September 10, 2015

Dear Colloquium Members:

This chapter is the turning point of my dissertation and seeks to explain the political, legal, and intellectual changes that led the United States to apply its law extraterritorially. It focuses on Judge Learned Hand's 1945 decision in *United States v. Aluminum Co. of America* (*Alcoa*). According to the standard narrative, Hand's opinion ushered in a new era of extraterritorial jurisdiction. By abandoning rigid formalism in favor of an "intended effects test," Hand transformed conventional views about the territoriality of law and thereby introduced an important mechanism for forcing other nations to come to terms with (and ultimately embrace) U.S. notions of competition. Yet scholars have also puzzled over why Hand rejected established Supreme Court precedent that confined antitrust law to the territorial boundaries of the United States. Moreover, historians have argued that U.S. antitrust law declined in importance during this period, but the *Alcoa* narrative centers on its dramatic extension overseas.

I link *Alcoa* to Justice Jackson's decision in *Wickard v. Filburn* and conclude that rather than rejecting established precedent, Hand sought to apply legal principles in a difficult and novel context. The concern for sovereignty that underlay existing law remained at the center of his opinion. I also situate *Alcoa* within a Justice Department campaign to link cartels to totalitarianism during the Second World War and early Cold War. By recasting antitrust law as part of the war effort, the Antitrust Division hoped to counteract its increasing marginalization. Nonetheless, corporate lawyers and law professors began to question this attempt, arguing that onerous enforcement actually undermined U.S. foreign policy goals. In this struggle, Hand's care to limit *Alcoa's* scope was forgotten, and the case came to stand for legal overreaching.

I am looking forward to your comments.
Ben

CHAPTER FOUR

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 regulate non-state actors abroad, especially the international cartels that many 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 Elihu Root and other opponents of the League of Nations supported the existing international order rooted in territorial

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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*

[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).

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. Disregarding such limits on American capabilities, the new model advocated by New Deal lawyers would extend U.S. law beyond American borders to regulate international threats to peace, without the sacrifice of American sovereignty entailed by Wilson's more multilateral approach.

[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, no. 4 (September 1, 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.

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]

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

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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.

[6] Elizabeth Borgwardt, *A New Deal for the World: America's Vision for Human Rights* (Cambridge, MA: Belknap Press of Harvard University Press, 2007). 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.

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] When the Supreme Court struck down key New Deal programs in the mid-1930s to maintain traditional legal distinctions between public/private and production/commerce, a constitutional crisis ensued.[9]

In the eyes of observers at the time and most scholars since, a popular president then faced down a reactionary court, and Franklin Roosevelt's plan to pack the Supreme Court to reverse the conservatives' 5-4 margin precipitated a constitutional revolution. Recognizing the Court's precarious political situation, the more moderate Justice Owen Roberts backed down—the switch in time that saved nine—and the Court gave up on imposing constitutional limits on Congress' economic legislation.[10] Barry Cushman, however, has challenged this conventional

[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.

[10] Joseph Alsop and Turner Catledge, *The 168 Days*, 1st ed. (Garden City, NY: Doubleday, Doran, 1938); Paul R. Benson, *The Supreme Court and the Commerce Clause, 1937-1970* (New York: Dunellen, 1970); Edward S. Corwin, *Court over Constitution; a Study of Judicial Review as an Instrument of Popular Government.* (Gloucester, MA: P Smith, 1950); Edward S. Corwin, *Constitutional Revolution, Ltd.* (Claremont, CA: Pomona College, Scripps College, Claremont Colleges, 1941); Benjamin Fletcher Wright, *The Growth of American Constitutional Law* (Boston: Published for Reynal & Hitchcock by Houghton Mifflin Company, 1942); Robert H. Jackson, *The Struggle*

view, which credits constitutional change to politics. Instead, he attributes the transformation to a process of doctrinal evolution and normal personnel turnover over the course of the 1930s rather than to a dramatic confrontation in 1937.[11]

Regardless of whether one adopts the standard externalist explanation or Cushman's countervailing internalist narrative, the 1930s and 1940s were a period of profound constitutional change. No case underscored the 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.[12] 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."[13]

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for Judicial Supremacy, a Study of a Crisis in American Power Politics (New York,: A.A. Knopf, 1941); Peter H. Irons, *The New Deal Lawyers* (Princeton, NJ: Princeton University Press, 1982); Robert G. McCloskey, *The American Supreme Court.* (Chicago: University of Chicago Press, 1960); Williams, *City of Ambition*; William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995); William E. Leuchtenburg, "Franklin D. Roosevelt's Supreme Court 'Packing' Plan," in *Essays on the New Deal*, ed. Harold M. Hollingsworth and William F. Holmes (Austin: Published for the University of Texas at Arlington by the University of Texas Press, 1969).

[11] Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998); Richard D. Friedman, "Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation," *University of Pennsylvania Law Review* 142 (1994): 1891; Richard D. Friedman, "Taking Decisions Seriously: A Review of Rethinking the New Deal Court: The Structure of a Constitutional Revolution," *Journal of Supreme Court History* 24, no. 3 (Dec. 1, 1999): 314–24; Richard D. Friedman, "Sometimes-Bumpy Stream of Commerce Clause Doctrine, The," *Arkansas Law Review* 55 (2003): 981; Barry Cushman, "Continuity and Change in Commerce Clause Jurisprudence," *Arkansas Law Review* 55 (2003): 1009; Richard D. Friedman, "Charting the Course of Commerce Clause Challenge," *Arkansas Law Review* 55 (2003): 1055; Barry Cushman, "Small Differences," *Arkansas Law Review* 55 (2003): 1097; G. Edward White, *The Constitution and the New Deal* (Cambridge, MA: Harvard University Press, 2000); The debate is summarized in Laura Kalman, "The Constitution, the Supreme Court, and the New Deal," *The American Historical Review* 110, no. 4 (Oct. 1, 2005): 1052–80.

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

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

The constitutional changes that permitted Congress's unprecedented regulatory authority over the domestic economy likewise swept away legal limits on the international scope of American power. As Chapter 2 explains, 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. Writing for the Court, Justice Holmes refused to apply the Sherman Act to the conduct of American corporations operating in Central America.[14] This presumption against extraterritoriality limited the reach of U.S. law for the next three decades. But the 1945 case of *United States v. Aluminum Co. of America* (*Alcoa*) ushered in a new era. Sitting in for a Supreme Court that failed to muster a quorum to hear the case, a three-judge panel of the Second Circuit abandoned Holmes's rigid territorialism in favor of an "intended effects test" that extended liability to a foreign cartel composed of non-American corporations whose overseas business nevertheless intentionally impacted U.S. imports.[15]

Like *Wickard v. Filburn*—which involved Congress' power to regulate a farmer growing his own wheat on his own farm for his own consumption—*United States v. Alcoa* presented a distinctive 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 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 and thereby introduced an important mechanism for forcing other nations to come to terms with (and ultimately embrace) U.S. notions of competition.[16] Hand's more flexible approach spread to

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

[15] 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).

[16] Kal Raustiala, *Does the Constitution Follow the Flag?: The Evolution of Territoriality in American Law* (New York: Oxford University Press, 2009), 102, 111; Larry Kramer, "Vestiges of Beale: Extraterritorial

other areas of law, and American law has been framed as one of the great exports of the American Century.[17]

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.[18] 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.

Application of American Law," *Supreme Court Review* 1991 (1991): 179–80, 191–93 (noting Alcoa's "quasi-Supreme Court status"); Gary B. Born, "A Reappraisal of the Extraterritorial Reach of U.S. Law," *Law and Policy in International Business* 24 (1992): 29–32 (calling Alcoa a "watershed decision"); Joseph Jude Norton, "Extraterritorial Jurisdiction of U.S. Antitrust and Securities Laws," *International and Comparative Law Quarterly* 28 (1979): 579–580 (describing "a new and different interpretation" which "subsequently provided the focal point of discussion"); Austen Parrish, "The Effects Test: Extraterritoriality's Fifth Business," *Vanderbilt Law Review* 61 (2008): 1470–75) ("Often seen as a tool for expanding American hegemony, the effects test gained widespread currency among U.S. courts in the years following Alcoa."); 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 . . . ."); Tonya L. Putnam, "Courts Without Borders: Domestic Sources of U.S. Extraterritoriality in the Regulatory Sphere," *International Organization* 63, no. 03 (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.

[17] United States v. Verdugo-Urquidez, 494 U.S. 259, 280-81 (1990) (Brennan, J., dissenting; *see also, e.g.*, Steele v. Bulova Watch Co., 344 U. S. 280 (1952) (applying the Lanham Act extraterritorially); Schoenbaum v. Firstbrook, 405 F.2d 200, (2d. Cir.) (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).

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

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.

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.[19]

[19] 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.

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 government-sponsored planning and cartelization of the National Industrial Recovery Act, even after the Supreme Court struck down the law in 1935.[20]

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

[20] 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.

regimentation from Washington." But with a national policy to combat monopoly and an amenable judiciary, free enterprise would continue to thrive.[21]

Desperate to alleviate the recession, President Roosevelt soon adopted Jackson's ideas.[22] On April 29, 1938, the president made the case before Congress: "Once it is realized 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."[23]

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.

[21] 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.

[22] 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.

[23] 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.

Nevertheless, TNEC's detailed studies of the economy helped lay the groundwork for enhanced antitrust enforcement.[24]

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 organizations by deflecting the attack on them into purely moral and ceremonial channels" without stopping the concentration of economic power.[25]

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.[26] "A dog talks by barking," Arnold remarked, "but we talk by litigation."[27] As a result, the Antitrust Division was a far cry from the "backwater" it had been during the early New Deal.[28] As Berge put it, "Prior to 1938 there were not sufficient funds or personnel available to make much more than a gesture at

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[24] 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.

[25] Thurman W. Arnold, *The Folklore of Capitalism* (New Haven: Yale University Press, 1937), 207–08, 212, 217.

[26] 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.

[27] "Maps Trust Drive in Building Trades," *N.Y. Times*, July 8, 1939, at 8.

[28] Waller, *Thurman Arnold*, 80.

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."[29]

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 Alcoa employed to acquire its monopoly, which it used to fix unreasonable prices and hurt other manufacturers. The government sought the company's dissolution.[30]

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*."[31] 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."[32] But though the Justice Department wanted to avoid a

[29] Berge to Ayers, Apr. 4, 1944, Box 28, WBP, LC.

[30] 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.

[31] Waller, "Story of Alcoa," 127.

[32] 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;

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.[33]

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."[34] 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."[35]

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.

[33] Memo for the AG, Mar. 16, 1937, Section 1, Box 171, Case 60-13-0, Entry # A1 COR 60, RG 60, NARA.

[34] Waller, "Story of Alcoa," 135.

[35] 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.

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 Western District of Pennsylvania.[36] 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.[37] 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.[38]

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

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[36] Memo for Jackson, Apr. 29, 1937, Box 77, RHJP, LC; memo for Jackson, April 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.

[37] Letter, AG to President Roosevelt, June 1, 1937, Box 77, RHJP, LC.

[38] 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.

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 monopoly. The attorney general therefore asked that the State Department compile evidence overseas to support the government's theory.[39] 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."[40]

The trial began the following June, a few months after Arnold had replaced Jackson in the Antitrust Division. It last 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.[41] 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."[42]

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 make headway in

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[39] AG to Secretary of State and attached memo, Aug. 17, 1937, Box 77, RHJP, LC.

[40] Memo for Jackson, Aug. 27, 1937, ibid.

[41] 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.

[42] Memo for Jackson, Dec. 17, 1937, Box 77, RHJP, LC.

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.[43]

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 1912 consent decree shut down this

[43] Rice to Arnold, Apr. 15, 1939, Section 1, Box 171, Case 60-13-0, Entry # A1 COR 60, RG 60, NARA.

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.[44]

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.[45] Caffey held that the government failed to prove any of its allegations of monopolization.[46] 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.[47] 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 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

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[44] 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.

[45] 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.

[46] *Alcoa*, 44 F. Supp. at 224.

[47] *Id.* at 285-86.

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."[48]

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.[49] 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.[50]

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[48] *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.

[49] 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.

[50] Waller, "Story of Alcoa," 129.

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.[51]

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."[52] 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 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

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[51] "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.

[52] Alva Johnston, "Thurman Arnold's Biggest Case," *New Yorker*, Jan. 24, 1942, 25.

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.[53]

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.[54] 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.[55] 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.[56]

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 part of the U.S. war effort.[57] The public, rather than judge and jury, was the key audience.[58] 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."[59]

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[53] Wells, *Antitrust and the Formation of the Postwar World*, 54.
[54] Memo for Wechsler, Dec. 27, 1943, Box 27, WBP, LC.
[55] Wells, *Antitrust and the Formation of the Postwar World*, 80.
[56] 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.
[57] Wells, *Antitrust and the Formation of the Postwar World*, 52.
[58] Waller, *Thurman Arnold*, 86.
[59] Max Lerner, "Economic Strategy in a Democracy," *New Republic* 106, no. 25 (June 22, 1942): 858.

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."[60] 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.[61]

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 died away and been replaced by an awareness that the Antitrust Division is one of the nation's vital defense agencies."[62]

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

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[60] Thurman W. Arnold, "An Inquiry into the Monopoly Issue," *New York Times*, Aug. 31, 1938, at B1.

[61] 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.

[62] Thurman W. Arnold, "Defense and Restraints of Trade," *New Republic* 104, no. 20 (May 19, 1941): 686–87.

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."[63]

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 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.[64]

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.[65] J. Edgar Hoover, however, cast doubt on Arnold's claims. With one exception, he was unaware of Arnold's allegations, and in

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[63] 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.

[64] Arnold to Jackson, Jan. 15, 1940, Box 85, RHJP, LC.

[65] Arnold to Jackson, May 16, 1940, ibid.

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.[66] 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.[67]

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 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.[68]

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

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[66] Hoover to Jackson, May 23, 1940, ibid.
[67] See Arnold to Jackson, May 17, 1941, ibid.
[68] Aluminum Monopoly and National Defense, May 1941, Section 5, Box 172, Case 60-13-0, Entry # A1 COR 60, RG 60, NARA.

preparedness committee to put the company's misdeeds in the public spotlight.[69] 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.[70]

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.[71] 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.[72] 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 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."[73]

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."[74] 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.

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[69] Wells, *Antitrust and the Formation of the Postwar World*, 73–78.
[70] Ibid., 78–80.
[71] Waller, *Thurman Arnold*, 110; cf. Brinkley, "The Antimonopoly Ideal and the Liberal State," 572.
[72] Wells, *Antitrust and the Formation of the Postwar World*, 82.
[73] 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.
[74] Volta Torrey, "Berge vs Cartels," *PM Magazine*, Dec. 26, 1943, m2.

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."[75]

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 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."[76] 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."[77] 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."[78]

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[75] "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.

[76] Wendell Berge, *Cartels: Challenge to a Free World* (Washington, D.C.: Public Affairs Press, 1944), 1, 3.

[77] Wendell Berge, "Antitrust Enforcement in the War and Postwar Period," *George Washington Law Review* 12 (1944): 384.

[78] Statement on International Cartels attached to Stout to Berge, Dec. 29, 1944, Box 28, WBP, LC.

Government investigations amplified these warnings. Senator Truman's committee considered how monopolies in key industries like aluminum undermined U.S. defense preparedness.[79] 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, full production and employment, and the expansion of world trade."[80] The resulting publicity generated considerable embarrassment for companies like Alcoa.[81]

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.[82] 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."

[79] 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).

[80] 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.

[81] 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.

[82] "The Threat to Democracy," *New Republic* 110, no. 7 (Feb. 14, 1944): 199–200.

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.[83]

Joseph Borkin and Charles A. Welsh’s 1943 book *Germany’s Master Plan*, for which Arnold provided an introduction, perhaps most popularized these themes.[84] Borkin was the first chief of the Antitrust Division’s Patent and Cartel Section, which Arnold created in 1938.[85] Borkin and Welsh explained how cartelization almost produced a German victory. “Without aluminum, magnesium, tin, tungsten, molybdenum, quinine, those who would 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.”[86] 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.[87] 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.”[88]

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

[83] Torrey, “Berge vs Cartels,” m3.
[84] Wells, *Antitrust and the Formation of the Postwar World*, 90–91.
[85] Kolasky, “Thurman Arnold: An American Original,” 93–94.
[86] Joseph Borkin and Charles A. Welsh, *Germany’s Master Plan; the Story of Industrial Offensive* (New York: Duell, Sloan and Pearce, 1943), 4.
[87] Ibid., 14–15.
[88] Ibid., 10.

peace."[89] 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.[90] 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."[91] In September 1944, he wrote Secretary of State Cordell Hull about the dangers of cartels. Observing that 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."[92]

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.[93] He also anticipated Hand's opinion in *Alcoa*, arguing that the location of a cartel agreement did not preclude the application of U.S.

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[89] Lester Velie, "They Want to Save Capitalism--They Say!," *Saturday Evening Post* 217, no. 10 (Sept. 2, 1944): 22, 77.

[90] Wells, *Antitrust and the Formation of the Postwar World*, 97.

[91] 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.

[92] Franklin D. Roosevelt, Letter to the Secretary of State Relating to the Elimination of Cartels, Sept. 6, 1944, in ibid., 255–56.

[93] Berge to Colton, Mar. 16, 1944, Box 28, WBP, LC.

law. The practical difficulty of obtaining personal jurisdiction, he contended, should not limit the international scope of U.S. antitrust law.[94]

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 trade but governmental barriers should be moderated and if possible eliminated.”[95] 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.”[96]

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.[97] 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

[94] Berge, “Antitrust Enforcement in the War and Postwar Period,” 387–88.
[95] Statement on International Cartels attached to Stout to Berge, Dec. 29, 1944, Box 28, WBP, LC.
[96] Torrey, “Berge vs Cartels,” m3; Berge, “Antitrust Enforcement in the War and Postwar Period,” 390.
[97] 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.

governing world markets and operating in secret without responsibility to the public can no longer be tolerated."[98]

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 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.[99]

As an occupying power, moreover, the United States also sought to break up cartels and zaibatsu in defeated Germany and Japan.[100] 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

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[98] Statement on International Cartels attached to Stout to Berge, Dec. 29, 1944, Box 28, WBP, LC.

[99] 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.

[100] 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.

Germany will afford us to pull up the whole institution of international cartels by the roots."[101] The most dramatic outcome of this policy was the breakup of Germany's IG Farben.[102] 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 tattered economies. Disagreements with the other allies and fears of Soviet communism compounded this problem.[103]

As these debates played out, the Antitrust Division continued to use the press to defend antitrust's relevance.[104] 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."[105]

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

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[101] Ibid., 35.

[102] 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).

[103] 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.

[104] Velie, "They Want to Save Capitalism--They Say!," 77.

[105] Wendell Berge, "The Challenge of the Cartel," *New York* Times, Aug. 5, 1945, at 13-14.

connotations." While trade formed only a small component of U.S. national income, what happened abroad had economic effects at home.[106] 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."[107]

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.[108] 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."[109] 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—

[106] Wendell Berge, "Cartels as Barriers to International Trade," *Law and Contemporary Problems* 11 (1946): 689.
[107] Ibid., 684.
[108] Ervin Hexner, *International Cartels* (Chapel Hill: University of North Carolina Press, 1945), viii, 12.
[109] J. Anton DeHaas, *International Cartels in the Postwar World* (New York: American Enterprise Association, 1944), 17.

that is, intergovernmental cartels—to deal with problems of oversupply.[110] The National Foreign Trade Council outlined a similar proposal.[111]

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 were more pressing than cartels.[112] "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."[113] 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.[114]

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

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[110] Milo Perkins, "Cartels: What Shall We Do About Them?," *Harper's Magazine*, Nov. 1, 1944, 575–78.
[111] See Edward S. Mason, *Controlling World Trade: Cartels and Commodity Agreements* (New York; London: McGraw-Hill, 1946), 81 & n.1.
[112] Ibid., 16–17.
[113] Ibid., 77.
[114] Ibid., 79, 83.

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 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.[115]

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.[116] "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.'"[117]

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[115] Cahill, "Some Recent Trends and Developments in the Anti-Trust Laws," 215–18.

[116] John E. Lockwood and William C. Schmeisser, Jr., "Restrictive Business Practices in International Trade," *Law and Contemporary Problems* 11 (1946): 663–66.

[117] Ibid., 682–83.

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 "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."[118]

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'."[119] 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."[120]

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[118] Walter K. Bennett, "Some Reflections on the Interpretation of the Sherman Act Since the Emergency," *Federal Bar Journal* 8 (1947): 323.

[119] Ibid., 317.

[120] Heinrich Kronstein and Gertrude Leighton, "Cartel Control: A Record of Failure," *Yale Law Journal* 55 (1946): 335.

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 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.[121] "[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."[122]

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]

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[121] Reynolds, *From Munich to Pearl Harbor*, 106, 128–29, 179, 183–84.
[122] Preston, "Monsters Everywhere," 492.

were driven . . . by an ideological conviction that their own political economy of freedom would be jeopardized if a totalitarian foe became too powerful."[123] 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.[124]

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.[125]

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[123] Melvyn P Leffler, *A Preponderance of Power: National Security, the Truman Administration and the Cold War* (Stanford: Stanford University Press, 1992), 13.

[124] Hamby, *Beyond the New Deal*, 5–6.

[125] 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*, Round Two

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.[126] 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.[127] 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.[128] 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.[129] 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 monopoly. Alcoa produced 100 percent of virgin aluminum ingot in the United States, but if scrap and secondary

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[126] The case went straight to the Supreme Court under a special expediting statute. 32 Stat. 823 (1903).
[127] 58 Stat. 272 (1944) (codified as amended at 15 U.S.C. § 29 (2006)); Waller, "Story of Alcoa," 129.
[128] Berge to Apsey, June 8, 1944, Box 28, WBP, LC.
[129] As Hand himself stated. *Alcoa*, 148 F. 2d at 422-23.

aluminum and other metals were also included, and if the aluminum Alcoa itself fabricated was excluded, Alcoa's market share dramatically diminished.[130]

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.[131]

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.[132] While Alcoa itself was not directly involved in the cartel, the government alleged it participated through Aluminium Limited (the Canadian corporation formed from Alcoa's properties outside the United States in 1928). Hand upheld the

[130] Memo for Avery, Mar. 4, 1942, Section 11, Box 173, Case 60-13-0, Entry # A1 COR 60, RG 60, NARA.

[131] 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.

[132] Alcoa, 148. F. 2d, at 426; Wells, *Antitrust and the Formation of the Postwar World*, 60; Waller, "Story of Alcoa," 135.

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.[133] 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.[134] 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.[135] This question hinged on the legislative intent of the Sherman Act.[136] 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."[137]

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

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[133] *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.

[134] 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.

[135] Cf. Arthur H. Dean, "Advising the Client," *ABA Section of Antitrust Law* 11 (1957): 100.

[136] Raustiala, *Does the Constitution Follow the Flag?*, 99, 269. n.20.

[137] 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 court had adjudicative jurisdiction over Limited. See Alcoa, 148 F. 2d at 421. The issue Hand faced concerned legislative jurisdiction.

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.[138]

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.[139] 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."[140]

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

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[138] David F. Cavers, "Two Local Law Theories, The," *Harvard Law Review* 63 (1950): 822–25.
[139] *Alcoa*, 148 F. 2d at 443.
[140] *Id.*

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.[141]

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."[142] 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."[143] 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.'"[144] Thus, to restate the effects test as formulated by Learned Hand, agreements made outside the United 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.[145]

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

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[141] *Id.*, at 443-44.
[142] *Id.* at 444.
[143] Swan Memo, Jan. 29, 1945, CCA Memoranda, 1944 Term, Box 207, LHP, HLL.
[144] *Alcoa*, 148 F. 2d at 444.
[145] 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.

and market control rather than Alcoa's "coercive or immoral practices."[146] 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.'"[147] 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 was doing was "childish."[148] In short, these critics suggest that the opinion would seem less revolutionary if Hand had been honest about what he was doing.[149]

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

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[146] United States v. United Shoe Mach. Corp. 110 F. Supp. 295, 341 (D. Mass 1953), *aff'd* 347 U.S. 521 (1954) (per curiam).

[147] I. F. Stone, "Alcoa in Wonderland," *The Nation*, Mar. 24, 1945, 323.

[148] 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.

[149] 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.").

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."[150] 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.[151]

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.[152]

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.

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[150] Augustus Noble Hand Memo, Feb. 5, 1945, CCA Memoranda, 1944 Term, Box 207, LHP, HLL.

[151] Max Goldman Interview with Gerald Gunther, Jan. 13, 1973, Box 233, LHP, HLL.

[152] 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 law to address the problems of monopoly. Gerald Gunther, *Learned Hand: The Man and the Judge* (New York: Knopf, 1994), 206–09.

In this sense, *Alcoa* was not a dramatic departure from *American Banana*, but simply used a different rule 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*,[153] even though many scholars immediately grasped the transformative nature of the case.[154] 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.[155] Hand, moreover, cited the key cases that had eroded Holmes's presumption against extraterritoriality.[156] 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

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[153] Dean, "Advising the Client," 89.

[154] 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").

[155] 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, October 5, 1910," *Official Opinions of the Attorneys General of the United States* 31 (1920): 545–57.

[156] 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.

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."[157]

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 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 . . . ."[158] 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."[159]

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

[157] "Note, Extraterritorial Application of the Antitrust Laws," *Harvard Law Review* 69 (1956): 1455–46.

[158] 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.

[159] Kramer, "Vestiges of Beale," 192–93.

States. And for this purpose he adopted the intent test."[160] 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."[161] 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 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."[162]) 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.[163] 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

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[160] Dean, "Advising the Client," 100.

[161] Sprigman, "Fix Prices Globally, Get Sued Locally: U.S. Jurisdiction over International Cartels," 268; Dean, "Advising the Client," 91.

[162] Dean, "Advising the Client," 91.

[163] *See supra* note 158 and accompanying text.

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.[164]

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 cited by Hand and seized by Kramer as the source of Hand's "inadvertent reformulation."[165] In fact, Chief Justice Melville Fuller used an intended effects test in the *Knight Sugar Case*, the paradigmatic formalist opinion.[166]

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

[164] 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).

[165] Kramer, "Vestiges of Beale," 191.

[166] 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.").

like *Standard Oil* and *American Tobacco* where the government did prove intent, the Supreme Court had no trouble upholding liability under the Sherman Act.[167]

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. 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."[168] As Chapter 2 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.[169]

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.[170]

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

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[167] Cushman, "Formalism and Realism in Commerce Clause Jurisprudence," 1095–1096, 1124.
[168] 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)).
[169] Cushman, "Formalism and Realism in Commerce Clause Jurisprudence," 1147.
[170] Wickard v. Filburn, 317 U.S. 111 (1942).

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 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."[171]

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. [172]

[171] Memo for Mr. Costelloe, Re Wickard Case, June 19, 1942, Box 125, RHJP, LC; Cushman, "Formalism and Realism in Commerce Clause Jurisprudence," 1138–41.

[172] Memo for Mr. Costelloe, Re Wickard Case, July 10, 1942, Box 125, RHJP, LC; Cushman, "Formalism and Realism in Commerce Clause Jurisprudence," 1141–46.

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 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.[173]

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."[174] 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.[175] In *American Banana*, Holmes had

[173] Cushman, "Formalism and Realism in Commerce Clause Jurisprudence," 1146–49.

[174] *Alcoa*, 145. F.2d at 443.

[175] 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

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 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. Alcoa's Legacy

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

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Erie. Caleb Nelson, "State and Federal Models of the Interaction between Statutes and Unwritten Law," *University of Chicago Law Review* 80 (2013): 723–28.

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."[176] 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.'"[177]

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.[178]

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

[176] 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.

[177] Augustus Noble Hand Memo, Feb. 5, 1945, & Swan Memo, Jan. 29, 1945, CCA Memoranda, 1944 Term, Box 207, LHP, HLL.

[178] 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*, August 1, 1949, 13.

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."[179] 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."[180]

By the 1950s, however, the campaign against cartels generated a backlash. A major problem was uncertainty. Lawyers representing business interests had difficulty explaining the law to their clients. As Rosemary D. Hale and 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."[181] Arthur Dean echoed this concern in his 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 at their expense," Dean wrote, "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."[182]

A comment in the *Yale Law Journal* defending this uncertainty pointed to a further problem. The author argued that uncertainty was necessary because the antitrust laws prohibited outcomes—monopolies and restraints of trade. Prohibiting specific means to these outcomes rather than the outcomes themselves would introduce loopholes into the law. Nevertheless, the

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[179] Letter from Arnold to Larson, June 6, 1966, in Arnold, *Voltaire and the Cowboy*, 461, 463.

[180] Stone, "Alcoa in Wonderland," 322.

[181] Rosemary D. Hale and G. E. Hale, "Monopoly Abroad: The Antitrust Laws and Commerce in Foreign Areas," *Texas Law Review* 31 (1953): 493.

[182] Dean, "Advising the Client," 88–89.

author 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.[183]

In fact, some worried that the growing reach of U.S. antitrust law was impeding the United States' ability to compete with the Soviet Union. Former New York Governor Thomas E. Dewey imagined the decisionmaking process of a corporate executive trying to decide whether to take on a venture in the third 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?"[184] Dewey thus turned the Justice Department's rhetoric about cartels and totalitarianism on its head.

A series of articles in the *Yale Law Journal* made the case for a renewed commitment to territoriality. George Winthrop Haight argued that extraterritorial jurisdiction violated international law.[185] William Dwight Whitney agreed, contending that a "dangerous conflict" between extraterritoriality and national sovereignty existed which was responsible for the unpopularity of U.S. policy abroad.[186] For Whitney, American lawyers had transferred the dramatic growth of federal power over interstate commerce overseas and applied it to foreign commerce. The "anti-cartel crusade," however, "led us into neglect of the heretofore well-

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[183] "Comment, Point Four: A Re-Examination of Ends and Means," *Yale Law Journal* 59 (1950): 1301–02. Yet for the author of the comment, the downsides of cartels outweighed any benefits of antitrust immunity. The Point Four Program was a technical assistance program for developing nations announced in Truman's 1949 inaugural address.

[184] Thomas E. Dewey, "Antitrust Barriers to Foreign Policy Goals," *New York State Bar Journal* 33 (1961): 22–24.

[185] George Winthrop Haight, "International Law and Extraterritorial Application of the Antitrust Laws," *Yale Law Journal* 63 (1954 1953): 640.

[186] William Dwight Whitney, "Sources of Conflict between International Law and the Antitrust Laws," *Yale Law Journal* 63 (1954 1953): 655–66.

established limitations on sovereignty" and was responsible for U.S. indifference to the concerns of the rest of the world.[187]

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."[188] 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."[189] 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."[190] Whitney too set aside the intent part of the test.[191]

Versed in conflict of laws and aware of *Alcoa's* international implications, Hand had anticipated just the sort of objections they raised. But in Hand's eyes, the intended effects test 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, Hand's concern for comity began

[187] Ibid., 661–62.
[188] Haight, "International Law and Extraterritorial Application of the Antitrust Laws," 641, 654.
[189] Ibid., 643.
[190] Ibid., 648.
[191] Whitney, "Sources of Conflict between International Law and the Antitrust Laws," 655.

to be forgotten. The intended effects test became the effects test.[192] According to 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."[193] Extraterritorial jurisdiction generated considerable hostility overseas, and many nations later adopted blocking statutes (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 other means to balance the need for regulation and the countervailing concerns with comity.[194]

Part of the problem with Hand's effects test, as Kramer has pointed out, is that intent is a messy concept: "Foreign acts deliberately affecting United States commerce are often intended also to affect foreign commerce—sometimes with the approval or even the encouragement of foreign governments."[195] As Christopher Sprigman has observed, moreover, the intent element proved impractical. Judges paid lip service to the intent element in stating the test, but in practice they ignored it, in large part because intent is so hard to ascertain.[196] The tens of thousands of documents at issue in antitrust cases underscored the difficulty.

When considered in light of the Department of Justice's postwar campaign against cartels, lawyers remembered *Alcoa* as a case that broke down traditional boundaries and contributed to prosecutorial overreaching. Opponents of extraterritorial jurisdiction and critics of

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[192] 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.

[193] Kramer, "Vestiges of Beale," 180, 193.

[194] Raustiala, *Does the Constitution Follow the Flag?*, 111–17; Born, "A Reappraisal of the Extraterritorial Reach of U.S. Law," 32–54.

[195] Kramer, "Vestiges of Beale," 192–93.

[196] Sprigman, "Fix Prices Globally, Get Sued Locally: U.S. Jurisdiction over International Cartels," 268.

legal uncertainty maintained that antitrust law hindered the United States' ability to compete in the Cold War. The old links between freedom and competition were no longer obvious.

V. Conclusion

While *Alcoa* came to be seen as an example of American and judicial overreaching, 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 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 that were perceived to threaten American security, the United States could achieve Wilson's goals without the costs.

The New Deal United States provided a model for this transformation. Traditional constitutional restrictions on Congress' ability to regulate commerce had fallen away. The careful boundaries between federal and state power that defined dual federalism gave way to an expansive new welfare state and new ideas of concurrent jurisdiction.[197] As *Alcoa* reveals, however, even as men like Arnold and 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. *Alcoa's* intended effects test presupposed a continuing judicial responsibility to preserve the boundaries between the United States and foreign nations. Only foreign conduct intended to affect American commerce fell within the purview of the Sherman Act.

The dialectic between extraterritoriality and territorial sovereignty at *Alcoa's* heart 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

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[197] Of course, the New Deal required its own compromises, in particular with the continued sovereignty of the southern states over race. See Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (New York: Liverlight Publishing Corporation, 2013).

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."[198]

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."[199]

International human rights, too, revealed this same dynamic. As Sam Moyn 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. 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. Neither the

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[198] Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton: Princeton University Press, 2009), 149.

[199] Jamie Martin, "Were We Bullied?," *London Review of Books*, Nov. 21, 2013, 16–18; Robert Skidelsky, *John Maynard Keynes: Fighting for Freedom, 1937-1946*, vol. 3 (New York: Penguin, 2000).

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.[200]

The Second World War did change 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 as *Alcoa's* intended effects test illustrates, 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 nations with the primary responsibility for governing their own territory. Like the New Deal at home, the changes wrought by the New Deal for the world came only through compromises with the continuing rights of other sovereigns.

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[200] 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 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.