De-Nazifying by De-Cartelizing: The Legacy of the American Decartelization Project in Germany

Daniel A. Crane

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Daniel A. Crane[1]†

In 1945, a group of zealous American trustbusters, freshly groomed in the Brandeisian tradition of "anti-Bigness," descended on the smoldering ruins of Germany, eager to identify and then nullify the culprits behind Hitler's rise to power. Their eyes were fixed on the enormous industrial combines and cartel organizations that had sprung up in the German economy since the time of Bismarck, grown exponentially during the Weimar era, and then served as the economic infrastructure of the Third Reich. To the trustbusters in the Office of Military Government U.S. ("OMGUS") Decartelization Branch, the monopolies and trusts were the prime culprits and their elimination was of paramount importance to Germany's peaceable future. The trustbusters understood their mission as not just economic reordering, but as training in democracy. According to their mission statement, the Declartelization Branch must "teach the German people that political democracy cannot long survive the disappearance of economic democracy."

The Decartelization project lasted until 1949, at which time it was shuttered amid recriminations and political intrigue. Functionally, it could claim only one major success—the dismemberment of the IG Farben chemical cartel. Scores of other industrial titans remained untouched on the project's hit list, protected from dismantling by American generals and

[1]† Frederick Paul Furth, Sr. Professor of Law, University of Michigan. Some of this chapter draws from a longer article published in the Michigan Law Review, *Fascism and Democracy*, 118 Mich. L. Rev. 1315 (2020).

industrialists hostile to a radical trustbusting project for Germany.

Nonetheless, it would be a mistake to count the Decartelization project an unmitigated failure. Although its immediate pay-off in Germany may have been quite limited, its findings exerted a considerable effect in domestic American politics, including influencing the course of the Celler-Kefauver reforms of 1950 and the era of aggressive antitrust that followed. More generally, the Decartelization project created a rich store of information and analysis concerning the role that monopolies and cartels played in the rise of the Third Reich, and thus provides fertile information for ongoing inquiry into the relationship between extreme industrial concentration and the extreme concentration of political power.

The Work And Shuttering Of The Decartelization Branch

The Road to Berlin

Already before American entry into the Second World War, American political leaders argued that cartels and monopolies were propelling the rise of fascism. In a 1938 address, President Roosevelt asserted that essence of fascism was "the growth of private power to a point where it becomes stronger than their democratic state itself."[2] With the advent of war, American political rhetoric linking fascism to industrial monopolization and cartelization increased. In the winter of 1943-44, the U.S. Senate Subcommittee on War Mobilization of the Committee of

[2] Message from the President of the United States Transmitting Recommendations Relative to the Strengthening and Enforcement of Anti-trust Laws, https://www.jstor.org/stable/1805350?seq=1#page_scan_tab_contents.

Military Affairs held hearings on the influence of German cartels and monopolies in Hitler's rise to power and cooption of American industry.[3] Senator Harley Kilgore, who chaired the committee, would later write that "the cartel system, in great measure, was responsible" for Hitler's dictatorship as the cartels' "funds and influence made possible Nazi seizure of power."[4] 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.[5] Simultaneously, the Justice Department's Antitrust Division announced a four-prong decartelization agenda for a future occupation of Germany:

> (1) German patents and know-how must be made available to the American people; (2) German laboratories must operate in full view of the rest of the world; (3) German firms, such as I.G. Farben, must at the very least be split up into separate companies; (4) some German firms probably ought to be removed from Germany and their laboratories internationalized.[6]

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."[7] The Potsdam Agreement of August 1945 provided that "[a]t the earliest possible

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[3] J.F.J. Gillen, *Deconcentration and Decartelization in West Germany 1945-1953*, Historical Division Office of the Executive Secretary, Office of the U.S. High Commissioner for Germany 6 (1953) (preliminary draft in files of Creighton R. Coleman).
[4] Senator Harley M. Kilgore, *Introduction* to Darel McConkey, *Out of YOUR Pocket, the Story of Cartels*, 3d ed. (1947).
[5] John C. Stedman, *The German Decartelization Program—The Law in Repose*, 17 U. Chi. L. Rev. 441, 441 (1950).
[6] Extension of Remarks, Hon. Harley M. Kilgore, Senate of the United States, Sept. 12, 1944 Appendix to Congressional Record A3990.
[7] Jonathan Tepper With Denise Hearn, The Myth Of Capitalism: Monopolies And The Death Of Competition 151 (2019)

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."[8]

The Decartelization Branch at Work: 1945-1949

A U.S. Decartelization Branch was established on December 15, 1945 under the authority of Section IV of the Potsdam Agreement as a branch of the Economics Division of the U.S. Office of Military Government ("OMGUS").[9] Its internal documents described the Branch's background and mission as follows:

> Following World War I, the German economy became more and more concentrated in the hands of a few individuals and financial institutions. This concentration had gone fare beyond mere ownership or possession of the means of production; it had become tantamount to economic empire and private business government. The extent of this power and control remains enormous and constitutes a menace both to the peace of the world and to the reconstruction of Germany on a democratic basis.
>
> The primary objective is the elimination of giganticism in German industry, the number and size of the residual industrial units of production being conditioned by factors of technological efficiency and economic need. The number of producing units will not be multiplied necessarily. Some plants which are technically inefficient may fail. The number of actual independent companies, however, may be increased to a slight extent. Pastoralization of Germany is not the goal, since it is intended that industrial units of substantial size will survive.

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[8] *Sen. Foreign Rel. Comm. Staff, A Decade Of American Foreign Policy: Basic Documents*, 1941-49, (1950). https://babel.hathitrust.org/cgi/pt?id=mdp.39015019162257;view=1up;seq=56; *see also* J.F.J. Gillen, *Deconcentration and Decartelization in West Germany 1945-1953*, Historical Division Office of the Executive Secretary, Office of the U.S. High Commissioner for Germany (1953) (preliminary draft in files of Creighton R. Coleman).
[9] *Decartelization in the U.S. Zone of Germany* 1 (December 1948) (Creighton papers).

> The deconcentration program will be correlated, of course, with the overall Military Government plan to establish levels of industry, select plants for reparation, and destroy Germany's war potential.

The contradictions in this final sentence—the objectives of destroying Germany's war potential and of doing so in concert with the plans of a Military Government not at all interested in neutering West Germany's potential to serve as a buffer against Stalin—would ultimately spell the Decartelization Branch's demise. But antitrusters at the Branch always viewed their mission as critical to creating long-term democratic conditions in Germany, and explicitly linked their 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 buy and sell in freely competitive markets is the economic philosophy must suitable to their needs.[10]

The Decartelization Branch was well-staffed, with 94 lawyers and investigators at its peak.[11] It was largely responsible for the break-up of the I.G. Farben chemical combine in 1945.[12] Thereafter, it identified an additional 70 firms or cartel organizations as potential targets for break-up or dissolution.[13] A February 12, 1947 decartelization law promulgated by OMGUS gave further legal status to the Decartelization unit's efforts.[14] Nonetheless, the Farben break-up proved to be the program's one substantial achievement, and it was effectively disbanded in

[10] Program and Aims of the Decartelization Branch, March 28, 1946, at 6.
[11] Stedman, *supra* n. 4 at 443.
[12] *Id.* at 442.
[13] *Id.* at 445.
[14] *Id.* at 441.

1949.

Among the surviving records from the Decartelization Branch, the most important work product was a three-volume Report on German Cartels and Combines released internally in March of 1947. The first volume, entitled *German Economic Decentralization: An Analysis of the German Cartel and Combine Problem*, focused principally on the cartel problem. It documented the structure and nature of German cartels, their legality and encouragement under German law, the use of cartel agreements to limit competition in patented technologies, and the participation of German companies in international cartels. Volume I ended with a series of recommendations, including prohibiting holding companies past "the second or third generation," presuming family holdings to be common economic enterprises until they could be conclusively proven independent, and that common stock ownership and voting by financial institutions be eliminated and interlocking directorships abolished. Volume II, *Survey of Germany's Major Industries*, contained a detailed analysis of Germany's major industries and firms, including the relationship of major firms to the Nazi regime and participation in rearmament and war. Volume III, *Germany's Major Industrial Combines*, chronicled Germany's leading monopoly firms and the path they took to achieve domination, often in concert with the Nazi regime.

Shuttering the Decartelization Branch

The Decartelization Branch was largely shuttered in 1949, depleted of personnel and demoralized.[15] Two comprehensive accounts offer different perspectives on the reasons for the program's failure and effective termination.

An internal monograph produced in 1953 by the Historical Division of the U.S. High Commissioner for Germany offers a blunt political assessment of Decartelization Branch's demise in 1949.[16] As early as December 1945, Senator Kilgore charged that OMGUS economic officials, many of whom were drawn from leading U.S. industrial or financial firms, were corrupted by their relationships with German enterprises: "They are still sympathetic to their old cartel partners and they look forward to resuming commercial relationships with a rehabilitated German industry whose leading figures are well-known to them, rather than to striking out on new paths of economic enterprise."[17] In 1947, James Martin resigned as Chief of the Decartelization Branch and took his frustrations to the New York Times, which published the interview under the title "U.S. Soviet Difficulties Laid to Monopolists" on July 26, 1947. Martin charged that "monopolistic American corporations" were exercising influence over OMGUS leadership to prevent the break-up of their crony business partners in Germany.[18] General Lucius Clay, U.S. Military Governor, immediately denied the charges of crony corruption, but there seemed little doubt that, from the Decartelization project, there had been a fundamental conflict of views between the trustbusters manning the Decartelization Branch and the U.S. business leaders and generals running other portions of OMGUS. In an interview with a

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[15] *Id.* at 445. Technically, the program was not shuttered by reorganized by an order of High Commissioner McCloy. In fact, the reorganization effectively terminated the program.
[16] *Decartelization in the U.S. Zone*, at 48.
[17] *Decartelization in the U.S. Zone*, at 49.
[18] *Decartelization in the U.S. Zone*, at 49.

committee appointed in 1949 by the Secretary of the Army to review the Decartelization Program, one of the leading businessmen staffing OMGUS—Lawrence Wilkinson—testified about early meetings in which he had told the trustbusters that various economic policies called for in the Potsdam Agreement, including decartelization, "could not fail to have a most disruptive effect on other policies of Military Government which were directed toward the economic reconstruction of Germany," and that that "blanket application of the anti-trust doctrines of the U.S. to the German economy would not only be futile but would retard German recovery."[19] General Clay repeatedly sided with the businessmen over the trustbusters, leading to a flurry of political in-fighting within OMGUS. When Martin's successor, Richard Bronson, brought Clay proposals to break up ball bearing and locomotive firms, Clay told him that he would have to employ a "rule of reason" aimed at "getting Germany on her feet and off the back of the American taxpayer," which precluded deconcentration efforts in the industries proposed.[20] This interview caused "all Hell [to break] loose," with further stories in the New York Times about Clay ordering a halt to decartelization, Clay denying it, Decartelization staff nonetheless being cut, a letter of protest to Clay from 19 members of the Decartelization Branch, further promises by Clay that the program was not being shuttered, and the total reorganization of the Decartelization Branch to eliminate the growing conflict in 1949, and Senators introducing the paper trail into the Congressional Record under cover of harsh indictments of the Army's refusal

[19] *Id.* at 51.
[20] *Id.* at 52. Clay's invocation of a "rule of reason" is ironic. Antitrust law recognizes a "rule of reason," but one that is focused on market competitiveness and precludes inquiry into the sort of political factors that Clay had in mind.

to carry out the Decartelization mandate.[21]

Another account on the demise of the Decartelization Branch, focusing less overtly on politics and more broadly on structural reasons, was published in 1950 in the University of Chicago Law Review by John Stedman, the Secretary of the "Ferguson Committee" appointed to investigate the causes of the program's failure.[22] Stedman identified four reasons for the program's failure.

The first was "confusion over purposes and objectives."[23] Different players in OMGUS had different objective for decartelization, ranging from vengeance on the Germans to destroying Germany's war-making capacity to retaining it as a bulwark against the Russians. Stedman argued that the only proper objective for the decartelization program was a different one altogether, one embraced by the Branch's leadership: democratizing Germany.[24] Alas, General Clay never understood this long-run policy as the objective, and hence reduced all decisions to the immediately strategic.

The second reason identified by Stedman was "nonsupport of the program by the Germans themselves."[25] The problem was that the Germans had no tradition of a free and competitive economy, and its values and traditions were never adequately explained to them. "It is disconcerting, to say the least," wrote Stedman, "to have German lawyers, in 1949, plaintively writing to persons in the United States asking where and how they can find out something about

[21] *Id.* at 52-63.
[22] *Id.* at 448-56.
[23] 17 U. Chi. L. Rev. at 448.
[24] *Id.* at 449.
[25] *Id.* at 450.

the anti-trust laws, what they mean, what they stand for, and how they operate."[26]

Third, Stedman noted that the U.S. allies in the occupation did not adequately support the Decartelization program.[27] The Russians were soon a lost cause, of course, but the British and French did not support the program much either. The British, in particular, were not too interested in supporting a program that would lead to a loss of governmental control over industry, since their principal economic objective was to preserve and maintain their own trade advantages, in part by socializing and controlling the German economy.

Finally, Stedman faulted lack of enthusiasm for decartelization among U.S. officials, many of whom were businessmen and industrialists who did not have much appetite for antitrust law back at home either: "[W]hen a group of American businessmen took an active interest in the German situation, they came back and reported that the decartelization program should be toned down."[28]

What is perhaps most interesting for purposes of this volume is that the difficulty in obtaining military government support for creating a competitive economy in the name of democracy seems, with hindsight, entirely inevitable. OMGUS was not a democratic government—it was a military government, which means it was centralized, hierarchical, and authoritarian. Armies are not democratic because democracy is messy and inefficient in the short run, just as markets can be. Hence, the story of the demise of the Decartelization Branch in many ways mirrors (much more venially) the story of fascism and monopoly itself: OMGUS

[26] *Id.* at 451,
[27] *Id.* at 452.
[28] *Id.* at 455.

preferred economic concentration to economic democracy, because that is the way OMGUS itself was run. Fortunately, of course, OMGUS was ultimately accountable to a democratic government, and the military government was temporary and transitional.

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

Photo: Military Government for Germany (U.S.), Decartelization Branch, Berlin, 13 April 1946. From left to right: P.V. Martin, Tom Hawkins, Allen Barth, C.R. Coleman, Frank Garnett, Malcolm Muir. Credit: Bentley Historical Library, University of Michigan (reproduced with permission) 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.

The Record on German Industrial Concentration and the Nazi Regime

The Decartelization Branch left a voluminous record of information regarding the role that large industrial firms and cartels played in the rise and dominance of the Third Reich. Those findings were almost immediately influential in U.S. domestic policy, with important implications for antitrust enforcement in the following three decades. However, some contemporary business historians urge caution in relying on rhetorical characterizations in the Decartelization Branch reports, which were allegedly made "for prosecutorial purposes by persons who were also trustbusters," and often were not well-steeped in German economic history.[29] Despite such objections, there is much useful information in the Decartelization Branch archives, including information drawn from proprietary records seized directly from German businesses by the occupation forces.[30]

[29] 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.").
[30] In examining the record of the relationship between German industrial concentration and the Third Reich, the pages that follow draw extensively on information contained in OMGUS reports and working files. To the extent possible, that information is corroborated and supplemented with information from scholarly business histories and other reliable sources. Where OMGUS reports made characterizations of dubious historical validity—as particularly with respect to support given to the Nazi party by large business firms prior to 1933—alternative historical readings are presented.

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 push an industrial policy supporting "hierarchical organization and centralization" of all aspects of economic life.[31] 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.[32] Cartelization was not only tolerated, but actively encouraged by state policy. An 1888 Bavarian Supreme Court decision declared that "it is incumbent on prudent businessmen belonging to a branch of industry which is suffering from depression to get together and enter into agreements regulating the ways and means of operating their industry with a view to promoting recovery."[33] In 1897, just at the U.S. Supreme Court was interpreting the Sherman Act to foreclose the argument that cartel agreements were necessary to prevent "ruinous competition" and establish "reasonable prices,"[34] the German Supreme Court was accepting just

[31] Wilhelm Roepke, *The Solution of the German Problem* (xxx); see also John O. Haley, *Antitrust in Germany and Japan: The First Fifty Years, 1947-1998* 7-8 (2001) (summarizing Germany's abandonment of free trade in 1870s and movement toward cartelization).
[32] Decartelization Branch, Office of Military Government for Germany (U.S.), *Report on German Cartels and Combines, Volume 1, German Economic Decentralization*, March 1, 1947, at I-28-29. ("Decartelization Vol. 1")
[33] Edward S. Mason, *Controlling World Trade: Cartels and Commodity Agreements* 129 (1946).
[34] U.S. v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897) (rejecting claim that railroad pooling agreement was lawful under Section 1 of Sherman Act because prices charged were reasonable in light of

such assertions.[35]

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.[36] 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.[37] 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.[38] 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.[39] 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, cartels were now given explicit statutory recognition.[40] Further, the regulatory provisions were generally not enforced by the

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effects of excessive competition); *see also* U.S. v. Addyston Pipe & Steel Co., 85 F. 271, aff'd 175 U.S. 211 (1899) (rejecting arguments that "ruinous competition" justifies cartel agreements).

[35] 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* Decartelization Vol. 3, at I-28-29; Ivo E. Schwartz, *Antitrust Legislation and Policy in Germany: A Comparative Study*, 105 U. Pa. L. Rev. 617, 626 (1957) (discussing holding in *Woodpulps* case).

[36] Decartelization Vol. 1, at I-29-31.

[37] Decartelization Vol. 1, at I-31.

[38] Decartelization Vol. 1, at I-30-35.

[39] Schwartz, supra n. 34 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, at I-35.

[40] *Schwartz,* supra n. 34 at 636-39; Decartelization Vol. 3, at I-35.

government, which showed little interest in arresting the spread of cartelization.[41] German courts continued to show little interest in reigning in cartels and monopolies.[42]

Unfettered by a government ranging from complacent to affirmatively enthusiastic for cartels, cartelization progressively swept through the German 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.[43] 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, electrochemical, optics, porcelain and stoneware, glass, leather, sugar, food, and brewing and distilling.[44] Germany has been called "the fatherland of the cartel movement."[45]

In the economic distress and disorganization that followed the First World War, many of

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[41] Decartelization Vol. 1, at I-36.
[42] *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* n. 34 at 634.
[43] Decartelization Vol. 3, 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); Hendrich Kronstein, *The Dyamics of German Cartels and Patents*, 9 U. Chi. L. Rev. 643, 647 (1942) (reporting the existence of 450 German cartels in 1901); Schwartz, *supra* n. 34 at 635 (reporting the existence of 3,000 German cartels in 1925).
[44] Decartelization Vol. 1, at I-17-18.
[45] Haley, *supra* n. 30 at 8; John C. Stedman, *The German Decartelization Program--The Law in Repose*, 17 U. Chi. L. Rev. 441 (1949-1950); Heinrich Kronstein, *The Dynamics of German Cartels and Patents. II*, 10 U. Chi. L. Rev. 46 (1942); Heinrich Kronstein, *The Dynamics of German Cartels and Patents. I*, 9 U. Chi. L. Rev. 643 (1942).

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.[46] 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. The steel industry also moved through mergers and acquisitions in the direction of large, vertically integrated conglomerates.[47] By the time the Nazis came to power, significant swaths of the German economy were subject to monopolies or near monopolies. 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, companies such as Vereinigte Stahlwerke and I.G. Farben, producing wide range of raw materials, semi-finished products and commodities themselves, and a vastly wider range through their numerous affiliates and subsidiaries, were in effect an industrial dictatorship capable (should it suit their purposes) of reorganizing the German state.[48]

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

[46] Decartelization Branch, Office of Military Government for Germany*, Report on German Cartels and Combines, Volume 3, Germany's Major Industrial Combines* (U.S.), March 1, 1947, at III-1. ("Decartelization Vol. 3")
[47] Haley, *supra* n. 30 at 8; Turner, *German Big Business*, *supra* n 42 at xvii.
[48] Decartelization Vol. 3 at III-2.

Hitler's ascent.[49] 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.[50] 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.[51]

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,[52] and Hjalmar Schacht of the Reichsbank.[53] 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. 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."[54] Similarly,

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[49] 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 Marxist line, the answer to this question has never been a problem. From the outset, they have viewed Naziism as a manifestation of 'monopoly capitalism' and the Nazis as the tool of big business."); George W. F. Hallgarten, *Adolf Hitler and German Heavy Industry, 1931-1933*, 12 J. Econ. Hist. 222, 222-23 (1952) ("The Marxist and leftist view [] sees in the Führer one of the most outstanding servants of German monopoly capitalism...").
[50] 1 Dietrich Eichholtz, *Geschichte der deutschen Kriegswirtschaft, 1939-1945* 90 (1969) (quoted in translation in Feldenkirchen, *supra* n. 28 at 3.
[51] Turner, *German Big Business*, *supra* n. 40 at 56; *see also* Wyatt Wells, *Antitrust & 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.").
[52] Ernest S. Griffith, *Facism in Action,* H.R. Doc. No. 80-401, at 89 (1947)
[53] Decartelization Vol. 3 at III-2
[54] Fritz Thyssen, *I Paid Hitler* 16 (1941).

OMGUS's Decartelization Report claimed that, in the final years of the Weimar Republic, industrialists Emil Kirdorf used his influence in the domestic coal cartel to levy assessments on every ton of coal mined or sold to raise money for the Nazis,[55] although historians have questioned the extent of Kirdorf's support for the Nazis before 1934.[56]

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 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.[57] 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."[58]

The situation changed with Hitler's ascension as chancellor on January 30, 1933. 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

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55 Decartelization Branch, *Report on German Cartels* Vol. 3 at III-2.
56 Turner, *Big Business and the Rise of Hitler*, supra n. 48 at 60-61; Turner, *German Big Business*, *supra* n. 40 at 350 (dismissing coal levy as a "myth").
57 *Id.* at 62.
58 Hallgarten, *supra* n. 48 at 224.

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 re-arm Germany.[59] The industrialists responded with enthusiasm, and Schacht collected three million Reichsmarks in donations to the Nazis.[60] 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.[61] A succession of further donations followed, providing Hitler with a source of extra-governmental funding even while he struggled to consolidate his power over the state. 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 donors, does not diminish the fact that they were made and that, through them, "big business was helping consolidate Hitler's rule."[62]

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, that finding is not inconsistent with the thesis that the concentrated economic structure of industry may facilitate the rise of totalitarian government. The observation 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

[59] William L. Shirer, *The Rise and Fall of the Third Reich: A History of Nazi Germany 190* (1959).
[60] *Id.*
[61] Diarmuid Jeffreys, *Hell's Cartel: IG Farben And The Making Of Hitler's War Machine* 170 (2008).
[62] Thomas Childers, *The Third Reich: A History of Nazi Germany* 269 (2018).

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 anti-capitalist ideological purposes.[63] 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.[64] But that small business may have supported Hitler's rise while big business largely did not does prevent the concentrated *structure* of German industry from having contributed significantly to Third Reich's ascent, just as other structures of German society may have facilitated the Nazis without being designed to do so.

Mechanisms of Corruption: How Industrial Concentration Enabled Nazism

The Decartelization Branch, and its supporters in U.S. domestic politics, were convinced that the extreme concentration of the German economy during the Weimar period enabled Hitler to come to power. As noted, however, the thesis that monopoly firms deliberately brought Hitler to power by supporting him financially and logistically during his long ascent from 1919 to 1933 is historically contested. A question that has received less attention is the concentrated *structure* of the German economy—regardless of the interests or initial intentions of the captains of industry—played in facilitating the consolidation of fascist political power. The historical record

[63] Turner, *German Big Business*, *supra* n. 40.
[64] *Id.* at 344.

suggests five mechanisms by which extremely concentrated economic power contributed to the corruption of German democracy and the rise of totalitarian extremism.

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."[65] 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.[66] As previously noted donations from big industry picked up significantly in 1933 after Hitler became Chancellor and arguably helped to "consolidate Hitler's rule."[67]

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 the 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

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[65] U.S. Senate, Subcommittee on War Mobilization to the Committee on Military Affairs, *Cartels and National Security*, 79th Cong., 2d Sess. 1944, p. 6-7.
[66] 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] (collecting sources).
[67] Childers, *supra* n. 61 at 269.

of March 23, 1933, which granted the Reich cabinet "temporary" ruling powers for an ostensible period of four years.[68] Even after the abolition of political parties other than the Nazis on July 14, 1933 and the Reichstag's effective abdication, 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. It was not until soldiers were required to swear an oath of allegiance to Hitler on August 20, 1934, over a year and half after his ascension as Chancellor, that Hitler achieved full dictatorial power over Germany.[69] 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 industrialist's 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

[68] William L. Shirer, *The Rise and Fall of the Third Reich: A History of Nazi Germany* 184, 198 (1959).
[69] Jeffreys, *supra* n. 60 at 202 (observing that army's August 1934 oath of allegiance removed "the last remaining barrier to the Nazi revolution" and made Hitler "the unchallenged master of Germany"); Shirer, *supra* n. 67 at 226 (noting that, with Hidenburg'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"); Karl Dietrich Bracher, *The German Dictatorship: The Origins Structure and Consequences of National Socialism* 281-87 (1970) (chronicling Hitler's steps toward total dictatorship in year and a half following his elevation as chancellor).

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.[70]

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 through the regime's industrial policy. 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."[71] Zingales argues that monopolists have a unique ability to capture politics over the long term based on (1) their ability to make credible

[70] Hallgarten, *supra* n.48 at 246.
[71] Luigi Zingales, *Towards a Political Theory of the Firm*, https://research.chicagobooth.edu/~/media/5D8A9BE2EFB8435B91D23E6BB1859B2E.pdf.

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.[72] 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.

To understand the significance of monopoly power to this Faustian bargain, it may be helpful to imagine a counter-factual 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

[72] *Id.* at 19-20.

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, but it was to those cartels and monopolies that Hitler turned 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 credibly to promise its continuation. Those were the circumstances of Germany in 1933.

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. Thus developed a co-dependent relationship between the firm and the regime. Over time, the firm became evermore intermeshed organizationally intermeshed with the Wehrmacht and took on many of economy-wide planning functions characteristic of governmental bureaucracies. 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" without the bureaucratic structure of the firms themselves.[73] The Nazis built up their own "army, police, and spy system" but relied heavily on the centralized power of their corporate partners to administer the regime's economic policies.[74] "[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."[75] 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.[76]

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,[77] and owned a number of newspapers,[78] which allowed the firm to spread Nazi propaganda in Germany and around the world.[79] Although senior Farben managers continued to have private qualms about the Nazi regime, 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

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[73] *Elimination of German Resources for War*: Hearings Before a Subcomm. of the S. Comm. on Military Affairs, 79th Cong. 943 (1945)
[74] *Id.*
[75] *Id.* at 505.
[76] *Id.* at 506.
[77] Jeffreys, *supra* n. 60 at 124.
[78] *Id*. at 146.
[79] *Elimination of German Resources*, supra n. 72 at 90-92.

Nazi speeches and give "Sig Heil" chants.[80] Similarly, as of August 1933, all workers in Krupp factories were required to give the Nazi salute; any who refused were terminated.[81] 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.

Cartelization and Political Control

As made clear in its name, the Decartelization Branch was focused particularly on dismantling the cartel structure that had dominated German industry since the early twentieth century. Even before the end of the war, American authorities had drawn a linkage between the cartels and Nazi 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 governmental instrumentalities to achieve political ends."[82] 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 a book by two federal officials on Hitler's use of Germany's cartels, observing that "the vast centralized 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."[83] 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

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[80] Jeffreys, *supra* n. 60 at 180.
[81] William Manchester, *The Arms of Krupp*, 1587-1968, at 413 (2003).
[82] Tepper, *supra* n. 6 at 150.
[83] Thurman Arnold, *Introduction*, in Joseph Borkin & Charles A. Welsh*, Germany's Master Plan: The Story of the Industrial Offensive* (1943).

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.[84]

As noted above, 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."[85] 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.[86] 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."[87]

The Nazis used the reinforced cartel structure pervading the German economy as 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.[88] This administrative

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[84] *See* Hans B. Thorelli, *Antitrust in Europe: National Policies After 1945*, 29 U. Chi. L. Rev. 222 (1959) (summarizing research concerning importance of cartels to the Nazi regime).
[85] Decartelization Vol. 3 at III-41.
[86] Decartelization Vol. 3 at III-42.
[87] Decartelization Vol. 3 at III-43.
[88] Philip C. Newman, *Key German Cartels Under the Nazi Regime*, 62 Q. J. Econ. 576, 576 (1948); Decartelization Vol. 3 at III-47.

structure also served as one of the Nazis' chief means of orchestrating business surveillance. The groups were charged with maintaining non-public registers of the cartels' existence, composition, area, membership, and duties and reporting any market-regulating activities contemplated by the cartels.[89] 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 of the various aspects of production and distribution is of inestimable advantage—as the Nazis were quick to realize."[90] Similarly, writing in 1957, German scholar Ivo Schwartz summarized the Nazi appropriation of Germany's highly cartelized economy as follows:[91]

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.

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-

[89] Decartelization Vol. 3 at III-47.
[90] Decartelization Vol. 3 at III-43.
[91] Schwartz*, supra* n. 34 at 641-42.

directed and state-controlled economy.[92] 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.[93] The Nazis effectively used their mutual interdependence through the medium of anticompetitive agreements as a lever to exert political control over entire industries.

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,[94] 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. Still, that big industry was initially reluctant to support the Fuhrer 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 does not depend on industry having been enthusiastic for Hitler's rise, but on it having the incentive to pledge loyalty

[92] Newman, *supra* n. 87 at 576 (observing that Nazis appropriated and transformed existing cartel structures in order to bring industry under total state control).
[93] Decartelization Vol. 3 at III-17.
[94] President Dwight D. Eisenhower, *Farewell Address to the Nation* (Jan. 17, 1961).

to a regime whose consolidation of power seemed imminent and that 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."[95]

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, Siemens with Bendix as to automatic pilots and as to beryllium with Beryllium Corp., and Krupp with General Electric as to carboloy. 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.[96] 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

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[95] Jeffreys, *supra* n. 60 at 206.
[96] Buel W. Patch, *Foreign Control of American Patents* (July 17, 1941), https://library.cqpress.com/cqresearcher/document.php?id=cqresrre1941071700; *see also* Wells, *supra* n. 50 at 43-52.

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—i.e., firms with a position of domestic dominance tolerated and encouraged by the regime as instruments of foreign policy.

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.

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 1937-38, as Farben was becoming increasingly an arm of the regime, the company reorganized to centralize power in a few senior managers: 46 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.[97] 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. 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."[98] 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."[99] The decree resulted in a complete centralization of corporate power in the Krupp family.[100]

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.

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[97] Peter Hayes, *Industry And Ideology: IG Farben in the Nazi Era* 203-05 (2d ed. 2001).
[98] Harold James, Krupp: *A History of The Legendary German Firm* 207 (2012).
[99] *Id.;* Telford Taylor, *The Krupp Trial: Fact v. Fiction*, 53 Colum. L. Rev. 197, 209 n.85 (1953).
[100] *Id.* at 207-08.

Celler-Kefauver and the Domestic Legacy of the Decartelization Project

The Decartelization program bore fruit on American soil almost immediately after it died on German soil. In 1950, Congress enacted the Celler-Kefauver Act, substantially expanding Section 7 of the Clayton Act of 1914, which prohibits anticompetitive mergers. At a technical level, Celler-Kefauver accomplished three things: (1) closing the "asset loophole," which had allowed merging firms to 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 which might threaten competition. In a more general sense, Celler-Kefauver served up a Congressional mandate for a post-War program of intensive anti-merger enforcement by the Justice Department and Federal Trade Commission from the 1950s through the early 1970s to stem the perceived "rising tide of concentration" in the American economy.[101]

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."[102] 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—and New York Senator Emanuel

[101] Brown Shoe Co. v. U.S., 370 U.S. 294, 316 (1962).
[102] *Id.*

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 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.[103]

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

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[103] 95 Cong. Rec. 11, 486 (1949). 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 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.

> 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 short-sighted in not appreciating the plight to which they are forcing their Government.[104]

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.[105] Senator Charles Kersten of Wisconsin linked the dangers of "big government" and "business so big that it is monopolized in the hands of a few."[106] Senator William Langer of North Dakota introduced into the record a March 26, 2017 *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."[107] For its part, the Federal Trade Commission—whose Chairman had recently chaired the Ferguson Committee on the

[104] 96 Cong. Rec. 16,452 (1950).
[105] *See generally* Robert Pitofsky, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051, 1051 (1979)); Tim Wu, *The Curse Of Bigness: Antitrust In The New Gilded Age* 81 (2018) (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"); but see Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 Hastings L. J. 871, 956 (1999) ("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.").
[106] Remarks by Mr. Kersten in the House on H.R. 7024, August 7, 1948, 94 Cong. Rec. 10241-42 (1948) Debate: 94 Congressional Record (Bound Edition) - 80thCongress, 2nd Session - 1948: Document No. 59.
[107] Extensionary Remarks by Mr. Langer on Mergers through a Loophole, June 4, 1948, 94 Cong. Rec. A3552 (1948) Debate: 94 Congressional Record (Bound Edition) - 80th Congress, 2nd Session - 1948: Document No. 56, page A352.

demise of the Decartelization Branch—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."[108]

The period of post-war anti-merger 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. That epoch of aggressive antitrust enforcement came to a crashing end with the rise of the Chicago School in the late 1970s—a pivot in the law discussed further in Chapter 9 of this book.

The U.S. military's German decartelization project failed on its own terms—it did not achieve the significant deconcentration of the German economy its champions had thought necessary to set Germany back on the road to liberal democracy. However, the information it uncovered and the political currents it unleashed had lasting implications for both U.S. antitrust policy and the development of competition law ideas in Europe.

[108] Washington: FTC Asks Congress to Curb Corporations," Detroit Free Press (Jul. 26, 1948) at 4 (available at http://proxy.lib.umich.edu/login?url=https://search-proquest-com.proxy.lib.umich.edu/docview/1817302297?accountid=14667).