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# Thurman Arnold's International Antitrust Legacy

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## Book Review:

# Thurman Arnold's International Antitrust Legacy

Wyatt Wells

**Antitrust and the Formation of the Postwar World**

Columbia University Press ■ 2002

### Reviewed by William H. Page

In the decades before the World War II, a new economic philosophy favoring cooperation among competitors challenged the competitive model embodied in the antitrust laws. In the United States, the cooperative model had some successes in, for example, the Webb Pomerene Act of 1918, the associational activities of the 1920s, and the NRA codes of the 1930s. And, of course, antitrust law itself, after some false starts,<sup>1</sup> came to recognize that some forms of cooperation are necessary for efficient production. Outside the United States, however, especially in the economic turbulence following World War I, policymakers adopted such an extreme form of the cooperative model that they not only tolerated but actively assisted the formation and operation of international cartels as means of organizing production. Wyatt Wells's fascinating study shows that America's efforts to project its antitrust policies internationally during and after World War II played a critical role in the destruction of this "cartel ideal," particularly in Western Europe. This ideological transformation had lasting effects for the development of the world economy.

Among the book's many points of interest for antitrust practitioners are its accounts of the formation and operation of cartels. Wells shows that during the prewar period international cartels formed in steel, light bulbs, and rubber, each for different reasons: the steel industry was characterized by high concentration and a homogeneous product; the light bulb industry required extensive sharing of intellectual property; and the rubber industry, although fragmented, enjoyed the supervision of multilateral treaty. By 1939, according to one study, "cartels were active in industries that accounted for 42% of world trade," (p. 25) albeit with varying degrees of success.

In the United States, many of the early New Deal reforms, particularly the NRA, reflected elements of the cooperative ideal. But in his second administration, Roosevelt turned to aggressive antitrust enforcement as central feature of his economic recovery policy, appointing Thurman Arnold to head the Antitrust Division.<sup>2</sup> Wells reminds us repeatedly of just how radical Arnold's enforcement program was. He quotes, for example, an internal 1942 Division memo that proposed a restructuring of business everywhere in the world (p. 211):

Selling must largely be divorced from manufacture; manufacturing firms must become more narrowly specialized; needless industrial combination, whether vertical or horizontal, must be avoided; and the maximum permitted size in corporate units must approximate the minimum size requisite for efficient,

■  
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<sup>1</sup> See, e.g., *Chesapeake & Ohio Fuel Co. v. United States*, 115 F. 610, 620–21 (6th Cir. 1902).

<sup>2</sup> See generally ELLIS HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* (1966).

specialized production. Information about products (advertising) should be provided mainly by disinterested agencies, governmental and private.

The least controversial aspect of the Division's policy program was its opposition to cartels, but even here Arnold took that hostility to new levels, publicly linking Hitler's rise to cartels, and warning darkly of similar threats to democracy in the United States.

Again, Wells reveals the operation of major cartels, this time focusing on links between American firms and the German chemical manufacturer IG Farben. He also offers chronicles the conflicts within the Roosevelt Administration over the role of antitrust in the war mobilization effort. The Division repeatedly insisted that vigorous antitrust enforcement was necessary to sever American firms' involvement with international cartels. Some of the claims were questionable at best. In an important revelation, Wells debunks Arnold's charge—repeated by respected historians to this day—that Standard Oil's deals with IG Farben delayed the development of synthetic rubber essential for the American war effort. Arnold's claims in this and similar cases succeeded in creating a climate of hostility to international cartels. But his vehement insistence on antitrust prosecutions of firms engaged in war production led the Attorney General to cede to the Secretaries of the Army and Navy the power to delay prosecution of antitrust cases that they believed hindered mobilization—a power they wielded freely.<sup>3</sup> Arnold also made enemies by repeatedly challenging the actions of the War Production Board on competition grounds. Finally, Roosevelt rid himself of Arnold by appointing the combative Assistant Attorney General to the D.C. Circuit.

Nevertheless, the administration's actions against cartels continued in a variety of contexts, such as farm and regulatory programs, and especially in planning for postwar international trade policies. And the Antitrust Division, despite its setbacks in 1943, resumed its challenges to international agreements, some of which it mischaracterized as cartels. Wells describes a number of Division prosecutions in the immediate postwar period that led to important Supreme Court decisions like *National Lead*, *Line Material*, and *Timken Roller Bearing*.

The most dramatic application of the Antitrust Division's radical policies, however, was in the postwar decartelization and deconcentration programs in occupied Germany and Japan. In both countries, representatives of the Division and their ideological allies sought to impose a restructuring of industry far more extreme than anything conceivable in the United States. Proponents of these policies argued that the German cartels and Japanese Zaibatsu played central roles in the emergence of warlike totalitarian regimes in their respective countries, and that the occupiers must reshape the countries' economies if they hoped to institute democratic reforms. In Germany, the decartelization policy was largely successful, but the more ambitious and dubious deconcentration program fell far short of its most zealous advocates' dreams, although there was a significant restructuring of I.G. Farben. Wells concludes that the occupation policies ultimately succeeded in instilling an antitrust sensibility in Germany, because antitrust ideas accorded well with the process of liberalization in the western zones of occupied Germany and throughout Europe.

The anti-Zaibatsu program, however, was essentially a failure, despite the exclusive American control of postwar Japan's economy and political system. There, as in Germany, an American commission prescribed an extreme program of dissolution of large firms, but the collapse of the Japanese economy and the rise of the Soviet threat prevented any substantial implementation.

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<sup>3</sup> See Richard M. Steuer & Peter A. Barile, *Antitrust in Wartime*, ANTITRUST, Spring 2002, at 71.

American policy shifted instead toward promoting recovery. After the occupation, Japanese authorities reversed the few moderate antitrust reforms that Americans had effected. The Japanese Fair Trade Commission, Wells observes, allowed the Zaibatsu to reemerge as Keiretsu and allowed cartels to spread throughout the economy in order to foster “rationalization.” Wells attributes the failure of antitrust in Japan to the hostility of government officials and the virtual absence of foreign trade until well into the 1950s.

In a final chapter, Wells describes the post-war operation of international cartels in oil and steel, and the antitrust policies adopted in response to them. He describes the Antitrust Division’s attempt to prosecute the major oil producers, only to be thwarted by orders from Presidents Truman and Eisenhower. Wells defends presidential interference in these instances on the ground that cartels played a legitimate role in an industry located in highly unstable and undeveloped regions of the world. He contrasts this failure of antitrust enforcement with the largely successful efforts of the European Coal and Steel Community to break up cartels in their industries.

All of these accounts support Wells’s primary argument that antitrust has succeeded in the United States because of our political stability and economic prosperity, and that the United States has exported antitrust successfully only where the policy has been accompanied by political and economic liberalization. Antitrust has failed in countries with unstable autocracies and illiberal trade policies. While Thurman Arnold’s promotion, at all costs, of his populist brand of antitrust was a necessary spur to American efforts to promote competition worldwide, the ultimate success of American policy in other countries turned out to be dependent on pragmatic officials who implemented it in a broader program of political reform and relaxation of trade barriers.

Although Wells’s main story ends in the 1950s, he extends individual parts of his argument into the 1980s. He could have taken the narrative further. It would be interesting to explore the extent to which Arnold’s antitrust vision has influenced the development of European competition law. Wells’s account would also provide an interesting historical context for the Antitrust Division’s more recent prosecutions of international cartels and for the emergence of antitrust enforcement programs in today’s transition economies.

Although Wells is a historian and not a lawyer or an economist, *Antitrust and the Formation of the Postwar World* adds significantly to our understanding of the workings of international cartels and the political context of antitrust enforcement. Antitrust practitioners, policy makers, and academics should welcome it. ●