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# The Antimonopoly Ideal and the Liberal State: The Case of Thurman Arnold

Alan Brinkley

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For more than half a century—from the moment large industrial combinations began to emerge in the last decades of the nineteenth century to the late years of the Great Depression—the question of monopoly power was among the central issues of American public life. Then, with striking suddenness, it began to fade from both popular and official discourse until, by the end of World War II, it had largely vanished from political debate. Antitrust laws have remained on the books; at times, they have been vigorously enforced. But the larger popular animus against monopoly that was once so important to American political discourse has stirred no more than passing popular interest for almost fifty years. As Richard Hofstadter wrote in 1964, “Once the United States had an antitrust movement without antitrust prosecutions; in our time there have been antitrust prosecutions without an antitrust movement.”<sup>1</sup>

What makes this change particularly puzzling is that antimonopoly sentiment began its decline just when it seemed ready to prevail: the late 1930s. Franklin D. Roosevelt’s reelection victory in 1936 came after a campaign marked by attacks on “economic royalists” and concentrated power. Antimonopoly forces in the New Deal won some of their most important victories during the recession of 1937–1938, when they launched a major public inquiry into monopoly power through the Temporary National Economic Committee and reinvigorated the Antitrust Division of the Justice Department. Yet, in the end, the antimonopoly activities of the late 1930s did not increase popular interest in the issue. Instead, they helped weaken it. For liberals were not only reviving antimonopoly ideas. They were also—without fully realizing it—revising them in a way that contributed to their eventual irrelevance.

In the wake of the 1937–1938 recession, American liberals moved haltingly but decisively toward a revised notion of political economy. They were beginning to devise a prescription for the state that rested less on reining in corporate power and

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<sup>1</sup> Richard Hofstadter, “What Happened to the Antitrust Movement? Notes on the Evolution of an American Creed,” in *The Business Establishment*, ed. Earl F. Cheit (New York, 1964), 114. A revised version of this essay appears in Richard Hofstadter, *The Paranoid Style in American Politics and Other Essays* (New York, 1965), 188–237.

more on promoting economic growth and expanding mass purchasing power, less on regulating production and more on stimulating consumption. Class-centered issues of production did not disappear from liberal politics. The rights of labor and the role of the state in protecting them remained important areas of conflict until at least the late 1940s. But on the whole, liberals were moving away from such issues and toward a vague consensus around a moderate Keynesianism and an expanding welfare state. And they were shifting the antimonopoly impulse in the process, redefining it to accommodate a set of ideas that reduced it to no more than a secondary role.<sup>2</sup>

Debate over antimonopoly ideas began in the first months of the New Deal, in the policy struggles that led to the National Industrial Recovery Act of 1933. It continued throughout the 1930s—in the inquiries of the National Recovery Review Board (or Darrow Board, as it was popularly known) that helped consign the National Recovery Administration to oblivion; in the creation and operation of the Securities and Exchange Commission (SEC) and the Tennessee Valley Authority; and in the hearings and publications of the Temporary National Economic Committee from 1938 to 1941.<sup>3</sup>

But nothing more vividly illustrates how profoundly antimonopoly ideas changed in the course of the 1930s—and how much they faded in importance—than the way government used the antitrust laws in the last years of the decade under the supervision of Thurman W. Arnold, chief of the Antitrust Division of the Justice Department from 1938 to 1943 and one of the preeminent figures of the late New Deal. Arnold's relatively brief public career was significant less for the important changes he made in the idea and practice of antitrust law than for the way Arnold represented and helped articulate a set of changes in liberal thought. He revealed, even if unwittingly, how those changes were marginalizing the very enterprise he was attempting to revive. In some respects, Arnold's effort to reinvigorate the antitrust laws was among the most successful public policy initiatives of the late 1930s. But his stewardship of those laws also illustrates how antimonopoly rhetoric was beginning to describe a concept of economic regulation that had little in common with, and in fact helped undermine, some of the most powerful impulses that had traditionally sustained antimonopoly sentiment.<sup>4</sup>

Like other New Dealers, Arnold was an iconoclast who stopped well short of being a revolutionary. While the path to his political stance was in many ways distinctive, it was also representative of the way many members of his generation learned to question inherited ideas without repudiating inherited institutions.

<sup>2</sup> See Alan Brinkley, "The New Deal and the Idea of the State," in *The Rise and Fall of the New Deal Order*, ed. Steven Fraser and Gary Gerstle (Princeton, 1989), 85–121; and Alan Brinkley, "Origins of the 'Fiscal Revolution,'" *Storia Nordamericana* (Turin), 6 (no. 1–2, 1989), 35–56.

<sup>3</sup> See, especially, Ellis Hawley, *The New Deal and the Problem of Monopoly* (Princeton, 1966), 283–455.

<sup>4</sup> Max Lerner, "Trust-Buster's White Paper," *New Republic*, Sept. 16, 1940, p. 389.

Arnold was the product of two very different worlds: the relatively fluid world of the American West, where he grew up, and the more established world of the eastern intellectual elite, where he was educated and spent most of his adult life. He was born in Laramie, Wyoming, in 1891, the son of a prosperous lawyer-rancher and the grandson of a Presbyterian minister unreflectively committed to the stern dogmas of his faith. Among other legacies of his western childhood, Arnold noted in his autobiography, were "the seeds of skepticism about the old-time religion that have plagued and tormented me ever since." In 1907, at the age of sixteen, he entered Wabash College in Indiana, a place he so detested that he left after a year and excluded all mention of it from his memoirs. The next fall, he enrolled at Princeton University—an awkward outsider, wearing the wrong clothes and speaking with the wrong accent, largely ostracized from the hierarchical social structure of the college. "My years at Princeton," he recalled, "were chiefly remarkable for their loneliness." They were notable as well for what he considered their intellectual barrenness. Arnold found the rigid classical curriculum "extraordinarily dull":

The ancient texts were studied as if they existed in a vacuum, wholly apart from the culture of the civilizations that created them. This process made them an intolerable bore. . . . It was an age of absolute certainties. . . . The one thing that had to be avoided at all cost was the discussion of new ideas.<sup>5</sup>

Four years later, he entered Harvard Law School, which he found a considerably more inviting place both socially ("Enough of my Western manners had rubbed off so that I was no longer lonely") and academically ("The professors at Harvard, compared with the Princeton faculty, seemed intellectual giants"). But Harvard Law School, too, proved unsatisfying in the end to Arnold's skeptical intellect. It was, he decided, "as much a world of eternal verities and absolute certainties as it had been at Princeton. . . . The idea that thinking was a form of human behavior lay far beyond the horizon."<sup>6</sup>

After a brief and unsuccessful effort to establish his own practice in Chicago and an unremarkable period of military service during World War I, Arnold returned to Wyoming and joined his father's law office. He became involved in local politics, serving first as mayor of Laramie and then as the only Democrat in the Wyoming House of Representatives. (There he once rose to nominate himself facetiously for speaker, rose again to second the nomination, and rose a third time to attack the "irresponsible Democrat" who had proposed him and to withdraw his name.) Arnold was too irreverent for conventional politics and too restless for a small-town law practice. He was also discouraged by the "economic blight known as absentee ownership" that was, he came to believe, depressing the Wyoming economy and destroying opportunity. And so in 1927, when he received an offer to become dean of the University of West Virginia Law School (on the strength of a recommendation

<sup>5</sup> Thurman Arnold, *Fair Fights and Foul: A Dissenting Lawyer's Life* (New York, 1965), 3–20.

<sup>6</sup> Arnold, *Fair Fights and Foul*, 3–20; Gene M. Gressley, ed., *Voltaire and the Cowboy: The Letters of Thurman Arnold* (Boulder, 1977), 8–9. Gressley's long introduction to this collection of letters is the most extensive biographical study of Arnold yet to appear.

from Dean Roscoe Pound at Harvard), he loaded his family into a car and drove east, never to return except for occasional visits.<sup>7</sup>

In West Virginia, Arnold quickly grew impatient with what he considered the antiquated legal and political structures of the state and set out to reform them. His most important achievement was the creation of a commission of experts (on which he served) that oversaw a reconstruction of legal procedure. The legislature, he implied, could not be trusted to do the job; only an educated elite, insulated from political pressures, was capable of evaluating the real needs of the system. The work in West Virginia brought him to the attention of Dean Charles Clark of Yale Law School, who had been involved in a similar revision of legal procedure in Connecticut. In the fall of 1930, Arnold eagerly accepted the offer of a professorship at Yale.<sup>8</sup>

Yale was appealing to Arnold for many reasons: greater prestige, a higher salary, and an escape from the social isolation he and his family had experienced in West Virginia. But its principal attraction was apparently an intellectual one. For Yale Law School (unlike Harvard, from which Arnold refused an almost simultaneous offer) was at the center of a new critique of traditional concepts of the law—legal realism—that Arnold found highly appealing. Legal realists challenged the prevailing belief, generally known as conceptualism, that legal concepts were fixed, timeless truths (or, as one critic wrote, “supernatural entities which do not have a verifiable existence except to the eyes of faith”). The realists argued that fixed legal rules and principles were “empty symbols which take on significance only to the extent that they are informed with the social and professional traditions of a particular time and place.” Most lawyers and judges claimed to act in response to timeless legal principles when they were actually operating in response to a personal, social, and economic context. Realists called for recognizing that contradiction. Lawyers, they argued, should, in Laura Kalman’s words, “shift the focus from legal rules and concepts to facts.” Such a shift could help transform the legal system from an instrument used to preserve things as they were into one used to promote social and political change. But at least equally important—since the kinds of changes the realists envisioned were relatively modest—the redefinition would make the law a more efficient and predictable mechanism, better able to respond to the real situations it encountered.<sup>9</sup>

Arnold found in legal realism a framework and a language for his own long-developing convictions that unexamined beliefs, particularly outmoded myths and symbols, obstructed the effective workings of government and the law. His ex-

<sup>7</sup> Arnold, *Fair Fights and Foul*, 30–35; Joseph Alsop and Robert Kintner, “Trust Buster: The Folklore of Thurman Arnold,” *Saturday Evening Post*, Aug. 12, 1939, pp. 30–33; Scripps-Howard wire service profile, March 11, 1938, box 102, Raymond Clapper Papers (Library of Congress, Washington, D.C.).

<sup>8</sup> Thurman Arnold to Charles Clark, Oct. 12, 1929, March 18, 1930, Thurman Arnold Papers (Manuscript Division, University of Wyoming Library, Laramie); Arnold to John R. Turner, Dec. 23, 1930, *ibid.*; Gressley, ed., *Voltaire and the Cowboy*, 25–30.

<sup>9</sup> Laura Kalman, *Legal Realism at Yale, 1927–1960* (Chapel Hill, 1986), 3–10, 30–35; Jerome Frank to Leon Henderson, July 31, 1939, box 29, Jerome Frank Papers (Yale University Library, New Haven, Conn.); Stuart Chase to Frank, June 29, 1937, box 23, *ibid.*

periences in Wyoming and West Virginia had also left him with an interest in the "science" of governmental administration, which legal realism — by rejecting fixed, universal principles — invested with great importance. In *Symbols of Government*, Arnold's first book, published in 1935, he decried the invidious distinction between the judiciary ("toward which we take an attitude of respect because we use it to symbolize an ideal of impersonal justice") and the bureaucracy ("which has little symbolic function" and which therefore becomes "a gaunt specter" to which society attributes all deviations from its ideals). In reality, he insisted, judges and bureaucrats operated in much the same way, weighing their decisions less against timeless principles than against immediate circumstance. From this he concluded, not that society should lower its esteem for the courts, but rather that it should raise its respect for bureaucracy. The real need was for a political theory that would allow administrators "to come out of the disreputable cellars in which they have been forced to work" and to operate in a place of respect in society's moral universe.<sup>10</sup>

Two years later, in 1937, Arnold published *The Folklore of Capitalism*, which received wide attention and acclaim. There he called even more explicitly for a new creed, or "folklore," that would give administrative government the same respect society already accorded the courts and private corporations. American political and economic theory, he argued, was "the most unrealistic in the world." It assumed the autonomy of the individual when every other branch of knowledge conceded the interconnectedness of society. It embraced the "ideal that a great corporation is endowed with the rights and prerogatives of a free individual," when the modern corporation was a great bureaucracy and, in most respects, little different from the state structures with which it was so often (and so favorably) contrasted.<sup>11</sup>

Unlike some realists, Arnold was not innately hostile to "symbols" and "folklore." Indeed, he could not imagine society functioning without them. His concern was with recognizing the mutability of symbols and creating a folklore that served society's present needs, acknowledging that "principles grow out of and must serve organizations." In the age of the Great Depression and the New Deal, he insisted, those needs included a recognition of the positive value of the state. Americans should develop a "religion of government which permits us to face frankly the psychological factors inherent in the development of organizations with public responsibility."<sup>12</sup>

<sup>10</sup> Thurman Arnold, "Theories about Economic Theory," *Annals of the American Academy of Political and Social Science*, 173 (March 1934), 36; Edward N. Keatny, *Thurman Arnold, Social Critic: The Satirical Challenge to Orthodoxy* (Albuquerque, 1970), 14–15, 31–32, 49; Douglas Ayer, "In Quest of Efficiency: The Ideological Journey of Thurman Arnold in the Interwar Period," *Stanford Law Review*, 23 (June 1971), 1065–68; Thurman Arnold, "Criminal Attempts—The Rise and Fall of an Abstraction," *Yale Law Journal*, 40 (Nov. 1930), 53–62, 79–80; Thurman Arnold, *Symbols of Government* (New Haven, 1935), 206, 224, 237. See also Thurman Arnold and Wesley A. Sturges, "The Progress of the New Administration," *Yale Review*, 22 (June 1933), 656–77.

<sup>11</sup> Thurman Arnold, *The Folklore of Capitalism* (New Haven, 1937), 115, 185, 263–64.

<sup>12</sup> *Ibid.*, 389; Warren J. Samuels, "Legal Realism and the Burden of Symbolism: The Correspondence of Thurman Arnold," *Law and Society Review*, 13 (Summer 1979), 997–1008; Keatny, *Thurman Arnold*, 49, 55–56; Max Lerner, "The Shadow World of Thurman Arnold," *Yale Law Journal*, 47 (March 1938), 689; Joseph Featherstone, "The Machiavelli of the New Deal," *New Republic*, Aug. 7, 1965, pp. 22–26; Christopher Lasch, *The True and Only Heaven: Progress and Its Critics* (New York, 1991), 430–32.



Thurman Arnold believed that explaining the work of the Antitrust Division to the public was an essential part of his job. Here he addresses a meeting of the American Automobile Association. *Courtesy American Heritage Center, University of Wyoming.*

Such sentiments won Arnold a sympathetic audience among liberals in the Roosevelt administration, a significant number of whom were themselves legal realists, and some of whom (most notably William O. Douglas, Arnold's close friend) were also from Yale Law School. In 1933 and 1934, Arnold performed occasional legal chores for the Agricultural Adjustment Administration and spent a summer in the Philippines negotiating sugar quota agreements. He spent the following two summers working with Douglas at the SEC. In 1937, he went on leave from Yale to do trial work for the Justice Department's Tax Division. By then, he had become a familiar figure within the Washington "liberal crowd," friendly with

Felix Frankfurter, Thomas Corcoran, Benjamin Cohen, Robert Jackson, Jerome Frank, and others. All expressed enthusiasm for *The Folklore of Capitalism*, which they interpreted, with some reason, as a defense of the New Deal. It therefore came as no surprise when Arnold was offered an important position in the administration.<sup>13</sup>

That he was named to head the Antitrust Division, however, caused considerable surprise and, in some quarters, consternation. Arnold had done some occasional consulting for Robert Jackson, the outgoing antitrust chief, but he had no particular background in antitrust law. His only significant commentary on the field had been a scathing critique of antimonopoly traditions in *The Folklore of Capitalism*. "The antitrust laws," he had written, "were the answer of a society which unconsciously felt the need of great organizations, and at the same time had to deny them a place in the moral and logical ideology of the social structure." They resembled a "thick priestly incense which hung over the nation like a pillar of fire by night and a cloud of smoke by day." Their real effect was not to reduce economic concentration but "to promote the growth of great industrial organizations by deflecting the attack on them into purely moral and ceremonial channels. . . . In this way the antitrust laws became the greatest protection to uncontrolled business dictatorships."<sup>14</sup>

Even Jackson—who had urged, as he departed to become solicitor general in 1938, that Arnold succeed him in the Antitrust Division—conceded that Arnold "had no large interest or faith in the Antitrust laws." But the antitrust directorship was the first major Justice Department post to come open at a moment when liberals in Washington were trying to find a place for Arnold in their midst. The appointment was a reflection both of the administration's eagerness to recruit a talented lawyer and of its relatively low expectations of the Antitrust Division, which Jackson, for example, had used merely as a stepping-stone to bigger things. Most New Dealers expected the Temporary National Economic Committee (on which Arnold was also to serve) to be the real center of antitrust activity.<sup>15</sup>

Arnold experienced brief embarrassment during his confirmation hearings when members of the Senate Judiciary Committee (most notably, Sen. William Borah of Idaho, the target of some direct and caustic comments in *The Folklore of Capitalism*) read passages from his book and asked him to respond. Arnold insisted that he had been criticizing only the enforcement of the antitrust laws, not the laws themselves. Borah asked him, "Do you believe in breaking up monopolies?" Arnold replied, "Certainly." Borah seemed satisfied, but his concerns were well grounded. Little in

<sup>13</sup> Chase to Frank, June 29, 1937, box 23, Frank Papers; Frank to Arnold, Oct 25, 1939, Arnold Papers; Arnold to Bernard Kilgore, Nov. 3, 1939, *ibid.*; Peter Irons, *The New Deal Lawyers* (Princeton, 1982), 7–9, 124–25.

<sup>14</sup> Arnold, *Folklore of Capitalism*, 96, 211, 213–41. Arnold's only previous commentary on the trust question expressed skepticism about laws governing the creation of trusts but said virtually nothing about the antitrust laws. See Thurman Arnold, "The Restatement of the Law of Trusts," *Columbia Law Review*, 31 (May 1931), 800–23.

<sup>15</sup> *New York Times*, March 6, 1938, p. 1; Robert H. Jackson, autobiography, 1944, box 188, Robert H. Jackson Papers (Library of Congress); Arnold to Leon Green, March 17, 1938, Arnold Papers; Arnold to Herbert E. Goodrich, March 24, 1938, *ibid.*; Arnold, *Fair Fights and Foul*, 135–36; Wilson D. Miscamble, "Thurman Arnold Goes to Washington: A Look at Antitrust Policy in the Later New Deal," *Business History Review*, 56 (Spring 1982), 5–9.





Members of the Temporary National Economic Committee assembled in the U.S. Capitol early in 1937. Thurman Arnold is seated, second from right. Sen. Joseph C. O'Mahoney of Wyoming, chairman of the committee, is seated at center. Directly behind him, in the light suit, is William O. Douglas. *Courtesy American Heritage Center, University of Wyoming.*

Arnold's subsequent career suggests that he did, in fact, believe enforcing the antitrust laws had much to do with what Borah called "breaking up monopolies."<sup>16</sup>

Just how different Arnold's philosophy was from that of more traditionally populist antimonomopolists was not immediately apparent once he assumed his new office, for the frenzied activity he brought to the Antitrust Division tended for a time to obscure ideological subtleties. Unlike Jackson, who had believed that reform of the antitrust laws must precede any major campaign of prosecutions, Arnold was determined to use the power he had and to use it immediately. The existing antitrust laws "may be imperfect," he wrote Senator Borah shortly after his confirmation, but "it would be fatal not to do the utmost we can with them since that is the only instrument we have." In his first two years in office, he succeeded in increasing his

<sup>16</sup> Among the statements that surfaced to embarrass Arnold during his confirmation hearings was the following: "Men like Senator Borah founded political careers on the continuance of [antitrust] crusades, which were entirely futile but enormously picturesque, and which paid big dividends in terms of personal prestige." Arnold, *Folklore of Capitalism*, 217. "Hearings before a subcommittee of the Senate Judiciary Committee on the nomination of Thurman W. Arnold as assistant attorney general, 75 Cong., 3 sess.," March 11, 1938, pp. 4-6, box 15, Wendell Berge Papers (Library of Congress); Henry Hyde to William Borah, July 6, 1938, box 772, William Borah Papers, *ibid.*; Walter Williams to Borah, Feb. 23, 1939, *ibid.*; Arnold to Matthew Josephson, March 29, 1938, Arnold Papers; Arnold to Douglas Maggs, April 22, 1937, *ibid.*; Arnold to Borah, March 16, 1938, in Gressley, ed., *Voltaire and the Cowboy*, 268-69; Harold L. Ickes, *The Secret Diary of Harold L. Ickes* (3 vols., New York, 1954), II, 347.

budget more than fivefold and in enlarging his staff from fifty-eight lawyers to over three hundred. Most of all, he radically expanded the number and range of prosecutions. In 1938, the division had instituted 11 new cases; in 1940, it initiated 92. In 1938, 59 major investigations were begun; in 1940, 215. The Justice Department filed 923 complaints in 1938 and 3,412 in 1940. Arnold was not only active but effective. He won almost every case he took to trial (31 of 33 in 1940) and settled most others out of court on terms favorable to the government. One reason he was able to win ever larger appropriations for his division was that he brought three times as much money into the treasury in fines and settlements as he spent on prosecutions. Two tactics enabled Arnold to widen the impact of antitrust prosecutions and to move enforcement in unprecedented directions: a new and more aggressive use of consent decrees and the launching of industrywide prosecutions.<sup>17</sup>

The Antitrust Division had made use of consent decrees throughout its history, filing a civil suit against any violator of the Sherman Antitrust Act and then dropping it in exchange for an agreement by the defendant to stop the offending practice. But Arnold believed past use of the consent decree had too often been a "process by which criminal activity was condoned," and he was determined to use it more creatively and intrusively. No longer could defendants avoid prosecution simply by abandoning "the practices for which they had been indicted." Business leaders, Arnold insisted, must agree to much more sweeping reforms in their behavior than even a successful criminal prosecution could have produced. They must eliminate not only the offending practice but also "the conditions in the entire industry which compelled these illegal practices."<sup>18</sup>

A second departure from traditional practice, closely allied to the first, was the use of "industry-wide" prosecutions, what Arnold described as "prosecuting simultaneously all of the restraints which hamper the production and distribution of a product from raw material to consumer." Anticompetitive practices were not necessarily confined to individual firms or organizations; they could permeate an entire industry, from top to bottom. The only effective way to preserve competition was, as the journalists Joseph Alsop and Robert Kintner characterized Arnold's view, to "hit hard, hit everyone and hit them all at once."<sup>19</sup>

<sup>17</sup> Arnold to Borah, March 16, 1938, Arnold Papers; Gene Gressley, "Thurman Arnold, Antitrust, and the New Deal," *Business History Review*, 38 (Summer 1964), 217-21; Karl A. Boedecker, "A Critical Appraisal of the Antitrust Policy of the United States Government from 1933 to 1945" (Ph.D. diss., University of Wisconsin, Madison, 1947), 223; Thurman Arnold, "An Inquiry into the Monopoly Issue," *New York Times Magazine*, Aug. 21, 1938, p. 1-2; "The New Deal and the Trusts," *New Republic*, Dec. 7, 1938, p. 115; *New York Times*, July 8, 1939, p. 8.; "Trust Buster Benched," *Newsweek*, Feb. 22, 1943, pp. 32-34; Harold Smith Diary, Nov. 27, 30, 1939, box 1, Harold Smith Papers (Franklin D. Roosevelt Library, Hyde Park, N.Y.); Gressley, "Thurman Arnold," 224.

<sup>18</sup> Thurman Arnold, speech, April 28, 1938, box 15, Berge Papers; Thurman Arnold, *The Bottlenecks of Business* (New York, 1940), 141-43, 152-54. Arnold increased pressure on businesses by filing not only civil but criminal suits. Any settlement, he insisted, must be "subject to reexamination by the court at the earliest convenient time. . . . It should provide access to the corporate books and records so that examination of how the plan is working will be easy." *Ibid.*, 152-63. Milton Katz, "The Consent Decrees in Antitrust Administration," *Harvard Law Review* 8 (Jan. 1940), 415-47; Benjamin Cohen to Milton Katz, Jan. 15, 1940, Temporary National Economic Committee Records, box 58, RG 144 (National Archives, Washington, D.C.); Hawley, *New Deal and the Problem of Monopoly*, 429-30; Gressley, "Thurman Arnold," 222-23; Bruce Bliven, "Lower to Washington," *New Republic*, Dec. 27, 1939, p. 278.

<sup>19</sup> Arnold, *Bottlenecks of Business*, 191-93; Alsop and Kintner, "Trust Buster," 7; Bliven, "Lower to Washington," 278-79.

The most dramatic result of the industrywide approach, the biggest project of Arnold's years in office, was a massive, nationwide campaign to restore competition to the housing construction industry—"the first [antitrust prosecution] of industry-wide scope ever undertaken in the history of [the] Antitrust Division," Arnold boasted. Many New Dealers believed sluggishness in the housing industry was among the principal obstacles to economic recovery. Home construction was slow and costs were artificially high, they argued, because a rigid system of "administered prices" was obstructing economic growth. How else could one explain the simultaneous decline in new construction and the rise in construction costs? How else could one explain the failure of government "pump priming" directed at housing to stimulate any sustained growth in that market? "In the building industry," Arnold claimed, "we are confronted with a series of restraints, protective tariffs, and aggressive combinations which has practically stopped progress." The Antitrust Division filed nearly one hundred separate criminal suits and several dozen civil actions against defendants at all levels of the housing industry and in all regions of the country. It prosecuted producers and distributors of building materials and contractors. In the most controversial move of all, the Antitrust Division prosecuted the building trades unions. The prosecution claimed that the unions had colluded with contractors to protect restrictive agreements and had "refused to permit the use of new products or new processes because of their fear that the new method might make it possible to erect a house with fewer hours of labor than the old."<sup>20</sup>

At the same time, the Antitrust Division was mobilizing similarly "massed" assaults on monopolistic practices in other large industries: food, transportation, automobiles, aluminum, prescription drugs, and insurance. There were challenges to the way corporations used the patent laws to "build a domestic or international cartel or to stifle enterprise or production." And there were preliminary plans for major actions in other industries. Arnold's confidence and his ambitions for his division seemed to grow with every success. "In the entire history of the Sherman Act," he boasted in 1940, "there has never been such support for its enforcement."<sup>21</sup>

But Arnold did more than expand the Antitrust Division's administrative capacities and its public profile. He also embraced a conception of the antitrust laws that was profoundly, if subtly, different from that of earlier generations of reformers.

<sup>20</sup> *New York Times*, July 8, 1939, p. 8; *ibid.*, July 16, 1939, sec. E, p. 7; Transcript of Treasury Department meeting, Diaries of Henry Morgenthau, Nov. 5, 1937, vol. 94 (Roosevelt Library); Arnold, *Bottlenecks of Business*, 37-43, 50-54; Sidney Fine, *Frank Murphy: The Washington Years* (Ann Arbor, 1984), 50; Arnold to John Bainbridge, June 3, 1940, Arnold Papers.

<sup>21</sup> Corwin D. Edwards, "Thurman Arnold and the Antitrust Laws," *Political Science Quarterly*, 58 (Sept. 1943), 338-55; Arnold to Robert H. Jackson, June 12, 1940, Arnold Papers; Arnold to Richardson Wood, Oct. 19, 1940, *ibid.*; "Arnold vs. ICC," *Business Week*, Aug. 1, 1942, pp. 23-24; "Monopoly Attacks Increasing," *Newsweek*, Nov. 6, 1939, p. 50; I. F. Stone, "Thurman Arnold and the Railroads," *Nation*, March 6, 1943, p. 332; Burnham Carter, "The Sherman Anti-Trust Blackjack," *American Mercury*, 52 (April 1941), 427-32; Arnold to William H. Grimes, Nov. 18, 1938, Arnold Papers; Arnold to Kenneth W. Payne, Aug. 2, 1941, *ibid.*; Arnold to R. I. Elliott, Nov. 14, 1938, *ibid.*; Arnold to Edwin S. Friendly, Oct. 21, 1940, *ibid.*; Arnold to Henderson, March 16, 1939, Temporary National Economic Committee Records; Thurman Arnold, "The Abuse of Patents," *Atlantic Monthly*, 170 (July 1942), 16; Thurman Arnold, "We Must Reform the Patent Law," *ibid.* (Sept. 1942), 54; Edwards, "Thurman Arnold and the Antitrust Laws," 343, 353; Arnold, *Bottlenecks of Business*, 277.

The antitrust idea, like the larger antimonopoly impulse of which it was a part, was a diverse and contested one. Neither Borah nor Arnold nor anyone else could speak for all the many ways in which Americans had promoted, interpreted, and enforced the antitrust laws in the forty years of their existence. Those laws had emerged in response to the demands of many different groups, each with its own reasons for fearing monopoly power. Agrarian dissidents had hoped to curb the power of railroads and corporations that processed and marketed food. Workers sought to challenge the new factory system that was robbing them of their autonomy. Small producers wanted protection against large-scale organizations. Local merchants looked for a defense against chain stores. Consumers demanded an end to what they considered the artificially inflated prices trusts and monopolies imposed on them. There was no single antitrust idea in the United States in the late nineteenth and early twentieth centuries; there was a cluster of related ideas.

Yet common themes suffused most of these different approaches. One of the most important—a theme that permitted the antitrust cause to engage the passions of the public—was the urge to combat concentrated power and restore the authority of individuals and communities. Farmers, workers, small producers, local merchants, and consumers—all resented monopoly power not only because they blamed it for their economic problems but also because they feared it as a threat to their ability to govern their futures. Not all supporters of antitrust laws agreed on the best way to fight the problem. But most believed that a solution must shift power from inaccessible corporate institutions to “the people,” that the economy must be made responsive to a larger notion of the public interest than the corporate world was likely to produce.<sup>22</sup>

Arnold's approach to the problem of monopoly embraced little of the rhetoric and virtually none of the substance of this tradition. His departure from earlier approaches to the antitrust laws was visible in many ways, but nowhere more clearly than in his attitude toward the size of corporate organizations. A principled, even moral, opposition to the “curse of bigness” had been a conspicuous characteristic of most American antimonopoly movements from their beginnings in the mid-nineteenth century to the early years of the Great Depression; and that fear of “bigness” had been a large part of the public rationale for the antitrust laws themselves. Louis Brandeis, who articulated the case against monopoly for many early twentieth-century Americans, made opposition to large-scale organization a central element of his critique. He wrote in 1933, “I am so firmly convinced that the large unit is not as efficient—I mean the very large unit—as the smaller unit, that I believe that if it were possible today to make the corporations act in accordance with what doubt-

<sup>22</sup> The literature on antimonopoly ideas in America is vast and as contested as the ideas themselves. On the populist and democratic underpinnings of antimonopoly sentiment, see, for example, Bruce Palmer, *“Man over Money”: The Southern Populist Critique of American Capitalism* (Chapel Hill, 1980), 114–17; David Montgomery, *Beyond Equality: Labor and the Radical Republicans, 1862–1872* (New York, 1967), 335–56, 425–47; and Steven L. Piott, *The Antimonopoly Persuasion: Popular Resistance to the Rise of Big Business in the Midwest* (Westport, 1985), 1–10. On the links between consumers and antimonopoly sentiment, see, for example, H. Roger Grant, *Insurance Reform: Consumer Action in the Progressive Era* (Ames, 1979); and David P. Thelen, *The New Citizenship: Origins of Progressivism in Wisconsin, 1885–1900* (Columbia, Mo., 1972). On the origins of the antitrust laws, see Hans Thorelli, *The Federal Antitrust Policy* (Baltimore, 1954).

less all of us would agree should be the rules of trade no huge corporation would be created, or if created would be successful." Even many younger liberals, suffused with the pragmatic spirit of the New Deal and uninterested in the kind of large-scale trustbusting that Brandeis had advocated, remained suspicious of large organizations, which they considered antidemocratic. At least in theory, they believed in reducing the size of corporate institutions.<sup>23</sup>

But to Arnold neither the size of a corporate venture nor the degree to which it was subject to public control was relevant. He had made that clear in *The Folklore of Capitalism* through his caustic characterization of Borah and other traditional antimonopolists. While he prudently retreated from his attacks on Borah once he entered the Justice Department, he maintained his attacks on the ideas Borah embraced. "As a generalization," he said in 1938, "it is as meaningless to say that small units are better than big units as to say that small buildings are better than big ones." Indeed, he spoke frequently and vehemently about the positive value of bigness, about the great contributions of large organizations to the growth of the industrial economy, and about the impossibility and undesirability of restoring an atomized, small-scale economy—a goal he dismissed as nostalgic folly. "There can be no greater nonsense," he wrote in 1942, "than the idea that a mechanized age can get along without big business—its research, its technicians, its production managers. Not only our production during the war, but our way of life after the war, depends on big business." If the antitrust laws were allowed to remain "simply an expression of a religion which condemns largeness as economic sin," they would quickly become "an anachronism."<sup>24</sup>

By rejecting the "moral value of trustbusting," by repudiating the idea that "bigness is a curse in itself," Arnold was also implicitly endorsing a vision of the role of the state quite different from that of many earlier antimonopolists. The populist and Brandeisian antimonopoly ideals rested on a fear of concentrated power in both private and public institutions. Large corporations were not only dangers in themselves. They were dangerous, too, because controlling them would require the state to become a Leviathan. In a small-scale economy, the state could also remain small. Power could remain accessible to the people, not concentrated in remote government bureaucracies. But while Arnold spoke occasionally of the dangers of excessive government power, he was actually promoting a significant expansion of the government's regulatory power—and celebrating the possibility of that expansion.<sup>25</sup>

Arnold's view of the state reflected his view of the economy. Unlike some earlier antimonopolists, he did not believe the modern economy tended naturally toward a

<sup>23</sup> Thomas K. McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* (Cambridge, Mass., 1984), 94–109, 135–42.

<sup>24</sup> *New York Times*, July 8, 1939, p. 8; Thurman Arnold, "What Is Monopoly?," *Vital Speeches of the Day*, July 1, 1938, p. 568; Thurman Arnold, "The Abuse of Patents," 16; Arnold, *Bottlenecks of Business*, 4.

<sup>25</sup> Arnold to Allen C. Dibble, Aug. 23, 1940, Arnold Papers; "Monopoly and the New Deal," transcript of University of Chicago Round Table, Nov. 27, 1938, pp. 2–5, Berge Papers; *New York Times*, Nov. 25, 1943, p. 43; "Do Monopolies Retard or Advance Business Recovery?," *Town Meeting*, Jan. 30, 1939, pp. 11–12; Thurman Arnold, "Feathers and Prices," *Common Sense*, 8 (July 1939), 6; Alan R. Sweezy, "Mr. Arnold and the Trusts," *New Republic*, June 8, 1942, p. 803; Arnold to William Allen White, Sept. 9, 1943, Arnold Papers.

“normal” competitive condition, which monopolistic practices artificially disrupted. Rather, he believed that obstacles to competition were so thoroughly woven into the fabric of the economy—so embedded in pricing and production practices at every level—that there was no “natural” competitive structure to which society could “return.” Hence, if competition were to play a role in economic life, as Arnold believed it must, it would have to be created and sustained by public action. Government could not hope to “set the competitive machinery right” and withdraw from the arena. It would have to become a permanent part of the machinery, a “policeman” or “referee,” constantly monitoring and regulating business practices. “The maintenance of a free market,” Arnold wrote in 1940, “is as much a matter of constant policing as the flow of free traffic on a busy intersection. It does not stay orderly by trusting to the good intentions of the drivers or by preaching to them. It is a simple problem of policing, but a continuous one.” A year earlier, he had used another image: “The competitive struggle without effective antitrust enforcement is like a fight without a referee.”<sup>26</sup>

In this, Arnold was saying little that was inconsistent with the history of antitrust law enforcement before and during the New Deal. He was, however, offering a view of the state significantly at odds with some of the central ideological traditions of the antitrust movement. His was a position more reminiscent of Theodore Roosevelt’s nationalistic economic ideas (or Thorstein Veblen’s concern with efficiency) than of the more populist antimonopolist views of Brandeis or the Woodrow Wilson of 1912. It was a position that emphasized the role of experts, agencies, and bureaucratic processes in the effort to control monopoly power and one that implicitly rejected the concept of returning economic authority to “the people.” The distinction was clear in the way Arnold fused his defense of competition with his effort to enhance the power and status of the administrative process and the people who controlled it. He sought (as he had at least since the publication of *Symbols of Government* in 1935) to legitimate an important and permanent role for administrators and experts who would be largely independent of “politics.” He was willing, even eager, to permit administrators to interpret and apply regulations in ways unforeseen by their legislative drafters. His most important task, he believed, was not defining economic goals, but securing “adequate weapons”—sufficient administrative capacity—to make his agency’s presence felt in the economy. In this, he was aligning himself solidly with James Landis and other New Deal champions of regulatory reform to whom process was at least as important as goals.<sup>27</sup>

<sup>26</sup> Arnold, *Bottlenecks of Business*, 122; Arnold, “Feathers and Prices,” 5–6; Lerner, “Trust-Buster’s White Paper,” 389; Thurman Arnold, “How Far Should Government Control Business: Competition Requires a Referee,” *Vital Speeches of the Day*, March 1, 1939, pp. 290–92; Leon Henderson diary, Sept. 9, 1938, box 36, Leon Henderson Papers (Roosevelt Library).

<sup>27</sup> James R. Brackett to Katz, Feb. 9, 1940, Temporary National Economic Committee Records; Thurman Arnold, “An Inquiry into the Monopoly Issue,” *New York Times Magazine*, Aug. 21, 1938, pp. 2, 14; Arnold to Elliott Dunlap Smith, Oct. 12, 1938, Arnold Papers; Arnold to E. J. Coil, Sept. 9, 1940, *ibid.*; Chase to Arnold, April 15, 1941, *ibid.*; Arnold to James Landis, March 23, 1937, *ibid.*; Arnold to William Douglas, May 7, 1937, *ibid.*; Curtice Hitchcock to Arnold, Nov. 1, 1938, *ibid.*; Ayer, “In Quest of Efficiency,” 1085; Lasch, *True and Only Heaven*, 432–34.

Arnold distinguished himself from other antimonopolists, too, in his rejection of—indeed contempt for—the idea of “fundamental solutions” to economic problems. “We have been passing through a period where the case by case method of reaching economic solutions was psychologically difficult because men were too much interested in broad ideas,” he wrote in 1940. “The objection to the enforcement of the Sherman Act as a practical solution to our problems was always that we needed a more fundamental cure.” But the New Deal, he claimed, had injected a healthy dose of realism into political thought. “Today the pendulum is swinging against broad general solutions. . . . We can now get down to the tiresome job of handling smaller and more concrete problems in the light of their particular facts. And in such a situation the method of the Sherman Act comes into its own.” The business of government, in other words, was not the inspiring task of reaching for a great, permanent “resolution” of economic questions. It was the grubbier job of establishing administrative mechanisms that would become a constant and permanent presence in the economy and that would grapple perpetually with problems that could never be completely “solved.”<sup>28</sup>

Arnold also broke decisively with earlier rationales for antitrust activity in his definition of the ultimate purposes that activity was to advance. Eclectic as it had been, the antimonopoly impulse had usually included a belief that the public interest would be best served by ensuring that the institutions of the economy remained accountable and responsive to popular needs and desires. It had rested on essentially democratic aspirations. In part, that had reflected a traditional reverence for the democratic potential of small producers (small businesses and manufacturing concerns, independent shops, family farms) and a commitment to protecting them from being “swallowed up” or destroyed by the great combinations. But it had also reflected the belief among consumers that they could control prices and services only if they could influence the behavior of economic institutions. The consumer interest, too, required a change in the structure of production. Arnold’s curt rejection of the idea that there was anything intrinsically wrong with “bigness” and his conviction that the best solution to monopoly power was supervision by government experts left him with little sympathy for producer-oriented, democratic rationales.<sup>29</sup>

By what standards, then, should government judge the effects of monopoly? To Arnold, there was one, simple, absolute standard: the price to the consumer. Whatever artificially inflated consumer prices (and thus reduced economic activity)—whether the anticompetitive practices of a great monopoly, the collusive activities of small producers, or the illegitimate demands of powerful labor organizations—was a proper target of antitrust prosecution. Any organization, regardless of its size, that did not harm the consumer had nothing to fear. Emphasis on this narrow conception of the “consumers’ aspect,” uncomplicated by any concern about empowering consumers themselves, had liberated the enforcers of the antitrust laws

<sup>28</sup> Arnold, *Bottlenecks of Business*, 274; Thurman Arnold, “Why Trustbusting?” n.d., Temporary National Economic Committee Records.

<sup>29</sup> Samuels, “Legal Realism,” 1008.

from the impossible task of evaluating the "moral aspects of the offense" and determining "that will-o'-the-wisp corporate intent." They were free to concentrate instead on assessing the effects of economic activity by a simple, uniform standard.<sup>30</sup>

In this way, enforcement of the antitrust laws would contribute to a larger goal that was moving to the center of late New Deal economic policy: increasing mass consumption by stimulating purchasing power. Arnold agreed with the emerging Keynesians in the administration who argued that federal budget cuts had caused the 1937 recession. He vigorously supported the president's spending initiatives in the spring of 1938. At times he expressed skepticism about some aspects of Keynesian theory, criticizing it for insufficient attention to anticompetitive practices within economic institutions. But he accepted John Maynard Keynes's repudiation of Say's Law (the belief, central to classical economics, that supply automatically created demand) and applauded his emphasis on stimulating mass consumption. An aggressive antimonopoly program, Arnold argued, was not only compatible with, but necessary to, the achievement of Keynesian goals. Most of the consumption-oriented economists associated with the New Deal (and, indeed, Keynes himself) generally agreed.<sup>31</sup>

In some respects, Arnold's tenure in the Antitrust Division was dramatically successful. In the short run, he launched and won an impressive number of important antitrust prosecutions. For the longer term, he greatly expanded the administrative capacities of his division and developed new techniques for enforcement of the antitrust laws. By detaching antimonopoly policy from its preoccupation with bigness, he transformed the antitrust laws from the symbolic mechanisms he had denounced in *The Folklore of Capitalism* into mechanisms theoretically capable of regulating a modern, integrated, industrial economy. Future antitrust directors would have much wider options available to them because of Arnold's work.

By the standards Arnold set for himself, however, his years in the Justice Department must be seen as a failure. For Arnold had aspired to much more than a technical refurbishment of the Antitrust Division. He had hoped that his own, "modern" conception of the antitrust laws would become a central and enduring part of the liberal state, both administratively and ideologically. But that would have required a secure popular and political base for his conception, something that neither Arnold nor anyone else was able to create.

Arnold recognized that building popular support for this redefined notion of antitrust activity would require creating new rationales for antimonopoly activity, rationales unrelated to older, populist fears of bigness and concentrated power. Indeed, he considered the generation of publicity an essential part of his job. Few

<sup>30</sup> Arnold, *Bottlenecks of Business*, 263–81; Ayer, "In Quest of Efficiency," 1077; Arnold to Dibble, Aug. 23, 1940, Arnold Papers; Gressley, "Thurman Arnold," 230–31.

<sup>31</sup> Arnold, *Bottlenecks of Business*, 9, 276–77; Arnold, "Inquiry into the Monopoly Issue," 14; Arnold to Lon Fuller, Jan. 21, 1941, Arnold Papers; Guy Martin to Arnold, Feb. 2, 1938, *ibid.*; "Prices and Social Policy," *New Republic*, Feb. 17, 1941, p. 244; Arnold, *Folklore of Capitalism*, 174.



figures in the New Deal were so assiduous at promoting their work and their ideas. Arnold participated in radio forums, appeared at meetings of business and professional groups, and wrote articles for both popular and professional periodicals; in 1940 he published a book—*The Bottlenecks of Business*—aimed at a popular audience, explaining his views of the antitrust laws and recounting some of his experiences in enforcing them. Arnold was always a natural showman, with a sardonic humor that some considered flippant. His irreverence was all the more striking because it stood in such contrast to his staid, almost stuffy appearance. (With his slicked-back hair, his thin mustache, and his dark, double-breasted suits, he looked like a slightly paunchy Ronald Colman.) However personally satisfying the public prominence may have been, his real aim, he insisted, was to promote public understanding of, and support for, the new standards of economic behavior that the Antitrust Division was erecting. If public life functioned on the basis of popular mythology, as Arnold had long believed, then one of his principal tasks was to win a place for antitrust enforcement within that mythology.<sup>32</sup>

Yet even before he left office, it was clear that this effort at legitimization had failed. There were many reasons for that failure. Arnold's own limitations, including the sardonic approach to public issues that led many of his contemporaries and some later historians to dismiss him as a showman and even a buffoon, at times made it difficult for him to win serious public attention for his ideas. Mobilization for World War II and the massive shift of power within the federal government away from liberal administrators and toward corporate interests undercut Arnold's ability to pursue antitrust cases. But most of all, perhaps, Arnold was unable to make an effective case, either to the public or to other policy makers, that aggressive antitrust enforcement was essential for promoting mass purchasing power and protecting consumers. There were always other, less controversial, vehicles for pursuing those goals.

Arnold's political problems stemmed in part from his controversial effort to use the antitrust laws against organized labor, an effort he began during his construction industry campaign with his assault on the building trades unions and continued well beyond it. His justification for prosecuting unions was, on the surface at least, simple and plausible: Anticompetitive labor regulations, no less than anticompetitive business practices, artificially inflated prices. He was not, he insisted, challenging labor's right to agitate in any reasonable way to advance its aims. Instead, he was arguing that the rights of labor could not supersede the rights of the consumer. For a building trade union to enforce a rule "limiting the paint brush that can be used to 4½ inches," to cite one of Arnold's favorite examples, was a direct assault on the interests of the consumer and protected no legitimate labor interest; it served only to protract (and hence artificially raise the cost of) painters' work. As Arnold later wrote, "When a labor union utilized its collective power to destroy another

<sup>32</sup> Alva Johnston, "Thurman Arnold's Biggest Case," *New Yorker*, Jan. 31, 1942, pp. 41-42; Arnold to Arthur Sulzberger, Aug. 25, 1939, Arnold Papers; Carl Holderman to Arnold, Dec. 22, 1939, *ibid.*; Arnold to Frank Knox, June 25, 1940, *ibid.*; J. David Stern to Robert S. Allen, Dec. 9, 1939, *ibid.*

union, or to prevent the introduction of modern labor-saving devices, or to require the employer to pay for useless and unnecessary labor, I believed that the exemption [from the antitrust laws] had been exceeded and that the union was operating in violation of the Sherman Act."<sup>33</sup>

Arnold was not a labor baiter. He had supported the Wagner Act (National Labor Relations Act) of 1935 and the controversial 1937 sit-down strikes in automobile, rubber, and other industries. He denounced company unions. Most of the specific anticompetitive union practices he criticized were, as he claimed, ones that even many labor leaders found indefensible. But Arnold's careful, tempered public statements about labor failed to convey the depth of his resentment at what he sometimes privately called the "dictatorial" and "autocratic" power of union hierarchies. His letters on the subject, and occasionally his published writings, were suffused with a moralistic contempt for anticompetitive labor practices. In 1943, after leaving the Justice Department, he offered a scathing assessment:

Some of these labor organizations are beginning to take on the color of the old Anti-Saloon crowd in its palmy days before Repeal. . . . Independent businessmen, consumers and farmers have had to sit back in enraged helplessness while labor used coercion for the following purposes: Price control, eliminating cheap methods of distribution, creating local trade barriers by restricting the use of materials made outside the state, preventing organization of new firms, eliminating small competitors and owner-operators, preventing the efficient use of machines and materials. . . . A certain percentage is graft and corruption, but a larger percentage is the result of the age-old struggle for economic power by men who love power.<sup>34</sup>

Unions are, by definition, anticompetitive institutions. On one level, Arnold knew and accepted that and attempted only to curb the extremes. But at some other, more visceral level, it seems clear, he simply did not like unions very much. He accepted their legitimacy when they were dealing with a few, strictly defined issues: "wages, conditions of labor, and fringe benefits." But when unions attempted to protect or secure advantages for their members by artificially raising the cost of work (and hence the products of that work), Arnold likened the result to the "administered prices" for which antimonopolists had long criticized corporations. In the end, he argued, labor arrangements should be judged as corporate arrangements should be judged: by their contributions to the health of the economy and to the interests of consumers.<sup>35</sup>

<sup>33</sup> Arnold to Dorothy Thompson, Nov. 27, 1939, Arnold Papers; Arnold, *Fair Fights and Foul*, 115-16.

<sup>34</sup> Arnold, *Folklore of Capitalism*, 191; Arnold to Buckley Griffin, Nov. 7, 1940, Arnold Papers; Thurman Arnold, "Labor's Hidden Holdup Men," *Reader's Digest*, 38 (June 1941), clipping, *ibid.*; A. E. Duncan to Arnold, June 20, 1941, *ibid.*; Arnold to Richardson Wood, Oct. 19, 1940, *ibid.*; Arnold to Attorney General, June 21, 1940, *ibid.*; "The Folklore of Unionism," *Time*, Oct. 18, 1943, p. 24. In his memoirs, Arnold wrote with apparent approval of the Taft-Hartley Act of 1948: "Today there is still no effective curb against the abuse by unions of their privileges, though some of the practices described have been declared unfair under the Taft-Hartley Act." See Arnold, *Fair Fights and Foul*, 119.

<sup>35</sup> *New York Times*, Jan. 28, 1940, p. 27; *ibid.*, Dec. 6, 1941, p. 10; Elliot Thutston, memorandum, Oct. 31, 1937, box 38-2, Marriner S. Eccles Papers (University of Utah Library, Salt Lake City); Arnold to Charles J. Connick, Dec. 4, 1941, Arnold Papers.

Such positions naturally won Arnold few friends in the labor movement. They also lost him many friends in the liberal community. To most of its members, uncritical support of unionization had become a basic article of faith (and a political necessity as well, considering labor's importance within the New Deal coalition). Using the antitrust laws to attack labor "abuses" reminded union supporters of earlier and long-since-repudiated uses of the Sherman Act by the courts to destroy unions altogether as "organizations in restraint of trade." The American Federation of Labor (AFL) somewhat extravagantly denounced Arnold's prosecutions as "the most vicious attack" the government had ever made on "organized labor and the fundamentals upon which it is founded." The *Nation* accused him of ignoring legislation that had specifically exempted unions from antitrust prosecutions (the Clayton Antitrust, the Norris-LaGuardia and the Wagner acts) and of once again twisting the Sherman Act into an antilabor law. "It is better to suffer certain labor abuses," its editorial writers argued, "than to endanger labor-unionism by using the anti-trust laws against them." Even some of Arnold's closest friends within the New Deal were skeptical. Robert Jackson, his predecessor as chief of the Antitrust Division, privately expressed "great doubt whether the antitrust laws could be properly applied to the activities of labor unions." And in 1941, the Supreme Court, newly filled by Roosevelt with liberal appointees, ruled in *United States v. Hutcheson* that Arnold had exceeded his authority in filing an antitrust suit against the AFL's United Brotherhood of Carpenters. The decision, Arnold privately admitted, was "a tremendous blow." Unions, he predicted, would be emboldened by the Court's support and would be less likely now to stop "vicious practices" simply because of the threat of a suit. Within a few months, the effects of the *Hutcheson* decision had brought the construction industry project to a virtual halt and had helped stymie plans for launching other comprehensive campaigns.<sup>36</sup>

Arnold paid a dual price for his unsuccessful effort to discipline unions through antitrust prosecutions. Once unions became largely exempt from such prosecutions, his industrywide strategy lost much of its economic credibility, as the collapse of the construction industry project illustrated. Perhaps equally important, Arnold's political standing within the liberal community, a community upon which he was critically dependent, suffered a blow from which it never fully recovered. As a result, he would have fewer defenders when he faced the pressures of the new wartime state.

As the nation began to mobilize for war in 1940 and 1941, Arnold argued strenuously that suspension of antitrust enforcement would have dire consequences, that without vigorous prosecutions World War II might produce the same dangerous cartelization that World War I had helped create. Cartelization in the United States, he said, had "slowed down production in basic war materials and given Hitler his

<sup>36</sup> *New York Times*, Nov. 28, 1940, p. 13; "Blunderbuss," *Nation*, Dec. 2, 1939, pp. 596-97; Jackson, autobiography, box 188, Jackson Papers; "Arnold Anti-Labor Drive Scorned," *American Federationist*, 49 (Nov. 1941); Henderson diary, Nov. 3, 1939; Holderman to Arnold, Dec. 22, 1939, Arnold Papers; Arnold to Holderman, Jan. 2, 1940, *ibid.*; *United States v. Hutcheson*, 312 U.S. 219 (1941); Arnold, *Fair Fights and Foul*, 116; Gressley, ed., *Voltaire and the Cowboy*, 49-50; Arnold to Edward A. Evans, Feb. 17, 1941, Arnold Papers; Arnold to Reed Powell, Feb. 21, 1941, *ibid.*



Thurman Arnold posed with staff members in the Denver office of the Antitrust Division in October 1942. *Courtesy American Heritage Center, University of Wyoming.*

flying start." The antitrust laws would help the nation catch up with Germany, Arnold insisted. They could be "one of the most effective legal means of speeding national defense." They "must not be laid on the shelf in an industrial war." Curiously, he hardly spoke of the role cartelization had played in the creation of the fascist regimes in Germany and Italy—a line of argument that might have resonated more powerfully than anything else with the wartime public and with the rest of the Washington bureaucracy. Perhaps that was because his claim that cartels impeded mobilization for military production was difficult to reconcile with his simultaneous argument that the highly cartelized German war machine was outproducing the United States.<sup>37</sup>

Arnold knew he had to accommodate his work to the political and economic requirements of wartime. He created a special unit within the Antitrust Division to give prior approval to defense production plans that manufacturers feared might

<sup>37</sup> Richard Lee Strout, "The Folklore of Thurman Arnold," *New Republic*, April 27, 1942, p. 570; Arnold, *Folklore of Capitalism*, 205; Thurman Arnold, draft of unpublished article for the *Progressive*, 1944, Berge Papers. Several of Arnold's colleagues in the Antitrust Division spoke ominously of how the elimination of competition within German industry during World War I had helped create the fascist economic arrangements of the Nazi era. See, for example, Heinrich Kronstein to Arnold, Dec. 16, 1941, Arnold Papers. Arnold, *Bottlenecks of Business*, 73; Thurman Arnold, "How Monopolies Have Hobbled Defense," *Reader's Digest*, 39 (July 1941), 51, 55; Thurman Arnold, speech to the National Petroleum Association, Sept. 13, 1939, box 102, Clapper Papers; Thurman Arnold, speech to the California Bar Association, Sept. 19, 1941, *ibid.*; *New York Herald Tribune*, Sept. 14, 1939, p. 13; Arnold to Frank W. Abel, June 2, 1942, Arnold Papers; Joseph Zashin to Arnold, April 15, 1942, *ibid.*; *New York Times*, April 18, 1942, p. 32; Gressley, "Thurman Arnold," 227–29; Eliot Janeway, *The Struggle for Survival: A Chronicle of Economic Mobilization in World War II* (New Haven, 1951), 187.

violate the Sherman Act. The basis of the antitrust laws, Arnold explained, was the "rule of reason." Any measures the war agencies believed essential to national defense were by definition reasonable. "It is not conceivable to me that any plan safeguarded as I have described can be rejected."<sup>38</sup>

Obviously this newly generous standard of "reasonableness" reduced the Antitrust Division's prosecutory latitude. But in the beginning, at least, Arnold appeared to believe that considerable latitude would remain. For a time, he seemed to be right. While Congress was cutting appropriations for one New Deal agency after another in 1940 and 1941, funding for the Antitrust Division remained high. Arnold launched new investigations, worked out new consent decrees, and tried new cases. "Within the last year," he noted cheerily in May 1941, "the clamor to set aside the antitrust laws has died away and been replaced by an awareness that the Antitrust Division is one of the nation's vital defense agencies." But the optimism was premature. Little by little, the ground Arnold had staked out as suitable terrain for antitrust activities eroded as the military, the war agencies, and their allies increased their control over the mechanisms of government and expanded their involvement in ever wider areas of the economy.<sup>39</sup>

Arnold had been confident, for example, that a major suit against the petroleum industry (and the Standard Oil Company in particular) would meet the new war-time standard of reasonableness. He was attacking the cartelistic relationship between Standard Oil and I. G. Farben, the great German chemical manufacturer, a relationship that Arnold claimed had resulted in the transfer of important technologies to Germany. Standard Oil had, moreover, worked to delay the development of the synthetic rubber industry in America and had resisted participating in other war-related industrial efforts, all in deference to its financial and patent agreements with Farben. These were not only anticompetitive arrangements, Arnold argued; they were threats to American security, an "economic fifth column." Harry S. Truman was blunter when the Standard Oil matter was aired before his committee on war contracts in the spring of 1942. "I think this approaches treason," he said when told that Standard Oil had withheld information on some of its patented processes from the United States Navy "even after Pearl Harbor."<sup>40</sup>

But despite such arguments, the Standard Oil prosecution soon evoked the ire not only of the oil industry but also of the War Department, which insisted that the time and energy the company had to spend defending itself against the antitrust suit was interfering with its ability to meet essential war needs. Arnold managed to resist the pressures to drop the suit entirely, but only by threatening to resign and to go public with his charges. In April 1942, however, he agreed to what he

<sup>38</sup> Thurman Arnold, radio speech, July 2, 1940, Arnold Papers; Wilber Stammer to "Avery," June 24, 1940, *ibid.*

<sup>39</sup> Thurman Arnold, "Defense and Restraints of Trade," *New Republic*, May 19, 1941, p. 687.

<sup>40</sup> *New York Times*, Sept. 18, 1940, p. 1; "Dinner-Table Treason," *Time*, April 6, 1942, pp. 15-16; "Blast at Standard Winds up Antitrust Actions for the Duration," *Newsweek*, April 6, 1942, p. 42; I. F. Stone, "The Truth about Rubber," *Nation*, April 18, 1942, p. 451.



Thurman Arnold's ambitious agenda for the Antitrust Division met increasing opposition once the United States entered World War II, as this May 4, 1942, cartoon from the *Washington Evening Star* illustrates. Courtesy American Heritage Center, University of Wyoming.

considered an unsatisfactory settlement through a consent decree that simply required Standard Oil to release a number of patents and pay a \$50,000 fine.<sup>41</sup>

The Antitrust Division's problems were mounting in other ways as well. The dominant centers of power in Washington in the spring of 1942 were no longer the New Deal agencies staffed by Arnold's liberal friends, but the war agencies staffed largely by corporate figures hostile to antimonopoly efforts. Arnold had, in effect, given the military and the war agencies the right to veto antitrust initiatives that they believed would interfere with the war effort. By the end of 1942, the War and Navy departments and the War Production Board were using the veto almost indiscriminately, to stop virtually all antitrust projects that involved companies or industries doing war-related work, which by then was almost everyone. Within months

<sup>41</sup> "Arnold vs. Standard Oil," *Newsweek*, June 8, 1942, pp. 47–48; Thurman Arnold, "Confidence Must Replace Fear," *Vital Speeches of the Day*, July 1, 1942, pp. 558–59.

of the unhappy settlement of the Standard Oil case, Arnold was forced to abandon investigations and prosecutions involving the chemical, electrical, steel, ship-building, aircraft, transportation, and other industries, even though some of the cases had been in progress for three years or more and involved activities that had preceded the war.<sup>42</sup>

In February 1943, shortly after the attorney general directed him to abandon a case against the railroads for price fixing, Arnold finally resigned from the Justice Department to accept an appointment as a judge on the First Circuit Court of Appeals. "I guess I'm like the Marx brothers," he said ruefully at the time. "They can be awfully funny for a long while, but finally people get tired of them. A lot of the bureaucrats are not only tired of me but also awfully sore." In a farewell address a few weeks later, he gave voice to larger concerns. "We are on the verge of a new industrial age," he predicted, "which may bring a higher standard of living than the world has ever known before. . . . And so the cartel leaders are gathering from all parts of the world to protect their system of high prices and low turnover, restricted production and controlled markets—domestic and foreign—against the new enterprise that is coming after the war."<sup>43</sup>

That Arnold failed to survive in the Antitrust Division was perhaps an inevitable result of the changed political circumstances of the early 1940s. But Arnold's departure from the Justice Department did not simply mark the wartime triumph of the military-industrial power structure over the New Deal. It also symbolized the way in which the new, consumption-oriented, increasingly Keynesian liberalism of the 1940s was marginalizing antitrust enforcement and the larger struggle against monopoly of which it was a part.

Arnold's contempt for political folklore had always coexisted with an awareness of the vital role myths played in public life. No important cause could hope to acquire and retain its necessary popular support on rational grounds alone. Any great public project must have a symbolic foundation as well. But Arnold's own great project—legitimizing a new consumer-oriented vision of the antitrust laws—was not really an attempt to create a folklore, despite his occasional claims to the contrary. It was, rather, part of a broad effort among realists and liberals of his generation to demystify public policy, to peel away what they considered the encrusted symbols of government and create a new, more efficient, and more pragmatic state.

<sup>42</sup> Jordan A. Schwarz, *The Speculator: Bernard M. Baruch in Washington, 1917-1965* (Chapel Hill, 1981), 428; Hawley, *New Deal and the Problem of Monopoly*, 441-43; Stone, "Handcuffing Thurman Arnold," 387-88; Johnston, "Thurman Arnold's Biggest Case," 40; "An Antitrust Holiday?," *Business Week*, April 4, 1942, pp. 15-17.

<sup>43</sup> "Last Roundup," *Time*, Feb. 22, 1943, p. 18; *New York Times*, March 10, 1943, p. 9; "Trust Buster Benched," 34; Donald H. Riddle, "The Truman Committee: A Study in Congressional-Military Relations" (Ph.D. diss., Princeton University, 1956), 42-43; Stone, "Thurman Arnold and the Railroads," 331-32; Thurman Arnold, "How Cartels Affect You," *American Mercury*, 56 (March 1943), 321. Arnold served on the court of appeals only briefly. In 1945, bored and frustrated by judicial life, he resigned and formed a new legal partnership: Arnold, Fortas, and Porter (now Arnold and Porter), which remains one of Washington's most powerful law firms. There he spent the rest of his professional life. He died in 1969, at the age of seventy-eight.

In the end, therefore, Arnold's vision of antitrust had no symbolic foundation and no real constituency beyond the small cadre of lawyers and experts he recruited to the field of antitrust law. Arnold had promoted an antimonopoly ideal stripped of its populist and democratic content; an ideal tied to a vision, not of restoring power to individuals and communities, but of expert management of the economy through centralized state bureaucracies; an ideal perhaps better attuned to the modern form of the economy and the state than the one it replaced, but one less capable of generating and sustaining genuine popular enthusiasm.

Nor did this new antitrust philosophy find a secure home even in the new liberal policy world of the 1940s and beyond, which it was designed to accommodate. For in that world—one in which commitment to mass consumption and full employment had superseded older concerns about economic power and control of production—the redefined antimonopoly impulse had become a secondary, easily discarded element of a larger ideological design. If the goal of public policy was not to redistribute power but to enhance mass consumption, it was both easier and more efficient to pursue other strategies to achieve that goal: government spending, tax reductions, redistributive welfare policies, and others. It was easy to justify avoiding the politically and bureaucratically difficult task of confronting capitalist institutions and pressuring them to change their behavior.

In the end, Arnold left behind him an impressive bureaucratic apparatus but a depleted reservoir of political support for or interest in the antitrust laws. It would be too much to claim that Arnold himself was responsible for depleting that reservoir; the vitiation of antimonopoly impulses would almost certainly have occurred without him. But Arnold's inability simultaneously to embrace the new, consumer-oriented liberalism of the late New Deal and to secure for the antitrust laws an important place within it illustrates the enormous difficulties facing everyone trying to sustain antimonopoly ideas in the emerging liberal world of the 1940s and beyond.

Antimonopoly impulses have revived intermittently in the years since World War II in the rhetoric of public figures as various as Estes Kefauver, George Wallace, Fred Harris, Jesse Jackson, and Jerry Brown and in the language of the New Left, feminism, and the environmental movement. Occasionally, when linked to something of its old populist and democratic content, it has generated momentary public enthusiasm. But the antimonopoly "movement," which once loomed so large in American public life and which Thurman Arnold helped redefine but could not effectively refurbish, remains what Richard Hofstadter called it a generation ago: "one of the faded passions of American reform."<sup>44</sup>

<sup>44</sup> Hofstadter, "What Happened to the Antitrust Movement?" 113.