2 The Context of Antitrust

Alone among industrial nations, the United States rejected cartels—at least in theory. Americans had been ambivalent toward big business ever since it emerged in the late nineteenth century, respecting its efficiency but fearing its economic and political power. These concerns led Washington to regulate the activities of large firms, outlawing cartels and imposing other restrictions on these companies. A few cartels did exist in the United States, but they were exceptions that participants usually justified by reference to special conditions. As a whole, Americans placed great confidence in economic competition as a check on the power of big business and looked askance at cartels.

The Antitrust Tradition

The antitrust laws, which largely banned cartels, had deep roots in the American political tradition. They evolved in the fifty years before World War II, shaped by a struggle between those who sought to break up large firms and those who believed that such companies offered economic advantages. By the 1930s, most in the United States took the antitrust laws for granted, considering them as part of an “American way” that tolerated big business but preserved a measure of competition among even the largest firms.

For most Americans, the status of cartels was part of a larger constellation of issues involving the place of big business in society. During the late nineteenth century, the U.S. economy had changed radically. Before 1850, a complex network of independent merchants, most of whom employed no more than a handful of clerks and did business only in a limited geographic area, managed the flow of goods through the economy. The largest manufacturing companies, New England's textile mills, each employed at most a few hundred workers. No firm had much control over its markets. On the whole, economic power, and the social and political power that went with it, was widely diffused. Slowly after 1850, and more rapidly after 1870, the situation changed. New technologies, particularly the development of the railroad, encouraged the growth of large, bureaucratic companies—big business. By 1900, these firms managed railways and telegraphs and dominated the production of steel, oil, copper, farm implements, electrical machinery, papers, cigarettes, soap, and more.[1]

Big business wielded unprecedented power. In most areas railroads enjoyed monopolies over transportation—farmers had to ship their crops out on a single railroad, and merchants had to bring their goods in the same way. Yet neither group had much control over the railways, which were governed by bureaucracies headquartered far away and ultimately often controlled by financiers in New York, Boston, Philadelphia, Baltimore, or even London. Managers charged shippers "what the market would bear," rates that secured maximum revenue. Railways had close ties with all levels of government, which chartered and sometimes financed them. No firm was willing to leave such important relationships to chance, and to protect their position and, ideally, improve it, railroads plunged into politics, contributing mightily to the political corruption endemic to the United States in the late nineteenth century. Large industrial firms, which often ruthlessly destroyed smaller competitors and bought the support of government officials, presented a similar aspect to the public.

Many Americans concluded that big business posed a dual threat. On one hand, it gouged consumers and destroyed smaller competitors, distorting economic life. On the other, it corrupted government and robbed communities of their autonomy, eroding political democracy. Historian Matthew Josephson summed up these concerns in his classic 1934 study of the rise of big business in the late nineteenth century, *The Robber Barons*: "Under the new dispensation . . . the strong, as in the Dark Ages of Europe, and like the military captains of old, having preempted more than others, having been [possessed] . . . of land and highways and strong places, would own because they owned. Chieftains would arise, in the time-honored way, to whom the crowd would look for leadership, for protection, finally for their very existence. They would be the nobles of a new feudal system."[2]

Yet big business also generated immense wealth that it spread widely, if not evenly. Companies like Standard Oil, Swift, Heinz, Pillsbury, and Procter & Gamble made and distributed high-quality consumer goods far more cheaply than the old independent merchants. Railroads opened up for economic development parts of the country previously isolated, most notably the Great Plains and the Rocky Mountains. Innovative firms like General Electric and Westinghouse brought to market entirely new products, such as electric lights and streetcars, that made life easier. However uncomfortable with big business, most Americans also understood that it contributed substantially to their high standard of living. Writing in the 1930s, journalist Dorothy Thompson observed, "Two souls dwell . . . in the bosom of the American people. The one loves the abundant life, as expressed in the cheap and plentiful products of large-scale mass production and distribution. . . . The other soul yearns for former simplicities, for decentralization, for the interests of the 'little man,' . . . denounces 'monopoly' and 'economic empires,' and seeks means of breaking them up."[3]

Progressive Era reformers reflected this ambivalence. After 1900, activists labeled Progressives, touting a wide variety of programs, seized the political stage. Chief among the issues with which they wrestled was the place of big business in society. Many rejected large companies in toto. They contended that only government favoritism and sharp dealings like predatory pricing, concessionary railroad rates, and preferential financing had allowed large firms to triumph over smaller rivals.[4] Louis Brandeis, one of the leading lights of the Progressive Era, stated, "I am so firmly convinced that the large unit is not as efficient—I mean the very large unit—is not as efficient as the smaller unit, that I believe that if it were possible today to make corporations act in accordance with what doubtless all of us would agree should be the rules of trade no huge corporations would be created, or if created, would be successful."[5]

The rejection of big business rested as much on social and political concerns as on economic ones. The power of these companies threatened to corrupt government, regiment national life, and destroy political democracy. Woodrow Wilson spoke for many when he warned in 1912 that in big firms, "individuality is swallowed up in the individuality and purpose of a great organization. While most men are thus submerged in the corporation, a few, a very few, are exalted to a power which as individuals they could never have wielded. . . . A few are enabled to play a part unprecedented by anything in history . . . in the determination of the happiness of great numbers of people."[6] Brandeis and Wilson advocated "trust-busting," breaking up large firms.

Yet other Progressive reformers saw big business as a blessing, albeit a decidedly mixed one. They realized that large companies enjoyed economies of scale and scope that allowed them to produce and deliver goods far more cheaply than their smaller competitors. Theodore Roosevelt insisted, "Combinations in industry are the result of an imperative economic law which cannot be repealed by political legislation."[7] Still, although considering big business economically valuable, he too worried about its political power and its impact on democracy, warning, "Now the great special business interests too often control and corrupt the men and methods of government."[8] Herbert Croly's influential *The Promise of American Life*, which described alluringly the opportunities afforded by large-scale economic organization, contended, "The rich men and the big corporations have become too wealthy and powerful for their official standing in American life. They have not obeyed the laws. They have attempted to control the official makers, administrators, and expounders of the law. They have done little to allay and much to excite . . . resentment and suspicion. In short, while their work has been constructive from an economic and industrial standpoint, it has made for political corruption and social disintegration."[9] The government needed to regulate big business, preventing it from abusing its power and guaranteeing that its activities benefited society as a whole.

The thinking of Progressives like Roosevelt and Croly illustrates a key difference between the United States and other industrial countries that probably had great impact on attitudes toward big business. Most European nations (as well as Japan) had strong government institutions that could easily regulate large firms. Before the twentieth century, the U.S. government had few such capabilities, which made the power of big business seem particularly alarming.

Cartels occupied an unusual place in the American debate over big business. Businessmen in the United States, like their counterparts in other countries, had organized cartels in the late nineteenth century, most notably railroad pools. Yet they enjoyed little success, in part because of the intensely competitive culture of American business. The key development, however, came in 1890, when Congress enacted the first measure directed against big business, the Sherman Act. It banned "restraint of trade," a common-law term on which legal experts often disagreed. The courts initially interpreted the measure very narrowly, striking down only agreements among independent firms that set prices and production—that is, cartels. Individual companies, no matter how large, were exempt. This doctrine encouraged a wave of mergers around the turn of the century that brought competing firms together, circumventing the prohibition against cartels.[10] Thus in the United States, large unitary companies emerged in sectors where in Europe (particularly Germany) cartels predominated. As a result, few Americans made much of a distinction between cartels and big business, as both seemed to have the same objective—controlling markets.

During the Progressive Era, the courts reinterpreted the Sherman Act, greatly extending its reach. Decisions in the first decade of the twentieth century started the process of bringing individual companies under the law's purview, and the Supreme Court set down a comprehensive doctrine on the subject in 1911. In that year's *Standard Oil* decision, the court distinguished between companies engaged in "reasonable" and in "unreasonable" restraint of trade. Firms that grew large because of superior efficiencies were examples of the former and within the law. Those that prospered because of underhanded tactics like predatory pricing and railroad rebates represented an unreasonable restraint of trade and faced dissolution, which was the fate of Standard Oil.[11] The Clayton and Federal Trade Commission Acts, enacted in 1914 during the Wilson administration, expanded on this approach, explicitly banning "unfair" competitive practices.[12] As a practical matter, these measures did little to halt the growth of large companies, which, contrary to Brandeis's assertion, usually did enjoy economies of scale and scope. This legislation did, however, restrict some of the most objectionable practices of big business.

The *Standard Oil* decision summed up, as much as anything, the implicit compromise on big business that emerged from the Progressive Era. The country would accept large companies as long as they were efficient and stopped short of monopoly. Accordingly, many industries developed into oligopolies, dominated by a handful of very big enterprises that competed, albeit cautiously. Some dissented from this compromise. Many businessmen wanted to cooperate to stabilize markets, and they sometimes developed sub rosa ways of doing so. Many reformers continued to draw inspiration from Brandeis and to distrust all large companies. Experts also disagreed on how strictly Washington needed to enforce the antitrust laws to preserve competition. Nevertheless, the antitrust compromise proved remarkably durable.

The dissidents largely balanced out, blocking each other's schemes for radical change. The debates over enforcement, no matter how heated, did not challenge the objectives of policy. The principle that big business was acceptable as long as it was efficient and faced competition persisted.[13]

The antitrust compromise precluded cartels. These organizations sought to regulate markets, and most Americans wanted to retain at least a measure of competition. Nor did cartels meet the standard of efficiency. Whereas mergers among competing companies could secure efficiencies by combining and rationalizing operations, cartels could not because members retained their independence.

Most U.S. firms did not really need cartels. The country enjoyed a huge domestic market, a fairly stable currency, and the rule of law, advantages that more than compensated for the risks of competition. In this context, industrial rivalry probably strengthened the economy by encouraging efficiency and innovation. Firms in other industrial nations faced more daunting prospects. None had a domestic market even half the size of the American one, and their governments and currencies were often extremely unstable.[14] In such conditions, competition might well cripple everyone.

The 1920s saw a new approach to economic regulation, one that reflected the trend toward cartels abroad. Herbert Hoover, as commerce secretary and later president, sponsored trade associations for American industries. These organizations encouraged the standardization of products and disseminated the latest technical information to members. They also circulated data on output, sales, and prices, which presumably would lead firms to make more "rational" decisions and so promote economic stability. On accepting the Republican presidential nomination in 1928, Hoover proudly claimed, "During my term as Secretary of Commerce I have steadily endeavored to set up a system of cooperation between government and business. Under these cooperative actions all elements interested in the problems of a particular industry such as manufacturer, distributor, worker and consumer had been called into council together, not for a single occasion but for continuous work."[15] As historian Robert Himmelberg has pointed out, trade associations sometimes worked like cartels, regulating markets. Yet Hoover himself refused to endorse cartels per se, believing that price setting and market allocation hurt consumers and that centralized control over the economy threatened political democracy. As president, Hoover actually encouraged antitrust prosecution against trade associations that worked like cartels.[16] He sought not to eliminate competition but to reconcile it with planning and stabilization. Despite a few breaches, Hoover's trade associations left the antitrust compromise intact.

Policy toward international cartels at this time demonstrated considerable ambivalence. The 1918 Webb-Pomerene Act allowed American producers in the same line of business to form joint companies to manage their exports. Designed to allow American firms to present a common front to large foreign purchasers such as governments and to enable small firms to reduce the cost of selling abroad by working together, the act also had substantial utility for cartel builders. As early as 1918, American copper producers, which at that time dominated the world industry, had organized a cartel under the aegis of a Webb-Pomerene corporation. In 1924, the Federal Trade Commission (FTC), which oversaw Webb-Pomerene companies, made the act even more useful to cartel builders when it informed the Silver Producers Committee, a trade association, "There is nothing in the [Webb-Pomerene] act which prevents an association formed under it from entering into any cooperative relationship with a foreign corporation for the sole purpose of operation in a foreign market. The only test of legality in such an arrangement would be the effect upon domestic conditions within the United States."[17] Though the silver cartel never materialized, producers in other industries took the "silver letter," as it was called, as permission for Webb-Pomerene companies to sign cartel accords that apportioned foreign markets. Exactly how a cartel could influence world markets without affecting those in the United States was not entirely clear. As the head of the copper industry's Webb-Pomerene company admitted in 1940, "You had one market practically, and that was a world-wide market."[18] Yet before 1940, the FTC challenged none of the agreements signed by Webb-Pomerene companies, which tied American firms to the electrical machinery, copper, steel, and synthetic alkali cartels, among others.

At the same time, the American government did attack international cartels that, it believed, abused their power. Here again Herbert Hoover was the critical figure. As commerce secretary he vigorously opposed the international rubber and potash cartels, doing his best to develop new supplies of both materials.[19] This policy reflected national self-interest. In the 1920s, the United States imported large quantities of both rubber and potash, and the sharp price increases engineered by the two cartels hurt. Yet in these cases economic calculation accorded with Hoover's convictions. Throughout his career he opposed cartels, and in the international sphere he merely concentrated attention on those that affected his country the most.[20] Nevertheless, no one in Washington seems to have contemplated a general attack on international cartels.

The Great Depression transformed the political as well as the economic situation. The unprecedented economic collapse threw millions out of work and propelled Franklin D. Roosevelt into the White House. Roosevelt, one of the canniest politicians this country has ever produced, immediately embarked on a program of economic reform—the New Deal—which he justified in large part with references to the evils of big business. Americans had accepted large companies chiefly because they generated great wealth, and the Depression brought to the surface all the doubts the people harbored about these organizations. Roosevelt capitalized on this sentiment, a process that began early. As one historian observed, "Franklin Roosevelt drew his first notable applause during his inaugural address [in 1933] when he assailed the money-changers, and the next, and even louder applause, when he promised to end business misconduct."[21] The rift between Roosevelt and business grew during his first administration. In 1936, when accepting renomination by the Democratic Party, the president drew inspiration from Louis Brandeis's book *Other People's Money*, declaring that before he had entered the White House, "A small group had concentrated into their own hands an almost complete control over other people's property, other people's money, other people's labor—other people's lives. For too many of us life was no longer free; liberty no longer real; men could no longer follow the pursuit of happiness." He continued, "Here in America we are waging a great and successful war. It is not alone a war against want and destitution and economic demoralization. It is more than that; it is a war for the survival of democracy."[22] In 1937, Secretary of the Interior Harold Ickes, one of the most influential members of Roosevelt's cabinet, declared that the central question before the country was "a struggle for power, for the control of lives, labor, and possessions of whole peoples—a struggle between the many and the few, a struggle between those who would live and let live and those who want the thrill of the power of ruling others." "The future of America," he said, "depends upon whether big business can . . . be compelled to conform to our laws, be compelled to accept the will of the majority, be compelled to cooperate with the rest of us in trying to make democracy work."[23]

The Roosevelt administration was not firing its rhetorical barbs into a void. The president's opponents subjected him and his administration to a flood of abuse, warning that the New Deal would bankrupt the government and destroy the free enterprise system. However exaggerated these sentiments appear in retrospect, they reflected disagreement over important issues. The New Deal imposed major reforms on private enterprise that most businessmen staunchly opposed: regulating the financial system, strengthening organized labor, and sharply raising taxes on the wealthy. Despite some important exceptions, the business community came to hate FDR with a passion.

Yet Roosevelt's policies toward big business were actually more ambiguous than his white-hot rhetoric suggested. Some reforms did strike at important interests of these organizations, but others offered them substantial benefits. Some of Roosevelt's advisers drew inspiration from Louis Brandeis and urged aggressive antitrust policies, but others looked to the experience of Hoover's trade associations and forwarded schemes for economic planning in which business would have a substantial role. The division of opinion evident among Progressive Era reformers persisted during the New Deal. As historian Ellis Hawley noted, "On one hand, the Depression produced insistent demands for planning, rationalization, and the erection of market controls that could stem the forces of deflation and prevent economic ruin. On the other, it intensified antimonopoly sentiment, destroyed confidence in business leadership, and produced equally insistent demands that big business be punished and competitive ideals made good."[24] Roosevelt maneuvered between these forces, balancing them as the political situation dictated.

The New Deal actually saw the acme of cartels in the United States. As was always the case during economic downturns, the Depression made these organizations attractive to businessmen. Meanwhile, the unprecedented collapse made the public willing to consider new approaches to economic policy. In the early 1930s, several articles and books appeared on cartels, most notably one by Gerard Swope, the president of General Electric and an architect of the Phoebus cartel. In 1930, he urged, "Production and consumption should be coordinated on a broader and more intelligent basis [through cartels] thus tending to regularize employment."[25] Swope's plans required substantial revision of the antitrust laws, however, which President Hoover refused to countenance.

Roosevelt proved more receptive. Soon after taking office he secured passage of the National Recovery Act (NRA), which suspended the antitrust laws and provided for the creation of mandatory "codes of conduct" for each industry. These would regulate production and sales, as well as the conditions of labor, and business would cooperate with the government, organized labor, and consumer groups in drafting codes.[26] Unfortunately, different groups interpreted the NRA quite differently: businessmen saw it as an aegis under which to organize cartels; enthusiasts of planning wanted to erect industry-wide organizations through which the government could guide economic development; and trust-busters hoped that the codes, by banning underhanded tactics and restricting collusion, would actually reinforce competition as well as protect smaller firms against their more powerful rivals. As Hawley wrote, "The NRA was not a single program with a single objective, but rather a series of programs with a series of objectives, some of which were in direct conflict with each other."[27] The result was a mess that contributed mightily to the deterioration of relations between the business community and the Roosevelt administration. As Hawley put it, the NRA led to "the conviction of one side [business] that cooperation would lead to bureaucratic socialism, of the other [New Dealers] that it would lead to fascism or economic oppression."[28] Most seemed relieved when, in 1935, the Supreme Court struck down the NRA as unconstitutional.

Despite this fiasco, the Roosevelt administration continued to sponsor cartels for favored sectors of the economy. Agricultural programs instituted price supports and limited planting. Government regulation of trucking, airlines, and railways restricted capacity and propped up prices; legislation governing coal and petroleum did the same. Although cartels remained the exception in the American economy, the exceptions were significant.

Still, cartels lost ground intellectually under the New Deal. In 1933, the country appeared on the verge of embracing these organizations. Desperate to halt the downward spiral of the economy, Americans seemed willing to abandon the antitrust tradition. The NRA, however, soured many people on cartels, including businessmen who had been among their foremost advocates. The fierce hostility that developed between business and government under the New Deal increased the presumption against cartels. Businessmen were extremely reluctant to submit their arrangements to federal oversight, whereas New Dealers refused to tolerate cartels in whose operations Washington did not have a leading voice.

Many opposed to cartels in principle tolerated the organizations in practice, particularly when they themselves benefited. Yet in these cases the advocates of a cartel usually insisted that market "imperfections" made deviations from the ideal of competition necessary. Sometimes serious imbalances did exist, although in other cases talk of "imperfections" was largely an exercise in hypocrisy.[29] Regardless, even the advocates of specific cartels portrayed these organizations as exceptions to the norms of economic life.

The first Roosevelt administration generally left international cartels alone. Trying to organize a domestic system of cartels, the NRA, the president could hardly have launched a campaign against similar organizations abroad. In fact, the Department of Agriculture actually participated in the international sugar and wheat cartels. Moreover, Roosevelt evinced little interest in foreign affairs during his first term in office, concentrating instead on domestic reform. As one student of antitrust policy has written, "There is little evidence of United States government opposition to notorious foreign cartels or the open participation in them by American firms during the interwar period."[30]

The Antitrust Drive

In Roosevelt's second term, his administration launched perhaps the most ambitious antitrust drive in the nation's history. It developed unexpectedly, propelled by political expediency and the enthusiasm of middle-level officials, yet it drew on the established antitrust tradition and would have lasting implications at home and abroad.

The antitrust drive had its origins in the sharp recession of 1937 and 1938. The downturn, probably triggered by large cuts in government spending and the Federal Reserve's tightening of monetary policy, surprised the administration and encouraged enemies of the New Deal, who saw the recession as a harbinger of the president's political demise. His administration was already in trouble. Roosevelt's notorious "Court-packing" plan, which sought to remake the high bench in the image of the New Deal, had alienated many of the president's supporters and had galvanized his opponents. Controversial "sit-down" strikes had further sapped his support, as had Roosevelt's ill-considered attempts to "purge" conservatives from the Democratic Party. In 1938, the Republicans scored large gains in the off-year elections, and starting in 1939, they worked effectively in Congress with conservative Democrats to stymie Roosevelt's plans for further domestic reform.

Beset by difficulties, the administration intensified its attacks on Roosevelt's favorite political foil, big business. In late 1937, Harold Ickes and Robert Jackson, two of the president's closest advisers, delivered perhaps the most savage attacks on the business community yet by prominent New Dealers. Among other things, they blamed the recession on a "capital strike," a conspiracy of the wealthy to discredit the New Deal.[31] Others advanced a more measured explanation for the recession that nevertheless placed the onus for the nation's economic ills on large companies. They blamed the recession and, indeed, the Depression itself on the power of big business to control prices and restrict output. Thurman Arnold, who took over the Justice Department's Antitrust Division in 1938, wrote, "When industry becomes highly organized, it gains the power to control prices which the people must pay. The exchange of raw materials and services by unorganized groups for the products of organized industry becomes more and more a one-sided bargain. When this happens a farm problem always arises because the farmer cannot buy. Then an unemployment problem becomes acute because the manufacturer cannot sell its goods." According to Arnold, this situation explained the 1937 recession. "With the expanding market [in 1936]," he wrote, "most industries attempted, by raising their prices, not to distribute the most goods but to obtain the largest share of that expanding purchasing power. The result was that we became choked with our own wealth."[32]

In 1938, President Roosevelt sent a message on antitrust policy to Congress stating, "One of the primary causes for our present difficulties lies in the disappearance of price competition in many industrial fields, particularly in basic manufacture where concentrated economic power is most evident."[33] "Private enterprise," the president warned ominously, "is ceasing to be free enterprise and is becoming a cluster of private collectivism: masking itself as a system of free enterprise after the American model, it is in fact becoming a concealed cartel system after the European model."[34]

Roosevelt embraced antitrust out of desperation. Heretofore he had displayed little interest in the subject, yet earlier reforms had failed to bring economic recovery, and political reverses made it nearly impossible to get major new programs from Congress. Antitrust prosecution was all that remained. Whatever doubts the president himself may have harbored, however, those who designed and carried out his program were sincere. As far as they were concerned, the antitrust drive was not a political ploy or a second-best policy but a radical effort to restore economic competition.

The drive against monopoly followed two different avenues: the investigation by the Temporary National Economic Committee (TNEC) and prosecutions by Justice Department's expanded and reenergized Antitrust Division. At first, both focused on the domestic scene, but the TNEC did not ignore conditions abroad, and the Antitrust Division would eventually make international cartels one of its prime targets.

The TNEC, which drew members from both Congress and the administration, launched an exhaustive investigation of economic power that, its supporters believed, would suggest reforms. By the time it had finished its work, however, the outbreak of war in Europe had diverted public attention from the question of monopoly. Moreover, the very thoroughness with which the TNEC pursued its job retarded its effectiveness. Its reports were generally of high quality, but their complexity put off the public, not to mention politicians looking for easy solutions.

The TNEC examined the two chief ways in which American firms participated in international cartels: Webb-Pomerene companies and patent agreements. It evinced skepticism about the utility of the former, questioning whether participation in cartel agreements dividing up foreign markets was the best way to expand exports. The committee also noted, "Doubt has been expressed, too, that firms can assign quotas and fix prices in foreign markets without influencing prices in the domestic market."[35] Nevertheless, the committee concluded, "On the whole, foreign cartels and foreign corporations exerted only a minor influence on production in this country."[36]

The TNEC devoted more time to patents. The use of patents as a basis for monopolies and cartels infuriated critics of economic concentration. To their minds the government had created the patent system to allow inventors to enjoy the benefits of their discoveries. Corporations, artificial legal constructs, could not actually invent anything, and their ownership of patents seemed perverse. Particularly galling, the patent laws allowed companies to enlist the government in enforcing monopolies. The TNEC report on patents argued that corporate manipulation had "lifted the patent out of the province in which it is supposed to operate, separates it from the objective it is supposed to serve. . . . It sets the grant down in a universe of business, makes it a counter in the acquisitive game." This report, which among other things discussed GE's lightbulb cartel, did not neglect the international application of patent agreements. "In peace or war," it noted, "the international cartel poses its problems. A corporation barricades its monopoly by securing grants [patents] in all dominant nations. If concerns here and abroad lay claim to rival technologies, the conflict is usually resolved by private understanding. Like countries engaged in power politics, an international cartel marks out spheres of influence. . . . An agreement between gentlemen which vaults over frontiers becomes the actual regulation of commence with foreign nations."[37]

The TNEC recommended important changes in the patent laws. Some were of a technical nature, such as procedures to speed up applications and to prevent companies from using various legal devices to extend the life of a patent beyond its seventeen-year limit.[38] But the TNEC went further. It recommended "legislation which will require that any future patent is to be available for use by anyone who may desire its use and who is willing to pay a fair price for the privilege. Machinery . . . should be set up to determine whether the royalty demanded by the patentee may be fairly be said to represent reasonable compensation."[39] Congress did not pass this broader suggestion into law.

The brunt of the effort against monopoly fell, somewhat surprisingly, on the Antitrust Division of the Justice Department. Long a stagnant bureaucracy, this agency suddenly became a focus of activity in the late 1930s under the leadership of Thurman Arnold. His predecessor, Robert Jackson, had launched several important cases, but Arnold massively expanded the activities of the bureau. He increased its staff of lawyers from fifty-eight when he took over in 1938 to two hundred by 1940, and during the same period the number of cases filed annually grew from eleven to ninety-two. These prosecutions were particularly aggressive. The Antitrust Division would file several cases, each with dozens of defendants, to break up anticompetitive practices that infected entire industries. For instance, the government launched a series of actions against contractors and construction unions whose arrangements, the Antitrust Division claimed, stifled innovative building techniques and kept construction costs high. The Justice Department also began to use consent decrees more widely. Under these, the government agreed to suspend prosecution in exchange for alterations in the policies of the accused organization. Because decrees did not formally terminate prosecution but merely left the matter in limbo, Arnold could use them to exert continuing review over business.[40] Initially few of the division's cases dealt with international cartels, but in time that would change.[41]

Thurman Arnold summed up in himself reformers' contradictory attitudes toward big business. A native of Laramie, Wyoming, educated at Princeton and Harvard Law School, he was a colorful character even by the standards of New Deal Washington. He was known for an irreverent wit that occasionally, his critics said, shaded into buffoonery. As a professor at Yale Law School, Arnold had made his reputation with the publication of *The Folklore of Capitalism*, which among other things contained a scathing critique of the antitrust laws. It claimed that they "enabled men to look at a highly organized and centralized industrial organization and still believe that it was composed of individuals engaged in buying and selling in a free market." "They [antitrust measures] were part of the struggle of a creed of rugged individualism to adapt itself to what was becoming a highly organized society." "The actual result[s] of the antitrust laws," Arnold insisted, "were to promote the growth of great industrial organizations by deflecting the attack on them into purely moral and ceremonial channels."[42]

These statements would seem to disqualify Arnold for leadership of the Antitrust Division, but he managed to reconcile vigorous antitrust enforcement with such views by shifting the emphasis of prosecution. Arnold argued, "Most of the books in the past on the antitrust laws have been written with the idea that they are designed to eliminate the *evil of bigness*. What ought to be emphasized is not the evils of size but the evils of industries which are not efficient or do not pass efficiency on to consumers. If the antitrust laws are simply an expression of a religion which condemns largeness as economic sin they will be regarded as an anachronism in a machine age." He concluded, "The test is efficiency and service—not size."[43] This view ranged Arnold in opposition to many labor unions, which sometimes obstructed more efficient production techniques that might reduce employment, and it elicited from him great enthusiasm for one of the largest industrial empires built during the early twentieth century, the Ford Motor Company, which had produced the first car within the reach of the masses. Arnold wanted to use antitrust laws not to restrain the growth of large companies but to clear and police the channels of trade, guaranteeing efficiency.

Yet at an instinctive level Arnold disliked and distrusted big business. In his public statements it is difficult to find positive reference to any large firm other than Ford, and although less doctrinaire than Brandeis, Arnold seems to have believed that most big companies owed their success to underhanded tactics or collusion. This attitude may have reflected his upbringing in Wyoming, where most citizens assumed that large, eastern companies exploited the state's natural resources with little regard for the well-being of the inhabitants. As the editor of his papers wrote, Arnold was, as a Westerner, "acutely aware of the impact of [economic] colonialism on his region." For him, "Brandesian economic doctrine made sense."[44]

Arnold's importance sprang as much from the people he trained and inspired as from his own achievements. His subordinates at the Antitrust Division included Tom Clark, a Texan who later became attorney general and a Supreme Court justice; Wendell Berge, a Nebraskan who had been with the Antitrust Division since 1930 and who, as its chief after 1943, would launch some of the most important prosecutions of international cartels; and Corwin Edwards, a Nevada-bred economist brought in from the Federal

Trade Commission who provided much of the economic rationale for the antimonopoly program and who later became a major figure in occupation policy toward Japan. It was probably no accident that, along with their chief, all of these men hailed from west of the Mississippi.[45]

Before the outbreak of World War II in September 1939, this group concentrated on domestic conditions. War, however, would force them to pay more attention to foreign affairs and open up new avenues for antitrust prosecution.