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Introduction

The international spread of antitrust since World War II suggested the historical process shaping global capitalism. During the closing decades of the nineteenth century, the growing separation between owners and operators resulted in managers becoming the primary decision makers. This transformation of capitalism constituted what historian Alfred Chandler called the managerial revolution in American business. Managerial capitalism nonetheless spawned popular anxiety that big business had exceeded the government's capacity to impose accountability, engendering the creation of a regulatory regime known as antitrust. By the 1930s managerial capitalism had appeared in varying degrees in the industrial nations of Europe and in some European settler societies such as Australia, and Japan. Generally, however, these nations expressly rejected American-style antitrust as unsuited to their cultures. The perception of antitrust as a distinctly American response to big business changed after World War II. Governments increasingly adopted workable antitrust regimes; by the turn of the millennium, antitrust was instrumental to the clash between state sovereignty and globalization associated with the World Trade Organization (WTO).

The internationalization of antitrust occurred within a contested cross-cultural public discourse that recognized Americanization as an active element primarily in relation to indigenous factors already constituting capitalist systems. Given this interaction, what foreign and indigenous elements explain the global change from opposing antitrust to supporting it? The Allied occupations of Germany and Japan following World War II suggest the difficulties in answering this question. By 1970 the prevailing view was that American pressure resulted in establishing an effective antitrust regime in Germany but not Japan. Reconsidering the U.S. policy toward instituting antitrust in Germany, this book presents evidence of contemporary public opinion prior to 1950 showing that Americans and Germans alike concluded that the U.S. effort had *failed*. In Japan, by contrast, similar evidence reveals that in response to the occupation's order requiring the installation of an antitrust regime, the Japanese quickly learned enough about U.S. antitrust policy and history to seize and maintain the

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initiative over the Americans during the drafting of the Antimonopoly Law of 1947 and its subsequent enforcement until the occupation ended in 1952.

The internationalization of antitrust raises further challenging questions. The prevailing view holds that Franklin Roosevelt's Antimonopoly message of 1938 and antitrust critic-turned-activist Thurman Arnold's efforts to enforce it by 1943 had at best a modest impact on the powerful postwar expansion of American big business. If so, how do we account for the contemporary official and business opinion that stated during and after World War II that the implementation of Arnold's policies by his successors made exceptional involvement of American big business in international cartels that had been commonplace before 1941, while these same officials also compelled technology transfers aiding postwar America's foreign competitors, including Japanese and German enterprise? In light of repeated assertions by foreign officials, businessmen, and experts that Japanese antitrust was of marginal significance, why did Japanese bureaucrats, big businesses, and political officials repeatedly attempt but fail to do away with it during the postwar economic growth "miracle"; once the miracle ended in the 1990s, why did those same groups switch to supporting the most vigorous antitrust enforcement since the occupation? Despite the heritage of condemning U.S. style antitrust, why did postwar European authorities install their own version of antitrust in order to pursue economic integration capable of enforcing equal opportunity throughout the common market? And why, after abandoning an antitrust law before World War I, did Australia not only enact new legislation during the 1960s and 1970s, but by the 1990s also implement one of the world's most active and innovative antitrust regimes?

Offering answers to these and related questions, this book suggests a new perspective on antitrust. It locates the particular doctrines and rules constituting antitrust within changing historical and comparative contexts since the 1930s; it then considers how within these distinct institutional and cultural contexts formal legalities have shaped business' two principal organizational approaches to risk, the large-scale corporation defined as managerial capitalism and popularly known as big business, and looser anticompetitive arrangements identified with cartel practices. During the Great Depression in the United States, antitrust had acquired a metaphorical meaning that Thurman Arnold identified with the folklore of American capitalism. This reimagining of antitrust's relation to capitalism expressed ambivalent public values: Americans embraced the consumer benefits that big corporations made possible, but feared that large concentrations of economic power threatened individual opportunity and democratic government. Antitrust thus embodied an American ideal that big business should be held accountable to power outside itself. Prior to World War II, other nations rejected this ideal. Indeed, in authoritarian states and liberal democracies alike government officials and business people, as well

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as political party leaders and legal-economic professionals, assumed that anticompetitive collaboration through cartels among business, government, and producers was necessary to preserve social order at home and competitive advantage abroad.

During the 1990s, Australians Philip and Roger Bell suggested another perspective: “one might think of ‘Americanization’ as a linguistic infiltration. It does not so much replace or displace the local lexicon as supplement it.”¹ Applied to antitrust internationalization, these metaphors described a process whereby societies *selectively* acquired a language of market competition. At the more familiar instrumental level of enforcement, of course, antitrust engages private business practices to achieve particular social and market outcomes in a capitalist economy. Thus, symbolically and instrumentally, antitrust creates a particular consciousness about what constitutes legitimate individual or corporate conduct as well as the appropriate scope and substance of policy enforcement. Adopting antitrust as a governmental regime involves, then, not only making basic policy choices but also the acquisition of a mental stance and a mode of communicating. To other societies American antitrust represents a praxis: a model or practical example for emulation embodying theories of accountability and competition that societies must follow if antitrust is to be translated into customary market conduct.² The praxis idea also suggests the degree to which antitrust reflects a distinctive institutional culture committed to enforcing certain policies toward competitive and non-competitive behavior. Though substantive rules and procedures governing restrictive practices and monopolies vary among jurisdictions, antitrust regimes possess a common institutional culture defined by relative bureaucratic autonomy, due process standards, and judicial review.

Such institutional and symbolic autonomy did not happen randomly. Instituting an antitrust regime required officials to choose to enforce its legitimacy within the changing indigenous business, governmental, and social order. Whether the regime was effective enough to actually shape conduct depended, moreover, upon the extent to which the consciousness sustaining it became imbedded. According to the praxis imagery, therefore, antitrust gained enforcement authority in America and spread abroad when it possessed sufficient bureaucratic and symbolic autonomy through procedures, rules, and policies that the dominant capitalist enterprise was more or less held accountable to external public and private interests. Clearly, the principle of accountability lacks formal force when compared with established antitrust doctrines such as the *per se* prohibition against cartels or the

¹ Philip Bell and Roger Bell, “Introduction,” in Philip Bell and Roger Bell, eds., *Americanization and Australia* (Sydney, 1998), 6.

² Antonio Gramsci, ed., *Further Selections from the Prison Notebooks*, trans. Derek Boothman (Minneapolis, 1997), 395, 430, 579.

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rule of reason distinguishing “efficient” mergers from those creating unlawful monopolies. Understood as a consciousness and institutional culture embracing competition over collaboration, however, accountability acquires a sharper policy content underlying all formal antitrust rules and process. Approached in this way, the numerous doctrines and procedures comprising antitrust as an autonomous field of law constitute a general policy of accountability fostering the public consciousness that some degree of market competition enforceable by law was preferable to having the law sanction collusive market behavior.

Conceiving of antitrust as praxis that promotes and enforces competition consciousness must take into account the basic changes in managerial capitalism. Shortly after World War II, in 1947 Joseph A. Schumpeter identified the difference between firms that adapted to and those that innovated in response to market and technological imperatives. The adaptive firm simply attempted to minimize costs within a market environment it took as given. The innovative firm pursued strategies within a process of change. Shortly after World War I, in the early 1920s and then increasingly during the Great Depression, certain American managers in innovative firms discovered that more efficient administrative coordination could be achieved by separating the strategic decision-making process from the operational process, instituting a multidivisional structure. Chief executives in separate divisions fashioned strategies to develop new products or markets and monitored profitability. By the Depression, historians found, a few firms had adopted a similar multidivisional structure in such diverse capitalist systems as liberal Britain and Australia or fascist Germany and Japan. That such versatile managerial innovation arose among different governments and cultures possessing conflicting ideologies confirmed Chandler’s general theoretical insight: Most economic theory assumed that divisional specialization within the corporation was a “natural response to improved technology and markets.” He concluded, however, that “increasing specialization must, almost by definition, call for more carefully planned coordination.”³

This book argues that to varying degrees antitrust shaped managerial capitalism’s global expansion, especially as it refined the multidivisional structure. Although managers implemented a unified investment and operational strategy, each corporate unit was bound by the local laws and regulations of the sovereign state or states where it did business. Both authoritarian and liberal-democratic governments imposed conflicting laws and regulations upon multinational corporations, circumscribing the manager’s control. During the Great Depression and World War II, U.S. antitrust authorities exposed the extensive involvement of U.S.

³ Alfred D. Chandler, Jr., *The Visible Hand: The Managerial Revolution in American Business* (Cambridge, MA, 1997), quote at 489–90.

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multinational corporations in cartels and other anticompetitive agreements benefiting big business and governments in Germany, Britain, Japan, Australia, and elsewhere. After the war multinational corporations maneuvered within the new liberal international order to manipulate or avoid government restrictions. Ultimately, however, the proliferation of antitrust regimes proved difficult to escape. At the same time, the manager's ability to preserve centralized control had profound social and political consequences. The separation between owners and managers heightened labor's, small business', and consumers' market vulnerability, exacerbating class conflict. Big business became the object of political struggles defining socialism, fascism, and John M. Keynes's "middle-way" between unfettered laissez faire and authoritarianism. During the final decades of the twentieth century, similar struggles exacerbated the economic and cultural clashes identified with globalization.

From World War II on, trade policies and antitrust increasingly presented distinct approaches to competition. Trade policies embraced wide-ranging government controls through tariffs, currency exchange rates, taxes, investment, antidumping regulations, commodity agreements, and patent monopolies. Antitrust dealt with private business conduct. Before the war the U.S., Japanese, German, British, and Australian governments countenanced or even promoted international cartels in order to protect themselves from foreign competition and to project their power against other nations. During the war the United States and its Allies replaced the protectionist system with the liberal international financial order maintained through the International Monetary Fund and the World Bank. Controversy nonetheless arose over whether the International Trade Organization (ITO) should include antitrust provisions targeting international cartels, patents, and other anticompetitive behavior. The General Agreement on Tariffs and Trade (GATT) went into effect without antitrust provisions in 1947–48. Although the United States had proposed the antitrust provisions, it proved unwilling to create international antitrust regulation over private business' anticompetitive practices exercising authority that was comparable to that applied by the government through control of employment, technological innovation, agricultural or industrial commodity prices, and the balance of payments within the international trade system. This book offers new evidence explaining the ITO's defeat and its implications for the coexistence of antitrust and trade policies under the WTO.

Trade policies and antitrust also applied changing economic theories over time in divergent approaches to competition. Trade officials applied economic theory to protect industries and jobs from international competition; they achieved these goals primarily through domestic politics and international diplomacy. Antitrust authorities, by contrast, applied much the same economic theory on behalf of consumer welfare, exemptions for

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organized labor and farm groups, and, under certain circumstances, the defense of small business. Compared with trade authorities, stricter procedural autonomy and judicial review nonetheless constrained antitrust officials. Placed within changing political and cultural contexts and public discourse, this book attempts to show how and why contemporary officials, big and small businesses, industrial and agricultural groups, and legal-economic experts constructed on their own terms, through three distinct phases from the 1930s to the turn of the century, the meaning and outcomes of antitrust's and trade policies' use of economic theories. In the following chapters, accordingly, an effort is made to allow the participants themselves to define legal and economic terms and to explain what they believed were the issues at stake in doing so. In this sense this book is a policy history.

The first internationalizing phase was the Great Depression and World War II. This period witnessed the reconstitution of American antitrust and its rejection abroad, especially through international cartels, amidst the intractable struggle between liberal and protectionist trade systems. In the initial postwar period from 1945 through the early 1970s, American antitrust experienced its most active enforcement ever within a liberal consensus. As a result, international cartels became exceptional whereas American managers developed strategies leading to diversification and conglomerate mergers on a global scale. Over this period, too, European and Japanese firms gradually became more competitive against U.S. multinational corporations. The European Community's Commission employed antitrust to integrate a common market based on equal economic opportunity and a new respect for competition whereas Australia's antitrust revival paved the way for instituting an effective antitrust regime in the 1970s. Meanwhile, Japanese antitrust survived by preserving some market competition and protecting small business, thereby exercising surprising influence on the economic miracle engineered by the powerful finance and trade ministries. Even so, up to the 1970s, antitrust authorities everywhere sought to balance social welfare objectives and market efficiency through theories of "workable competition."

The third phase was the second postwar period continuing from the 1970s until after the millennium. The oil shocks of 1973 and 1979 facilitated new U.S. investment strategies defining "efficiency" solely in terms of consumerism and increased shareholder values. A chaotic business cycle of recession and boom recurred. American managerial capitalism was transformed; its effectiveness tied to the short-term performance of the stock market whereas advocates of the Chicago School of Economics remade antitrust. Over the same period, multinational corporations in Western Europe, Japan, and Australia increasingly competed effectively with their U.S. counterparts for global advantage. The United States experienced weakened antitrust enforcement in the 1980s; in the following decade,

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European, Australian, and Japanese antitrust enforcement became more active. The end of the cold war and the emergence of antiglobalization ideology facilitated the internationalization of antitrust. The United States reinvigorated antitrust enforcement, targeting international cartels rather than monopoly. Although the European Commission's decisions were stronger than that of its American counterparts, international cooperation increased as never before, prompting persistent, if unfulfilled, demands for an antitrust authority at the level of the WTO. Antitrust praxis thus achieved new force in the growing effort to impose accountability on global capitalism.

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Reconstituting American Antitrust, 1937-1945

On April 29, 1938, Franklin Roosevelt put aside pressing foreign policy concerns to present an antimonopoly message. Roosevelt declared that activist antitrust enforcement was essential in order to defend American liberal democracy and free enterprise from becoming a “fascist-collective” system on the European “model.” The dramatic foreign imagery and conspiratorial overtones contrasted sharply with the monopoly problem that Roosevelt defined in technical terms such as patents and cartels.¹ A remedy of vigorous enforcement and investigation seemed tame when compared with the Progressive trust-busting ideology that Louis Brandeis had popularized to combat the “curse of bigness.” Contemporary and later observers sharing the Brandeisian perspective concluded that the message resulted primarily in the disappointing investigation of the Temporary National Economic Committee (TNEC) and Thurman Arnold’s flamboyant but narrowly bureaucratic antitrust campaign.² Given the context of economic foreign policy and New Deal liberalism’s evolving business–government relations, however, Roosevelt’s antimonopoly message reconstituted antitrust policy, imposing accountability on the expansion of American managerial capitalism in peace and war.³

¹ “Recommendations to Congress to Curb Monopolies and the Concentration of Economic Power, April 29, 1938,” *The Public Papers and Addresses of Franklin D. Roosevelt, 1938, Volume 7, The Continuing Struggle for Liberalism* (New York, 1941), 305–32; for the foreign policy context, see Robert Dallek, *Franklin D. Roosevelt and American Foreign Policy, 1932–1945* (New York, 1979), 160.

² Thomas K. McCraw, *Prophets of Regulation* Charles Francis Adams, Louis D. Brandeis, James M. Landis, and Alfred E. Kahn (Cambridge, MA, 1984), 80–142; Alan Brinkley, *The End of Reform, New Deal Liberalism in Recession and War* (New York, 1996), 86–200; Ellis W. Hawley, *The New Deal and the Problem of Monopoly* (Princeton, NJ, 1974), 270–455.

³ Dallek, *Roosevelt and Foreign Policy*, 101–70; David M. Kennedy, *Freedom from Fear the American People in Depression and War, 1929–1945* (New York, 1999), 323–464; Robert A. Divine, *The Illusion of Neutrality* (Chicago, 1962), 162–228; Tony A. Freyer, “Antitrust and Bilateralism: The US, Japanese, and EU Comparative and Historical Relationships,” in Clifford A. Jones and Mitsuo Matsushita, eds., *Competition Policy in the Global Trading System* (The Hague, 2002), 3–52; Thomas K. McCraw, “Government, Big Business, and the Wealth of Nations,” in Alfred D. Chandler, Jr., Franco Amatori, and Takashi Hikino, eds., *Big Business and the Wealth of Nations* (Cambridge, UK, 1999), 522–45.

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Placing the New Dealers' bureaucratic struggles within the context of national security and liberal trade politics, this chapter argues that Arnold built better than either he or the historians imagined.⁴ Section I examines Robert Jackson's proposals for an antitrust study committee which located patent, cartel, and corporate finance issues within the context of domestic and international economic policies before the recession of 1937 diminished New Dealers' reform hopes. Section II traces how Roosevelt's approval of Jackson's study committee affected the Antimonopoly Message of 1938. Section III follows Thurman Arnold's implementation as he shifted from enforcement policies aimed at promoting social welfare to a policy focusing on preserving accountability in the defense build up prior to 1941. Section IV explores the scope and impact of Arnold's compliance strategy during the period preceding Pearl Harbor. Section V examines how this expanded strategy influenced war and peacemaking from 1941 to 1945. The chapter suggests that the continuity linking Jackson's antitrust study committee, Roosevelt's Antimonopoly Message, and Arnold's initial enforcement record reflected the New Dealers' wider struggle to keep reform alive. The defense build up and the war compelled Arnold to institute an antitrust regime capable of holding American managerial capitalism accountable to American democracy. His success shaped the future image of antitrust.

I. ROBERT JACKSON AND THE ANTIMONOPOLY STUDY COMMITTEE

Robert Jackson did much to shape Roosevelt's decision to deliver an antimonopoly message. He became one of Roosevelt's inner circle during 1937. In January he left the post of general counsel for the Internal Revenue Service to become the Justice Department's assistant attorney general of the Antitrust Division.⁵ The move coincided with the administration's search for ways – including an active antimonopoly campaign – to revive the New

⁴ The evidence concerning Arnold is presented below. Compare this evidence with the secondary works discussed within the notes and text below: John Morton Blum, *V Was for Victory Politics and Culture during World War II* (San Diego, CA, 1976); Brinkley, *End of Reform*, 106–25 Susan Ariel Aaronson, *Trade and the American Dream, a Social History of Postwar Trade Policy* (Lexington, KY 1996); Patrick J. Hearden, *Architects of Globalism Building a New World Order during World War II* (Fayetteville, AR, 2002); Wyatt Wells, *Antitrust and the Formation of the Postwar World* (New York, 2002). But see the pioneering study by Graham D. Taylor, "Debate in the United States over the Control of International Cartels, 1942–1950," III *The International History Review* (July 1981), 385–98. See also Tony A. Freyer, *Regulating Big Business Antitrust in Great Britain and America 1880–1990* (Cambridge, UK, 1992).

⁵ File, "Justice Jackson's Story," manuscript of tape recording taken by Dr. Harlan B. Phillips, Oral History Research Office, Columbia University, 1952–53, RHJ Papers, Box 190, Library of Congress (LC), 256–638.

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Deal reform programs the Supreme Court had struck down. Yet, by the summer and fall opposition to Roosevelt's court-packing plan and a pronounced recession stalled the reform drive. Even so, the National Recovery Administration's (NRA's) suspension of antitrust laws in favor of federally enforced cooperation within manufacturing and labor sectors, like the anticompetitive practices the AAA instituted, had for the first time imposed upon peacetime America the sort of cartelized order prevailing in Europe and Japan. Thus, although the court had overturned the early New Deal's cartel policies, the government's sanction of those policies exposed anticompetitive market conduct pervading corporate relations.⁶ In early 1937, moreover, the *Alcoa* case publicized international cartel practices, revealing larger security and trade issues.⁷ Some liberals nonetheless persistently advocated a neo-NRA policy. Jackson quietly addressed these conflicting demands, proposing an antimonopoly study committee to explore corporate accountability within New Deal liberalism.⁸

As the government's leading antitrust official, Jackson confronted liberals who favored the NRA approach. The NRA's rise and fall represented the influence of those who believed that the Depression presented an opportunity to transform American capitalism into a scientifically planned cooperative economy. Prominent business leaders had promoted this approach, particularly Gerard Swope of General Electric and Henry I. Harriman of the Chamber of Commerce.⁹ By 1937-38, liberals such as Donald Richberg, the NRA's former general counsel, urged reconstructing the New Deal on the basis of cooperative planning. Some of the president's closest advisors accepted this view, including Harold Ickes, who generally favored a vigorous antitrust campaign except in the petroleum industry over which he presided. Jackson later recalled that Roosevelt himself was "not too clear" on the difference between the NRA approach and antitrust laws; the president generally conceived of economic issues "in terms of rights and wrongs." He believed that if he talked with businessmen and "made them see that their course was morally wrong, they would do something about it." Enforcing the antitrust laws was for Roosevelt, accordingly, "punishing a conspiracy, thinking of a conspiracy as a dark

⁶ Merle Fainsod and Lincoln Gordon, *Government and the American Economy* (New York, 1941), 557-620; Hawley, *New Deal*, 286-87, 374-8, 389-94; Kennedy, *Freedom from Fear*, 352-3; Brinkley, *End of Reform*, 55-61, 88, 92-3, 101, 110-11, 267.

⁷ *U.S. v. Aluminum Co. of America*, 44 F.Supp. 97 (Dis. Ct. S.D.N.Y., 1941); "Memorandum For Attorney General, Re: *U.S. v. Aluminum Co. of America et al.*, March 16, 1937," RHJ Legal File, *Alcoa*, Box 77, LC.

⁸ File, "Justice Jackson's Story," Columbia University Oral History, 1952-53, RHJ, Box 190, LC; Jackson to Leon Henderson, July 20, 1937, RHJ Legal File, Box 77, LC.

⁹ Freyer, *Regulating Big Business*, 218-20; Mira Wilkins, *The Maturing Multinational Enterprise: American Business Abroad from 1914 to 1970* (Cambridge, MA, 1974), 49-244; Wyatt Wells, *Antitrust*, 4-37.