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Resisting democratic backsliding: An essay on Weimar, self-enforcing constitutions, and the Frankfurt School

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Abstract: What, if anything, can constitutions do to resist democratic backsliding? The collapse of the Weimar Republic has led scholars of comparative politics to conclude that constitutional forms and institutions can do little to resist the breakdown of democracy and the rise of autocracy. This paper offers a constitutionalist response. The outlines of that answer can be found in decades-old policy documents produced by a set of German émigré scholars during and in the immediate aftermath of the Second World War: Franz Neumann, Herbert Marcuse, and Otto Kirchheimer. The secret reports root constitutional stability in the creation of a framework for bounded partisan pluralist contestation among political parties that track the principal social and economic cleavages, and that is rooted within, and does not seek to overthrow, the underlying political economy. Second, the secret reports highlight the importance of constitutional design in creating a constitutional infrastructure for bounded pluralistic political contestation, especially with respect to the role of political parties. Third, the secret reports suggest a counter-narrative of the German Basic Law as creating a framework for political contestation that reinforces constitutional stability instead of undermining it.

Keywords: constitutional design; democratic backsliding; political parties; Weimar

I. Introduction

What, if anything, can constitutions do to resist democratic backsliding? This has emerged as one of the central questions for the fate of constitutional democracy in the first half of the twenty-first century. In a diverse and growing set of countries, including Hungary, India, Poland, South Africa, Turkey and the United States, this issue has surged onto the constitutional agenda. These cases straddle geographic, cultural, and economic divides. Indeed, the term

democratic deconsolidation has recently been coined to capture the idea that the threat of democratic backsliding is no longer confined to transitional democracies emerging from authoritarian rule, and encompasses both consolidated and unconsolidated democracies.[1] As we think about the sources of, and potential responses to, democratic backsliding, the conversation is now truly a global one.

This emerging discourse is comparative cross-jurisdictionally. The most dramatic implication of this argumentative turn is the apparent death of American exceptionalism – i.e., the idea that American political development is fundamentally different from those of other constitutional democracies. But it is also comparative historically. While there is a long tradition of historically-oriented, comparative scholarship on both democratic transitions and breakdown, pioneered by Juan Linz and Al Stepan,[2] historical examples have re-emerged as important elements not only of academic analysis, but also of constitutional practice. Among these cases, among the most important is the collapse of the Weimar Republic.

Weimar has come to represent the paradigmatic example of democratic backsliding, which defines the breakdown of constitutional order in a certain kind of way. As Karl Lowenstein argued more than 80 years ago shortly after the rise of Hitler, Weimar fell because it had 'tendered to a ruthless enemy the most effective weapons for its own destruction'.[3] For Lowenstein, the rights and liberties, institutions, and procedures of liberal democracy were abused *from within* by a political party through a strict fidelity to constitutional legality, which enabled it to capture the state and to put an end to democracy:[4]

> Democracy sharpened the dagger by which it was stabbed in the back … by the generous and lenient Weimar republic [sic.], Hitlerism was allowed to use democracy for the avowed and explicit purpose of destroying democracy. The anti-parliamentarian cohorts entered the legislative bodies with the unreserved intention to wreck the legislative machinery. The courts misunderstood the true meaning of democratic privileges and sustained the 'constitutional' rights of the movement.

[1] R Stefan Foa and Y Mounk, 'The Danger of Deconsolidation: The Democratic Disconnect' (2016) 27(3) *Journal of Democracy* 5.

[2] J Linz and A Stepan (eds), *The Breakdown of Democratic Regimes* (Johns Hopkins University Press, Baltimore, MD, 1978).

[3] K Lowenstein, 'Autocracy Versus Democracy in Contemporary Europe, I' (1935) 29 *American Political Science Review* 571, 579. For a contemporary discussion of these concerns, see S Issacharoff, 'Fragile Democracies' (2007) 120 *Harvard Law Review* 1405 and S Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press, New York, NY, 2015).

[4] Ibid 580.

> By this attitude, they frustrated the belated and half-hearted measures of weak and dogmatically entangled governments. The democratic constitution became the main obstacle against its maintenance and the best tool for its destruction.

Scholars of comparative politics have taken from this diagnosis of the breakdown of Weimar a broader lesson about the limited role of constitutions in resisting democratic backsliding. Writing shortly after the election of President Trump in the *New York Times*, for example, Steven Levitsky and Daniel Ziblatt argued in response to those who took comfort from America's long, unbroken tradition of constitutionalism, including judicial review as a check against democratic backsliding, that:[5]

> [a] well-designed constitution is not enough to ensure a stable democracy … Democratic institutions must be reinforced by strong informal norms. … Norms serve as the soft guardrails of democracy, preventing political competition from spiraling into a chaotic, no-holds-barred conflict.

Although Levitsky and Ziblatt cited the Latin American experience as an illustrative example, Weimar lurked in the background. On their view, constitutional forms and institutions can do little, in the end, to resist the breakdown of democracy and the rise of autocracy.

Is there a kind of constitutionalist response to democratic backsliding that takes seriously, responds to, and integrates, the lessons of comparative politics? In this article, I suggest that the outlines of that answer can be found in decades-old policy documents produced by a set of German émigré scholars during and in the immediate aftermath of the Second World War: Franz Neumann, Herbert Marcuse and Otto Kirchheimer. Neumann, Marcuse and Kirchheimer were prominent members of the Frankfurt School, who went into political exile in the 1930's in the United States. They were important legal and political theorists; Neumann and Kirchheimer were also lawyers who had practised in Weimar. But during the Second World War, the three of them were recruited to join the OSS (the precursor to the CIA) as policy advisors on the reconstruction of Germany. They wrote a series of classified reports, in English, that sought to explain the breakdown of Weimar and the nature of the Nazi regime including its possible collapse, and offered highly detailed advice on a broad range of legal issues in a post-War Germany. The secret reports

[5] S Levitsky and D Ziblatt, 'Is Donald Trump a Threat to Democracy?' *New York Times* (16 December 2016).

were published as a collection for the first time in 2013, seven decades after the first one had been written.[6]

The secret reports present a puzzle with great contemporary political salience. These members of the Frankfurt School had a ringside seat on the breakdown of the Weimar Republic, and the catastrophe that followed. Yet they held out hope for the prospect of constitutional order at its darkest moment, in precisely the country where it had experienced its most abject failure, to ensure that Weimar never happened again. What was the basis for this sober optimism, this realistic, clear-eyed faith in the potential of constitutions to stem the slide into disaster? Are there contemporary lessons we can learn?

I make three main claims in this article. First, the secret reports set out a theory of constitutional stability which is rooted in the creation of a framework for *bounded partisan pluralist contestation* among political parties that track the principal social and economic cleavages, that is rooted within, and does not seek to overthrow, the underlying political economy.[7] Following Barry Weingast, this is a version of a theory of constitutional 'self-enforcement', because political opponents have more to gain from cooperating and competing within the constitutional order than in bringing it down.[8] Second, the secret reports provide a response to scholars of comparative politics by highlighting the importance of constitutional design in creating a constitutional infrastructure for bounded pluralistic political contestation, especially with respect to the role of political parties. If constitutions enable parties to be aligned with the principal economic and political cleavages, those constitutions are more likely to be stable. Third, the secret reports should lead us to reassess the dominant narrative surrounding how Germany's Basic Law orients itself to the legacy of the Weimar Republic. The dominant narrative of the Basic Law imagines it as establishing a clear foundation of human dignity, judicially enforced and protected by an eternity clause; the secret reports suggest a counter-narrative of the Basic Law as creating a framework for political contestation that reinforces constitutional stability instead of undermining it.

[6] F Neumann, H Marcuse and O Kirchheimer, *Secret Reports on Nazi Germany: The Frankfurt School Contribution to the War Effort*, edited by R Laudani (Princeton University Press, Princeton, NJ, 2013).

[7] S Issacharoff and R Pildes, 'Politics as Markets: Partisan Lockups of the Democratic Process' (1998) 50 *Stanford Law Review* 643.

[8] S Mittal and B Weingast, 'Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century' (2013) 29 *Journal of Law, Economics and Organization* 278. Also see D Levinson, 'Parchment and Politics: The Positive Puzzle of Constitutional Commitment' (2011) 124 *Harvard Law Review* 657.

II. The secret reports: Liberal legalism vs. social and political theory

The collection prints 31 secret reports; there are many more not included, to which the theorists contributed and which they may have even written, but for which insufficient evidence exists to attribute authorship at this time. They span the time period 1943 to 1949. The collection organises the reports into seven parts: 'The Analysis of the Enemy', 'Patterns of Collapse', 'Political Opposition', 'Denazification and Military Government', 'A New Germany in a New Europe', 'Toward Nuremberg' and 'A New Enemy'. The secret reports range over a broad array of topics under each of these headings, including economic policy (inflation, centralised European controls of raw materials, industry and transport, cartels), political dynamics in Nazi Germany (Speer's appointment as dictator of the German economy, the attempt on Hitler's life, the social and political impact of the air raids on the German people), the political roots of Nazism (anti-Semitism, Prussian militarism), denazification and military government (dissolution of the Nazi party, German criminal justice under military administration) and war crimes trials (the Nazi Master Plan, the Leadership principle and criminal responsibility). As the secret reports move forward through time, it becomes likely, and then almost certain, that the Allies would defeat the Nazis, and the reports accordingly turn to concrete plans for a projected American military occupation. They are written for policymakers, and are often highly technical and detailed, containing extensive lists of laws and regulations to be repealed, and government units to be purged by a military government.

The secret reports provide a window into how these members of the Frankfurt School deployed their analytical and theoretical prowess in the service of detailed policy prescription, in which law and legal institutions figured centrally. But notwithstanding their origins and audience, the secret reports are an exercise in applied legal, political and social theory. They could be read as a German tract in the tradition of the *Federalist Papers*, because their analyses incorporated basic political ideals alongside attentiveness to political interests and concrete institutions. And like the *Federalist Papers*, they should have enduring value even though they were written in real-time in response to fast moving events with a view to shaping political decisions at hand.

The secret reports devoted considerable attention to the breakdown of constitutional democracy in the Weimar and its reconstruction after Nazi rule. Since Kirchheimer and Neumann were lawyers, it is not surprising that law and the legal system figured prominently, especially in the reports they authored. But the archive speaks in in two distinct voices: liberal legalism and political and social theory.

The secret reports deployed the traditional tools of liberal legalism to describe and assess Nazi policy and institutions, and to set out a framework for denazification and the reconstitution of a liberal legal order. The tools of liberal legal reform ranged from renovation to abolition and re-creation. In 'Nazi Plans for Dominating Germany and Europe: Domestic Crimes', written in August 1945 (Ch 29) Kirchheimer carefully laid out the role of legal instruments in the rise of the Nazis, which he termed 'political terror'. It was through the law that Hitler was appointed Chancellor, and that the Reichstag was dissolved; that the Communist Party (KPD) was abolished, its property seized, and its members persecuted; that the concentration camps were established to initially target political opponents of the regime; that trade unions, political parties and other organizations that resisted the Nazi rise were abolished; that penal legislation was adopted to effect Nazi policy (e.g. on racial hygiene) and to suppress the regime's enemies; that in the form of prosecutorial discretion, the protection of the ordinary criminal law was denied to the Nazi's victims.

In 'The Abrogation of Nazi Laws in the Early Period of the MG [Military Government]', for which there is no firm date, but which presumably was written in March 1944, Kirchheimer devoted specific attention to the role of the Germany judiciary (Ch 15). He charged the German courts with having abetted the Nazis rise to power, by discriminating between 'nationalist and Leftist political opposition' (232) in the application of the criminal law; in so doing, 'the judiciary constituted one of the chief benefactors of the groups thriving upon aggressive nationalist policies'; it followed that 'the Nazis … could never have been able to build up terroristic organizations undisturbed by official interference' without judicial support (232). Once in power, the Nazis used the judiciary as an instrument of legal terror when, by having them enforce legislation and cooperating with the extra-legal infliction of coercive interrogation and torture.

The centrality of the legal system to the rise and maintenance of Nazi power raised important questions about how a military government should tackle them going forward. A key recommendation was the blanket suspension of the entire German judiciary, extending beyond special courts and jurisdictions used to prosecute political opponents to the entire court system, as a preliminary step to comprehensively vetting judges` individually, on the basis of a detailed review of personnel files and public hearings. The secret reports also laid out extensive plans for Nazi-era legislation. Kirchheimer (in 'The Abrogation of Nazi Laws in the Early Period of the MG') categorically rejected the view that since Nazi legislation was invalid because it was rooted in an unconstitutional and illegitimate seizure of authority, it should therefore be declared immediately and retroactively invalid in its totality, because not every law was morally

objectionable, and so doing would produce chaos by destroying countless acts of private reliance. Instead, he proposed the careful repeal of discriminatory legislation, legislation granting special privileges to the Nazi party, and special criminal law and procedure regarding political crimes and racial crimes.

In the same vein, Kirchheimer devoted a secret report ('Nazi Plans for Dominating Germany and Europe: Domestic Crimes') to the prosecution of Nazis for crimes committed in violation of domestic criminal law. The premise of this secret report was that the ordinary criminal laws protecting life and bodily integrity remained in force during the Nazi era, but had not been applied to the benefit of the Nazi's victims. So the presumptive recommendation was simply to apply the laws in force at the time to the Nazi's conduct. This led Kirchheimer to work through a set of familiar liberal legal dilemmas, arising out of what we would now term the transitional justice context. If Nazi criminal law was to govern the conduct in question, should its defences apply as well? Was the Nazi regime even constitutional? Could there be a selective retroactive revision of legislation which abrogated the immunity of the Nazi party from the ordinary laws, and which justified the commitment of crimes (e.g. the crime of race defilement)?

At times, Kirchheimer had to unravel legal knots created by this commitment to fighting institutionalised evil through liberal legalism. A fascinating example can be found in 'Leadership Principle and Criminal Responsibility', in which Kirchheimer and John Herz in July 1945 adapted doctrine of *respondeat superior* to the Nazi context, whereby superiors granted broad discretion to, and very few direct orders, to their subordinates – thereby avoiding liability under traditional legal principles. But under Nazi constitutional theory, leaders are responsible for the acts of subordinates even if they have not ordered or acquiesced in them. Kirchheimer and Herz reasoned by analogy to develop a corresponding theory of criminal liability for leadership crimes that was a logical corollary to the way in which authority was understood and wielded by Nazi leaders (Ch 27).

As these select examples from the secret reports illustrate, a traditional, liberal legalist framework on the problem of democratic backsliding has a particular analytical viewfinder that highlights certain issues, and casts others in shadow. It foregrounds how backsliding can occur through the perversion of legal forms and institutions, which in turn serve as a system for reinforcing an authoritarian political order. It entails a clear path toward the reconstruction of constitutional democracy, through the wholesale replacement of authoritarian laws by norms rooted in liberal democracy, coupled by a blanket judicial purge to ensure a new cadre of judges sworn to enforce those norms. Constitutional democracy is the mirror image of what it replaces.

But to be complete, the traditional liberal legalist framework must also have a theory of the *causes* of democratic backsliding, which in turn should have prescriptive implications. The liberal legalist answer came in the form of militant democracy – at its core, the ideas that (a) democratic backsliding can occur through the abuse of the rules and institutions of constitutional democracy by a political party determined to end democratic life, and (b) the best way to mitigate this risk is to restrict rights and freedoms as strictly necessary to defend a constitutional democracy against capture by authoritarian political parties. The secret reports devote considerable attention to this issue, illustrating the concrete impact of Lowenstein's academic arguments, which had appeared nearly a decade earlier. Kirchheimer proposed the immediate repeal of Nazi laws that prohibited political parties, freedom of association, and freedom of assembly in order to allow for the restoration of political life, but in a manner that would prevent their abuse by Nazi supporters to engage 'openly or in veiled manner in Nazi activities' (The Abrogation of Nazi Laws in the Early Period of the MG', 238). Marcuse, writing a few months later in July 1944, in 'Policy toward the Revival of Old Parties and Establishment of New Parties in Germany' (Ch 18), framed the problem of a Nazi return after the revival of constitutional democracy as a problem of 'camouflage', which he viewed as 'the greatest threat to the security of the occupying forces and to the restoration of a peaceful [democratic] order' (297). The problem was not just the revival of nationalist right wing parties using different names and slogans, but also camouflaged nationalist groupings, such as business and professional organizations. His proposals went further than Kirchheimer's, requiring the close supervision of right wing parties and the banning of parties and other institutions merely dominated by former Nazis, even if they did not publicly advocate Nazi aims.

Militant democracy is subject to the well-known objection from within the liberal legal framework that it is self-contradictory, to which Neumann responded in 'The Revival of Political and Constitutional Life under Military Government' (September, 1944) that '[d]isefranchisement of certain groups in society is altogether compatible with the idea of civil rights' since their 'ultimate aim … has never been merely to protect all kinds of political activities, but to provide the basis for the formation of a political will' (432). But a more serious concern is the one raised by Levitsky and Ziblatt, in the spirit of Madison's 'parchment barriers' objection to constitutional enforcement in *Federalist* No. 48. At its core, it holds that the same political forces that challenge constitutional democracy would likewise refuse to accept the constraints of its rules and institutions, and would actively seek to subvert them, and with enough strength, time and determination, would ultimately prevail. The vulnerable joint in the design

of most constitutional democracies is the power to appoint judges and the bureaucracy who would oversee and enforce the norms of militant democracy; appointment powers cannot anticipate and prevent every kind of abuse.

Lowenstein, the originator and public champion of militant democracy, never squarely addressed this question. But we can infer what his answer might have been from his views on the prospects for the success of the broader project of legal reform in Germany under American military occupation. He served as a legal advisor to the American Military Government after the war, which gave him a first-hand, insider's perspective. In a little-known article published in 1948, based on his own experiences in Germany, he appeared to concede that a liberal legal approach to the democratic reconstruction of Germany, at least on its own, would not suffice.[9] Lowenstein observed that 'few of the legal staff realized in advance the degree of moral erosion to which Germany had been subjected by the Nazi regime' and had not realised their task extended beyond the design of law and legal institutions to 'the even more exacting assignment of rediscovering under the Nazi rubble the Gestalt of the German social and legal order'.[10] Rather than confront this fundamental problem, American legal advisors instead retreated into liberal legalism, specifically taking 'refuge in and shelter behind the institutions and techniques of home', on the basis of a naïve belief 'that the laws of social causation are identical in different environments'.[11] So perhaps hard experience proved that the ambition of liberal legalism was impossible; 'in retrospect, it may seem doubtful whether any program of boldly recreating German life in the image of the conqueror could have succeeded in the face of the ingrained social habits of the German people'.[12]

By extension, Lowenstein might have likewise concluded that the project militant democracy was doomed from the start, and could be overwhelmed by the 'ingrained habits of the German people'. Indeed, what Lowenstein seems to be implying is that what brought down Weimar was not merely a coup by a small, determined group of fanatics through constitutional means, but a broader set of social forces that at the very least failed to resist the Nazi takeover and undermined constitutional stability. Although the secret reports did not expressly acknowledge this problem directly, the theorists could not have been unaware of it, given the failure of constitutional

[9] K Lowenstein, 'Law and the Legislative Process in Occupied Germany: II' (1948) 6 *Yale Law Journal* 994.

[10] Ibid 996.

[11] Ibid 997.

[12] Ibid.

democracy in Weimar and the manifest need for denazification, which conceded the limitations of a liberal legal focus on texts and institutions. Neumann came closest when he said that a policy of denazification 'would still leave the forces of reaction and aggression entrenched in Germany's social and political structure' ('The Revival of Political and Constitutional Life under Military Government', 427). This is just as much a worry about the prospect for constitutions to resist democratic backsliding as it is to the whole project of liberal legalist constitutional reconstruction.

Perhaps in response to this challenge, the reports shift gears and speak in a second, distinctive voice – that of social and political theory. One can trace through the secret reports and their specific policy recommendations a theory of constitutional stability that sheds light on Weimar and its breakdown, the power structure of the Nazi regime, and the conditions for building a politically more durable constitutional democracy after the Nazi defeat. Marcuse produced the bulk of this analysis, although Neumann contributed as well. This theory of constitutional stability is built around the notion of *social stratification*. The secret reports organise German society under democratic rule into a distinct set of social groups, each with common economic interests, political goals to pursue those interests, and a shared identity that enables them to translate those interests and goals into collective political action. On the right, these groups included the agrarian aristocracy of the Junkers, the traditional source of Prussian economic and political power; heavy industry, which had eclipsed the Junkers as the heart of the German economy; and the military, where the officer core dated from the Imperial era and was dominated by the nobility. On the left, there was labour, working in the industrial economy. In the centre of the political spectrum, the old middle classes and peasants were 'no longer a decisive political factor', in Marcuse's view ('Policy toward the Revival of Old Parties and Establishment of New Parties in Germany', 287). Rather, on his account, the centre consisted of 'a Catholic integration of members of all social groups, holding the balance between Right and Left' (299).

These social groups, in turn give rise to distinctive *political parties*. As Neumann put it, in Germany (and indeed, across Europe), political parties 'are not arbitrary creations but sprang from a definite social stratification' ('The Revival of Political and Constitutional Life under Military Government', 422); that is, there is an underlying, social structure, 'of which the Germany party system was a reflection' (422). For the social groups of the right, the parties which they spawned, and which advocated for the interests in politics, were the German National People's Party and the German People's Party; for the left, it was the Social Democratic Party (SPD) and the KPD; for the centre, the Centre Party and the Bavarian People's Party. The core of politics consists of how social groups, through their respective political

parties, frame and negotiate political claims, and contest and work within relationships of economic and political power that accept certain outer boundaries or fixed presuppositions; these relationships constitute a *social structure*. Politics occurs across multiple arenas – centrally, the Parliament, but also, crucially, in the economy. And the mechanisms or means of politics vary by context. In some cases, it is the constitution itself; in other cases, it is through contracts or collective agreement; in yet others, is through formal alliances or pacts. A constitutional order reflects, and is nested in, a broader political economy that organises relationships among these groups.

The reports develop and apply this social and political theory to offer a positive account of the founding of the Weimar Republic and its collapse, the political economy of the Nazi regime, and the likely nature of post-Nazi political life. The common thread is that political change consists of, and can be explained by, shifting power relations among social groups. In the 'Social Democratic Party of Germany' (Ch 14), published in September 1945, Marcuse explained that at the founding of Weimar, the SPD 'did not obtain a popular and parliamentary majority' (205) and therefore had a choice – to fight for the goal of socialism with 'the radical left … in a revolutionary class struggle for socialism against the "bourgeoisie parties", or it could cooperate with the latter within the framework of the capitalistic-democratic state' (205). It chose to advance social and economic reform in the service of workers *within* a democratic, capitalist framework. These commitments were formalised in 1918 through pacts with the Army to jointly combat the revolutionary left, and with entrepreneurs to negotiate wages and the conditions of work while respecting property rights. These pacts provided the foundation for democratic cooperation with bourgeoisie parties in coalition governments, and to maintain 'the labor movement within the framework of legalism and parliamentarism' (205). This entailed that 'the SPD had to uphold the Weimar Republic not only against the monarchists and other enemies on the right, but also against a considerable part of the labor movement itself' because the 'SPD regarded itself as part of the existing state rather than as the opposition to the state' (206). This commitment to the constitutional regime led the SPD to reconceive and transform even one of its basic forms of political action, the political strike, because it 'saw in the political strike a threat to their position and their vested interests in the prevailing state' (206).

Although the Nazi regime asserted absolute power, it followed that that power, as had the power of the Weimar Republic that preceded it, also derived from a coalition of the same set of social groups, which constitute the basic units of political life. To the theorists, this was not a democratic coalition, but an autocratic coalition, of the kind that has become very familiar

to students of comparative politics. In 'German Social Stratification' (Ch 6), dated November 1943, Marcuse categorised social groups as 'rulings groups' and 'ruled groups'. The ruling groups were the Nazi party and big business, the Army and the bureaucracy, and the Junkers. For Marcuse, 'the privileged position of the ruling groups of Nazi Germany still rests on the old foundations' (79) and 'the fundamental change in the forms of political control which marked the transition from the Weimar Republic to the Nazi state was not accompanied by an equally fundamental change in the type of the ruling groups' (81). But there had been two major shifts in social stratification since the era of the Weimar Republic. The first was that 'political power is increasingly amalgamated with and even dependent on economic power' (79), as was reflected by the close alliance of business and the Nazi Party. The second was 'the disappearance of labor from the policy-making level'; under both Weimar and Nazi rule, labor had been a 'ruled group', but whereas 'under the Weimar Republic, the political decisions were the result of a compromise between the ruling and the ruled … under the Nazi regime, they result from a compromise among the ruling groups' (81). The Nazis had adopted a divide and conquer approach for labour, coopting its leadership and destroying it as an economic and political base for the opposition.

Marcuse predicted in 1943 that after the fall of the Nazis, the 'former political tendencies which have split German workers will probably be resurrected in a new form as soon as civil liberties are restored' (85–6). Writing in the dying days of the Nazi regime in 1944, Marcuse again predicted 'there will emerge a general pattern of political organization corresponding to the prevailing structure of German society' ('Policy toward the Revival of Old Parties and Establishment of New Parties in Germany', 288). The reason was that although 'the Nazi regime has abolished all parties with the exception of the Nazi Party … it did not essentially change the social stratification of which the Germany party system was a reflection' (288). What the Nazi regime had done was only to achieve 'a temporary integration' through economic cooptation – in the form of full employment – and the coercive force of 'a totalitarian terroristic apparatus' (288). However, once these two elements disappeared, 'the revived political life of Germany will, in its main lines, follow the old-established pattern: the party systems will revolve around the two poles on the Right and the Left' (289). While the 'names, slogans and programs' might be new, 'this will be a mere façade under which the real political issues will be fought out', i.e., economic and social policy. And indeed, in September 1945 ('The Social Democratic Party of Germany, Ch 14), in the early days of military occupation, Marcuse's prediction was borne out; he observed that 'the old social and political conflicts characteristic of modern

Germany are reemerging' and as 'denazification has stripped the Hitlerian layers from the structure of German society, its pre-Nazi shape has begun to appear once more' in the form of political parties '[c]losely expressive of' the Weimar period 'which, representing specific social groups, worked for the most part at cross purposes', which in turn made it likely that 'the traditional conflicts are likely to reemerge' (223).

What is the relationship between social stratification, political parties, and constitutional stability? This is a key question and a puzzling omission in the secret reports. To supply the answer, we must look to back to 1933, to Kirchheimer's review of Carl Schmitt's *Legality and Legitimacy*.[13] In his essay, Kirchheimer distinguished between two accounts of democracy. We can term the first the intrinsic account, which derives from the social contract tradition. Persons are imagined as free and equal citizens who provide their hypothetical consent to the coercive power of the state by agreeing to live under a constitution that gives them the power to deliberate and vote upon laws that restrict their freedom in a scheme of individual and political liberties and freedoms. Kirchheimer suggests that the intrinsic account presupposes 'relatively uniform social classes', and accordingly that a different explanation for constitutional democracy is needed 'in a heterogeneous society' with 'distinct social classes', as was the case in Germany.[14] Inspired by Charles Beard's recent economic interpretation of the American federalist constitution, Kirchheimer abstracted from it the instrumental account of constitutional democracy. In that account, 'democracy's basic virtue lies in the fact that it provides a better chance for each of the respective parties to exercise power than a non-democratic system can provide'.[15] And the explanation for the fall of Weimar – which was unfolding as Kirchheimer wrote these words – was that this rational calculus of self-interest no longer held. As he wrote, the instrumental account of constitutional democracy 'contributes to the instability of democracy to the extent that political shifts may suggest to key parties or power groups that democracy no longer functions as an adequate instrument for reaching their particular goals. This appears to be the case in Germany.'[16]

Which group is Kirchheimer referring to? In this essay, he does not say. But what he does seem to be arguing is that the fall of Weimar and the rise of the Nazi regime was not simply the result of a small group of extremists,

[13] O Kirchheimer, 'Remarks on Carl Schmitt's Legality and Legitimacy' (1933) 68 Archiv für Sozialwissenschaft und Sozialpolitik 457 in W Scheuerman (ed), *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann & Otto Kirchheimer* (University of California Press, Berkeley, CA, 1996) 64.

[14] Ibid 70.

[15] Ibid.

[16] Ibid.

through some sort of legal-democratic coup, who seized power over the objections of the social groups that came together in the pact that was the Weimar constitution. Rather, he appears to suggest that one or more of the constituent social groups of modern Germany chose to exit from this arrangement, bringing the constitutional order tumbling down. The reports are silent on this crucial detail, although the implication is that big business, the bureaucracy and the army saw it in their interest to achieve their goals outside of constitutional democracy. In the democratic reconstruction of Germany, the theorists proposed specific elements of constitutional design as part of an instrumental case for constitutional democracy that were meant to mitigate this risk from materialising in the future.

Some of these are familiar. An important question was the choice of electoral system. Weimar had been plagued by unstable coalition cabinets that were a product of a fragmented legislature, in turn the result of a system of proportional representation with a minimal threshold that incentivised the proliferation of political parties, and which set the stage for the Nazi seizure of power. One idea in response to this experience was to shift to a system of constituencies and plurality voting, that would be more likely to produce two large, umbrella parties that would alternate with major governments, introducing stability into the constitutional system. Neumann acknowledged this concern, in 'Revival of German Political and Constitutional Life under Military Government', published in November 1944, and his response merits careful attention. He noted it would be possible to redress this deficiency in proportional representation by raising the threshold, as Germany eventually did. But this merely eliminated an objection to proportional representation; it was not in itself a positive reason to opt for proportionality representation over plurality voting. Neumann's positive case was as follows (434):

> If it is the aim of MG to achieve internal stability in Germany, in order to prevent the ascendancy of more demagogues and to minimize the danger that secret Nazis and other agents will infiltrate all political groups, the organized political parties should have every opportunity to dominate the field. The parties can control the electorate and their candidate. Proportional representation allows the organized parties to achieve a predominant position in politics.

Within political parties, there is a balance of power between party elites – career politicians, party officials, and expert advisors – and the party rank-and-file. Neumann supposes that the party leadership is a relative source of political moderation, and is more likely to see ongoing advantage to pursuing policy goals within the constitutional order than the rank and file, which is more vulnerable to radicalisation. This was a particular concern in the dire

circumstances of post-War Germany, Neumann reasoned, because a significant proportion of voters were focused on day-to-day survival, which 'leaves the political field to determined minorities which may or may not reflect the unconscious demands of the masses' and capture political parties (423). Proportional representation would strengthen party leaders relative to voters. Indeed, he went further, and said 'they would control the electorate', making them the principal actors of political choice. Strong and relatively autonomous political parties would yield constitutional stability.

This was a radical stance at the time, especially because of the widespread disrepute in which political parties were regarded in the Weimar Republic. Carl Schmitt's critique of the manner in which the rise of political parties had subverted the institutions of parliamentary democracy, reflected widely views.[17] For Schmitt, Parliament was a forum for 'discussion', which he understood to be 'an exchange of opinion that is governed by the purpose of persuading one's opponent through argument of the truth or justice ... or allowing oneself to be persuaded', coupled with a 'disinterrestedness' consisting of 'freedom from selfish interests'.[18] Political parties, built around sectional interests, had converted parliamentary decision-making into 'an object of spoils and compromise for the parties and their followers'.[19] The rise of political parties had shifted effective decision-making authority away from parliament to '[s]mall committees of parties or of party coalitions' who 'make their decisions behind closed doors', replicating 'the secret politics of princes' to which parliamentarism was a response.[20] Schmitt's views were held across the political spectrum; arguably German democrats were even more critical of political parties in the face of the inability of parties to stem the Nazi rise to power.

During the Weimar period, Hans Kelsen was a lone voice defending the essential role of political parties to modern parliamentary democracy, in *On the Essence and Value of Democracy*.[21] For Kelsen, political parties serve a number of important functions: they '*unite* the like-minded to ensure their influence in shaping public affairs' because 'the isolated individual has no real political existence whatsoever, because he can gain no actual influence on forming the will of the state'[22] – i.e. interest aggregation; they

[17] C Schmitt, *The Crisis of Parliamentary Democracy* (MIT Press, Cambridge, MA, 1985).
[18] Ibid 5.
[19] Ibid.
[20] Ibid 49–50.
[21] H Kelsen, 'On the Essence and Value of Democracy' in AJ Jacobson and B Schlink (eds), *Weimar: A Jurisprudence of Crisis* (University of California Press, Berkeley, CA, 2001) 84. For a helpful discussion of Kelsen's views, see Y Mersel, 'Hans Kelsen and Political Parties' (2006) 39 Israel Law Review 158, 160–5.
[22] Ibid 92 (original emphasis).

create 'the organizational conditions' for reaching a 'common will' which is 'a compromise among opposing interests' – i.e., facilitating political negotiation; they check the 'the ideal of a collective interest above and beyond group interests and thus "supra-partisan"' which is no more than a disguised attempt to serve 'the interests of a dominant group' – i.e., checking tyranny.[23] He concluded it was imperative 'to anchor political parties *in the constitution* and give legal form de facto to what they have long since become: organs forming the will of the state' – i.e., '[a] democracy is necessarily and unavoidably a *party state*'.[24] By suggesting that parties should have some degree of institutional autonomy from voters and individual politicians, the secret reports went even further than Kelsen; while Kelsen appeared to conceptualise parties as agents of individuals and the social groups to which they belonged, the theorists suggested that parties were independent entities in and of themselves – a truly radical position indeed. This raised in acute form the question of internal party democracy, which Kelsen was alert to.[25]

A second important idea concerns the non-state, institutional support for parties. An important issue high on the agenda for the Allied Military Government was the fate of the German cartels. Germany had a business culture that encouraged industrial combinations (which had vertical and horizontal dimensions) long before the Nazi regime, which was facilitated by a lack of antitrust regulation. These cartels were important interlocutors of the SPD in the early post-Imperial period, and continued to consolidate and expand during the Weimar era. Under Nazi rule, the cartels became instruments of state policy to facilitate war production; the regime consolidated them, established compulsory membership, and delegated authority to cartels to regulate the economy. Indeed, many leaders of cartels became Nazi party members, fusing political with economic power. The reports advocate a Nazi purge that would be wide and deep – and on this logic, it should have extended to the cartels.

But Neumann categorically rejected this approach in 'German Cartels and Cartel-Like Organizations' (Ch 17, July 1944). His reasoning was that the 'political power of industrialists resides essentially in their wealth and control of large corporations', such that 'any program to eliminate the fundamental economic foundations of German aggression would involve profound changes in the entire structure of individual and corporate property in Germany' (281). The constitutional argument is that Neumann

[23] Ibid 92, 93.

[24] Ibid 92 (original emphases).

[25] Ibid 94 ('Anchoring political parties in the constitution also makes it possible to democratize the formation of the will of the community *within this sphere*.') (original emphasis).

foresaw large industry as a constituent social group of a post-war constitutional order, and that its wealth was a source of economic and political power – in a way that corresponded to how industrial labour was an economic and political asset for a revived SPD. Protecting and safeguarding big industry's property rights from the outset, as a baseline for a new German regime, the military authorities would increase the likelihood that a new right wing party would participate in a new constitutional order to protect those interests. Political contestation would be bounded by the underlying political economy, including capitalist democracy, whose core elements would be protected in the constitution.

What is conspicuously absent from the theorists' vision for post-War Germany is any notion of the power of judicial review. Yet the importance of courts to the success of democratic reconstruction was a central preoccupation of the secret reports, and indeed, were a key reason why the theorists recommend a comprehensive process for vetting the entire German judiciary. So what explains the omission of judicial review, alongside a commitment to constitutionalism and a frank recognition of the centrality of courts to a constitutional democracy? Part of the answer may lie in the fact that the secret reports were written by social democrats, living in the United States after the Court-packing crisis and the demise of the *Lochner* era. For constitutional scholars committed to the regulatory, redistributive state, the conflict between the political branches and the Court over the constitutionality of the New Deal shattered their faith in judicial review. Leftists across the world shared the scepticism of the left in the United States toward judicial review – including, in all likelihood, the theorists, given their support for the SPD.

So the challenge was to conceptualise a kind of constitutionalism and judicial review that would avoid the risks of *Lochner*. One answer would be a constitutionalism enforced *without* judicial review – that is, a system of constitutional *self*-enforcement. But another would be a much more limited role for judicial review, on the Kelsenian model – *a priori*, abstract, lodged in a specialist constitutional court, and capable of being triggered by different constitutional institutions (e.g. the *Länder*) that might be under the control of a political party in opposition nationally, or by opposition members of the legislature, in order to safeguard their constitutional protections. Judicial review in the American model, which gives ordinary citizens direct access to the courts to protect their rights, would be excluded.

III. Conclusion

In *Political Liberalism*, John Rawls distinguishes between two grounds of stability for a basic structure of political and economic institutions: a *modus*

vivendi and an overlapping consensus.[26] A *modus vivendi* arises from a balance of interests among competing social groups; it is contingent and, for that reason, fragile. A shift in the assets and interests of contending forces may destabilise a *modus vivendi* and therefore bring down the basic structure. An overlapping consensus, by contrast, produces political stability through a shared consensus around a public set of justifications for the basic structure – that is, a public constitutional culture – that becomes internally anchored among members of heterogeneous social groups. Political stability is anchored in the right reasons, which Rawls argues is a more resilient foundation for a basic structure than a contingent and potentially shifting calculus of self-interest.

The theory of constitutional stability offered by Kirchheimer, Marcuse and Neumann offers an account of how a *modus vivendi* can serve *as the foundation for an overlapping consensus*, and the role of constitutions in that process. The key is constitutional design. Constitutional design creates a framework for bounded partisan pluralist contestation that is nested within the underlying political economy, within which the major social groups engage in political conflict and compete for power according to the rules and under the institutions of a constitutional order, because it is in their mutual advantage to do so. Kirchheimer explained how the shift from *modus vivendi* to overlapping consensus might occur on the eve of his exile from Germany and the collapse of Weimar:[27]

> Every social system possesses a need for a certain legitimization and strives … to transform itself from a set of factual relations of power into a cosmos of acquired rights. … the legitimation of the given system of social power is achieved through the forms of the existing legal order.

For Kirchheimer, through iterative political interaction, over time, of living under and managing and settling political disagreement through a constitutional regime, a public constitutional culture can emerge from this shared practice, that both explains and justifies the constitutional framework within which it occurs. This is how the 'existing legal order' – of which the central component must be its constitution – begins as a system of 'factual relations of power' and transforms into a 'cosmos of acquired rights'.[28]

Weingast has argued more recently, in parallel fashion, that rational calculation can give rise to common values, or even 'veneration' and

[26] J Rawls, *Political Liberalism* (Columbia University Press, New York, NY, 1993).

[27] O Kirchheimer, 'Legality and Legitimacy' (1932) 9 *Die Gesellschaft* 8–20, in W Scheuerman (ed), *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann & Otto Kirchheimer* (University of California Press, Berkeley, CA, 1996) 44, 44.

[28] For a similar argument, see F Almeida, 'The Emergence of Constitutionalism as an Evolutionary Adaptation' (2014) 13 *Cardozo Public Law & Policy Journal* 1.

is therefore also a characteristic of a regime of constitutional self-enforcement.[29] On Weingast's view, however, 'democratic stability rarely arises from veneration, however, because veneration is not antecedent to democracy's consolidation but is a product of it'; self-enforcement, on his account, 'roots democratic stability in rational calculation'.[30] I think Kirchheimer would disagree with Weingast – that is, he would view the 'cosmos of acquired rights' as an additional source of ballast in the vessel of constitutional democracy. Nonetheless, he would likely concede – as would I – that veneration can only do so much to offset rational calculation. In other words, while an overlapping consensus enhances constitutional stability, a modus vivendi is a *sine qua non*.

Weingast introduces the concept of the constitution as a 'focal point' that captures it how it can coordinate elite and mass expectations and behaviour in a system of self-enforcement – even without judicial review. In their own theory of self-enforcement, I think that Kirchheimer, Marcuse and Neumann would imagine constitutions as focal points in two senses, each corresponding to a different source of constitutional stability. A constitution can be an *instrumental* focal point by providing a public framework for political decision-making that can shape expectations, behaviour, and assessments of behaviour. But a constitution can also be an *expressive* focal point by providing the raw material for the creation of a public culture – perhaps even to create an after-the-fact narrative of a 'constitutional moment' that elides over the interest-driven nature of constitutional bargaining. This is the beginnings of an answer to comparative politics about the role of constitutions in resisting democratic backsliding.

The secret reports suggest that we should rethink how we talk about the Basic Law in the comparative constitutional imagination. The Basic Law is the world's archetypical, and arguably the most successful post-authoritarian constitution. In an era of global threats to constitutional democracy, it has never been more important to learn from the Basic Law and the Weimar Republic whose fall it was a response to. So what lessons can we draw?

One set of lessons – the dominant narrative – sounds in liberal legalism. The Basic Law is the constitution of absolute values, unamendable, and eternal. Its foundation is Article 1, which entrenches the right to dignity as absolute. These rights are subject to strong-form judicial review by a newly

[29] B Weingast, 'The Political Foundations of Democracy and the Rule of Law' (1997) 91 *American Political Science Review* 245, 262.

[30] Ibid.

created, independent, specialist Constitutional Court. The Basic Law entrenches the basic structure the German constitutional order – as a rights-protecting, democratic, federal republic committed to the rule of law – as beyond the scope of constitutional amendment (Article 79(3)). It views politics negatively, as a potential threat to these fundamental values, and creates mechanisms in the name of militant democracy to hem in politics. Article 18 empowers the Constitutional Court to oversee the forfeiture by individuals of their political rights if they abuse them 'to combat the free democratic basic order'. Article 21 authorises the Court to declare political parties unconstitutional if 'by reason of their aims or the behavior of their adherents' they 'seek to undermine or abolish the free democratic basic order'. This vision of the Basic Law is a decisive repudiation of the social conflict and chaos of Weimar, and the catastrophic, institutionalised abuses of the most basic human rights at a massive scale of the Nazi era. Constitutional right prevails over political power.

But the secret reports suggest a counter-narrative of the Basic Law of urgent relevance to the current age. A constitution rests on a political foundation of power-relations, and provides the infrastructure for a politics of bounded pluralistic partisan contestation. Political parties that track the principal social and economic cleavages are at the centre of this constitutional order and central to ensuring that Weimar does not happen again. Article 20's reference to Germany as a 'democratic and social' state captures this idea. The Basic Law legitimises political parties, and defines a central task as the design of rules and institutions governing political parties and their role in the political process. The goal of this system is to become self-enforcing, with judicial review limited to instances where opposition parties and constitutional institutions under opposition control can invoke the court to protect their power and prerogatives. Constitutional stability is strengthened and sustained by political contestation that it enables, not weakened by it. But constitutions are contingent, not eternal. Militant democracy – as entrenched in Articles 18 and 21 – defines the boundaries of political contestation, by excluding individuals and parties who are presumptive defectors from the framework of political contestation, because their goals and/or behaviour poses a threat to constitutional democracy, or their lack of an internal democratic structure predisposes them to imagine public power organised in a similarly undemocratic fashion. The legislative process includes special protections for the opposition – for example, by granting one-quarter of the members of the Bundestag the power to establish a committee of inquiry (Article 44; also see Article 45a) or the power to challenge the constitutionality of any law before the Constitutional Court (Article 93(2)); and by providing that the Joint Committee which considers government plans for a state of defence to

have proportionate representation from political parties (Article 53a(1)). The entrenchment of human rights and democracy through an eternity clause, but one which is directed against and restricted to the return of fascism, is part of this counter-narrative. This counter-narrative rejects the scepticism of political parties in the Weimar Republic. Rather than seeing political parties as undermining parliament as a forum for principled decision-making above politics, it sees them as constituent elements of the constitutional order. It also rejects the populism of the Nazi era, which does not admit the very idea of a legitimate opposition and takes a decidedly anti-pluralist stance toward political life; opposition parties are no longer Schmittean enemies. This reading of the Basic Law should prompt historical research into the links between members of the Frankfurt school and the constitutional and political theorists of the left in 1950s, such as Wolfgang Abendroth.

These may seem to be paradoxical lessons to draw from the breakdown of Weimar, which fell victim to feckless political parties engaged in partisan struggle, descending into paralysis and breakdown, and from the Nazi era, which was characterised by the abuse of absolute power in the service of unspeakable evil. But instead of running away from political power, constitutions must firmly acknowledge that they rest on a political foundation of instrumental need and must place political parties at their very core. Bounded pluralist partisan contestation is not the negation of constitutional essentials and a regime of fundamental rights. Rather, it lies at their very foundation.

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