nations Ad Hoc Committee on Restrictive Business Practices

As mentioned earlier, such a proposal was then being considered in the United Nations Economic and Social Council. At the instigation of the United States, the council had established an Ad Hoc Committee on Restrictive Business Practices. In 1953, the Ad Hoc Committee issued proposals that mostly echoed the anti-cartel provisions of the 1948 Havana Charter, which would have allocated authority over trade and cartels to an International Trade Organization.[99] In a close vote, the Attorney General's National Committee to Study the Antitrust Laws declined to weigh in on this proposal, calling the problem "primarily one of international relations rather than of national antitrust policy."[100]

Writing for a minority, Eugene Rostow, joined by Wendell Berge, condemned the attorney general's committee's failure to support the UN proposal, calling its "deliberate silence on this question . . . the most serious defect" in the report. Recalling the long history of U.S. opposition to international cartels, Rostow and Berge pointed out that the issue was "one of the most thoroughly studied issues in public life." They rejected arguments that "further study" was required or that the proposed convention "would establish a supranational kangaroo court." Instead, Rostow and Berge defended the convention's two-fold approach, which established international standards but relied on national governments for enforcement. An international agreement was necessary because "gradual evolution"

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[98] Ibid., 93–94, 97.

[99] *Report of the Ad Hoc Committee on Restrictive Business Practices to the Economic and Social Council*, U.N. ESCOR, 16th Sess., Supp. No. 11, U.N. Doc. E/2380, E/AC.37/3 (Mar. 30, 1953), in *Anti-Trust and Restrictive Business Practices: International, Regional & National Regulation*, ed. Julius J. Marke and Najeeb Samie (New York: Oceana Publications Inc., 1982), Booklet 5, p. 17; Diane P. Wood, "The Impossible Dream: Real International Antitrust," *University of Chicago Legal Forum* (1992): 284–85.

[100] *Report of the Attorney General's National Committee to Study the Antitrust Laws*, 98–99.

would not be enough to change foreign legal systems. As Rostow and Berge pointed out, "All governments (including our own) look askance at foreign monopolists who charge their citizens high prices, but almost invariably tend to support restrictive arrangements which permit their own citizens to raise the prices at which they sell to foreigners."[101]

Nor, could the United States compel change through extraterritorial antitrust enforcement. The extraterritorial approach legitimized by *Alcoa*, Rostow and Berge explained,

> cannot reach most of the foreign restraints of trade affecting the American economy. Occasionally our Courts can take effective jurisdiction over the program of a foreign cartel, and they can often weaken such cartels by forbidding American nationals and corporations to participate in them. But at best the Sherman Act can do a limited part of the job, and its enforcement with regard to non-residents, foreign corporations, or even foreign subsidiaries of American corporations is bound to create serious problems of international law, and significant political friction.

Given the limits of U.S. law, the United States could "accept the inevitability of foreign cartels" and permit American participation, continue the present policy "of partial, inadequate, and generally unsatisfactory enforcement of our law against those offenders whom we happen to catch," or reach an international agreement.[102]

The UN agreement, Rostow and Berge continued, would be "an instrument of international cooperation, not an international governmental authority exercising sovereign power." It would rely on "informal international consultation, and the investigation of complaints," "international cooperation, rather than international adjudication," preserving sovereignty by requiring national authorities to implement any recommendation. Because U.S. laws were already more stringent than the new requirements would be, the United States would not have to make major changes. The agreement would not be perfect, but it

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[101] Ibid., 98–103.
[102] Ibid., 100–01.

would reduce the disparity between U.S. and foreign laws: signatories would at least have to meet minimum international standards, even if those standards were laxer than U.S. laws.[103]

New York antitrust lawyer Gilbert H. Montague countered Rostow and Berge's arguments.[104] He rejected their claim that the *Alcoa* approach was inadequate, pointing to "scores of judgments which the Department [of Justice] has obtained against international cartels." He also argued that the UN proposal was unworkable. Because the proposed agreement relied on national enforcement, it let nations with lax laws off more easily than nations with more stringent laws, and it also exempted government monopolies and nationalized businesses. The agreement would "stimulate every anticapitalistic participating nation to instigate harassing complaints against the United States and other participating nations" which would "so imperil them in their most vital operations, at home as well as abroad, that the national security of the United States and of this small minority of highly developed nations will be mortally jeopardized." This would provide "a potent service for the Kremlin." Moreover, even though the decisions of the program were nonbinding, the resulting publicity would lead to "world-wide calumny and stigma." And because it involved a treaty, the agreement would become the supreme law of the United States in "defiance of constitutional principles that have always been tenaciously held and maintained by the United States.[105]

In more measured and diplomatic language, the Eisenhower administration sided with opponents of the Ad Hoc Committee's proposals like Montague against Rostow and Berge. As the Report of the Attorney General's National Committee to Study the Antitrust

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[103] Ibid., 102–05.

[104] On Montague, see Fligstein, *The Transformation of Corporate Control*, 184.

[105] Attorney General's National Committee to Study the Antitrust Laws, *Report of the Attorney General's National Committee to Study the Antitrust Laws*, 105–08.

Laws was being released, the U.S. Mission to the United Nations informed the U.N. Economic and Social Council that the United States did not support the proposed agreement. Differences between national laws were too great for the proposal to be effectively implemented. The United States therefore concluded that "present emphasis should be given not to international organizational machinery but rather to the more fundamental need of further developing effective national programs to deal with restrictive business practices, and of achieving a greater degree of comparability in [national] policies and practices." In other words, the problem was not the wording of the agreement—it was the lack of agreement on underlying "fundamentals."[106]

D. "More Than a Purely Legal Point of View": The National Security Council

On March 24, 1955, as the attorney general's report was being readied for release, the National Security Council again met to discuss the issue of antitrust enforcement abroad. Attorney General Brownell began the discussion by noting that the Iranian agreement "provided a first-rate laboratory lesson" that complemented the attorney general's report. After the assistant attorney general summarized the report's foreign commerce chapter, the NSC discussed the best system of consultation between the Justice Department and the other executive agencies. Most participants agreed that informal consultation between the State and Justice Departments was adequate. Secretary Dulles then spoke. "The gist of the report was that everything was more or less all right at the present time," he explained, according to the meeting's minutes. "Moreover, the committee report appeared to agree with

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[106] U.S. Mission to the United Nations, Press Release No. 2134, Mar. 28, 1955, in *Current Antitrust Problems: Hearings Before the Antitrust Subcomm. of the H. Comm. on the Judiciary*, 84th Cong., pt. 2, at 692 (1955); U.S. Mission to the United Nations, Press Release No. 2161, May 23, 1955, Folder 2(3), CFEP 524, Effect of Existing Antitrust Laws on U.S. Foreign Activities, Apr.-Oct. 1955, Box No. 12, Joseph Rand Records, 1954-1961, DDEL.

a number of 'pretty extreme decisions' by the courts." Dulles thought the issue required "consideration from more than a purely legal point of view." He saw the need for the sort of inquiry that the Attorney General's National Committee had refused to undertake.[107]

Somewhat puzzlingly, Dulles explained that the "the unfettered operation of the anti-trust laws . . . which, because of the severity of our anti-trust laws, virtually requires the most extreme competition" could produce "unrestrained imports" into the United States. "Such unrestrained imports," Dulles continued, "could quite possibly lead the United States Government into the adoption of a quota system for the regulation of imports, and accordingly, to a certain degree of socialism, which would be far from welcome." Dulles' remarks were a dramatic example of the way in which the wartime debates about antitrust had been turned on their head. During the war, Arnold and Berge had argued that cartels abroad might undermine a competitive economy at home. Now Dulles was arguing that antitrust would have that effect. By preventing companies from colluding to limit imports, antitrust would necessitate regimentation. Dulles insisted that he still favored "so-called liberal trade policies," but he thought the issue needed to be examined "from a broader point of view than the strictly legal one."[108]

Treasury Secretary George M. Humphrey agreed. The Attorney General's Report "provided an excellent legal analysis" of the issues faced by American companies overseas, but the real issue for the NSC was how to promote investment abroad. "The present antitrust laws were so extremely severe and restricted that many American companies had simply made up their minds not to run the risk of violating these laws," Humphrey insisted.

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[107] Memorandum of Discussion at the 242d Meeting of the National Security Council, Mar. 24, 1955, in U.S. Department of State, *Foreign Relations of the United States, 1955–1957*, vol. 10, *Foreign Aid and Economic Defense Policy* (Washington, DC: Government Printing Office, 1989), 524–26.

[108] Ibid., 526.

Unlike Dulles, however, he accepted antitrust's domestic utility. The United States needed to loosen antitrust laws enough to encourage rather than deter overseas investment, "without at the same time destroying the competition and free enterprise which we wish to preserve domestically in the United States."[109]

As the discussion returned to imports, Secretary Dulles distinguished domestic and international competition: "The last thing, said Secretary Dulles, that the United States Congress really wanted was unbridled competition for U.S. markets from abroad. While such competition was OK in the U.S., it was not OK from abroad."[110] The secretary of state's concerns had not come from nowhere. As historians Becker and McClenahan note, the United States exported twice what it imported in 1949 in nonfood consumer goods. By 1955-1956, when the meeting was occurring, imports and exports were roughly equal. By 1959, however, imports would more than double, while exports would remain flat. In addition to the rise of foreign competition, the United States balance of payments and gold positions were deteriorating.[111]

The administration's desire to integrate Japan into the international economy further complicated matters. The Japanese recovery depended upon exports, which compounded fears of increasing foreign competition. As Eisenhower would later explain, integrating the Japanese economy was as "equally vital to the security of the free world" as more classic security issues. In the long run, Eisenhower hoped that the exchange of raw materials and manufactured goods between Vietnam and Japan would solve the problem. In the short term, however, Japan "must have additional trade outlets now." This required the United

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[109] Ibid., 526–27.
[110] Ibid., 527.
[111] McClenahan and Becker, *Eisenhower and the Cold War Economy*, 201–05.

States to accept Japanese exports—"the free world stake in the whole Pacific" hinged on its willingness to do so. The United States ended up absorbing a disproportionate share, and the Eisenhower administration struggled to bring some order to this process to ensure domestic opposition did not undermine the important foreign policy goal of incorporating Japan into the liberal Western order. The government embraced voluntary export agreements as a way to contain Japanese imports, and Dulles was worried that these would run afoul of the antitrust laws.[112]

For Dulles, the United States had "outgrown" its old antitrust policy. The United States needed to think about competition in light of these new *international* realities, and it needed to look beyond the legal framework that had heretofore defined the debate. In response, Brownell defended the existing U.S. approach. He pointed out that the State Department, supported by the business community, had opposed the recent proposal at the United Nations. He therefore rejected Dulles' premise that these issues had not received more general scrutiny. He insisted that the Justice Department was going as far as it could go under existing law to protect American business overseas—anything further required new legislation.[113]

Eisenhower then intervened: "The President said that the essence of the problem was the question of what authority must be created to deal with foreign competitors rather than with U.S. domestic competition. The President agreed that it would be essential to look into tariff problems and the 'most-favored-nation' clauses in our commercial treaties. He

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[112] Address at the Gettysburg College Convocation, The Importance of Understanding, Apr. 4, 1959, in Eisenhower, *PPP, 1959*, 313–15; McClenahan and Becker, *Eisenhower and the Cold War Economy*, 205–16; Memorandum of Discussion at the 242d Meeting of the National Security Council, Mar. 24, 1955, in *FRUS, 1955–1957*, vol. 10, *Foreign Aid and Economic Defense Policy*, 527.

[113] Memorandum of Discussion at the 242d Meeting of the National Security Council, Mar. 24, 1955, in *FRUS, 1955–1957*, vol. 10, *Foreign Aid and Economic Defense Policy*, 527–28.

confessed, however, that he was not sure as to the next step that we ought to take." Confronted by the impact of the antitrust laws on U.S. foreign economic policy, the president had shifted the frame to trade policy. He ignored private restrictive practices, subject to the purview of antitrust law, and invoked the public restrictions embodied by tariffs.[114]

E. The Council on Foreign Economic Policy

Nonetheless, the NSC directed the Council on Foreign Economic Policy (CFEP) to review the relationship between U.S. trade objectives and the antitrust laws.[115] Established in 1954, the CFEP sought to coordinate and simplify foreign economic policy across the government. It was chaired by Joseph Dodge, Eisenhower's former budget director, who had conducted a study of the problems of coordinating the foreign economic policy responsibilities of the various government agencies and had suggested the CFEP as a solution. (In 1956, Clarence Randall, the steel executive who had chaired the Randall Commission, replaced Dodge.) To prevent the inevitable squabbling, the CFEP was subordinate to the NSC on matters falling within the NSC's purview.[116]

In April 1955, the CFEP established an intergovernmental task force to study the antitrust laws. By June, the task force had identified the issues to be studied, and a first draft of a report was completed in November. The report examined the effects of the antitrust laws on private foreign investment, the international exchange of technology, and trade problems. While supporting U.S. efforts to combat restrictive practices overseas, the report concluded that the law was "uncertain" and that a clarification process was necessary. Rather

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[114] Ibid, 528.
[115] Ibid., 529.
[116] Alfred Dick Sander, *Eisenhower's Executive Office* (Westport, CT: Greenwood Press, 1999), 27–29.

than relying on new legislation from Congress (or bringing test cases to have the Supreme Court clarify matters), the draft report proposed keeping the clarification process in the executive branch. The attorney general could issue formal opinions or give speeches resolving ambiguities, and a special section of the Antitrust Division could meet with companies and provide informal rulings.[117]

Initially, the biggest opposition to the report came from the State Department, which maintained that the report's actual goal was "relaxation rather than a clarification" of the antitrust laws. The Justice Department, meanwhile, supported the idea of a clarification process but maintained it lacked statutory authority for giving advance rulings. The Commerce Department, Defense Department, the Federal Trade Commission, the International Cooperation Administration, and the CFEP itself all supported the draft report.[118] The Treasury Department urged new legislation rather than advisory opinions from the Justice Department.[119]

By the spring of 1956, the final draft was completed. While still recommending a clarification process—or at least that the Department of Justice and the FTC "give consideration, insofar as feasible in their areas of jurisdiction," to such a process—the final draft now endorsed the Justice Department's call for legislation authorizing the president to

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[117] Minutes of the 14th Meeting of the Council on Foreign Economic Policy, Mar. 29, 1955, in *FRUS, 1955–1957*, vol. 10, *Foreign Aid and Economic Defense Policy*, 531–32; Dodge to Barnes, Jan. 23, 1956, CFEP 524 Effect of Existing Anti-Trust Laws on U.S. Foreign Activities (4), Box 4, Policy Papers Series, U.S. Council on Foreign Economic Policy Records, DDEL; Draft Report of Antitrust Task Force of Council on Foreign Economic Policy, (Folder 5), ibid.

[118] Memorandum to Col. Cullen, Nov. 29, 1955, CFEP 524 Effect of Existing Anti-Trust Laws of U.S. Foreign Activities (4), Box 4, Policy Papers Series, U.S. Council on Foreign Economic Policy Records, DDEL.

[119] Sec. of the Treasury to Dodge, Dec. 19, 1955, ibid.

exempt companies from the antitrust laws for national security reasons.[120] The State Department had come around in "a complete reversal" from its earlier opposition and now accepted the need for a clarification process. Pointing to the Iranian oil consortium as a model, Foggy Bottom maintained that the cases in which antitrust really affected national security were few and could be handled "by close Executive Branch coordination" without waiving applicable laws. While sympathetic, however, the State Department, joined by the International Cooperation Administration, opposed new legislation to allow the president to provide exemptions. This would make it more difficult to convince allies overseas to adopt competition laws of their own and would lead companies to seek special treatment. Secretary of Commerce Sinclair Weeks, joined by the Treasury Department, led the push for stronger action. In the short term, he thought the Justice Department should issue clarifications of the law, leading to a more formal administrative procedure devised by the Justice Department or the Federal Trade Commission, and ultimately better legislation. Despite these lingering disagreements, the task force felt it had achieved enough of a consensus on to forward the report to the CFEP.[121]

By May, however, the attorney general reconsidered his support for the report. He argued that he lacked statutory authority to give official advisory opinions, which would therefore not be binding, and he feared that legislation allowing the president to exempt companies from the antitrust laws for national security and foreign policy reasons would

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[120] Memorandum from Dodge to Anderson, May 9, 1956, ibid; Final Joint Draft, Report of the Antitrust Task Force of the Council on Foreign Economic Policy, (Folder 3), ibid.

[121] Cullen to Dodge, Mar. 30, 1956 and accompanying memorandum from Prochnow to Dodge, (Folder 4), ibid.; Memorandum from Rand to Dodge, Apr. 25, 1956, ibid.; and Weeks to Dodge, May 1, 1956, ibid.

interfere with other legislative goals before Congress.[122] At the attorney general's request, President Eisenhower therefore agreed to postpone implementation of the task force's report.[123]While the CFEP was right that there was a consensus for reducing uncertainty in the antitrust laws, the council could not forge an agreement on how to go about doing so.

F. The Straus Report

The CFEP report lingered in bureaucratic limbo for most of Eisenhower's second term. In fact, the question of antitrust enforcement abroad fell by the wayside. As personnel left government and as new issues arose, extraterritorial antitrust enforcement ceased to be a topic of deliberation in the upper reaches of the government, as it had been during Ike's first term. The CFEP did not return to the issue again until the final year of Eisenhower's presidency, as they took stock of unfinished business. In April 1960, over five years after the NSC first put the issue on the CFEP's agenda, National Security Adviser Gordon Gray inquired about its status. Joseph Rand, who had chaired the CFEP task force, told CFEP chair Clarence Randall that he stood by the council's report. But he also recognized that administration would be unable to implement the recommendations, particularly as the (new) attorney general refused to budge. It was too late to introduce legislation in 1960, and next year would bring a new Congress and a new president. "The case is much like the Dickensian case of Jarndyce vs. Jarndyce which lasted so long that old litigants departed and new ones came into the case," Rand observed. "All of the people participating in the study have left the Government."[124]

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[122] Memorandum from Rand to Dodge, Apr. 25, 1956, ibid.; Memorandum from Dodge to Anderson, May 9, 1956, ibid.; and Brownell to Dodge, May 8, 1956, ibid.

[123] Dodge to Brownell, June 6, 1956, ibid.

[124] Memorandum for Mr. Randall from Joseph Rand, Apr. 6, 1960 (Folder 2), ibid.; Memo for File, Apr. 7, 1960; ibid.; Memorandum for the Chairman, Apr. 1, 1960, ibid.

The Justice Department suggested a compromise. A year earlier, frequent government consultant Ralph I. Straus had prepared a report for the State Department on the problem of expanding private investment abroad. Straus' study examined how to bring U.S. business expertise to bear on the goal of promoting growth in developing nations. It emphasized the need to encourage private enterprise in the developing countries and focused on ways to encourage U.S. companies to invest abroad. The Straus Report made recommendations in areas of tax policy, government financing, contracting, and antitrust.[125]

The Justice Department suggested the antitrust section of the Straus Report, for which the Antitrust Division and experts like Kingman Brewster had consulted, might provide a solution to the impasse over the tabled CFEP report. The CFEP could withdraw its own report and substitute Straus' instead.[126] The Straus Report was an appropriate substitute because it synthesized the key strands of thinking. On the one hand, it acknowledged the continued importance of U.S. opposition to cartels. Competitive markets were "a cardinal element in our belief that free enterprise is a superior way of organizing economic activity." The United States wanted "ever-higher levels of multilateral trade, increasingly free of private and public barriers alike." Backing away from this commitment would empower anti-capitalist propagandists and hurt American businesses. In addition to continuing to apply the antitrust laws abroad, it was important for the State Department to work with foreign governments to remove restrictions on trade or investment and to encourage other countries to enact their own competition laws.

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[125] Expanding Private Investment for Free World Economic Growth: Summary of the Report of the Consultant (Straus) to the Under Secretary of State for Economic Affairs (Dillon), Mar. 30, 1959, in U.S. Department of State, *American Foreign Policy: Current Documents, 1959* (Washington, DC: Government Printing Office, 1963), 1688–91.

[126] Memorandum for the NSC Planning Board, May 31, 1960, and enclosures, CFEP 524 Effect of Existing Anti-Trust Laws on U.S. Foreign Activities (2), Box 4, Policy Papers Series, U.S. Council on Foreign Economic Policy Records, DDEL; Memorandum for Mr. Randall from Joseph Rand, May 10, 1960, ibid.

On the other hand, the Straus Report recognized the costs of applying the antitrust laws to foreign commerce. The application of U.S. law abroad deterred useful U.S. private investment abroad and created conflicts with foreign sovereigns. But rather than requiring new legislation, "orderly administration" within the executive branch could handle these problems. This conclusion stemmed from the report's focus on developing nations. "With the possible exception of some large-scale extractive investment," it reasoned, "it does not seem to us that investment in Asia, Latin America, and Africa is likely to raise as many or as difficult antitrust problems as those encountered when American firms are doing business with major competitors in the industrialized countries." Because U.S. enterprise in these countries would not have a major impact on U.S. imports and exports, and because any joint ventures would be with relatively minor firms, they were unlikely to arouse concern.

The Straus Report made three recommendations for how the executive branch could approach these issues. First, while some dicta in recent court cases had "gone beyond what was necessary to decide the particular cases . . . and have the effect of inhibiting initiative," the rule of reason approach advocated by the Report of the Attorney General's National Committee to Study the Antitrust Laws offered a solution. The Justice Department could make clear that it did not intend to prosecute joint ventures abroad as per se illegal and that it was not opposed to parent-subsidiary cooperation. It could also explain that it would take into account foreign legal conditions before deciding to bring a suit. Second, the Justice Department was already reviewing proposed arrangements and clearing those that did not run afoul of the antitrust statutes. While it should better publicize this process, the Straus Report nevertheless insisted that preclearance should remain the exception rather than the rule. Otherwise, "business would be saddled with one more burden of negotiation with

government" and the antitrust agencies would not be able to keep up with their additional responsibilities. Finally, the Justice Department should continue to consult with the State Department before bringing actions involving foreign relations. This would allow for the possible diplomatic resolution of a dispute before the legal system got involved.[127]

Since the Department of Justice and the State Department had agreed to implement these recommendations, the National Security Council decided the CFEP study was no longer necessary. In July 1960, the NSC rescinded its directive, and the CFEP study was withdrawn.[128] The Straus Report, like previous studies, took for granted the parallel between cartels and tariffs. Just as "protectionist restraints have the effect of excluding investment," it noted, "cartel restraints have the effect of restricting trade." The statements against cartels were sincere. But the report's recommendations reflected the administration's repeated conclusions that it was unrealistic to internationalize U.S. competition policy. Rather than developing an institution to promote the virtue of competition, or at least focusing on ways to lay the foundation for such an institution in the future, the focus was on accommodating the diversity of competition policies that actually existed in the world.[129]

III. Conclusion

Lawyers and business organizations made antitrust an issue of debate during the 1950s because it had major consequences for U.S. companies. It prevented U.S. corporations from participating in cartels and blocked many horizontal and vertical mergers, giving rise to

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[127] Annex A, Expanding Private Investment for Free World Economic, Growth, a report prepared under the direction of Ralph I. Straus, as Special Consultant to the Under Secretary of State for Economic Affairs, Apr. 1959, enclosure to Memorandum for the NSC Planning Board, May 31, 1960, ibid.

[128] Memorandum for the Chairman, Council on Foreign Economic Policy, July 19, 1960, ibid.

[129] Though the Straus Report did support "international action" to promote competition.

the diversified modern multinational corporation. And it exposed those corporations to liability for their activities abroad, even if they followed all the rules of the jurisdictions in which they operated. In theory, this gave U.S. companies a reason to support efforts to internationalize U.S. competition policy. Extraterritorial enforcement and a new international institution devoted to combating cartels offered the prospect of a world in which foreign companies would have to play by the same—U.S.—rules, creating a more equal international playing field.

Instead, corporate lawyers lobbied the government to roll back U.S. antitrust enforcement abroad. Enforcing the Sherman Act within the territorial United States was one thing, they argued. Bringing suit against a U.S. or even a foreign company doing business abroad was another. And they had a point. The U.S. commitment to competition was not yet widely shared by other nations. And extraterritorial enforcement was "partial, inadequate, and generally unsatisfactory," limited to "those offenders whom we happen to catch."[130] Given the difficulty of enforcing the Sherman Act abroad and of persuading other nations to adopt the U.S. model, confining the Sherman Act to the territorial United States made sense. Businesses wanted the freedom and flexibility to adapt to local laws as they found them, not as antimonopolists wished they would be. Law, they were implying, could only accomplish so much. Powerful though it was, the United States could not simply impose its standards on the world.

Yet while the Eisenhower administration sought to clarify antitrust enforcement standards, and in general favored a flexible rule of reason approach for antitrust enforcement, it refused to roll back the changes that had occurred during the Roosevelt and

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[130] *Report of the Attorney General's National Committee to Study the Antitrust Laws*, 100–01.

Truman administrations. Indeed, the debates about antitrust abroad during the 1950s fit the conventional story about the resiliency of the New Deal state during the Eisenhower presidency. The New Deal had expanded federal regulation of economic activity outside the United States as well as within it. Conservatives who wanted to dismantle the New Deal state at home also attacked New Deal regulation abroad. A series of government commissions—the Randall Commission, the Attorney General's National Committee to Study the Antitrust Laws, the Council on Foreign Economic Policy, and the Straus Report—investigated the problem and all agreed that uncertainty about the scope of U.S. law threatened important foreign economic policy objectives.[131] And yet the policies that had emerged during the 1940s endured. With the exception of the oil consortium, the administration refused to exempt foreign business activities from the antitrust laws and continued to regulate the conduct of U.S. and foreign firms around the world, partial, inadequate, and unsatisfactory though such enforcement proved to be.[132]

But the world of the 1950s was not the world of the 1930s and 1940s. The recovery of the European and Japanese economies, decolonization, the spread Cold War competition beyond Europe, and the establishment of the European Economic Community created anxieties different from those of the Second World War, when Arnold and Berge pressed for decartelization abroad. A deteriorating trade position, the possibility that the United States might be excluded from crucial markets, and the importance of economic development in the Global South led government officials to view about antitrust law in a new light.

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[131] See Memorandum for Mr. Randall from Joseph Rand, May 10, 1960, CFEP 524 Effect of Existing Anti-Trust Laws on U.S. Foreign Activities (2), Box 4, Policy Papers Series, U.S. Council on Foreign Economic Policy Records, DDEL.

[132] See Freyer, *Antitrust and Global Capitalism, 1930–2004*, 128–29.

They worried that it was the United States that was falling behind in the areas that mattered: trade, balance of payments, keeping states out of the Soviet orbit. *Timken* wrongly dismissed the reality that U.S. companies needed to cooperate with competitors overseas. By failing to respect other nations' own laws and practices, the United States risked antagonizing Cold War allies, as in the case of *Imperial Chemical Industries*. Many of these claims were overblown and speculative, relying on tenuous inferences from Supreme Court dicta. There were good reasons that the Attorney General's Commission reaffirmed the doctrinal soundness of the antitrust laws.

But amid these debates, something fundamental had also shifted. For the Eisenhower administration, promoting competition ceased to be a goal in itself. Instead, it was treated as an element of other, more fundamental issues like overseas investment. As a result, attention to *private* restrictive practices paled compared to *public* restrictive practices. Indeed, Eisenhower made macroeconomic free trade a major priority. Through the Trade Agreements Extension Act of 1958, Eisenhower gained the authority to tackle the tariff wall of the new Common Market, which would be employed in the Dillon Round of the GATT in 1960-1961. Eisenhower told British Prime Minister Harold Macmillan that "never has he worked harder for anything."[133] Trade, foreign aid, and the balance of payments mattered, not antitrust, which received attention from the principal decision-makers only when it obstructed these other priorities. [134]

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[133] Memorandum of Conversation, Mar. 22, 1959, in U.S. Department of State, *Foreign Relations of the United States, 1958–1960*, vol. 4, *Foreign Economic Policy* (Washington, DC: Government Printing Office, 1992), 42–43; McClenahan and Becker, *Eisenhower and the Cold War Economy*, 204–05.

[134] Tony A. Freyer, "Antitrust and Bilateralism: The US, Japanese and EU Comparative and Historical Relationships," in *Competition Policy in the Global Trading System*, ed. Clifford A. Jones and Mitsuo Matsushita (New York: Kluwer Law International, 2002), 16.

This marked an important break from the New Deal vision of the Roosevelt administration. In September 1944, President Roosevelt wrote Secretary of State Cordell Hull insisting that the United States' antitrust tradition "goes hand in glove with the liberal principles of international trade for which you have stood . . . . The trade-agreement program has as its objective the elimination of barriers to the free flow of trade in international commerce; the anti-trust statutes aim at the elimination of monopolistic restraints of trade in interstate and foreign commerce." This way of framing the problem—which linked private and public restrictive practices—persisted through the 1950s as a statement of U.S. ideology. It animated Eugene Rostow and Wendell Berge's dissent from the Attorney General's Report as they urged the United States to recommit to the "collaborative action by the United Nations" for which Roosevelt had called in 1944.[135]

But in practice, the idea that antimonopoly was an essential counterpart to free trade no longer guided U.S. policy. Even as they continued to pay lip service to this old article of faith, business executives, lawyers, and government officials recast antitrust as an impediment to freer trade and investment. Uncertain antitrust laws deterred investment overseas and created international conflict. Law was now regarded as a problem rather than a solution. John Foster Dulles insisted "the whole problem needed to be studied from a broader point of view than the strictly legal one." He worried that the antitrust laws threatened the nation's capitalist political economy.[136] A potentially revolutionary moment, in which private economic activity might be made an appropriate subject of international law, had passed. In this sense, rather than a mere interlude in an era of Democratic dominance,

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[135] Suggested Curb on Cartels, Letter from the President to the Secretary of State, Sept. 6, 1944, *Department of State Bulletin* 11 (Sept. 10, 1944): 254.

[136] Memorandum of Discussion at the 242d Meeting of the National Security Council, Mar. 24, 1955, in *FRUS, 1955–1957*, vol. 10, Foreign *Aid and Economic Defense Policy*, 524.

the Eisenhower presidency pointed to the more conservative politics to come later in the twentieth century.

CONCLUSION

The Second World War changed the way the United States related to the world. The New Dealers who expanded government authority to bring economic security to Americans at home also sought to extend the regulatory power of the United States abroad to achieve national security. But, the borders that separated the United States from the rest of the world remained, and they remained significant. Even as the United States applied its laws to agreements made on the other side of the world, its leaders reconstructed an international system that continued to entrust nation-states with the primary responsibility for governing their own territory. Like the New Deal at home, which was possible only by allowing Southern states to retain sovereignty over Jim Crow, the "New Deal for the world" came only through compromises with the continuing rights of other sovereigns.[1] As the American Chamber of Commerce in London warned in 1955: "Powerful as we are, we cannot afford thus to disregard the sovereign rights of other nations and to disrupt the international harmony that we are otherwise so zealous to maintain."[2]

Understanding legal thought is important for explaining the abiding importance of sovereignty in U.S. foreign relations. Building on Charles McCurdy's work on American

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[1] Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (New York: Liverlight Publishing Corporation, 2013); Elizabeth Borgwardt, *A New Deal for the World: America's Vision for Human Rights* (Cambridge, MA: The Belknap Press of Harvard University Press, 2005).

[2] American Chamber of Commerce in London, "The American Antitrust Laws and American Business Abroad" (London, Dec. 30, 1955), 16.

federalism, I have sought to show how "[i]ntegrating legal and [international] political history . . . requires attention to the distinctive logics, the distinctive cultures, of law and . . . politics. It requires attention to the role of lawyers in bridging the two. And it requires attention to the configurative effects of all these things" on American diplomacy.[3] Law was not everything, and it should supplement rather than supplant the strategic, political, economic, cultural, and ideological factors historians have traditionally used to explain U.S. diplomatic history.[4] But as policymakers confronted the challenges of international politics, law shaped the opportunities they saw—whether to develop a world court or a League of Nations to preserve peace, for example—and it influenced the threats they perceived—about the dangers of cartels and corporations, for instance.

This dissertation begins by exploring how two particular legal cultures—classical legal thought and sociological jurisprudence—affected the United States' emergence as a leading global power during the early decades of the twentieth century. Classical legal thought infused Secretary of State Elihu Root's plans for a world court and his hostility to the League of Nations. A world court could impartially define the boundaries separating one state from another, promoting peace by keeping each state within its own sphere of authority as commerce brought the world together. Sociological jurisprudence, meanwhile, helps to explain why Woodrow Wilson ignored predecessors like Root and even his own adviser Robert Lansing and instead favored a more parliamentary model of global government. Wilson recognized that politics transcended sovereign borders in an

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[3] Charles W. McCurdy, *The Anti-Rent Era in New York Law and Politics, 1839-1865* (Chapel Hill: The University of North Carolina Press, 2003), xv–xvi.

[4] See generally Frank Costigliola and Michael J. Hogan, eds., *Explaining the History of American Foreign Relations*, 3rd ed. (New York: Cambridge University Press, 2016). The new edition of this work now includes a section on the legal influences on U.S. foreign relations..

interconnecting world, and he rejected the idea that a court could apolitically address the world's problems. Instead, a global parliament could collectively and flexibly craft solutions to issues that affected the world as a whole. Heeding these distinctive legal cultures and focusing on the lawyer-statesmen who brought them to bear on international affairs illuminates the defining battle of twentieth-century foreign relations: the fight over the League of Nations.

By the 1930s, sociological jurisprudence had evolved into legal realism, and classical legal thought "would shudder and collapse into a pile of rubble."[5] Yet many of the ideas animating classical legal thought would endure.[6] In particular, even as men like Thurman Arnold and Wendell Berge contemplated a new relationship among the United States, foreign nations, and international business, in which the jurisdictional restraints on U.S. power fell away as they had within the United States, older patterns of sovereignty persisted. By the end of Eisenhower's first term, the U.S. government rejected the plans of antimonopolists for an international organization or an agreement at the United Nations to regulate cartels. Moreover, the Allied occupation of Germany also came to an end with the

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[5] William M. Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886-1937* (New York: Oxford University Press, 1998), 175; G. Edward White, "From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America," *Virginia Law Review* 58 (1972): 999–1028; Edward A. Purcell, "American Jurisprudence between the Wars: Legal Realism and the Crisis of Democratic Theory," *The American Historical Review* 75 (1969): 424–46. Other scholars downplay the differences between sociological jurisprudence and legal realism. See Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), 169–70.

[6] The desire to "absorb and temper" "the destabilizing consequences of Realism," and to restore a distinction between law and politics, helped inspire the legal process school, the dominant legal approach in the early postwar period. See Horwitz, *The Transformation of American Law, 1870-1960*, 247, 250, 254. The need to distinguish the United States from totalitarian states also had a profound influence on legal thought. Purcell, "American Jurisprudence between the Wars"; William E. Nelson, *The Legalist Reformation: Law, Politics, and Ideology in New York, 1920-1980* (Chapel Hill: The University of North Carolina Press, 2003).

West German economy intact (though the Allies did reserve important powers and tied the Federal Republic to the Western system).[7]

Having rejected a more radical restructuring of the international system to address the fears raised by German cartels, the United States used extraterritorial jurisdiction to regulate business activities abroad. While accepting that nation-states should generally regulate the activities that occur within their borders, Judge Learned Hand's opinion in *Alcoa* recognized that many business activities transcended boundaries and affected multiple jurisdictions. Hand's intended effects test therefore extended the reach of U.S. law to those activities, but with a key limit: only foreign conduct intended to affect American commerce fell within the purview of the Sherman Act. *Alcoa* thus presupposed a continuing judicial responsibility to preserve the boundaries between the United States and foreign nations while promoting a more integrated global economy, the sort of responsibility that Taney assigned the federal courts under dual federalism.

Indeed, the comparison with dual federalism is revealing. In 1858, on the eve of the American Civil War, the U.S. Supreme Court decided the case of *Ableman v. Booth*. The Wisconsin Supreme Court had granted a writ of habeas corpus to free prisoner Sherman Booth, held by the U.S. marshal under federal authority for urging a mob to free a fugitive slave. Holding that the Wisconsin Supreme Court's writ violated the U.S. Constitution, Chief Justice Roger B. Taney reviewed the major features of dual federalism, which the Supreme Court had developed during his twenty-plus-year tenure. "[N]o State can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent Government," Taney declared. The federal

[7] Marc Trachtenberg, *A Constructed Peace: The Making of the European Settlement 1945-1963* (Princeton, NJ: Princeton University Press, 1999), 125–28.

government and the several states were "separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres . . . as if the line of division was traced by landmarks and monuments visible to the eye."[8]

Despite this demarcating line, however, "local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one State upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them."[9] The Supreme Court served this function, preserving the independence of the federal government, ensuring that Constitution and federal law were uniformly interpreted throughout the nation, and preventing state courts from issuing opinions at odds with those of federal courts.[10]

History had proven the wisdom of this approach: "[S]everal irritating and angry controversies have taken place between adjoining States, in relation to their respective boundaries, and which have sometimes threatened to end in force and violence, but for the power vested in this court to hear them and decide between them."[11] Thanks to the U.S. Supreme Court, controversies among the several states, and between the states and the federal government, "instead of being determined by military and physical force, are heard, investigated, and finally settled, with the calmness and deliberation of judicial inquiry."[12] There is considerable irony in Taney's words, for his disastrous decision in *Dred Scott v. Sandford* a year earlier would soon help to plunge the country into conflict. But dual

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[8] Ableman v. Booth, 62 U.S. 506, 515-16 (1858).
[9] *Id.* at 17.
[10] *Id.* at 518-19.
[11] *Id.* at 519.
[12] *Id.* at 520-21.

federalism would endure beyond the war, and vestiges would remain well into twentieth century.

Nonetheless, the U.S. Supreme Court would ultimately reject Taney's understanding of the relationship between the federal government and the states, as well as the role of the Supreme Court in administering it. As Justice Thurgood Marshall declared in 1987, "'[T]he fundamental premise . . . —that the States and the Federal Government in all circumstances must be viewed as coequal sovereigns—is not representative of the law today.' [Dual federalism was] the product of another time. The conception of the relation between the States and the Federal Government there announced is fundamentally incompatible with more than a century of constitutional development."[13] Through this process of development, traditional constitutional restrictions on Congress' ability to regulate commerce fell away. An expansive welfare state and new ideas of concurrent jurisdiction replaced the clear boundaries between federal and state power. "Our Federalism," in other words, evolved into a less doctrinaire "system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."[14] Rather than guarding a "line of division . . . visible to the eye," the Supreme Court would merely be solicitous of the interests of the several states.

Yet as Taney's theory of coequal sovereignty eroded within the United States, the issues he raised in *Ableman v. Booth* emerged in another context in the twentieth century: the

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[13] Puerto Rico v. Branstad, 483 U.S. 219, 228, 230 (1987) (quoting FERC v. Mississippi, 456 U.S. 742, 761 (1982)).

[14] Younger v. Harris, 401 U.S. 37, 44 (1971).

United States' relations with foreign states. The idea that "no State can authorize one of its judges or courts to exercise judicial power . . . within the jurisdiction of another and independent Government"—this was Justice Oliver Wendell Holmes's position in *American Banana* and the argument of *Alcoa's* opponents in the 1950s. The desire that controversies between states, "instead of being determined by military and physical force, [be] heard, investigated, and finally settled, with the calmness and deliberation of judicial inquiry" thanks to some "common arbiter"—this was the theory at the heart of Elihu Root's campaign for international law and a world court. And as with dual federalism at home, these ideas were contested. Woodrow Wilson during the First World War and Thurman Arnold and Wendell Berge during the Second World War challenged the idea that nation-states constituted "separate and distinct sovereignties, acting separately and independently of each other." They sought to replace the line of division that distinguished sovereigns with a more communal understanding of the international system. In other words, domestic debates about federalism and sovereignty spilled over into debates about international law and sovereignty abroad.

To be sure, the analogy between the foreign and the domestic was never perfect. Elihu Root pointed to diversity jurisdiction within the United States to support his idea of a world court of independent judges, but this did not mean he was primarily influenced by the domestic American model. He also drew on a wider international jurisprudence shaped by European and British thinkers like Lassa Oppenheim and John Westlake. Indeed, the fact that debates about international law resembled debates about federalism is unsurprising, for the law of nations had itself shaped federalism during the eighteenth and nineteenth

centuries.[15] And the federal and state governments may have been "separate and distinct sovereignties, acting separately and independently of each other," but especially after the Civil War, "there [was] but one nation, acting in direct relation to and representation of every citizen in every state," as Root declared in 1907.[16] And in this nation, the U.S. Constitution was the supreme law of the land.

But the comparison is nevertheless illuminating. For it underscores the degree to which policymakers in the first half of the twentieth century had to grapple with complicated legal questions as they responded to the challenges of a globalizing economy ravaged by two world wars and a depression and reconstructed amidst the Cold War. These legal questions—about the place of sovereignty in a connecting world and the role of courts and legislatures in regulating international affairs—resembled questions Americans had confronted at home and produced comparable answers. In other words, the U.S.-led international order abroad shared key elements of the architecture used to build a unified nation at home. The demise of dual federalism and the triumph of a more consolidated understanding of the Union have obscured the similarities, but ideas about sovereignty bridge the exercise of American power before and after 1898.

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[15] See, e.g., Alison L. LaCroix, *The Ideological Origins of American Federalism* (Harvard University Press, 2010), 124–25; Thomas H. Lee, "Making Sense of the Eleventh Amendment: International Law and State Sovereignty," *Northwestern University Law Review* 96 (2002): 1027; Sarah H. Cleveland, "Our International Constitution," *Yale Journal of International Law* 31 (2006): 1–126.

[16] "The Real Questions Under the Japanese-Treaty and the San Francisco School Board Resolution," Presidential Address at the First Annual Meeting of the American Society of International Law, Apr. 19, 1907, in Elihu Root, *Addresses on International Subjects*, ed. Robert Bacon and James Brown Scott (Cambridge, MA: Harvard University Press, 1916), 14, 20–21.

From Law to Economics

Though ideas about law and about sovereignty provided continuity to American foreign relations, there was also profound change. As the United States emerged as the world's preeminent power during World War II, many lawyers felt a responsibility to use federal power to restrain and regulate corporations, both at home and around the world. Left unchecked, they argued, corporate power would lead to totalitarianism. But by the 1950s, the terms of the conversation had shifted, and regulating international business no longer seemed to be an obvious good. Indeed, law was sometimes regarded as a problem rather than a solution. Bodies of law like antitrust imposed requirements on free-world companies that their communist competitors did not face. Policymakers like John Foster Dulles sought "a broader point of view than the strictly legal one."[17]

Economics offered such a broader point of view, and it took on increasing importance as policymakers confronted a more competitive international economy. As U.S. support for European integration illustrated, U.S. officials had subordinated the United States' own economic self-interest for the sake of more important political goals: integrating West Germany into Western Europe and standing up to the Soviet threat. As Europe and Japan recovered from the Second World War, however, policymakers began to worry about the United States' own economic position.

By the 1980s, these concerns culminated in neoliberalism: lifting regulations, cutting taxes, privatizing state-owned enterprises, and extending markets to more and more areas of

[17] Memorandum of Discussion at the 242d Meeting of the National Security Council, Mar. 24, 1955, in U.S. Department of State, *Foreign Relations of the United States, 1955–1957*, vol. 10, *Foreign Aid and Economic Defense Policy* (Washington, DC: Government Printing Office, 1989), 524–26.

human interaction.[18] Many scholars have viewed neoliberalism as a response to the economic crisis of the 1970s, as policymakers looked for a way to jumpstart growth. And there is no doubt that the late twentieth century witnessed the triumph of a new and powerful ideology of the market. As historian Daniel T. Rodgers, has written, "In an age when words took on magical properties, no word flew higher or assumed a greater aura of enchantment than 'market.' . . . The puzzle of the era's enchantment of the market idea is that it was born not out of success but out of such striking market failure."[19] Globalization provides one important answer to this puzzle. By the 1970s, policymakers thought that neoliberal reforms were essential if their nations were to compete successfully in this more open world with fewer restrictions on the movement of capital. Competing for capital seemed to require probusiness reforms and sparked a "race to the bottom."[20]

But signs of this more competitive, cutthroat economy were evident far earlier than the 1970s. In a 1962 speech, former Attorney General Herbert Brownell captured the transformation that had occurred in the years since the Second World War. "Our tariff and foreign tax policies as well as our antitrust policies developed during an era when business

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[18] Aaron Major, *Architects of Austerity: International Finance and the Politics of Growth* (Stanford, CA: Stanford University Press, 2014), 9; Marion Fourcade-Gourinchas and Sarah L. Babb, "The Rebirth of the Liberal Creed: Paths to Neoliberalism in Four Countries," *American Journal of Sociology* 108 (2002): 533–79; John Markoff and Verónica Montecinos, "The Ubiquitous Rise of Economists," *Journal of Public Policy* 13 (Jan. 1993): 37–68.

[19] Daniel T. Rodgers, *Age of Fracture* (Cambridge, MA: The Belknap Press of Harvard University Press, 2011), 41–76.

[20] Major, *Architects of Austerity*, 12–13; Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (New York: Cambridge University Press, 1996); 44–65; Dani Rodrik, *Has Globalization Gone Too Far?* (Washington, DC: Institute for International Economics, 1997).

And yet considerable evidence contradicts this claim and suggests that globalization can even strengthen the regulatory power of states, or at least of the states with large internal markets like the United States. See David Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy* (Cambridge, MA: Harvard University Press, 1995); Daniel W. Drezner, "Globalization and Policy Convergence," *International Studies Review* 3 (2001): 53–78; Daniel W. Drezner, *All Politics Is Global: Explaining International Regulatory Regimes* (Princeton: Princeton University Press, 2007); David R. Cameron, "The Expansion of the Public Economy: A Comparative Analysis," *The American Political Science Review* 72 (1978): 1243–61.

operation and equity investment were largely concerned with domestic United States resources and substantially devoted to the United States market," he explained. But as the European economy recovered after World War II, American business executives began to look to Europe:

> Far sighted business management in the United States also began to appreciate and take advantage of the profit potentials available by way of equity investment, accompanied by direct or shared control, in manufacturing plants, assembly plants and marketing arrangements based within Western Europe. A combination of trade barriers against imports and lower manufacturing costs within the market area inevitably led to the development with which we are now concerned. This development was further accelerated, and its economic and business significance dramatized, when the Treaty of Rome was signed on March 25, 1957 by the so-called 'Inner Six'. . . .

American business, in other words, established production and distribution footholds in Europe. And through private associations like the International Chamber of Commerce and the International Arbitration Association, they developed procedures to navigate local customs, practices, and law. But the U.S. government was slow to catch up. According to Brownell, the new economic situation that incentivized U.S. companies to move to Europe, and the emergence of European competition law, meant that the United States should hesitate to apply its antitrust laws abroad.[21] Brownell's concerns—his recognition that U.S. companies operated in a global economy and his belief that U.S. law could disadvantage American competitiveness—illustrated policymakers' perception of the limitations on American power at the moment when it was arguably at its zenith.

At the century's beginning, Root and other international lawyers had promoted a system of international law that regulated states rather than non-state actors like individuals or corporations. The distinction between public (the state) and private (individuals and

[21] Address by Herbert Brownell, "American Business in World Trade," National Industrial Conference Board, May 16, 1962, Antitrust (9), Box 30, Brownell Papers, DDEL.

corporations) that infused classical legal thought underlay their program. Corporations always fit uneasily within this model, however. While the multinational companies of the early twentieth century were few in number, in the 1950s they emerged as the defining feature of the international economy. And their two-fold character raised unsettling questions. As historian Tony A. Freyer has written, "The separate corporate subsidiaries operating in foreign markets were nonetheless bound by the local laws and regulations of each of those sovereign States in which they did business, just as the parent company remained directly subject to the laws of the host State."[22] By transcending jurisdictions, they seemed to be "subjects without a sovereign," or at least subjects with multiple sovereigns.[23]

Woodrow Wilson's League of Nations and the International Trade Organization proposed by the United States in the 1940s offered a way around this impasse. Both institutions would have broken down the public-private distinction that insulated private actors from public international law. They would have provided mechanisms for international law to act upon non-state actors. Wedded to sovereignty, the United States rejected both plans. And by nixing the proposal of the United Nations Economic and Social Council's Ad Hoc Committee on Restrictive Business Practices, the Eisenhower administration ensured that the issue would not return to the agenda until the 1970s, when it would continue to enjoy little success.[24]

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[22] Tony A. Freyer, "Regulatory Distinctiveness and Extraterritorial Competition Policy in Japanese-US Trade," *World Competition Law and Economics Review* 21 (1998): 10.

[23] Theodore Roosevelt, Fifth Annual Message to Congress, Dec. 5, 1905, in Theodore Roosevelt, *State Papers as Governor and President, 1899-1909*, ed. Hermann Hagedorn, National ed., vol. 15, The Works of Theodore Roosevelt (New York: C. Scribner's Sons, 1926), 273.

[24] Eleanor M. Fox, "Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade," in *Antitrust: A New International Trade Remedy?*, ed. John O. Haley and Hiroshi Iyori (Seattle: Pacific Rim Law & Policy Association, 1995), 3.

But, it was not simply the enduring power of sovereignty that undermined hopes for subordinating corporations to some effective international authority. The Bretton Woods system was supposed to reconcile national economic autonomy with the needs of international financial stability, giving policymakers some flexibility to pursue full employment and economic growth. Instead, officials felt a powerful sense of constraint. As Aaron Major explains, "By the late 1950s the increasing volume and speed of global capital flows had created a real dilemma for national governments and international organizations charged with managing the postwar international monetary order. [F]or many North American and Western European governments, the acceleration of short-term capital movements wreaked havoc on their balance of payments accounts."[25] Rather than preserving national autonomy, in other words, the postwar international economic architecture seemed to dictate certain policy responses.

This did not necessarily entail deregulation and a less assertive role for the state, however.[26] Armed with the unprecedented authority of the Trade Expansion Act of 1962, the U.S. government negotiated lower tariffs, furthering the globalization that became a defining feature of the contemporary world. It would also launch "a near decade-long process of institutional innovation, the central goal of which was to buttress the original Bretton Woods institutions with new international credit facilities that could be drawn on to finance balance of payments deficits," and which shifted power to public monetary

[25] Jamie Martin, "Were We Bullied?," *London Review of Books*, Nov. 21, 2013, 16–18; Major, *Architects of Austerity*, 36.

[26] See *supra* note 20.

authorities.[27] With respect to competition, companies still had to deal with formidable antitrust authorities in the nations in which they operated.

But caught up in the desire to dismantle public barriers to preserve American competitiveness and to overcome the limitations of Bretton Woods, U.S. officials set aside the wartime preoccupation with competitive conditions within other countries. They were content with the "partial, inadequate, and generally unsatisfactory enforcement of our law against those offenders whom we happen to catch."[28] Constraining global corporations no longer offered a compelling motivation, and the government sought to ease obstacles for American companies doing business abroad.

"What Happened to the Antitrust Movement?" Richard Hofstadter asked in 1964.[29] The emergence of an alternative "politics of productivity" and the rise of consumer consumption provided one answer to Hofstadter's question. In place of antimonopoly, policymakers emphasized economic growth and increased consumer consumption as a way of bypassing difficult questions about the distribution of wealth.[30] Gradually, moreover, the conservative opponents of the New Deal gained the upper hand.[31] "In the old days, corporations were regulated in the name of a theory of the healthy role they could and must

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[27] Major, *Architects of Austerity*, 37, 45; Douglas A. Irwin, "The GATT in Historical Perspective," *American Economic Review* 85 (May 1995): 323–28; William Diebold, Jr., "A Watershed with Some Dry Sides: The Trade Expansion Act of 1962," in *John F. Kennedy and Europe*, ed. Douglas Brinkley and Richard T. Griffiths (Baton Rouge: Louisiana State University Press, 1992), 235–60.

[28] Attorney General's National Committee to Study the Antitrust Laws, *Report of the Attorney General's National Committee to Study the Antitrust Laws* (Washington, DC: Government Printing Office, 1955), 100–01.

[29] Richard. Hofstadter, "What Happened to the Antitrust Movement?" in *The Paranoid Style in American Politics and Other Essays* (New York: Vintage Books, 2008), 188–237.

[30] Charles S. Maier, *In Search of Stability : Explorations in Historical Political Economy* (New Rochelle, NY: Cambridge University Press, 1987), 123, 130–34; Lizabeth Cohen, *A Consumers' Republic: The Politics of Mass Consumption in Postwar America* (New York: Alfred A. Knopf, 2003); Alan Brinkley, "The Antimonopoly Ideal and the Liberal State: The Case of Thurman Arnold," *Journal of American History*, vol. 80 (1993): 557–79.

[31] Major, *Architects of Austerity*; Angus Burgin, *The Great Persuasion: Reinventing Free Markets Since the Depression* (Cambridge, MA: Harvard University Press, 2012); Daniel Stedman Jones, *Masters of the Universe: Hayek, Friedman, and the Birth of Neoliberal Politics*, (Princeton: Princeton University Press, 2014); Kevin M. Kruse, *One Nation Under God: How Corporate America Invented Christian America* (New York: Basic Books, 2015).

play in a democracy," historian Samuel Moyn has argued. "They were not simply unbound—as they have been since the conservative legal movement set the terms of corporate law nationally and internationally—and then at most taxed after the fact when they went awry."[32]

Moyn is right that perceptions of the proper relationship between corporations and government were changing. But even before the rise of the conservative legal movement and the triumph of neoliberalism, economics was emerging as a new framework for understanding policy choices. It provided a language for lawyers and businesspeople to challenge the global assertiveness of the U.S. regulatory state that had emerged during World War II. And it created a sense among policymakers that the United States must adapt and subordinate its economy to international economic realities, rather than using law to promote an existing vision of political economy. As a result, multinational corporations would not be regulated in the name of a theory of the healthy role they could and must play in the international community. "Since 1947 successive GATT rounds lowered macroeconomic trade barriers throughout the world, facilitating the integration of domestic markets into a more global business order which nevertheless remained rooted in the [multinational corporation's (MNC)] host state," explains Freyer. "Yet, paradoxically, progressive international market integration fostered increasing private anticompetitive practices among MNCs and other firms operating in the local economic order."[33]

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[32] Samuel Moyn, ""Stewart Mini-Symposium: The Ambitious Past of Corporate Regulation," Nov. 24, 2014," http://opiniojuris.org/2014/11/24/stewart-mini-symposium-ambitious-past-corporate-regulation/.

[33] Tony Freyer, "Antitrust and Bilateralism: The US, Japanese and EU Comparative and Historical Relationships," in *Competition Policy in the Global Trading System: Perspectives from the EU, Japan and the USA*, ed. Mitsuo Matsushita and Clifford Jones (New York: Kluwer Law International, 2002), 8.

The Legacy of Extraterritoriality

In the early 1960s, however, this transformation remained inchoate. While more ambitious schemes to regulate the world had failed, the United States nevertheless applied its laws to transactions that occurred beyond its borders. In fact, in addition to opposition at home, extraterritoriality generated considerable opposition abroad, epitomized by Jean-Jacques Servan-Schreiber's 1968 book *The American Challenge*, which warned of American economic domination.[34] Some nations even adopted blocking statues (punishing companies which cooperated with U.S. investigations) to limit what they perceived as U.S. incursions on their sovereignty. U.S. courts, in turn sought to better balance extraterritoriality and countervailing concerns with comity.[35]

Despite these challenges, the synthesis between extraterritoriality and territorial sovereignty underlying *Alcoa* was emblematic of the United States' general efforts to shape the postwar world. The new institutions established by the United States embedded international cooperation upon a continuing foundation of national sovereignty. The United Nations reinforced rather than weakened sovereignty. As Mark Mazower has written, "[T]he UN was basically a cooperative grouping of independent states. Explicit where the League was implicit, it rested on the doctrine of the sovereign equality of its members. Yet despite the utopian rhetoric of its supporters, the UN represented a deliberate retreat from the League's comparative egalitarianism back to the great power conclaves of the past."[36]

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[34] J.-J. Servan-Schreiber, *The American Challenge* (New York: Atheneum, 1968).

[35] Kal Raustiala, *Does the Constitution Follow the Flag?: The Evolution of Territoriality in American Law* (New York: Oxford University Press, 2009), 111–17; Gary B. Born, "A Reappraisal of the Extraterritorial Reach of U.S. Law," *Law and Policy in International Business* 24 (1992): 32–54.

[36] Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton: Princeton University Press, 2009), 149.

Likewise, the Bretton Woods agreements created an international and financial monetary system imbued with the new Keynesian regard for national welfare. The international gold standard had rested on sovereignty-limiting rules that promoted economic integration at the expense of national welfare. By contrast, Bretton Woods promoted economic integration but only while preserving space for a Keynesian management of the economy. As historian Jamie Martin writes, "One of the most innovative aspects of the Anglo-American deal was the fact that it prioritised the need for full employment and social insurance policies at the national level over thoroughgoing international economic integration. To this extent, it was more Keynesian than not—and it represented a dramatic departure from older assumptions about the way the world's financial system should function." The United States and Britain, Martin emphasizes, "agreed to rewrite the rules of global capitalism to make the world safe for the interventionist Keynesian state."[37]

International human rights, too, revealed this same dynamic. As Samuel has recently argued, post-World War II internationalism was primarily about advancing the interests of the great powers, and nationalism and decolonization overshadowed rights talk. Rather than transcending and limiting the nation-state, rights were to be enjoyed through it and within it. And efforts to hold a wider range of individuals and corporations responsible for wartime atrocities failed in large part because the overburdened Allies expected that Germany itself would hold trials—they were hesitant to impose external solutions. Neither the horrors of World War II nor the ideas embodied in agreements like the Universal Declaration of Human Rights dislodged the primacy of the nation-state.[38]

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[37] Martin, "Were We Bullied?," 16–18; Major, *Architects of Austerity*, 26.

[38] Samuel Moyn, *The Last Utopia Human Rights in History* (Cambridge, MA: Belknap Press of Harvard University Press, 2010), 44–83; Brief Amici Curiae of Nuremberg Historians and International Lawyers in

As a result, extraterritorial antitrust enforcement proved to be "partial, inadequate, and generally unsatisfactory," limited to "those offenders whom we happen to catch."[39] Indeed, as Alan Sykes and Paul Stephan have argued, extraterritoriality can function as a form of protectionism, "the functional equivalent of a trade barrier." It is easy to hale U.S. defendants into court. "By contrast," Sykes points out, "many (although by no means all) foreign defendants are beyond the reach of U.S. courts as both a legal and practical matter." Extraterritorial jurisdiction therefore only allows the United States to regulate the behavior of some foreign companies, namely those with sufficient connections to the United States. Thus, foreign firms deciding whether to enter the U.S. market have to decide whether they want to expose themselves to liability for their activities elsewhere in the world, liability they might avoid if they lacked a presence in the United States. For many companies, the costs exceed the benefits.[40]

Over time, however, other nations came to adopt antitrust regimes of their own.[41] The European Union in particular has developed a robust competition policy. Building on the anticartel provisions of the Schuman Plan described in Chapter Four, the 1957 Treaty of Rome contained competition provisions analogous to the Sherman Act. And as the

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Support of Neither Party, at 15-16, Kiobel v. Royal Dutch Petroleum Co. 133 S. Ct. 1659 (2013); Devin O. Pendas, *The Frankfurt Auschwitz Trial, 1963-65: Genocide, History and the Limits of the Law* (New York: Cambridge University Press, 2006), 11–13; see generally Jonathan A. Bush, "The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said," *Columbia Law Review* 109 (2009): 1094–1261.

[39] Attorney General's National Committee to Study the Antitrust Laws, *Report of the Attorney General's National Committee to Study the Antitrust Laws*, 100–01.

[40] Paul B. Stephan, "The Political Economy of Extraterritoriality," *Politics and Governance* 1 (June 2013): 98; Alan O. Sykes, "Transnational Forum Shopping as a Trade and Investment Issue," *The Journal of Legal Studies* 37 (2008): 342.

[41] While the number of nations with antitrust laws increased from two to thirty-seven over the hundred-year period from 1890 through 1990, since 1990 over 120 nations now have competition laws. Antitrust regulation is truly a global phenomenon. Tim Büthe, "The Politics of Market Competition: Trade and Antitrust in a Global Economy," in *The Oxford Handbook of the Political Economy of International Trade*, ed. Lisa L. Martin (New York: Oxford University Press, 2015), 215.

conceptual foundations of U.S. antitrust policy have changed—with a new focus on economic efficiency driving U.S. policy—European competition policy has generally followed suit, though important differences remain.[42]

The Eisenhower administration had used the lack of an international consensus to reject a UN agreement on cartels. But the diffusion of antitrust law around the world reopened the possibility of forging common international standards. In fact, during the 1970s, it was developing nations in the Global South that pushed for an international agreement on competition, which they saw as a way to limit incursions by multinational corporations. These efforts generated a Restrictive Business Practices Code in 1980 created by the United Nations Conference on Trade and Development.[43] Meanwhile, the Organization for Economic Cooperation and Development (OECD) also sought to harmonize the competition policies of its industrialized members. In 1967, it recommended voluntary cooperation, and by 1976 it had produced Guidelines for Multinational Enterprises.[44] But all of these efforts predated the efficiency revolution in antitrust law and proved to be dead ends.[45]

The creation of the World Trade Organization at the Uruguay Round in 1994 offered new possibilities, and many experts have called for an international agency to

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[42] Daniel J. Gifford and Robert T. Kudrle, *The Atlantic Divide in Antitrust: An Examination of US and EU Competition Policy* (Chicago: University Of Chicago Press, 2015).

[43] Eleanor M. Fox, "Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade," in *Antitrust: A New International Trade Remedy?*, ed. John O. Haley and Hiroshi Iyori (Seattle: Pacific Rim Law & Policy Association, 1995), 3–5; Eleanor M. Fox, "Harnessing the Multinational Corporation to Enhance Third World Development—The Rise and Fall and Future of Antitrust as Regulator," *Cardozo Law Review* 10 (1989): 1981–2012; Debra Miller and Joel Davidow, "Antitrust at the United Nations: A Tale of Two Codes," *Stanford Journal of International Law*, 1982, 347–76; Nataliya Yacheistova, "The International Competition Regulation: A Short Review of a Long Evolution," *World Competition* 18 (1994): 102–04.

[44] Barry E. Hawk, "The OECD Guidelines for Multinational Enterprises: Competition," *Fordham Law Review* 46 (1977): 241–76; Fox, "Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade," 5.

[45] Fox, "Harnessing the Multinational Corporation," 1982–83; Fox, "Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade," 5.

promote competition within the WTO.[46] But the WTO was designed to regulate states, not private actors. The severing of trade policy and antitrust described in Chapter Five has continued to frustrate hopes of forging an international agreement on antitrust. As antitrust scholar Eleanor M. Fox writes, "Government restraints of trade are governed by the GATT (WTO), while private restraints of trade are government by the competition laws of the nations. A meaningful system of international antitrust has been avoided for fear of loss of national control and the related fear that world negotiations will inevitably entail compromising principle."[47] More recently, the Doha Round of trade negotiations contemplated an agreement on competition before dropping the issue.[48]

The failure to achieve an international agreement on antitrust enforcement, combined with the explosion of antitrust regimes around the world, has arguably made it more important for nations to coordinate with one another, both to avoid conflicts and to make competition polices work together more effectively.[49] Within the United States, the executive branch has taken the lead in this process, working with other governments and multilateral and organizations to coordinate enforcement policies.[50]

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[46] Philip Marsden, *A Competition Policy for the WTO* (London: Cameron May, 2003); Edward M. Graham and J. David Richardson, "Conclusions and Recommendations," in *Global Competition Policy*, ed. Edward M. Graham and J. David Richardson (Washington, DC: Institute for International Economics, 1997), 559–60; Andrew Guzman, "The Case for International Antitrust," in *Competition Laws in Conflcit: Antitrust Jurisdiction in the Global Economy*, ed. Richard A. Epstein and Michael S. Greve (Washington, DC: AEI Press, 2004), 99.

[47] Fox, "Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade," 9; Freyer, "Antitrust and Bilateralism: The US, Japanese and EU Comparative and Historical Relationships," 5–6.

[48] World Trade Organization, Ministerial Conference—Fourth Session—Doha, 9-14 Nov. 2001—Ministerial Declaration—Adopted on 14 Nov. 2001, ¶ 25, WTO Doc. No. WT/MIN(01)/DEC/1 (Nov. 20, 2001); WTO General Council, Decision Adopted by the General Council, WT/L/579 (Aug. 2. 2004).

[49] But see Paul B. Stephan, "Global Governance, Antitrust, and the Limits of International Cooperation," *Cornell International Law Journal* 38 (2005): 174.

[50] See, for example, Brief for the United States as Amicus Curiae Supporting Petitions at 22, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004); Joseph P. Griffin, "Extraterritoriality in U.S. and EU Antitrust Enforcement," *Antitrust Law Journal* 67 (1999): 159–99; Marie-Laure Djelic and Thibaut

Meanwhile, the federal courts have also continued their role of policing the limits of the global regulatory state. In an important case in the 1970s, the U.S. Court of Appeals for the Ninth Circuit supplemented Hand's effects test with Kingman Brewster's "jurisdictional rule of reason" to better accommodate the interests of foreign nations.[51] Other circuits soon adopted this approach.[52] But businesspeople continued to express frustration with the costs of extraterritorial antitrust enforcement. In 1982, alarmed by renewed complaints that extraterritorial enforcement limited American business' ability to compete, Congress attempted to clarify the reach of U.S. law by limiting extraterritoriality to certain circumstances. In essence, Congress codified the effects test, requiring "a direct, substantial and reasonably foreseeable effect" on domestic commerce or conduct that involves U.S. imports before authorizing jurisdiction.[53]

This general language left major questions unresolved, and in 2004 the U.S. Supreme Court heard another important case about the extraterritorial reach of the Sherman Act.[54] Justice Stephen Breyer's opinion for the court sought to move beyond a mere negative understanding of comity—avoiding conflicts between jurisdictions—towards a more positive notion of "help[ing] the potentially conflicting laws of different nations work

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Kleiner, "The International Competition Network: Moving Towards Transnational Governance," in *Transnational Governance: Institutional Dynamics of Regulation*, ed. Marie-Laure Djelic and Kerstin Sahlin-Andersson, (New York: Cambridge University Press, 2006), 287–307; Oliver Budzinski, "The International Competition Network: Prospects and Limits on the Road towards International Competition Governance," *Competition and Change* 8 (2004): 223–42; Leslie C. Overton, Deputy Assistant Att'y Gen., Remarks at the Fifth Annual Chicago Forum on International Antitrust Issues: International Antitrust Engagement: Benefits and Opportunities (June 12, 2014), http://justice.gov/atr/public/speeches/306510.pdf.

[51] Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 613 (9th Cir. 1976).

[52] Industrial Inv. Dev. Corp. v. Mitsui & Co. 671 F.2d. 876, 855 (5th Cir. 1982); Montreal Trading Ltd. V. Amax, Inc. 661 F.2d 864, 869-70 (10th Cir. 1981); Mannington Mills, v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3rd Cir. 1979).

[53] Foreign Trade Antitrust Improvements Act of 1982, 96 Stat. 1233, 1246, codified at 15 U.S.C. § 6a (2012). Fox, "Harnessing the Multinational Corporation," 2000.

[54] Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (New York: Knopf, 2015), 100–01.

together in harmony."[55] As he has subsequently written, the Supreme Court "no longer seeks only to avoid direct conflicts among laws of different nations; it seeks, rather to harmonize the enforcement of what are often similar national laws" and to "maintain cooperative working arrangements with corresponding enforcement authorities of different nations . . . consistent with the effort in the executive branch to harmonize regulatory rules."[56]

In reconceiving of comity in this manner, Justice Breyer narrowed the gap between the understanding of sovereignty prevailing under federalism at home and the understanding used in international law. Domestically, dual federalism no longer prevails. Recognizing that the United States is now one nation, the Supreme Court has instead promoted a "system in which there is sensitivity to the legitimate interests of both State and National Governments."[57] Internationally, however, sovereignty has remained more robust. But recognizing our "ever more interdependent world—a world of instant communications and commerce, and shared problems of (for example) security, the environment, health, and trade), all of which ever more pervasively link individuals without regard to national boundaries," Breyer sought a less formal, more functional understanding of sovereignty. "[T]here is no Supreme Court of the World with power to harmonize differences among the approaches of different nations," he has pointed out. "Thus such problems will require the judiciaries of different nations to address them separately but collaboratively. If they are to do so, they cannot abdicate their authority at the water's edge."[58] By reconceiving of sovereignty in this manner, Justice Breyer assumed that judges are capable of understanding and crafting solutions for complex global problems.

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[55] F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 156 (2004).
[56] Breyer, *The Court and the World*, 4, 96, 133.
[57] Younger v. Harris, 401 U.S. 37, 44 (1971).
[58] Breyer, *The Court and the World*, 6, 106–07.

Other members of the U.S. Supreme Court, however, have been more skeptical of Justice Breyer's faith in the judiciary's capacity to carry out this task. Antitrust is a special—though by no means unique[59]—case, in that Congress subsequently ratified what the courts had inferred: that Congress intended for antitrust to apply abroad in certain situations. In other areas of law, however, in which Congress remained silent—employment discrimination, securities, human rights—the Supreme Court has resurrected Justice Oliver Wendell Holmes's presumption against extraterritoriality. Rejecting Hand's effects-based jurisdiction and limiting the scope of U.S. law to the territorial United States, the court has questioned the competence of judges to understand and evaluate the international consequences of their decisions for U.S. foreign relations.[60]

The court's recent jurisprudence therefore seeks to replace Hand's facts-based effects test with a more rule-bound approach. As Justice Antonin Scalia wrote in *Morrison v. National Australia Bank*, "The results of judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the court—demonstrate the wisdom of the presumption against extraterritoriality. Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects."[61] Congress has not necessarily agreed with these decisions, and it quickly overturned both *Morrison* and an earlier case.[62] "Apparently the presumption against extraterritoriality, which supposedly manifests

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[59] Stephan, "The Political Economy of Extraterritoriality," 97.

[60] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013); Morrison v. Nat'l Australia Bank Ltd, 130 S. Ct. 2869 (2010); EEOC v Arabian American Oil Co., 499 U.S. 244 (1991) [hereinafter *Aramco*].

[61] *Morrison*, 130 S. Ct. at 2877, 2881.

[62] Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 109, 105 Stat. 1071, 1077–78 (1991) (codified at 42 U.S.C. 2000e(f) & 2000e-1); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, sec. 929P(b), 124 Stat. 1376, 1865–65 (2010) (codified at 15 U.S.C. § 77v(c) (2012) & 15 U.S.C. §78aa(b) (2012)).

legislative intent, does not always hit Congress's mark," observed legal scholar Zachary Clopton.[63]

But, that is precisely the point. The Supreme Court seeks to force Congress to decide whether or not legislation applies abroad, rather than leaving it to the courts to guess what Congress would have said had it addressed the question. This reflects the sense of some justices that Congress and the executive branch are better able to make determinations relating to foreign affairs than courts. As Chief Justice John Roberts explained, "The presumption against extraterritoriality guards against our courts triggering such serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches."[64]

If Justice Breyer's pragmatic approach seeks to narrow the gap between the nineteenth-century notions of sovereignty that prevail in international affairs and the weaker understandings that apply to federal-state relations within the United States, the revived presumption against extraterritoriality addresses another anomaly, one concerning the way the law treats the role of the judge. As Chapter Three explains, *Wickard v. Filburn* and *Alcoa* both extended U.S. law to spheres formerly left to other sovereigns, the several states on the one hand and foreign governments on the other. Driven by the experience of the Great Depression and the Second World War, the federal government began to use its power to address the economic sources of economic misery and war, both at home and abroad. In providing a judicial imprimatur to this shift, Justice Robert Jackson and Judge Learned Hand were both mindful of the need for limits. Concluding that judicial supervision did more

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[63] Zachary D. Clopton, "Replacing the Presumption Against Extraterritoriality," *Boston University Law Review* 94 (2014): 14–15.

[64] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).

harm than good, Jackson abandoned the traditional effects test and shifted responsibility to Congress to ascertain the boundary between Congress' commerce power and the states' police powers. Faced with a vague, open-ended statute silent as to scope, meanwhile, Hand embraced the very test Jackson dismissed as an unworkable vestige of formalism.

An important difference between *Wickard* and *Alcoa* necessitated Hand's reliance on effects. In *Wickard*, the Supreme Court had to determine whether a regulatory program passed by Congress was constitutional. Jackson decided to defer to Congress' judgment. But in *Alcoa*, Congress was silent about the key question of whether or not the statute applied abroad. Congress had made no decision to which Hand could defer. Using the effects test as a way of inferring congressional intent, Hand essentially made the answer up.

The revived presumption against extraterritoriality seeks to avoid this problem by kicking the question back to Congress. Unless Congress indicates otherwise, U.S. law will only apply within the territorial United States. The courts can then defer to Congress in foreign commerce as they do in interstate commerce after *Wickard*, treating silence as equivalent to an express provision stipulating territoriality. Indeed, it is interesting to see how closely Justice Jackson's reasoning rejecting an effects test in *Wickard* aligns with Justice Scalia's conclusions in *Morrison*. As mentioned in Chapter Three, Jackson concluded the judiciary "had no standards to determine" "[the] point [at which] these effects have enough vitality to confer federal jurisdiction and at what point they have passed outside it." He determined that the distinction between direct and indirect effects was "not one of constitutional law, but one of economic policy," and he reiterated that the Court "has no legal standards by which to set our own judgment against the policy judgment of

Congress."[65] Justice Scalia, meanwhile, complained that the "tests were not easy to administer" and that district courts struggled to understand "such vague formulations" and "described their decisions regarding . . . extraterritorial application . . . as essentially resolving matters of policy."[66] Both justices rejected the effects test because the lack of clear standards meant that courts were essentially making policy judgments better left to Congress.

Thus, for Justice Breyer, judges are (or should become) expert at assessing the international ramifications of their decisions—judges must be diplomats. For the late Justice Scalia, judges make terrible diplomats. The goal of the presumption against extraterritoriality is to force Congress to consider the international implications of the laws it passes so the courts don't have to. Congress can make the courts hear cases involving foreign activities, but it must do so expressly.

Despite this significant disagreement, however, both justices are confronting some of dual federalism's lingering influences on U.S. law abroad: its strong emphasis on sovereignty and its reliance on judges to administer boundaries. Like the New Deal opponents of classical legal thought, Justice Scalia sought to jettison the judicially-administered effects test—he doubted the capacity of judges to apply it objectively.[67] Meanwhile, Justice Breyer rejects "a categorical or formal conception of sovereignty," interpreting the idea of sovereignty practically rather than legalistically.[68] Like early-twentieth-century progressives who advocated a national police power, Breyer's internationalism reflects his conviction that

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[65] Memo for Mr. Costelloe, Re Wickard Case, July 10, 1942, Box 125, RHJP, LC; Cushman, "Formalism and Realism in Commerce Clause Jurisprudence," 1141–46.

[66] Morrison v. Nat'l Australia Bank Ltd, 130 S. Ct. 2869, 2879–80 (2010).

[67] Perhaps surprisingly, the conservative Scalia shares a great deal with the progressive opponents of courts in the early twentieth century.

[68] Breyer, *The Court and the World*, 76; Boumediene v. Bush, 553 U.S. 723, 751 (2008).

the world is interdependent and requires more collective solutions.[69] But whereas sovereignty and the judiciary reinforced one another a century ago, they now sometimes operate inversely. Justice Breyer has turned to the judiciary to overcome the limits of sovereignty, whereas Justice Scalia promoted sovereignty to limit judicial power.

These debates show that the questions the United States has confronted throughout its history, questions about how to balance sovereignty and economic integration, and questions about who should decide—courts or legislatures, the United States or other nations, national or international institutions—endure. If sovereignty has provided a measure of continuity to international affairs since Root's tenure as secretary of state, the world envisioned by Wilson in 1919 and by the New Deal antimonopolists in the 1940s nevertheless remains relevant today. "[T]he interdependent world in which we are part is characterized by, among other things, a fragile international economy, economic divisions between North and South, increased environmental risks, insecurity, and in some places anarchy, fanaticism, and terrorism," Justice Breyer reminds us. "If there is any hope of solving such complex problems, which belong to no one nation, the effort will have to be a collective one."[70]

[69] Ibid., 281–82.
[70] Ibid., 281–82.

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