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by

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More Realism About Realism: Dean Acheson and the Jurisprudence of Cold War Diplomacy

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Were it not for fear of the state, men would eat each other alive.

--Pirke Avot 3:2

The period immediately following World War II represented the greatest transformation in the history of American foreign policy. Before the Second World War most Americans took for granted the idea that the world's problems--and particularly Europe's problems--did not directly concern the United States. By the end of the war, and certainly by the middle of the Truman Administration, national policymakers were just as unified on the opposite notion. Traditional wisdom explains this transformation in two words: Pearl Harbor. But historians scrutinizing the matter have questioned this explanation. Frank Ninkovich notes that

[c]ertainly the Pearl Harbor attack made it seem as if the death of isolationism was sudden and decisive . . . [But] the destruction of the kind of deep-seated fears of internationalism that undergirded isolationism could not be accomplished in the course of a day by a single event. After the war, internationalism would have good reason to nurse their continuing suspicion that the American public had been converted more for reasons of convenience than from genuine faith. Like many Romans and barbarians who agreed to be baptized once Christianity became the official religion of the empire, the conversion was only skin deep.¹

¹ Frank Ninkovich, *The Wilsonian Century: U.S. Foreign Policy Since 1900*, at 136 (1999).

Ninkovich's argument only begins the inquiry: even assuming that American elites would adopt some type of internationalism, we still need to explain the precise form that this new outlook took. As Deborah Welch Larson explains,

Within a bipolar structure of power, the United States and the Soviet Union could have defined their relationship in a variety of ways. . . . Roosevelt and Stalin could have signed a gentleman's agreement dividing the world into rival spheres of influence. Or, unable to agree on a solution to the 'German problem,' the United States and the Soviet Union might have engaged in destructive competition for the favors of a unified Germany. Conversely, the United States might have reverted to isolation from the affairs of Europe. . . . In that event . . . Soviet dominance over Western Europe would not have been inconceivable. The United States and the Soviet Union could have adopted a 'limited adversary' relationship--cooperating on some issues while competing on others. Or there could have been war.²

Fascism's destruction might well have given Americans the signal that the international system could take care of itself, and the inflation and domestic turbulence of the immediate postwar period might have disillusioned the public about any grand scheme to stabilize the globe--as it did in 1919-1920.

Larson's scenarios skirt over another possibility that the war brought into focus: a renewed Wilsonian commitment to international institutions as the guarantor of global security. On this vision, the United States might have committed to the fledgling United Nations as the best route to peace. Certainly many Americans believed as much,³ and they voted in large numbers to show it.

At some point, then, we are driven ineluctably back toward an analysis of the ideologies and perceptions of the men who actually brought the United States into sharp

² Deborah Welch Larson, *Origins of Containment: A Psychological Explanation 19-20* (1985).

³ Robert Divine, *Second Chance*.

confrontation with Soviet power.⁴ It was not inevitable that the United States embarked upon a Cold War strategy; rather, actual policymakers created and implemented that strategy based upon their own ideologies and background assumptions.⁵

Yet interestingly enough, we know little about the origins of those ideologies and assumptions. The most brilliant and comprehensive history of the Truman Administration's foreign policy observes that geopolitics became influential in some scholarly circles during the 1930's, but does little to trace how this thought became important to policymakers.⁶

Nowhere is this gap more glaring than in the case of Dean Acheson, the Truman Administration's principal foreign policy architect. Historians have done virtually no work on his pre-State Department career, and what work is available has little analytical content. Yet Acheson led the drive to fundamentally redirect American foreign policy; if the career of any US diplomat needs searching investigation of his early career, it is Acheson, because he broke so sharply with those who went before him.

The dearth of work also presents legal historians with an important opportunity, for Acheson's entire professional background, experience and training was as a lawyer.

⁴ By phrasing it in this way, I in no way mean to suggest that the United States was "responsible" for the Cold War or that the origins of the Cold War should be "blamed" on the United States. The Cold War policy of confrontation may well have been appropriate given the contours of Soviet foreign policy. My point is that such a response was not inevitable; it was instead conditioned by the perceptions and ideologies of the men who made it.

⁵ Dean Acheson recognized as much. About Senator Arthur Vandenberg, the prewar Republican isolationist whose conversion to internationalism heralded a bipartisan internationalism and who ascribed his own conversion to Pearl Harbor, Acheson argued instead that "[t]his was a long road. Despite his dramatic words about Pearl Harbor--words of hindsight--Vandenberg's change of mind did not come in a sudden flash like that other change on the road to Damascus." Instead Acheson argued, it was Vandenberg's work on the Senate postwar planning committee: "Here he was thrown, without prior experience or knowledge, into the most involved international problems since the Congress of Vienna. He was to spend the seven years of his life which remained to him immersed in these problems." Dean Acheson, *Sketches From Life of Men I Have Known* 123 (1959).

After experiencing his intellectual awakening at Harvard Law School under the tutelage of Felix Frankfurter, he clerked in Justice Brandeis' chambers for two terms, and then joined the prestigious Washington DC law firm that eventually bore his name and continues to this day. His 1941 (pre-Pearl Harbor) entry into government service as Assistant Secretary of State for Economic Affairs set him to work not on matters of grand strategy but on the quotidian details of export controls.⁷

So much is well-known. But Acheson was more than merely a lawyer who advanced to high diplomatic posts. He was an overlooked member of the legal realist movement, although his name is rarely if ever mentioned in connection with legal realism.⁸ Even those works that have explored the relationship of lawyers to the New Deal have not seen fit to mention him.⁹ As I hope to show, this silence represents an important historical oversight; indeed, Acheson's work shows him to be a realist pioneer.

Acheson's involvement with legal realism, I argue played a crucial role in establishing his diplomatic outlook. Acheson pioneered American foreign policy realism, and by contending that his legal philosophy helped to foster his diplomacy, I am also suggesting that the "realism" in both law and foreign policy represents more than just a linguistic fortuity. Both "realisms" place the exercise and structure of power at the heart

⁶ Melvyn P. Leffler: *A Preponderance of Power: National Security, the Truman Administration, and the Cold War* (1992).

⁷ Acheson himself admitted as much, although it is clear that his views were much broader. See Dean G. Acheson, *Present at the Creation: My Years in the State Department* 16-20 (1969).

⁸ For example, Morton Horwitz, who seeks to reorient the definition of Realism to connect it more closely to actual politics (successfully, in my view), makes no mention of Acheson. See Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy*. Among the other works discussing realism extensively but overlooking Acheson are: John Henry Schlegel, *American Legal Realism and Empirical Social Science* (1995); The one exception is Laura Kalman, *Legal Realism at Yale, 1927-1960* (1986); Kalman states that Acheson was sympathetic to Realism and relates that both the law school faculty and the Yale Corporation were prepared to offer him the Deanship, but does not pursue the matter beyond that.

of their social theory, and thus both evince deep skepticism that "neutral" rules and institutions can create stable social order. For legal realists, such skepticism implies that no legal rules are actually neutral: law invariably makes choices between differing interests and values, and it must use power to coerce losers to disobey. For international relations thinkers, it implies a deep pessimism in international law's ability to effectively stabilize global order because it lacks coercive state power. Only a balance of power can perform such stabilization.

Looking at the transformation of American foreign policy through the prism of "realism," then, can help fill the remarkable gap in our understanding of the origins of the Cold War. I do not claim a unique or privileged place for legal thought in the development of postwar US external policy, but it must be acknowledged, along with other as-yet unexplored intellectual and political developments, as an important factor both present at and involved with the creation of the central American foreign affairs paradigm of the last six decades. Investigating Acheson's career constitutes just such an acknowledgement.

Reprise: Classical Legal Thought

In order to understand Acheson as a realist, we need to understand what realism was. That, in turn, requires knowing what realism was seeking to overthrow: classical

⁹ Acheson makes no appearance in the two most important works on the subject, Ronen Shamir, *Managing Legal Uncertainty: Elite Lawyers in the New Deal* (1995) and Peter Irons, *The New Deal Lawyers* (1982).

legal thought.¹⁰ Classical legal ideology was complex, but it had four principal tenets that interacted to promote a coherent world view:¹¹

*Legal peripheralism.*¹² Classical legal thinkers denied that the state constituted the dominant source of legal rules and enforcement efforts. They placed strong emphasis on the notion that custom and informal social controls could establish a modicum of social order in the absence of the coercive state. Positing a sharp distinction between "law" and "force," they firmly believed that large gains in social force and legal stability could be achieved by non-state methods of social control and voluntary institutions.

Interest unitarianism. Informal norms and controls, and voluntary dispute resolution could succeed because social actors and groups were not divided by fundamental or irresolvable conflicts of interests and values. While conflicts did occur, they were not as important as the fundamental consensus linking social groups.

Conflict resolution through neutral expertise: law versus politics. Classical legal thinkers believed that social conflict resulted either from failure to provide proper institutional mechanisms, or because problems were misconceived to obscure the more basic commonalities. Law and legal institutions served as neutral, apolitical institutions

¹⁰ Cf. Thomas C. Grey, "Langdell's Orthodoxy," 45 U. Pitt. L. Rev. 1, 3 (1983)("[C]lassical orthodoxy is this thesis to which modern legal thought has been the antithesis."). Grey defines "classical orthodoxy" in much narrower terms than I define "classical legal thought." For Grey, classical orthodoxy refers specifically to the work of Langdell and his associates at Harvard Law School in the late 19th century. I see classicism as being a broader trend, encompassing Langdellianism but also historical jurisprudence and laissez-faire constitutionalism.

¹¹ I have dealt with classicism at greater length in previous work, from which this distillation derives: Jonathan Zasloff, "Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era," 78 N.Y.U. L. Rev. 239 (2003); Jonathan Zasloff, "Law and the Shaping of American Foreign Policy: The Twenty Years' Crisis," 77 So. Cal. L. Rev. 583 (2004); Jonathan Zasloff, "Abolishing Coercion: The Jurisprudence of American Foreign Policy in the 1920's," 102 Yale L.J. 1689 (1993).

¹² I take this term from Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* 147 (1991). Ellickson uses the term in contrast to "legal centralism," which (following Oliver Williamson) he defines as "the belief that governments are the chief sources of rules and other enforcement efforts." *Id.* at 138.

and principles that if properly applied, could resolve conflicts while giving groups and individuals complete liberty within their respective spheres of action.

Evolutionary thought. Law evolved according to secular causes and grew through time in both strength and effectiveness. This evolution, however, did not occur through the exercise of state power; instead, it evolved through a voluntary process of arbitration and informal mechanisms.

This ideology contained profound implications for international relations, which was critical because lawyers dominated the foreign policymaking elite during the first two decades of the 20th century. Most importantly, it strongly suggested that international law and legal institutions could effectively regulate international relations, and achieve major gains in global stability. Critics of international law maintained that international law is condemned to impotence because it is not enforced by the centralized, coercive power of the state. Legal peripheralism, by contrast, emphasized those areas of social action where (it believed) law effectively maintained social stability in the absence of centralized state coercion.

Second, it caused lawyer-diplomats to shy away from Realism. Realist thought holds that the anarchical international system creates fundamental conflicts of interest between nations, requiring states to maintain a balance of power for them to survive. Traditional Realism also focuses on basic conflicts of values between nations as a source of international instability. Classical legal thought rejected both of these premises: it argued that most conflicts were false ones, and contended that they could be mediated and resolved through the application of neutral legal rules, which could demonstrate how individuals could pursue their aims without conflicting with each other.

Third, the evolutionary character of classical legal thought lent powerful support for the belief that the weaknesses of international institutions were not fundamental problems, but rather temporary difficulties on the way to more robust institutions.

In all, classicism provided lawyers and jurists with a coherent, internally consistent ideology that provided them with guidance not only on legal issues but also on matters of international diplomacy. As I have sought to demonstrate elsewhere, they relied on this guidance for a series of diplomatic initiatives from America's rise to world power to the end of the Hoover Administration in 1933. But even as classicism, and classical foreign policy, reached its apex in the 1920's, its intellectual foundations were being undermined by the nascent realist movement.

The Emergence of Realism

Few concepts engage the combative instincts of legal scholars more than that of "legal realism." Partisans of critical legal studies and law-and-economics battle over which camp represents the realists' rightful heirs, with legal historians dismissing both factions and offering their own myriad of competing theories as to realism's true meaning. And why not? "Realism" is a trophy word, grasped at by all who desire the reputation of hard-headedness and an honored intellectual pedigree.

My purpose is more limited: to identify a central theme running through the Realist project that has remained relatively submerged. Realism strongly emphasized the role of power both in structuring social relationships and in the nature of the state. This broke decisively with Classicism, which implied that social conflicts of both interests and values were more apparent than real. Many of the moves commonly associated with

Realism can be viewed through the prism of bringing the ubiquity of power back into legal thought. For example, the realist critique of formalism implied that judges were exercising power in their decisions: if abstract categories did not cabin judicial discretion, then that meant judicial decisions were exercises not of disinterested reason but rather of the sovereign will. Similarly, the realist critique of supposedly neutral legal principles revealed that legal doctrine created winners and losers among social groups; the enforcement of that doctrine, then, did not derive from consensus but rather from a state apparatus monopolizing force. This kind of conflict did not represent a passing phase, but was rather the very marrow of law.

Acheson played no public role in the realist movement, but as I hope to show in the next section, his private writings--including a remarkable unpublished book-length manuscript--show him to have internalized the lessons of realism long before it became a major movement.

Acheson's Harvard--the Frankfurter Connection

Acheson graduated from Yale College in 1915, and maintained a close relationship with his alma mater all his life. But it was at Harvard Law School where his intellectual growth approached take-off phase. At Harvard, Acheson discovered "the power of thought," becoming cognizant of "this wonderful mechanism, the brain."¹³ Enrolling in 1915, Acheson thrived in Langdell Hall, becoming a law review editor and eventually finishing fifth in his class.

¹³ Hamburger, *supra* note --.

The key event in Acheson's development was his enrollment in Felix Frankfurter's second-year seminar on public utilities.¹⁴ Both the topic and the instructor were critical. Frankfurter had come to Cambridge from Washington DC, where he had been a protégé of Henry L. Stimson at the US Attorney's office in New York City and the War Department; his work as general counsel of the Bureau of Insular Affairs was so good that the Wilson Administration kept him on. Frankfurter was by temperament an activist rather than a scholar, and hesitated when he received the Harvard appointment: he accepted the offer because Cambridge was "the center of the liberal movement."¹⁵

Frankfurter's course represented his attempt to change aspects of the Harvard curriculum, teaching courses on the administrative state and explicitly injecting public policy into his discussions: "our universities," he argued, "increasingly should *be* in politics."¹⁶ For his part, Acheson eagerly responded to Frankfurter's demands that law students assimilate a mass of (often unorganized) legislative and administrative materials in order to understand regulated industries,¹⁷ relishing the fact "an unlimited mass of material that was lying about the world waiting to be stuffed into the brain."¹⁸

Frankfurter's course put him squarely at the center of the progressive era movement for sociological jurisprudence, pioneered a few years earlier by Roscoe

¹⁴ See Arthur E. Sutherland, *The Law at Harvard: A History of Ideas and Men, 1817-1967*, at 242 (1967).

¹⁵ Quoted in Joel Seligman, *The High Citadel: The Influence of Harvard Law School* 56 (1978).

¹⁶ *Id.*

¹⁷ A good description of the early version of the class can be found in Michael E. Parrish, *Felix Frankfurter and His Times: The Reform Years 65-66* (1982). The course's anti-Langdellian case, as well as the instructor's personality, is given in a student poet's doggerel:

You learn no law in Public U.
That is its fascination
But Felix gives a point of view
And pleasant conversation

Quoted in *id.* at 65.

¹⁸ Hamburger, *supra* note --.

Pound.¹⁹ Sociological jurisprudence, which closely linked with the progressive movement,²⁰ saw an intensive investigation of facts as yielding superior public policy than the skein of Langdellian abstract reasoning. Brandeis served as the exemplar of this approach; his famous brief in *Muller v. Oregon* set the standard in litigation, but sociological jurisprudence saw the legislature or the administrative agency as the appropriate forum to balance interests and arrive at the socially optimal result.

Frankfurter saw the young Acheson's potential and got him a judicial clerkship with Justice Brandeis. If this was all that sociological jurisprudence had done for Acheson, then he might not have distinguished himself: Frankfurter, after all, collected acolytes. But Acheson moved beyond traditional sociological jurisprudence by questioning its premises.

Holmes v. Brandeis

Acheson started working for Brandeis in the fall of 1919, and after a few months, had developed a fuller picture of the Justice. That picture demonstrated some real skepticism about the Progressive project. He told Frankfurter that

[t]he Justice seems to regard a doubtful point as the product of divergent premises based upon imperfect knowledge. Most doubtful points would not be doubtful if all the facts were thoroughly known, not only the facts in regard to the situation [but] also in regard to the law and its making.²¹

Acheson remained unconvinced:

¹⁹ See, e.g., Roscoe Pound, "The Need of a Sociological Jurisprudence," 19 Green Bag 607 (1907); Roscoe Pound, "The Scope and Purpose of Sociological Jurisprudence," 24 Harv. L. Rev. 591 (1910-1911); Roscoe Pound, "Liberty of Contract," 18 Yale L.J. 454 (1909); Roscoe Pound, "Law in Books and Law in Action," 44 Am. L. Rev. 15 (1910).

²⁰ Thomas Grey for this reason refers to it as "Progressive Jurisprudence." Thomas C. Grey, "Modern American Legal Thought," 106 Yale L.J. 493 (1996). For my purposes, we can treat the two as equivalents

²¹ Acheson to Frankfurter, Mar. 15, 1920, Frankfurter Papers.

To me, however, most of these things fall in line with Justice Holmes' definition of a miracle--'A phenomenon without a phenomenal antecedent.' It is not hard to see how he does things after he starts, but the inspiration which selects a given method out of all possible methods seems to me what is called genius for lack of a better name. The Justice says that it is simply the result of hard work and studying the record.²²

One can easily see a sort of detachment from a wholesale endorsement of the Brandeis legacy, and an attachment to Realism: it wasn't just the facts. It was, instead, a matter of intuition. No Brandeis brief, however elegantly constructed, could prove one moral point superior to the other. But that, in turn, implied that the will was involved. If facts alone could not solve a problem, at some point preferences had to. Those who held power would determine which preferences would win.

Memorializing his mentor and law partner George Rublee, he noted that Rublee, along with such classical legal luminaries as Dwight Morrow, had played a critical role in the formation of the Allied Maritime Transport Council.²³ The AMTC coordinated shipping and goods deliveries between the allied forces (particularly between the United States, the British Empire, and France), in order to achieve the most efficient distribution of goods and thereby promote the war effort. The AMTC was a classic example of individualist Progressivism, relying on supposedly neutral bureaucrats and detailed statistical knowledge to produce a broader benefit for society.²⁴

Acheson's analysis, however, revealed a typical skepticism:

[T]he task was absorbing. Gradually a vision as mystical and inspired as that of the Holy Grail began to come to this brilliant and devoted group. It seemed to them that here in this body of disciplined men, a technical staff, might lie the secret of subordinating national interests in the creation of a

²² Id.

²³ See Dean Acheson, George Rublee, in *Fragments of My Fleece*, supra note --, at 201, 206.

²⁴ Cite.

new world order. Reason and knowledge could be, they thought, so powerful as to overwhelm prejudice and narrow interest.²⁵

The tone is unmistakable, because Acheson firmly believed that facts could not determine policy by themselves. They might narrow contours of permissible strategies, educate the judgment, point the direction: but they could not transcend "narrow interests" because those interests were based not upon ignorance but on coldly calculated egoism. Scientific knowledge did not trump self-love.

Acheson's other breaks with Brandeis show him again in the Realist mode. Brandeis was appalled at the state of world affairs not only due to the Senate's rejection of the League of Nations, but also because France's seeming desire to prevent Germany from getting back on its feet. Acheson told Frankfurter that Brandeis "would rather let European civilization take its own chances than guarantee the French, whom he regards as a wretched, greedy lot at best." The latter was an article of faith among most American Progressives: France was the problem in Europe because instead of rejecting balance-of-power politics, it insisted on maintaining it.²⁶ Acheson disagreed. Instead, he favored a traditional balance-of-power approach, namely, a security guarantee to France, which President Wilson had signed at Versailles but had become lost in the recriminations over the League. Acheson even risked an argument with Brandeis about it, telling the Justice "that I thought we were rather unsympathetic with people justifiably scared to death."²⁷ Acheson couldn't resist getting in a good joke at the expense of both his old boss and sociological jurisprudence: "I was somewhat tempted to discuss their

²⁵ Acheson, George Rublee, *supra* note --, at 206.

²⁶ For progressive and peace movement opinion on France, see Robert David Johnson, *The Peace Progressives and American Foreign Relations* 152-45, 208-09 (1995).

²⁷ Acheson to Frankfurter, Nov. 26, 1921, Frankfurter Papers.

contributions to civilization at the end of the Eighteenth Century but knew that he would floor me by quoting their exports statistics for the same years, so I gave up."²⁸

Instead, it was Holmes, not Brandeis, who remained the young lawyer's ideal of the "perfect judge."²⁹ Brandeis was always a step below his Supreme Court colleague. Acheson told a friend that "[w]e ought to have on the Supreme Court great judges of the stature of Justice Holmes. That is almost impossible, but there are those who approach him such as Stone, Brandeis, Cardozo, Chief Justice Waite, and in some respects Taney."³⁰ Acheson later recalled that "I have no defense to the charge often made that from the first moment I saw Justice Holmes I succumbed to hero worship."³¹

Acheson's choice was telling; while Holmes and Brandeis may have formed a superb dissenting partnership on the court, their philosophies of life and law were poles apart. As Acheson described him, Brandeis was a mixture of sociological jurisprude and Old Testament prophet, obsessive about getting all the facts and then filtering them through a moralistic lens that he assumed everyone shared.³² Holmes, on the other hand, had not an ounce of moralism in him. Life instead was a struggle for power:

The *ultima ratio*, not only *regum*, but of private persons, is force, and . . . at the bottom of all private relations, however tempered by sympathy and all the social feelings, is a justifiable self-preference. If a man is on a plank in the deep sea which will only float one, and a stranger lays a hold

²⁸ Id.

²⁹ Acheson to Frankfurter, Jan. 17, 1921, Frankfurter Papers.

³⁰ Acheson to Randal MacDonald, Sept. 29, 1937, in *Among Friends: Personal Letters of Dean Acheson* 33 (David S. McLellan & David C. Acheson eds. 1980).

³¹ Acheson, *Morning and Noon*, *supra* note --, at 65.

³² Acheson saw Brandeis after he left his clerkship, but the two never achieved anywhere near the personal closeness of the Acheson-Frankfurter relationship. After arguing the Arizona case, regarding the Boulder Dam, "L.D.B. set me up very much by commending my efforts. I think it is the only time in twelve years that he has ever said anything to indicate what he thought about anything I have done so I appreciated it particularly." March 21, 1931. (Box 11, Folder 140, Reel 7, Acheson Papers).

of it, he will thrust him off if he can. When the state finds itself in a similar position, it does the same thing.³³

This was the youthful Holmes. By the middle of his time on the United States Supreme Court, the justice could wryly remark that he was "a supple tool of power." Holmes cared deeply about ideas, but it was as an intellectual. The only social reform that interested him was eugenics.

Acheson was not so cynical: it is hard to think of any major American figure whose philosophy was as bleak as Holmes'. But Acheson's preference for Holmes over Brandeis reveals something important about his emerging social theory. He found in Holmes towering intellectual authority for a power-driven view of the world that rested upon an essential relativism. That outlook stayed with Acheson for the rest of his life, and Holmes was often cited.

An exchange two decades later is revealing in what Holmes' legacy meant to Acheson. After being named to the Yale Corporation in 1937, Acheson had occasion to interact with his alma mater's luminaries. After meeting Yale Medical School Dean Stanhope Bayne-Jones, Acheson sent him a copy of "The Uncollected Writings of Justice Holmes," particularly recommending an essay entitled "Natural Law." Bayne-Jones liked it even if it was so condensed:

It seems to me to be sort of a sketch of objection to conceptions of absolute truth than a well developed argument, and I doubt whether the Justice really meant that truth is the majority vote of the most powerful or that the yearning for certainty comes from a demand for the superlative. Like you, I disagree with Bob Hutchins' statements that there are absolute and invariable truths. But I think that there are some formulations of approximate natural laws in science and in methodology which come close to being truth recognizable without aid of emotion or force.³⁴

³³ Oliver Wendell Holmes, *The Common Law* 38 (Mark DeWolfe Howe ed., Bantam Books 1975)(1880).

³⁴ Bayne-Jones to Acheson, Mar. 17, 1937, Acheson Papers, Box 3, Folder 27, Reel 2.

Acheson replied that Holmes did indeed mean a lot of it. "You are quite right that what the Justice says in 'Natural Law' is not to be taken too literally. But I think that it is intended to express a fairly deep skepticism about even the natural laws in science. I remember that he took a good deal of comfort from the fact that Mr. Einstein had put some crimps into Newton."³⁵

Acheson's choice of "Natural Law" was telling. In the essay, Holmes directly punctured the most central classicist assumption, viz. that all people could agree on fundamental values. "The jurists who believe in natural law," he wrote, "seem to me to be in that state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."³⁶

But "Natural Law" sparks the interest for reasons that go to the core of Acheson's career. It was written in August 1918, at the height of the First World War, when most American citizens were convinced that the conflict represented a struggle between democracy and "Prussianism." Holmes appeared to demur: "Certainly we may expect that the received opinion about the present war will depend a good deal upon which side wins (I hope with all my soul that it will be mine)."³⁷ Holmes believed in the Allied cause, but recognized that its justice was contingent and unclear: America's cause was

³⁵ Acheson to Bayne-Jones, Mar. 22, 1937, Acheson Papers, Box 3, Folder 27, Reel 2. Strictly speaking, one could quibble with the notion that Einstein had "put crimps" into Newton or indeed whether general relativity is a relativistic theory at all. Although Einstein's paradigm did portray time and space as relative, it rested on the notion that the speed of light is absolute, and Einstein himself never accepted the Copenhagen interpretation of quantum mechanics. Nevertheless, it is in my view hard to contend that a theory relativizing time and space represented an absolutist physics, especially for those accustomed to a Newtonian concept of the universe. Put most succinctly (if somewhat redundantly), relatively speaking, relativity was a relativistic theory.

³⁶ Oliver Wendell Holmes, *Natural Law*, in *Collected Legal Papers* 310, 312 (1920).

³⁷ Holmes, *Natural law*, *supra* note --, at 310.

"mine", not God's. In framing the issue this way, Holmes was restating one of the central tenets of realist foreign policy thought: international conflict represents a clash of national interests, not a battle between the forces of light and darkness. If no universal values existed to distinguish national causes (thus making international law unable to stabilize the international system), and if at the bottom of all relations was force, then the pursuit of order through some sort of power balance remained the only reasonable course.

Little wonder, then, that when Acheson collected a series of his own miscellaneous writings, he titled it *Fragments Of My Fleece*--a phrase that directly quotes Holmes' own description in the preface to *Collected Legal Papers*.³⁸ The Holmesian influence stood above all others.

The Inarticulate Major Premise

Holmes' legal theories were more than merely fragments for Acheson, for they represented the linchpin of the young lawyer's nascent jurisprudence. During his clerkship, Acheson was also producing a remarkable book-length document entitled "Law and Justice and Their Relationship to Industry." Originally a third-year paper for Frankfurter, "Law and Justice" sought nothing less a complete reformulation of American labor law.

At the time, American labor law was a doctrinal morass of common and statute law, which centered upon the questions of criminal conspiracy and when union activity

³⁸ See Oliver Wendell Holmes, Preface, in *Collected Legal Papers*, at v. ("This collection has been made by the kindness of a friend, Mr. Harold J. Laski, and I owe him thanks for gathering these little fragments of my fleece that I have left upon the hedges of life.").

reached this threshold. Echoing Holmes,³⁹ Acheson argued that the question was misplaced: the essential question was the public policy issue of how to divide the fruits of industry between capital and labor. If precedent did not answer this question, then get rid of the precedent; Acheson noted sardonically on the very first page, in a thinly-veiled reference to Holmes,⁴⁰ that "English law was not written by the finger of God on tablets of stone."

Acheson knew that balance-of-power questions between labor and capital closely resembled those in the international sphere. He opened his thesis with a quote from von Jhering: "The end of the law is peace. The means to that end is war . . . The life of the law is a struggle--a struggle of nations, of the state power, of classes, of individuals."⁴¹ Noting how the war had taught the world "more deeply of their significance," Acheson observed that

out of the struggle of the workers and those who own the means of production is developing a new legal ordering of industrial relations. It is idle to discuss the necessity or the moral desirability of the struggle. For us it is a fact. We must rather look for the conflicting human demands from which it results, understand the basis of the evaluation by which the law has decided between them in the past, and just of that standard of values from its effect upon human life.

The image of labor relations as type of war served as a central trope throughout the manuscript. The origins of the common law's hostility toward unions, he argued, was the crown's attempt to liquidate all independent associations, which "had resulted in the

³⁹ Acheson explicitly cited Holmes' landmark dissent in *Vegeahn v. Gunther* as partial support for this theory. See *Vegeahn v. Gunther*, 167 Mass. 92 (1896)(Holmes, C.J., dissenting).

⁴⁰ *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 217 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified.").

⁴¹ Dean Acheson, "Law and Justice and Their Relationship to Industry," typescript, ca. 1917-1918, Supplemental Series, Box 1, Folder 3, Dean Acheson Papers, Sterling Memorial Library, Yale University.

turmoil of civil war."⁴² The brute necessity of achieving social order, and not abstract principle, had determined legal doctrine.

As the state pulled back, labor law essentially boiled down to the coercive power of labor versus the coercive power of employers. (page 10). The law could not abolish coercion: it could simply determine the balance of power between two coercive forces. But Acheson protested that instead of making this determination, the state only recognized the legality of labor unions: "it offered no new principle by which the conflicting claims might be adjusted. It withdrew from the field of industrial disputes and relegated it to private war." (Chapter 2, page 11). And that was would "be decided by the strength of the parties." (Page 31)

Acheson meant the image of private war to be taken seriously. When he resorted to metaphor, it showed the grave consequences of the law's abdication:

recent development can best be put in terms of regulations of warfare. Broadly it consists in the recognition by certain courts that the interests of the union as a whole may justify a declaration of war. This, of course, legalizes the secondary strike. Having done this the law does not bother itself trying to adjust the difficulty, but directs its attention to determining who are the neutral and who combatants. (Page 31).

Such an analysis carried broad implications. First, Acheson equated a "withdrawal" of the law to the laws of war--in other words, international law. The law

⁴² Acheson wrote:

Feudalism with its semi-independent associations, among which the royal group struggled to maintain its position as *primus inter pares*, had resulted in the turmoil of civil war. The outstanding need of the time was the primitive one of peace, preserving the general security. The Civil Wars had demonstrated the use of force, and to secure and maintain this monopoly the Tudors bent all their energies toward suppressing organized activity which was not directly under their control. Combinations of men which had any degree of independence were too dangerous to permit, and it did not matter that they might be friendly or even enthusiastic supporters of the crown.

Id. at 1-2.

was about establishing the balance of coercive social forces. If it didn't do that, then it wasn't really law at all. International law fell outside this definition.

Second, in the wake of the First World War, Acheson's analogizing of contemporary labor law to the laws of war meant that social order was at stake. America was forced into the war precisely because the regulations of warfare turned out to be so ineffective. Imperial Germany's decision to commence unrestricted submarine warfare--a clear violation of international law--caused America's entrance into the war. Earlier on, other violations by both Britain and Germany made it crystal clear that relying on neutral rights for security was a chimera. By the same token, relying on the domestic equivalent would be disastrous.⁴³

The problem, said Acheson, was that courts failed to recognize the essentially martial aspect of labor relations; instead, they attempted to find neutral rules governed by empty concepts such as "reasonableness", "due process" or "coercion." While Acheson always maintained a focus on institutions and a belief that they could make a difference, he also maintained a resolutely skeptical tone about their ability to transcend fundamental interest and value conflicts. A court's decisions as to whether someone's behavior is actionable, he noted, depends upon whether the action's benefits outweigh its costs. But

It is obvious that such a decision cannot be made simply from the evidence presented. To decide whether a minimum wage act is due process of law, or a scale of freight rates reasonable, requires more than the logical deduction from proved facts. It involves the whole business background of the situation, the political theory and the economic beliefs of the time, the legal tradition, the philosophy of life of the judges. As Mr. Justice Holmes has said 'the decision will depend on a judgment or intuition more subtle than any articulate major premise.' (pp. 12-13).

⁴³ Acheson called the law's indifference an "alarming bankruptcy of legislative method." *Id.* at 33. Later on, he again referred to the "private war" between labor and capital. *Id.* at 90.

Holmes' dictum remained central for Acheson throughout his life: more than four decades later, he quoted it and noted that "in any issue worth litigating several principles might apply, and the importance of their bearing on the decision would depend, in part, upon one's view of 'the facts' and in part upon views about law and society."⁴⁴

Facts simply could not solve the problem. They were, of course, critical: quoting Holmes, Acheson noted that "all that life offers any man from which to start his thinking or his striving is a fact . . . and it does very much matter what that fact is; for every fact leads to every other by the path of the air." This path had important implications given the state of constitutional jurisprudence, said Acheson: "With the correlation of phenomena more and more of these aerial paths are incorporated into men's habits of thought, and . . . [i]t is this probability of vindication in light of experience which constitutes the causal relationship which is one element of due process." But "experience" was not a universal or objective phenomenon:

[T]he probability of vindication depends upon the belief in the verity of causal relationships which few individuals have been able to test in their own experience but which they accept because they seem to be in accord with what experience they have had - because they seem reasonable. But the same facts are subject to various interpretations and that one will appeal to the individual as true is the one which stresses the facts life has stressed for him.

Which facts were relevant or probative deeply depended upon individual experience and perspective. Simply moving from abstractions to facts did not resolve the necessity of choice and value judgments.

If courts could not regulate this private war through legal principle or closer attention to facts, what, then, should they do? For Acheson, the "primary purpose" of

⁴⁴ Dean Acheson, *Lawyers and the Republic*, in *Fragments of My Fleece* 123 (1971) (article originally

industrial relations law is "to equalize the bargaining power of the parties." (Chapter 3, Note 58) Such a balance of power was necessary because it produced social peace. Peace, however, was more than the mere absence of physical violence, because "economic coercion is no less real than physical coercion." (Page 64). Acheson went on to argue that the real reason why power must be equalized is that it promotes industrial peace. By insisting on the open shop, laborers could challenge employer coercive power only through employing the secondary strike, which would quickly destabilize society. "If the law now permits any employer who choses [sic] to deny the union its function, it will have done its best to set the stage for an era of industrial vendetta. . . (page 67).

Acheson's did not shy away from making his own value judgments, taking his thesis away from a pure focus on order. Against the possibility of industrial vendetta, he claimed "there is only the inherited fear of collective action and the interest of the employer in getting as 'cheap labor' as possible. Can we doubt but that the social interests must have the more weight?" (page 67). Indeed, Acheson came close to denying the efficiency of a market system entirely. Instead, the "market" was an artifact of power, not its basis: "The margin between the wages of the skilled and the common laborer is not the inherent price of skill but the result of the weakness of the common laborer. Through lack of organization he has been forced to live on a wage most often below the line of social safety."⁴⁵ (Page 79). And there was little doubt that Acheson thought this

published 1961).

⁴⁵ Earlier, Acheson had expressed his skepticism about the market when he stated that "in considering the decisions on what acts are justified by trade competition, we must remember that the judges were individualists of the Benthamite school; that they believed with the Manchester economists that they might as well oppose the law of supply and demand as the law of gravitation. They inherited a legal tradition which looked with disfavor on collective action, and they lived at a time when the sanctity of private property was almost a political axiom."

Id. at 12.

use of power was actually an abuse. "The security of the worker's position is, in the last resort, dependent upon the arbitrary will of the employer." (page 91). Such a will had little social desirability. Page 92--"We may be told that efficient management requires the use of this power. We should have been told the same thing by any benevolent despot."

Acheson's references to at-will employers as "despots" and his confidence that "social interests" predominated over those of employers were a far cry from Holmesian skepticism. Acheson was no moral nihilist, and "Law and Justice" resembles more a Brandeisian argument for social reform. His account of interest-balancing was thin, and blandly cited two Pound articles as their basis.⁴⁶ The final section of the manuscript set forth a variety of "social interests" that new labor law needed to comprise, the discussion of which was hardly earth-shattering and essentially repeated some of the goals of the old sociological jurisprudence.⁴⁷ But when he considered the "social interest in the security of acquisitions", he argued that courts should enforce a minimum wage in a particular industry. Doing so, he said, was hardly exceptional, for a doing this means that a court "is securing the same interest which the law of property secures, the social interest in the security of acquisitions, by giving a group right to a group standard of living. We do not present it as a new interest to be secured, but simply as an attempt to make conscious a process which industrial courts have long pursued unconsciously." (p.77). Acheson was not simply making a policy argument: he was reconceptualizing the nature of property, a

⁴⁶ First footnote cites Pound, *Interests of Personality*, 28 Harv. L. Rev. 343, and 445, as a "thorough" discussion of interest balancing.

⁴⁷ Acheson focused on "the social interest in the family and dependents" (p. 73), "the social interest in economic, political, and cultural progress" (p. 74), "the social interest in fair methods" (p. 76), and "the social interest in health and safety".

move he would continue to make during the New Deal era.⁴⁸ Property was simply another name for a group's or individual's claim on resources: the minimum wage and the fee simple were two sides of the same coin.⁴⁹

In sum, Acheson had composed a classic of Realist jurisprudence several years before the emergence of the Realist movement. Not only could abstractions not solve legal problems, but facts could not solve them, either. Before Robert Hale produced his seminal work on coercion,⁵⁰ Acheson made the equivalent point. Before Morris Cohen transformed the concept of property,⁵¹ Acheson had done the same.

Little wonder, then, that Acheson had a hard time getting academic presses interested in the book. Roscoe Pound, still in a left-leaning progressive phase, liked the book and arranged to have it published at Harvard,⁵² but the press was so far behind that Acheson feared it would lose its usefulness.⁵³ Yale, which had originally seemed positive, began to pull back. "I hardly think it is the sort of thing that they would want," he told Pound, "since they are going in for Mr. Hadley on the moral forces of democracy and Arthur Woods on Policeman and Public, etc."⁵⁴ Acheson to Pound, Apr. 2, 1920.

The references were clear: Hadley's book was a series of Sunday sermons to Yale

⁴⁸ See *infra*.

⁴⁹ Acheson equivocated somewhat on this matter. Page 116--"The remedy is not to abolish law of property - though they must tend to affect the ultimate question of control of industry - but to delimit property interests by balancing against them interests of personality., and the introduce into the legal order principles which would secure both interests thus delimited."

⁵⁰ See Robert L. Hale, "Coercion and Distribution in a Supposedly Non-Coercive State," 38 Pol. Sci. Q. 470 (1923).

⁵¹ See Morris R. Cohen, "Property and Sovereignty," 13 Cornell L.Q. 8 (1927).

⁵² Pound thought that Acheson book manuscript "as a whole is very well done, and as soon as able will either prepare it for the press, or return it to you with suggestions as seem to me worth while." Pound to Acheson, Nov. 10, 1919, Box 25, Folder 318, Reel 16, Acheson Papers.

⁵³ Acheson was concerned about the manuscript's timeliness: "Such things as the Kansas Industrial Court and the President's Conferences intervening between the time it was written and its publication detract from its value to readers . . . if it does not get started on its journey through the press before next year I shall emerge into the open as naked as the day I left the School." Acheson to Pound, Mar. 18, 1920, *Id*.

students.⁵⁵ Woods was an earnest progressive reformer, deeply concerned about police corruption, and seemingly oblivious to the urban politics upon which genuine police reform rested.⁵⁶ Acheson realized that his hard-edged, realist look at the world might have been before its time. If had ever considered going into academia, the tepid reception that publishers gave to "Law and Justice" persuaded him to drop the idea and look for a job in private practice.

The Middle Years: Acheson in the 1920's

Acheson spent most of the 1920's building that practice. He had initially wanted to work for a labor union, until he realized that the job would consist mostly in resolving internal disputes. Eventually he would argue cases for the ILGWU; its President, David Dubinsky, recognized Acheson as a strong supporter of labor, describing him in 1940 as a man "not only brilliant as a lawyer, well known as a progressive, but one who could understand the heart of our labor movement."⁵⁷

But in the meantime, Acheson joined what would eventually become Covington & Burling and made partner in less than three years.⁵⁸ The pressures of professional

⁵⁴ Acheson to Pound, Apr. 2, 1920, Acheson Papers.

⁵⁵ See Arthur Twining Hadley, *The Moral Basis of Democracy: Sunday Morning Talks to Students and Graduates* (1920).

⁵⁶ See Jerome H. Skolnick, "Introduction to the Reprint Edition," in Arthur Woods, *Policeman and Public*, at v-xiii and especially at vii & xii (reprint ed. 1975)(1919)("[I]n a theme that runs throughout the volume, Woods urges 'the public' to take an interest in police affairs, to insist upon the highest standards of conduct, to dignify the work, to reward good work In the end, Woods' abundant virtues may have been his worst shortcoming. He was a high-minded man who believe that good men could accomplish good things. . . . Moreover, and worse yet, Woods' writing is morally didactic, sometimes preachy-sounding.").

⁵⁷ Quoted in Chace, *supra* note --, at 70.

⁵⁸ MacLeish to Acheson, Feb 5, 1924, Box 21, Folder 266, Reel 13, Acheson Papers. MacLeish wrote:

I am overwhelmed with your new grandeur. It is not at all remarkable that they should have admitted you to a place on the letter head and a share in the firm debts but it is simply amazing that they should have further increased your already Tommy Tompkinsesque remuneration. I do not mean to suggest that you are now paid or ever

advancement and raising a young family kept him out of public affairs, but the occasional private glimpse is revealing. One of Acheson's closest friends was the poet Archibald MacLeish, who also trained as a lawyer and taught at Harvard Law School for a while. MacLeish and Acheson kept up a lively correspondence, which sometimes gives us a good indication of the state of Acheson's mind and career.

Shortly after Acheson went into law practice, MacLeish described the available philosophical postures open to them. Acheson's course, MacLeish said, was "to believe that nothing is worth believing. In its bald terms it is of course the negation of all action and the end of all hope."⁵⁹ But while this seemed to be thoroughgoing skepticism, "it rests upon the assumption that it is worth while retaining openness of mind for some future seeding of possible truth. If we believe that there is a demonstrable truth and that it is possible for us to recognize its demonstration then we are already half aware of truth and we need only cultivate the sense to secure it."⁶⁰ And thus, despite Acheson's pretensions, "You know from experience that there are truths capable of arousing your entire loyalty and you are too sensitive to the world to fail of finding them again. We are not sure but that Alice [Acheson's wife] already has found them. We won't worry about you."⁶¹ Acheson thus remained a moral skeptic, but skeptical about his skepticism as well. He had, in effect, out-Holmesed Holmes. This attitude would loom larger during the New Deal and the postwar period.

will be paid within reach of your value but I do intend most earnestly to remark that you are now the highest paid lawyer of your age in the field of my knowledge - which, if not large, is certainly deep. I congratulate you with just the proper emphasis of envy to make the acknowledgement real.

⁵⁹ MacLeish to Acheson, Sept. 3, 1923, Box 21, Folder 266, Reel 13, Acheson Papers.

⁶⁰ Id.

⁶¹ Id.

In the meantime, Acheson's practice continued to grow, even after the depression hit.⁶² But his cynicism hardly diminished. MacLeish was working on a piece about the state of the legal profession and asked his friend about the topic, but for Acheson there was no occasion for sermons about public service by the bar or "the Ideal and the Actual in Law."⁶³ MacLeish posited that American lawyers' status outstrips their counterparts in western Europe because of the timing and pace of American industrialization. Acheson disagreed. Instead, he suggested that the bar's prestige derived from

(a) The conviction that anything, whether it is a physical or a social institution, can be bent to whatever is the purpose of a strong willed individual or group.

(b) The fact that even the most distinguished citizens have no convictions in the real sense but are simply mouth pieces for some purpose which is sought to be accomplished. This apparently has been true for a long time. Harriet Martineau talked about it a hundred years ago.

(c) The glorification of the American business man and the subordination of all other interests to his in a way which had never been true anywhere else.⁶⁴

Put another way, Americans--especially the business community--wanted hired guns, and the bar was able to supply them. Holmesian ideas echoed once again: lawyers, Acheson suggested, were supply tools of power. And so was the law.

⁶² Acheson to MacLeish, Nov. 20, 1930, Box 21, Folder 267, Reel 13, Acheson Papers. Acheson wrote:

Apparently upon some cosmic theory of the equalization of forces I have been busier during these last two months of business depression than I have ever been before. This does not necessarily mean that I am going to be paid anything for what I have done but I have been rushing about physically and mentally quite madly.

⁶³ For the phrase, see Robert W. Gordon, "'The Ideal and the Actual in the Law': Fantasies and Practices of New York City Lawyers, 1870-1910, in *The New High Priests: Lawyers in Post-Civil War America* 51 (Gerald W. Gawalt ed. 1984). In Gordon's account, elite lawyers imbued with classicism were eager to extol the virtues of the bar and the public role that lawyers played.

⁶⁴ *Id.* Acheson also conjectured that it derived from "[a] rather curious situations which arises from our great specialization and makes the specialist peculiarly weak and incompetent when he gets outside his field. The lawyer who is really the only unspecialized person left has to be called in to deal with non-legal situations with which anyone could have dealt with a long time ago."

The Impact of Realism

Not surprisingly, when legal realism emerged, Acheson strongly defended it and its adherents--at times even coming close to its central metaphors. He noted to MacLeish, who was writing a magazine story about the Supreme Court, that the differences between the Court's conservatives and liberals were only matters of degree. Both factions believed that the Court could and should invalidate some laws under Fourteenth Amendment. "The difference," Acheson explained, "is the point at which they are willing to interfere. . . . The law is only unconstitutional when it makes their blood pressure rise sufficiently to declare it so. Holmes and Brandeis think that judicial blood pressure should be controlled more than the majority are willing to control it."⁶⁵ The point was the same whether it concerned Jerome Frank's analysis of a judge's breakfast habits or Acheson's description of a judge's hypertension. Not surprisingly, soon after Frank came to Washington, Acheson resolved to see him and the two became friends.⁶⁶ Acheson also became close with Thurman Arnold. Arnold had somewhat sarcastically criticized Acheson in *The Symbols of Government*, deriding a speech in which Acheson seemed to suggest that academics staying outside of government service would be more impartial as a result.⁶⁷ But in fact Acheson loved the book, started a correspondence with the author, and the two soon became good friends.⁶⁸

⁶⁵ Acheson to MacLeish, May 4, 1932, Box 21, Folder 267, Reel 13, Acheson Papers.

⁶⁶ "Jerome Frank came in to see me the other day, and we had a most interesting talk about the Solicitorship of the Department of Agriculture. I had never met him before, and found him a delightful person. I hope that he is going to be in Washington." Acheson to Frankfurter, Mar. 24, 1933, Box 11, Folder 140, Reel 7, Acheson Papers.

⁶⁷ See Thurman W. Arnold, *The Symbols of Government* 53 (1935). Acheson had argued in a speech at Yale that "[i]t is not in the interests of our universities to have [professors] running down to Washington for they will never again be able to judge these problems in an unprejudiced light." It is hard to believe that Acheson meant this as a general matter, especially given his closeness with Frankfurter. Moreover, on the

In 1937, Acheson got the chance to put some of his realist principles into practice. That year, he was appointed to the Yale Corporation, governing body of his undergraduate alma mater, and he happily threw himself into the work, of course taking a special interest in the law school. In particular, he looked to reform the law school curriculum in the direction of social science, a cause that legal realists had been pushing for years. Acheson immediately proposed developing a joint Yale Law School-Harvard Business School course, which would introduce law students to economics, particularly areas such as price policy and marketing.⁶⁹

Acheson did not conceive of such classes as an exercise in purely value-free social science. As he begun his law practice in 1921, he had thought of creating a "seminar" on political economy. "No one can work on the coal industry from a purely economic point of view," he told Frankfurter, "because the whole life of the United Mine Workers is political in the sense that their leaders are faced with the same problems as a ward politician or a Secretary of State."⁷⁰ His solution was to gather a massive body of empirical data, and "then on that raw material operate with some of the modern chaps like Tawney and Veblen and also the classical fellows themselves, Adam Smith and the Mills etc.; and at the same time read such things as a little Aristotle, Bentham, Locke, a

Yale Corporation, he defended Yale Law School professors--particularly realists--who wanted to take leaves to go on government service. See, e.g., Acheson to Charles Seymour, Jan. 27, 1938, Box 28, Folder 362, Reel 18, Acheson Papers (Volume X). (Urging "diplomatic and sensitive treatment" in extending Fred Rodell's leave for government service in order to encourage Rodell's return. Acheson did not know Rodell, but took Douglas' recommendation that he was good; said that this approach had worked with Thurman Arnold as well.).

⁶⁸ See Acheson to Frankfurter, Oct. 21, 1936, Frankfurter Papers. ("I had a most amusing correspondence with Thurman Arnold about his reference to me in the book. We started off on the common ground that it was a pretty stuffy utterance and that I deserved some punishment for making it. From there we went on to become good friends.").

⁶⁹ See, e.g., Acheson to Clark, Nov. 13, 1936, Box 6, Acheson Papers; Acheson to Clark, Apr. 26, 1937, Box 6, Acheson Papers.

⁷⁰ Acheson to Frankfurter, Sept. 13, 1921, Frankfurter Papers.

bit of Lord Acton, using fellows like Walpole, Gladstone, Hamilton, Madison and Mark Hanna as clinics."⁷¹ This was a tall order, and indicative of what Acheson felt he had missed in Cambridge notwithstanding Frankfurter's own course. Again, Acheson's pattern is clear. Facts were critical, but they could not be understood unless they were "operated" on with social theory, and tested in concrete political circumstances.

So Acheson moved ahead with his nascent law-and-political economy course, and not coincidentally moved at connecting his two alma maters. But he quickly encountered resistance from the old guard at Harvard, even from Frankfurter. Acheson told Yale Law School Dean Charles E. Clark that

In talking to Felix and Beale at Harvard, they continually spoke about the experiment as though it were adding extraneous matter to legal training, which would be desirable if one had eternity, but which in a short time meant giving up more desirable legal study. I tried to point out that I thought that the whole essence of law school training was to teach a method of analysis and constructive thought so that the future lawyer would be equipped to deal with novel situations for which no answers existed in the books.⁷²

Acheson stayed firm, and persuaded the conservatives on the Yale Corporation to allow the law school to move ahead. This kind of advocacy gave him a unique position on campus--and perhaps in American legal education. Two years after Acheson became a trustee, Franklin Roosevelt appointed Clark to the Second Circuit, leaving Yale Law School looking for a new dean. The faculty originally united around William O. Douglas, who had previously taught at Yale (becoming a leading realist) and was then serving chairman of the SEC. But it ran into trouble in the Yale Corporation; not only were some university officials worried that Douglas could never resist calls for help from

⁷¹ Id.

⁷² Acheson to Clark, Apr. 29, 1937, Box 6, Acheson Papers.

Washington, but Douglas' outspoken realism made him anathema to some of the more conservative trustees. Finally, the administration offered the job to Douglas, and he accepted--only to receive an appointment five days later to the United States Supreme Court.

"I sorrowfully extend my enthusiastic congratulations," Arthur Corbin wrote Douglas. "Now, please write me, as Chairman on the Deanship, a detailed letter about Dean Acheson. If we can't agree on him, I am sunk."⁷³ They could, and so could the Yale Corporation. Acheson had been the faculty's second choice, even though he was not an academic and had not expressed interest in the job. It comes as little surprise that the Corporation might accept one of their own, but the faculty's endorsement of Acheson speaks to the respect that his intellect attracted at one of the leading law schools in the country. It also speaks to his support of realism: the faculty knew that Acheson had supported the realist program against its conservative detractors,⁷⁴ and that went a long way to gaining their support. In any event, Acheson made it clear he was uninterested in the position, and forced the faculty and the trustees to come up with someone else. He recommended to Yale President Charles Seymour a young unknown legal historian and former Brandeis clerk named J. Willard Hurst,⁷⁵ and was ignored. He then advocated Harry Shulman as dean. Shulman's Judaism was hardly a roadblock for Acheson; indeed, the friend of Brandeis and Frankfurter remarked two weeks after Hitler's invasion of

⁷³ Corbin to Douglas, Mar. 20, 1939, Box 23, William O. Douglas Papers, quoted in Kalman, *supra* note --, at 140.

⁷⁴ Clark regarded Acheson and Henry Sloane Coffin as the only liberal members of the Yale Corporation. Clark to Acheson, Oct. 3, 1938, Box 6, Folder 74, Acheson Papers.

⁷⁵ Acheson started promoting Hurst in 1937; he told Clark that Justice Brandeis "says quite frankly to us alumni of the Secretariat that Hurst is the ablest man he has ever had with him." Acheson to Clark, May 15, 1937, Box 6, Folder 73, Acheson Papers.

Poland, it was an advantage "especially in light of recent events."⁷⁶ But here, too, his appeal fell on deaf ears: Yale was not yet ready for a Jewish dean.⁷⁷

In the meantime, Acheson began to restate for a public audience the conclusions he had reached privately several years back. What resulted were legal realist essays. He delivered "Some Social Factors in Legal Change" in January 1937, just after FDR's landslide victory the previous November but before Roosevelt announced his court-packing plan. (*This Vast External Realm*, pp. 173-192). Acheson began by reconceptualizing property in similar fashion to the way he had in his abortive book. "The press tells us that property rights are yielding to human rights," he noted. "This language only confuses me. Men are not less concerned than formerly with property. If anything, they are more concerned with it." (p. 174) The point, said Acheson, was that "property" as a category was changing; "Property" was not a real thing, but rather a human construct: "new interests in property are pressing for recognition. But before we can understand what is going on about us we must free ourselves from the limitations of some concepts as 'ownership,' 'legal title,' and 'liberty of contract.'" (Id.). The Depression, he argued, led to demands "that our legal system shall recognize that people who are not owners, as well as those who are owners, have interests in property and in the use of property which must be considered and protected." Reconceptualization of property derived not from theorizing, but from the concrete facts of political struggle.

It had always been that way, Acheson said. Property was a historically contingent concept depending upon the correlation of political forces. Someone living in the feudal era, he noted, would find our notion of "ownership" to be "wholly alien." (p. 175).

⁷⁶ Acheson to Seymour, September 17, 1939, Box 28, Folder 362, Reel 18, Acheson Papers.

Property concepts derived from certain political factions dominating others, punishing others groups, and then calling their preferred usages "customary." But social forces had changed, and so social interests had changed as well. Acheson's outline of these social interests were strikingly similar to those he had set forth twenty years earlier in "Law and Justice."⁷⁸ These were "reasonable demands" and were "backed with political power" but what they "really mean is that property must be held in the medieval sense of which I spoke at the outset—not subject to absolute dominion, but conditioned upon the performance of social duties."

Acheson then moved to the specifics of New Deal legislation, which he strongly endorsed. After defending the Public Utility Act, (p. 183) which evoked howls of protest from private power companies (including some of Acheson's own clients), he predicted that the government might even go further in regulating corporations. Moreover, he said that it was wholly legitimate because "the state, which creates these legal entities as instruments for furthering the public interest, may exercise its visitorial power and subject their costs, their processes of production, and their business dealing to public study, with the idea that periodic scrutiny in and of itself would have a beneficial effect, and that attention will be drawn to situations which require correction." (p. 185). By

⁷⁷ This is Kalman's conclusion, see Kalman, *supra* note --, at 142-43.

⁷⁸ *Id.* at 175:

"These interests I should briefly outline in this way:

"An interest in the stability of production of goods.

"An interest in the use of wealth to produce and distribute goods in quantity and at low cost.

"An interest in that the young have opportunity to form a relation to property; that is, to enter the system and get a job.

"The interest of people in their job, in achieving dignity, in making it an opportunity to use their powers.

"The protection of the interest in the job against arbitrary dismissal.

"And finally, security against the inevitable hazards of life—unemployment, sickness, accident, old age, death."

emphasizing that the state created corporations, Acheson thus restated a central tenet of legal realism.

Acheson then turned to labor relations, a topic of interest for nearly twenty years. They were not merely market relations, but the essence of power. He argued that Charlie Chaplin's "Modern Times" grasped the "reality" of the "industrial relation," in which "[t]here was no dignity, no peace in that life; there was no justice in that relationship, subjected to every petty tyranny of a petty tyrant with more authority than a drill sergeant, the power to deny food. We are apt to forget that the function of the industrial system is not merely to produce goods, it is produce people. The only reason for producing goods is to keep people alive . And if in producing goods to keep the people alive we destroy the people, the whole system is futile."

In order to repair the industrial relation, what was needed was not total state control but rather a domestic balance of power; the same prescription he had endorsed two decades earlier. (p. 187) But how could industrial powers accept such organization? For Acheson, the answer was easy: coercion. "There must be no nonsense or doubt about that. We must use all the powers of the law to coerce any individual who undertakes the set up his private desire that there should no be organization against the social necessity of having it." (p. 188).

Acheson concluded on an optimistic note, arguing to his audience of mostly conservative lawyers that establishing equilibrium would produce broader benefits for industry. Once again, his metaphor for business-labor relations was war: "Guerrilla warfare produces leaders for guerrilla warfare. With the coming of peace, or even a cessation of war, the demands upon leadership change and with the change a new school

of leaders will emerge.” Perhaps this could finally produce some consensus, which would be “more fruitful than focusing the efforts of all upon the politics of power. That road leads only to a conflict of increasing bitterness, in which finally all objectives disappear except the extermination of the opponent.” (190-91).

Acheson's other major effort of the period was "Mr. Justice Cardozo and the Problems of Government"⁷⁹, which carried out a frontal assault on the entire program of laissez-faire jurisprudence. But more importantly for our purposes was Acheson's basis for doing so: instead of taking the standard liberal position that courts should defer to majorities, Acheson reached out to a more Holmesian skepticism about truth-claims.

Acheson recalled that Cardozo "deeply distrusted the ability of the human mind to resolve human problems by logical reasoning from assumed premises." (p.2). and quoted Cardozo approvingly regarding how "the demon of formalism tempts the intellect with the lure of scientific order." (p.3). All this might be familiar to a Brandeis or an early Pound. But then Acheson noted Cardozo's "distrust of generality", which derived partly from skepticism about abstractions but "also on the awareness of the tricks which our minds play upon us and of the degree to which they are controlled in the choice of values by 'inherited instincts, traditional beliefs, acquired convictions, . . . a sense in James's phrase of 'the total push and pressure of the cosmos.'" (pp. 4-5). This last notion seemed wholly in keeping with the Holmes of "Natural Law." Facts were filtered through inherited instincts; it made little sense to speak of them as self-evident things.

⁷⁹ The complete task of the address can be found in Acheson, "Mr. Justice Cardozo and the Problems of Government," Nov. 26, 1938, in the Proceedings of the Bar and Officers of the Supreme Court of the United States, Accession 89-M-44, Box 1, Folder 5, Reel 46, Acheson Papers.

Thus, choices had to be made at some level through the raw exercise of power. It was not all arbitrariness; democratic decision-making was not tantamount to dictatorship, but "government is at best a makeshift, that the attainment of one good may involve the sacrifice of others and that compromise will be inevitable until the coming of Utopia." (p.7; this is a quote from Cardozo). And even if courts can draw upon judicial reasoning, at some point they will face competing social policies and will have to "mediate between them, assigning, in so far as possible, a proper value to each." (p.5, n.15, quoting approvingly Cardozo's statement in *Clark v. United States*, 289 U.S. 1, 13.).

These were not minor actions; rather, they reflected "changes in the social order which carried with them the need of a new formulation of fundamental rights and duties." P. 11 (quoting approvingly C.). In contrast to a functionalist passion for facts, Acheson approvingly quoted Cardozo in asserting that "what is to be looked for is not an absolute accuracy but an accuracy which shall mark an advance upon previous uncertainty." This, Acheson proclaimed, is the "pragmatic test of workability in an imperfect world...." (p.16). This posed a problem. Acheson noted that Cardozo's goal was "to deal justly with the never-ending compromises between the individual and society." (p. 22) But neither Cardozo nor Acheson laid out precisely what was the matrix of justice. How was anyone supposed to know what it meant to deal justly with never-ending compromises?

Some Realism About Realism

Little wonder, then, that Acheson's embrace of realism did not smoothly translate into an unqualified acceptance of the New Deal, for he recognized that endless legal plasticity could translate into authoritarian tendencies. Acheson had long been wary of

Franklin Roosevelt. In this he parted company with Holmes, who famously declared that FDR had a "second-rate intellect, but a first-class temperament." Acheson himself was far harsher, calling the new President "a political trimmer, a skimper of problems, and an arrogant bully."⁸⁰ For someone like Acheson, who prized intellectual honesty, a quintessential politician like Roosevelt was not a good match. A lifelong Democrat and progressive, Acheson voted for FDR, but was not connected to the national campaign.

Nevertheless, Franklin Roosevelt appointed Acheson Undersecretary of the Treasury, which in light of Treasury Secretary William Woodin's poor health, effectively meant that he was running the department. But Acheson lasted only six months. In summer of 1933, FDR became convinced that in order to stabilize the economy, the federal government needed to bid up the price of gold in order to stabilize prices. Acheson believed this policy illegal, citing a federal statute in which Congress appeared to dictate the government's buying price. Acheson's refusal to accept the White House's policy led him to resign.

Scratching the surface of Acheson's aborted stint at Treasury raises the question of why precisely he felt the need to leave. It was not obvious that FDR's plan was illegal; a competing opinion from the Reconstruction Finance Corporation, authored by future Supreme Court Justice Stanley Reed, came out the opposite way. While the gold purchase plan was hardly a success, there also seems to have been no public outcry or even protest as to its illegality. Several decades later, Acheson conceded that he may have gone too far in "making a federal case" about the dispute.

⁸⁰ Quoted in Parrish, *supra* note --, at 225.

But at the time, he may have believed that he needed to because of his distrust of Roosevelt and the "first New Deal." The President's 1933 program consisted not of social reform but governmental power in the service of central planning. Given Acheson's concern with a social balance of power, such a program was disquieting. He had emphasized in his book that a healthy society requires a series of institutions taking on social obligations; the breakdown of these institutions, and the dominance of capital over labor, had brought society to disequilibrium. Pure statism in this context seemed frightening.

Acheson's suspicious yet loyal support of Roosevelt waned with the emergence of the Second New Deal, whose two great pillars were the Social Security Act and the Wagner Act, and which took the administration's focus away from central planning and more toward social democracy.⁸¹ Acheson's replacement at Treasury, Henry Morgenthau Jr., whom Frankfurter had despised, surprisingly turned to the Harvard professor for advice and counsel, not surprisingly changing Frankfurter's view of him. Frankfurter also became permanent fixture in the Oval Office. Not coincidentally, Acheson became less critical of Roosevelt. He firmly rejected an attempt to get him to join a Democrats for Landon group,⁸² instead strongly endorsing Roosevelt in 1936 when the election was still in doubt.

⁸¹ A good discussion of the policy changes of 1935, which shows both their divergence from and similarity to the First New Deal, can be found in William E. Leuchtenberg, *Franklin D. Roosevelt and the New Deal, 1932-1940*, at 148-66 (1963).

⁸² Acheson later wrote of the Democrats for Landon idea: "Nothing, it seemed to me, could be more foolish. Whatever differences we had had with FDR were as nothing compared to the gap between, at least, my ideas of desirable public policy and the Republican platform even as interpreted by the rather sensible Mr. Landon." *Morning and Noon*, supra note --, at 199. One should take the tone of this with a grain of salt: in the 1950's for a Democrat to have admitted flirting with the idea would have been tantamount to heresy. Still, Acheson's actions in 1936 show it to be more true than false.

It was still a difficult move. In late October 1936, Acheson's friend Grenville Clark had sent an article entitled "Notes on the Election, or The Dilemma of an Independent-Conservative Voter." Clark said he was a "conservative" in the sense that he wished to conserve traditional American values and institutions, and argued that the new Deal's social reform measures were conservative because they helped to preserve those values and institutions. He compared the New Deal with the Liberal Party's social reforms measures prior to World War I, which included old age pensions, national health insurance and progressive taxation. But Clark was worried whether another Roosevelt Administration would maintain fiscal discipline and also concerned about FDR's judicial appointments, many of which, he said, had been subpar; since Congress would clearly remain Democratic, he said, the question was whether there were enough checks on executive power. In the end, he was still undecided. Acheson responded five days later with a lengthy missive showing his ambivalence toward the President⁸³:

The present system has been more than good to me. If my contemporaries accepted it in full, I should be the last to dissent. But they don't and I see two psychological tendencies which I feel have to be reckoned with. One is the belief that Government can and should do more than it probably can do successfully, and, second, that when differences of opinion on governmental policy go to the point of arousing intense emotion the result must be a quick victory of absolution of one extreme or the other, or the sort of anarchy which we see in Spain. Your discussion of early Twentieth Century Liberalism in England is tremendously interesting to me on this point because I have long wondered whether we have the political genius of the British which permits compromise after great emotion. I think the Commonwealth shows that even the British can reach a point where compromise becomes impossible -- for a time. That kind of living dangerously has no appeal for me. It seems the most wanton recklessness.

The modern belief in the sovereignty of the state -- its power and duty to do everything -- comes, it seems to me, from the abdication of the many sovereignties which used to share the scepter -- the family, the church, the labor union, the trade association or the guild, the landlord, the employer, and so on. These have all been dis-

⁸³ Acheson to Clark, Oct. 31, 1936, Grenville Clark Papers, Rauner Special Collections Library, Dartmouth College Library, ML-7, Box 252.

tracted into absorbing pursuits, and only the politician has remembered that to rule it is essential to have an emotional acceptance of the system and to give, or appear to give, results. So everyone who travails or is heavy laden turns to the state, and the politician with a sound, if limited, instinct tackles the problem.

The answer is not that these problems should not be tackled because the government cannot do the job, but, that the statesman has two functions. He must attempt those things which large groups demand as a condition continuing their emotional allegiance to the system -- whether he can perform or not -- and he must stimulate the other agencies of sovereignty to resume the business of governing.

On the whole, Mr. Roosevelt has, I think, understood and accepted these functions. He has done the things which you mention to relieve pressure and return groups to their loyalty, but he has also stimulated people who have not accepted the responsibility of actual sovereignty to see that some demands have to be recognized. After the war, when we were all speculating for a year or two about social reconstruction, I used to wonder what a group of, say fifty, carefully selected princes of privilege could accomplish if they sat down together, accepting the premise that some measure of security was a fundamental need of an industrial civilization and were willing to offer it for power in the feudal manner. I still wonder. Mr. Roosevelt has set others wondering.

I agree with you that he has characteristics which may ruin us. His recklessness in finance may be one. But more dangerous, I think, is the "Happy Warrior" concept which significantly was his. He is a good hater and has a gift for rabble rousing. Such efforts as the Philadelphia acceptance speech with its "economic royalists" and "princes of privilege" can do incalculable damage. Grape shot is not a selective implement of offense, and/or don't produce thought by shouting, "Once more into the breach, dear friends, once more."

But, on the whole, I think he is a self conscious political figure and not a man with a message.

Acheson's doubts derived from what one might call a realist's doubts about realism. He acknowledged that the state created property and set the ground rules for the social balance of power; but that made the state a distinctly double-edged sword.

Roosevelt might not recognize the dynamite he held in his hands. Acheson later recalled that "the essence of [Roosevelt] was force. He exuded a relish of power and command.

His responses seemed too quick; his reasons too facile for considered judgment; one

could not tell what lay beneath them."⁸⁴ Acheson contemptuously dismissed conservative attacks on Roosevelt as a communist; but he realized that the New Deal had amassed great power in the presidency, and with Roosevelt, it sometimes seemed an arbitrary and capricious presidency. For a realist, that was frightening.

Acheson eventually made his peace with Roosevelt. The President tried to appoint him as a judge of the DC Circuit, and failing that, to the newly-created position of Assistant Attorney General for Civil Rights. Acheson declined both positions, pleading the need for a private-sector salary to support his family. Eventually, however, he agreed on a volunteer basis to chair the Attorney General's Committee on Administrative Procedure, which issued recommendations eventually resulting in the Administrative Procedure Act.

In any event, his focus was turning abroad. He told Seymour in 1938 after a vacation in England and France that he "came home very depressed. France seemed to me disorganized and defeated; the British, bewildered and unprepared. On the whole the guesses which were made to me by military men have turned out better than those of the diplomats and business people."⁸⁵

The Dilemmas of Realism, Legal and Otherwise

I perfectly admit that if you have the power on your side and find that present arrangements cause you a discomfort that you can shift to someone else, you will do so-- and I should bow to the way of the world.

--Oliver Wendell Holmes⁸⁶

⁸⁴ Morning and Noon, supra note --, at 165.

⁸⁵ Acheson to Seymour, Sept. 22, 1938, Box 28, Folder 362, Reel 18, Acheson Papers.

⁸⁶ 2 Holmes-Laski Letters 950.

The struggle for power is universal in time and space and is an undeniable fact of experience.

--Hans Morgenthau⁸⁷

Legal realism represented the domestic equivalent of foreign policy realism.

Foreign policy realism sees world politics as the product of an anarchical system. Fareed

Zakaria explains that:

[b]ecause this realm has no ruler, its cardinal feature is the distribution of power within it, determine who can do what to whom. Thus the distribution of power has a potent influence on world politics. The seminal example of systemic pressures affecting international outcomes, indeed creating a pattern of history, is the recurrent formation of balances of power. The logic of competition under anarchy suggests that states, jealous of their independence, will balance against a rising, threatening great power, rather than jump on its bandwagon.⁸⁸

Legal realism suggested that such a Hobbesian world would exist within societies but for the presence of the state. Both legal and foreign policy realism saw social life as the competition between organized groups, where the possibility of domination and oppression was ever-present: the difference domestically is that the state could structure the balance of power through setting the rules of the game. And in order to establish a true balance, the state needed to augment the power of weaker groups. Strengthening workers and the poor was the logical consequence. Social equality served as a prerequisite for social peace. This hardly implied that all of life was a zero-sum game, as Acheson recognized: capital and labor could cooperate to increase the size of the pie for both sides. But such absolute gains could only be achieved through an overall balance of power. And thus in the diplomatic sphere, legal realism profoundly militated toward a

⁸⁷ Politics Among Nations 30-31 (4th ed. 1957)

⁸⁸ Fareed Zakaria, "Is Realism Finished?," 30 Nat'l Interest, Winter 1992/1993, at 21, 23.

balance-of-power strategy--Acheson's hallmark at the State Department. In all, legal realism supported a coherent foreign policy outlook in the same way that classicism had--the results were sharply different because the underlying legal ideology was sharply different as well.

Such a robust ideology, however, was not free from internal contradictions and ambiguities, some of which Acheson sensed and which even his formidable intellect could not cure. Most prominently, while the dictates of realism might form the outlines of a foreign policy, they could not substitute for the practical wisdom necessary for concrete policy formulation. To state that realistic foreign policy requires power balancing and a recognition of an anarchical self-help system hardly suffices for actual diplomacy. Little wonder, then, that such self-styled realists as Acheson and George Kennan quickly fell out after Acheson's ascension to the Secretaryship in 1949; Kennan resigned a few months later. Realism could displace legalism as the dominant framework of US foreign policy, but it seemed to raise more questions than it answered.

Moreover, legal realism's destruction of a universal theory of value made it harder to provide legitimacy because it suggested that the only legitimacy rested in the application of force. Holmes may have believed that; Acheson refused to go so far. As Yosai Rogat notes, "To a remarkable degree, Holmes simply did not care."⁸⁹ Acheson did. He backed the second New Deal's social reforms, and his support of the labor movement derived from more than a belief in an equilibrium between labor and capital: he also saw it as a question of oppressed workers blocking the tyranny of ownership. In this, he fit well within the mainstream of legal realist thought.

⁸⁹ Yosai Rogat, "The Judge as Spectator," 31 U. Chi. L. Rev. 213, 255 (1963-1964).

But as soon as he began to speak of tyranny or oppression, he needed to provide a theory of value. Providing one was not difficult, as the most sophisticated realists showed⁹⁰ even during the era when process theory eroded much of legal realism's punch. But carried over into the diplomatic sphere, integrating realist balance-of-power considerations and a theory of value proved more difficult, for three reasons.

First, there was the problem of incommensurability. It is hard of enough to balance competing values, but it is even harder to balance moral and power-political concerns. All balancing is difficult: the very fact that we are reduced to the use of a balancing metaphor shows the arduousness of the task. But the particular kind of balancing that Acheson asked of himself was particularly hard because it involved two different ways of looking at the world. Zakaria observes that "any politics that is devoid of purposive action degenerates into sterile selfishness. America's foreign policy in particular, is properly concerned with ideals and principles, and the world is a better place because of the spread of American values."⁹¹ Very true--and very revealing of the central difficulty of knowing when interest politics stop and values politics begins. In comparison, the simpler verities of classical legal thought must have seemed alluring.

Second, there was the problem of hegemony. Ironically, the United States had become, in the wake of World War II, too powerful. Strictly speaking, of course, a balance-of-power diplomat (or legal realist) would resist the hegemon, but what he do if he found himself in that position? Such was Acheson's dilemma. He responded by insisting on negotiating only from "situations of strength," a condition that somehow always eluded him. Skeptics wondered when the United States would ever find a time

⁹⁰ See, e.g., Charles L. Black, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421 (1960).

for a negotiated settlement with the Soviet Union if not in the late 1940's, when the United States possessed nearly half of the globe's GDP. Given the (relatively enviable) challenge of managing the diplomacy of the world's leading power, Acheson not unreasonably began to insist on maintaining a preponderance of power. But that, in turn, created a new, third, problem.

That was the problem of hypocrisy. In order to maintain this preponderance of power, America needed to nurture its European alliances, prevent the nations of the Third World from going over to the Soviet camp, and maintain public support for a national security apparatus unlike anything in American history. But all of these things required justifications over and above mere power balancing. It needed to induce other nations to accept American hegemony by arguing that US interests coincided with other nations through a framework of commonly accepted values. That was challenging enough with the Europeans, although Acheson ably constructed international institutions such as NATO, the IMF, the World Bank, and the Marshall Plan to achieve it.

The task was considerably more difficult with Third World and domestic audiences as soon as it became clear that sometimes, supposedly universal values and US interests did not coincide. As Secretary of State, Acheson did not have to deal much with Third World issues, although when he did, his record was something to be proud of: for example, he consistently supported Iran's democratically-elected Prime Minister, Mohammed Mossadegh and quashed any thoughts of overthrowing him. But in the last two decades of his life, during the period of decolonization, he developed contempt for the new African and Asian states, carrying on an unjustified and in retrospect

⁹¹ Zakaria, *supra* note --, at 32.

embarrassing crusade to garner US support for white minority regimes in southern Africa. Advocating such policies made it seem that the United States was a great power just like any other, so it would make sense for much of the world to balance against it. But at some level, if the United States did not act out of its own self-interest, its preponderance of power could begin to erode.

Domestic audiences might have been even harder. Acheson himself may have wanted to emulate Metternich and Castlereagh at times, but it would be difficult to persuade the American people to sacrifice for such policies. So even at the State Department, he found himself emphasizing supposedly universal principles that he thought he had rejected. The Truman Doctrine, which Acheson formulated as Under Secretary of State in 1947, set forth "the policy of the United States to assist free peoples who are resisting attempted subjugation by armed minorities or by outside pressures."

By using such universalistic rhetoric to attain the modest ends of aid to Greece and Turkey (then under Soviet threat), Acheson laid the groundwork for the belief, which would become ever more widely shared by government officials as well as the larger public, that the United States saw little alternative but to embark on a global containment of communism--a notion that foreign policy realists such as George Kennan and Hans Morgenthau deplored and eventually crashed in the jungles of Viet Nam. But in order to gain support for a major policy, Acheson conceded, "qualification must give way to simplicity of statement, nicety and nuance to bluntness, almost brutality, in carrying home a point."⁹² As Secretary of State, Acheson approved NSC-68, which gave birth to

⁹² Acheson, *Present at the Creation*, supra note --, at 374.

the massive Cold War military buildup and the formation of a national security state,⁹³ for much the same reasons. Similarly, he became prone to publicly accuse the Soviet Union of "perfidy" even though the realist in him would have seen merely another great power fighting for its interests.

It is testimony to Acheson that as Secretary of State he was able to grapple with these problems and still create the most successful foreign policy in American history. He made his share of mistakes, but in comparison to those who went before and after, his record holds up well. If confronted by his errors, in a generous mood he might acknowledge them, respond that no overarching framework yields perfection, and quote one of his favorite Holmesian aphorisms: "At the outset of our philosophy we take the step of supreme faith--we admit that we are not God."⁹⁴

⁹³ See John Lewis Gaddis, *Strategies of Containment: A Critical Appraisal of Postwar American National Security Policy*, chap. 2 (1982).

⁹⁴ Acheson, *Morning and Noon*, *supra* note --, at 63.