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Fascism and Monopoly

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FASCISM AND MONOPOLY

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The recent revival of political interest in antitrust has resurfaced a longstanding debate about the role of industrial concentration and monopoly in enabling Hitler's rise to power and the Third Reich's wars of aggression. Proponents of stronger antitrust enforcement argue that monopolies and cartels brought the Nazis to power and warn that rising concentration in the American economy could similarly threaten democracy. Skeptics demur, observing that German big business largely opposed Hitler during the crucial years of his ascent. Drawing on business histories and archival material from the U.S. Office of Military Government's Decartelization Branch, this Article assesses the historical record on the role of industrial concentration in facilitating Nazism. It finds compelling evidence that, while German big business principally did not support Hitler before he won the chancellorship in 1933, the extreme concentration of market power during the Weimar period enabled Hitler to seize and consolidate totalitarian power through a variety of mechanisms. Hence, the German experience with Nazism lends support to the idea that extreme concentration of economic power enables extreme concentration of political power. However, most of the conduct that created the radical economic concentration of the Weimar period would be unlawful under contemporary antitrust principles, which casts doubt on claims that a significant shift in antitrust enforcement is necessary to forestall antidemocratic forces.

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INTRODUCTION

"The Decartelization Branch . . . should, therefore, make every effort to teach the German people that political democracy cannot long survive the disappearance of economic democracy . . . ."

—U.S. Office of Military Government Decartelization Branch, March 28, 1946

In the wake of the Second World War, the United States Congress enacted reform antitrust legislation to halt the "rising tide of economic concentration" in the American economy.[1] The framers of the 1950 Celler-Kefauver Act advanced a stark claim about dangers of undue concentrations of economic power: industrial "monopolies . . . brought Hitler to power," and the same could happen in the United States.[2] Congressman Celler and Senator Kefauver's claim arose from extensive reports by the U.S. Army's Decartelization division (operating in Germany from 1945 to 1949), which concluded that German industrial monopolies and cartels in key fields such as chemicals, armaments, steel, and electricity had played a key role in Hitler's rise to power and the atrocities of the Nazi regime.[3]

After a period of intensive antitrust enforcement against mergers and monopolies in the 1950s, '60s, and early '70s, the antitotalitarian rationale for antitrust enforcement was lost in the tectonic shift in antitrust policy begun by the Chicago School.[4] Despite occasional reminders that antitrust has a "political content," antitrust law became concerned near-exclusively with the promotion of consumer welfare.[5] Debate over antitrust law and policy continued, but it was largely closeted within an establishment clique of lawyers and economists operating within the antitrust profession.[6]

The insulated, technocratic decades of antitrust may be coming to a close. In the last several years, antitrust law has achieved a political saliency that it has not experienced since its formative years around the turn of the twentieth century. From right to left, the top tiers of the political class have returned to antitrust as a popular political issue, a potential holding place for a wide variety of problems and anxieties, from wealth inequality to Big Tech's power over data and privacy.[7]

There are growing signs that, in the nascent challenge to the reigning consumer welfare regime, concerns over monopoly's effects on liberal democracy may come again to the fore, as they did at the end of the Second World War. Voices on the Democrats' progressive wing like Senator Elizabeth Warren have been warning that "[c]oncentration threatens our markets, threatens our economy, and threatens our democracy."[8] The influential

1. Brown Shoe Co. v. United States, 370 U.S. 294, 315–16 (1962).

2. 95 CONG. REC. 11,486 (1949) (statement of Rep. Celler).

3. *See infra* text accompanying notes 34–37.

4. *See* Daniel A. Crane, *Chicago, Post-Chicago, and Neo-Chicago*, 76 U. CHI. L. REV. 1911 (2009) (book review).

5. Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979).

6. *See* Daniel A. Crane, *Antitrust's Unconventional Politics*, 104 VA. L. REV. ONLINE 118, 118–21 (2018).

7. *See id.* at 118.

8. *Senator Elizabeth Warren Delivers Remarks on Reigniting Competition in the American Economy*, ELIZABETH WARREN (June 29, 2016), https://www.warren.senate.gov/?p=press_release&id=1169 [https://perma.cc/AAD7-HBHW]; *see also* Brian Beutler, *How Democrats Can Wage War on Monopolies—And Win*, NEW REPUBLIC (Sept. 16, 2017),

Open Markets Institute argues that the Progressive obsession with the Supreme Court's *Citizens United*[9] decision ignores the equally antidemocratic effects of corporate consolidation brought about by lax antitrust.[10] The critique has migrated to the political center, with the congressional Democrats asserting that "concentrated market power leads to concentrated political power."[11] Centrist policy groups like the Brookings Institution argue that stronger antitrust is necessary to prevent large tech firms from "wield[ing] excessive influence in our democracy."[12]

These critiques are not limited to the political left or center. On the right, President Trump warns that allowing deals like AT&T-Time Warner "destroy[s] democracy."[13] Even staunch defenders of the consumer welfare standard, like Republican Senator Orrin Hatch, have recently trumpeted the importance of antitrust as a political institution—"the magna carta of the free enterprise system" and "the capitalist answer to the siren song of the central planner."[14] Along the broad political continuum, there appears to be a consensus forming—at least a rhetorical one—that antitrust is an important institution of democracy, not merely a tool for extracting lower prices for consumers. At this potentially generative moment in antitrust history, antitrust's relationship to democracy is back on the table for reexamination.

As the relationship between monopoly and democracy seeps back into popular discourse, attention is naturally reoriented to the post-War moment when that relationship was last squarely on the table. Across a variety of political, popular, and scholarly platforms, a debate has ignited about the role of industrial monopolies and cartels in enabling Hitler's rise to power and wars of aggression.[15] The political stakes in characterizing German heavy in-

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https://newrepublic.com/article/144675/democrats-elizabeth-warren-can-wage-war-monopolies-and-win [https://perma.cc/R7JP-C9AH].

9. Citizens United v. FEC, 558 U.S. 310 (2010).

10. *Democracy & Monopoly*, OPEN MARKETS, https://openmarketsinstitute.org/explainer/democracy-and-monopoly/ [https://perma.cc/Y7J7-3X6B].

11. U.S. House of Representatives Democratic Leadership, *Crack Down on Corporate Monopolies & the Abuse of Economic and Political Power*, BETTER DEAL, https://abetterdeal.democraticleader.gov/the-proposals/crack-down-on-abuse-of-power/ [https://perma.cc/G8LJ-TVHB].

12. Clara Hendrickson & William A. Galston, *Big Technology Firms Challenge Traditional Assumptions About Antitrust Enforcement*, BROOKINGS INST.: TECHTANK (Dec. 6, 2017), https://www.brookings.edu/blog/techtank/2017/12/06/big-technology-firms-challenge-traditional-assumptions-about-antitrust-enforcement/ [https://perma.cc/5GDX-SMNV].

13. Editorial, *Trump's Comments Create a Lose-Lose Position for Justice*, WASH. POST (Nov. 13, 2017), https://www.washingtonpost.com/opinions/trumps-comments-create-a-lose-lose-position-for-justice/2017/11/13/6fd7b28e-c596-11e7-aae0-cb18a8c29c65_story.html (on file with the *Michigan Law Review*).

14. *See* SenatorOrrinHatch, *Hatch on Antitrust for the 21st Century,* YOUTUBE (Aug. 3, 2017), https://www.youtube.com/watch?v=x0IgNjKr17I.

15. *See, e.g.*, JONATHAN TEPPER WITH DENISE HEARN, THE MYTH OF CAPITALISM: MONOPOLIES AND THE DEATH OF COMPETITION 137–53 (2019) ("It is difficult to understate the importance of concentrated industry to the Nazi rise."); TIM WU, THE CURSE OF BIGNESS:

dustry's support for the Nazi regime are presentist and significant: establishing that industrial concentration contributed to the rise of fascism and that industrial concentration is on the rise in the United States lends support to those pushing urgently for a return to aggressive antitrust. On the other hand, advocates of a less interventionist antitrust regime tend to dismiss the assertion that industrial concentration was a significant factor in Hitler's rise to power, noting that many social and political factors other than industrial organization explain Nazism and that big business did not support Hitler until he was already in power.[16]

My purpose in this Article is to provide a fresh examination of the historical record on the relationship between monopoly power and the rise of the Nazi regime and to assess that relationship using concepts from contemporary economic learning and antitrust analysis. More particularly, in order to sharpen the ongoing debate over fascism and monopoly, I ask the following research questions: (1) Did industrial concentration facilitate the rise of German fascism; (2) was the problem overly large industrial organizations (i.e., "the Curse of Bigness") or rather organizations with excessive market power; (3) by what mechanisms did monopoly facilitate fascism; and (4) what manner of antitrust regime would have been necessary and sufficient to prevent the unholy relationship between big business and Nazism from developing? To foreshadow the answer to each of these questions briefly, I find: (1) industrial concentration did facilitate the rise of Nazism and, particularly, its consolidation of power; (2) although it is not always possible to separate the effects of large business firms from that of market power, market power

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ANTITRUST IN THE NEW GILDED AGE 80 (2018) (arguing that industrial concentration facilitated Hitler's rise to power); Ajay Singh Chaudhary & Raphaële Chappe, *The Supermanagerial Reich*, L.A. REV. BOOKS (Nov. 7, 2016), https://lareviewofbooks.org/article/the-supermanagerial-reich [https://perma.cc/H44T-FQ5G] (discussing Nazis' facilitation of industrial consolidation into "massive, profit-generating monopolies"); Michael Rieger, *Were the Nazis Really Socialists? It Depends on How You Define Socialism,* FOUND. FOR ECON. EDUC. (Apr. 19, 2019), https://fee.org/articles/were-the-nazis-really-socialists-it-depends-on-how-you-define-socialism/ [https://perma.cc/S6DE-P85G] (discussing whether or not the Nazi control of monopolies could be considered socialist); Ganesh Sitaraman, *Unchecked Power: How Monopolies Have Flourished—And Undermined Democracy*, NEW REPUBLIC (Nov. 29, 2018), https://newrepublic.com/article/152294/unchecked-power [https://perma.cc/J44R-HS3J] (discussing relationship between the World War II monopolies and today's communications industry monopolies); Alec Stapp, *In "The Curse of Bigness" Tim Wu Makes His Case that Big Business Ushered in the Nazis*, SALON (Mar. 14, 2019, 10:00 PM), https://www.salon.com/2019/03/14/in-the-curse-of-bigness-tim-wu-makes-his-case-that-big-business-ushered-in-the-nazis/ [https://perma.cc/H5RT-68JS] (voicing skepticism that historical record supports claims that big business ushered in Hitler); Matt Stoller, *How Democrats Killed Their Populist Soul*, ATLANTIC (Oct. 24, 2016), https://www.theatlantic.com/politics/archive/2016/10/how-democrats-killed-their-populist-soul/504710/ [https://perma.cc/Y8HS-XHXJ] (discussing perception by U.S. political leaders that monopolies were fueling rise of fascism in pre–World War II period); Tim Wu, *Be Afraid of Economic 'Bigness.' Be Very Afraid.*, N.Y. TIMES (Nov. 10, 2018), https://www.nytimes.com/2018/11/10/opinion/sunday/fascism-economy-monopoly.html [https://perma.cc/7BFP-WMD5] (arguing that in the 1930s monopolies contributed to the rise of fascism).

16. *See* Stapp, *supra* note 15.

did play a distinct role in facilitating Nazism; (3) the concentrated and cartelized structure of the Weimar economy contributed to the consolidation of Nazi power through several distinct mechanisms, including a Faustian bargain exchanging regime support for a privileged monopoly position, lending organizational infrastructure to the regime, and steering entire industries to the regime's bidding through expansive and coercive cartel structures; and (4) application of contemporary consumer welfare–oriented antitrust norms would have prevented most of the paths of economic power concentration that facilitated Hitler's rise and wars of aggression.

The organization of the remaining portions of this Article is as follows: Part I sets the stage by reviewing the record of political reform efforts in antitrust that grew out of perceptions that fascism ascended on the backs of monopolies. In particular, it reviews the work of the U.S. occupation authorities to document and diagnose the role of monopolies and cartels in Hitler's rise to power and consolidation of totalitarian control, the influence of this learning on the Celler-Kefauver Act of 1950 and the subsequent period of aggressive antitrust enforcement, and the demise of this antitrust enthusiasm in the 1970s. It also surveys the influence of anti-Nazi thinking in the formation of Ordoliberalism, an influential school of European antitrust in the post-War period.

Part II examines the historical record on the relationship between the concentration of economic power in Weimar Germany and the subsequent concentration of political power in the Nazi regime. Section A surveys the increasing consolidation and cartelization of the German economy from unification under Bismarck at the end of the nineteenth century up to Hitler's ascension to power in 1933. Section B considers the extent to which German heavy industry supported the Nazi regime, showing that the large industrial firms were generally reluctant to support Hitler prior to 1933 but provided critical support to the Nazi regime from 1933 forward. Section C conducts case studies of three leading industries—chemicals, armaments, and electricity—showing both heterogeneity and significant common threads in the attitudes and relationships of German heavy industry with respect to the Nazi regime and the roles that different kinds of concentrated economic power played in facilitating Hitler's consolidation of political power.

Part III analyzes the mechanisms by which industrial concentration facilitated the rise and dominance of fascism and groups them into five buckets: (1) a Faustian bargain in which dominant firms exchanged financial and other material support for Hitler for implicit guarantees that their dominant positions would be protected and furthered in the new regime; (2) the ability of monopoly firms to lend the Nazi Party bureaucratic and organizational resources capable of dominating entire industries and swaths of German society at a time when the Nazis did not yet have plenary control over other critical institutions, such as the government and the military; (3) cartel structures that were easily appropriated by the Nazis to centralize power over industry, coerce unwilling firms to follow the regime's policies, monitor dissidents, and generally steer the course of industry to the regime's purposes; (4) the existence of "national champion" firms that enabled Hitler's rearmament plans and, through cartel agreements with foreign firms, undermined the Allies' war readiness; and (5) centralization of power and loss of democratic features within the monopoly firms themselves as they became intermeshed with the Nazi apparatus.

Finally, Part IV asks whether the history of German fascism lends support to the claim that antitrust law and enforcement need to take into account political and democratic values explicitly and not simply advance economic efficiency and consumer welfare. It shows that most of the conduct that created the economic conditions that facilitated Hitler's rise would be prohibited even under the consumer-welfare standard that governs contemporary antitrust law in the United States. While this by no means proves that consumer-welfare antitrust would have stopped Hitler, it is relevant to ongoing debates about antitrust policy to observe that the cartelization, monopolistic mergers, and naked market division agreements that pervaded Weimar Germany would not be tolerated under contemporary antitrust norms.

I. Antitrust's Anti-Fascist Turn and Its Demise

To set the stage for this Article's substantive inquiry into the relationship between fascism and monopoly in Germany, this Part positions that inquiry in its political and legal context in the United States and Europe, both before and after the Second World War. Even before American entry into the war, American political leaders had begun to identify monopolization and cartelization as root causes of fascism. In the wake of the war, spurred by political leaders who attributed Hitler's rise to the overconcentration of the German economy, the United States Office of Military Government (OMGUS) undertook an extensive "Decartelization" project in Germany. Although the project was shuttered in 1949 without yielding significant fruit on German soil, the research and documentation done by the Decartelization team contributed intellectually to subsequent programs of heightened antitrust enforcement in the United States and Europe. The two regimes were subject to different influences and took different paths, but they shared a common underlying concern about the role that economic concentration had played in the rise of fascism in Europe. With the passage of time and the confluence of events, the anti-fascist strand of antitrust law has eroded—to the point of oblivion in the United States and near-oblivion in Europe.

A. *The Lost Concern of the Post-War Congress*

1. Investigating Germany's Monopolies and Cartels

Before American entry into the Second World War, American political leaders were already arguing that cartels and monopolies were propelling the rise of fascism. In a 1938 address, President Roosevelt asserted that the essence of fascism was "the growth of private power to a point where it be-comes stronger than the[] democratic state itself."[17] With the advent of war, American political rhetoric linking fascism to industrial monopolization and cartelization increased. In the winter of 1943–1944, the U.S. Senate Subcommittee on War Mobilization of the Committee of Military Affairs held hearings on the influence of German cartels and monopolies in Hitler's rise to power and their cooption of American industry.[18] Senator Harley Kilgore, who chaired the committee, would later write that "[t]he cartel system, in great measure, was responsible" for Hitler's dictatorship as the cartels' "funds and influence made possible Nazi seizure of power."[19] In September of 1944, President Roosevelt characterized Germany's cartels as "weapons of economic warfare" that would have to be eradicated along with the Wehrmacht.[20]

As victory neared in Europe, the U.S. military prepared to carry out the president's directive to decartelize Germany. In April of 1945, General Eisenhower issued an order to the U.S. Army to "prohibit all cartels or other private business arrangements and cartel-like organizations."[21] The Potsdam Agreement of August 1945 provided that "[a]t the earliest practicable date, the German economy shall be decentralized for the purpose of eliminating the present excessive concentration of economic power as exemplified in particular by cartels, syndicates, trusts and other monopolistic arrangements."[22] A U.S. Decartelization Branch was established on December 15, 1945 as a branch of the Economics Division of OMGUS, with a mandate to deconcentrate and decartelize German industry.[23] The Decartelization Branch explicitly linked its economic and political goals:

> The Decartelization Branch, acting with and through other Military Government activities should, therefore, make every effort to teach the German people that political democracy cannot long survive the disappearance of economic democracy, and that the freedom of the individual consumer to

17. FRANKLIN D. ROOSEVELT, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS RELATIVE TO THE STRENGTHENING AND ENFORCEMENT OF ANTITRUST LAWS, S. DOC. NO. 75-173, at 1 (1938).

18. J.F.J. Gillen, Deconcentration and Decartelization in West Germany 1945–1953, at 8–9 (June 1953) (unpublished report) (on file with the Bentley Historical Library, University of Michigan, Creighton R. Coleman Papers Collection).

19. Harley M. Kilgore, *Introduction* to DAREL MCCONKEY, OUT OF YOUR POCKET: THE STORY OF CARTELS, at vii (1947).

20. John C. Stedman, *The German Decartelization Program—The Law in Repose*, 17 U. CHI. L. REV. 441, 441 (1950).

21. TEPPER WITH HEARN, *supra* note 15, at 151.

22. STAFF OF S. COMM. ON FOREIGN RELATIONS & DEP'T OF STATE, A DECADE OF AMERICAN FOREIGN POLICY: BASIC DOCUMENTS, 1941–49, S. DOC. NO. 81-123, at 38 (1950); *see also* Gillen, *supra* note 18, at 10.

23. 1 Decartelization Branch Office of Military Government for Germany (U.S.), German Economic Decentralization: An Analysis of the German Cartel and Combine Problem I-1 (Mar. 1, 1947) (unpublished report) (on file with the Bentley Historical Library, University of Michigan, Creighton R. Coleman Papers Collection) [hereinafter Decartelization Vol. 1].

> buy and sell in freely competitive markets is the economic philosophy most suitable to their needs.[24]

The Decartelization Branch was well staffed, with ninety-four lawyers and investigators at its peak.[25] It was largely responsible for the breakup of the I.G. Farben chemical combine (discussed in greater detail in Part II below) in 1945.[26] Thereafter, it identified an additional seventy firms or cartel organizations as potential targets for breakup or dissolution.[27] A February 12, 1947 decartelization law promulgated by OMGUS gave further legal status to the Decartelization Branch's efforts.[28] Nonetheless, the Farben breakup proved to be the program's one substantial achievement. The program was largely shuttered in 1949, depleted of personnel and demoralized.[29] The Secretary of the "Ferguson Committee" that investigated the operation of the German decartelization program and rendered a critical report on it opined that a variety of factors contributed to the program's failure, including confusion over the program's aims and objectives, lack of support by American allies, lack of support by the German people, and lack of support from American officials and the American business community.[30]

If the decartelization program failed to achieve significant remedial results in the German economy, it nonetheless provided a useful service by thoroughly researching and reporting on the concentrated and cartelized state of the German economy and the role of that concentration and cartelization in the rise and perpetuation of the Nazi regime. The program's reports on specific firms and industries and on the history and nature of German industrial concentration and cartelization more generally became focal points for subsequent political discourse and reforms concerning concentration in the American economy, most particularly with respect to the Celler-Kefauver Act of 1950.

2. The Anti-Fascist Roots of the Celler-Kefauver Amendment to Section 7 of the Clayton Act

In 1950, Congress enacted the Celler-Kefauver Act, substantially expanding Section 7 of the Clayton Act of 1914, which prohibits anticompetitive mergers.[31] At a technical level, Celler-Kefauver accomplished three things: (1) closing the asset "loophole," which had allowed merging firms to

24. Creighton R. Coleman, Program and Aims of the Decartelization Branch 6 (Mar. 28 1946) (unpublished report) (on file with the Bentley Historical Library, University of Michigan, Creighton R. Coleman Papers Collection).

25. Stedman, *supra* note 20, at 443.

26. *See id.* at 442.

27. *Id.* at 445.

28. *See id.* at 441.

29. *See id.* at 442–43, 456.

30. *Id.* at 448–56.

31. Celler-Kefauver Act, Pub. L. No. 81-899, 64 Stat. 1125 (1950).

escape Section 7's coverage through asset, rather than stock, acquisitions; (2) deleting "acquiring-acquired" language in the original text of Section 7 that could be read to limit Section 7 to horizontal mergers and exclude coverage of vertical and conglomerate mergers; and (3) clarifying that Section 7 reached "incipient" trends toward increasing concentration levels that might threaten competition.[32] In a more general sense, Celler-Kefauver served up a congressional mandate for a post-War program of intensive antimerger enforcement by the Justice Department and Federal Trade Commission from the 1950s through the early 1970s to stem the perceived "rising tide of economic concentration in the American economy."[33]

As the Supreme Court acknowledged in *Brown Shoe*, the Act's legislative history reveals "Congress' fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose."[34] Although the Supreme Court did not specify what "other values" Congress perceived to be at stake, floor statements by the bill's two primary sponsors—New York Senator Emanuel Celler and Tennessee Senator Estes Kefauver—reveal a preoccupation with the political consequences of concentrated economic power, particularly in the correlation between industrial cartelization and monopoly and the rise of fascism in pre-War Germany, and with totalitarianism more broadly. Celler and Kefauver relied heavily on work generated from the findings of the Decartelization Branch. Celler warned:

> I want to point out the danger of this trend toward more and better combines. I read from a report filed with former Secretary of War Royall as to the history of the cartelization and concentration of industry in Germany:
>
> Germany under the Nazi set-up built up a great series of industrial monopolies in steel, rubber, coal and other materials. The monopolies soon got control of Germany, brought Hitler to power and forced virtually the whole world into war.
>
> The report continues:
>
> A high degree of concentration throughout industry fosters the formation of cartels and readily enables a war-minded government to mobilize for hostilities. Such was the history of war preparations in Germany in both World War I and World War II.[35]

32. Brown Shoe Co. v. United States, 370 U.S. 294, 316–18 (1962).

33. *See id.* at 315–19.

34. *Id.* at 316.

35. Celler continued by quoting Walter Lippmann of *Fortune* magazine as follows:

> The development of combinations in business, which are able to dominate markets in which they sell their goods, and in which they buy their labor and materials, must lead irresistibly to some form of state collectivism. So much power will never for long be allowed to rest in private hands, and those who do not wish to take the road to

Senator Kefauver seconded Celler's anti-totalitarian themes. The rising tide of concentration would lead to totalitarianism of either the fascist or Stalinist variety:

> I am not an alarmist, but the history of what has taken place in other nations where mergers and concentrations have placed economic control in the hands of a very few people is too clear to pass over easily. A point is eventually reached, and we are rapidly reaching that point in this country, where the public steps in to take over when concentration and monopoly gain too much power. The taking over by the public through its government always follows one or two methods and has one or two political results. It either results in a Fascist state or the nationalization of industries and thereafter a Socialist or Communist state. Most businessmen realize this inevitable result. Certain monopolistic interests are being very shortsighted in not appreciating the plight to which they are forcing their Government.[36]

Celler and Kefauver's floor speeches reflected a broader concern of the U.S. Congress and other national institutions that industrial concentration facilitated the incubation of totalitarianism and threatened democracy.[37] Senator Charles Kersten of Wisconsin linked the dangers of "big government" and "business so big that it is monopolized in the hands of a very few."[38] Senator William Langer of North Dakota introduced into the record a March 26, 1947 *Christian Science Monitor* article warning of the "danger . . . for any democracy which allows economic concentration of power to spread at the expense of small business."[39] For its part, the Federal Trade Commission warned that "[i]f nothing is done to check the growth in concentration, either the giant corporations will ultimately take over the Country or the Government will be impelled to step in and impose some form of direct regulation . . . . In either event, collectivism will have triumphed over free enterprise."[40]

> the politically administered economy of socialism, must be prepared to take the steps back toward the restoration of the market economy of private competitive enterprise.

95 CONG. REC. 11,486 (1949).

36. 96 CONG. REC. 16,452 (1950).

37. *See generally* WU, *supra* note 15, at 81 (noting that Celler-Kefauver Act "was explicitly styled as a reaction to the German and Soviet examples"); Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J.F. 960, 966 (2018) ("The Celler-Kefauver Act, a supplementary antitrust law, was passed in 1950 due to fears that excessive consolidation could deliver fascism."); Pitofsky, *supra* note 5, at 1053–54 (1979). *But see* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 151 (1982) ("The dramatic statements in the legislative history of the Celler-Kefauver Antimerger Act probably reflect less a fear of imminent fascism than a desire to curb increases in industrial concentration for a large number of social and political reasons.").

38. 94 CONG. REC. A4304 (1948) (statement of Rep. Kersten).

39. 94 CONG. REC. A3552 (1948) (statement of Sen. Langer).

40. *FTC Asks Congress to Curb Corporations*, DET. FREE PRESS, July 26, 1948, at 4, ProQuest Historical Newspapers (on file with the *Michigan Law Review*).

The period of post-war antimerger enthusiasm, which lasted roughly from 1950 to the mid-1970s, thus reflected, at its core, a deep concern that industrial concentration threatened the democratic order, as evidenced by the recent experience with Nazism.

3. Post-War Antimerger Enthusiasm and Its Demise

The Celler-Kefauver Act empowered the federal antitrust agencies to pursue an antimerger agenda that included successful challenges to many mergers that posed little, if any, immediate threat of oligopolistic concentration.[41] The federal courts largely rubber-stamped the agencies' enforcement agenda in the 1950s through the mid-1970s, leading Justice Stewart famously to complain in dissent that "[t]he sole consistency that I can find is that in litigation under [Section 7 of the Clayton Act], the Government always wins."[42]

The period of enthusiastic merger-busting subsided in the mid-1970s as a result of two distinct forces. One was the rise of the Chicago School of economic analysis, which had been mounting a critique of post-War antitrust since at least the 1950s and succeeded in conquering the Supreme Court by the late 1970s.[43] The Supreme Court signaled a turn toward Chicago in one of its last major merger decisions of the 1970s, *General Dynamics*,[44] shortly after which it got out of the merger business entirely. The Court has not decided a merger case on the merits since 1975.[45]

And, not coincidentally, that was also the year of the second distinctive force that ended the era of enthusiastic merger-busting—the Hart-Scott-Rodino Act. Hart-Scott created a premerger notification system and effectively shifted merger review out of the courts and into the agencies, from an adjudicatory model to an administrative model.[46] Following Hart-Scott, merger control settled into a technocratic data-crunching exercise performed by professional economists more interested in the predictive power on prices and output from changes in the Herfindahl-Hirschman Index than the veiled specter of fascism.[47]

Chicago and Hart-Scott killed the aggressively anti-incipiency version of Celler and Kefauver's project, but what happened to the concern with economic concentration leading to political concentration? Many different forc-

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41. *See, e.g.,* United States v. Von's Grocery Co., 384 U.S. 270, 302, 302–03 n.35, 304 (1966) (Stewart J., dissenting).

42. *Id.* at 301 (Stewart, J., dissenting).

43. *See generally* Crane, *supra* note 4, at 1911.

44. United States v. General Dynamics Corp., 415 U.S. 486, 506 (1974) (explaining the inapplicability of assumptions about concentration and anticompetition in the context of the coal industry where other anticompetitive forces present in the industry made merger a procompetitive option).

45. *See* United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975).

46. Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1194–95 (2008).

47. *See id.* at 1218.

es, including dimming collective memory of the war, distrust of governmental institutions post-Watergate, and the rise of the consumerist movement, had a hand in the demise of the antimerger regime.[48] But one particular angle has the strongest explanatory power: the anti-fascist political strain of Celler-Kefauver ideology coincided so neatly with the rising economic theory of antimerger enforcement—structuralism—that the two lines became intermeshed and inseparable. Then, when Chicago demolished structuralism empirically and theoretically to the point that even leading structuralists admitted error and moved on,[49] structuralism pulled down anti-fascism in its collapse. Anti-fascism was effectively subsumed in structuralism, and hence shared its fate.

Few schools of antitrust thought have enjoyed such temporal success as the structuralist school, which came to become known as the Harvard School because of its association with Harvard professors Carl Kaysen, Donald Turner, and Phil Areeda, and Joe Bain, a Harvard-trained economist who spent the bulk of his career at the University of California, Berkeley.[50] Structuralism's core and elegant tenet was that a strong, deterministic relationship exists between a market's structure, conduct, and performance (thus giving rise to the Structure-Conduct-Performance, or just S-C-P, paradigm).[51] Concentration was the most significant component of structure.[52] Thus, a highly concentrated market inexorably led to anticompetitive firm behavior, and such behavior inexorably led to poor market performance, expressed as higher prices and lower quality.[53] The upshot was that the government could directly attack concentrated market structures without worrying about the specific mechanisms (conduct) that led from that structure to poor market performance.[54] Structuralism had the virtue of aiming for the same policy

48. Stoller, *supra* note 15.

49. *See, e.g.*, *infra* note 56 and accompanying text.

50. *See generally* Herbert Hovenkamp, *United States Competition Policy in Crisis: 1890–1955*, 94 MINN. L. REV. 311, 346–59 (2009).

51. *Id.* at 350–51.

52. *See* Leonard W. Weiss, *The Structure-Conduct-Performance Paradigm and Antitrust*, 127 U. PA. L. REV. 1104, 1104 (1979).

53. *See* Hovenkamp, *supra* note 50, at 352; Weiss, *supra* note 52, at 1104.

54. At a theoretical level, structuralism rested on four broad theoretical and empirical propositions. First, the structuralists assumed a strong link between the number of firms in a market and the propensity of prices to rise above cost. This claim rested principally on strong assumptions, formalized by the nineteenth-century French mathematician Augustin Cournot, that oligopoly behavior would increase as the number of firms decreased. Hovenkamp, *supra* note 50, at 360. The structuralists claimed that the Cournot assumptions were borne out by empirical studies showing that firms in concentrated industries earned higher profits than those in more competitively structured industries. *See, e.g.*, *id.* at 349–50 (discussing Professor Bain's research agenda around profit and concentration). Second, echoing a theme from Louis Brandeis, the structuralists rejected the notion that large aggregations of capital were necessary to achieving economies of scale. *See* Crane, *supra* note 6, at 122. While economies of scale did exist, in many markets the firms were far larger than minimum efficient scale demanded; such markets could be "deconcentrated" by breaking up large firms without causing significant pro-

objectives—reducing economic concentration through active scrutiny of mergers and market dominance—as suggested by the anti-fascist strain of post-War antitrust ideology.[55]

Structuralism prevailed in the academy, antitrust agencies, courts, and political institutions until the mid-1970s. In late 1967, President Lyndon Johnson secretly asked Phil Neal, dean of the University of Chicago Law School, to lead a commission of distinguished economists and lawyers to report on the state of competition in the United States and recommend potential changes to the antitrust laws.[56] Johnson intended to use the report as part of his reelection campaign, but he eventually decided not to seek reelection because of the unpopularity of the Vietnam War.[57] Nonetheless, the commission concluded its work and released its report. The report represented the high watermark of structuralist thinking. It proposed a Concentrated Industries Act that would give the Attorney General a mandate to "search out" oligopolies and order divestiture to the point that no firm would end up with a market share exceeding 12 percent.[58] It also proposed a much stronger structuralist presumption in horizontal merger cases, condemning any merger in which the four-firm concentration ratio exceeded 50 percent and one of the firms involved in the merger had a market share exceeding 10 percent.[59]

None of the report's recommendations was adopted into law. Not only did Richard Nixon's election kill off its immediate political prospects, but by the early 1970s the Chicago School was rapidly eroding structuralism's theoretical and empirical assumptions. In the 1970s, Turner underwent a "conversion experience" in which he accepted many of the Chicago School critiques of the S-C-P paradigm.[60] Vestiges of structuralist thinking appeared as late as 1979 in various iterations of the Justice Department and Federal Trade Commission's Horizontal Merger Guidelines[61] and in Jimmy Carter's

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duction inefficiencies. *See* Hovenkamp, *supra* note 50, at 362. Third, the structuralists claimed that barriers to entry were high in many industries, but particularly in those with a large fixed cost component. *See id.* at 350. The Harvard School's broad definition of entry barriers would raise a strong challenge from the Chicago School, which gave a much narrower definition to entry barriers—with the implication that far fewer markets would be considered difficult to enter. *See id.* at 361. Fourth, Kaysen-Turner argued that, given the close link between Cournot theory and maximizing behavior, poor performance in highly concentrated markets was inevitable. *See id.* at 350, 356. As a result, antitrust should focus on structure and pay relatively less attention to conduct.

55. *See* Hovenkamp, *supra* note 50, at 351–52.

56. Herbert Hovenkamp, *Introduction to the Neal Report and the Crisis in Antitrust & a Reprint of the Neal Report*, COMPETITION POL'Y INTL'L, Spring 2009, at 217.

57. *Id.*

58. *Id.* at 217–18.

59. *Id.* at 218.

60. HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 37 (2005).

61. *See, e.g.*, U.S. DEP'T OF JUSTICE, 1982 MERGER GUIDELINES 12 (1982) (adopting the Herfindahl-Hirschmann Index as means of calculating market concentration).

National Commission to Review Antitrust Law and Procedures's recommended adoption of a no-fault monopolization statute.[62] But the S-C-P paradigm had long since been intellectually and politically vanquished. The Harvard School that undergirded the antimerger regime of the 1950s and '60s morphed into a neo-Harvard School that focused on institutionalism (the institutional and procedural mechanisms of antitrust enforcement) rather than structuralism as a theory of market behavior.[63]

Structuralism's claims were distinct from the anti-totalitarian claims of Celler and Kefauver. S-C-P was a purely descriptive economic theory, if such a thing exists. All of Chicago's empirical and theoretical refutations of S-C-P could have been well taken without touching the separate Celler-Kefauver claim that an aggressive industrial deconcentration regime was necessary to prevent the consolidation of political power and erosion of democracy. Nonetheless, the temporal coincidence and prescriptive alignment of the political and economic theories contributed to the demise of the political theory when the economic theory fell. Merger policy in the 1970s concerned the predictive power of the S-C-P's models; once those models were discredited, Celler-Kefauver's political project largely ended too without separate examination. The anti-fascist strand of post-War antitrust ideology vanished from American political and legal discourse without almost any separate consideration.

B. *Fascism and European Ordoliberalism*

The fate of the anti-fascist strand of American antitrust law can be contrasted with another post-War, anti-fascist antitrust ideology that has had a much longer political run—the Ordoliberalism of the Freiburg School, which viewed economic competition as a key constitutional guarantor of liberty and continues to exert influence in the European Union.[64] Ordoliberalism has its roots in pre-War Germany largely as a reaction to the failure of the Weimar state and the rise of Nazism.[65] Franz Böhm, Walter Eucken, and Hans Grossmann-Doerth, professors at Freiburg, penned their *Ordo Manifesto* in 1936 amid the dominion of National Socialism and were elevated to prominence during the Allied reconstruction of Germany.[66]

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62. *Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures*, [Special Supplement] Antitrust & Trade Reg. Rep. (BNA) No. 897, at 50 (Jan. 18, 1979).

63. William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 32–33.

64. Silvia Beltrametti, *Capturing the Transplant: U.S. Antitrust Law in the European Union*, 48 VAND. J. TRANSNAT'L L. 1147, 1182–84 (2015).

65. David J. Gerber, *Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe*, 42 AM. J. COMP. L. 25, 27 (1994).

66. DANIEL A. CRANE & HERBERT HOVENKAMP, THE MAKING OF COMPETITION POLICY: LEGAL AND ECONOMIC SOURCES 252–54 (2013); *see also* VOLKER R. BERGHAHN, THE AMERICANIZATION OF WEST GERMAN INDUSTRY 1945–1973, at 84–110 (1986) (demonstrating

Methodologically, the Ordoliberals lamented the compartmentalization of academic disciplines, particularly economics. According to Eucken, "during the nineteenth century economic thought gradually had become isolated, and economists had lost sight of both the political and social contexts of economic issues."[67] As a result, the liberal tradition had become narrowly associated with *laissez-faire* political ideology. The Ordoliberals sought to promote moralistic and humane values by fusing economic and legal understanding into a comprehensive account of a just and liberal social order.

Competition entered the Ordoliberal framework not merely as instrumental to achieving consumer or social welfare but as a fundamental requirement of social justice and a well-functioning democratic society.[68] Free economic participation by all citizens was the primary channel for achieving liberal and humane values.[69] Market power by individuals or firms stood in the way of this goal. According to Ordoliberalism, "[t]he economic problems of the Weimar Republic and Nazi Germany were attributable in part to the inability of the legal system to control and, if necessary, to disperse private economic power."[70] Accordingly, the state had an affirmative obligation to promote market competition in order to secure liberal goals.

A major point of difference between Ordoliberalism and mainstream Anglo-American traditions is that the Freiburg School conceived of competition principles as bedrock constitutional principles operating on both the state and private actors.[71] Although the U.S. Supreme Court has described the Sherman Act as the "Magna Carta of free enterprise,"[72] the U.S. antitrust laws have never been understood as constitutional in any meaningful sense.[73] The government has no affirmative obligation to protect any private firm or individual from monopolistic oppression. It may and frequently does exempt large actors from antitrust scrutiny and, more generally, makes judgments about what degrees of market power are tolerable or intolerable insofar as they promote or retard efficiency.[74]

By contrast, the Ordoliberals understood the promotion of individual economic freedom as a core obligation of the state. Freedom, in this lexicography, meant the absence of arbitrary control by private actors. Even if concentrations of market power could advance economic efficiency, the

how Allied policy regarding deconcentration and decartelization arose against the backdrop of American war aims).

67. DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS 237 (1998).

68. *See* Gerber, *supra* note 65, at 36–38.

69. *Id.*

70. RICHARD WHISH & DAVID BAILEY, COMPETITION LAW 22 (9th ed. 2018).

71. Beltrametti, *supra* note 64, at 1175.

72. United States v. Topco Assocs., 405 U.S. 596, 610 (1972).

73. *See* Daniel A. Crane, "The Magna Carta of Free Enterprise" *Really?*, 99 IOWA L. REV. BULL. 17, 17 (2014).

74. *See* Beltrametti, *supra* note 64, at 1183–85.

government could not permit such concentrations without compromising the liberal interest in personal freedom. As Böhm explained, "[i]f we want freedom, we have no option but to sacrifice some advantage which we could obtain only by employing concentrated power."[75]

Ordoliberalism resonated with Brandeisian atomistic competition values and the belief in antitrust law as creating a level playing field and economic opportunity.[76] Consistent with antitrust's historical tendency to draw support from both right and left,[77] the Ordoliberal tradition resonated with some on the populist-libertarian right like Friedrich von Hayek who maintained close intellectual connections to the Freiburg school and made frequent contributions to the *ORDO* journal.[78]

Partly owing to its proponents' anti-Nazi credentials and its lineage as an anti-Nazi ideology, Ordoliberalism grew in favor during the post-War era.[79] With West Germany's meteoric economic growth paralleling the rise of European integration and the creation of European-wide antitrust principles, Ordoliberalism was poised to become an important—perhaps the dominant—European antitrust ideology. Comparativists often explain divergenc-divergences between U.S. and EU antitrust law in recent decades as founded on Europe's Ordoliberal commitments that have no analogue in contemporary U.S. antitrust ideology.[80]

Ordoliberalism, like Celler-Kefauver anti-concentrationism, linked industrial pluralism with political pluralism and owed its ascent to the demise of mid-century fascism. Why, then, did Ordoliberalism survive as an antitrust ideology in Europe long after anti-fascism faded as an antitrust ideology in the United States? The lines of influence are many and complex, but an important differentiating factor was that Ordoliberalism never became conceptually and politically comingled with a "purely economic" theory of concentration and oligopoly, as occurred with respect to the Celler-Kefauver legacy in the United States. Ordoliberalism remained a *moral* theory of coercion and restraint that recognized the possible efficiency costs of a deconcentrated economy and demanded it nonetheless in light of recent European experience. Hence, when the assault on economic structuralism arrived in the 1970s, European Ordoliberalism did not find its fundamental claims threatened.

In recent years, the European Commission has stated a goal of moving away from a "form-based" approach to an "effects-based" approach to com-

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75. CRANE & HOVENKAMP, *supra* note 66, at 253.

76. Crane, *supra* note 6, at 122.

77. *Id.* at 118–35.

78. *Id.* at 125.

79. Beltrametti, *supra* note 64, at 1174–75.

80. *See, e.g.*, Beltrametti, *supra* note 64, at 1182–89. For example, in the last several decades, European competition authorities have been much more aggressive in pursuing dominant firms like Google and Intel than have their American counterparts. *Id.* at 1185 n.166, 1187–88.

petition law issues, which is widely seen as throwing down the gauntlet to Ordoliberalism.[81] This is occurring at a time when the economics profession has moved somewhat away from the more *laissez-faire* prescriptions of the Chicago school, so the implications for European antitrust law are not as liberalizing as the Chicago assault on structuralism in the 1970s. Still, this shift, if ultimately endorsed by other elite European institutions (particularly the General Court and Court of Justice), could bring to a close the post-War European experiment with antitrust as an explicitly democracy- and pluralism-reinforcing institution. It is perhaps a sign of antitrust's inherently cyclical nature that Europe appears to be moving away from a political conception of antitrust just as that theme is reemerging in American political discourse.

* * *

Both the United States and Europe experienced periods—albeit a longer one in Europe—in which the shades of Nazism and the role of monopolies and cartels in supporting the Third Reich motivated the dominant antitrust ideology of the day, at least in part. On both sides of the Atlantic, those influences have waned over time as antitrust has become more technocratic and focused on efficiency and consumer welfare. Today, as the political value of antitrust as a democracy-reinforcing instrument is under reexamination at the highest levels in Washington, the forgotten learning of the post-War period deserves reexamination as well. But the political rhetoric of the post-War era linked German industrial concentration and cartelization, and the Nazi regime should not be accepted without critical examination. As discussed below, many scholars have questioned the degree to which German heavy industry actually supported Hitler, and some have urged caution in accepting the characterizations of the Decartelization Branch, which have been described as the product of zealous American trustbusters and prosecutors primarily concerned about playing to a domestic American audience and supporting an enhanced antitrust regime in the United States.[82] Drawing on the work of the Decartelization Branch and independent historical sources, the following Sections assess the evidence concerning the relationship between German industrial concentration and cartelization and the rise of Hitler.

81. Pierre Larouche, *The European* Microsoft *Case at the Crossroads of Competition Policy: Comment on Ahlborn and Evans*, 75 ANTITRUST L.J. 933, 962 (2009).

82. Gerald D. Feldman, *Financial Institutions in Nazi Germany: Reluctant or Willing Collaborators?*, *in* BUSINESS AND INDUSTRY IN NAZI GERMANY 15 (Francis R. Nicosia & Jonathan Huener eds., 2004); *see also* WILFRIED FELDENKIRCHEN, SIEMENS: 1918–1945, at 8 (1995) (criticizing Siemens report's assessments as "very much the product of their time" and inconsistent with the "current state of research").

II. GERMAN INDUSTRIAL CONCENTRATION AND THE NAZI REGIME

There can be no doubt that the German economy had become extremely consolidated and cartelized by the end of the Weimar Republic and that many dominant German firms and cartels played significant roles in the malevolent business of the Third Reich. However, historians have long debated the extent to which the monopolies and cartels were instigators of Nazism, or rather its hapless pawns. This Part begins to reframe the question away from the one often debated by historians—the moral culpability or volitional participation of heavy industry—and toward an inquiry into whether the extremely concentrated *structure* of an economy may facilitate the extreme concentration of political power, regardless of the conscious intentions of dominant firms.

A. *The Cartelization and Consolidation of German Industry from Bismarck to the Third Reich*

The roots of German industrial consolidation leading up to the monopolization and cartelization of industry under the Third Reich run back to the unification of Germany under Otto von Bismarck. Professor Wilhelm Roepke identified 1879 as the year when Germany began a transformation from free trade to cartelization (control of an industry through orchestration by a number of firms) and monopolization (dominance of an industry by one or two leading firms) as Bismarck pushed an industrial policy supporting "hierarchical organization and centralization" of all aspects of economic life.[83] Cartelization began to grow rapidly in the German economy, with German courts upholding and enforcing cartel agreements in the last decades of the nineteenth century.[84] Cartelization was not only tolerated but actively encouraged by state policy. An 1888 Bavarian Supreme Court decision declared that "it is incumbent upon prudent business men belonging to a branch of industry which is suffering from a depression to get together and enter into agreements regulating the ways and means of operating their industry with a view to promoting recovery."[85] In 1897, just as the U.S. Supreme Court was interpreting the Sherman Act to foreclose the argument that cartel agreements were necessary to prevent "ruinous competition" and

83. Wilhelm Roepke, The Solution of the German Problem 1 (1946) (unpublished report) (on file with the Bentley Historical Library, University of Michigan, Creighton R. Coleman Papers Collection); *see also* JOHN O. HALEY, ANTITRUST IN GERMANY AND JAPAN: THE FIRST FIFTY YEARS, 1947–1998, at 7–8 (2001) (summarizing Germany's abandonment of free trade in 1870s and movement toward cartelization).

84. Decartelization Vol. 1, *supra* note 23, at I-28–30.

85. EDWARD S. MASON, CONTROLLING WORLD TRADE: CARTELS AND COMMODITY AGREEMENTS 129 (1946).

establish "reasonable prices,"[86] the German Supreme Court was accepting just such assertions.[87]

Despite occasional political contestation over the benefits of cartelization, the number of cartels continued to grow during the imperial period, expanding from raw materials to manufactured goods.[88] During the First World War, the German government moved from tolerance of cartels to active compulsion, enforcing and managing price fixing agreements and production quotas as part of the government's industrial policy.[89] Following the war, cartelization continued to grow rapidly, leading to some political backlash (mostly arising out of Bavaria) concerning the effects of cartels on consumers.[90] The government did little to arrest the growing tide of cartelization until 1923, when it passed a cartel decree that, if anything, reinforced the legal status and protection of cartels.[91] Although providing for the terminability of cartel agreements by parties to the contract upon a showing of good cause and subjecting the agreements to the control and supervision of the government, the decree now gave cartels explicit statutory recognition.[92] Further, the regulatory provisions were generally not enforced by the government, which showed little interest in arresting the spread of cartelization.[93] German courts continued to show little interest in reigning in cartels and monopolies.[94]

Unfettered by a government ranging from complacent to affirmatively enthusiastic for cartels, cartelization progressively swept through the Ger-

86. United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 341 (1897) (rejecting claim that railroad pooling agreement was lawful under Section 1 of Sherman Act because prices charged were reasonable in light of effects of excessive competition); *see also* United States v. Addyston Pipe & Steel Co., 85 F. 271, 283 (6th Cir. 1898), *aff'd,* 175 U.S. 211 (1899) (rejecting arguments that "ruinous competition" justifies cartel agreements).

87. B. v. den Sächsischen Holzstoff-Fabrikanten-Verband, Reichsgericht (VI. Zivilsenat), Feb. 4, 1897, 38 R.G.Z. 155 (*B. v. Saxon Woodpulps Manufacturers Ass'n*); *see also* 3 Decartelization Branch Office of Military Government for Germany (U.S.), Germany's Major Industrial Combines III-1 (March 1, 1947) (unpublished report) (on file with the Bentley Historical Library, University of Michigan, Creighton R. Coleman Papers Collection) [hereinafter Decartelization Vol. 3]; Ivo E. Schwartz, *Antitrust Legislation and Policy in Germany—A Comparative Study*, 105 U. PA. L. REV. 617, 626–27 (1957) (discussing holding in *B. v. Saxon Woodpulps Manufacturers Ass'n*).

88. Decartelization Vol. 1, *supra* note 23, at I-30.

89. *Id.* at I-31.

90. *Id.* at I-30–35.

91. Schwartz, *supra* note 87, at 636–39; Peter D. Schapiro, *The German Law Against Restraints of Competition—Comparative and International Aspects*, 62 COLUM. L. REV. 1, 7 n.38 (1962); Decartelization Vol. 1, *supra* note 23, at I-35.

92. Schwartz, *supra* note 87, at 636–39; Decartelization Vol. 1, *supra* note 23, at I-35.

93. Decartelization Vol. 1, *supra* note 23, at I-36.

94. *See* Decision of the Hanseatisches Oberlandesgericht, Jan. 14, 1925, 23 Kartellrundschau 256, *aff'd by* the Reichsgericht (IV. Zivilsenat), Dec. 12, 1925, 24 Kartellrundschau 18 ("For business men to obtain a monopoly is not, under general principles of civil law, unlawful even if such monopoly should in effect be at variance with the interests of national economy."), *translated in* Schwartz, *supra* note 87, at 634.

man economy from the time of Bismarck to the Third Reich. One German historian estimated the following numbers of cartel agreements in Germany by year: 4 in 1865; 70 in 1887; 300 in 1900; 600 in 1911; 1,000 in 1922; 2,100 in 1930; and 2,500 by 1943.[95] These included most significant industries: coal, iron and steel, steel processing, wire and cable, machinery, vehicles, non-ferrous metals, building materials, chemicals, rubber, textiles, paper, printing, wood, electrotechnical, optics, porcelain and stoneware, glass, leather, sugar, food, and brewing and milling.[96] Germany has been called "the fatherland of the cartel movement."[97]

In the economic distress and disorganization that followed the First World War, many of Germany's cartels and syndicates found themselves in a state of decay, which paved the way for the second stage of concentration—outright monopolization in many industries—facilitated by German bankers.[98] Many industries transitioned from tight cartelization to merger to monopoly, as for example the chemical industry, which merged from two cartels into a single integrated firm in 1925.[99] The steel industry also moved through mergers and acquisitions in the direction of large, vertically integrated conglomerates.[100] By the time the Nazis came to power, significant swaths of the German economy were subject to monopolies or near monopolies. These included, among many others:

- Wintershall Potash Works, controlling over two-thirds of the German potash industry;[101]
- Robert Bosch, GmbH, with a near-monopoly position in fuel injection equipment and magnets;[102]
- Siemens & Halske A.G. and Allgemeine-Elektrizitaets-Geselleschaft ("AEG"), collectively controlling over three-quarters of the electro-technical industry;[103]

95. Decartelization Vol. 1, *supra* note 23, at I-17; *see also* HENRY ASHBY TURNER, GERMAN BIG BUSINESS AND THE RISE OF HITLER, at xix (1987) (reporting "in excess of fifteen hundred [cartels] in industry alone by 1925"); Heinrich Kronstein, *The Dynamics of German Cartels and Patents* (pt. 1), 9 U. CHI. L. REV. 643, 647 (1942) (reporting the existence of 450 German cartels in 1901); Schwartz, *supra* note 87, at 635 (reporting the existence of 3,000 German cartels in 1925).

96. Decartelization Vol. 1, *supra* note 23, at I-17–18.

97. HALEY, *supra* note 83, at 8; *see* Heinrich Kronstein, *The Dynamics of German Cartels and Patents* (pts. 1 & 2), 9 U. CHI. L. REV. 643 (1942), 10 U. CHI. L. REV. 46 (1942); John C. Stedman, *The German Decartelization Program—The Law in Repose*, 17 U. CHI. L. REV. 441 (1950).

98. Decartelization Vol. 3, *supra* note 87, at III-1.

99. *See infra* Section II.C.

100. HALEY, *supra* note 83, at 8; TURNER, *supra* note 95, at xvii.

101. Decartelization Vol. 3, *supra* note 87, at III-2.

102. Creighton R. Coleman, Decartelization in the U.S. Zone of Germany 5 (Dec. 1948) (unpublished report) (on file with the Bentley Historical Library, University of Michigan, Creighton R. Coleman Papers Collection).

- I.G. Farben, with monopoly or near-monopoly shares in many segments of the chemical industry;[104]
- Deutsche Zuendwaren-Monopolgesellschaft, with a complete monopoly over all match sales in Germany pursuant to a 1930 Reichstag law;[105]
- Henschel und Sohn, GmbH, with a dominant position in locomotive and heavy machine manufacturing;[106]
- The Krupp armaments firm, with a monopoly over heavy artillery and many other military product lines;[107]
- Vereinigte Stahlwerke (United Steel Works), created in 1926 by the merger of three major steel firms;[108] and
- The Degussa firm, with a dominant position in precious metals.[109]

In sum, before Hitler came to power, the German economy had been thoroughly cartelized and monopolized. A 1946 report of the Decartelization Branch summed up the situation as follows:

> [D]espite war, defeat, inflation, and depression, the concentration of German industry proceeded without interruption as merger succeeded merger. By 1928 the officers and directors of the principal combines were in a position to dictate national economic policy, sometimes but not always in consultation with state officials. In fact, such companies as Vereinigte Stahlwerke and I.G. Farben, producing a wide range of raw materials, semifinished products and commodities themselves, and a vastly wider range through their numerous subsidiaries and affiliates, were in effect an industrial dictatorship capable (should it suit their purposes) of reorganizing the German state.[110]

As previously noted, contemporary historians urge caution in relying on rhetorical characterizations in the Decartelization Branch reports, which were made "for prosecutorial purposes by persons who were also trustbusters" and often were not well steeped in German economic history.[111] But whether or not the industrial giants that dominated Germany's business landscape in the Weimar period are rightly characterized as an "industrial

103. Decartelization Vol. 3, *supra* note 87, at III-2.

104. *Infra* notes 111–117.

105. Decartelization Vol. 3, *supra* note 87, at III-33.

106. *See* COLEMAN, *supra* note 102, at 5.

107. *See infra* Section II.C.3.

108. TURNER, *supra* note 95, at xvii.

109. *See infra* text accompanying notes 140–149.

110. Decartelization Vol. 3, *supra* note 87, at III-2.

111. Feldman, *supra* note 82, at 15; *see also* FELDENKIRCHEN, *supra* note 82, at 8 (criticizing Siemens report's assessments as "very much the product of their time" and inconsistent with the "current state of research").

dictatorship," the high degree of concentration and cartelization in the German industry and the monopolies' practical power to reorganize the German state is beyond peradventure.

B. *German Heavy Industry's Support for the Nazi Regime*

The historical record on heavy industry's support for the Nazi regime is hotly contested. Marxist-leaning historians have consistently taken the view that capitalist monopolies supported Hitler's ascent.[112] For instance, Dietrich Eichholtz, writing in East Germany in 1969, faulted the "leading German monopolies[] for their initiative and leading role" in propelling the Nazi march toward war.[113] By contrast, among non-Marxists there has been no such consensus, with many taking the position that the captains of industry were largely not supportive of Hitler until he was already in power, at which point they had no choice but to fall in line with the Nazi regime.[114]

Much of the dispute over the characterization of the historical record turns on questions of timing. Adherents to the view that big business pushed Hitler's ascent point to early support from Fritz Thyssen of the steel combine, who began to contribute funds to Hitler's coffers in 1923,[115] and Hjalmar Schacht of the Reichsbank.[116] On January 27, 1932, a year before Hitler became chancellor, Thyssen organized a meeting at the Industry Club of Dusseldorf to introduce Hitler to leading industrialists.[117] According to Thyssen's first-person account (published after he fell out with Hitler), the meeting resulted in "a number of large contributions flow[ing] from the resources of heavy industry into the treasuries of the National Socialist party."[118] Similarly, OMGUS's Decartelization Report claimed that, in the final years of the Weimar Republic, industrialist Emil Kirdorf used his influence in the domestic coal cartel to levy assessments on every ton of coal mined or

112. George W.F. Hallgarten, *Adolf Hitler and German Heavy Industry, 1931–1933*, 12 J. ECON. HIST. 222, 222–23 (1952); Henry Ashby Turner, Jr., *Big Business and the Rise of Hitler*, 75 AM. HIST. REV. 56, 56 (1969) ("For Marxists, or at least those who adhere to the Moscow line, the answer to this question has never been a problem. From the outset, they have viewed Nazism as a manifestation of 'monopoly capitalism' and the Nazis as tools of big business.").

113. 1 DIETRICH EICHHOLTZ, GESCHICHTE DER DEUTSCHEN KRIEGSWIRTSCHAFT 1939–1945, at 37 (1969), *translated in* FELDENKIRCHEN, *supra* note 82, at 3.

114. *See* Turner, *supra* note 112, at 56, 68; *see also* WYATT WELLS, ANTITRUST AND THE FORMATION OF THE POSTWAR WORLD 140 (2002) ("Although Germany's business community certainly harbored a substantial number of Nazis, many historians have argued that industry as a whole contributed no more to Hitler's rise to power than other segments of German society and may have contributed less than some.").

115. ERNEST S. GRIFFITH, FASCISM IN ACTION, H.R. DOC. No. 80-401, at 89 (1947)

116. Decartelization Vol. 3, *supra* note 87, at III-2.

117. FRITZ THYSSEN, I PAID HITLER 16 (César Saerchinger trans., 1941).

118. *Id.* at 101.

sold to raise money for the Nazis,[119] although historians have questioned the extent of Kirdorf's support for the Nazis before 1934.[120]

Despite early support for Hitler by a few industrialists, the historical record does not bear out claims that Germany's monopolies and cartels were pining for Hitler's rise or providing material support to his ascension during most of the years of the Nazi Party's ascent from 1919 forward. Yale historian Henry Turner observed that "most of the political money of big business went, throughout the last years of the republic, to the conservative opponents of the Nazis" and that most of the business community backed Paul von Hindenburg against Hitler in the 1932 presidential campaign.[121] Similarly, George Hallgarten observed that "[d]own to 1929 [the Nazi Party] appears to have lived, in the main, on membership dues and individual gifts, mainly from local South German producers. A donation by Fritz Thyssen in 1923 remained an isolated fact."[122]

The situation changed with Hitler's ascension as chancellor on January 30, 1933.[123] Leading industrialists, who were often more motivated by profits than political ideology, began to bet on Hitler's political future and its implications for their businesses. On February 20, 1933, Hjalmar Schacht of the Reichsbank organized a meeting among Hitler, Hermann Göring, and several dozen leading industrialists, including executives from the Krupp, Bosch, Farben, and United Steel Works firms, during which Hitler promised to destroy the Marxists and rearm Germany.[124] The industrialists responded with enthusiasm, and Schacht collected three million Reichsmarks in donations to the Nazis.[125] On February 27, 1933—perhaps not coincidentally the day of the Reichstag fire—the I.G. Farben chemical monopoly deposited RM 400,000 in the Nazi Party's coffers.[126] A succession of further donations followed, providing Hitler with a source of extragovernmental funding even while he struggled to consolidate his power over the state.[127] As discussed further below, the Krupp armaments monopoly led a fundraising effort among twenty other leading industrial firms a month later, raising millions of reichmarks for the Nazis. That these donations may have been made through "political extortion" and without enthusiasm by the industrial do-

119. Decartelization Vol. 3, *supra* note 87, at III-2.

120. TURNER, *supra* note 95, at 350 (dismissing coal levy as a "myth"); Turner, *supra* note 112, at 60–61.

121. Turner, *supra* note 112, at 62.

122. Hallgarten, *supra* note 112, at 224 (footnote omitted).

123. WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY 187 (1959).

124. *Id.* at 189–190.

125. *Id.* at 190.

126. DIARMUID JEFFREYS, HELL'S CARTEL: IG FARBEN AND THE MAKING OF HITLER'S WAR MACHINE 143 (2008).

127. *Id.* at 144.

nors does not diminish the fact that they were made and that, through them, "big business was helping consolidate Hitler's rule."[128]

Although the best reading of the historical record suggests that most of the Weimar monopolies and cartelists were not generally disposed to support Hitler and did not do so until he was already grabbing the reins of power, this Article's purpose is not to judge the ethical responsibility of heavy industry for the rise of German fascism but rather to understand the ways in which the concentrated economic structure of industry may facilitate the rise of totalitarian government. In this vein, it is important to make clear that the thesis that extremely concentrated economic power facilitated Hitler's rise to power is distinct from the controversy that has occupied historians since the end of the Second World War about whether the Nazi regime was an outgrowth of capitalism. In *German Big Business and the Rise of Hitler*, Turner systematically debunked the claim that the captains of heavy industry deliberately boosted Hitler to power, which Turner saw as an inaccurate interpretation of history for anticapitalist ideological purposes.[129] Turner argued that support for Hitler was much more concentrated among small businessmen, who felt trapped between the powerful and rapacious monopolies and cartels, on the one hand, and the labor unions, on the other.[130] But that small business may have supported Hitler's rise while big business largely did not does not prevent the concentrated *structure* of German industry from having contributed significantly to the Third Reich's ascent, just as other structures of German society may have helped the Nazis without being designed to do so. Nor is it an indictment of capitalism in general to observe that extreme monopolization and cartelization may pose a threat to democracy—capitalism, tended by anti-monopoly principles, need not result in extreme monopolization and cartelization. Thus, the record of German heavy industry's lack of willing support for the rise of the Nazis before 1933 is only one small piece of the wider story of how the steady cartelization and monopolization of the German economy from the time of Bismarck through the end of the Weimar Republic set the stage for the fascist period that followed.

C. *Concentration and Nazi Facilitation in Three Principal Industries*

As discussed in the previous Section, the story of big business support for Hitler is contested, complex, and varied. This Section presents case studies from three German industries—chemicals, electricity, and armaments—that were critical to Hitler's consolidation of power, Germany's rearmament, and its wars of aggression. Each industry was dominated by one or two large firms subsequently charged with war crimes. The case studies reveal both the heterogeneity and homogeneity of the relationship between monopoly and fascism. On the one hand, the principal firms differed in their enthusiasm

128. IAN KERSHAW, HITLER: 1889–1936: HUBRIS 448 (1st American ed. 1999).

129. TURNER, *supra* note 95.

130. *Id.* at 344.

for competition, monopolization, and cartelization and in their support for the Nazi regime. On the other hand, all three industries were characterized by high levels of economic concentration and played a role in Hitler's consolidation of political and economic power. The case studies that follow survey the paths by which the leading firms in these industries rose to economic dominance, their attitudes toward Nazism, what they concretely and specifically did to support it and when, and how they benefitted from it once they had Hitler's favor. Although the firms differed in how they supported the Third Reich, the common pattern of dominance across industries played a crucial role in consolidating the Nazis' power.

1. Chemicals

Among the German firms most important to the rise of Nazism and the perpetuation of its atrocities, none was more significant than the I.G. Farben chemical cartel.[131] A 1945 OMGUS *Report on the Investigation of I.G. Farbenindustrie A.G.* concluded that Farben, although "nominally a private business enterprise," was "in fact, a colossal empire serving the German State as one of the principal industrial cores around which successive German drives for world conquest have been organized" and served as "a trump which . . . almost enabled Hitler and Goering to extinguish the flame of freedom and human decency everywhere."[132]

Ironically, for all of the headaches it would eventually induce, the story of I.G. Farben's rise to power begins with a growing German chemical company—Bayer—which introduced the world to aspirin in 1899.[133] Inspired by the American trusts of the Gilded Age, which were just beginning to receive serious antitrust scrutiny, Bayer entered into a pooling arrangement with two other chemical companies—BASF and Agfa—in 1904.[134] A rival chemical pool, headed by the Hoechst firm and including six German chemical companies, formed in the same year.[135] The two rival pools operated as conventional cartels, including coordination on pricing, research and development, investment decisions, market allocations, and entry into foreign markets.[136]

131. *See* JEFFREYS, *supra* note 126, at 211 (describing I.G. Farben's singular importance to the Nazi regime).

132. *Elimination of German Resources for War: Hearings Before a Subcomm. of the S. Comm. on Military Affairs*, 79th Cong. 943 (1945) [hereinafter *Military Government Report*].

133. JEFFREYS, *supra* note 126, at 32. The I.G. Farben story has been extensively studied by scholars. The leading works include JOSEPH BORKIN, THE CRIME AND PUNISHMENT OF I.G. FARBEN (1978); PETER HAYES, INDUSTRY AND IDEOLOGY: IG FARBEN IN THE NAZI ERA (2d ed. 2001); JEFFREYS, *supra*; STEPHAN H. LINDNER, INSIDE IG FARBEN: HOECHST DURING THE THIRD REICH (2008).

134. JEFFREYS, *supra* note 126, at 35–36.

135. *Id.* at 36.

136. *Id.* at 36 & n.*.

In 1916, with the British making inroads at the Somme, the two pools began to fret about the advent of foreign competition following the war.[137] These anxieties resulted in a combination of the two trusts into a single mega-trust or profit-sharing pool, with the power to enable industry-wide coordination with respect to pricing, research and development, patent strategies, legal affairs, and insurance.[138] The cartel structure persisted until 1925, when the pool's nine members underwent a final corporate integration, merging into a single corporate entity (albeit with a complex structure of subsidiaries and holdings).[139] Thereafter, until its dissolution in the post-War era, Farben no longer operated as a "chemical cartel" as it is often styled in the literature. In modern legal and economic terms, it was an integrated, widely held corporation, with 140,000 shareholders.[140]

After the great merger of 1925, Farben continued to extend its control over the German chemical industry and adjacent sectors that were important to Germany's rearmament project. A series of 1936 agreements ceded control over the German explosives industry to Farben.[141] But it was a 1930 market division agreement with the American company Standard Oil of New Jersey, or Esso, that garnered the most critical attention after the commencement of hostilities.

In the convention of the times, Farben had long engaged in global market division agreements with foreign rivals. A 1923 agreement with the Sterling unit of the American firm Winthrop Chemical had allocated to Sterling the right to market aspirin in the United States, some of the Commonwealth countries, and South America, and to Farben the rest of the globe.[142] In 1925, Farben initiated similar discussions with Standard Oil, these on the question of synthetic fuel.[143] After a five-year courtship, the negotiations resulted in the creation of the Joint American Study Company (JASCO), a research and development joint venture that also involved allocation of global markets for hydrogenated fuel.[144]

Since Farben's exclusive area was limited to Germany, the fuel market–division agreement turned out to be relatively unimportant to subsequent war efforts. But a separate agreement turned out to be hugely damaging to U.S. interests. In addition to fuel, a form of synthetic rubber called buna can be extracted from coal. The parties enlarged the JASCO agreement to include joint research and development related to buna. Under the terms of the agreement, Standard Oil was obliged to assign to Farben any patents and

137. *Id.* at 63.

138. *Id.*

139. *See id.* at 101–04.

140. *Id.* at 121–22; *Military Government Report*, *supra* note 132, at 966–97.

141. *Military Government Report*, *supra* note 132, at 946–47.

142. JEFFREYS, *supra* note 126, at 89.

143. *Id.* at 113. *See generally* BORKIN, *supra* note 133, at 76–90.

144. JEFFREYS, *supra* note 126, at 116–17.

know-how related to buna production.[145] Farben had no reciprocal obligation, although, in 1930, the parties had anticipated some sort of collaboration on the marketing of buna.[146] However, as Germany remilitarized, Farben became integrated into the Wehrmacht, and buna became strategically important to military mobilizations, Farben began to drag its feet on sharing any proprietary information with Standard Oil.[147] Other American manufacturers interested in manufacturing synthetic rubber, such as Goodyear Rubber Company and Dow Chemical, unsuccessfully sought a patent license from Standard Oil, which stalled them on a licensing arrangement due to being stalled themselves by Farben.[148] The JASCO arrangement had the effect of delaying American development of buna by a number of years.[149]

After Pearl Harbor and the commencement of the war in the Pacific, American access to rubber supplies from Southeast Asia faltered and access to synthetic rubber became critical.[150] Due to Farben's cooption of Standard Oil under the JASCO agreement, American scientists were far behind in developing their own way of producing buna, and it took an immense expenditure of time and effort to catch up to the Germans.[151] The U.S. War Depart-Department felt that the cooption of Standard's buna research efforts by Farben "seriously imperiled the war preparations of the United States."[152] So did the United States Justice Department, which indicted and convicted Standard Oil, six subsidiaries, and three executives on charges of criminally conspiring with Farben to restrict trade in synthetic fuel and buna.[153]

With Hitler's rise to power in the early 1930s, Farben initially resisted Nazification, worried about potential ill effects on its global business of becoming overly intertwined with a controversial political party.[154] However, by the mid-1930s, the firm's management had acceded to the reality that alliance with the Nazis was critical to the continued success of the Farben enterprise. The firm purged its Jewish managers, began making financial contributions to Hitler's slush fund, and began to align politically with the

145. *Id.* at 117, 199; HAYES, *supra* note 133, at 38.

146. JEFFREYS, *supra* note 126, at 199.

147. *Id.* at 199–200; BORKIN, *supra* note 133, at 80–90. In 1939, Standard and Farben reworked the JASCO agreement, including an assignment of the U.S. patent rights to buna to Standard. HAYES, *supra* note 133, at 335. However, the German government insisted that Farben share none of its know-how on buna production with Standard. *Id.* at 336; BORKIN, *supra* at 87.

148. BORKIN, *supra* note 133, at 81.

149. *See Military Government Report*, *supra* note 132, at 952.

150. JEFFREYS, *supra* note 126, at 231.

151. *Id.* at 230–31.

152. *Military Government Report*, *supra* note 132, at 952.

153. JEFFREYS, *supra* note 126, at 231.

154. *Id.* at 119–44.

Nazis.[155] By 1935–1936, as Hitler's rearmament project intensified, the firm became organizationally intermeshed with the Wehrmacht.[156] From then until the end of the war, Farben effectively served as an industrial branch of the Nazi regime, with profits continuing to flow to the firm's managers and shareholders.

The rewards of the Nazi alliance paid off handsomely. By the late 1930s, Farben controlled almost all German chemical and synthetic production, including 100% of synthetic rubber, 100% of lubricating oils, 100% of serums, 90% of plastics, 88% of magnesium, 84% of explosives, and 75% of nitrogen.[157] Even during the economic downturn of the Great Depression, Farben continued to earn handsome profits.[158]

Following the Austrian Anschluss of 1938 and the German invasion of much of Europe beginning the following year, Farben gobbled up the chemical industries in the conquered territories, annexing them into the Farben empire.[159] Farben effectively served as the prime economic arm of Germany's European conquests, coercing firms in conquered territories to sell cheaply or simply taking them over. Tragically, Farben also served as one of the many faces of Third Reich evil, running a factory concentration camp at Auschwitz and supplying the Zyklon B gas used to exterminate Jews and other prisoners.[160]

After German capitulation in 1945, Farben fell under the control of the occupying forces. Convinced that Farben's global network of subsidiaries and interests remained a threat to the free world, OMGUS set out immediately to dismantle the company.[161] In 1947, twenty-four Farben executives were tried for war crimes at Nuremberg; among them, nine defendants were ultimately found guilty of committing war crimes and crimes against humanity through the plunder of public and private property in territories that came under German occupation, and five found guilty of enslavement and deportation for slave labor of civilians.[162] In 1951, Farben was split into three large companies—Bayer, Hoechst, and BASF—and six smaller firms.[163] The pre-1904 market was largely recreated, with substantial adjustments for the passage of time.[164]

155. *Id.* at 143–44, 189.

156. *Military Government Report*, *supra* note 132, at 979.

157. *Id.* at 986; *see also* JEFFREYS, *supra* note 126, at 211; TURNER, *supra* note 95, at xvi.

158. *Military Government Report*, *supra* note 132, at 962.

159. *Id.* at 1005–07; JEFFREYS, *supra* note 126, at 204–05.

160. JEFFREYS, *supra* note 126, at 245, 275.

161. *Id.* at 302; BORKIN, *supra* note 133, at 158–59.

162. JEFFREYS, *supra* note 126, at 316, 338.

163. *Id.* at 343.

164. Recently, Bayer again made antitrust headlines because of its merger with Monsanto. Natalia Drozdiak & Jacob Bunge, *'Serious Doubts' Over Bayer and Monsanto's $57 Billion Megadeal, Says EU*, WALL STREET J. (Aug. 22, 2017, 5:54 pm), https://www.wsj.com/articles

The cooption of monopoly firms as agents of the Nazi regime was not limited to firms of enormous scale like Farben. The Third Reich selected even smaller-scale business partners that could exercise exclusive control over industrial segments important to the regime's goals, and it then ensured the perpetuation and deepening of those firms' monopoly power. For instance, the Degussa chemical firm was one-tenth the size of Farben, but it played a significant role in the Nazi's rearmament project and in the plundering of precious metals from the Jews.[165] From its incorporation in 1873 through the Weimar period, Degussa was largely a niche player in precious metals and specialty chemical products.[166] In the late 1920s and early '30s, Degussa made a number of strategic acquisitions to strengthen its position in precious metals and also to diversify into niche product lines like carbon black, an additive that could be used to increase the durability of rubber tires.[167] In 1933, Degussa leveraged Nazi threats against Jewish-owned firms to buy up Degea AG, the leading producer of gas masks and radioactive earth metals, at the same time that the Nazi regime issued decrees to eliminate competition with Degussa in its carbon black development project.[168] The deeper Degussa became intermeshed with the Nazi regime, the more it became an arm of Nazi industrial and political policy, eschewing even more lucrative product lines to focus on the Nazis' priorities.[169]

By 1937–1938, Degussa was a full-fledged participant in the Nazis' atrocities, plundering Jewish-owned firms to increase its holdings and processing gold, silver, and platinum seized from Jews in Germany.[170] Even though the profit margins from performing the processing function were initially very low, Degussa took on this function in order to preserve its dominance in previous metals and, hence, its position in the Nazi industrial hierarchy.[171] From 1939 to 1941, Degussa processed 80 percent of the gold seized from German and Austrian Jews and shared over 50 percent of other precious metals as well.[172] Thereafter, its dominant position reinforced, the firm took an even larger role in processing precious metals seized from occupied territories.[173] With Farben, Degussa also took part in the manufacture of Zyklon B and the use of slave labor.[174]

/eu-launches-in-depth-investigation-into-bayer-monsanto-deal-1503408880 [https://perma.cc/7CZK-G25E].

165. Peter Hayes, *The Chemistry of Business-State Relations in the Third Reich*, *in* BUSINESS AND INDUSTRY IN NAZI GERMANY, *supra* note 82, at 66, 66–77.

166. *Id.* at 67–68.

167. *Id.* at 68.

168. *Id.* at 69.

169. *See id.* at 71.

170. *Id.* at 72.

171. *Id.*

172. *Id.*

173. *See id.* at 73.

174. *Id.* at 73–75.

The chemical industry was a backbone of the Third Reich. Its extreme economic concentration facilitated Hitler's consolidation of political power, wars of aggression, and atrocities.

2. Electricity

Like the chemical industry, the electrical industry played a significant role in Germany's industrial development during the early twentieth century, and it too transitioned from a competitive market to an oligopoly dominated by two large firms—Siemens and Allgemeine Elektricitats Gesellschaft (AEG).[175] An economic crisis in 1901–1902 took a particularly harsh toll on the electricity industry and enabled Siemens and AEG to gobble up a number of distressed firms or jointly liquidate their smaller rivals in order to clear the market.[176] Siemens and AEG emerged from this period of intensive consolidation with a combined share approaching two-thirds of the market.[177] In the years leading up to the First World War, both firms continued to acquire rival firms, thus solidifying their position of dominance.[178] During the Depression, Siemens and AEG bought up yet additional failing rivals or, as during the 1901–1902 crisis, jointly liquidated them.[179] The two firms held serious discussions about a potential merger, but were ultimately unable to come to agreement.[180] Even without integration through merger, AEG and Siemens quickly grew to a tremendous scale. At the outbreak of the Second World War, Siemens employed 187,000 workers, making it among the top five largest firms in the world.[181] By 1944, AEG and its subsidiaries employed more than 200,000 workers.[182]

In addition to consolidation through acquisition or joint liquidation, the electrical industry achieved anticompetitive coordination through cartels that fixed prices and imposed marketing quotas on a wide variety of electricity-related submarkets.[183] For example, a 1903 cartel agreement between Siemens, AEG, and F&G-Lahmeyer committed the firms to a secret "business sharing" arrangement where the firms essentially agreed not to compete against one another in bids to public works or industrial plants.[184] Siemens and AEG also entered into a variety of bilateral cooperation agreements, including the opening of several jointly owned subsidiaries,[185] and worked to-

175. FELDENKIRCHEN, *supra* note 82, at 11, 24.

176. *Id.* at 22, 24.

177. TURNER, *supra* note 95, at xvii; *see also* FELDENKIRCHEN, *supra* note 82, at 26.

178. FELDENKIRCHEN, *supra* note 82, at 49, 52.

179. *Id.* at 104.

180. *Id.* at 274–75.

181. *Id.* at 152.

182. Decartelization Vol. 3, *supra* note 87, at III-15.

183. FELDENKIRCHEN, *supra* note 82, at 27–28.

184. *Id.* at 29.

185. *Id.* at 53.

gether to undermine or weaken smaller rivals that had reached a level of production that threatened the two big firms.[186] At its height, Siemens participated in more than one thousand foreign and domestic cartel agreements.[187]

The House of Siemens did not welcome Hitler's rise to power. Carl Friedrich von Siemens, the family patriarch, supported the democratic German People's Party up through the March 1933 elections—several months after Hitler had assumed the chancellorship—and the family thereafter participated reluctantly in the Nazi regime.[188] Still, the highly concentrated structure of the electrical industry—produced through decades of mergers, liquidation of rivals, and cartel activity—facilitated the Nazis' projects of centralizing political and economic power and rearming Germany for wars of aggression. The Nazis quickly seized on the consolidated and cartelized structure of the electrical industry to force it within the party's control and reorient the industry to remilitarization.[189] In November of 1933, the Nazis reconstituted the Zentralverband de Deutschen Elektrotechnischen Industrie (Central Association of the German Electrical Industry, or ZVEI)—the association of electrical industry cartels formed in 1918—into the Reichsfachverband Elektroindustrie (RFE), effectively transforming the cartel umbrella organization into an organ of the regime.[190] Through this means and a succession of additional decrees in 1934 and 1935, the Nazi brought the cartels under the direct control of the regime and ensured that "[t]he self-governing industrial bodies were to feel responsible for ensuring that the cartels, in all the measures they took, adhered to the economic policy of the Reich government."[191]

Chief among the regime's policies was rearmament, and the cartelized electrical industry quickly bent to the regime's will. As the Nazis increasingly employed the preexisting cartel structure to remove "production and sales . . . from the sphere of entrepreneurial decision making" and prevent "[t]he possibilities of pursuing an autonomous corporate policy," electrical "[c]ompanies were increasingly less able to resist integration in rearmament and the war economy."[192] Although political support for Hitler varied within the German electrical industry as it did throughout many other facets of German society, the concentrated and cartelized structure of the industry offered the Nazis an organizational structure that facilitated the consolidation of economic—and hence political—power and the push toward the war.

186. *Id.* at 276.

187. Decartelization Vol. 3, *supra* note 87, at III-77.

188. FELDENKIRCHEN, *supra* note 82, at xv.

189. *Id.* at 113–17.

190. *Id.* at 114.

191. *Id.* at 114–15.

192. *Id.* at 116.

With the advent of war, AEG, like Farben, used its close connections with the military to seize firms in occupied territory.[193] It also employed slave labor, about which reparations litigation has occurred in recent decades.[194] And, like Farben, cartel agreements with U.S. electrical companies undermined U.S. war readiness. Siemens's refusal to honor the terms of a patent exchange agreement with California-based Bendix Aviation Company "seriously handicapped the production of electrically-driven automatic pilots in the U.S.," and a separate cartel agreement with Beryllium Corporation of New York "resulted in limitation of defense production in the U.S."[195]

The electrical industry differed structurally from the chemical industry—it was characterized by duopoly rather than monopoly and relied extensively on cartelization to achieve economic control. Its industrial captains were slower to lend aid to the Nazis than their peers in the chemical industry. Nonetheless, as in the chemical industry, the industry's concentrated structure was easily coopted to bolster Hitler's political and economic strength and hence facilitated Germany's transformation from democracy to totalitarianism.

3. Armaments

At the Nuremberg Military Tribunal, Justice Robert Jackson indicted the Krupp steel and armaments concern as key supporters of the Nazi regime and its wars of aggression:

> Four generations of the Krupp family have owned and operated the great armament and munitions plants which have been the chief source of Germany's war suppliers. For over 130 years this family has been the focus, the symbol, and the beneficiary of the most sinister forces engaged in menacing the peace of Europe.[196]

Although the firm patriarch was too mentally infirm to stand trial, most of Krupp's directors were convicted for employing slave labor and plundering occupied Europe in a subsequent war crimes trial.[197] But though Krupp surely deserved blame for its conduct during the war, the family firm's attitude toward both cartelization and the Nazi regime was significantly different from those of Farben and Siemens. In assessing the relationship between German industrial concentration and the rise of fascism, it is important to

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193. Decartelization Vol. 3, *supra* note 87, at III-15.

194. BENJAMIN B. FERENCZ, LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION 106–15 (Ind. Univ. Press 2002) (1979); Elizabeth D. Lauzon, Annotation, *Recoverability of Reparations from Corporations for Nazi-Related Conduct*, 6 A.L.R. Fed. 2d 279, 306, 308–09 (2005).

195. Decartelization Vol. 3, *supra* note 87, at III-78; *see also* BUEL W. PATCH, CQ RESEARCHER, FOREIGN CONTROL OF AMERICAN PATENTS (1941), https://library.cqpress.com/cqresearcher/document.php?id=cqresrre1941071700 (on file with the *Michigan Law Review*).

196. HAROLD JAMES, KRUPP: A HISTORY OF THE LEGENDARY GERMAN FIRM 223 (2012).

197. *Id.* at 223–24.

avoid painting all firms and industries with a broad brush, as often occurs when histories are being contested. Krupp's dominance in the armaments industry surely facilitated Hitler's aggressive rearmament policies, but in some very different ways than Siemens or Farben.

Krupp's transition from a steel company to an armaments company in the late nineteenth and early twentieth centuries reflects the limits of the cartelization-and-merger story to explain the concentration of German industry and the need to identify additional sources of economic concentration, such as long-term exclusive or semi-exclusive governmental procurement relationships. On the one hand, the Krupp firm was generally averse to participation in cartel agreements. Firm patriarch Alfred Krupp once remarked: "I hate the idea of fraternization with our competitors, since nobody will do anything for us, and everyone just wants to derive some benefits from such fraternization."[198] The firm also resisted pressure to merge with other firms, preferring the independence of the family-owned tradition,[199] and declined to join the steel trust in the mid-1920s.[200] On the other hand, in eschewing anticompetitive collusion and merger, the Krupp firm steered toward a different strategy to avoid direct competition: moving away from homogenous mass-market products subject to intense price competition and toward cultivation of markets subject to long-term exclusivity and guarantees, namely military contracting.[201] In the run-up to the First World War, the firm engaged in intensive, arguably cutthroat, competition to expand its market share in the supply of munitions and artillery products to the German army.[202] When a rival firm attempted to sell a hydraulic recoil gun to the army, Krupp asked the army for an exclusive contract, including lodging an appeal with Wilhelm II.[203] When this gambit failed, Krupp secretly bought up shares of the rival firm in order to hamper its investment ability.[204] By the First World War, the German army had become so reliant on Krupp to supply heavy artillery that Krupp had a near-monopoly.[205]

The Treaty of Versailles and its implementing agreements required German demilitarization and for Krupp to exit the arms business.[206] On the surface, Krupp shifted back towards its mid-nineteenth century roots in manufacturing finished commercial products like railway cars, but almost

198. *Id.* at 43.

199. *Id.* at 43–44.

200. *Id.* at 165.

201. *Id.* at 44.

202. DAVID STEVENSON, ARMAMENTS AND THE COMING OF WAR: EUROPE, 1904–1914, at 25 (1996).

203. *Id.*

204. *Id.*

205. JAMES, *supra* note 196, at 136; *see also* Michael Epkenhans, *Military-Industrial Relations in Imperial Germany, 1870–1914*, 10 WAR HIST. 1 (2003) (describing Krupp's rise to monopoly supplier of heavy arms to the German army).

206. WILLIAM MANCHESTER, THE ARMS OF KRUPP, 1587–1968, at 323–24 (2003).

immediately it began a secret campaign to retain its arms-building capacity, with the sanction of the German army.[207] By the mid-1920s, Krupp had furtively developed "eight types of heavy artillery, howitzers, and light field guns; a new, mobile 21-cm. mortar; and the tank family."[208] Years before the Nazis' first electoral successes, the House of Krupp had been mass producing tanks for the German army and tightening its grip as the monopoly supplier of German arms and as one of the largest firms in the world.[209] At Hitler's ascension, the head of the Krupp family bragged that he "had the honor to report to the Führer that Krupp stood ready after a short warm-up to begin the rearmament of the German people without any gaps of experience."[210]

This is not to say that Krupp immediately supported the Nazis—despite the financial benefits of remilitarization, the family was initially skeptical of Hitler.[211] George Hallgarten has observed that family-owned enterprises like Krupp were significantly less likely to support Hitler than were widely held firms: "It would appear that the old industrial families of the Ruhr feared Hitler's budding totalitarianism much more strongly than did the directors of the anonymous companies who live on big salaries, instead of on individual profits."[212] Still, Krupp broke for Hitler before he came into office, probably sometime after the November 1932 elections.[213] On February 20, 1933, the senior Krupp, Gustav, attended the previously mentioned meeting with Hitler and Göring, at the conclusion of which he donated a million reichmarks to the Nazis and organized the collection of two million more from other industrialists.[214] Thereafter Gustav Krupp became a leading fundraiser for the Nazi Party.[215]

In the years following 1933, Krupp worked closely with the Nazi regime and the German army and navy on rearmament, not only filling orders for its own products but also leveraging its financial strength to spur rearmament more generally. For instance, in 1934, it participated with four other large firms (including Siemens) in the creation of the Metallurgische Forschunggesellschaft, which provided creditworthy signatures permitting the Reichsbank to discount armament bills.[216] The Krupp firm became an organizational spearhead for the Nazi's rearmament project and the Nazification

207. JAMES, *supra* note 196, at 151–52; MANCHESTER, *supra* note 206, at 337–49.

208. MANCHESTER, *supra* note 206, at 349–50.

209. By 1937, Krupp was the fourth-largest firm in Germany and the forty-eighth largest worldwide. JAMES, *supra* note 196, at 2.

210. MANCHESTER, *supra* note 206, at 350.

211. *Id.* at 359–60.

212. Hallgarten, *supra* note 112, at 243.

213. MANCHESTER, *supra* note 206, at 360.

214. *Id.* at 363–64.

215. *Id.* at 366–68.

216. JAMES, *supra* note 196, at 181.

of German industry; for example, it required all of its workers to demonstrate allegiance to Hitler by performing the Nazi salute.[217]

Krupp also directed its efforts to neutralizing technological development by foreign firms that might develop technologies important to waging war. In 1941, the United States Justice Department brought an antitrust case against General Electric (GE) and Krupp, alleging that the firms had colluded in 1938 to monopolize worldwide production and sale of carboloy, a trade name for tungsten carbide.[218] The case was suspended during the war but eventually went to trial in 1947, with the Krupp firm under control of the U.S. occupation authorities.[219] Despite the suspension of the antitrust case, the Senate Patents Committee held hearings in April of 1942, in which GE was accused of participating in a conspiracy that led to a "drastic shortage" of carboloy, which was freely available in Germany.[220] Ostensibly settling patent infringement claims, Krupp and GE had agreed to divide up the world markets for carboloy, with GE getting the United States and Canada and Krupp the rest of the world.[221] Throughout the trial, the prosecution presented evidence that the market division agreement had led to price increases and losses of American jobs.[222] The trial also underscored the importance of carboloy to the war effort and the deleterious effects of its limited availability in the United States during the war: one witness testified that a tool edged with tungsten carbonite could be used one thousand times before it had to be reground compared to one hundred times for other tools.[223] By contrast, "without [carboloy,] the German military machine could not have been built in the time that it was built and in the efficient fashion that it was built."[224] The district court ultimately found GE liable and imposed a relatively small corporate fine.[225]

Krupp's path to dominance looks very different from Farben's or Siemens's. A family-run business to the end, it was enamored neither of merger nor cartelization. Nonetheless, its position of dominance also served Hitler's nefarious purposes and contributed to the rise of the Third Reich.

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217. MANCHESTER, *supra* note 206, at 368–69.

218. United States v. Gen. Elec. Co., 80 F. Supp. 989 (S.D.N.Y. 1948).

219. JAMES LERNER, COURSE OF ACTION: A JOURNALIST'S ACCOUNT FROM INSIDE THE AMERICAN LEAGUE AGAINST WAR AND FASCISM AND THE UNITED ELECTRICAL WORKERS UNION (UE) 1933–1978, at 155 (Richard Neil Lerner & Anna Marie Taylor eds., 2012).

220. *Id.* at 156.

221. *Id.* at 156–57; *see* Decartelization Vol. 1, *supra* note 23, at I-60.

222. LERNER, *supra* note 219, at 157.

223. *Id.* at 156.

224. Decartelization Vol. 1, *supra* note 23, at I-60.

225. United States v. Gen. Elec. Co., 80 F. Supp. 989, 1017 (S.D.N.Y. 1948); LERNER, *supra* note 219, at 159.

These case studies of Farben–Degussa, Siemens–AEG, and Krupp demonstrate both heterogeneity and commonality when it comes to characterizing the relationship between German cartels and monopolies and the rise of the Third Reich. The firms had different corporate structures, attitudes toward competition, and receptivity to Hitler, and they obtained their market dominance in different ways. None of them instigated Hitler's rise to power. Yet the concentrated market power that characterized each of their industries facilitated Hitler's ascension to totalitarianism and his wars of aggression while undermining U.S. war readiness. The Section that follows subjects the raw historical facts just discussed to a variety of analytical questions, such as the degree to which industrial concentration "caused" Hitler, whether the problem was large corporate scale or market power in an economic sense, and by what mechanisms industrial concentration may have facilitated Hitler's rise and consolidation of power.

III. Causation, Mechanisms, and Questions of Scale and Power

A. *Four Analytical Questions*

The previous Section showed that industrial cartels and monopolies played a significant role in Hitler's consolidation of power, in Germany's wars of aggression, and in the evils perpetrated by the Nazi regime. But it does not necessarily follow that the concentration of German industry is causally related to the rise of fascism—or that monopoly enabled Nazism. Four matters should give us pause before making such an inference.

First, we should dispense at the outset with the strongest version of the causation argument: that industrial concentration is the root cause of Nazism—as some of the previously cited political rhetoric suggests. In drawing morals from the history of fascism for current antitrust policy, skeptics frequently note that a large number of complex social, political, economic, and ideological factors lie at the root of Nazism,[226] and that reducing the story to "monopoly caused Hitler" is overly simplistic.[227] Of course, these critics are right—industrial concentration was only one of many factors that contributed to the rise of Third Reich. The burden of this paper is not to prove any particular version of causation—"but for," proximate, necessary and sufficient, substantial, contributing, etc. Rather, it is to show that the high concentration of the German economy facilitated Hitler's rise to power, consolidation of power, and wars of aggression. Had economic power in critical industries been significantly more dispersed, it would have been considerably more difficult for the Nazis to obtain such an inexorable grip on all

226. *See, e.g.*, Daniel Ziblatt, Conservative Parties and the Birth of Democracy 297–333 (2017).

227. Turner, *supra* note 95, at xi (reporting that most historians eschew reductionist accounts of the rise of the Third Reich, looking instead to a variety of causal factors).

aspects of German society once they came to political power in 1933.[228] Whether or not monopolies and cartels "caused" Hitler, they facilitated his rise and consolidation of power.

Second, the direction of causation requires further specification. Did preexisting monopoly conditions in the German industry precipitate the initial rise of Nazism, or did ascendant Nazism promote monopoly? In other words, were monopoly and cartelization causes or symptoms of German fascism? The answer, in short, is that the monopolization and cartelization of the German economy preceded the Nazis by several decades. Although the Nazis certainly furthered and deepened the concentration of economic power after 1933,[229] as shown in Section II.A, the stage was fully set by 1933. For example, Farben's chemical monopoly did not come about as a facet of national industrial policy during wartime.[230] Rather, the cartel preceded World War I by a decade and the merger-to-monopoly process preceded the Second World War by fifteen years.

However, that the Nazis made such a priority of furthering industrial concentration and consolidation as a key facet of their economic, political, social, and military policy also speaks to the relevance of the pre-Nazi monopolization and cartelization of the German economy as a factor in facilitating the Nazis' rise to power. According to the Decartelization Branch's report *Germany's Major Industrial Combines*, "the structural changes that took place after 1933 would seem to indicate that there was scarcely any economic or political measure, no matter what its ostensible aim, that did not ultimately result in the increased concentration and centralization of industrial and political power."[231] Further, the Nazi Party and bureaucracy displayed a strong preference for dealing with a single business or small handful of businesses per industry, consistently directing procurement and patronage to monopoly or dominant firms.[232] Fascist governments in Italy and Japan also tended to consolidate political power by consolidating and concentrating industry.[233] The fact that the Nazis pushed concentration and monopolization as part of their industrial and political strategy suggests that an already-concentrated, monopolized, and cartelized economy was congenial to the character of the Nazi regime at the time of its ascension.[234]

228. *See infra* Section III.B.

229. On the Nazis' program to further industrial concentration and monopoly for political purposes, see generally ARTHUR SCHWEITZER, BIG BUSINESS IN THE THIRD REICH (1964).

230. *See supra* Section II.C.1.

231. Decartelization Vol. 3, *supra* note 87, at III-5.

232. *Id.*

233. ERNEST S. GRIFFITH, FASCISM IN ACTION, H.R. DOC. NO. 80-401, at 106–10, 113–18 (1947).

234. The extreme concentration of German industry and the extreme concentration of political power in the Nazi regime may have reinforced one another through what organizational sociologists call institutional isomorphism—the process by which institutions operating in a similar environment become organizationally homogenized through normative, coercive, and mimetic pressures. *See generally* Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Re-*

Third, economic concentration could have facilitated the German war effort without necessarily facilitating fascism per se. Characteristically of the German businessmen tried at Nuremberg for war crimes, the I.G. Farben executives vigorously objected that they had acted only as patriotic businessmen serving their country during wartime, just as their counterparts did in Allied territory.[235] Though gigantic, Farben remained smaller than three American industrial concerns—General Motors, U.S. Steel, and Standard Oil.[236] Nor was Farben's wartime market power exceptional. During both World Wars, the United States largely suspended the antitrust laws in war-critical industries in order to mobilize economically and militarily.[237] During the First World War, the federal government relaxed antitrust enforcement to permit competitor collaborations and suspended pending antitrust cases against *U.S. Steel, Eastman Kodak, American Can*, and *International Harvester*.[238] President Wilson opined that "to vindicate the [antitrust] law, [it] would disorganize industry."[239] During the Second World War, the Roosevelt administration issued grants of formal immunization to permit otherwise anticompetitive activities supporting the war effort, allowed small firms to pool resources, allowed the Secretaries of War and Navy a veto over antitrust prosecutions, and tolled over thirty antitrust cases.[240] Even the previously mentioned prosecution of Standard Oil for its participation in the JASCO debacle was ordered tolled at the instance of the War Department in order to allow Standard to focus on the war effort, as was the case against General Electric and Krupp.[241] That the U.S. government viewed some degree of enhanced industrial concentration and collaboration as critical to the war effort suggests that such relaxation of competition norms and increases in market power may be endemic to war efforts in general, whether in the service of liberal democracy or its regrettable alternatives.

Fourth, and perhaps most importantly for present purposes, there is a question of whether the industrial factor that facilitated the rise of Nazism was "bigness" or market power. Corporate size is distinct from market power in the sense in which economists and antitrust lawyers use that term—as the

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visited: Institutional Isomorphism and Collective Rationality in Organizational Fields, 48 AM. SOC. REV. 147 (1983).

235. JEFFREYS, *supra* note 126, at 325–35.

236. *Id.* at 7.

237. *See* Thomas K. Fisher, *Antitrust During National Emergencies* (pt. 1), 40 MICH L. REV. 969, 987–1000 (1942); Richard M. Steuer & Peter A. Barile III, *Antitrust in Wartime*, ANTITRUST, Spring 2002, at 71.

238. Steuer & Barile, *supra* note 237, at 72.

239. Fisher, *supra* note 237, at 996.

240. Steuer & Barile, *supra* note 237, at 72.

241. Standard declined the Government's tolling suggestion, preferring to resolve the case immediately through no contest pleas in the criminal case and a consent decree in the civil case, with the effect of immediately rescinding the agreements with Farben. BORKIN, *supra* note 133, at 89–91.

power to raise price above a competitive level and exclude competitors.[242] A firm of tremendous size may have little market power, and a relatively small firm may have significant market power. The distinction between market power and corporate bigness has long been understood, and it has been consequential to antitrust law. In 1952, future Nobel Laureate George Stigler drew a distinction between two meanings of "bigness" in business: "First, bigness may be defined in terms of the company's share of the industry in which it operates . . . . Second, bigness may mean absolute size—the measure of size being assets, sales, or employment as a rule."[243] He added that antitrust law deals adequately with the first phenomenon but "cannot cope effectively with the problem posed by big business."[244] Even during the era in which Brandeisian views largely prevailed in the Supreme Court, mere corporate bigness was not sufficient to constitute an antitrust offense.[245] Still, though modern antitrust law distinguishes between size and power, strands of antitrust ideology have at times been concerned with sheer scale, as reflected in the Brandeisian concept of "the Curse of Bigness." When Berle and Means warned in 1932 that "[t]he rise of the modern corporation has brought a concentration of economic power which can compete on equal terms with the modern state,"[246] their supporting data tables largely demonstrated corporate size as represented by such factors as gross assets, cash positions, and proportions of securities issued.[247] Thus, it is important to be clear in specifying whether it was the sheer scale of industrial firms, or the market power they held in a contemporary microeconomic sense, that played the vital role in facilitating the Third Reich.

The remainder of this Part responds to issues three and four—facilitating war versus facilitating fascism, and bigness versus market power—by distilling the mechanisms of facilitation.

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242. *Compare* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 27 n.46 (1984) ("As an economic matter, market power exists whenever prices can be raised above levels that would be charged in a competitive market."), *with* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956) ("Monopoly power is the power to control prices or exclude competition.").

243. George J. Stigler, *The Case Against Big Business*, FORTUNE, May 1952, at 123, 123.

244. *Id.* at 164.

245. United States v. Columbia Steel Co., 334 U.S. 495, 526–27 (1948) (rejecting government challenge to large corporate acquisition on grounds that it did not diminish competition); United States v. Int'l Harvester Co., 274 U.S. 693, 708 (1927) ("The law . . . does not make the mere size of a corporation, however impressive, or the existence of unexerted power on its part, an offense, when unaccompanied by unlawful conduct in the exercise of its power."); United States v. U.S. Steel Corp., 251 U.S. 417, 451 (1920) ("[T]he law does not make mere size an offence or the existence of unexerted power an offence.").

246. ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 357 (2d prtg. 1933).

247. *Id.* at apps. A, B, C.

B. *The Mechanisms by Which Industrial Concentration and Cartelization Enabled Nazism*

The German Weimar economy was undoubtedly characterized by high levels of concentration and cartelization, and Hitler utilized the dominant firms and cartels to his advantage, but that alone does not demonstrate that extreme economic concentration facilitated extreme political concentration. Without identified mechanisms of influence, the relationship between industrial concentration and political concentration may reflect correlation rather than causation. This Part identifies five mechanisms by which Germany's extreme economic concentration facilitated Hitler's consolidation of political power.

1. Monopoly Profits and the Faustian Bargain

Historians who debate the extent to which big business support was important to Hitler's rise to power often focus on financial donations to the Nazi Party. A U.S. Senate report charged that "Krupp, Thyssen and other powerful figures on the German industrial scene provided the Nazis with indispensable financial and political support."[248] On the other hand, many historians argue that most of the pre-1933 donations from big business were token amounts given on the same basis as donations to political parties across the spectrum and did little to aid Hitler's ascent to power.[249] As previously noted, donations from big industry picked up significantly in 1933 after Hitler became chancellor and arguably helped to "consolidate Hitler's rule."[250]

In judging the importance of big industry's financial donations and other forms of material support to the Nazis, it is important to bear in mind that Hitler did not achieve full consolidation of political power immediately upon his appointment as chancellor on January 30, 1933. The Nazis controlled only three out of eleven cabinet posts and continued to require the legislative support of the Center Party and the Conservatives for the passage of the Enabling Act of March 23, 1933, which granted the Reich cabinet "temporary" ruling powers for an ostensible period of four years.[251] Even after the abolition of political parties other than the Nazis on July 14, 1933 and the Reichstag's effective abdication, Paul von Hindenburg, as president, remained commander-in-chief of the military and held the power to negotiate foreign treaties until his death in August of 1934.[252] It was not until soldiers were required to swear an oath of allegiance to Hitler on August 20, 1934, over a

248. SUBCOMM. ON WAR MOBILIZATION, SENATE COMM. ON MILITARY AFFAIRS, CARTELS AND NATIONAL SECURITY, S. REP. NO. 78-4, at 6–7 (1945).

249. Stapp, *supra* note 15 (collecting sources).

250. IAN KERSHAW, HITLER 448 (First American ed. 1999).

251. SHIRER, *supra* note 123, at 198.

252. *Id.* at 226.

year and half after his ascension as chancellor, that Hitler achieved full dictatorial power over Germany.[253] Hitler's plenary control over industry arguably preceded his plenary control over the army.

Moreover, as Hallgarten observes, the significance of big industry's financial contributions to the Nazis in the critical years of his ascension lies in much more than the immediate impact on filling the party's coffers:

> While Hitler was strongly assisted by the industrialists' funds, one cannot say that industry "made" his movement. A movement of such enormous size as his which in 1932 controlled 230 seats in the Reichstag, is not made by any individual or group. It might be more correct to state that heavy industry by its very existence and social nature caused the movement, or, at least, helped to cause it and once it was given birth tried to use it for the industrialists' purposes. Mechanization and economic concentration, maintenance of monopoly prices and monopoly agreements, with the resulting pressure on small competitors, were the fertile ground on which mass fascism grew.[254]

The significance of financial contributions by the monopolists and cartelists from 1933 forward cannot be measured solely in terms of enabling the Nazi Party's financial activities. More importantly, the donations evidence big industry's willingness to strike a Faustian bargain with the Nazi regime, in which the captains of industry would support the regime not only with their pocketbooks but also through a variety of other organizational, political, and economic mechanisms in exchange for the party's favor and furtherance of their market dominance. That big industry may have come into the Nazi fold grudgingly does not negate the fact that, when the political winds turned and Hitler's long-term political dominance seemed likely, the concentrated structure of German industry produced the Faustian bargain—the exchange of continued monopoly rents for the support of a political regime that big industry was not otherwise inclined to favor.

The case of German fascism may be a vivid illustration of what economist Luigi Zingales has called a "Medici vicious circle" (based on a case study of the Medici dynasty in medieval Florence), "in which money [derived from monopoly profits] is used to gain political power and political power is then used to make more money."[255] Zingales argues that monopolists have a

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253. *See* JEFFREYS, *supra* note 126, at 170 (observing that the army's August 1934 oath of allegiance removed "[t]he last remaining barrier to the Nazi revolution" and made Hitler "the unchallenged master of Germany"); SHIRER, *supra* note 123, at 226 (noting that, with Hindenburg's death, the consolidation of the positions of president and chancellor, and the army's oath of allegiance to Hitler, "[h]is dictatorship had become complete"). *See generally* KARL DIETRICH BRACHER, THE GERMAN DICTATORSHIP: THE ORIGINS, STRUCTURE, AND EFFECTS OF NATIONAL SOCIALISM 202–14 (1970) (chronicling Hitler's steps toward total dictatorship in year and a half following his elevation as chancellor).

254. Hallgarten, *supra* note 112, at 246.

255. Luigi Zingales, *Towards a Political Theory of the Firm*, J. ECON. PERSP., Summer 2017, at 113, 114, 119–120, https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.31.3.113 [https://perma.cc/R5ZE-VTTE].

unique ability to capture politics over the long term based on (1) their ability to make credible long-term promises; (2) their grip on the market for specific human capital; (3) their ability to wrap their self-interest in "a bigger, noble[] idea"; and (4) the social control they acquire through their image in society as it affects employment, data ownership, media ownership, advertising, research funding, and other methods.[256] In 1933, German heavy industry had already accumulated significant economic and political power through consolidation and cartelization. Hitler's rise simultaneously threatened the persistence of the industrialists' monopoly rents and created an opportunity to retain and even grow those rents in the future through increased state patronage and national rearmament. By casting their lot with Hitler in 1933, the monopolies and cartels were spending some of the income earned from their existing monopoly status to buy political power in the rising regime. In coming years, the monopolies and cartels would spend their political capital to earn even greater monopoly rents—an outcome clearly evidenced by their soaring profits in the later years of the Nazi regime.[257]

To understand the significance of monopoly power to this Faustian bargain, it may be helpful to imagine a counterfactual situation in which the German economy was significantly less concentrated at the time of Hitler's ascension to power. Smaller individual firms in unconcentrated markets might still have been willing to make the Faustian bargain—support for the regime in exchange for economic privileges—but the bargain would have been much harder to strike or enforce because the mutual gains would have been significantly more difficult to assure. A small business firm in an unconcentrated market would not have the financial or other economic resources to offer the regime in its quest to centralize power. Nor could the regime as easily promise smaller firms long-run monopoly profits, which would require suppressing many competitor firms capable of mounting robust political and economic opposition. As previously noted, Hitler's initial political support was far deeper among small-scale businesspeople who felt threatened by the power of the cartels and monopolies,[258] but it was to those cartels and monopolies that Hitler turned when he sought to consolidate his power and arm for war. The exchange of material support from monopolies for the promise of continued and deepened monopoly power depends on the preexistence of monopoly power and the regime's ability to credibly promise its continuation. Those were the circumstances of Germany in 1933.

256. *Id.* at 126.

257. *See* SHIRER, *supra* note 123, at 261 ("[T]he German economy was mobilized for war, and businessmen . . . their profits soared . . . .").

258. TURNER, *supra* note 95.

2. Organizational Structure, Industry-Wide Mobilization, and Dissemination of Propaganda

Beyond cash payments to finance the Nazis directly, which may nor may not have been critical to the Nazis in the years of their ascendance, the Faustian bargain manifested itself in forms of organizational, industrial, and political support that were of immense help to Hitler as he worked to consolidate power after his ascension as chancellor. Monopoly business firms were ideally positioned to facilitate the rapid consolidation of political power by lending the Nazi Party an organizational and bureaucratic structure at a time when the party was not yet in full control of either the political or military bureaucracy. For instance, once Farben's senior managers had made a bet that alliance with Hitler was critical to the firm's long-run profitability (particularly given the immense commercial benefits that would come to a chemical monopoly from a program of rearmament and industrial-military independence), they effectively put the firm and its resources at Hitler's disposal—with the understanding, of course, that the firm would be allowed to cash in financially by serving as a military-economic arm of the state.[259] Thus developed a codependent relationship between the firm and the regime. Over time, the firm became evermore organizationally intermeshed with the Wehrmacht and took on many economy-wide planning functions characteristic of governmental bureaucracies.[260] With fewer internal checks and balances to overcome than in the political and military spheres, a massive organization that already, by virtue of its monopoly position, controlled large swaths of the German economy was a prime vehicle for a rising political force eager to centralize power.

More generally, once the Faustian bargain had been struck, the great industrial monopolies were well-positioned to begin carrying out the Nazi regime's economic, political, and social policies with immediate and far-reaching effect. These policies included such measures as purging Jews from senior management positions, reorienting industries toward rearmament, achieving German industrial independence, and spreading Nazi propaganda. Having signed onto the Nazi regime, the monopolies were able to begin advancing these policies across hundreds of thousands of employees and entire industries spread throughout Germany.

In many cases, the Nazis allowed the bureaucratic and managerial functions assigned to the monopolies and cartels during the early days of the regime to continue even after the Nazis had secured plenary political power. A U.S. War Department study submitted to Congress found that the Nazi apparatus never achieved an economic organizational superstructure independent of the dominant business firms assigned to run the major sectors of the German economy and that the Nazis were economically "helpless" with-

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259. *See supra* Section II.C.1.

260. *Military Government Report*, *supra* note 132, at 979.

out the bureaucratic structure of the firms themselves.[261] The Nazis built up their own "army and police and spy system" but relied heavily on the centralized power of their corporate partners to administer the regime's economic policies.[262] "[T]he bureaucratic structure itself was controlled by an oligarchy consisting of the chief stockholders of the great combines, the political hierarchy, and the military High Command."[263] Often the captains of industry were given official governmental titles so that they could run economic functions officially from within their own firm structures. The head of I.G. Farben held the position of National Deputy for Chemicals, and the chairman of the coordinating organization of coal cartels was also given the title National Deputy and ran the coal industry through the offices of the Ruhr coal syndicate.[264]

The role of big industry in propagating Nazi propaganda and coercing allegiance to the Nazi cause was also important to the regime. Farben played a significant role as an incubator and disseminator of Nazi propaganda. The firm employed 120,000 people[265] and owned a number of newspapers,[266] which allowed the firm to spread Nazi propaganda in Germany and around the world.[267] Although senior Farben managers continued to have private qualms about the Nazi regime,[268] the firm sprang into action to ensure ideological purity and adherence to the regime among its workforce. On May Day—May 1—1933, Farben lined up its plant workers to hear Nazi speeches and give "Sig Heil" chants.[269] Similarly, as of August 1933, all workers in Krupp factories were required to give the Nazi salute; any who refused were terminated.[270] Once the dominant firms had bet on Hitler, they were able to serve as channels of his policies and ideology with greater alacrity than many other institutions of German society.

3. Cartelization and Political Control

In a September 1944 letter to Secretary of State Cordell Hull, President Roosevelt observed that German "cartels were utilized by the Nazis as government instrumentalities to achieve political ends."[271] Thurman Arnold, a Yale law professor and Assistant Attorney General for the Justice Department's Antitrust Division, echoed similar themes in his 1943 introduction to

261. *Id.* at 504.
262. *Id.*
263. *Id.* at 505.
264. *Id.* at 506.
265. JEFFREYS, *supra* note 126, at 124.
266. *Id.* at 121–22.
267. *Military Government Report*, *supra* note 132, at 1027–37.
268. *See supra* note 132 and accompanying text.
269. JEFFREYS, *supra* note 126, at 150–51.
270. MANCHESTER, *supra* note 206, at 369.
271. TEPPER, *supra* note 15, at 150.

a book by two federal officials on Hitler's use of Germany's cartels, observing that "the vast centralized cartel organization of Germany became a tool in the hands of a dictator who no longer operated for private profit but solely to serve a ruthless ambition."[272] Although some of this rhetoric was directed at drumming up domestic opposition to the cartelization of the U.S. economy rather than providing a sober assessment of Germany, the basic point was correct: the existence of German cartels greatly facilitated Hitler's goal of achieving plenary political control over the German economy and reorienting it for war.[273]

As noted *supra* in Section II.A, the German economy was subject to an increasing pattern of cartelization from the Imperial period up through the Weimar period, to the point that, with the Nazi ascendancy, cartels permeated the German economy. The Nazis quickly turned the cartelized structure of the German economy to their own ends. A decree of July 15, 1933 amended the 1923 permit decree to centralize power over cancellation of cartel agreements in the minister of economics, which "made possible a more effective integration of state control over cartels and general economic policy."[274] A second decree the same day authorized the minister of economics to create compulsory cartels—essentially allowing the Reich government to force firms to participate in cartels.[275] Little by little, the government employed these powers to bring industry firmly under state control and transform the cartels into "agents of a totalitarian government."[276]

The Nazis used the reinforced cartel structure pervading the German economy as a means to achieve total control over every aspect of German industry. A decree of November 12, 1936 integrated the cartels into the state's administrative hierarchy and charged administrative groups with regulating the German markets through the means of the cartels.[277] This administrative structure also served as one of the Nazis' chief means of orchestrating business surveillance. The groups were charged with maintaining nonpublic registers of the cartels' existence, composition, area, membership, and duties and reporting any market-regulating activities contemplated by the cartels.[278] The Decartelization Branch observed that "[i]n a war economy, the ability to deal with a few large organizations in possession of detailed information concerning all the various aspects of production and distribution is of inestimable advantage—as the Nazis were quick to real-

272. Thurman W. Arnold, *Introduction* to JOSEPH BORKIN & CHARLES A. WELSH, GERMANY'S MASTER PLAN: THE STORY OF THE INDUSTRIAL OFFENSIVE, at xi, xiv (1943).

273. *See* Hans B. Thorelli, *Antitrust in Europe: National Policies After 1945*, 26 U. CHI. L. REV. 222, 222 (1959).

274. Decartelization Vol. 3, *supra* note 87, at III-41.

275. *Id.* at III-42.

276. *Id.* at III-43.

277. Philip C. Newman, *Key German Cartels Under the Nazi Regime*, 62 Q.J. ECON. 576, 576 (1948); Decartelization Vol. 3, *supra* note 87, at III-47.

278. Decartelization Vol. 3, *supra* note 87, at III-47.

ize."[279] Similarly, writing in 1957, German scholar Ivo Schwartz summarized the Nazi appropriation of Germany's highly cartelized economy as follows:

> Cartels proved themselves a very appropriate device to increase the power of the totalitarian system. By law the Reich Minister of Economics was authorized to establish compulsory cartels in any branch of industry or, by executive decree, to compel outsiders to join cartels already existing. Compulsory and free cartels were used to establish and maintain price, raw material and production controls as introduced by the government. Finally, they were used to strengthen the government-planned war industry. At the beginning of World War II, German industry was highly cartelized and concentrated, and completely in the hands of the Nazi administration.[280]

The Nazis succeeded in centralizing political power over German industry by appropriating a decades-long tradition of industrial cartelization as the launchpad of a state-directed and state-controlled economy.[281] Although the Nazis possibly could have achieved economy-wide cartelization on their own initiative from scratch, the existing cartel structure greatly expedited their campaign to achieve total control over the German economy. Significantly, this power-consolidating effect arose not so much from corporate "bigness" as from a culture of business collusion rather than competition. Many of the cartels included scores of smaller or medium-sized firms.[282] The Nazis effectively used their mutual interdependence through the medium of anticompetitive agreements as a lever to exert political control over entire industries.

4. National Champions and the Military-Industrial Complex

As applied to German fascism, the classic version of the "military-industrial complex," of which President Eisenhower would warn in his valedictory address in 1961,[283] holds that German industrial monopolies that would profit from rearmament and war propelled Hitler to power. As previously discussed, this characterization of heavy industry's support for Hitler during the Weimar period is doubtful.[284] Still, that big industry was initially reluctant to support the Führer does not mean that the highly concentrated structure of German industry critical to rearmament played no role in Hitler's rise. The previously described Faustian bargain depends not on industry having been enthusiastic for Hitler's rise but on it having the incentive to pledge loyalty to a regime whose consolidation of power seemed imminent

279. *Id.* at III-43.

280. Schwartz, *supra* note 87, at 641–42 (footnotes omitted).

281. Newman, *supra* note 277, at 576 (observing that Nazis appropriated and transformed existing cartel structures in order to bring industry under total state control).

282. Decartelization Vol. 3, *supra* note 87, at III-16–17.

283. Farewell Radio and Television Address to the American People, 1960–61 PUB. PAPERS 1035, 1038 (Jan. 17, 1961).

284. *See* discussion *supra* Section II.B.

and who could promise war profits in exchange for the monopolies' support. Once convinced that Hitler was in power for the long term and that this meant an opportunity to grow monopoly profits, firms like Farben had the capacity to "creat[e] an infrastructure that would allow it to respond directly to the government's demands for strategic autarky—in effect, taking a leading role in getting Germany ready for war."[285]

Moreover, the monopolies were in a unique position to play the role of "national champions" neutralizing or pacifying foreign rivals' efforts at developing products critical for war. As noted in the earlier case studies, Farben, Siemens, and Krupp were each involved in market allocation agreements with U.S. firms that the Nazi regime used to impede American development in war-critical product lines: Farben with Standard Oil as to buna rubber,[286] Siemens with Bendix as to automatic pilots and as to beryllium with Beryllium Corp.,[287] and Krupp with General Electric as to carboloy.[288] A 1941 Congressional Research Service report on foreign control of U.S. patents found numerous other instances in which German firms were able to limit the availability of defense-related materials in the United States because of market division agreements under color of patent law with U.S. firms.[289] Although some of the market division agreements predated the Nazis, the Nazi regime made strategic use of them to prevent U.S. firms from developing indigenous technologies that could replace German-made products during wartime. The regime's capacity to use its national champion firms in this way to centralize its global political and military power was only possible because Germany had national champion firms—that is, firms with a position of domestic dominance tolerated and encouraged by the regime as instruments of foreign policy.

5. Decline of Democracy Within the Firm

A final potential mechanism by which the concentration of economic power facilitated the concentration of political power in Nazi Germany concerns the decline of democracy within the firms themselves in parallel with the decline of democracy in the surrounding political sphere. As firms that once replicated forms of democracy—or at least the dispersion of authority—internally began to serve the regime's goals of concentrating political power, it was not long until power within the firm had to be centralized as well. Once the firms became intermeshed with the hierarchical and centralized power structure of the state, democracy within the firm could not long survive. The decline of democracy within the firm, in turn, furthered the regime's power-centralizing goals in society generally.

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285. *See* JEFFREYS, *supra* note 126, at 203–06.

286. *See supra* text accompanying note 151.

287. *See supra* text accompanying note 195.

288. *See supra* text accompanying notes 216–222.

289. *See* PATCH, *supra* note 195; *see also* WELLS, *supra* note 114, at 43–52.

Consider the symbiotic effects of the relationship between I.G. Farben and the Nazi regime and the resulting loss of checks and balances—of democratic features—within the Farben organization itself. In 1937–1938, as Farben was becoming increasingly an arm of the regime, the company reorganized to centralize power in a few senior managers: forty-six once-distinct subsidiaries were absorbed into the main enterprise, the number of managing and supervising board members was reduced, the governing powers of the firm's central committee were largely transferred to the company's president, company minutes and records ceased to be widely circulated, and board members were denied access to financial reports.[290] In short, the firm organizationally replicated many of the democracy-quashing changes occurring in the political regime, with the effect of extending totalitarian control from the political to the business realm.

Similarly, the Krupp firm also underwent a structural transition under the Nazis in the direction of increasing centralization of power in the Krupp family. Although the Krupp family largely controlled the firm, its corporate form allowed for some degree of influence by external directors.[291] After managerial conflicts arose during the war, Alfried Krupp made a personal appeal to Hitler for the Krupp firm to be reorganized by state decree, arguing that "the concentration of responsibility in a single head, especially in critical times . . . cannot be valued highly enough."[292] On November 12, 1943, a Fuhrer decree that became known as "Lex Krupp" specified that "the owner of the Krupp family wealth is empowered to create a family enterprise with a particular regulation of succession."[293] The decree resulted in a complete centralization of corporate power in the Krupp family.[294]

The Nazi regime favored centralization of power within its partner monopoly firms, just as it favored the centralization of power throughout the economy and society more generally. As the regime worked to centralize its own political power, the concentration of economic power in a few dominant firms was congenial to its purposes.

* * *

The beginning of this Section asked whether industrial concentration and cartelization facilitated Germany's war effort or the Nazis per se and whether the problem was really large-scale business or market power in an economic sense. With the mechanisms by which the concentrated and cartelized structure of German industry facilitated Hitler distilled, these ques-

290. HAYES, *supra* note 133, at 203–05.

291. *See* JAMES, *supra* note 196, at 205.

292. *Id.* at 207.

293. *Id.* (translating Erlaß des Führers über das Familienunternehmen der Firm Fried. Krupp. [Lex Krupp], Nov. 12, 1943, REICHSGESETZBLATT, Teil I [RGBL I] at 655 (Ger.)); *see also* Telford Taylor, *The Krupp Trial: Fact v. Fiction*, 53 COLUM. L. REV. 197, 209 n.85 (1953).

294. JAMES, *supra* note 196, at 207–08.

tions can now be answered directly, although not necessarily in an unqualified or dogmatic way.

As to the first question, it is difficult to disentangle Germany's radical rearmament and wars of aggression from the Nazi regime, since forcibly destroying the Treaty of Versailles regime was Hitler's chief political aim. That said, the historical record reveals that German monopolies and cartels played an important role in consolidating Hitler's power and carrying out his policies even apart from the directly military functions—for example, by incubating and disseminating Nazi ideology, purging Jewish managers, and cencentralizing power over industry.

As to the question of large scale versus market power, it is true that some of the democracy-eroding effects were products of large organizational structure rather than market power in an economic sense. Still, the historical record suggests that it was not just the gigantic size of the Farbens but also the economic dominance of even the much smaller Degussas that made them such convenient vehicles for the rise of Nazism. What Hitler needed in 1933 was firms willing to cut the Faustian bargain with ample cash to bankroll his political regime extragovernmentally, an organizational structure spread throughout German society, and the economic power to drive an entire industry at a dictator's direction. Abnormal financial resources, ubiquitous local presence, and—in particular—the power to direct an entire industry are attributes of monopoly. In 1933, the German economy possessed all of these in large quantities due to a course of economic concentration dating back to Bismarck. Further, the cartel structures that the Third Reich used to control and direct industry, police dissent, and dictate commercial and political uniformity did not require economic bigness in the form of large corporations. Economic interdependence and habituation to concerted action even among smaller firms made the cartels convenient mechanisms for achieving political control over the economy. Market power, whether achieved through merger, monopolistic exclusion, or cartelization, played a distinct role in facilitating the Third Reich.

IV. What Sort of Antitrust Regime Would Have Prevented the Industrial Concentration and Cartelization that Facilitated Hitler's Rise?

This final Section turns from historical analysis to use of history for presentist concerns (and hence runs the usual risks of distortion and anachronism). What does the history of early and mid-twentieth century German industrial concentration and fascism mean for contemporary debates over antitrust policy? Nearly forty years ago, Bob Pitofsky wrote, in his classic article *The Political Content of Antitrust*, that it is "bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws."[295] Pitofsky argued that pervasive monopoly threatened democratic values in three ways:

> [F]irst, . . . excessive concentration of economic power will breed anti-democratic political pressures . . . . [S]econd, . . . by [increasing the possibility that] private discretion by a few in the economic sphere controls the welfare of all . . . . [Third] if the free-market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs.[296]

Pitofsky cited the history of Nazi Germany and the influence of the decartelization program on the Celler-Kefauver Act in furtherance of his thesis that antitrust policy should not be blind to the political and democratic value of maintaining a deconcentrated industrial sector.[297]

The historical record of German fascism lends credence to the claim that concentrated economic power fuels concentrated political power, with corrosive effects for democracy. But does it follow that an antitrust regime explicitly focused on political values is necessary for the preservation of democracy, or would an antitrust regime focused on economic values such as preserving allocative efficiency and maximizing consumer welfare serve the same function? Some data relevant to answering these questions can be gathered by subjecting the German story to a counterfactual inquiry that imagines the German economy constrained by contemporary economically oriented antitrust norms. Would the presence of a consumer welfare–oriented antitrust law have prevented the economic dominance of the Farbens, Siemens, and Krupps, and hence the crucial role they played in supporting the rise and evils of Nazism? Yes, even an economically and consumer welfare–oriented antitrust law would have prevented much of the monopolization and cartelization that characterized the German economy in 1933. Prior to reconstruction under the Allies, Germany had no antitrust law—at least none that would be recognizable under contemporary global standards.[298] If it had, the levels of concentration and cartelization that characterized Germany in 1933 would not have been possible.

Consider Farben's path to monopoly, which consisted of five steps: (1) domestic cartelization, (2) domestic merger to monopoly, (3) international market division, (4) integration with the state, and (5) foreign industrial conquest through economic and military coercion. The first three steps were accomplished prior to the rise of the Nazi regime and put in place the economic and institutional arrangements that Hitler would seize upon in his

295. Pitofsky, *supra* note 5, at 1051.

296. *Id.*

297. *Id.* at 1062–65.

298. HALEY, *supra* note 83, at 7–9.

navigation to power. The second two steps, mediated by the Nazi regime, consolidated and expanded Farben's preexisting power.

The first three steps present relatively straightforward cases for condemnation under economically oriented antitrust norms. Naked cartel agreements, including the two 1904 pooling arrangements, the 1916 megapool, and the 1926 explosives agreement, are considered per se illegal under contemporary antitrust doctrine.[299] The Justice Department vigorously prosecutes them criminally, yielding billions of dollars in fines and hundreds of years in prison terms.[300] If contemporary antitrust norms had applied to early twentieth-century Germany, the chemical cartel could not lawfully have occurred. By the same token, the vast swath of naked cartel arrangements that permeated German industry would have been unlawful.

Similarly, the 1925 merger-to-monopoly process that created Farben would almost certainly have been disallowed under consumer welfare–oriented antitrust norms. Although mergers, unlike cartels, are judged under a rule of reason standard rather than a per se rule of illegality, a merger between the nine largest chemical companies in the country, resulting in a Herfindahl-Hirschman Index figure of a perfect 10,000 in many sectors, would almost certainly be prohibited.[301]

Farben's international market division agreement with Standard Oil presents a somewhat closer case than the domestic cartel agreements and merger to monopoly. Though it involved market division, JASCO nominally advanced two interests recognized as generally procompetitive under contemporary antitrust norms: (1) licensing contested patent rights and (2) pooling economic and technical resources for joint research and development activities.[302] Despite these facially procompetitive effects, the JASCO arrangement would likely fail under contemporary antitrust norms—as it

299. 12 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2022a (3d ed. 2012).

300. *See, e.g.*, Press Release, U.S. Dep't of Justice, Antitrust Division Issues 2016 Annual Spring Update (April 8, 2016), https://www.justice.gov/opa/pr/antitrust-division-issues-2016-annual-spring-update [https://perma.cc/K3PP-GYTY] (reporting $3.6 billion in criminal fines and penalties for price fixing and prosecutions of twenty companies and sixty individuals); Antitrust Div., *Division Update Spring 2015*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/atr/division-update/2015/criminal-program-update [https://perma.cc/6NZ7-KU75].

301. *See generally* U.S. DEP' T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010 [https://perma.cc/LZ5D-EQSR]; United States v. Energy Sols., Inc., 265 F. Supp. 3d 415, 441–42 (D. Del. 2017) (holding merger to monopoly unlawful, and collecting recent cases blocking mergers with significantly lower concentration thresholds).

302. *See* 15 U.S.C. §§ 4302–4304 (2012); National Cooperative Production Amendments Act of 1993, Pub. L. No. 103-42 § 2, 107 Stat. 117 (codified at 15 U.S.C. §§ 4301–4306) (encouraging research joint ventures by guaranteeing rule of reason rather than per se treatment under the antitrust laws, detrebling damages in private litigation, and permitting fee-shifting in favor of prevailing defendants); FTC v. Actavis, Inc., 570 U.S. 136 (2013) (discussing case law on competitive effects of patent licensing); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (2017), https://www.justice.gov/atr/IPguidelines/download [https://perma.cc/GB4R-8NKF].

did when challenged by the Justice Department in 1942.[303] The sweeping global market division accomplished by the JASCO agreements—allocating entire product segments and the entire globe—quite plainly exceeded the scope of any relevant patent rights, and hence would be considered per se illegal market division under prevailing contemporary norms.[304] Moreover, the "joint research" functions of JASCO apparently did not involve much genuine pooling of technical resources by the two companies, as evidenced by the fact that Standard's scientists and engineers were unable to replicate the production of buna without Farben's help until, after the termination of the agreement, they effectively reinvented the wheel.[305] The "joint study" arrangement seems to have operated principally as an allocation of buna research and market exploitation to Farben, with a loose expectation that Farben might later enable Standard to enter the field as well.[306] Such an arrangement would also be considered unlawful market division under contemporary antitrust norms, as it was in 1942.[307] By the same token, Krupp's market division agreement with American firms under color of patent law was challenged in American court under American antitrust principles.[308]

The last two steps—integration with the state and foreign conquest—permitted Farben to consolidate and enlarge its preexisting monopoly power under the Third Reich. Contemporary antitrust norms would not likely have been availing to curb these abuses, but not due to antitrust's contemporary economic or consumer welfare orientation. Direct state involvement in the creation of monopoly power generally renders the scheme untouchable under the antitrust laws, not out of solicitude to consumer welfare or efficiency but because of political commitments to federalism and democratic processes.[309] Indeed, it has largely been advocates of the consumer welfare approach that have argued for narrowing state action immunity on the view that states

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303. Herbert A. Berman, *Cartels and Enemy Property*, LAW & CONTEMP. PROBS., Winter-Spring 1945, at 109, 111 n.4.

304. *See Actavis*, 570 U.S. at 149 (discussing illegality of agreements restraining competition beyond the scope of lawful patent rights); Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990) (per curiam) (holding illegal per se market division under color of trademark licensing).

305. *See supra* text accompanying notes 143–150.

306. *See* JEFFREYS, *supra* note 126, at 199–200.

307. *Palmer*, 498 U.S. at 48 (discussing case law holding market allocations per se unlawful).

308. *See supra* note 218 and accompanying text.

309. *See* Daniel A. Crane & Adam Hester, *State-Action Immunity and Section 5 of the FTC Act*, 115 MICH. L. REV. 365, 373–74 (2016) (explaining the *Parker* doctrine as a democracy-reinforcement technique); Milton Handler, *The Current Attack on the* Parker v. Brown *State Action Doctrine*, 76 COLUM. L. REV. 1, 20 (1976) (defending state action immunity from antitrust law as necessary to democratic experimentation); William H. Page, *Interest Groups, Antitrust, and State Regulation:* Parker v. Brown *in the Economic Theory of Legislation*, 1987 DUKE L.J. 618 (explaining state-action immunity doctrine as means of reinforcing representative political processes).

systematically distort competitive processes for the benefit of rent-seekers.[310] As to economic conquests during the war, this facet of Farben's malfeasance is quite obviously beyond the possible scope of any domestic antitrust law. This is not to say that it is untouchable by law more generally. Nine of the Farben defendants were convicted at Nuremberg on the charges of plundering and spoliation of public and private property,[311] and expropriation of property during war remains a serious crime under the Hague Convention.[312]

In sum, application of contemporary economically oriented antitrust principles could have prevented Farben's rise to dominance in Germany, and hence the exploitation of Farben's monopoly to facilitate Hitler's rise to power. Once the firm and state were organizationally intermeshed and part of a single, lawless program of domestic and international conquest and control, no form of antitrust law—nor any other domestic law—realistically could have arrested their brutal trajectory.

Application of contemporary antitrust principles could also have prevented the rise to dominance of Siemens and AEG. As noted, the electrical industry achieved its duopolistic concentration through a chain of horizontal mergers, exclusion of rivals, and cartelization,[313] all of which are subject to scrutiny under prevailing antitrust standards.

It is less clear that application of contemporary antitrust principles would have prevented Krupp from obtaining such a dominant position in the armaments industry. As noted, the Krupp firm eschewed merger and cartelization as devices to achieve market power, preferring instead to curry favor with the military to secure exclusive or semi-exclusive procurement relationships.[314] Exclusivity in military procurement contracts is not free from antitrust review,[315] but the Department of Defense frequently employs sole-source contracting for important weapons programs, and antitrust law does not touch such sovereign decisions of the government. At a time when

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310. Crane & Hester, *supra* note 309, at 374–76, 403 (arguing for more preemptive role for FTC Act over anticompetitive state regulations that harm competition and consumer welfare); Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, *in* COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 189, 189–213 (Richard A. Epstein & Michael S. Greve eds., 2004) (proposing modification to *Parker* immunity doctrine to curb excesses of state anticompetitive regulation); Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 HARV. J.L. & PUB. POL'Y 439, 446 (2008) (discussing Robert Bork's concern about use of government as agent of exclusion). *But see* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 350 (1978) (describing Supreme Court's premise in *Parker v. Brown* that Sherman Act does not reach state action as "unassailable").

311. JEFFREYS, *supra* note 126, at 338.

312. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

313. *See supra* text accompanying notes 175–187.

314. *See supra* text accompanying notes 197–205.

315. *See* Wendy A. Polk, *Antitrust Implications in Government Contractor Joint Venture and Teaming Combinations*, 28 PUB. CONT. L.J. 415, 444–45 (1999) (discussing example of consent decree to terminate sub-contract exclusivity in military procurement context).

the number of major U.S. defense contractors continues to dwindle to a small handful with the consent and often encouragement of the military,[316] it would seem self-righteous to proclaim the Krupp story as one that could have been avoided through application of contemporary antitrust law.

Although much of the monopolistic and cartelizing conduct that facilitated Hitler's rise and consolidation of power would have been illegal under the consumer welfare standard, contemporary antitrust norms would not have prevented all vestiges of market power in the Weimar economy any more than they eliminate all vestiges in the American economy today. Some of the dominance of the large industrial firms in question came about through legitimate means, such as managerial skill or technological innovation—the "superior skill, foresight and industry" that Learned Hand famously held off limits to antitrust scrutiny in *Alcoa*, another wartime antitrust case.[317] And some of the conduct that spurred the big firms to dominance by impairing smaller rivals might today be found to enhance efficiency, and hence not constitute an antitrust violation. Still, the core elements that drove German industry to its concentrated stage in the late Weimar period—cartelization and merger to monopoly—are paradigmatic instances of conduct prohibited by contemporary antitrust principles. It is therefore fair to say that application of consumer welfare–oriented antitrust principles would have prevented the path that the German economy took to concentration and monopoly in 1933 and beyond.

CONCLUSION

Concerns that industrial monopoly and cartelization undermine democracy are not new. Most recently in Western history, such concerns obtained political traction in the wake of the Second World War, to the point that anti-fascism served as a dominant motivation underlying the post-War antitrust regimes in both the United States and Europe. With the ascendancy of calls for a reinvigorated antitrust regime in service of democracy today, it is important to recall the similar conversation that took place in light of fascism's existential threat to the democratic order. The framers of the post-War antitrust regimes in Europe and the United States were convinced that a strong anti-monopoly and anti-cartelization norm was necessary to prevent the reemergence of the sort of consolidated economic power that empowered fascism and threatened democratic liberalism. This Article has presented historical evidence substantiating that concern—demonstrating that industrial concentration and cartelization in Weimar Germany facilitated Hitler's rise and consolidation of political power.

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316. Joe Gould, *American Exodus? 17,000 US Defense Suppliers May Have Left the Defense Sector*, DEF. NEWS (Dec. 14, 2017), https://www.defensenews.com/breaking-news/2017/12/14/american-exodus-17000-us-defense-suppliers-may-have-left-the-defense-sector/ [https://perma.cc/2DSR-2XWW].

317. United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945).

What contemporary uses should be made of this history? On a scholarly basis, much work remains to be done to establish the general proposition that extreme concentration of economic power tends to facilitate extreme concentrations of political power. The Nazi story, while obviously significant because of Germany's leading role in mid-twentieth-century fascism, is only one piece in the wider story of fascism. Similar inquiries into periods of fascist or quasi-fascist regimes in other nations, including Japan, Italy, Spain, and Portugal, could allow for a more general conclusion about the importance of industrial concentration and cartelization in the rise of fascism. And then there are important questions about the relationship between economic concentration and other forms of totalitarian or highly centralized political power, such as the Stalinist systems about which the framers of the Celler-Kefauver Act worried as the next frontier of monopoly. The idea that concentrated economic power breeds concentrated political power has much rhetorical appeal, but documenting the relationship historically, exploring the variations and mechanisms, and prescribing the particular antidotes remains a largely incomplete project.

Finally, how should the history of economic concentration in Weimar and Nazi Germany inform current debates over the goals of antitrust law and the direction of antitrust enforcement? This Article has suggested that the chief culprits in the creation of the overly concentrated German economy—cartelization and merger to monopoly—are already prohibited by antitrust's reigning consumer welfare standard. However, those who believe that the U.S. economy is becoming dangerously overly concentrated because the consumer welfare standard has been laxly applied will worry, with Professor Wu, that conditions that facilitated Hitler's rise are being replicated in our economy today.[318] Although I am skeptical that this is the case, that issue is beyond this Article's purview. Rediscovering the voluminous record of concentration and cartelization that facilitated the Nazi regime and diagnosing the mechanisms by which extremely concentrated economic power served to concentrate political power in Nazi Germany lays a foundation for the important policy debates to come about the relationship between democracy and monopoly.

318. Wu, *supra* note 15.