Jurisdiction Beyond Our Borders: *United States v. Alcoa* and the Extraterritorial Reach of American Antitrust, 1909–1945

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Introduction

In 1945 the Second Circuit Court of Appeals handed down one of the most important decisions in modern American antitrust law—a case that is famous not only for expanding the Sherman Act's antimonopoly provision but also for its length, unique procedural posture, and extraordinary cast of characters. Because the US Supreme Court had been unable to reach a quorum of justices to hear the case, the US Senate had intervened to allow the Second Circuit to sit as the court of last resort. Writing for the Second Circuit, Judge Learned Hand found himself in the unenviable position of having to sort through years of litigation records and to rule on one of the most contentious cases of the era: *United States v. Aluminum Company of America*.[2]

[1*] The author would like to thank Brian Balogh, John Cisternino, Dan Crane, Harlan Cohen, Herbert Hovenkamp, Richard John, Naomi Lamoreaux, Joel Michaels, Bill Novak, David Shorten, Mira Wilkins, and the participants at the following workshops: Tobin Project, Department of Justice, American Economic Liberties Project, University of Utah Eccles Business School, and UGA-Emory Law School summer workshop. I am grateful for research assistance from Matthew Collins, Katherine Graham, Katherine Freeman, David Hauser, Matthew Linton, and Sofia Shaflak. Pam Ozaroff copyedited an earlier draft. And special thanks to two generous colleagues who shared their archival sources—thank you Tony Freyer and Matthew Stoller.

[2] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). William E. Kovacic, "Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration," *Iowa Law Review* 74 (July 1989): 1117. Four justices recused themselves for unstated

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Reams of legal briefs, testimony, and exhibits were accompanied by an ever-changing team of attorneys at the Department of Justice. Attorney General Homer Cummings had brought the original indictment in 1937; he later handed over the reins to Solicitor General Robert H. Jackson and Assistant Attorney General Thurman Arnold, who charged the Aluminum Company of America (Alcoa) with violating both the Sherman Antitrust Act's prohibition on monopolization (section 2) and combinations, contracts and conspiracies in restraint of trade (section 1). The case was then frozen throughout the duration of World War II, until Attorney General Francis Biddle revived prosecution in 1944.[3] And so it happened that in the early 1940s Judges Hand, Thomas W. Swan, and Augustus Noble Hand (Learned Hand's cousin) confronted tens of thousands of pages of documents that recounted how Alcoa had come to dominate the domestic aluminum market and how the company had participated in a global conspiracy to control the worldwide aluminum market. What prosecutors were asking for was nothing less than a revolution in American antitrust at home and abroad—and they won.

reasons but presumably because they had previously been involved in prosecuting Alcoa with the Justice Department. See Spencer Weber Waller, *Thurman Arnold: A Biography* (New York: New York University Press, 2005), 94.

[3] See Spencer Weber Waller, "The Story of Alcoa: The Enduring Questions of Market Power, Conduct, and Remedy in Monopolization Cases," in *Antitrust Stories*, eds. Eleanor M. Fox and Daniel A. Crane (New York: Foundation Press, 2007), 121–44.

The *Alcoa* ruling is well-known in two regards. First, it expanded the Sherman Act's prohibition on monopolization. Although Judge Hand[4] was careful to say that monopoly in and of itself is not illegal under the antitrust laws, he held that in this case Alcoa had achieved and maintained its monopoly power by foreclosing new entry into the market for virgin aluminum production. Defining the relevant market within which the defendant operates has always been a contentious first step in section 2 litigation.[5] Hand decided to limit the relevant market to virgin aluminum only, where Alcoa controlled over 90 percent of production, and to disregard the secondary market for recycled aluminum, where more competitors existed. Next, he asked how Alcoa had achieved this monopoly and if its tactics fell within the meaning of section 2. Answering this question, he held that Alcoa had continuously increased its production ahead of demand and thereby illegally monopolized the market. Secondly, the case established extraterritorial jurisdiction for US antitrust law, establishing the general rule that US antitrust liability could be applied to foreign firms' conduct abroad.[6] Hand held that Alcoa had maintained its dominance, in part, through its participation in an international cartel, which it had helped

[4] Unless otherwise noted, this and all subsequent references to Hand are to Learned Hand, not Augustus Hand.

[5] See Louis Kaplow, "Market Definition, Market Power," *International Journal of Industrial Organization* 43 (2015): 148-161.

[6] See Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* 4th ed. (St. Paul, MN: West, 2011), 969.

orchestrate through the Canadian firm, Aluminum Limited.[7] This part of the holding became known as the "intended effects doctrine."

Alcoa both expanded the Sherman Act's prohibition on monopolization and reoriented the reach of the act's anticartel policies to include anticompetitive agreements made by foreign firms that were intended to and did effect the US market—and Hand was careful to link both of these elements in his opinion.[8] Judge Hand was also careful to distinguish this new intended effects test from the existing "strict territoriality" doctrine, which had explicitly limited American antitrust jurisdiction to disputes within US territorial borders. Writing in 1909, Justice Oliver Wendell Holmes Jr. had famously declared that the lawfulness of an act must be determined according to the laws of the country where the act was committed; however, a key piece of that case concerned an act of state.[9] Thus, the liberal principles espoused in antitrust law were constrained by how the Court understood territorial sovereignty. Despite that certainty in law, disputes continued to arise through the 1920s that challenged strict territoriality. And, by 1945, the second world war had provoked the rethinking of the association of sovereignty and

[7] The two companies were managed by brothers and shared a majority of stockholders and managers. Alcoa made favorable loans to Limited, and the latter shared proprietary information with the former.

[8] See Wilbur L. Fugate, "Antitrust Jurisdiction and Foreign Sovereignty," *Virginia Law Review* 49.5 (June 1963): 925–37; Fugate, *Foreign Commerce and the Antitrust Laws*, 4th ed. (Boston: Little, Brown, 1991), 2:467–68. As clarified by the Foreign Trade Antitrust Improvements Act (1982), amending both the Sherman Act and the Federal Trade Commission Act. See Tonya Putnam, *Courts without Borders: Law, Politics, and U.S. Extraterritoriality* (Cambridge: Cambridge University Press, 2016).

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

liberalism; while *American Banana* remained in-tact, the *Alcoa* case insisted that international cartels threatened American territorial sovereignty as well as its popular sovereignty, which the antitrust laws had been designed to protect.[10] American jurists were willing to apply US antitrust regulations to acts carried out abroad if that anticompetitive conduct was intentional and the consequences were proven—foreign cartels operating abroad were unlawful under the Sherman Act if "they were intended to affect imports, and did affect them."[11] And so, on March 12, 1945, as Allied troops prepared for the final offensive in Germany and as Congress prepared to ratify the Bretton Woods agreement, Judge Hand seemed to resolve the mounting tension in international law between market capitalism and state sovereignty by rethinking the association between two. Not only did Hand revive the American antimonopoly tradition but he also helped foist it onto global trade partners, projecting an emergent liberal international order.

Americanist historians (myself included) have explained the shift in US antitrust jurisprudence that began around 1937, when the original indictment against Alcoa was issued, largely in terms of *domestic* economic changes and shifting political coalitions. However, an alternative explanation might emphasize—as I do here—a concomitant concern with both *foreign* and *international* cartels as a threat to mobilizing US wartime production, to establishing

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[10] The key holding of *Alcoa* is 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 represents." United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945).

[11] *Id.* at 444.

postwar international trade and peaceable relations, and to maintaining US democratic processes untainted by illegal agglomerations of market power. Cartels and the monopoly power they might control have always been an antitrust concern in the United States, yet the question of how to handle foreign and international cartels proved increasingly problematic during the first half of the twentieth century. During the early 1900s, American antitrust law and policy embraced strict territoriality. Yet, the US remained alone in its anticartel policies and judicial enforcement; other developed countries instead embraced a more flexible approach to various cartel or cartel-like business activities.[12] US businesspeople complained that they operated at a disadvantage in international markets and, in turn, Congress promoted export-oriented trade associations by exempting them from antitrust laws through the Webb-Pomerene Act of 1918.[13] International cartels expanded, but, especially in the inflationary wake of WWI, many European commentators and policymakers began to question their efficacy in managing business cycles, tampering currency inflation, and protecting consumer welfare.[14] Through the interwar years,

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[12] See Sigmund Timberg, "Restrictive Business Practices: Comparative Legislation and the Problems That Lie Ahead", *The American Journal of Comparative Law* 2, no. 4 (Autumn 1953): 445–73; Hans Thorelli, "Antitrust in Europe: National Policies After 1945" *University of Chicago Law Review* 26, no. 2 (1959): 222–36.

[13] Gilbert H. Montague, "American National Policy Regarding International Trade Agreements and Cartels" (address, American Academy of Political and Social Science, Philadelphia, PA, Nov. 25, 1944), reprinted in 90 Cong. Rec. A4621 (1944).

[14] Lee McGowan, *The Antitrust Revolution in Europe: Exploring the European Commission's Cartel Policy* (Cheltenham: Edward Elgar, 2010): 60–3, 67. See also Mira Wilkins, *The Maturing of Multinational Enterprise: American Business Abroad from 1914 to 1970*, 260-264 (3d ed. 2008).

American antitrust doctrine began to shift away from strict territoriality by distinguishing *American Banana*. By the mid-1930s, many US legislators and regulators embraced more stringent rules against monopolization and cartel behavior, both at home and abroad. Very real concerns about European fascism and national socialism revitalized antimonopoly's original link between promoting a decentralized economic order and safeguarding liberal democracy.[15] At the turn of the twentieth century, American antitrust policies had focused on newly formed domestic monopolies and cartels (e.g., in railroads and oil production) that had threatened to overtake rickety democratic, representative institutions. By 1940, however, it had become clear that if antitrust prosecution could not be used to ensure competitive international markets and prevent cartelization and monopolization, then the now-powerful state would be required to intervene. In the wake of World War II, with the example of Germany acutely in mind and the fear of a resurgent Soviet Union, it was not hard to imagine such a scenario. The United States became actively engaged in constructing international institutions, a posture it had previously forsaken,

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[15] See Alva Johnston, "Thurman Arnold's Biggest Case," pts. 1 and 2, *New Yorker*, Jan. 24, 1942, 25–31; Jan. 31, 40–46. On US policies that extended American economic imperialism, whether de jure or de facto, see Emily Rosenberg, "U.S. Mass Consumerism in Transnational Perspective," in Frank Costigliola and Michael J. Hogan, eds., *America in the World: The Historiography of American Foreign Relations since 1941*, 2nd ed. (New York: Cambridge University Press, 2014), 307–37. On the various US legal domains with extraterritoriality, see Putnam, *Courts without Borders*, 3.
See also Crane, "Fascism and Monopoly," *Michigan Law Review* 119, no. 7 (2020): 1315–70; Crane, "Antitrust and Democracy: A Case Study from German Fascism," University of Michigan Law & Economics Research Paper Series Paper No. 18-009, University of Michigan Public Law Research Paper No. 595, April 2018, https://ssrn.com/abstract=3164467.

and in exporting (i.e., imposing) American competition policies on the rest of the world.[16] The *Alcoa* decision of 1945 played an important role in solidifying this shift.

This chapter is organized into three parts. *Part 1* examines the shift in US antitrust law and policy between 1909 and 1929. This early era was characterized by strict territoriality and antitrust exemptions for firms operating abroad. The *Alcoa* case was a major reversal of existing Supreme Court precedent; however, a series of distinguishing cases had significantly weakened that precedent, demonstrating how a process of accommodation had unfolded over the course of four decades. And, by the mid-1930s, those older approaches seemed increasingly untenable. *Part 2* focuses on the public speeches of Robert Jackson and Thurman Arnold, in which they explained their revived antitrust agenda as necessary to enforce market competition and to instill democratic accountability. Increasingly, they—and President Franklin D. Roosevelt—contrasted American markets and democracy with those of fascist regimes, pinpointing antitrust as a necessary backstop against the rise of powerful fascist states. More specifically, Alcoa had long

[16] See Tony A. Freyer, *Antitrust and Global Capitalism, 1930–2004* (New York: Cambridge University Press, 2006). But see Ellis W. Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (Princeton, NJ: Princeton University Press, 1966); Thomas K. McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* (Cambridge: Belknap Press, 1984); Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (New York: Knopf, 1995).

Separately, in the immediate postwar years most European countries created cartel offices to register, monitor, and police cartel arrangements. See Christopher Harding and Julian Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* (Oxford: Oxford University Press, 2010).

been of interest to the Justice Department, and just as it had become representative of wildly successful industrial firms, it had also attracted concerns about its involvement in an international cartel. Alcoa, it seems, was the low-hanging fruit that would allow Jackson and Arnold to accomplish a long-standing liberal goal to fight both monopoly and cartel activity. *Part 3* further explores Judge Hand's economic analysis and legal reasoning, linking his ruling to a coterie of intellectuals who had puzzled over this problem of extraterritoriality through the early 1940s, when international cartels played an ever-present role in wartime preparedness. Those international and foreign cartels were lambasted as intruding on American territorial and popular sovereignty by interfering with wartime preparedness and supporting illiberal organizations of capital (i.e. cartels). The world wars had run roughshod over the flows of global trade and finance, but with the end of World War II now in sight and with the ink still drying on the Bretton Woods agreement, the time seemed ripe to reconfigure American antimonopolism, both at home and abroad.

Part 1: Regulating International Cartels and Monopolies: Strict Territoriality at Home and Exemptions Abroad, 1890–1929

Passage of the Sherman Antitrust Act of 1890 coincided with the first era of globalization, which brought with it a massive expansion in the mobility of goods and services, capital, and people. Although the US maintained high import tariffs on manufactured goods, Congress recognized the challenges that both foreign, state-sanctioned cartels and international private cartels might pose to the US domestic political economy.[17] Senate George Hoar, whose revisions to Senator John Sherman's original act were adopted by the judiciary committee, explained:

> The great thing that this bill does, except affording a remedy, is to extend the common law principles, which protected fair competition and trade in old times England, to international and interstate commerce in the United States.[18]

Congressional debate regarding the application of the Sherman Act to international actors received far less discussion than that concerning the problem of domestic combinations and monopolies. Nevertheless, both sections 1 and 2 of the Sherman extended to commerce "with foreign nations."[19] Nineteenth century customary international law limited the reach of a sovereign state's laws to private actors within its territorial jurisdiction and typically, did not

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[17] See David Shorten, *For Capital or Country? International Bankers, Antimonopoly Politics, and the Origins of "Isolationism in the United States, 1905-1929* (Baltimore: Johns Hopkins University Press, forthcoming).

[18] 21 Cong. Rec. 1766 (1890), as quoted in Fugate, *Foreign Commerce*, 1:4.

[19] The following are antitrust provisions citing "foreign trade" or "commerce": 15 U.S.C. §§1, 2 (1988) (Sherman Act); 15 U.S.C. §§12, 13(a) (1988) (Clayton Act); 15 U.S.C. §§41 et seq. (1988) (Federal Trade Commission Act); 15 U.S.C. §8 (1988) (Wilson Tariff Act); 15 U.S.C. §§61 et seq. (1988) (Webb-Pomerene Act); 46 U.S.C. §§801 et seq. (1988) (Shipping Acts of 1916 and 1984); 47 U.S.C. §§202, 203, 309, 313–314 (1988) (Federal Communications Act); 49 U.S.C. §§1302, 1378(b), 1381, 1382, 1384 (1982), *as amended by* Pub. L. 95-504, 92 Stat. 1705 (1982), 49 U.S.C. §§1302 et seq. (1988) (Federal Aviation Act); 15 U.S.C. §31 (1988) (Atomic Energy Act). Subsequent US antitrust statutes contain similar language, see Fugate, *Foreign Commerce*, 1:19-30.

extend into another state's sovereign sphere.[20] In other words, state sovereignty preempted antitrust extraterritoriality; and yet the Alien Torts Statute of 1789 had provided standing for "private causes of action for certain torts in violation of the law of nations," keeping alive private suits for extraterritorial claims (discussed further below).[21] In the early twentieth century, transnational combinations and anticompetitive acts committed abroad challenged the presumption against extraterritoriality as business contracts and supply chains increasingly transcended state borders and came into conflict with US antitrust law. American antitrust policy, it must be remembered, remained unique in its construction of competition policy especially against cartels—it was far stricter in its prohibition of "contracts, conspiracy, and combinations in restraint of trade" than any other nation. In turn, novel challenges arose regarding both how US law would apply to international cartels and monopolies doing business in the US as well as how US law would apply to American firms operating abroad.

This era of American antitrust law was characterized by two competing frameworks that were not entirely consistent—on the one hand, the US Supreme Court adopted "strict

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[20] See Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804). See also David L. Sloss, Michael D. Ramsey, and William S. Dodge, eds., *International Law in the U.S. Supreme Court: Continuity and Change* (New York: Cambridge University Press, 2011), 259.

[21] 28 U.S.C. § 1350. The original text is here: Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 77 (1789). For a recent discussion, see "Brief of Amici Curiae Professors of Legal History William Casto, Martin Flaherty, Stanley Ketz, Samuel Moyn, and Anne-Marie Slaughter in Support of Petitioners" *Joseph Jesner et al., v. Arab Bank, PLC*, No. 16-499. Quoting the statutory text at p. 2.

territoriality" that seemed to limit the reach of antitrust liability to anticompetitive conduct taking place on American soil; on the other hand, Congress passed legislation exempting American export associations from antitrust liability when doing business abroad. Part 1 does three things: it begins with the doctrine of strict territoriality that Holmes articulated in *American Banana Co. v. United Fruit Co.* (1909);[22] it shows how that doctrine influenced US policy on international cartels throughout the Wilsonian era—in part through US policies exempting American export associations from antitrust review while also insisting that foreign firms abide US antitrust laws while on US soil; and it also demonstrates how the *American Banana* doctrine of strict territoriality eroded over time through distinguishing cases, which created a doctrinal opening for the *Alcoa* decision establishing antitrust extraterritoriality. Eventually, the doctrine of strict territoriality enunciated in *American Banana* would be narrowed so as to only prohibit US interventions against an act of state, but even then, exceptions could be found.

In *American Banana*, Supreme Court Justice Oliver Wendell Holmes, Jr. applied a strict application of state sovereignty—an interpretation that he based on nineteenth-century jurisdictional norms—to a private antitrust suit between two competing banana plantation owners operating abroad and importing into the US. In that case the Court distinguished between two types of sovereignty—external and internal—and ruled that American antitrust regulation

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[22] American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). See Putnam, *Courts without Borders*, 23; William Dodge, "Understanding the Presumption against Extraterritoriality," *Berkeley Journal of International Law* 16 (1998): 85-125.

touched only the internal regulation of the US market. The ruling established what has become known as "strict territoriality" and thereby, refused to apply US antitrust liability to clearly anticompetitive acts instigated by a US citizen against another US citizen for the purposes of monopolizing an industry. The fact that a sovereign nation—Costa Rica—had facilitated one part of the anticompetitive behavior had solidified Holmes's position and the Court embraced a strict limitation against employing American antitrust rules to extraterritorial disputes, and especially those involving sovereign states.

Admittedly, the *American Banana* case was a complicated one. In 1903 Herbert McConnell had started a banana plantation in Colombia and built a railroad to connect the plantation to the coast.[23] The United Fruit Company (the defendant) told him that he should either combine with United Fruit or stop his business.[24] Instead, McConnell sold his plantation to American Banana Company in June 1904. United Fruit—a corporation domiciled in New Jersey and headquartered in Boston—allegedly had monopolized and restrained the banana trade and, in turn, had maintained unreasonable prices in the US market.[25] Those acts were alleged to be unlawful under the Sherman Act and the plaintiff sought antitrust relief.[26]

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[23] Warren B. Hunting, "Extra-territorial Effect of the Sherman Act: American Banana Company versus United Fruit Company," *Illinois Law Review* 6 (1911): 35.

[24] Ibid.

[25] Ibid.

[26] Ibid., 40.

Amid this intense competition to corner the trade in bananas, geopolitical skirmishes redrew territorial boundaries in the region.[27] Also in 1903 the Republic of Panama seceded from Colombia with the aid of the US Navy. Shortly thereafter, the United States secured rights to the canal zone. The following year, "Costa Rican soldiers, instigated by the United Fruit Company, seized a part of the supplies of American Banana and stopped the construction and operation of both the plantation and railway" to the port.[28] The American Banana plantation, once part of Panama, then fell under the de facto jurisdiction of the Costa Rican government. Although US Secretary of State Elihu Root attempted to persuade Costa Rica to "preserve the property, not to destroy it, and hand it over to her owner," the Costa Rican government transferred title to the properties to a citizen of Costa Rica, Astua.[29] Eventually, United Fruit bought the plantation and the railroad from that individual, who appears to have been the Minister of Foreign Relations for

[27] See Bradley Webster Palmer, *The American Banana Company: An Account of the Operations of Herbert L. McConnell . . .* (Boston: George Ellis Company, 1907). See also Charles David Kepner, Jr. and Jay Henry Soothill, *The Banana Empire: A Case Study of Economic Imperialism* (New York: The Vanguard Press, 1935).

[28] American Banana, 213 U.S. 347.

[29] Letter from Secretary of State Elihu Root to Minister Magoon on Rights of American Citizens in Disputed Territories, April 16, 1906, Document 309, in *Papers Relating to the Foreign Relations of the United States, with the Annual Message of the President Transmitted to Congress December 3, 1906*, Department of State ed. (Washington, DC: Government Printing Office, 2008) 2:1201 (hereafter cited as Root Letter); American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), at 355.

Costa Rica.[30] The US government declined to intervene on behalf of American Banana, preferring instead to allow the Costa Rican courts to settle the dispute.[31]

Justice Holmes, writing for the Court, leaned hard on a presumption against extraterritoriality and grounded that understanding in his interpretation that "sovereignty is pure fact."[32] He argued that "it is a contradiction in terms to say that, within its jurisdiction, it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. . .The very meaning of sovereignty is that the decree of the sovereign makes law."[33] Holmes went further, declaring that US antitrust law could not be applied to extraterritorial conduct by American citizens and firms: "The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act was done."[34] Moreover, it did not matter that United Fruit seemed to influence, or control, that sovereign government. Concurrent or competing sovereignties were simply an impossibility for Holmes, except "in regions subject to no sovereign, like the high

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[30] Palmer, *American Banana*, 143.

[31] Root Letter, 1203.

[32] *American Banana*, at 358.

[33] Ibid..

[34] Ibid., 356.

seas, or to no law that civilized countries would recognize as adequate."[35] But, Holmes concluded, that was not the case here and the Court would not grant that the Costa Rica government was a "mere tool of the defendant."[36]

In this way, *American Banana* was an easy case—the US Supreme Court scarcely considered intervening due to the state action of the Costa Rican government. (Indeed, the "act of state doctrine" bars an antitrust claim today when it would require a court to declare invalid an official act of a foreign nation.)[37] Yet, while this doctrine reflected the long standing Euro-centric idea of the Peace of Westphalia, which enshrined state sovereignty as an organizing principle of international law in the seventeenth century, the Court's legal formalism combined the act of state doctrine with strict territoriality in antitrust law so as to unleash—and protect—American multinational firms seeking to monopolize entire industries abroad and import those products in the US market.[38] To acknowledge that *American Banana* played a pivotal role in the creation of

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[35] Ibid., 355-6. See John T. Noonan Jr., *Persons and the Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as the Makers of the Mask*, with a new preface (New York: Farrar, Straus and Giroux, 1976), 73–78, 107–9.

[36] *American Banana*, 213 U.S. at 358. The plaintiff had relied on *Rafael v. Verelst*, 96 Eng. Rep. 579 (1775).

[37] See U.S. v. Sisal Sales Corp., (S.D.N.Y. June 4, 1925), *reproduced in* Brief for the United States as Amicus Curiae in Support of Neither Party at 48, Mountain Crest SRL v. Anheuser-Busch InBev, No. 18-2327 (7th Cir. May 8, 2019).

[38] See Benjamin Allen Coates, *Legalist Empire; International Law and American Foreign Relations in the Early Twentieth Century* (New York: Oxford University Press, 2019).

"banana republics" in Latin America is not to say that the United States should intervene against acts of foreign states, but rather it draws attention to how American antitrust law played a role in facilitating economic imperialism—whether intended or not.[39] Moreover, the case illustrates in bold relief how an economically powerful firm might insinuate itself into—or perhaps even "instigate," as the petitioners charged— political acts for anticompetitive purposes—a fear that had motivated the passage of the Sherman Act.

At the time, United Fruit's actions in Central America begat inquiries from Congress,[40] and some legal commentators decried the failure of US antitrust law to intervene in a private action and to protect American consumers.[41] For the legal scholar Warren B. Hunting, United Fruit should not have gone unpunished, especially given that the prior conspiracy—United Fruit's insistence that McConnell either join the combination or cease banana cultivation and export—provided proof enough of the intent to restrain trade. According to the plaintiffs, under

[39] The US also paid several Caribbean countries' outstanding European debts, recouped those payments through customs collections, and thus converted the area to dollar-based trade (away from the British sterling). The US military intervened regularly in Latin America, and the US maintained a no-tariff policy on banana imports, further encouraging investments in the region. Governments of the Caribbean Basin offered land grants to United Fruit (as well as New Orleans-based Standard Fruit and Steamship Company) to build railroads and telegraph lines. See Marcelo Bucheli, "Multinational Corporations, Totalitarian Regimes, and Economic Nationalism: United Fruit Company in Central America," *Business History* (July 2008): 439-43; Kepner and Soothill, *Banana Empire*, 338-41.

[40] Hearing Before a Subcommittee of the Committee on Interstate Commerce, US Senate, on S. Res. No. 139, (Washington, 1908).

[41] Hunting, "Extra-territorial Effect," 34.

existing US antitrust law, United Fruit's actions created a cause of action by the mere fact of conspiracy, which was forbidden by the Sherman Act.[42] And, moreover, Costa Rica need not be implicated in the judgment—the illegal act by the private party gave rise to the liability.[43]

Indeed, Holmes had ignored the Wilson Tariff Act of 1894, which explicitly prohibited foreign or international cartels from importing into the US market, even though the plaintiff had brought it into their briefs. The Wilson Tariff had lowered tariffs and imposed an income tax to recoup lost revenue; also, it contained provisions similar to section 1 of the Sherman Act as applied to foreign importers.[44] One year after *American Banana*, Attorney General George Wickersham issued an official opinion,[45] in response a State Department inquiry, asserting expansive extraterritorial antitrust jurisdiction over a German syndicate of potash producers, which employed an American importer (German Kali Works) for its distribution in the US

[42] The plaintiff cited City of Atlanta v Chattanooga Foundry Co., 127 Fed. 23; Chicago Coal Co. v. People, 214 Ill. 453.

[43] The plaintiff cited Swift v U.S., 375, at 396; Lowe v Lawlor, 208 U.S. 274 (The plaintiff here referred back to *Rafael v. Verelst*—"Its officials were mere tools of defendant." See Brief for the Petitioner, 39.)

[44] Act of Aug 27, 1894, c.349, 28 Stat. 509, sections 73-77. The Supreme Court declared the federal income tax provisions unconstitutional in 1895. The Sixteenth Amendment reinstated a federal income tax in 1913.

[45] "Under the Judiciary Act of 1789, the Attorney General was authorized to render opinions on questions of law when requested by the President and the heads of Executive Branch departments." https://www.justice.gov/olc/opinions-main Last accessed Feb. 14, 2022.

market.[46] In short, the German government passed legislation creating a "board of apportionment" to set overall quotas for potassium salt domestic consumption and export, and the board set production quotas for each mine, which were transferrable, but any sales in excess of the quota were met with a tax. The board fixed prices.[47] In turn, the mine owners (all excluding one) formed a syndicate to market and sell its products, among other tasks. The result was "the price paid by the American purchasers immediately became about twice the amount specific in their contracts with the mine owners."[48] While Wickersham thought further evidence was needed, he declared that if the syndicate exported into the US, then the Wilson tariff and the Sherman act should apply. It's not clear if any part of this opinion was enforced.

Where the act of state doctrine did not apply, Justice Holmes's strict territoriality morphed into the "domestic conduct test," requiring that some portion of the conduct take place on American soil. In a series of cases just before World War I, the Supreme Court considered instances when American firms had participated in international combinations to control infrastructure access in the United States and abroad. In each case, the Court held that even though participants to the combination or conspiracy were domiciled abroad and the acts fell under foreign jurisdiction, the fact that these American firms had operationalized some part of

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[46] "Opinion re Potash Mines in Germany," Oct. 5, 1910, *Opinions of the Attorney General*, 31 (1916-1919): 545, as cited in Fugate, 1:138-9, also available at HeinOnline.

[47] "Opinion re Potash Mines," 548-9.

[48] Ibid., 551.

the agreement on American soil meant that the Supreme Court had jurisdiction and that antirust liability would apply.[49] Limiting access or controlling prices of railroad lines, steamships, or ports of entry, however, presented relatively easy distinguishing cases: These were clearly businesses affected with a public interest and thus perhaps impossible for the Supreme Court to let go unregulated.

And, yet, what's striking about this era of US antitrust enforcement was its uncertainty. Writing from the vantage point of the twenty-first century, we can see the continuity—the deference to *stare decisis* and international norms—but that obscures the transformations taking place both in the application of the law and in the business community. The preceding cases, along with domestic antitrust cases, established baseline rules prohibiting cartel activity in the US. Additionally, the famous cases of *U.S. v. Standard Oil Co.* and *U.S. v. American Tobacco Co.* (both handed down in 1911) enforced the anti-monopolization provisions of the Sherman Act and affirmed the Court's commitment to the rule of reason—what would become a burden-shifting framework employed to test the legality of the conduct. Yet, the uncertainty regarding

[49] United States v. Nord Deutscher Lloyd, 223 U.S. 512, 518 (1912), holding that *American Banana* does not apply when a contract—illegal in New York but signed in Bremen, Germany—becomes operative in the United States. See also United States v. Pacific & Arctic Railway Co., 228 U.S. 87 (1913), enjoining a combination of foreign and domestic corporations that had monopolized transportation between Alaska and Washington state; Thomsen v. Cayser, 243 U.S. 66 (1917), applying the Sherman Act against a combination of transporters between New York and South African ports. See also Thomsen v. Union Castle Mail S.S. Co., 166 F. 251 (1908), striking down a conspiracy of shippers to fix prices between US and South African ports and holding that it was immaterial that the conspiracy was formed abroad.

what restraints might be deemed "reasonable" led some business organizations, such as the National Industrial Conference Board, to call for antitrust reforms to clarify the act's meaning. As early as 1911, Louis D. Brandeis, the famed "people's lawyer" and antitrust activist, with the help of his sister-in-law, the social reformer Josephine Goldmark, presented to Congress a study of European competition policy.[50] In short, he argued that US antitrust law should consider the benefits of European-style competition policy. Brandeis and the American "fair trade movement" later made some headways in enacting that vision: through the interwar period the Court affirmed certain market-making and information-sharing practices by associations of competitors.[51]

Brandeis and others provided a two-fold critique of American antitrust law—domestically, it restricted legitimate forms of business cooperation and, internationally, it impeded US ventures abroad. After all, European countries allowed—if not supported—cartel activities in strategically important industries, which disadvantaged US exporters and affected the US market.[52] These and other concerns elevated antitrust and tariff reform to the limelight in

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[50] Laura Phillips Sawyer, *American Fair Trade: Proprietary Capitalism, Corporatism, and the "New Competition," 1890–1940* (New York: Cambridge University Press, 2018), 121.

[51] See, for example, Chicago Board of Trade v. United States, 246 U.S. 231 (1918). See also *Maple Flooring Manufacturers' Assn. v. United States*, 268 U.S. 563 (1925).

[52] William Notz, "Export Trade Problems and American Foreign Trade Policy," *Journal of Political Economy* 26. 2 (1918): 105–24. See also Sigmund Timberg, "Restrictive Business Practice," 222–36.

the presidential election of 1912.[53] Woodrow Wilson, the Democratic contender, campaigned to lower tariff rates and strengthen antitrust laws, which he argued were two sides of the same coin—consumers were injured both by tariffs that facilitated domestic monopolies and by foreign cartels that similarly raised prices. Once in office, Wilson worked with Congressional Democrats to sharpen antitrust statutes with the Federal Trade Commission Act and the Clayton Act, both of 1914. Each of these statutes contained language applying to foreign commerce.[54] Moreover, the administration also amended the Wilson Tariff, reinstating the federal income tax and lowering average tariff rates from 40% to 25%.[55]

In 1916, the Federal Trade Commission (FTC) published a report suggesting that American exporters were hampered by their fear of antitrust prosecutions if they organized to promote their businesses abroad, but the report also raised doubts that the Sherman Act would apply to foreign trade activities.[56] FTC Chair Joseph E. Davies, in a letter to Congress, summarize the commission's findings "that doubt and fear as to legal restrictions prevent Americans from developing equally effective organizations for overseas business and that the

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[53] Daniel A. Crane, "All I Really Need to Know about Antitrust I Learned in 1912," *Iowa Law Review* 100 (2015): 2025.

[54] On the language from the FTC and Clayton Acts regarding "foreign commerce" see n.19, supra.

[55] Amendment of Feb. 12, 1913, c.40, 37 Stat. 667 (1913). On tariff rates, see Douglas Irwin, *Clashing Over Commerce: A History of US Trade Policy* (Chicago: University of Chicago Press, 2017).

[56] Federal Trade Commission, "Report on Cooperation in American Export Trade" (Washington, DC, 1916), 1:4–7, 200–1.

foreign trade of our manufacturers and producers, particularly the smaller concerns, suffers the consequence."[57] The report explained:

> In seeking business abroad, American manufacturers and producers must meet aggressive competition from powerful foreign combinations, often international in character. In Germany, England, France, Italy, Austria-Hungary, Switzerland, Holland, Sweden, Belgium, Japan, and other countries businessmen are much freer to cooperate and combine than in the United States. They have developed numerous comprehensive combinations, often aided by the government, which effectually unite their activities both in domestic and foreign trade.[58]

The report then listed the following industries affected by international combinations: "coal, iron and steel, agricultural machinery, oil, sulphur, superphosphate, cement, matches, chocolate embroidery, silk goods, watches, cotton goods, condensed milk, canned fish, currants, quebracho, iodine, cacao, etc." as well as shipping, banking, mining, and merchandising enterprises.[59] Additionally, American exporters of timber, copper, cotton, and coal were injured by foreign buying combinations, which were accused of driving US prices "near or below the

[57] Joseph Davies, "Cooperation in American Export Trade," 64th Cong., 1st Sess. Sen. Doc. No. 426 (May 3, 1916), 2.

[58] Ibid., 2-3.

[59] Ibid., 3.

cost of production."[60] The FTC recommended that American export associations be formed to "combine their efforts" and "share the cost of developing new markets" in order to "compete more successfully with foreign syndicates and cartels."[61]

The Webb-Pomerene Act was first proposed by Senator Atlee Pomerene (D-OH) and Representative Edwin Y. Webb (D-NC) in April 1917.[62] The bill's aim was to increase American exports by allowing industries to form associations, similar to joint ventures, in order to compete in foreign markets. It encouraged American producers to sell off surplus goods to foreign markets, preventing overproduction and growing domestic industry.[63] For Pomerene, it was particularly important for small producers who lacked the means to pursue export markets without pooling their resources.[64] In response to Senator James A. Reed's (D-MO) (and other opponents of the bill) suggestion that it promoted the creation of cartels similar to that of Prussia in the nineteenth century,[65] Pomerene insisted that foreign cartels existed and would continue to

[60] Ibid., 5.

[61] Ibid., 6. See also Joseph E. Davies, address before the National Foreign Trade Council, "Cooperation in Foreign Trade," (January 28, 1916).

[62] Cong. Rec., May 23, 1917, p. 2784.

[63] Cong. Rec., December 12, 1917, p. 171.

[64] Ibid.

[65] Reed fits the mold of the stereotypical isolationist. On isolationism and antitrust, see Shorten, *Capital or Country?*

exist. Too weak to penetrate European markets American exporters would be unable to combat "this Prussian-made animal" and would be "crushed by its jaws."[66]

Congress passed the act in 1918—exporters might collude abroad, but definitely not in the US market.[67] The Webb-Pomerene Act required export-oriented associations to submit its business contracts to the FTC, and upon receiving approval, the "Webb association" received a tacit agreement that precluded antitrust prosecution.[68] This act was a US experiment with European-like competition policy that allowed for something akin to a cartel register. Since it created substantial government oversight of American cartelization, the Act encouraged American business groups to expand US exports through Latin America and, after WWI, to Europe as well, and into the Chinese market.[69] Export-oriented trade associations multiplied during the interwar period, though they largely escaped antitrust scrutiny.[70] Although the law

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[66] Cong. Rec., December 12, 1917, p. 172

[67] Cong. Rec., Conference Report No. 450, April 2, 1918, p. 1-2. The Wilson Tariff of 1894 contained provisions (sections 73-77) prohibiting cartel activity that affected US import markets.

[68] Webb-Pomerene Act, section 5. Relatedly, the Edge Act of 1919 allowed national banks to establish foreign subsidiaries and exempting those from US state law. See William F. Notz and Richard Selden Harvey, *American Foreign Trade: As Promoted by the Webb-Pomerene and Edge Acts…* (Indianapolis: Bobbs-Merrill, 1921).

[69] McGowan, *Antitrust Revolution*, 64

[70] See Zdzislaw P. Wesolowski, "An Inquiry into the Administration and Utilization of the Webb-Pomerene Act." *The International Lawyer* 1.4 (Oct., 1969): 107-124, 113.

still remains on the books, it was severely rolled back in the Second New Deal (see part 2) and it was later amended by the Export Trade Association Act of 1982.[71]

While the FTC pushed Webb associations onto export markets, the DOJ continued to investigate international agreements coming into the domestic import market. Building on those infrastructure cases, in 1927, the Supreme Court expanded the domestic conduct test and went so far as to apply it against a government-owned monopoly in Mexico.[72] In *United States v. Sisal Sales Corp.*, the Court considered whether US antitrust laws could prevent an American importer—Sisal Sales—and its American business partners from securing and maintaining exclusive contracts with a state-run monopoly—*Comision Exportadora de Yucatán*. In 1921, the Yucatán state government had created a government-owned corporation to control the purchase, sale, and export of sisal, a common type of rope or twine. Like most agricultural products, sisal prices had vacillated wildly around the First World War and thereafter. When prices collapsed in 1921, both the Mexican and Yucatán governments redoubled efforts to control production and export. When a group of US-based firms created Sisal Sales in order to contract with that government monopoly, the Department of Justice (DOJ) brought suit, seeking to enjoin the deal. Judge Augustus Hand, writing for the District Court, had ruled in 1925 that the *American*

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[71] Export Trading Company Act of 1982, 96 Stat. 1233.

[72] United States v. Sisal Sales Corp., 274 U.S. 268 (1927). The complaint alleged violation of both the Sherman Act, section 1 and the Wilson Tariff Act, section 73, as amended.

Banana decision gave him no choice: "an agreement to procure monopolistic legislation in another country cannot be treated as unlawful by our courts."[73]

However, a unanimous Supreme Court disagreed and distinguished *American Banana*, rather than overturning it. Although in both cases an American agent had sought and secured "discriminating legislation" from a foreign government, in *Sisal Sales* the Court emphasized that the parties' conspiracy had been conducted and was effective within the United States, which created the liability. "By constant manipulation of the markets, [Sisal Sales] acquired complete dominion over them, destroyed all competition, obtained power to advance and arbitrarily to fix excessive prices, and have made unreasonable exactions."[74] Because the Court distinguished *American Banana*, federal prosecutors continued to believe "that the *Banana* case limited federal prosecutorial power to the territorial limits of the United States," even though *Sisal* intervened

[73] Transcript of Record at 53, *Sisal Sales Corp.*, 274 U.S. 268 (1927) (No. 200).

[74] *Sisal Sales Corp.*, at 274.

against an act of state, the state monopoly.[75] In turn, the DOJ's prosecutorial discretion remained constrained by the territoriality of the conduct—not merely the intended effects of the conduct.[76]

International cartel activities had become an increasingly prevalent policy issue throughout the interwar period, particularly in Europe, and as a result, governmental and academic studies of international cartels began to multiply.[77] In 1928 the US Department of Commerce published an investigation of international cartels, describing them as "one of the outstanding features of postwar economy."[78] The report focused on the economic and political conditions that had fostered cartelization within several European countries, including Belgium, France, Switzerland, and Great Britain, and it paid special attention to "Germany's prominence in [the] international cartel movement."[79] Germany's "highly developed cartel system," the

[75] Fugate, *Foreign Commerce*, 1:56. Robert T. Molloy, "Application of the Antitrust Laws to Extraterritorial Conspiracies," *Yale Law Journal* 49 (May 1940): 1312–19, 1316. See United States v. Amsterdamsche Chininefabriek, 4 Fed. Trade Reg. Serv. 4186 (S.D.N.Y. 1928); United States v. Deutsches Kalisyndikat Gesellschaft, 4 Fed. Trade Reg. Serv. 4188 (S.D.N.Y. 1929); United States v. ABC Canning Co., 4 Fed. Trade Reg. Serv. 4213 (S.D.N.Y. 1931); Eastern States Petroleum Co. v. Asiatic Petroleum Corp., 103 F.2d 315, 319 (2d Cir., 1939).

[76] William Donovan and Breck McAllister, "Consent Decrees in the Enforcement of Federal Antitrust Laws," *Harvard Law Review* 46 (1933): 885-932, 926-7.

[77] For example, Louis Domeratzky, *The International Cartel Movement* (Washington, DC: U.S. Department of Commerce, 1928); Robert Liefmann, *International Cartels, Combines and Trusts* (Europa Publishing, 1927); Robert Liefmann*, Cartels, Concerns and Trusts* (London, 1932).

[78] Domeratzky, *International Cartel*, 1, 2.

[79] Ibid., 4. On the history of German cartels, see Ibid., 9-26.

report explained, had played an instrumental role in both fostering German industrial development in minerals, chemicals, and consumer goods, which entered export markets, and "in overcoming [domestic] political antagonisms."[80] Ultimately, however, the Commerce Department lamented that while the 1927 World Economic Conference, held in Geneva that year, had intended to create rules to govern transnational cartels, European states remained too divided on the issue to accomplish that goal.[81]

The Geneva conference built on the organizing principles of the 1925 League of Nations global conference, whose core purpose was to foster peace and international trade by reducing tariffs and harmonizing other commercial policies.[82] Although many European countries had restored their prewar levels of agricultural and capital goods production, Europe's share of world trade had not recovered to the same extent. The organizers of the Geneva conference—specifically, the French politician and businessperson Louis Loucheur—sought to outline transnational rules that would facilitate cross-border competition and enhance national productivity while also preventing future world war.[83] Country-specific and international cartels,

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[80] Ibid.

[81] Ibid., 57. David Gerber, *Global Competition: Law, Markets and Globalization* (Oxford: Oxford University Press, 2010), chapter 2. The US was not officially party to the League or the Geneva conference.

[82] See Arthur Salter, "The Contribution of the League of Nations to the Economic Recovery of Europe," *The Annals of the American Academy of Political and Social Science* 134 (1927): 132.

[83] Domeratzky, *International Cartel*, 57.

however, played an important role in post-WWI Europe. They had helped mitigate price fluctuations and currency volatility, especially in Germany; they had distributed excess production capacity; they had organized workers; and they had exercised political power.[84] As the US Commerce Department documented, post–World War I European governments employed cartels for both economic and political purposes. These agreements were intended to protect their domestic industries, currencies, and political coalitions through cartel policies and national tariffs to "manage" competition[85]; however, these protections had the effect of fragmenting the European market, both economically and politically.[86] The Geneva conference's final report endorsed reducing tariffs and adopting the most-favored-nation (MFN) principle—recommendations that were "hailed as a victory for liberalization."[87] However, those measures were soon overtaken by deflationary pressures brought about by the Great Depression.

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[84] Zara Steiner*, Lights That Failed: European International History 1919 –1933* (Oxford: Oxford University Press, 2005), 278, 446–49; Gerber, *Global Competition*. See also Domeratzky, *International Cartel*, 3–4, 38.

[85] Domeratzky, *International Cartel*, 38.

[86] Domeratzky, *International Cartel*, 4. (Domeratzky noted the alternative hypothesis that European cartels might "prepar[e] the way for a European customs union.") On tariff levels and fragmentation, see Steiner*, Lights That Failed*, 448, Table 20.

[87] Steiner*, Lights That Failed*, 449.

Part 2: Bringing Suit against Alcoa: A New Plan for Antitrust during the Second New Deal, 1932–1940

On April 29, 1938, President Roosevelt announced a new antitrust program, which was already underway at the Department of Justice.[88] "Unhappy events abroad" framed his message. "The liberty of a democracy is not safe," he warned, "if the people tolerate the growth of private power to a point where it becomes stronger than their democratic state itself. That, in its essence, is fascism—ownership of government by an individual, by a group, or by any other controlling private power." The "growing concentration of economic power as revealed in the ownership of corporate assets, in the income and profits of corporations, and in the income and property of individuals" threatened to make America into "a concealed cartel system after the European model."[89]

Part 2 explores how three leading figures in the Justice Department—Homer Cummings, Robert Jackson, and Thurman Arnold—revived antitrust prosecutions, overthrowing the First New Deal's experiments with coordinated markets, and then pushed to reform antitrust rules to apply to international cartels. Historians and legal scholars have mainly explained these efforts to

[88] "Recommendations to Congress to Curb Monopolies and the Concentration of Economic Power, April 29, 1938," in *The Public Papers and Addresses of Franklin D. Roosevelt*, Vol. 7 (New York, 1941), 305–32. (Hereafter: FDR, "Curb Monopolies.") See William Kolasky, "Trustbusters: Robert H. Jackson: How a 'Country Lawyer' Converted Franklin Roosevelt into a Trustbuster," *Antitrust* 17, no. 2 (Spring 2013): 85.

[89] FDR, "Curb Monopolies," 321 and 308, respectively.

revive and reform antitrust law within the context of domestic political economy. I argue in this part of the chapter, however, that international concerns over the connection between the economic concentrations of power and the rise of fascist states in Europe played a significant role in the DOJ's reorientation of antitrust policy. Both international cartels and, most conspicuously, German cartels and consolidated industries provided a foil to the Americans' renewed preference for more expansive economic regulation and more stringent antimonopoly policy. The leniency with which many European states had governed concentrations or combinations of private economic power, many US regulators began to argue, had fomented conditions ripe for national socialism.[90] This part of the chapter focuses on how the Roosevelt administration pivoted away from the antitrust policy of the First New Deal and explained this shift to the public as a necessary corrective not only to restore market competition but also to safeguard political democracy. This connection between competitive markets and political democracy was a long-standing one—but now the argument the administration was making was not simply about economic concentration necessarily overpowering rickety domestic political institutions. The assertion was that economic concentration required the countervailing force of

[90] Scholars have attributed the Second New Deal's antitrust program to the growing influence of Keynesian economics and to the political problems posed by the "Roosevelt Recession" of 1937. During that recession, New Dealers increasingly attributed the collapse of the economy "to misuse of business power, to pricing decisions that had negated the effects of monetary expansion, and to the withholding of investment for political reasons." See Ellis Hawley, "Antitrust," *Encyclopedia of American Economic History* (New York, 1980), 780. But see Freyer, *Antitrust and Global Capitalism*.

big government if market competition could not be effectively restored with the existing regulatory tools—the antidote they prescribed was active antitrust enforcement against both domestic cartelization and monopolization as well as international combinations.

Two cases took center stage. First, in December 1936, Justice brought charges against Socony-Vacuum Oil Company (one of the world's largest oil producers) and other US oil refiners for conspiring to fix prices in violation of the Sherman Act.[91] In order to remove "surplus" gasoline from the market the group had created a selling agency to price and market gasoline. The agency set-up "dancing partners" by pairing "majors"—the vertically integrated oil companies, controlling 85% of the Midwest's production and distribution capacity—with smaller, independent producers; then, the majors would purchase surplus gasoline from those independents at the spot market price (rather than have the independents take whatever price the market might bear and further drive down prices).[92] The defendants responded that they had received tacit approval for their output-restricting scheme from the government's Petroleum Administration, as organized by the First New Deal's National Industrial Recovery Act.[93] (The Court had declared the NIRA unconstitutional in 1935, however.[94]) And, now the refiners argued

[91] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[92] The spot market price refers to a composite of current market prices. See *Yale Law Journal*, 762.

[93] Socony-Vacuum, 225-7 (rejecting that argument).

[94] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) and Panama Refining Co. v. Ryan, 293 U.S. 388 (1935)

that the Great Depression had necessitated, and rendered reasonable, their activities, which the jury should hear and consider to determine the legality of the acts.[95]

Solicitor General Jackson thought otherwise: for the DOJ, the agreement itself was enough to warrant a categorical condemnation.[96] Showings of tacit approval from the defunct now-NIRA or of intent to alleviate "so-called competitive abuses or evils" were immaterial—the refiners had no authority to make such an agreement.[97] In his closing statements he went further, "'The enterprises of the country are … coldly marching, not for economic conquests only, but for political power … money is taking the field as an organized power. The question will arise … which shall rule, wealth or man? Which shall lead, money or intellect? Who shall fill the public stations, educated and patriotic free men, or the futile serfs of corporate capital?'"[98] Although counsel raised objections to statements referring to the defendants as "malefactors of great

[95] The defense relied on Appalachian Coals, Inc. v. U.S., 288 U.S. 344 (1933), where the Court upheld a joint sales agency among 137 coal producers. In that case, the venture provided procompetitive benefits, such as marketing, research, and distribution services, in addition to its pricing functions. Moreover, the agency did not control prices, nor could it—"their coal would continue to be subject to 'active competition.'" See *Socony-Vacuum*, at 214-7, quote at 215. On joint ventures, see Hovenkamp, *Federal Antitrust*, 260. More recently, see Texaco v. Dagher, 547 U.S. 1, (2006), at 6.

[96] The prosecution relied on US v. Trenton Potteries Co., 273 U.S. 392 (1927), striking down an agreement among toilet producers controlling 82% of the national market to fix prices. See *Socony-Vacuum*, at 212.

[97] Socony-Vacuum, at 237.

[98] Ibid., 238. Douglas quoted from Jackson, who had quoted a Wisconsin judge. (Ellipses in original.)

wealth" and "eager, grasping men," the court overruled them.[99] It found drumming up class prejudice "undignified and intemperate," but "it [was] not improper in Sherman Act cases to discuss corporate power, its use and abuse, so long as those statements are relevant to the issues at hand."[100]

Ruling in 1940, the Supreme Court declared that the refiners "had as their direct purpose and aim the raising and maintenance of [prices]."[101] This constituted a *per se* violation of the Sherman Act, and thus, no defense of reasonableness would stand.[102] Price-fixing contracts, conspiracies, or combinations "are all banned because of their actual or potential threat to the central nervous system of the economy"—market competition, or the price mechanism.[103] It was only in monopolization cases, Justice Douglas continued, that "an intent and a power to produce the result which the law condemns are then necessary."[104] Although the Court accepted that the conspiracy had affected prices, the majority also recognized the complexity of teasing out that causal relation and, in turn, it fell back on the nature of the contract itself.[105] In *Socony-Vacuum*,

[99] Ibid., 238.

[100] Ibid., 239.

[101] Ibid., 216.

[102] Ibid., 210, 218.

[103] Ibid., n.59.

[104] Ibid.

[105] Justice Owen Roberts, dissenting, insisted that market effects must be proven in order to hold that a conspiracy had actually fixed prices. Socony-Vacuum, at 260.

the Court affirmed long-standing anti-cartel precedents and clarified its categorical prohibition of "naked" price-fixing agreements; and, in doing so, it helped usher in the DOJ's pivot toward a new era of active antitrust enforcement.

The second major case was brought against Alcoa, its financiers, and a long list of alleged collaborators. The *Alcoa* case, however, went further—it charged Alcoa with monopolizing the domestic market for virgin ingot and with participating in an international cartel to allocate world markets.[106] Historically, Alcoa had long been a famously successful American industrial corporation, and its aggressive tactics to protect and enhance its market share had garnered Justice Department attention as early as 1908.[107] At that time, Alcoa dominated the domestic aluminum market, but it did have serious competitors abroad, particularly in France, Switzerland, and Brazil. When some of those foreign competitors expressed interest in opening a refinery in the United States, Alcoa pursued an agreement to exclusively divide national territories among themselves, as has been well documented by academics, regulators, and private litigation.[108] The Department of Justice intervened, and Alcoa

[106] United States v. Aluminum Company of America, et al., Filed April 1937, Box 71, Wright Patman Papers, LBJ Presidential Library. [Hereafter Patman Papers.] (No specific date in April given.) See also Annual Report of the Attorney General of the United States of 1937, 43.

[107] See George David Smith, *From Monopoly to Competition: The Transformations of Alcoa, 1888–1986* (Cambridge, 1988). See also Donald H. Wallace, *Market Control in the Aluminum Industry* (Cambridge, MA, 1937).

[108] See the petition of the United States and answer of the principal defendant, *Alcoa* case. See also Wallace, *Market Control*, 118–128, 157–169; Haskell v. Perkins, 31 F. 2d 53 (CCA 3d, 1929), *cert*

entered into a consent decree in 1912 to cease such agreements. We should note, however, that the consent decree abided the strict territoriality enunciated in *American Banana*—the Justice Department could tell Alcoa that it could not collude with foreign competitors while on US soil, but it could not hold those foreign firms, operating on foreign soil liable for violating US law. Although Alcoa agreed to stop such agreements, the firm had remained of interest to both the Justice Department and the FTC through the 1920s.

As early as 1934 Cummings had pursued tax evasion charges against Andrew Mellon, a major owner of Alcoa; however, it seems that Cummings had set his sights on an antitrust suit against the firm from the beginning. In 1933, during his first year as US attorney general, Cummings had explained that the government needed data on "what it cost [Alcoa] to produce Aluminum" to build its case.[109] Cummings intended to prove that Alcoa had foreclosed new competition and then reaped handsome rewards through its monopoly position. A recent private suit brought by the Baush Machine Tool Company against Alcoa presented a new opportunity because the district court had compelled Alcoa to "reveal its costs."[110] He urged the Justice Department to "suspend the [Alcoa] investigation" until the private suit had been tried, and in

denied, 279 US 872 (1929); Baush Machine Tool Company v. Alcoa, 60 F. 2d 586 (DC Conn. 1932), affirmed, 60 3F (2d) 778 (CCA 2d, 1933), *cert denied sub nom*. Alcoa v. Baush Machine Tool Company, 289 US 739 (1933); Senate Doc. No. 67, 69th Congress, 1st session (1926).

[109] Cummings "Memorandum to Mr. Stevens: Assistant Attorney General, In Re Aluminum Company of America," July 8, 1933, Box 71, Patman Papers.

[110] Ibid.

February 1934 he wrote directly to George Haskell, who had been the president of Baush until its closure in 1931, to set up a meeting.[111]

The *Baush* suit against Alcoa exposed more information on Alcoa's price-cost structures than had previously been disclosed.[112] Piggybacking on an FTC antitrust investigation that had lasted nearly a decade, Baush sued Alcoa for $3 million. The charges ranged from monopolization of "crude aluminum" production to predatory pricing on alloys, to illegal cartelization with a foreign firm—Aluminium Limited, which Baush alleged was hardly an independent firm in ownership or management. Alcoa sued for a motion to dismiss, attempting to avoid discovery (turning over interrogatories under oath as to price-cost data). When that failed, Alcoa settled with Baush, paying a little less than a million dollars and placing Haskell on its payroll for five years.[113]

The DOJ's 1937 indictment against Alcoa intertwined charges of domestic monopolization with allegations of participating in an international aluminum cartel to maintain that monopoly status. According to the complaint, in 1928 Alcoa had spun off its Canadian subsidiary, Limited, making it a legally-separate entity; however, the two firms' management

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[111] Letter Cummings to Haskell, Feb. 7, 1934, Box 71, Patman Papers. Cummings had previously represented Haskell in an antitrust suit against George Perkins, see *Haskell v. Perkins*, 28 F. 2d 222 (1928); "Demands $9,000,000 in Aluminum Suit," *New York Times*, June 28, 1928, p. 33.

[112] *Baush Machine Tool Co.* 60 F. 2d 586; Canadine, *Mellon*, 516.

[113] "Final Report and Recommendations of the Temporary National Economic Committee: Investigation of Concentration of Economic Power," Senate Doc. No. 35, 77th Sess. (March 31, 1941), 230.

and ownership remained deeply interconnected. Working through Limited, Alcoa's officers had knowledge of the purpose and the effects of Limited's participation in the Alliance—*L'Alliance Aluminium Compagnie*. A Swiss corporation, Alliance brought together a British, a French, a Swiss, and two German aluminum producers who were negatively impacted by the Great Depression's decline in aggregate demand and falling prices. Beginning in 1931, Alliance began coordinating the sale of all available metals by setting production quotas for each member firm.[114] It also purchased members' surplus, or unsold, aluminum at a predetermined price, effectively creating a worldwide price floor. Although Alcoa was not directly party to the agreement, the government alleged that it had tacitly participated in and benefited from the agreement by using Limited as its proxy.[115] The original Alliance charter did not include imports into the US as part of member firms' quotas. However, in 1936, Alliance revised this agreement to include new penalties based on a royalties system, whereby if a member exceeded its production quota then it agreed to pay progressively-scaled royalties in proportion to that excess, and now these quotas and payments extended to sales in the US market.[116] The DOJ named Limited as a defendant alongside Alcoa, but it was unclear whether it had jurisdiction to do so since Limited was neither a subsidiary of Alcoa nor an importer.

[114] *Alcoa*, 44 F. Supp. 97, at 280.

[115] Brief for the United States in Support of a Preliminary Finding of Conspiracy, District Court of the United States for the Southern District of New York, pp. 2, 10–12 (June 1, 1939).

[116] 44 F. Supp. 97, at 225, 277, 280.

The government's suit against Alcoa was as high-profile a case as *Standard Oil* had been in 1911, and the regulators seemed increasingly aware of the public-facing aspects of their work.[117] In 1938, then-Solicitor General Robert Jackson, who had been succeeded in his role at the Department of Justice Antitrust Division by Thurman Arnold in March of that year, explained that although US antitrust law had "saved us from the cartel system of Europe," it currently lacked a "consistent or intelligible policy."[118] "Whatever solution" to the antimonopoly problem the United States adopted, for it "to be acceptable," he explained, it had to conform to "our ideal of political and economic democracy," with "no economic or political dictatorship imposed either by government or by big business." Any kind of control would be "distasteful," he insisted, "but if a choice has to be made the public will prefer governmental to private bureaucracy and regimentation."[119] Jackson singled out the Aluminum Company of America (Alcoa) as a case in point—alongside unnamed monopolists in the fields of "parlor and sleeping cars, cameras, sewing machinery, cash registers, and farm machinery." Monopolies, he explained, were locking in market control through "financial controls, interlocking directorates, patent controls, basing point practices, price leadership, [and] market dominance."[120] A new

[117] See Johnston, "Arnold's Biggest Case." See also Waller, "Story of Alcoa," 135.

[118] Robert H. Jackson and Edward Dumbauld, "Monopolies and the Courts," *University of Pennsylvania Law Review* 86, no. 3 (Jan. 1938): 237.

[119] Ibid., 237.

[120] Ibid., 239–40.

direction in American antitrust required a renewed attack on "industrial empire building," and the *Alcoa* case "not only puts the company on trial for monopoly, but also puts the existing antitrust laws on trial."[121] Jackson's vision of American antitrust appeared as much political as economic.

While Attorney General Homer Cummings and Jackson launched the opening salvo in this renewed attack on monopoly power, it was Arnold who carried the mantle through direct legal confrontation and popular public addresses. A Yale law professor originally from Laramie, Wyoming, Arnold donned a thin mustache and stuffy double-breasted suits that perhaps belied his progressive vision for American law and politics.[122] Unafraid of confrontation, Arnold became not only the lead prosecutor but also the main spokesperson for a reinvigorated antitrust that tied the economic costs of monopoly and cartels to the democratic challenges of concentration and control.

[121] Robert H. Jackson, "Should the Antitrust Laws Be Revised?" *United States Law Review* 71.10 (Oct. 1937): 575, 577. (Address before the Trade and Commerce Bar Association and Trade Association Executives, Sept. 17, 1937.)

[122] Brinkley, *End of Reform*, 118.

Part 3: *United States v. Alcoa*: Constructing a New Era for American Antitrust at Home and Abroad, 1941–1945

The Alcoa trial began in June 1938 and lasted nearly two years. In late September 1941, federal district judge Francis Gordon Caffey, writing for the Southern District of New York, "wiped Alcoa's slate clean" of the US government's monopolization and conspiracy charges.[123] After months of testimony and more than 58,000 pages of trial records, Judge Caffey held that Alcoa lacked market power sufficient for him to declare it a monopoly and that the government had failed to prove any *intent* to monopolize.[124] Thus there was nothing nefarious about Alcoa's pursuit of market dominance, and rather than accepting Arnold's charges of a "tacit" understanding among international competitors,[125] Caffey held that "without an agreement there was no conspiracy."[126] Instead, he embraced Arthur V. Davis's testimony stating that as chairman of Alcoa, he had "flatly refused" requests by the French Aluminum Company and the British Aluminum Company "to have Alcoa join" an international cartel.[127] Over the course of ten days, Judge Caffey read his opinion aloud—and then, according to *Time* magazine, he left

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[123] "Aluminum: Judge Caffey Concludes," *Time* magazine, Oct. 20, 1941, 87-88.

[124] United States v. Aluminum Co. of America, 44 F. Supp. 97 (S.D.N.Y. 1941).

[125] Ibid., 30.

[126] Ibid.

[127] Ibid., at 231, 280.

New York "for a six-week vacation in Maine."[128] Arnold appealed the decision, but events leading to America's entry into World War II quickly overtook the appeal, and it languished throughout the duration of the war—until Attorney General Francis Biddle revived it, and Judge Hand ultimately overturned Caffey's opinion in March 1945.

From 1941 to 1945, the US government began an intensive investigation into the problems of international cartels and monopolies—an investigation that was in no small part linked to the widespread notion that cartels had played a decisive role in Hitler's seizure of power and Germany's wartime economic power. There was, as well, both an awareness that these issues would help shape the postwar world and a preference for shaping postwar international competition policy modeled on US law. Historians have paid a great deal of attention to the TNEC, focusing on its lengthy hearings and policy recommendations, as well as its limited impact on the direction of antitrust legislation.[129] However, the TNEC *Final Report* along with State Department investigations and Congressional inquiries amassed evidence that German cartels (as well as international cartels like Alliance) had impeded US war preparedness efforts, and some American firms appeared complicit. Arnold and others at the Antitrust Division became acutely aware of these relationships as well. Part III widens the aperture, zooming out from doctrinal analysis to focus on the external events that surrounded the *Alcoa*

[128] "Aluminum: Judge Caffey."

[129] See Hawley, *New Deal and the Problem of Monopoly*; Brinkley, *End of Reform*.

case. This section concludes with an analysis of the *Alcoa* holding especially as it established antitrust extraterritoriality.

The TNEC *Final Report* entered into official documentation what many already believed, "in Germany the rise to power of the dictator was made possible by the support of commercial and industrial organizations, organizations which now have no more freedom in that state than the humblest of regimented individuals."[130] Arnold testified that the Antitrust Division had been tasked with breaking up combines that impeded the government's war preparation efforts, and the Division had uncovered collusion between domestic and foreign firms.[131] Arnold employed these cautionary tales of fascist Europe to warn that untrammeled "industrial autocracy" in the United States was also a threat to democracy so grave that it required intervention.[132] For Arnold, a choice must be made between "free competition" or the "cartel system." The former enshrined private property rights and democratic participation in governance; the latter (as a book reviewer put it) "leads inevitably to strangulation of trade, bureaucratic interference and finally a totalitarian economy of the Nazi type."[133] In popular speeches and publications, Arnold explained that both monopolies and cartels quashed market competition, fostered waste, and

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[130] TNEC, *Final Report*, 8, as quoted in Robert Franklin Maddox, *The War Within World War II: The United States and International Cartels* (Westport: Praeger Publishers, 2001), 4.

[131] TNEC, *Final Report*, 103.

[132] Arnold, *Bottlenecks*, 18.

[133] Alan R. Sweezy, "Mr. Arnold and the Trusts," *New Republic* (June 8, 1942): 803.

trammeled small producers; but, he was quick to add that they also threatened democracy and would ultimately be overtaken by either public regulation or public ownership—as he warned had been the case in Europe. Other leaders at Justice struck the same ominous tone, noting that while the Great Depression had incentivized some legitimate forms of consolidation, it had also been the harbinger of more nefarious forms of collusion, control, and inequality.[134]

Germany had long been known as the "land of cartels," placed in sharp contrast with the American response to somewhat similar macroeconomic challenges of late nineteenth century industrialization.[135] Industrial firms, working closely with supervising banks, offered self-regulation as a means to stabilize economic and social dislocation, and foster a distinctly Germany nationalism, or identity. Moreover, the prevailing sentiment of German economists, such as Friedrich Kleinwacher, had acknowledged that economic efficiency and stability could be achieved through such industrial self-regulation.[136] These agreements would be illegal, however, if they were shown to monopolize or exploit its market power to the detriment of consumers.[137] The number of German cartel agreements had increased through the late 19th

134 Thurman W. Arnold, "Fair and Effective Use of Present Antitrust Procedure," *Yale Law Journal* 47. 8 (June 1938): 1294–95.

135 Gerber, *Global Competition*, 69; Saxon Wood Pulp case (German Imperial court, 1897). See also Jeffrey R. Fear, *Organizing Control: August Thyssen and the Construction of German Corporate Management* (Cambridge, MA: Harvard University Press, 2005), 237-9.

136 Fear, *Organizing Control*, 236.

137 Fear, *Organizing Control*, 238.

century, and increasingly became international.[138] During the post-World War I inflationary period in Weimar Germany, however, public sentiment shifted against business cartels and, in 1923, emergency legislation was passed that required all inter-firm agreements to be put in writing and established a special administrative court to hear cartel cases.[139] Other central and northern European countries passed cartel laws, often modeled on the debates taking place in Germany. Notably, Norway was alone in enacting a stringent competition law that more closely aligned to the American preference for adversarial judicial interventions, as opposed to the administrative German model.[140] Regardless, German firms continued to play an important role in domestic stabilization efforts and were perceived to play a pivotal role in international cartel bodies.[141] When the Nazi Party seized power in 1933 "cartels became not only compulsory, but quasi-public bodies. This also applied in fascist Italy."[142]

Yet, fascist Europe was more than just a cautionary foil to the American experience, it was also a looming presence that impeded immediate war preparedness, especially in materials

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[138] See W. Henderson, *The Industrial Revolution on the Continent 1800–1914* (Frank Thomas, 1967), 60, as cited in Joshua and Harding, *Regulating Cartels*, 66.

[139] See Liefmann, *Cartels, Concerns and Trusts*, 351.

[140] Gerber, *Global Competition*, 155–9.

[141] See Robert Liefmann, "International Cartels," *Harvard Business Review* 5. 2 (Jan. 1927): 129–48.

[142] Susanna Fellman and Martin Shanahan, eds. *Regulating Competition: Cartel Registers in the 20th Century World* (London and New York: Routledge, 2016), 5. See also William Conrad Kessler, "The New German Cartel Legislation: July 15, 1933," *American Economic Review* 24.3 (Sep., 1934): 477- 482.

such as synthetic rubber, aluminum, copper, and steel.[143] In early 1941 the Senate voted to create the Special Committee to Investigate Contracts Under the National Defense Program, which became known as the Truman Committee given Vice President Harry Truman's leadership role as chair. Leveraging reams of data collected by TNEC, by 1942, Arnold took aim at Standard Oil of New Jersey for conspiring with German chemical producer IG Farben to suppress the production of synthetic rubber. As the *New Republic* explained: "I. G. Farben was a center of anti-democratic propaganda and illicit war preparation within Germany. It helped Hitler to take power and then became a basic part of Hitler's world organization of agitation and espionage."[144] And, as Arnold testified, "while the Hitler government, for military reasons, was refusing to make available to this country the German buna rubber [a patented technology], Standard sent to I.G. Farben information as to American butyl rubber and Standard's files show that a recommendation was made that 50 pounds of sample butyl should be sent to I.G. Farben."[145] As Arnold told the Truman Committee, "this is only a typical case of the operations of a cartel," especially one involving a domestic monopolist with a "desire … to maintain its monopoly

143 US Senate Committee on the National Defense Program, hearings, 77th Congress, 1st session (Washington, DC, 1942), 4283–4838, 4773. [Hereafter Truman Committee.]

144 Michael Straight, "Standard Oil: Axis Ally," *New Republic*, April 6, 1942, https://newrepublic.com/article/104346/standard-oil-axis-ally; Frank L. Kluckhohn, "Arnold Says Standard Oil Gave Nazis Rubber Process," *New York Times*, March 27, 1942.

145 Arnold, Truman Committee, 4318.

position."[146] In other words, Standard preferred to maintain "control" of the domestic market through its world-market allocation agreements with Farben, rather than share its synthetic rubber technology through licensing agreements with other US firms.[147]

He also accused Alcoa of conspiring with I.G. Farben to suppress magnesium production through the "I.G.—Alcoa Magnesium Cartel."[148] Arnold's testimony cataloged the deals restraining trade in tungsten carbide, a chemical compound used in machine tool production. A 1938 contract between General Electric and Friedrich Krupp of Essen restricted US output and, as a result, raised its price.[149] In another situation, the Shering Corporation of New Jersey agreed to take over the trademarks of Shelton AG of Germany in Latin American markets and thus, circumvent the British blockage against the Axis. Consent decrees swiftly followed.[150]

Additionally, at the State Department a Special Committee on Private Monopolies and Cartels, for which Harvard economics professor Edward S. Mason served as deputy chairman,

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[146] Ibid., 4321.

[147] Ibid., 4322.

[148] Ibid., 4819.

[149] Straight, "Standard Oil."

[150] See Exhibit No. 441, Truman Committee, 4693–4721. See also: U.S. v. Standard Oil Co. (N.J.), Civ. No. 2091 (D.N.J. 1942); U.S. v. Dow Chem. Co., Cr. No. 109-191 (S.D.N.Y. 1941); U.S. v. Sperry Corp., Civ. No. 19-175 (S.D.N.Y. 1941); U.S. v. Am. Bosch Corp., Civ. No. 20-164 (S.D.N.Y. 1942).

began investigating the problem of international cartels in May 1943.[151] Arnold, then still at Justice, started working with Heinrich Kronstein, a German lawyer and professor who had fled the Nazi regime for the United States in the mid-1930s. By the early 1940s, Kronstein had begun advising the US government on German cartel and monopoly policies, and in 1943 the special committee circulated "A List of International Cartels, 1939," prepared by Kate and Heinrich Kronstein.[152] As explained by legal historian Tony Freyer, the data provided by the Antitrust Division informed the State Department's bombing strategies under Dean Acheson's leadership.[153] The Special Committee's report on postwar foreign economic policy urged policymakers to consider both the immediate task of unwinding "Axis economic penetration through Europe and elsewhere" and "problems of a broader scope and more continuous nature which concern the business framework of international trade."[154] The report then provided a preliminary list of available studies and memoranda on these issues, conducted by the State

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[151] "Special Committee on Monopoly and Cartels," (October 14, 1943) Notter Files, RG 59, Box 34, National Archives. (Declassified 9–24–02.)

[152] Memo: Kate and Heinrich Kronstein, "A List of International Cartels, 1939," Notter Files, RG 59, Box 34, National Archives.

[153] Freyer, *Antitrust and Global Capitalism*, 44.

[154] "Report of Special Committee on Private Monopolies and Cartels to the Committee on Post-War Foreign Economic Policy," July 1, 1943, Marriner S. Eccles Papers, Federal Reserve Papers, Subseries III, Domestic Economic Stabilization, Box 32, Folder 19, Item 4.

Department, the Department of Justice, the Department of Commerce, the Office of Strategic Services, the Board of Economic Warfare, and the US Army.[155]

The State Department's special committee recognized the need for an international agreement on cartels as a way to "lessen the need for judicial interpretation,"[156] but it also remained keenly aware of what the United States could do unilaterally. For example, in 1943 Mason wrote to Myron Taylor, chair of the Committee for Coordination of Economic Policy Work and former-chairman of US Steel, explaining that the Office of Alien Property Custodian allowed the United States "to void illegal international cartel agreements and to grant licenses on the patents involved."[157] The patent policy was not only about cartels; it reflected the desire to break Axis control of key industrial sectors whether controlled by consolidated firms or groups of firms.[158] This required abrogating those patent rights that were exercised by monopolists and cartels and necessary to their market power.[159]

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155 Ibid., subsection "Progress Report: Subcommittee on European Enemy and Enemy Occupied Countries," 5–10.

156 "Special Committee on Monopoly and Cartels," Memo 5 (November 5, 1943) Notter Files, RG 59, Box 34, National Archives.

157 Ibid., Doc. No. 5 (December 23, 1943).

158 Heinrich Kronstein, "The Dynamics of German Cartels and Patents," *University of Chicago Law Review* 9 no. 4 (1942): 643-71.

159 See U.S. v. International Lead Co., 332 U.S. 319 (1947), striking down an international titanium cartel that employed cross-licensing of patents for market division purposes.

The United States pursued various multilateral strategies through the wartime Lend-Lease Program (article 7) and later through the Bretton Woods agreement, the General Agreement on Trade and Tariffs (GATT), and the International Trade Organization (ITO) treaty. (The ITO treaty contained anticartel provisions; however, it died in 1950 because of protectionist objections in the US House Committee on Foreign Affairs.) While each of these three transnational agreements focused on liberalizing trade and investment flows, none implemented provisions to prohibit cartels or monopolistic practices. As the previous Geneva conference had demonstrated, regulation of a nation-state's the internal organization and competitive structure remained firmly within the state's prerogative. This inaction reflected both the historical tradition of lenient competition policies (relative to US antitrust law) and the continued ambivalence towards cartels as a form of business organization—while cartels might act in their self-interest, they also might help mitigate business cycle downturns. Although an international agreement on competition policy failed to materialize during this transnational institution-building moment, the American antitrust regulators had already begun to embrace—and institutionalize—the Second New Deal's vision for active antitrust enforcement.

Wendell Berge, who succeeded Arnold at the Antitrust Division, appeared ready to take unilateral action. Antitrust prosecutors at Justice and the FTC reversed course on their previous interpretation of the Webb-Pomerene Act's export associations. Before World War II, Webb associations, as they were called, had accounted for 17.5 percent of US exports and yet had received little scrutiny from overseeing agencies.[160] In the spring of 1944, however, the Justice Department charged two American export associations, thirteen American manufacturers, and a British corporation and its American agent with maintaining an international cartel to restrain the trade of alkalis.[161] (Alkalis are used in the manufacture of soap, textiles, rayon, paper, chemicals, and drugs.) The complaint also included four co-conspirators—two American corporations, one German, and one Belgian—in the allocation of markets and export quotas. This was the first suit in which the government pursued Webb associations, and it sent a warning signal to US firms engaged in cooperative efforts to allocate markets abroad.[162]

Even after Arnold left his position at the Department of Justice in 1943 to take a seat on the US Court of Appeals for the District of Columbia, he continued his campaign for robust antitrust enforcement and focused on the problems that private cartels posed for democratic governance. He called this fight "the most important post-war struggle," describing it as a conflict "between the interests of vested capital representing cartels that can control industry in America and in England and in Europe, and the forces of new independent free enterprise that

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[160] Wesolowski, "Webb-Pomerene Act," 107, 113.

[161] United States v. U.S. Alkali Export Ass'n., 58 F. Supp. 785 (S.D.N.Y. 1949). See also United States v. Minn. Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950).

[162] See Wendell Berge, *Cartels: Challenge to a Free World* (Washington, DC, 1944), 192–207.

will be released by the technologies of a new industrial age."[163] Many of his speeches focused on European economic concentrations of power and their threat to European democracy, as well as their potential threat to American institutions.[164]

For Arnold, Berge, and others, the anti*cartel* international activism of the postwar era was a continuation of the domestic anti*monopoly* fervor of the late nineteenth century—in other words, fighting cartels presented a crucial, unifying touch point of antitrust activity. At this moment, a consensus had emerged within the administration that linked international cartels as a system of economic organization with political fascism; moreover, that US firms were found to be complicit with German cartels through market allocation, production quotas, and patent agreements seemed to underscore the vulnerability of American liberal capitalism, especially during wartime.[165]

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[163] "Cartels," Address by the Honorable Thurman Arnold, February 8, 1944, Thurman Arnold Papers, University of Wyoming American Heritage Center (Box 4). [Hereafter: Arnold Papers.]

[164] "Speech to American Business Congress," March 17, 1944, Arnold Papers, (Box 4); Arnold, "The A-B-Cs of Cartels," in *Credit Executive*, January-February 1943, Arnold Papers (Box 81); Thurman Arnold, "America's Choice: Cartels or Free Enterprise." Manuscript 1944, Arnold Papers (Box 81); Thurman Arnold, Book Review of *Cartels: Challenge to a Free World* by Wendell Berge, *Survey Graphic Magazine*, February 1945, Arnold Papers (Box 81); "Let's Face the Issue: Are Cartels Necessary?" Radio show script, where Arnold was a speaker, February 25, 1945, Arnold Papers, Box 106.

[165] Corwin Edwards, "International Cartels as Obstacles to International Trade," *American Economic Review* 34 (Mar., 1944): 330-9; Committee on Military Affairs, Report of Subcommittee on War Mobilization, Cartels and National Security, 78th Cong., 2d sess. (1944); George Stocking and Myron Watkins, *Cartels or Competition? – The Economics of International Controls by Business and Government* (New York: Twentieth Century Fund, 1948); Stocking and Watkins, *Cartels in Action: Case Studies in International Business Diplomacy* (New York: Twentieth Century Fund, 1946). See also

The court interpreted the facts presented in the *Alcoa* case to prove that Alcoa possessed monopoly power in virgin ingot production (the relevant market) and that it had illegally monopolized that market by forestalling competition by producing ahead of demand. To establish the liability, the court revisited the Congressional intent behind the Sherman Act. Despite Hand's reluctance to intervene, the court proclaimed that Congress "forbad all" trusts.[166] While acknowledging that "monopoly may have been thrust upon it" and "size does not determine guilt," Hand concluded that Alcoa was "not a passive beneficiary of a monopoly"—instead, it had the requisite market power and it utilized that power to maintain and enhance its position by producing ahead of demand.[167]

Next, Hand turned to the problem of the Swiss corporation (*L'Alliance Aluminium Compagnie*) controlling the international aluminum market. The DOJ had named both Alcoa and Aluminium Limited as defendants, and had asserted that the Alcoa's 1928 spin-off of Limited

Roland N. Stromberg, "American Business and the Approach of War, 1935-1941," *Journal of Economic History* 13 (Winter 1953): 78; Gabriel Kolko, "American Business and Germany, 1930-1941," *The Western Political Quarterly* 15, no. 4 (1962): 713-28.

[166] *Alcoa*, at 427, quoting: 21 Cong. Rec., 2460. On Hand's "reluctance" and his reliance on Congressional intent to condemn monopolies, see Winerman and Kovacic, "Learned Hand."

[167] *Alcoa*, at 429, 430. Alcoa was also found to have committed a "price squeeze" against aluminum fabricators by keeping ingot prices high but (fabricated) rolled sheet prices low relative to competitors. *Alcoa*, at 437-8. But see *DuPont*, 96 FTC 653, 747 (1980).

was purely a "legalistic maneuver, which should not blind the court to the realities."[168] Hand, too, emphasized the firms' "common shareholders" and their interconnected interests. Nevertheless, the court rejected the DOJ argument that Alcoa had directly participated in the agreement through Limited.[169] Hand set Alcoa aside, and focused on Limited involvement in the Alliance agreements from 1931 and 1936, the latter including imports into the US.[170] Now, the court returned to Congressional intent, asking had Congress intended to attach antitrust liability to foreign firms operating abroad?[171] Hand rejected the idea that antitrust liability would attach if the agreement had not intended to affect US markets; but, where intent could be found, antitrust liability might attach if "its performance is found actually to have had some effect," just as it had in previous cases dealing with international cartels or monopolization.[172] Critically, however, the burden then shifted to Limited—before effects were found—to prove that its participation in Alliance had not detrimentally affected the US market. The court relied on *Socony-Vacuum* for the proposition that "all factors which contribute to determine prices must be kept free to operate

[168] Equity Case Files No. 85-73, Brief of the United States, National Archives, RG 21, Box 4167, Folder 1.

[169] *Alcoa*, at 442.

[170] Ibid., 443.

[171] Ibid.

[172] Ibid., 444

unhampered by [such] agreements"—and the 1936 agreement was intended to do just that.[173] Yet, this was not a *per se* case, instead the court applied a burden-shifting framework and reasoned that both intent and effects are necessary to assign liability.

The Alcoa ruling on antitrust extraterritoriality—holding that an agreement among foreign firms which intended to and substantially did affect the US market was illegal under the Sherman Act—relied on the "effects test" from preceding cases, which had distinguished away much of *American Banana*'s strict territoriality.[174] It did not overrule *American Banana*, which concerned acts of state. For Hand, it seemed, the general rules established in *Alcoa* offered a response to the immediate crisis and a path forward. The Alliance, he explained, "still persists" and might resume its activities in peacetime "unless a judgment forbids" them from doing so.[175]

Although Alcoa was not broken apart—because over the course of the war the federal government reoriented market shares through government contracts that bolstered Alcoa's competitors, such as the Reynolds Metals Company— on remand, the District Court ordered the dissolution of common stockholders to Alcoa and Limited.[176] And the *Alcoa* case received a

[173] Ibid., 445.

[174] U.S. v. Hamburg-Amerikanische P.F.A. Gesellschaft, 200 F. 806 (S.D.N.Y. 1911), at 807, *rev'd on other grounds*, 239 U.S. 466 (1916); Thomsen v. Cayser, 243 U.S. 66 (1917), at 88; U.S. v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945), at 445.

[175] Alcoa, at 448.

[176] US v. Alcoa, 91 F. Supp. 333 (SDNY, 1950).

quick and sweeping affirmation from the US Supreme Court.[177] Hand's ruling gave US antitrust regulators expansive extraterritorial power over agreements made abroad between foreign firms, if those agreements had an intended and substantial effect on the US market.[178]

However, some limits remained in place over this new exertion of American legal and economic power. The *Alcoa* decision asserted American hegemony, but obviously, it did not resolve the timeless tension of comity between countries, particularly where domestic laws existed in direct tension with one another. As legal scholar Wilbur Fugate has explained, "acts by private parties *required* by a foreign sovereign within its territory are ordinarily not subject to antitrust prosecution."[179] Thus some conduct that is illegal according to American law might still survive scrutiny by US regulators if another country required that conduct from its own companies. Nevertheless, lacking state law to the contrary, US regulators could apply American

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[177] American Tobacco Company v. United States, 328 U.S. 781 (1946), affirming the *Alcoa* ruling. On government contracts, see Andrew Perchard, "This Thing Called Goodwill: The Reynolds Metals Company and Political Networking in Wartime America," *Enterprise & Society* 20, no. 4 (Dec. 2019): 1044–83.

[178] U.S. v. General Elec. Co., 82 F. Supp. 753 (D.N.J. 1949), at 891; U.S. v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945), at 527, *mod. and aff'd*, 332 U.S. 319, (1947); U.S. v. Timken Roller Bearing Co., 83 F. Supp. 284 (N.D. Ohio 1949), at 309, *mod. and aff'd*, 341 U.S. 593 (1951); U.S. v. Imperial Chem. Indus., Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951), at 592; Continental Ore Co. v. Union Carbon & Carbide Corp., 370 U.S. 690 (1962); U.S. v. The Watchmakers of Switzerland Info. Center, Inc., 1963 Trade Cases, ¶70,6000 (S.D.N.Y. 1962); Id. at ¶77,457. See also cases cited at Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161 (E.D. Pa. 1980), at 1187.

[179] Fugate, "Antitrust Jurisdiction," 926.

antitrust laws for foreign firms under the postwar effects test. Moreover, we should also note that the *Alcoa* case, as well as international competition policy more generally, represented only one aspect of US economic and regulatory power. The US State Department incentivized the Americanization of home country rules—and when those incentives were coupled with extraterritorial jurisdiction, it is perhaps not surprising that more than two dozen countries revised their domestic antitrust laws in the years after World War II.[180]

There is certainly a story to be told—and one with significant power and legitimacy—that the United States exercised its own hegemonic will over postwar Europe and Japan by insisting upon the adoption of competition policies that largely reproduced American preferences for a so-called free market economy. Yet although both jurisdictions certainly *translated* American antitrust into their own legal and economic systems, they did not actually adopt full-fledged US law and policy.[181] In fact, recent work in comparative international law has demonstrated that significant differences regarding the legal treatment of cartels have persisted into the late twentieth century.[182] Directly after the war many European countries adopted cartel

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[180] Fugate, *Foreign Commerce and Antitrust*, 2:467–68.

[181] On US antitrust policies being adopted, translated, and imposed abroad, see Freyer, *Antitrust and Global Capitalism*. See also Wyatt Wells, *Antitrust and the Formation of the Postwar World* (New York: Columbia University Press, 2001).

[182] See, for example, Gerber, *Global Competition*; Joshua and Harding, *Regulating Cartels*; Fellman and Shanahan, eds. *Regulating Competition*; Kathleen Thelen, "Historical Institutionalist in Comparative Politics," *Annual Review of Political Science* 2.1 (1999): 369–404.

registers, which monitored for anticompetitive harms but also acknowledged the utility of some cooperative arrangements. Legal processes also differed—most European states enforced competition law through specialized administrative bodies, such as Germany's Federal cartel office or the French *Autorite (nee Conseil) de law concurrence*.[183] At the level of the European Union, competition policy has played an important role in economic integration of the "ever closer union" and the Directorate General of Competition has encouraged convergence among member states, particularly regarding increasingly stringent supranational anti-cartel policies. In short, transatlantic convergence occurred in the 1980s with the prohibition of "hard core" cartels in EU law. And, more recently, many countries have revised their competition policy to include preemption clauses that limit the reach of US antitrust prosecutions within their borders.

Conclusion

The extraterritorial application of US antitrust law did not simply emerge from the wreckage of World War II and the subsequent assertion of American economic power abroad. Contradicting that origin story is a different narrative: American antitrust law through the 1920s and into the early 1930s was characterized by its experimentation—the Court found numerous exceptions to its strict territoriality doctrine and Congress passed statutory exemptions for American firms operating abroad. However, by the mid-1930s, amid the throes of the Great

[183] Putnam, *Courts without Borders*, 109.

Depression and the rise of fascist Germany, it seemed increasingly precarious to allow international trade and capital flows to be governed through a system of antitrust exemptions. Cartels, it seemed, could be an important tool for fascist regimes' economic organization and political control. Ultimately, Judge Hand revived anticartel antitrust law and extended it to extraterritorial cartels in an effort to resolve a longstanding tension in international law and trade regulation regarding how to balance state sovereignty and liberal values of market competition. Within American antitrust law, the tension between enforcing market competition and respecting national sovereignty became untenable to Americans with the rise of Nazi fascism and its association with cartels. The German experience had provided a critical, time-sensitive foil to American antitrust law—at the same time that the First New Deal faltered and DOJ regulators sought to revive antitrust prosecutions at home, the economic and political power of German cartels and patent-holding monopolies had become frighteningly clear.

For liberals, the problems and promises of a new globalization required a new era of international cooperation on the rules governing commerce and trade—liberal rules that they were increasingly comfortable imposing abroad (if not reaching through consensus). Perhaps ironically, then, reviving US antitrust and extending it abroad was a part of a larger liberal project to sustain democratic accountability by limiting anticompetitive economic concentration—a strategy that would be accomplished by advancing both antimonopoly and anticartel policies, as reflected in both *Socony-Vacuum* and *Alcoa*.

Hand did not resolve that tension in international law; nor did he resolve the tension in American antitrust law between the anti-monopolization provision of the Sherman Act and the insight that "the successful competitor, having been urged to compete, must not be turned upon when he wins."[184] Instead, he established two sweeping assertions of American antitrust law: First, if a firm possesses monopoly power and its actions are exclusionary such that they foreclose competition, then antitrust liability may attach. Secondly, an agreement made abroad among foreign firms that intends to affect the US import market supports a prima facie case for antitrust liability. Hand reasoned that the burden should shift to the defense to prove that it did not have the intended effect, otherwise the power to enact such a scheme would be assumed, according to Hand. Both general rules have been distinguished by case law and statutory interventions, which have clarified and constrained Hand's opinion in *Alcoa*. Nevertheless, the intended effects test is responsible for the extraterritorial application of US antitrust laws to foreign firms, and the subsequent moves by other countries to either block that preemption or assert their own extraterritorial authority.

Today, we live in a starkly different era of international law and statutory interpretation of American antitrust law—yet in the modern era, the more things change, the more they stay the same. Three points of continuity are important. First, the *Alcoa* case did not explicitly overturn *American Banana*. The presumption against extraterritoriality that Holmes articulated in

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[184] Alcoa, at 430.

American Banana remains an important aspect of customary international law—acts of state taking place within a foreign jurisdiction should not be superseded by US courts. Secondly, however, subsequent case law beginning with *Sisal Sales* and then reaching a crescendo with *Alcoa* distinguished *American Banana* away in so far as foreign or international cartels that have some actual and intended effect on the US market now fall under US jurisdiction.[185] Third, and finally, antitrust extraterritoriality seems to follow the broader trends, or periodization, in international law.[186] In the latter third of the twentieth century, developed-world competition policy largely converged across jurisdictions, particularly regarding cartels—suggesting a diminished need for US courts to unilaterally assert antitrust law against multinational firms. And, in the twenty-first century's era of international "fracture," the EU has asserted itself as a competition policy enforcer for the world, taking aim at American MNCs as well as state-aid market distortions; China passed an antitrust law in 2008, and currently, more than one hundred countries have competition laws on their books.[187]

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[185] See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), affirming *Alcoa*'s effects test (*Id*. 796); F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004), holding that the Foreign Trade Antitrust Improvements Act of 1982 did apply to an international cartel of vitamin producers, however, foreign plaintiffs must seek redress in their home jurisdictions, which had their own competition policy.

[186] John Fabian Witt, "The View from the U.S. Leviathan: Histories of International Law in the Hegemon," (January 22, 2022). Available at SSRN: https://ssrn.com/abstract=4014826 or http://dx.doi.org/10.2139/ssrn.4014826

[187] See Anu Bradford, Adam S. Chilton, Katerina Linos, and Alex Weaver, "The Global Dominance of European Competition Law over American Antitrust Law," *Journal of Empirical Legal Studies* 16 (2019): 731.

The story of how and why the US established antitrust extraterritoriality is at once both domestic and international legal history—at its center is the development of the American state, the emergent economic and political hegemon of the twentieth century. In turn, the tensions inherent to antitrust law—for example, that between admiration of the successful monopolist and fear of its monopoly power—were amplified and transmuted onto the world stage through trade and capital flows as well as through wartime and legal skirmishes. American adherence to and adaptation of international law reflected both shifting self-interest as well as a commitment to the rule of law—both concepts were constitutive of American liberalism and both have proven malleable across time and space. FDR's Second New Deal reimagined American antitrust law, ending one period of experimentation and opening another—one characterized by the idea that market competition and political democracy were reinforcing liberal phenomena. Although the meanings and the regulatory contours of both market competition and political democracy have shifted over time and across jurisdictions, that immutable connection between economic and political power has remained a central insight of—and tension within—antitrust law.