

2021

"That Man from Laramie:" Thurman Arnold and the Future of Antitrust

Jerry Fowler

University of Wyoming College of Law

Follow this and additional works at: <https://scholarship.law.uwyo.edu/wlr>



Part of the [Law Commons](#)

Recommended Citation

Fowler, Jerry (2021) ""That Man from Laramie:" Thurman Arnold and the Future of Antitrust," *Wyoming Law Review*. Vol. 21 : No. 2 , Article 3.

Available at: <https://scholarship.law.uwyo.edu/wlr/vol21/iss2/3>

This Article is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Wyoming Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

WYOMING LAW REVIEW

VOLUME 21

2021

NUMBER 2

“THAT MAN FROM LARAMIE:” THURMAN ARNOLD AND THE FUTURE OF ANTITRUST

*Jerry Fowler**

I. “THAT MAN FROM LARAMIE”	269
II. THE PERILS OF SATIRE	271
III. FROM DISSECTOR TO ENFORCER.....	278
IV. REKINDLED PASSION?	283

Thurman Arnold, who headed the Antitrust Division of the Department of Justice from 1938 to 1943, is a legend in the field of antitrust. Yale, where he once taught (though not antitrust), has an interdisciplinary antitrust project named after him.¹ His record as head of the Department of Justice’s Antitrust Division has served as a guiding light for those who have followed in his footsteps and led that Division.² Even practitioners across the country and around the world who do not specialize in antitrust are likely to be familiar with the elite firm that he founded and that bears his name, Arnold & Porter.³

“History never repeats itself,” Mark Twain wrote, “but the Kaleidoscopic combinations of the pictured present often seem to be constructed out of the

* Assistant Professor of Law & Director of International Human Rights Clinic, University of Wyoming College of Law; Stanford University School of Law, J.D., 1990; Princeton University, B.A., *summa cum laude*, 1983. The author served as special litigation counsel in the Antitrust Division of the Department of Justice from 1993–1995. This essay is written in honor of Anne K. Bingaman (Assistant Attorney General for Antitrust, 1993–1996), who embodied the spirit of Thurman Arnold on every day of her tenure in the position that he once held.

¹ *Thurman Arnold Project at Yale*, YALE SCHOOL OF MANAGEMENT, som.yale.edu/faculty-research-centers/centers-initiatives/thurman-arnold-project-at-yale (last visited Apr. 19, 2021) [<https://perma.cc/B6TT-GKG3>].

² SPENCER WEBER WALLER, *THURMAN ARNOLD: A BIOGRAPHY* 110 (2005).

³ See *Arnold & Porter*, www.arnoldporter.com/en/ (last visited Apr. 19, 2021) [<https://perma.cc/4NDE-65WL>].

broken fragments of antique legends.⁴ Arnold's intellectual worldview was shaped by a world much different from today's, but the broken fragments of it can be glimpsed in the present. He had seen the breathtaking destructiveness of World War I, joined as it was with propaganda that tried to cloak the slaughter in meaning. He experienced the oppressive economic colonialism that sapped places like his hometown, Laramie, of opportunity. And he witnessed the collapse of capitalist economies accompanied by the rise of totalitarian mass movements that depended on creating and imposing their own alternative ideological realities. He took the helm of the Antitrust Division at a time when the nation's economic system was in deep crisis and antitrust enforcement largely had been sidelined for decades.

Today, the United States is mired in conflicts abroad that began when many current law students had not yet started kindergarten. Additionally, the rise of China's authoritarian capitalism is challenging U.S. influence and liberal democracy. The Great Recession of 2008 shook public faith in the economic system, while persistent and growing income inequality and the vast power of a few large tech firms lead some to question the viability of the system. There seems to be a widening gap between places with economic opportunity and those without.⁵

Not unconnected to these broader developments, an "intellectual contest over the soul of antitrust" is raging.⁶ So now is a good time to revisit Thurman Arnold's story and his influence on antitrust. The Centennial issue of the Wyoming Law Review is an appropriate place to do so: before he strode onto the stage of history as the nation's chief "trust buster," Thurman Arnold was born and raised in Laramie and played an important role in founding the University of Wyoming College of Law.

⁴ MARK TWAIN & CHARLES DUDLEY WARREN, *The Gilded Age: A Tale of To-Day*, reprinted in MARK TWAIN, *THE GILDED AGE AND LATER NOVELS* 343 (Hamlin L. Hill ed., Library of America 2002) (1874). The pithier "History never repeats itself, but it rhymes" is often attributed to Twain. The passage in *The Gilded Age* was presented as the lede of an overwrought newspaper's coverage of a scandalous murder case.

⁵ See, e.g., Phillip Longman, *Why the Economic Fates of America's Cities Diverged*, ATL. MONTHLY (Nov. 28, 2015), www.theatlantic.com/business/archive/2015/11/cities-economic-fates-diverge/417372/ [<https://perma.cc/53KQ-MC2F>].

⁶ A. DOUGLAS MELAMED ET AL., *ANTITRUST LAW AND TRADE REGULATION: CASES AND MATERIALS* 59 (7th ed. 2018). Compare, e.g., Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EURO. COMPETITION L. & PRAC. 131 (2018), with Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714 (2018). See generally *What More Should Antitrust Be Doing?*, THE ECONOMIST (Aug. 8, 2020), www.economist.com/schools-brief/2020/08/06/what-more-should-antitrust-be-doing [<https://perma.cc/3BGW-F9ZA>].

I. "THAT MAN FROM LARAMIE"⁷

Thurman Arnold contained multitudes.⁸ He "was an original" who "was too large and interesting a man to be encapsulated in a few paragraphs."⁹ He was compared at various times and by various people to Rabelais¹⁰ and Voltaire¹¹; Machiavelli,¹² Marx—both Karl¹³ and Groucho,¹⁴ Jeremy Bentham and Charles Darwin,¹⁵ W.C. Fields and H.L. Mencken,¹⁶ Thorstein Veblen,¹⁷ Jonathan Swift, Montesquieu, and Friedrich Nietzsche.¹⁸ He was an outsider¹⁹ and an insider;²⁰ a small-town lawyer and politician;²¹ a soldier, a law school dean, and professor; a bestselling author; a top official in the federal government; a federal judge; and a founder of one of the top law firms in the nation. He was an iconoclast,²² but not

⁷ Gene M. Gressley, *Preface* to VOLTAIRE AND THE COWBOY: THE LETTERS OF THURMAN ARNOLD xiv (Gene M. Gressley ed., 1977) [hereinafter VOLTAIRE AND THE COWBOY].

⁸ See Walt Whitman, *Song of Myself*, 51, POETS.ORG, poets.org/poem/song-myself-51 (last visited Apr. 20, 2021) [https://perma.cc/GQ9F-4M4E] ("Do I contradict myself?/Very well then I contradict myself,/(I am large, I contain multitudes.)"); see also BOB DYLAN, *I Contain Multitudes, on ROUGH AND ROWDY WAYS* (Columbia 2020), www.bobdylan.com/songs/i-contain-multitudes/ [https://perma.cc/RJ2C-UZR6] ("I'm a man of contradictions and a man of many moods . . . I contain multitudes").

⁹ Edward H. Levi, *Thurman Arnold*, 79 YALE L.J. 983, 983 (1970).

¹⁰ GENE M. GRESSLEY, *Mr. Thurman Arnold, Antitrust, and the Progressive Heritage*, in THE TWENTIETH-CENTURY AMERICAN WEST: A POTPOURRI 164, 169–70 (1977) (quoting Joseph Alsop & Robert D. Kinter, *Trust Buster—The Folklore of Thurman Arnold*, SATURDAY EVENING POST 5 (Aug. 12, 1939)); see also THE TWENTIETH-CENTURY AMERICAN WEST: A POTPOURRI, *supra*, at 22.

¹¹ THE TWENTIETH-CENTURY AMERICAN WEST: A POTPOURRI, *supra* note 10, at 34 (quoting Robert Jackson). See also Gressley, *supra* note 7, at xiv ("Jackson's[] description of Arnold[] as 'a cross between Voltaire and the cowboy, with the cowboy predominating' . . . is the most graphic, and perhaps accurate, one-phrase representation of" Arnold.).

¹² Max Lerner, *The Shadow World of Thurman Arnold*, 47 YALE L.J. 687, 687 (1938).

¹³ *Id.*

¹⁴ WALLER, *supra* note 2, at 77.

¹⁵ Lerner, *supra* note 12, at 687.

¹⁶ WALLER, *supra* note 2, at 76–77.

¹⁷ *Id.*; see also Lerner, *supra* note 12, at 587.

¹⁸ Lerner, *supra* note 12, at 688.

¹⁹ See THURMAN W. ARNOLD, FAIR FIGHTS AND FOUL: A DISSENTING LAWYER'S LIFE 16 (1965) (recalling that his "Western clothes, mannerisms, and speech did not fit [at Princeton and he] was immediately classified as a queer character").

²⁰ WALLER, *supra* note 2, at 181 (recounting the celebrations of Arnold's seventieth birthday, including that "Vice-President Johnson invited him to the White House for a celebration").

²¹ See Gene M. Gressley, *Introduction* to VOLTAIRE AND THE COWBOY, *supra* note 7, at 18–23.

²² GRESSLEY, *supra* note 10, at 170.

a revolutionary.²³ He was the philosopher of middle-class radicalism.²⁴ He was a noted civil libertarian²⁵ whose writings seemed, to some, to include “dangerous totalitarian tendencies.”²⁶ He became a celebrated public intellectual by satirizing the antitrust laws the year before he was put in charge of enforcing those very laws. He was, in short, “a personality of marvelous incongruities.”²⁷

Thurman Arnold was a child of the West, born in Laramie in 1891, the year after Wyoming became a state.²⁸ In his late teens, he went east to study, first to Wabash College, which he hated, then to Princeton University. Though he made it through Princeton with flying colors, what stuck with him were feelings of alienation and boredom. He felt out of place because of his Western ways and recalled near the end of his life that “my years at Princeton were chiefly remarkable for their loneliness.”²⁹ After attending law school at Harvard, he headed back west to Chicago. There he made a go at practicing law. That effort was interrupted by a stint in the military, which took him first to Texas and Mexico in pursuit of Pancho Villa, then to France for a cameo in World War I.

After the war, Arnold returned to Laramie, settling down to practice law with his father. Not long after returning, he began pushing the state bar association to establish a law school at the University of Wyoming.³⁰ The bar association did not act but the University’s governing board did, and the College of Law admitted its first class in September 1920. Arnold taught at the new school and allowed the students to use his law library. He continued agitating for state bar support, emphasizing the importance of having Wyoming lawyers who were educated in Wyoming.³¹

He also entered politics, serving a single term as the lone Democrat in the Wyoming House, then eking out a victory to become mayor of Laramie. As his

²³ Alan Brinkley, *The Antimonopoly Ideal and the Liberal State: The Case of Thurman Arnold*, 80 J. AM. HIST. 557, 558 (1993) (“Arnold was an iconoclast who stopped well short of being a revolutionary.”).

²⁴ Lerner, *supra* note 12, at 701.

²⁵ See WALLER, *supra* note 2, at 130–50.

²⁶ EDWARD N. KEARNY, THURMAN ARNOLD, SOCIAL CRITIC: THE SATIRICAL CHALLENGE TO ORTHODOXY 4 (1970).

²⁷ *Introduction* to VOLTAIRE AND THE COWBOY, *supra* note 7, at 93.

²⁸ Those interested in learning about Arnold’s life are fortunate that he has had two attentive and sympathetic biographers. See generally *Introduction* to VOLTAIRE AND THE COWBOY, *supra* note 7; WALLER, *supra* note 2. This brief account of his life is drawn from their work, except as noted.

²⁹ ARNOLD, *supra* note 19, at 16.

³⁰ See Michael Golden, *History of the University of Wyoming College of Law: The First Seventy-Five Years*, 31 LAND & WATER L. REV. 1, 2 (1996); see also Douglas Ayer, *In Quest of Efficiency: The Ideological Journey of Thurman Arnold*, 23 STAN. L. REV. 1049, 1058 & n.41 (1971).

³¹ See Golden, *supra* note 30, at 3.

mayoral term came to an end, he was defeated in his bid for county prosecutor. With dim political prospects and frustrated by the limitations that Laramie's moribund economy imposed on the prospect of an interesting legal practice, Arnold jumped at an offer to be dean of the law school at West Virginia University. He never lived in Laramie again, and one imagines that he never regretted the professional consequences of leaving. But looking back many years later, he still remembered how his wife wept as they drove out of town and "how we hated to leave that wonderful combination of rolling plains and blue, snow-capped mountains that we knew as Wyoming!"³²

His time in West Virginia was relatively brief, ending when he joined the faculty at Yale Law School. His Yale years were productive as he taught, published as part of the burgeoning legal realist movement, and worked summers and during a sabbatical for the Roosevelt Administration. Certainly well regarded by 1937, Arnold rose to a new level of national prominence with the publication of a book called *The Folklore of Capitalism*.³³

II. THE PERILS OF SATIRE

The Folklore of Capitalism became a best seller and certified Arnold as a public intellectual. As his biographer, Spencer Weber Waller, noted, it was a book that "the 'chattering class' read and discussed."³⁴ This success was a little odd, because the point of *Folklore* was rather opaque. Introducing Arnold at a speaking event shortly after it was published, lawyer-businessman (and eventual 1940 Republican presidential nominee) Wendell Willkie commented that he had read *Folklore* three times, which no doubt filled Arnold with pride. "But," Willkie then explained, "I have yet to understand what Mr. Arnold is driving at."³⁵

However opaque the book as a whole, it appeared that Arnold held the antitrust laws in low regard. Arnold's idea broadly was that politicians and political programs must fit into a prevailing folklore or mythology. This becomes a problem in times of rapid change or dislocation, such as the 1930s, when a gap develops between folklore and reality. As Arnold himself explained in a preface to the 1962 reprint of the book, he sought to "describe the frustrating effects, in times of revolutionary change, of ideals and symbols inherited from a different past."³⁶

³² ARNOLD, *supra* note 19, at 35.

³³ THURMAN W. ARNOLD, *THE FOLKLORE OF CAPITALISM* (Greenwood Press 1980) (1937).

³⁴ WALLER, *supra* note 2, at 76.

³⁵ GRESSLEY, *supra* note 10, at 170 n.16 (quoting Shelby Cullum Davis, *The Bottlenecks of Business*, ATL. MONTHLY, Nov. 1940, at 560).

³⁶ ARNOLD, *supra* note 33, at iii.

Antitrust was an area, Arnold believed, where folklore and reality had diverged. The persistent folklore was that the American economy comprised individuals competing with each other. One corollary of this folklore was that corporations, no matter how large, were “personified” and treated as though they were individuals, even to the point where the folklore insisted that government regulation of business was the equivalent of—and as suspect as—government regulation of individuals. Another corollary of the ingrained assumption of competing individuals (or “small competing concerns which, if they were not individuals, nevertheless approach[ed] that ideal”) is that “[b]igness” was regarded as a curse because it led to monopoly and interfered with the operation of the laws of supply and demand.”³⁷

The divergence of folklore and reality, of course, was that the American economy of the 1930s had long since ceased to be primarily composed of competing individuals or small enterprises. Moreover, and equally important, large corporations had arisen for a very important practical reason: economies of scale resulted in higher output and lower prices.³⁸ The way that society resolved the contradiction between the folklore and the reality, in Arnold’s conception, was by creating a quasi-religious ceremony through which big corporations could be denounced but not obstructed. The need for this ceremony “gave rise to the antitrust laws which appeared to be a complete prohibition of large combinations . . . [but] made the enforcement of the antitrust laws a pure ritual.”³⁹

Arnold likened advocates for antitrust enforcement to preachers inveighing against vice. Actual success is neither possible, nor even the point:

[N]o preacher ever succeeded in abolishing any form of sin. Had there been no conflict—had society been able to operate in an era of growing specialization without these organizations—it would have been easy enough to kill them by practical means. . . . Since the organizations were demanded, attempts to stop their growth necessarily became purely ceremonial. . . . The antitrust laws, being a preaching device, naturally performed only the functions of preaching.⁴⁰

Antitrust campaigns “always ended with a ceremony of atonement, but few practical results.”⁴¹ The lack of practical results was a direct consequence of the

³⁷ *Id.* at 206.

³⁸ *Id.* (noting that “specialized techniques made bigness essential to producing goods in large enough quantities and at a price low enough so that they could be made part of the American standard of living”).

³⁹ *Id.* at 206–07.

⁴⁰ *Id.* at 211–12.

⁴¹ *Id.* at 220.

“moral attitude” of advocates, who “thought in Utopias.”⁴² For these advocates, “[p]hilosophy was . . . more important than opportunism and so they achieved in the end philosophy rather than opportunity.”⁴³

As throughout *Folklore*, Arnold’s analysis of the antitrust laws and their implementation is replete with analogy and metaphor: “Thus antitrust laws became popular moral gestures and their economic meaninglessness never quite penetrated the thick priestly incense which hung over the nation like a pillar of fire by night and a cloud of smoke by day.”⁴⁴

Arnold did not stop, however, at asserting that the antitrust laws were ineffective in dismantling large companies. They actually, he argued, “became *the greatest protection* to uncontrolled business dictatorships.”⁴⁵ Any proposal to regulate big business “broke to pieces on the great protective rock of the antitrust laws,”⁴⁶ because those laws were invoked as the proper recourse for any problems associated with corporate activity. And who was doing the invoking? Well, according to Arnold, it was liberals, whose vision, in effect, was obscured by the priestly incense he had described. And, in a passage that would soon come back to haunt him, he said it was not just any liberals, but “[m]en like Senator Borah [who] founded political careers on the continuance of such [antitrust] crusades, which were entirely futile but enormously picturesque, and which paid big dividends in terms of political prestige.”⁴⁷

The Senator that Arnold called out by name was Senator William Borah, a progressive Republican from Idaho.⁴⁸ His criticism of Borah was particularly ill-considered, as the next year the Senator was a member of the subcommittee considering Arnold’s nomination to be the Assistant Attorney General in charge of the Antitrust Division. One can only imagine the difficulties that Arnold would have created for himself if he had had access to Twitter.⁴⁹

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 96.

⁴⁵ *Id.* at 214 (emphasis added).

⁴⁶ *Id.* at 215.

⁴⁷ *Id.* at 217.

⁴⁸ Borah served in the Senate from 1907 to his death in 1940. Although he was often at odds with the Republican Party in his state, he was regularly re-elected with huge margins. See Claudius Johnson, *William E. Borah: The People’s Choice*, 44 PAC. NW. Q. 15 (1953); see generally LEROY ASHBY, *THE SPEARLESS LEADER: SENATOR BORAH AND THE PROGRESSIVE MOVEMENT IN THE 1920’S* (1972).

⁴⁹ Cf. Jennifer Scholtes & Caitlin Emma, *Tanden Pays for Belittling Bernie*, POLITICO (Feb. 10, 2021), www.politico.com/news/2021/02/10/sander-tanden-confirmation-468350 [https://perma.cc/3DV6-L2PD] (“[OMB nominee] Neera Tanden’s ruthless tweets continued to haunt her confirmation process Wednesday as she faced the scorn of Senate Budget Chair Bernie Sanders, another target of her public criticism.”).

Anyone who read *Folklore* could be forgiven for concluding that Thurman Arnold found little worth in the antitrust laws, that he considered them the creed of a religion in which he did not believe. And such a reader would have found it odd, if not shocking, that less than a year after the publication of *Folklore*, Arnold was nominated by Franklin Roosevelt to be in charge of enforcing those very laws.⁵⁰ Indeed, the nomination provoked “howls of holy horror,”⁵¹ and the press reproduced “succulent excerpts” from *Folklore*.⁵²

Not surprisingly, Arnold prepared a response, and it was what any clever lawyer—which he certainly was—would say: “My answer, of course, was to be that in writing that book I was merely an observer of what the antitrust laws had been during the period of great mergers in the 1920’s. It would all be different once I was in office.”⁵³ As for his criticism of Borah, Arnold’s “only hope was that he was too busy and important a man to read such trivia as *The Folklore of Capitalism*.”⁵⁴ As the hearing started, though, he saw to his consternation that Borah “conspicuously displayed . . . a copy of” the book.⁵⁵

Borah pressed Arnold strongly on things that Arnold had said in the book, although (to Arnold’s relief) he skipped over the *ad hominem* attacks.⁵⁶ As he had planned, Arnold stuck doggedly to the explanation that his point of view in the book was that of an observer “describing what has happened.”⁵⁷ Somewhat more colorfully, he described his approach as “that of a dissector in the laboratory.”⁵⁸

⁵⁰ See, e.g., RICHARD HOFSTADTER, *What Happened to the Antitrust Movement, in THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 188, 191 (Phoenix ed. 1979) (1965) (“The very appointment of Thurman Arnold as head of the Antitrust Division—a man whose books had effectively ridiculed the antitrust laws as a facade behind which the concentration of American industry could go on unimpeded—seemed to underline perfectly the whole comedy of the antitrust enterprise.”).

⁵¹ Wilson D. Miscamble, *Thurman Arnold Goes to Washington: A Look at Antitrust Policy in the Later New Deal*, 56 BUS. HIST. REV. 1, 7 (1982) (quoting Fred Rodell, *Arnold: Myth and Trust Buster*, THE NEW REPUBLIC, June 22, 1938, at 177–78).

⁵² Lerner, *supra* note 12, at 700; see also Spencer Weber Waller, *The Antitrust Legacy of Thurman Arnold*, 78 ST. JOHN’S L. REV. 569, 574–75 (2004); Brinkley, *supra* note 24, at 564.

⁵³ ARNOLD, *supra* note 19, at 136.

⁵⁴ *Id.* at 137.

⁵⁵ *Id.*

⁵⁶ See *id.*

⁵⁷ *Nomination of Thurman W. Arnold: Hearing Before the Sen. Subcomm. on the Nomination of Thurman W. Arnold of the Sen. Comm. on the Judiciary*, 75th Cong. 6 (1938) [hereinafter *Hearings*]; see generally *id.* at 4–10 (Arnold stating eleven times that *Folklore* was merely a description of “what happened”).

⁵⁸ *Id.* at 7.

Arnold's friend and the chair of the subcommittee, Wyoming Senator Joseph O'Mahoney, seemed mildly horrified by the image Arnold presented of himself dissecting capitalism and rushed to throw the witness a lifeline. "I think you ought to develop that phrase, Thurman," the Chairman interceded. "[T]oo many people who have read your book have thought you are a 'dissector.' That is probably the cause of the criticisms which have been directed against you."⁵⁹

Arnold did not at first take the hint, and soon was opining that he did "not think that the anatomical chart which you get out of that process with first the skin and finally the bones makes a good picture to hang in the library."⁶⁰ Maybe realizing that this analogy was less than effective, he concluded that the "point of view is a little difficult to state because it is not a usual one."⁶¹ Borah then helped Arnold out by offering him a chance to affirm that *Folklore* was "simply your preparation for a real attack upon monopolies and trust" and to disavow any intent to defend or apologize for them, which Arnold dutifully did.⁶²

Max Lerner, the editor of *The Nation* and not an unsympathetic observer,⁶³ commented that:

[T]he temper of Arnold's replies to Borah was not quite the temper of the book. There was more restraint in it, less joyousness, less certitude, less of the sharp quality of the dissecting room. The moral, of course, is that you don't take your dissecting instruments into the Senate chamber—it would clutter up the place and get in the way of the Senators.⁶⁴

More substantively, Lerner was not persuaded by Arnold's explanations. He worried that winning confirmation was, for Arnold, "a Pyrrhic victory" that required him to leave "his theory behind on the field of battle."⁶⁵

But did it? It may very well be that Arnold simply changed his view of the value of the antitrust laws once enforcing them became his job. He would not have been the first person in Washington, and certainly not the last, whose stand shifted based on where he sat. It is also possible, however, to accept at face

⁵⁹ *Id.*

⁶⁰ *Id.* at 7–8.

⁶¹ *Id.* at 8.

⁶² *Id.* at 8; *see also id.* at 3 ("I think that the enforcement of the antitrust laws should be vigorous and that it should be fair.").

⁶³ Arnold had tried unsuccessfully to get Lerner a faculty position at Yale a few years earlier. *See* WALLER, *supra* note 2, at 63.

⁶⁴ Lerner, *supra* note 12, at 701.

⁶⁵ *Id.* at 700.

value the explanation that Arnold offered to Senator Borah and his colleagues. It is, in fact, one thing to be an observer describing what has happened with the dispassion of a dissector—and an academic to boot—and quite another to have the responsibility actually to do something. To use a different metaphor, *Folklore* (and Arnold's previous book, *The Symbols of Government*⁶⁶) was about tipping over sacred cows, not providing instructions for running the ranch.⁶⁷

No doubt, Arnold had a penchant for getting carried away in his dissecting, sometimes wielding more of a machete than a scalpel.⁶⁸ In fact, he realized as much, writing Borah a letter after he had been confirmed to apologize for what he had said about the Senator in *Folklore*.⁶⁹ But he again reaffirmed his belief in *Folklore's* basic analysis of how the antitrust laws had been implemented to that point and presaged his program for the next five years: “[E]ven though the antitrust laws, as at present administered, may be imperfect, it would be fatal not to do the utmost we can with them since that is the only instrument we have. I doubt, therefore, if there is any real disagreement between us.”⁷⁰

More telling is an essay that Arnold published in the *New York Times Sunday Magazine* a few months after he took office explaining the necessity of the enforcement program the government was embarking upon.⁷¹ He reprised—in much more digestible form—many of the arguments (and analogies) he had made in *Folklore*.⁷² In particular, he argued that “forty years of ritualistic anti-trust

⁶⁶ THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* xiii (Harcourt, Brace & World 1962) (1935).

⁶⁷ See RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 317 (Vintage 1960) (1955) (though Arnold's target in *Folklore* and *Symbols* was “largely . . . the ritualistic thinking of the conservatives of the 1930s, [they] might stand equally well as an attack upon that moralism which we found so insistent in the thinking of Progressivism”); see generally KEARNY, *supra* note 26.

⁶⁸ See KEARNY, *supra* note 26, at 4 (Arnold's “books are highlighted by a series of dramatic overstatements.”).

⁶⁹ Letter from Thurman Arnold to Senator William Borah, in *VOLTAIRE AND THE COWBOY*, *supra* note 7, at 268 (expressing Arnold's “extreme regret at the reference to yourself in my book”).

⁷⁰ *Id.* at 269.

⁷¹ Thurman Arnold, *An Inquiry into the Monopoly Issue*, N.Y. TIMES SUNDAY MAG. 1 (Aug. 21, 1938), www.nytimes.com/1938/08/21/archives/an-inquiry-into-the-monopoly-issue-thurman-arnold-holds-that.html. He had been making the same case consistently and in any forum he could find since he took office. See, e.g., Thurman Arnold, *Fair and Effective Use of Present Antitrust Procedure*, 72 U.S. L. REV. 277 (1938) (text of address to the Trade and Commerce Bar Association of New York making many of the same points as and using similar language to the *Times* essay); see also Waller, *supra* note 52, at 581 (“Arnold was relentless in promoting himself, his vision for antitrust, the work of the Antitrust Division, and the need for ever greater resources, staffing, and budgets.”).

⁷² Compare, e.g., Arnold, *supra* note 71, at 1 (“The situation is similar to that in the days of prohibition when men wanted liquor and moral observance of the prohibition law at the same time.”), with ARNOLD, *supra* note 33, at 152 (The public “wanted the nation moral and dry in principle and at the same time wet in fact.”).

enforcement . . . has preserved the [anti-monopoly] ideal while at the same time it permitted sub rosa acquiescence in industrial empire building."⁷³ With an eye to his bureaucratic interests as well as practical reality, Arnold argued that the low level of resources devoted to enforcing the laws illustrated the lack of commitment to actual enforcement.⁷⁴ He noted that even as Theodore Roosevelt was gaining fame as a trust buster, the sum total of antitrust enforcement staff was only nine people.⁷⁵

Another idea borrowed from *Folklore* that Arnold deployed in his *Times* essay was to characterize high prices charged by monopolies and cartels as a form of taxation.⁷⁶ "The power of great organizations to levy what are in effect taxes is commonplace," he argued.⁷⁷ Highly concentrated industries, devoid of competition, keep prices high and output low and lay off workers.⁷⁸ Echoing his criticism in *Folklore* of focusing on "the curse of bigness," Arnold explained that the "answer is not a question of breaking up large businesses into small ones regardless of their efficiency," which "is neither the ideal of the policy of the Sherman Act nor should it be the ideal of further anti-monopoly legislation."⁷⁹ Rather, the policy would be "to condemn combinations going beyond efficient mass production which have become instruments arbitrarily affixing inflexible prices or exercising coercive power."⁸⁰

Other than its focus on high prices as a form of tax and the disavowal of breaking up large businesses solely because of their size, the *Times* essay was rather vague on the details of the new enforcement policy. Arnold attributed this to the understandable need to take each situation on its own terms. Thus, he promised that public statements of explanation would accompany his division's enforcement decisions as a means of making clear the underlying

⁷³ Arnold, *supra* note 71, at 1.

⁷⁴ *Id.* at 2 ("Nothing can be more indicative of the purely ritualistic enforcement of the anti-trust laws than the size of the personnel devoted to enforcing them."). He was not saying that the enforcers were small, but that there were not enough of them. One of his immediate priorities, which he succeeded in achieving, was vastly increasing the size of the Antitrust Division. See ARNOLD, *supra* note 19, at 113–14; WALLER, *supra* note 2, at 87 (noting that the Division grew from 18 employees before Arnold took over to a peak during his tenure of almost 600, while its budget increased 400 percent).

⁷⁵ Arnold, *supra* note 71, at 2.

⁷⁶ See ARNOLD, *supra* note 33, at 268 ("Men in America were so conditioned that they felt differently about taxes and about prices. The former was an involuntary taking; the latter a voluntary giving.").

⁷⁷ Arnold, *supra* note 71, at 1.

⁷⁸ *Id.* at 14.

⁷⁹ *Id.* at 15.

⁸⁰ *Id.*

policy. “Whether this policy is liked by business or not,” he said, “it will at least be understood.”⁸¹

In short, the segue from the academic observer satirizing the record of antitrust enforcement in *Folklore* to the nation’s chief trust buster was not as jarring as generally thought. None of this is to suggest that Arnold was chosen for the antitrust job *because* of his ideas for enforcement. It seems much more likely that his appointment to that particular job had an element of serendipity.⁸² In fact, Arnold had earlier been offered a position on the Securities and Exchange Commission, where he would have served alongside his good friend from Yale, William O. Douglas. But Yale denied his leave request.⁸³ A few months later, when he was offered the antitrust position, leave was forthcoming, and a new chapter in the history of antitrust enforcement began.

III. FROM DISSECTOR TO ENFORCER

The scale and scope of Arnold’s record as head of the Antitrust Division has been well documented and discussed by historians and legal scholars alike.⁸⁴ Although he disavowed “trust busting for the sake of trust busting,”⁸⁵ he found plenty of targets to go after. With Arnold as its chief, the Division filed almost as many cases as had been brought in the preceding half century. Richard Hofstadter contended that Arnold’s tenure “mark[ed] the true beginning of effective anti-trust action, . . . a watershed in the history of antitrust jurisprudence.”⁸⁶ Arnold’s significance lay not so much in individual cases, although some of the cases he brought continue to be important precedents.⁸⁷ Rather, “he showed for the first time what [the Sherman Act] could and could not do.”⁸⁸

⁸¹ *Id.* at 15.

⁸² See Brinkley, *supra* note 23, at 563; Miscamble, *supra* note 51, at 8. One report suggested that Arnold was the fourth choice for the antitrust slot. Waller, *supra* note 52, at 574 (citing Joseph Alsop & Robert Kintner, *The Capital Parade, Cummings Seen Losing Control of Justice Agency*, WASH. STAR, Mar. 9, 1938).

⁸³ Miscamble, *supra* note 51, at 8.

⁸⁴ See, e.g., Waller, *supra* note 52; WALLER, *supra* note 2, at 78–110; GRESSLEY, *supra* note 10; HOFSTADTER, *supra* note 50; Miscamble, *supra* note 51; Brinkley, *supra* note 23; RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA, 1888-1992: HISTORY, RHETORIC, LAW* 158–60, 168–71 (1996); ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* 421–31 (1966); Ayer, *supra* note 31.

⁸⁵ *Introduction to VOLTAIRE AND THE COWBOY*, *supra* note 7, at 44 (quoting July 4, 1939, letter from Arnold to Yale University President Charles Seymour).

⁸⁶ HOFSTADTER, *supra* note 50, at 192.

⁸⁷ E.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

⁸⁸ HOFSTADTER, *supra* note 50, at 232. Hofstadter, though, was not particularly impressed with what the Sherman Act actually could do: “[I]t is one thing to say that antitrust has at last begun to fulfill a function, and another to forget how modest that function is.” *Id.* at 236.

In his magisterial *History of Wyoming*, Professor T.A. Larson devoted a paragraph to Arnold's service as head of the Antitrust Division and his "crusade against trusts."⁸⁹ Larson was not too impressed with this crusade's achievements. Arnold "brought many suits," Larson damned with faint praise, "and won several of them." After citing Arnold's success in cases involving motion pictures, Pullman car manufacturing, and cigarettes, he noted that Arnold "failed in cases involving the more vital problems of medicine, milk, and oil."⁹⁰ Then World War II intervened "before any really spectacular achievements could be produced."⁹¹

One can imagine Arnold in his Washington office receiving a copy of Larson's book and, in time honored D.C. tradition, eagerly scanning the index for mentions of his own name.⁹² He was not happy with what he read. By his own account, though, he resolved not to raise the issue with Professor Larson. The discussion of Arnold's antitrust record was, after all, merely a paragraph in a tome of almost 600 pages. And in Arnold's view, it otherwise was "a hell of a good book."⁹³

But as such things go, Arnold could not entirely keep his unhappiness to himself. So it came to pass that he made "a casual remark at a cocktail party"⁹⁴ to a mutual acquaintance, and the acquaintance in turn passed it on to Larson, who for his own part felt the need to write the acquaintance and cite the sources for his less than positive judgment of Arnold's trust busting record. In that way, the whole matter arrived at a point where Arnold felt he had to write directly to Larson to set the record straight. And in so doing, he provided not just a vigorous defense of his time at the head of the Antitrust Division, but a clear statement of his view of the antitrust laws and their purpose.

Arnold began by clarifying that in the areas where Larson said he had failed—medicine, milk, and oil—"[i]t just so happens that I won all the cases which reached the Supreme Court in these three fields."⁹⁵ He underscored the impact of

⁸⁹ T.A. LARSON, *HISTORY OF WYOMING* 450 (1st ed. 1965).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Jennifer 8. Lee, *Washington Books Bring Out Index Fingers*, N.Y. TIMES, May 2, 2004, at Sec. 1, p. 38, www.nytimes.com/2004/05/02/us/washington-books-bring-out-index-fingers.html ("It is called 'the Washington read' . . . [t]he perusal of a book by checking the index for references, usually to oneself, and reading only those parts of the book.").

⁹³ Letter from Thurman Arnold to T.A. Larson, *in* VOLTAIRE AND THE COWBOY, *supra* note 7, at 465.

⁹⁴ *Id.* at 461.

⁹⁵ *Id.* at 462. The cases he is referring to presumably include *Am. Med. Ass'n v. United States*, 317 U.S. 519 (1943); *United States v. Borden Co.*, 308 U.S. 188 (1939); and *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

these decisions and the broader program of enforcement: “The result was a series of decisions which put a new arsenal of weapons in the hands of the Government. All of these decisions came as a shock to the business community.”⁹⁶ The program “changed the rules of the game and created hazards for big business which did not exist before.”⁹⁷ The lull in enforcement occasioned by World War II, Arnold argued, “in no way impaired the long run effect of Roosevelt’s crusade to restore competition to our economy.”⁹⁸

Having defended his record in specific areas and the overall record of the Administration’s policy, Arnold began to hit his stride and turned to the underlying objectives of the antitrust laws. He assured Larson that

The authorities you quote seem completely ignorant about the purpose of the Sherman Act. It was never intended to prevent the growth of great nationwide corporations, nor do I think in the light of modern industrial techniques that is a desirable objective. It does not protect small business from what used to be called ‘ruinous competition’ based on efficiency.⁹⁹

He allowed that small businesses could be protected from competition by state fair trade laws, but gloated that such laws protecting small liquor stores in Wyoming meant that Larson paid more for his whiskey than Arnold did in Washington. But back to his point about the Sherman Act: “No prosecution was ever brought based on the size of the defendants alone.”¹⁰⁰ The objective of the antitrust laws was not “to prevent the growth of great industrial empires. . . . Their only purpose is to see that corporate growth results from efficiency—not the elimination of competition by aggression or merger.”¹⁰¹ In other words, the point is “to make great industrial empires behave. This they are doing, since the war, better than they have ever done before.”¹⁰²

Arnold utterly rejected any contention, apparently suggested by Larson’s sources, that the state of antitrust enforcement after World War II somehow had relapsed into the torpor of the period before 1938. He assured Larson that Franklin Roosevelt had fundamentally transformed the view of the public and the judiciary of competition, just as he had fundamentally transformed attitudes

⁹⁶ Letter from Thurman Arnold to T.A. Larson, *supra* note 93, at 463.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

toward the proper role of the federal government in addressing social problems.¹⁰³ Arnold also credited Roosevelt's competition policy with Europe's post-war adoption of antitrust principles.¹⁰⁴

Arnold closed with some swipes at economic historians in general and one named Howard Smith in particular.¹⁰⁵ Smith failed to appreciate, Arnold argued, the significance of the precedent set by Theodore Roosevelt's pursuit of the *Northern Securities* case, which went after a combination of rail lines that threatened to monopolize railroad traffic in the western United States.¹⁰⁶ The government's successful prosecution in *Northern Securities* revived the Sherman Act after it had suffered a near death experience in an earlier Supreme Court decision that drastically narrowed its scope.¹⁰⁷ *Northern Securities*, Arnold explained to Larson, established a precedent that, though not pursued at the time, eventually made possible the achievements of Franklin Roosevelt's administration.¹⁰⁸

Arnold apologized for having gone on much longer than he intended, claiming to have been possessed by the "missionary zeal" of his grandfather, who had been a Presbyterian preacher.¹⁰⁹ He offered that if he could "dissuade [Larson] from reading the kind of superficial economic literature which [he] quote[s], it may help to preserve [his] integrity as a historian in this world, and save [his] immortal soul in the next."¹¹⁰ One doubts whether Larson feared for either his integrity or his immortal soul. But in the second edition of his book, he omitted any reference to Arnold's losing cases or not having spectacular achievements. Rather, he left things at noting the number of cases Arnold had brought,

¹⁰³ Whether Roosevelt deserved such credit for Arnold's enforcement program is debatable. See Miscamble, *supra* note 51, at 12–15 (suggesting that FDR's attitude toward Arnold was more permissive than supportive and cautioning against the idea that Arnold's actions reflected Roosevelt's views of antitrust).

¹⁰⁴ Letter from Thurman Arnold to T.A. Larson, *supra* note 93, at 464.

¹⁰⁵ See HOWARD R. SMITH, *ECONOMIC HISTORY OF THE UNITED STATES* 621 (1955) ("Thurman Arnold set out to take away from Theodore Roosevelt the (scarcely deserved) reputation of being the nation's greatest 'trust buster.' . . . Taken in all, however, it can legitimately be said that there were no more long-range consequences of this new attack on the 'trusts' than had been achieved on similar occasions in the past.").

¹⁰⁶ See Letter from Thurman Arnold to T.A. Larson, *supra* note 93, at 464–65; see *N. Sec. Co. v. United States*, 193 U.S. 197 (1904).

¹⁰⁷ See *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

¹⁰⁸ Letter from Thurman Arnold to T.A. Larson, *supra* note 93, at 465. Arnold believed that *Northern Securities* made TR the "real father of the Sherman Act," because he "took it off the shelf after ten years of innocuous desuetude as part of his campaign to assert the authority of government over business." ARNOLD, *supra* note 19, at 120.

¹⁰⁹ Letter from Thurman Arnold to T.A. Larson, *supra* note 93, at 465.

¹¹⁰ *Id.*

describing some of his victories, and recording that Arnold was famous by the time World War II curtailed the enforcement program.¹¹¹

A consistent theme of Arnold's—articulated in *Folklore*, his *Times* essay, his letter to Professor Larson, and many other places—was that the target of the antitrust laws is not bigness, but corporate conduct that results in inefficiency and high prices. While he was antitrust chief, Arnold published *The Bottlenecks of Business*,¹¹² which, twenty-five years later, he facetiously recalled “irrefutably proved that in enforcing the antitrust laws there could be found the complete solution of all the ills of the Great Depression.”¹¹³ In *Bottlenecks*, Arnold succinctly explained the relationship between competition and enforcement:

[F]ree markets do not maintain themselves. The very essence of competition consists in getting the better of the other fellow. Great organizations start by being more efficient. They get into power. It is inevitable that they will use that power to protect themselves against the new crop of independent enterprises which may be pushing them to the wall in the competitive struggle. A referee is always necessary in the competitive game as each new enterprise climbs to power.¹¹⁴

The referee, of course, is the government—specifically the Antitrust Division. An important insight here is that the markets are not necessarily self-governing.

Arnold underscored that the point is refereeing the competition, not the size of the competitors. He criticized, as he had before, the view that focused on “the supposed evils of bigness in itself.”¹¹⁵ For one thing, arguing over the merits of size “is like arguing whether tall buildings are better than low ones. . . . Such discussions have no meaning in the abstract since the answer depends on the purposes or functions the organizations are supposed to reform.”¹¹⁶ For another, a focus on size will deprive antitrust enforcement of public support for the simple but compelling reason that “[c]onsumers are unwilling to lose the advantages of a machine age because of sentimental attachment to the ideal of little business.”¹¹⁷ Having reiterated his point that bigness itself is not a curse, Arnold warned that bigness “does give power to those who control it. That

¹¹¹ T.A. LARSON, HISTORY OF WYOMING 450 (2d ed. rev. 1978).

¹¹² THURMAN W. ARNOLD, THE BOTTLENECKS OF BUSINESS (1940).

¹¹³ ARNOLD, *supra* note 19, at 120.

¹¹⁴ ARNOLD, *supra* note 112, at 121–22.

¹¹⁵ *Id.* at 122.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 123.

power must be constantly watched by an adequate enforcement organization to see that it does not destroy a free market."¹¹⁸

Arnold's biographer, Spencer Weber Waller, aptly observed that "*Bottlenecks* simply rambled from start to finish . . . [but] was nevertheless captivating."¹¹⁹ Yet Arnold's focus was clear enough. The first sentence explained that "[t]he purpose of this book is to explain to the consumer what can be done for him to increase the distribution of goods under our existing law and by pursuing our traditional ideals of an economy of free and independent enterprise."¹²⁰ In the first two paragraphs, he referred to the American consumer no fewer than eight times. Throughout the book, he retailed accounts of cases that lowered prices for consumers.¹²¹ He once again looked back to the first forty years of the Sherman Act and explained that "[a]ntitrust enforcement, not being geared to the idea of consumers' interests, became a hunt for offenders instead of" working to promote "the flow of goods in commerce"¹²²—that is, promoting maximum output. He boldly proclaimed that "[i]f the American consumer can be made to understand what the antitrust laws can do for him, the next few years of the Sherman Act will be an era of constructive achievement."¹²³ Somewhat ahead of his time, Arnold focused on benefits to consumers as the touchstone of effective antitrust enforcement.¹²⁴

IV. REKINDLED PASSION?

Richard Hofstadter famously observed that the "antitrust movement is one of the faded passions of American reform."¹²⁵ As Hofstadter was writing in the early 1960s, this absence of an antitrust movement was accompanied by vigorous antitrust enforcement—an antitrust "paradox"¹²⁶ he identified long before Robert Bork altered the course of antitrust jurisprudence by articulating a different antitrust paradox.¹²⁷

¹¹⁸ *Id.* at 125.

¹¹⁹ WALLER, *supra* note 2, at 102.

¹²⁰ ARNOLD, *supra* note 112, at 1.

¹²¹ *See, e.g., id.* at 191–212 (recounting cases in the dairy and construction industries, among others).

¹²² *Id.* at 263.

¹²³ *Id.* at 260.

¹²⁴ *See* Brinkley, *supra* note 23, at 570–71 (describing how Arnold's focus on consumer prices was a shift from earlier antitrust rationales).

¹²⁵ HOFSTADTER, *supra* note 50, at 188.

¹²⁶ *Id.* at 189–90 ("In the very years when it lost compelling public interest the antitrust enterprise became a force of real consequence in influencing the behavior of business.").

¹²⁷ ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978). Bork did not find anything at all paradoxical about the coincidence of increased enforcement with absence of public interest: "The waning of fervor with the growth of organization, bureaucracy,

The existence of Hofstadter's antitrust paradox is largely due to Thurman Arnold. He both deflated the antitrust movement in *Folklore* and demonstrated a practical and effective approach to enforcement. He also tried to spark an alternative antitrust movement of consumers, but in that he was less than successful. Another antitrust paradox: though numerous—indeed ubiquitous—consumers have an interest in antitrust that is too diffuse to form the basis of an effective political movement.¹²⁸ In the end, Arnold's singular achievement may have been to recognize that the antitrust laws were a particular type of tool—a hammer, say—and not something else. Equally important, though, he recognized that not every ill arising from the state of business is a nail.

One of the intellectually interesting developments of recent years has been the attempt on the part of some scholars and advocates—the so-called “New Brandeis School”—to rekindle a popular antitrust movement.¹²⁹ As suggested by their name, these writers take as their inspiration the work of Louis Brandeis and hearken back to the antitrust movement of the early twentieth century.¹³⁰ Like Brandeis, this school of thought is particularly preoccupied with the size of corporations and an accompanying “curse of bigness.”¹³¹ In sharp contrast to Thurman Arnold, the New Brandeisians have little interest in benefits to consumers, focusing instead on broader social and political goals such as “a democratic distribution of power and opportunity in the political economy.”¹³² When they list those whom antitrust enforcement should benefit, they notably

and effective power is a familiar occurrence in both secular and religious movements.” *Id.* at 4. To Bork, the antitrust paradox was that “[c]ertain of [antitrust’s] doctrines preserve competition, while others suppress it, resulting in a policy at war with itself.” *Id.* at 7. This paradox led to “the crisis in antitrust,” to which he already was directing attention as Hofstadter was writing. See Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363 (1965).

¹²⁸ See HAWLEY, *supra* note 84, at 447, 449 (suggesting that Arnold’s aggressive enforcement program was unsustainable because of the lack of a coherent pro-enforcement constituency and because it was “apparently destined to make more enemies than friends”).

¹²⁹ See, e.g., Khan, *supra* note 6; Lina Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710 (2017); BARRY C. LYNN, *CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION* (2010); TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018); MATT STOLLER, *GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY* (2019).

¹³⁰ See WU, *supra* note 129, at 33 (“This book aspires to resurrect and try to renovate the lost tenets of the Brandeisian economic vision.”); see also *id.* at 34–44 (recapping Brandeis’s thought); LOUIS D. BRANDEIS, *A Curse of Bigness*, in *OTHER PEOPLE’S MONEY: AND HOW BANKERS USE IT* 162 (1914); Louis D. Brandeis, *Shall We Abandon the Policy of Competition?*, in *THE MAKING OF COMPETITION POLICY: LEGAL AND ECONOMIC SOURCES* 185 (Daniel A. Crane & Herbert Hovenkamp eds., 2013).

¹³¹ See, e.g., WU, *supra* note 129; STOLLER, *supra* note 129.

¹³² Khan, *supra* note 6, at 131; see also Herbert Hovenkamp, *Is Antitrust’s Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 65, 81–92 (2019) (surveying New Brandeisian critiques of the consumer welfare approach).

omit consumers.¹³³ Nevertheless, the New Brandeisians seem to be gaining political traction as two of their leading voices have been tapped for top positions in the Biden Administration.¹³⁴

In addition to their namesake, many New Brandeisians also look to Thurman Arnold for inspiration.¹³⁵ This is curious, as Arnold obviously was not a Brandeisian himself.¹³⁶ If it was anything, the antitrust chapter in *Folklore* was an extended denunciation of the idea that bigness is a curse, ridiculing the consequences of pursuing that idea in policy.

But nor would Arnold be in sympathy with the Chicago School orthodoxy, which has taken hold in the past four decades and of which Robert Bork was one of the key proponents.¹³⁷ Arnold the “dissenting lawyer” would go after this doctrine, if for no other reason, precisely because it is an orthodoxy. More fundamentally, Arnold would find baffling the Chicago School’s seemingly boundless faith that markets, under virtually all circumstances, will correct themselves.¹³⁸ He would no doubt find that notion as outrageously unlikely as that city streets could do without traffic lights and traffic cops.¹³⁹

¹³³ Khan, *supra* note 6, at 132 (worrying about harms to “workers, suppliers, innovators, and independent entrepreneurs”).

¹³⁴ See Cecilia Kang, *A Leading Critic of Big Tech Will Join the White House*, N.Y. TIMES (Mar. 5, 2021), www.nytimes.com/2021/03/05/technology/tim-wu-white-house.html (appointment of Professor Tim Wu as a special assistant to the president for technology and competition policy); Cecilia Kang, *Biden Nominates Lina Khan, a Vocal Critic of Big Tech, to the FTC*, N.Y. TIMES (Mar. 22, 2021), www.nytimes.com/2021/03/22/business/lina-khan-ftc.html.

¹³⁵ See WU, *supra* note 129, at 51 (describing Arnold as “the Wyoming ‘cowboy’ and Yale professor who became the New Deal’s most aggressive trustbuster”); STOLLER, *supra* note 129, at 150 (crediting Arnold with “shift[ing] American business culture at large”).

¹³⁶ See Miscamble, *supra* note 51, at 10 (Arnold was not a trust buster “in the Brandeisian sense”); GRESSLEY, *supra* note 10, at 184 (“Arnold dissented from the Brandeis opinion” on the evil of bigness and the virtue of small business); HAWLEY, *supra* note 84, at 428 (Arnold differed from Brandeisians in his attitude toward “the mere possession of economic power [and] the evils of bigness per se”).

¹³⁷ See Waller, *supra* note 52, at 609 (“by no stretch of the imagination” could Arnold be considered a harbinger of the Chicago School). For a largely sympathetic review of the Chicago School’s impact on antitrust law, see Richard Schmalensee, *Thoughts on the Chicago Legacy in U.S. Antitrust*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 40, 43 (Robert Pitofsky ed., 2008) (arguing that “the work of lawyers and economists associated with the Chicago School, particularly in the 1970s, had a strongly positive effect on U.S. antitrust policy by defanging judicial decisions and policy proposals that could have had substantial economic costs”) [hereinafter CHICAGO SCHOOL OVERSHOT THE MARK].

¹³⁸ See, e.g., BORK, *supra* note 127, at 197 (arguing that “the maintenance of size against the eroding forces of the market over a long period of time also indicates either an absence of restriction of output or superior efficiency, or both”); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15 (1984) (“A monopolistic practice wrongly excused will eventually yield to competition, though, as the monopolist’s higher prices attract rivalry.”).

¹³⁹ See ARNOLD, *supra* note 112, at 122 (“The maintenance of a free market is as much a matter of constant policing as is the flow of free traffic on a busy intersection.”).

In *Folklore*, Arnold assessed the preceding forty years of antitrust enforcement and found it wanting. As it turned out, his tenure at the Antitrust Division ushered in forty years of vigorous, oftentimes quite effective enforcement of the antitrust laws. During those decades, enforcement efforts strayed only when they relied on the type of “curse of bigness” mythology that Arnold had debunked.¹⁴⁰

But beginning around 1980, things turned and over the past forty years a new folklore has arisen, especially in the judiciary. This folklore is more sophisticated, perhaps, than the laissez-faire orthodoxy of the early twentieth century, but the effect on antitrust enforcement has been somewhat similar. Antitrust enforcement has not quite fallen into “innocuous desuetude,”¹⁴¹ but it has been severely hampered by the judicial embrace of Chicago-inspired theories.¹⁴²

Richard Hofstadter had a slightly different take from Mark Twain regarding historical recurrence. “History cannot quite repeat itself,” he wrote, “if only because the participants in the second round of any experience are aware of the outcome of the first.”¹⁴³ The optimism of this maxim may seem almost naïve, as knowledge of past mistakes often does not protect against repeating them. In any event, recalling Thurman Arnold’s puncturing of received wisdom on both the left and right can provide a pole star to navigate these challenging times and the struggle over the direction of antitrust enforcement. He correctly saw that the proper focus of antitrust enforcement, if it is to be effective, must be on the interest of consumers in lower prices and higher output.

¹⁴⁰ See, e.g., *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 344 (1962) (barring merger of two shoe companies with small market share because “we cannot fail to recognize Congress’ desire to promote competition through the protection of viable, small, locally owned business [even if] . . . occasional higher costs and prices might result from the maintenance of fragmented industries and markets”); *United States v. Von’s Grocery Co.*, 384 U.S. 270 (1966) (using similar reasoning to block a merger of grocery stores with small market share); see also Thomas Kauper, *Influence of Conservative Economic Analysis on the Development of the Law of Antitrust*, in CHICAGO SCHOOL OVERSHOT THE MARK, *supra* note 137, at 40, 43 (“Antitrust of the [1950s and 1960s] reflected an almost randomized mix of economic, social, and political values.”).

¹⁴¹ ARNOLD, *supra* note 19, at 120.

¹⁴² See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) (asserting “consensus among commentators” regarding the rarity of predatory pricing schemes by citing Chicago School sources); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993) (invoking *Matsushita* language on rarity of predatory pricing while adopting restrictive test for proving such a scheme); C. Scott Hemphill & Philip J. Weiser, *Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing*, 127 YALE L.J. 2048, 2062 (2018) (contending that, far from reflecting a consensus, the Chicago School literature relied on by the Court “was contested at the time and . . . has [been] undermined” by subsequent scholarship).

¹⁴³ HOFSTADTER, *supra* note 67, at 313.

The issue today is whether antitrust will move in a new direction.¹⁴⁴ On the one hand, the New Brandeisians point toward a revived antitrust movement that resurrects the tropes of the original antitrust movement from the late nineteenth and early twentieth century. On the other hand, the Chicago School, though largely exhausted intellectually, guides the judiciary and its ideas permeate antitrust jurisprudence.¹⁴⁵ Perhaps between the extremes of an ill-considered revivalist movement and the continued lassitude of the Chicago School, there is a middle way. This direction would not target bigness merely for the sake of bigness, but neither would it assume that markets will always correct themselves. Instead, it would aim substantially to affect business conduct in a way that benefits consumers.¹⁴⁶ Such is the course “that man from Laramie” would have charted.

¹⁴⁴ See Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, 94 NOTRE DAME L. REV. 583, 583 (2018) (“Antitrust in the United States today is caught between its pursuit of technical rules designed to define and implement defensible economic goals, and increasingly political calls for a new antitrust ‘movement.’”).

¹⁴⁵ See Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PENN. L. REV. 1843, 1844 (2020) (arguing that the Chicago School’s “influence has waned considerably among scholars, [but] it continues to find support among conservatives in business, politics, and the federal judiciary”).

¹⁴⁶ See generally, e.g., Jonathan B. Baker et al., *Unlocking Antitrust Enforcement*, 127 YALE L.J. 1916 (2018); JONATHAN B. BAKER, *THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY* (2019); Shapiro, *supra* note 7.

