Resisting Democratic Backsliding:
An Essay on Weimar, Self-Enforcing Constitutions, and the Frankfurt School

Sujit Choudhry
University of California, Berkeley & Center for Constitutional Transitions

FIRST DRAFT: DO NOT CIRCULATE WITHOUT PERMISSION

A. Introduction

What, if anything, can constitutions do to resist democratic backsliding? This has emerged as one of the central issues for the fate of constitutional democracy in the first half of the 21st century. In a diverse and growing set of countries, including Hungary, India, Poland, South Africa, and the United States, this question has surged onto the constitutional agenda. These cases straddle geographic, cultural, and economic divides. What is particularly striking is that democratic backsliding is now a problem that encompasses both consolidated and unconsolidated democracies. 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. 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 in two senses. It is comparative cross-jurisdictionally. The most dramatic implication of this argumentative turn is the apparent death of American exceptionalism, a development with potentially far-reaching implications for the future intellectual agenda of comparative constitutional law and politics. But it is also comparative historically. To be sure, there is a long tradition of historically oriented, comparative scholarship on both democratic transitions and democratic

breakdown, pioneered by Juan Linz and Al Stepan.[1] Historical examples have re-emerged as important elements not only of academic analysis, but also of constitutional practice. Among these examples, none is more important than the collapse of Weimar.

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".[2] 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:[3]

> Democracy sharpened the dagger by which it was stabbed in the back … By the generous and lenient Weimar republic, 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. 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 democratization 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

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[1] Juan Linz & Alfred Stepan, eds., *The Breakdown of Democratic Regimes* (Baltimore: Johns Hopkins University Press, 1978.
[2] Karl Lowenstein, "Autocracy Versus Democracy in Contemporary Europe, I" (1935) 29 American Political Science Review 571 at 579.
[3] Ibid. at 580.

in the *New York Times*, for example, Steven Levitsky & 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 "[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."[4] 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 essay, I suggest that the outlines of that answer can be found in the decades-old work of a set of German émigré scholars produced during and in the aftermath of the Second World War: Frank Neumann, Herbert Marcuse, and Otto Kirchheimer. Neumann, Marcuse, and Kirchheimer were prominent members of the Frankfurt School, who went into exile in the 1930's in the United States. They were major legal and political theorists; Neumann and Kirchheimer were also lawyers who had practiced 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 produced a series of classified reports, in English, that sought to explain

[4] Steven Levitsky & Daniel Ziblatt, "Is Donald Trump a Threat to Democracy?", *New York Times*, December 16, 2016.

the breakdown of Weimar and the nature of the Nazi regime, and offered highly detailed advice on a broad range of legal issues in a post-War Germany. The reports were published as a collection for the first time in 2013, seven decades after the first one had been written.[5]

The reports provide a window into how members of the Frankfurt School deployed their analytical and theoretical prowess in the service not just of scholarly diagnosis but detailed policy prescription, in which law and legal institutions figured centrally. They have historical significance. But they also present a puzzle with great practical, contemporary political salience. These theorists 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. They were determined to use the constitution as a tool 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?

The theorists deployed the tools of liberal legalism to rescue German legal culture from the grip of a quiescence and complicity that they felt had facilitated the Nazi rise to power, and to inoculate it from future threats. But the theorists also rooted their analysis in an understanding of the political and economic foundations of constitutions. Their central claim is that constitutional

[5] Franz Neumann, Herbert Marcuse, Otto Kirchheimer, *Secret Reports on Nazi Germany: The Frankfurt School Contribution to the War Effort* (Princeton: Princeton University PRess, 2013), ed. Rafaele Laudani.

stability is rooted in the creation of a framework for bounded partisan contestation among political parties that track the principal social and economic cleavages, and which is rooted within, and does not seek to overthrow, the underlying political economy. This is a version of a theory that understands that constitutional stability as flowing from its "self-enforcing" character, because political opponents have more to gain from cooperating and competing within the constitutional order than in bringing it down.

B. 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 organizes 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 reports range of a broad array of topics under each of these headings, including economic policy (inflation, centralized 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), war crimes trials (the Nazi Master Plan, the

Leadership principle and criminal responsibility). As the reports move forward through time, it becomes likely, and then almost certain, that the Allies will defeat the Nazis, and the reports turn to concrete plans for the projected American military occupation. They are written for policy makers, 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.

But notwithstanding their origins and audience, the reports are an exercise in applied legal, political and social theory. The 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. The 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 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. 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 a personnel file and a public hearing, was a key recommendation. Courts

would be suspended in the interim. The 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 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 an entire 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 the report is 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 defenses 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 liberal legal knots created by this commitment to fighting institutionalized evil through liberal legalism. A fascinating example can be found in "Leadership Principle and Criminal Responsibility", a report 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. 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 reports illustrate, a traditional, liberal legalist framework on the problem of democratic backsliding has a particular analytical viewfinder that highlights certain issues, and cast 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 judicial cadre 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 idea that liberal rights and freedoms could be justifiably restricted by a constitutional democracy as a form of self-defence to protect itself from being captured through the rules and institutions of constitutional democracy by a political party determined to end democratic life. The reports devote considerable attention to this issue, illustrating the concrete impact of Lowenstein's academic arguments. Kirchheimer suggested in his report on the repeal of Nazi laws that prohibited political parties, freedom of association, freedom of assembly but at the same time to 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, requiring the close supervision of right wing parties and the banning of parties and other institutions dominated by former Nazis.

These measures are subject to the well-known objection from within the liberal legal framework that they are 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). A more serious concern is the one raised by Levitsky and Ziblatt, the "parchment barriers" objection to constitutional enforcement. At its core, it holds that the same policies 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 overwhelm them. 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; the power of appointment cannot anticipate and prevent every kind of abuse. Although the reports did not expressly acknowledge this problem directly, the theorists could not have been unaware of it, given the failure of constitutional 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 in the first place 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 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 reports organize 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 include 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 labor, working in the industrial economy. In the center of the political spectrum, the old middle classes and peasants, according to the theorists, 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 center consisted of "a Catholic integration of members of all social groups, holding the balance between Rights 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 Center, the Center 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 organizes 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 formalized through a pact with the Army to jointly combat the revolutionary left, and an agreement 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, that power, as had the power of the Weimar Republic that preceded it, 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 categorized 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 from 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 labor, 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 that "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 revolved around the two poles on the Rights 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 remerging" 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 and the stability of a constitutional order? This is a key question and a puzzling omission in the

reports. To supply the answer, we must look to back to 1933, to Kirchheimer's review of Carl Schmitt's *Legality and Legitimacy*.[6] 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 take away 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 (70). 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" (70). 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" (70).

[6] Otto Kirchheimer, "Remarks on Carl Schmitt's *Legality and Legitimacy*" (1933) 68 Archiv für Sozialwissenschaft und Sozialpolitik.

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—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 issue, 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 materializing 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 incentivized 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. It would 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 organize 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 radicalization. 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.

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 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 labor was a political asset for a revived SPD.[7]

[7] Discuss Kirchheimer review of Schmitt?

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.

C. Conclusion

In the comparative constitutional imagination, the Basic Law is the world's archetypical, and most successful, post-authoritarian constitution. In an era of global threats to constitutional democracy, it has never been 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 sounds in liberal legalism. The Basic Law is the constitution of absolute values. Its keystone is Article 1, which entrenches the right to dignity as absolute and un-amendable. In parallel manner, it entrenches the fundamental characteristics of the Germany constitution – as a rights-protecting, democratic, federal republic committed to the rule of law. It is a document that speaks clearly in the language of fundamental, enduring, unalterable principle that is a decisive repudiation of the social conflict and chaos of Weimar, and catastrophe of the Nazi era. Constitutional right prevails over political power.

But the wartime reports of Kirchheimer, Marcuse, and Neumann suggest another strain of German constitutional thought, in which political power precedes rights. A constitutional order of rights protection rests on a political foundation of power-relations, organized around a system of political

contestation, in which the principal actors are political parties that track the principal social cleavages of a society. This may seem to be a paradoxical lesson to draw from the breakdown of Weimar, which was the victim of feckless political parties engaged in partisan struggle, descending into paralysis and breakdown, leading to the abuse of absolute power in the service of unspeakable evil. But instead of running away from political power, constitutions must acknowledge that they rest on a political foundation of instrumental need, and that partisan struggle is not the negation of constitutional fundamentals and a regime of rights, but lies at their very foundation.