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## ANTITRUST AND DEMOCRACY: A CASE STUDY FROM GERMAN FASCISM

Daniel A. Crane†

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.”<sup>1</sup> Pitofsky argued that pervasive monopoly threatened democratic values in three ways: “[F]irst, . . . excessive concentration of economic power will breed antidemocratic political pressures . . . [S]econd, . . . individual and business freedom [can be enhanced] by reducing the range within which 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.”<sup>2</sup>

Over the last few decades, Pitofsky’s concerns about the democracy-corroding effects of corporate consolidation have garnered occasional academic mention, but have largely taken a back seat to an antitrust policy focused on economic efficiency and consumer welfare. But there are growing signs that, in the nascent challenge to the reigning consumer welfare regime, concerns over monopoly’s effects on democracy may come again to the fore. Since at least the last election cycle, 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.”<sup>3</sup> The influential Open Markets Institute argues that the Progressive obsession with the Supreme Court’s *Citizen United*<sup>4</sup> decision ignores the equally anti-democratic effects of corporate consolidation brought about by lax antitrust.<sup>5</sup> The critique has migrated to the political center, with the Congressional Democrats asserting that

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† Frederick Paul Furth, Sr. Professor of Law, University of Michigan. Earlier versions of this paper were presented at the Tobin Project conference on institutions of democracy (May 2017) and the Association of American Law Schools 2018 Annual Meeting Antitrust Section panel. I am grateful for helpful comments from \_\_\_\_\_.

<sup>1</sup> Robert Pitofsky, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051, 1051 (1979).

<sup>2</sup> *Id.*

<sup>3</sup> Senator Elizabeth Warren Delivers Remarks on Reigniting Competition in the American Economy, June 29, 2016, [https://www.warren.senate.gov/?p=press\\_release&id=1169](https://www.warren.senate.gov/?p=press_release&id=1169); see also Brian Beutler, *How Democrats Can Wage War on Monopolies—and Win*, New Republic, Sept. 16, 2017, <https://newrepublic.com/article/144675/democrats-elizabeth-warren-can-wage-war-monopolies-and-win>.

<sup>4</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>5</sup> *Democracy & Monopoly*, <https://openmarketsinstitute.org/explainer/democracy-and-monopoly/>.

“concentrated economic power leads to concentrated political power.”<sup>6</sup> Centrists policy groups like the Brookings Institution argue that stronger antitrust is necessary to prevent big tech firms from “wield[ing] excessive influence in our democracy.”<sup>7</sup> On the right, President Trump wants that allowing deals like AT&T/Time Warner “destroy[s] democracy.”<sup>8</sup> 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’s answer to the siren song of the central planner.”<sup>9</sup> 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 it seeps back into popular discourse, the relationship between democracy and the anti-monopoly tradition deserves a comprehensive examination—a task on which I am just now embarking. As a first step, I propose to return to a central concern of Pitofsky’s article—the historical relationship between monopoly and mid-twentieth century fascism. The case of German (and to perhaps a lesser extent Japanese) fascism provides an important starting point for this analysis. The role of concentrated economic power in supporting the Nazi regime served as a prime motivating factor for the post-War antitrust regimes in the United States and Europe—the Celler-Kefauver anti-merger regime in the United States and Ordoliberalism in Europe. More broadly, the history of German industrial consolidation in the early twentieth century and the subsequent role of large industry in enabling Hitler’s rise to power provide a fertile record on which to ask an important set of questions, particularly: (1) How did industrial concentration give rise to fascism; (2) was the problem overly large industrial organizations (i.e., “the Curse of Bigness”) or rather organizations with excessive market power; and (3) what manner of antitrust regime would have been necessary and sufficient to prevent the unholy relationship between business and Nazism from developing? I interrogate these questions through a case study of the German industrial firm most squarely responsible for Hitler’s rise to power: the I.G. Farben chemical cartel.

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<sup>6</sup> U.S. House of Representatives Democratic Leadership, A Better Deal: Crack Down on Corporate Monopolies & the Abuse of Economic and Political Power, <https://abetterdeal.democraticleader.gov/crack-down-on-abuse-of-power/>

<sup>7</sup> Clara Hendrickson & William A. Galston, *Big Technology firms challenge traditional assumptions about antitrust enforcement*, Brookings Institution, December 6, 2017, <https://www.brookings.edu/blog/techtank/2017/12/06/big-technology-firms-challenge-traditional-assumptions-about-antitrust-enforcement/>.

<sup>8</sup> *Trump’s comments create a lose-lose position for Justice*, Washington 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?utm\\_term=.3fa9eb549b54](https://www.washingtonpost.com/opinions/trumps-comments-create-a-lose-lose-position-for-justice/2017/11/13/6fd7b28e-c596-11e7-aae0-cb18a8c29c65_story.html?utm_term=.3fa9eb549b54).

<sup>9</sup> Hatch Speaks on Growing Controversy Over Antitrust Law in the Tech Sector, Aug. 3, 2017, <https://www.hatch.senate.gov/public/index.cfm/releases?ID=299BA71A-9DAB-45AC-BC7C-0FABB967451C>.

## I. ANTITRUST'S ANTI-FASCIST TURN AND ITS DEMISE

In the wake of the Second World War, both the United States and Europe embarked on programs of heightened antitrust enforcement. Although the two regimes were subject to different influences and took different paths, 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. Before digging deeper into the facts of industrial concentration and the rise of Nazism, it is worth recalling the way that anti-fascist rhetoric framed the post-War antitrust regimes and then receded over time.

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

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

Following World War II, Congress enacted the Celler-Kefauver Act of 1950, 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.<sup>10</sup>

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.”<sup>11</sup> 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 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 warned:

<sup>10</sup> *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 316 (1962).

<sup>11</sup> *Id.*

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.<sup>12</sup>

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 short-sighted in not appreciating the plight to which they are forcing their Government.<sup>13</sup>

Celler and Kefauver's floor speeches reflected a broader concern of the U.S. Congress that industrial concentration facilitated the incubation of

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<sup>12</sup> 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.

<sup>13</sup> 96 Cong. Rec. 16,452 (1950).

totalitarianism and threatened democracy.<sup>14</sup> As discussed in greater below, an extensive set of War Department and Justice Department investigations into Weimar and pre-Weimar era industrial practices in Germany and their relationship to the Nazi regime undergirded these concerns. 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.

## 2. *Post-War Anti-Merger Enthusiasm and Its Demise*

The Celler-Kefauver Act empowered the federal antitrust agencies to pursue an anti-merger agenda that included successful challenges to many mergers that posed little, if any, immediate threat of oligopolistic concentration. 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 "the sole consistency that I can find is that in litigation under s 7, the Government always wins."<sup>15</sup>

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. The Supreme Court signaled a turn toward Chicago in one of its last major merger decisions of the 1970s, *General Dynamics*,<sup>16</sup> shortly after which it got out of the merger business entirely. The Court has not decided a merger case on the merits since 1976.

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 which created a pre-merger notification system and effectively shifted merger review out of the courts and into the agencies, from an adjudicatory model to an administrative model.<sup>17</sup> This completed Post-Hart-Scott merger control settled into a technocratic data-crunching exercise 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.

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

<sup>14</sup> See generally Pitofsky, *supra* n. xxx (1979).

<sup>15</sup> *U.S. v. Von's Grocery Co.*, 384 U.S. 270, 302 (1966) (Stewart, J., dissenting).

<sup>16</sup> *U.S. v. General Dynamics Corp.*, 415 U.S. 486 (1974).

<sup>17</sup> Crane, *Technocracy*, *supra* n. xxx.

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, 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 at Berkeley.<sup>18</sup> 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). Concentration was the most significant component of structure. 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. 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.<sup>19</sup>

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

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<sup>18</sup> See generally Leonard W. Weiss, *The Structure-Conduct-Performance Paradigm and Antitrust*, 127 U. Pa. L. Rev. 1104 (1979); Herbert Hovenkamp, *United States Competition Policy in Crisis: 1890-1955*, 94 Minn. L. Rev. 311, 350-354 (2009).

<sup>19</sup> 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. 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. Second, echoing a theme from Louis Brandeis, the structuralists rejected the notion that large aggregations of capital were necessary to achieving economies of scale. 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 production inefficiencies. Third, the structuralists claimed that barriers to entry were high in many industries, but particularly in those with a large fixed cost component. 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. Fourth, Kaysen-Turner argued that, given the close link between Cournot theory and maximizing behavior, poor performance in highly concentrated markets was inevitable. As a result, antitrust should focus on structure and pay relatively less attention to conduct.

the antitrust laws.<sup>20</sup> Johnson intended to use the report as part of his reelection campaign, but eventually decided not to seek reelection because of the unpopularity of the Vietnam War.<sup>21</sup> Nonetheless, the Commission concluded its work and released its report. The Report represented the high water mark 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. 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.

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 self-described “conversion experience” in which he accepted many of the Chicago School critiques of the SCP paradigm.<sup>22</sup> Vestiges of structuralist thinking appeared as late as 1979 when Jimmy Carter’s National Commission to Review Antitrust Law and Procedures recommended adoption of a no-fault monopolization statute and in various iterations of the Justice Department and Federal Trade Commission’s Horizontal Merger Guidelines, but the S-C-P paradigm had long since been intellectually and politically vanquished. The Harvard School that undergirded the anti-merger regime of the 1950s and 60s morphed into a neo-Harvard School that focused on institutionalism rather than structuralism.<sup>23</sup>

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.

### 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

<sup>20</sup> Herbert Hovenkamp, *Introduction to the Neal Report and the Crisis in Antitrust & A Reprint of the Neal Report*, 5 Comp. Pol’y Intl’l 217 (2009).

<sup>21</sup> *Id.*

<sup>22</sup> HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 37 (2005).

<sup>23</sup> 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 (2007).



much longer political run—the ordoliberalism of the Freiburg School that continues to exert influence in the European Union. Ordoliberalism has its roots in pre-War Germany largely as a reaction to the failure of the Weimar state and the rise of Nazism.<sup>24</sup> Franz Böhm, Walter Eucken, and Hans Grossmann-Doerth, professors at Freiburg, penned their *Ordo Manifesto* in 1936 amid the rise of National Socialism and were elevated to prominence during the Allied reconstruction of Germany.<sup>25</sup>

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.”<sup>26</sup> 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. Free economic participation by all citizens was the primary channel for achieving liberal and humane values. Market power by individuals or firms stood in the way of this goal. According to the Ordoliberalism, “[t]he problems of Weimar and Nazi Germany were attributable in part to the inability of the legal system to control and, if necessary, to disperse private economic power.”<sup>27</sup> 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. Although the U.S. Supreme Court has described the Sherman Act as the “magna carta of free enterprise,”<sup>28</sup> the U.S. antitrust laws have never been understood as constitutional in any meaningful sense. 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, make judgments about what degrees of market power are tolerable or intolerable insofar as they promote or retard efficiency.

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

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<sup>24</sup> David J. Gerber, *Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the “New” Europe*, 42 Am. J. Comp. L. 25, (1994).

<sup>25</sup> Crane & HOVENKAMP, *SUPRA* N. XXX; VOLKER R. BERGHAHN, *THE AMERICANIZATION OF WEST GERMAN INDUSTRY 1945-1973* at 84-110 (1986).

<sup>26</sup> *Id.* at 237.

<sup>27</sup> RICHARD WHISH, *COMPETITION LAW* 20 (5th ed. 2003);

<sup>28</sup> *U.S. v. Topco Assoc.*, 405 U.S. 596, 610 (1972).

concentrations of market power could advance economic efficiency, the 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.”<sup>29</sup>

Ordoliberalism resonated with Brandeisian atomistic competition values and the belief in antitrust law as creating a level playing field and economic opportunity. Consistent with the earlier observation that antitrust has historically drawn support from both right and left, 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.<sup>30</sup>

Partly owing to its lineage as an anti-Nazi ideology and its proponents’ anti-Nazi credentials, Ordoliberalism grew in favor during the post-War era. 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 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.<sup>31</sup>

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 competition law issues, which is widely seen as throwing down the gauntlet to Ordoliberalism.<sup>32</sup> 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

<sup>29</sup> Crane & Hovenkamp, *supra* n. xxx.

<sup>30</sup> *Id.*

<sup>31</sup> See generally Silvia Beltrametti, *Capturing the Transplant: U.S. Antitrust Law in the European Union*, 48 *Vand. J. Trans. L.* 1147 (2015).

<sup>32</sup> Pierre Larouche, *The European Microsoft Case at the Crossroads of Competition Policy: Comment on Ahlborn and Evans*, 75 *Antitrust L. J.* 933, 962 (2009).

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. Unless, that is, the anti-monopoly political currents flowing in the United States find their way across the Atlantic.

## II. A CASE STUDY FROM THE I.G. FARBEN CHEMICAL CARTEL

As noted in the previous Section, the post-War currents of democracy-enhancing antitrust ideology arose in the United States and Europe in reaction to the role that concentrated economic power played in stimulating the rise of fascism. To the extent that claims about the importance of particular forms of antitrust enforcement are predicated on cautionary tales about the associations of industrial and political power concentrations, it is important to inquire into the specifics of that relationship. In particular: (1) by what mechanisms does industrial concentration facilitate the rise of political concentration; (2) is the problem “a curse of bigness” or market power more technically; and (3) what species of antitrust enforcement would be sufficient to counteract such effects?

The relationship between Nazism and German industrial concentration provides ample source material from which to address these questions—in the particular case of fascism at least. Among the German firms most important to the rise of Nazism and the perpetuation of its atrocities—a list that would have to include the Krupp armaments company, the Siemens railroad and infrastructure concern, and the Thyssen mining and steel business—none was more significant than the I.G. Farben chemical cartel.<sup>33</sup> A 1945 “Report on the Investigation of I.G. Farbenindustrie A.G.” by the U.S. Office of Military Government 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 . . . that almost enabled Hitler and Goering to extinguish the flame of freedom and human decency everywhere.”<sup>34</sup> How did Farben come to play this villainous role, and what manner of antitrust regime might have prevented it?

### A. *How I.G. Farben Empowered Hitler’s Rise to Power and the Nazi War Machine*

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—that introduced the world to aspirin in 1899.<sup>35</sup> Inspired by the American

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<sup>33</sup> See Diarmuid Jeffreys, *HELL’S CARTEL: IG FARBEN AND THE MAKING OF HITLER’S WAR MACHINE* 249 (2008) (describing I.G. Farben’s singular importance to the Nazi regime).

<sup>34</sup> Office of Military Government, U.S. (Germany), Division of Investigation of Cartels and External Assets, *Report on the Investigation of I.G. Farbenindustrie A.G.* (November 1945), at 5, available at <http://www.profit-over-life.org/books/books.php?book=30> (hereinafter “Military Government Report”).

<sup>35</sup> Jeffreys, *supra* n. xxx at 38. The I.G. Farben story has been extensively studied by scholars. The leading works include Diarmuid Jeffreys, *HELL’S CARTEL: IG FARBEN AND THE MAKING OF*

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.<sup>36</sup> A rival chemical pool, headed by the Hoechst firm and including six German chemical companies, formed in the same year.<sup>37</sup> The two rival pools operated as conventional cartels, including coordination on pricing, research and development, investment decisions, market allocations, and entry into foreign markets.<sup>38</sup>

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.<sup>39</sup> 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.<sup>40</sup> 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).<sup>41</sup> 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.<sup>42</sup>

After the great merger of 1925, Farben continued to extend its control over the German chemical industry and adjacent sectors with importance to Germany's re-armament project. A series of 1926 agreements ceded control over the German explosives industry to Farben.<sup>43</sup> 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 American firm Winthrop Chemical's Sterling unit 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.<sup>44</sup> In 1925, Farben initiated similar discussions with Standard Oil, these on the question of synthetic fuel.<sup>45</sup> 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.<sup>46</sup>

Since Farben's exclusive area was limited to Germany, the fuel market-

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HITLER'S WAR MACHINE (2008); Stephan H. Lindner, *INSIDE IG FARBEN: HOECHST DURING THE THIRD REICH* (2008); Peter Hayes, *INDUSTRY AND IDEOLOGY: IG FARBEN IN THE NAZI ERA* (1987); Joseph Borkin, *THE CRIME AND PUNISHMENT OF I.G. FARBEN: THE UNHOLY ALLIANCE BETWEEN HITLER AND THE GREAT CHEMICAL COMBINE* (1978).

<sup>36</sup> *Id.* at 46.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 45-46.

<sup>39</sup> *Id.* at 77.

<sup>40</sup> *Id.* at 77.

<sup>41</sup> *Id.* at 118-22.

<sup>42</sup> *Id.* at 121-22; Military Government Report at 41.

<sup>43</sup> Military Government Report at 32.

<sup>44</sup> *Id.* at 107.

<sup>45</sup> *Id.* at 137; *see generally* Borkin, *supra* n. xxx at 76-90.

<sup>46</sup> *Id.* at 140.

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 know-how related to buna production.<sup>47</sup> Farben had no reciprocal obligation, although, in 1930, the parties had anticipated some sort of collaboration on the marketing of buna.<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> The JASCO arrangement had the effect of delaying American development of buna by a number of years.

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.<sup>51</sup> 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.<sup>52</sup> The U.S. War Department considered that the cooption of Standard's buna research efforts by Farben "seriously imperiled the war preparations of the United States."<sup>53</sup> So did the United States Justice Department, which indicted and convicted Standard Oil, six subsidiaries, and four executives on charges of criminally conspiring with Farben to restrict trade in synthetic fuel and buna.<sup>54</sup>

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.<sup>55</sup> 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 Nazis.<sup>56</sup> By 1935-36, as Hitler's rearmament project intensified, the firm become organizationally

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<sup>47</sup> Jeffreys, *supra* n. xxx at 236; Hayes, *supra* n. xxx at 38.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 236-237; Borkin, *supra* n. xxx at 80-90. In 1939, Standard and Farben re-worked the JASCO agreement, including an assignment of the U.S. patent rights to buna to Standard. Hayes, *supra* n. xxx 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* n. xxx at 87.

<sup>50</sup> Borkin, *supra* n. xxx at 81.

<sup>51</sup> Jeffreys, *supra* n. xxx at 273.

<sup>52</sup> *Id.* at 273.

<sup>53</sup> War Department Report, at 81.

<sup>54</sup> Jeffreys at 273.

<sup>55</sup> *Id.* at 143-172.

<sup>56</sup> Jeffreys, *supra* n. xxx at 170.

intermeshed with the Wehrmacht.<sup>57</sup> 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 to 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, 64% of explosives, and 75% of nitrogen.<sup>58</sup> Even during the economic downturn of the Great Depression, Farben continued to earn handsome profits.<sup>59</sup>

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.<sup>60</sup> 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.<sup>61</sup>

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, the U.S. occupying forces set out immediately to dismantle the company.<sup>62</sup> In 1947, 24 Farben executives were tried for war crimes at Nuremberg, with nine defendants 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.<sup>63</sup> In 1952, Farben was split into three large companies—Bayer, Hoechst, and BASF—and six smaller firms.<sup>64</sup> The pre-1904 market was largely recreated, with substantial adjustments for the passage of time. As of this writing, Bayer is again making antitrust headlines, now because of its proposed merger with Monsanto.<sup>65</sup>

### B. *Did Monopoly Enable Nazism?*

Farben played a significant—perhaps indispensable—role in Hitler's rise to power, in Germany's wars of aggression, and in the evils perpetrated by the Nazi regime. But it does not necessarily follow that Farben's monopolistic position in the German chemical industry is causally related to the rise of fascism—or that monopoly enabled Nazism. Two matters should give us pause before making such an inference.

<sup>57</sup> Military Government Report at 57.

<sup>58</sup> Military Government Report at 33; *see also* Jeffreys, *supra* n. xxx at 124.

<sup>59</sup> Military Government Report at 35.

<sup>60</sup> Military Government Report, at 94-122; Jeffreys, *supra* n. xxx at 242-43.

<sup>61</sup> Jeffreys, *supra* n. xxx at 306.

<sup>62</sup> Jeffreys, *supra* n. xxx at 354-58.

<sup>63</sup> *Id.* at 378-402.

<sup>64</sup> *Id.* at 403.

<sup>65</sup> Natalia Drozdiak & Jacob Bunge, 'Serious Doubts' Over Bayer and Monsanto's \$57 Billion Megadeal, *Says EU*, Wall Street Journal (Aug. 22, 2017).

First, the direction of causation requires further specification. Did preexisting monopoly conditions in the German chemical industry (and other industries) precipitate the rise of Nazism, or did ascendant Nazism promote monopoly? In other words, was monopoly a cause or symptom of German fascism? If it was a symptom rather than cause, that might still be a salient data point in the current conversation over monopoly and democracy, since the presence of monopoly conditions could serve as a canary in the coal mine for the decline of democratic conditions. But the implications for antitrust enforcement might differ.

Second, Farben's chemical monopoly could have facilitated the German war effort without necessarily facilitating fascism per se. The Farben executives tried at Nuremberg vigorously objected that they had acted only as patriotic businessmen serving their country during wartime, just as their counterparts did in Allied territory.<sup>66</sup> Though gigantic, Farben remained smaller than three American industrial concerns—General Motors, U.S. Steel, and Standard Oil.<sup>67</sup> 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.<sup>68</sup> During the First World War, the federal government relaxed antitrust enforcement to permit competitor collaborations and suspended pending antitrust cases against *United States Steel*, *Eastman Kodak*, *American Can*, and *International Harvester*.<sup>69</sup> President Wilson opined that “to vindicate the [antitrust] law, [it] would disorganize industry.”<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup> 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 democracy or its regrettable alternatives.

Despite these potential objections, the claim asserted around the passage of the Celler-Kefauver Amendments—that the preexisting concentration of critical German industries facilitated and spurred the rise of Nazism—seems historically credible. Farben's chemical monopoly did not come about as a facet of national

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<sup>66</sup> Jeffreys, *supra* n. xxx at 394.

<sup>67</sup> Jeffreys, *supra* n. xxx at 9.

<sup>68</sup> Richard M. Steuer & Peter A. Barile, *Antitrust in Wartime*, 16-SPG Antitrust 71 (2002); Thomas K. Fisher, *Antitrust During National Emergencies*, 40 Mich. L. Rev. 969 (1942).

<sup>69</sup> *Id.* at 72.

<sup>70</sup> Fisher, *supra* n. xxx at 996.

<sup>71</sup> Steuer & Barile, *supra* n. xxx at 72-73.

<sup>72</sup> 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* n. xxx at 89-90.

industrial policy during wartime. Rather, the cartel preceded World War I by a decade and the merger-to-monopoly preceded the Second World War by fifteen years. If industrial coordination and concentration are necessary to military mobilization, then Farben's industrial conquests had laid the ground work for the rise of a militaristic regime long before the commencement of hostilities. Years before hostilities began, Farben had become fully engaged in the process of "creating 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."<sup>73</sup> With tremendous economic power over war-sensitive industries, Farben was willing and able to spur German rearmament and propel it into wars of aggression—the "military-industrial complex" of which President Eisenhower would warn in his valedictory address decades later.<sup>74</sup>

Moreover, the historical record suggests that the presence of a highly concentrated industrial sector facilitated Hitler's rapid consolidation of political control in Germany during the mid-1930s. During the years of his march from a failed putsch leader of a fringe party to totalitarian dictator, Hitler needed the material support of dominant institutions with organizational structures permeating German society. He could not rely initially on the Government, which was politically fractured and unstable, nor the Catholic Church, which was externally controlled and largely ideologically opposed. Even the army had to be gradually courted, then radically reorganized into the Wehrmacht, in order to consolidate Nazi control. By contrast, monopoly business firms were ideally positioned to facilitate the rapid consolidation of political power. 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.

For example, Farben played an early and critical role in developing the finances of the Nazi party. On February 27, 1933—perhaps not coincidentally the day of the Reichstag fire—Farben deposited RM 400,000 in the Nazi Party's coffers, the largest donation by any firm by a large order of magnitude.<sup>75</sup> A succession of further donations followed, providing Hitler with a constant source of extra-governmental funding even while he struggled to consolidate his power over the state. The firm also played a significant role as an incubator and disseminator of Nazi propaganda. Farben employed 120,000 people,<sup>76</sup> and owned a number of newspapers,<sup>77</sup> which allowed the firm to spread Nazi propaganda in Germany and around the world.<sup>78</sup>

There is also evidence that the symbiotic relationship between firm and regime resulted in a loss of checks and balances—of democratic features—within the Farben organization itself. In 1937-38, as Farben was becoming increasingly

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<sup>73</sup> Jeffreys, *supra* n. xxx at 206.

<sup>74</sup> President Dwight D. Eisenhower, *Farewell Address to the Nation* (Jan. 17, 1961).

<sup>75</sup> Jeffreys, *supra* n. xxx at 170.

<sup>76</sup> Jeffreys, *supra* n. xxx at 124.

<sup>77</sup> Jeffreys, *supra* n. xxx at 146.

<sup>78</sup> Military Government Report at 90-92.



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.<sup>79</sup> 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.

To be sure, some of these democracy-eroding effects were products of large organizational structure rather than market power in an antitrust sense—a distinction drawn in the introduction and explored further below. Still, the historical record suggests that it was not just Farben's size, but its economic dominance in the chemical sector, that made it such a convenient vehicle for the rise of Nazism. What Hitler needed in 1933 was a firm with ample cash to bankroll his political regime extra-governmentally, 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, Farben possessed all of these in droves due to a course of economic concentration dating back to the turn of the century.

C. *Could an Economically Oriented Antitrust Regime Could Have Prevented Farben's Tragic Role in Facilitating Nazism?*

The historical record of the Farben chemical cartel 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 to 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 initial data relevant to answering these questions can be gathered by subjecting the Farben 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 I.G. Farben and hence the crucial role it played in supporting the rise and evils of Nazism? The answer is plainly yes. Prior to reconstruction under the Allies, Germany had no antitrust law—at least none that would be recognizable under contemporary global standards.<sup>80</sup> If it had, Farben could not have risen to dominance in the manner it did. Nor could it likely have found another way to monopolize the German chemical market.

Farben's path to monopoly 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

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<sup>79</sup> Hayes, *supra* n. xxx at 203-05.

<sup>80</sup> John O. Haley, ANTITRUST IN GERMANY AND JAPAN, THE FIRST FIFTY YEARS, 1947-1998 7-9 (2001).

of the Nazi regime, and put in place the economic and institutional arrangements that Hitler would seize upon in his 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 mega-pool, and the 1926 explosives agreement, are considered *per se* illegal under contemporary antitrust doctrine.<sup>81</sup> The Justice Department vigorously prosecutes them criminally, yielding billions of dollars in fines and hundreds of years in prison terms.<sup>82</sup> If contemporary antitrust norms had applied to early twentieth century Germany, the chemical cartel could not lawfully have occurred.

Similarly, the 1925 merger to monopoly 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.<sup>83</sup>

The 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.<sup>84</sup> Despite these facially procompetitive effects, the JASCO arrangement would likely fail under contemporary antitrust norms—as it did when challenged by the Justice Department in 1942. 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.<sup>85</sup> Moreover, the “joint research” functions of JASCO apparently did not

<sup>81</sup> PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 2022a (3d ed. 2010).

<sup>82</sup> See, e.g., *Antitrust Division Issues 2016 Annual Spring Update*, (April 8, 2016) (reporting \$3.6 billion in criminal fines and penalties for price fixing and prosecutions 20 companies and 60 individuals) <https://www.justice.gov/opa/pr/antitrust-division-issues-2016-annual-spring-update>.

<sup>83</sup> See generally U.S. Dep't of Justice & FTC, *Horizontal Merger Guidelines* (2010); *U.S. v. Energy Solutions, 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).

<sup>84</sup> See *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013) (discussing case law on competitive effects of patent licensing); National Cooperative Research and Production Act (“NCRPA”), [Pub. L. No. 103-42 § 2\(b\), 107 Stat. 117 \(1993\)](#) (codified at [15 U.S.C. § 4301 et seq.](#)) (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).

<sup>85</sup> 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) (holding illegal *per se* market division under color of trademark licensing).

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.<sup>86</sup> 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.<sup>87</sup> Such an arrangement would also be considered unlawful market division under contemporary antitrust norms, as it was in 1942.<sup>88</sup>

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.<sup>89</sup> Indeed, it has largely been advocates of the consumer welfare approach that have argued for narrowing state action immunity on the view that states systematically distort competitive processes for the benefit of rent-seekers.<sup>90</sup> 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, and expropriation of property during war remains a serious crime under the Hague Convention.<sup>91</sup>

In sum, application of contemporary economically oriented antitrust principles could have prevented Farben's rise to dominance in Germany, and

<sup>86</sup> *Supra* text accompanying notes xxx – xxx.

<sup>87</sup> Jeffreys, *supra* n. xxx at 236.

<sup>88</sup> *Palmer*, 498 U.S. at 48 (discussing case law holding market allocations per se unlawful).

<sup>89</sup> 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); 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); Milton Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 Colum. L. Rev. 1, 19 (1976) (defending state action immunity from antitrust law as necessary to democratic experimentation).

<sup>90</sup> Crane & Hester, *supra* n. xxx (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 189-213 (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. Law & Public 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").

<sup>91</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Art. 147.

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.

## CONCLUSION

Concerns that industrial monopoly undermines 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 underling 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, 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 the Europe and the United States were convinced that a strong anti-monopoly norm was necessary to preventing the reemergence of the sort of consolidated economic power that threatened democratic liberalism. This Article has presented historical evidence substantiating that concern—demonstrating that I.G. Farben's rise from a loose chemical cartel to an industrial juggernaut facilitated Hitler's rise to power and wars of aggression and the atrocities of the Nazi regime. The particulars of the Farben story also have potential implications for the formulation of democracy-reinforcing antitrust law. At least as to the German chemical industry, application of consumer-welfare-oriented antitrust principles would have interdicted the steps leading to the Farben monopoly and hence its role as Hitler's industrial facilitator. *If* the Farben story can be generalized—an important caveat since this is just the beginning of an inquiry—that would suggest that antitrust law need not be reformulated to safeguard political liberalism, that what is good for consumers is good for democracy.