THE ROLE OF INSTITUTIONAL DESIGN IN PREVENTING CONSTITUTIONAL DECLINE: THE RADICALLY DIFFERENT APPROACHES IN GERMANY AND FRANCE

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ABSTRACT

The German and the French constitutions provide different lessons when it comes to the importance of institutional design in preventing the slide of a constitutional democracy toward authoritarianism or even totalitarianism. Whereas the German Basic Law adopted after World War II contains an abundance of constitutional safeguards designed to protect Germany against the recurrence of totalitarian rule in response to the experience of the demise of the Weimar Republic in the interwar period, such safeguards are almost completely absent in the French tradition of republican constitutionalism, which since the establishment of the Third Republic has often been threatened by, but never succumbed to, the enemies of republicanism. The success and stability of German postwar constitutional democracy, on the other hand, are due to a large variety of factors, of which the existence of institutional safeguards against authoritarianism in the Basic Law is only one factor, and quite plausibly not the most important one.

KEYWORDS: *constitutional democracy, militant democracy, emergency powers, constitutional court, republican tradition*

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I. INTRODUCTION

The various examples of a gradual slide toward authoritarianism in a number of democracies in Europe and elsewhere in recent years raises several questions: How can such developments be prevented, and what role does constitutional design play in forestalling processes of institutional degradation? On the one hand, it has been claimed that "the question of how constitutional design might generate a measure of insulation against democratic erosion has not been investigated deeply before" (Ginsburg and Huq 2018, 170). On the other hand, the concern about the threat posed by gradual decline to a constitutional order based on the twin principles of individual liberty and collective self-determination has been present ever since modern constitutionalism originated in the debates of the Philadelphia Convention and the commentary on its work in *The Federalist Papers*. The framers of the US Constitution had closely studied the classics and notably the reasons for the decline of the Greek and Roman Republics and were convinced that an unbalanced institutional system would inevitably degenerate into tyranny or mob rule. To prevent this from happening, the interior structure of the government had to be carefully designed so that its "constituents parts may, by their mutual relations, be the means of keeping each other in their proper places."[2]

In the twentieth century, these concerns resurfaced when the democracies that had emerged from the ruins of World War I in Central and Eastern Europe were subsequently submerged by the rise of authoritarian and totalitarian movements and ideologies, bringing fascism into power first in Italy and then in Germany. How to prevent the repetition of such events was upmost on the mind of constitutional drafters following World War II, and nowhere more so than in West Germany. In fact, the Basic Law of the Federal Republic of Germany is a complex web of institutions and procedures designed to protect the democratic constitutional order against any attempt to replace it with another authoritarian or totalitarian regime. As postwar Germany developed into a stable constitutional democracy, its example influenced other renascent democracies, first in the Iberian peninsula, after the end of the Cold War also in Central and Eastern Europe and in other regions of the world. But whereas these constitutions adopted some elements of the German model, no other contemporary constitution has taken a similarly comprehensive approach in addressing the root causes of potential democratic decline.

Within the precautions taken by the Basic Law to prevent a recurrence of the events that led to the downfall of the Weimar Republic, two broad

2. *The Federalist Papers*, 1788, ch. 51.

categories of measures can be distinguished. The first group comprises those instruments and proceedings that are designed to prevent authoritarian and totalitarian political forces from winning power by banning them from political life and democratic competition altogether. These instruments can be grouped under the heading "militant democracy," a concept that stresses the need for liberal democracies to actively defend themselves—including through legal/constitutional procedures specifically designed for the purpose—against its enemies openly or implicitly seeking to subvert the liberal democratic order. They include the ban on extremist political parties, the dissolution of antidemocratic associations, and the forfeiture of fundamental rights of individuals who abuse these rights in order to fight against the democratic constitutional order (II. 1.). By contrast, the second group consists of measures to improve the design of institutions and create new ones to eliminate defects and shortcomings in the democratic functioning of the institutional system. In this regard also, the Basic Law has implemented far-reaching reforms in response to Weimar, from the introduction of enforceable limits to the constitutional amendment power to the highly restrictive regulation of emergency powers and the fundamental restructuring of the entire system of government, strengthening its parliamentary and judicial features (see II. 2.–5.).

Not all democracies, however, succumbed to the pressure of authoritarian or totalitarian movements in the twentieth century. Britain and France stand out as European countries that were able to keep their democratic systems basically intact for most of the century, with the exception of the occupation period following Germany's defeat of France in World War II (1940–1944). However, in marked contrast to Germany, the French postwar constitutions (1946 and 1958) did not very much concern themselves with elaborate safeguards against the risk of institutional degradation. Quite the contrary, the main impulse behind the 1958 constitution was the creation of an extremely powerful executive whose liberation from any genuine checks and balances would have been anathema to both the framers of the US Constitution and the drafters of the German Basic Law. Nevertheless, the Republican system of government not only survived under the 1958 constitution but also evolved in an increasingly liberal direction following de Gaulle's departure from power (see III.). The French experience thus tends to qualify the relevance of institutional design as a major instrument in preserving liberal democracy and to caution against hasty conclusions on the respective importance of legal and nonlegal factors for the strengthening of democratic resilience.

II. INSTITUTIONAL DESIGN IS KEY: THE EXAMPLE OF GERMANY'S POSTWAR DEMOCRACY

The constitution of the Federal Republic of Germany was originally seen as a provisional document for the reconstruction of German statehood in the three Western occupation zones following Germany's total military defeat at the end of World War II. However, before long it was regarded by Germans as a symbol as well as an indispensable guarantee of the flourishing pluralist democracy which developed in postwar Germany. It was not even to be abandoned when reunification with the German Democratic Republic following the end of the Cold War in 1990 seemed to offer a unique opportunity to replace the provisional Basic Law with a permanent constitution approved by a vote of the reunited German people. Instead, a number of amendments to the Basic Law were adopted to integrate the new east German states (*Länder*) into the existing constitutional structure of the Federal Republic and to remove from the constitutional text any references to the provisional character of the Basic Law. Despite a considerable number of constitutional amendments the fundamental structure of the Basic Law has thus remained largely unchanged since 1949.

The concern that was uppermost on the minds of the Parliamentary Council members who convened in Bonn in August 1948 to draft a fundamental law for the three Western occupation zones was to prevent the recurrence of the circumstances that had led to the collapse of the first German democracy fourteen years before, following a period of increasing contestation from both the right and the left of the political spectrum. Indeed, the attempt to prevent such catastrophic events from ever happening again permeates the whole document, in particular the sections and provisions specifically dealing with the defense against political extremism ("militant democracy") as well as the chapters on the protection of fundamental rights, the federal system, the institutions of federal government, and the strong position of the newly created Constitutional Court. In political practice, these different institutions and mechanisms have fared unevenly, with the devices expressly designed to fight political extremism receiving less attention as years passed and political life in the Federal Republic settled into a mode of democratic normality.

1. Militant Democracy: Its Main Constitutional Tools and Their Impact in Practice

The best-known elements of the constitutional framework designed to fend off authoritarian tendencies are the rules and mechanisms related to the concept of

militant democracy (*wehrhafte Demokratie*). Originally developed by the German political scientist Karl Löwenstein in direct response to the rise of fascism, which he had witnessed in Germany in the early 1930s (see Löwenstein 1937a, 417; 1937b, 638), the concept of militant democracy is based on the premise that democracies that care for self-preservation must adopt proactive measures in order to prevent the emotional and nonintellectual appeal of totalitarian ideologies from first subverting and eventually destroying the pluralist political order. Of these measures, the power to ban unconstitutional political parties has attracted the most attention. The Basic Law imposes a number of requirements on political parties to ensure that they play by the rules of the democratic game. Their internal organization must conform to democratic principles, and they must publicly account for the sources of their funding. According to Article 21(2), parties that by reason of their political program or the activities of their supporters seek to undermine or abolish the free democratic basic order of the Federal Republic are unconstitutional. In the *Socialist Reich Party Case* the Federal Constitutional Court defined the free democratic basic order as an order that, by excluding any arbitrary rule or rule by force, establishes a political rule based on popular self-determination and governed by law, in accordance with the will of the majority and the principles of liberty and equality. The fundamental principles of such order include as a minimum the respect of human dignity as protected by the Basic Law, especially of the right to life and to free development of one's personality, popular sovereignty, the separation of powers, the accountability of the government, the legality of the administration, the independence of the judiciary, and a multiparty system with equal opportunities for all parties and the right to establish and practice political opposition in accordance with the Constitution of the Federal Republic of Germany.

Political parties can be dissolved only on the basis of a declaration of unconstitutionality issued by the Federal Constitutional Court in a special procedure (see §§43–47 of Act of the Federal Constitutional Court, i.e., FCCA). Applications for a declaration of unconstitutionality may be filed only by the federal government, the Bundestag or the Bundesrat. In addition, the decision to ban a political party as unconstitutional requires a two-thirds majority in the panel (Senat)—that is, a concurring vote of six out of eight judges, in contrast to most other proceedings, where a simple majority of five votes is sufficient (§15(4) FCCA). These strict procedural requirements for the ban of political parties ensure that this drastic instrument is not used lightly or for improper motives (e.g., to stifle genuine party political competition or to suppress unorthodox political views). If a party is declared unconstitutional, it loses its capacity to operate lawfully within the political system.

In almost six decades Article 21(2) has been applied successfully only in two cases in the early 1950s, when memories of the capacity of extremist parties to wreak havoc on a liberal democracy were still fresh. The first case in 1952 concerned the prohibition of the Sozialistische Reichspartei, a successor party to the defunct NSDAP (*Socialist Reich Party Case*), and the second four years later the Communist Party of Germany (KPD), a sister party of the East German Socialist Unity Party (*Communist Party Case*). After more than a half century, an application to ban the right-wing Nationaldemokratische Partei Deutschlands (NPD) failed twice, first on procedural grounds (*NPD Party Ban Dismissal Case I*, 2003) and, in a second attempt, also on substantive grounds. While in the second proceedings the Federal Constitutional Court had no doubts that the NPD pursued anti-constitutional aims, it did not deem a ban of the party to be necessary and proportionate, as the party stood no chance of winning power at the federal or state level in the foreseeable future, thus lacking any realistic perspective to put its anti-constitutional objectives into practice (*NPD Party Ban Dismissal Case II,* 2017).

While it would be premature to assume that the power to ban anticonstitutional political parties provided for in Article 21 of the Basic Law has lost its relevance altogether, its application by the German Constitutional Court has become noticeably more relaxed since the 1950s. Neither the SRP nor the KPD had any realistic prospect of coming to power at the time. But the judges did not attach much importance to this consideration back then, as other factors (the still fresh memories of the end of the Weimar Republic and the widespread fear of Communist subversion at the height of the Cold War) weighed more heavily on their minds when they assessed the threat emanating from the SRP and KPD to the fledgling democratic order of the Basic Law.

The constitutional ban on undemocratic political parties is only one, albeit the most important, of several devices expressly designed to protect the liberal democracy established by the Basic Law against its internal enemies and thus to prevent a repetition of the events that had provoked the downfall of the Weimar Republic. The other procedures include the forfeiture of certain fundamental rights of persons who abuse them to combat the free democratic order (Article 18) and the prohibition of associations whose activities are directed against the constitutional order (Article 9(2)). Like the dissolution of political parties, the forfeiture of the civil and political rights listed in Article 18 of individuals who abuse these rights to fight against the liberal democratic constitutional order can be pronounced only by the Federal Constitutional Court, which does so in a special procedure that confers on the individuals concerned privileges similar to those enjoyed by political parties, in particular the requirement of a two-thirds majority in the panel competent to order

the forfeiture (§15(4) FCCA). So far, the competent authorities have made very few applications for the pronouncement of such forfeiture. Those applications that have been brought have all been unsuccessful.[3]

The Basic Law's mechanism to ban unconstitutional parties has inspired drafters of constitutions in other countries. Without doubt its biggest impact was on the drafters of the Turkish Constitution of 1982. Article 68 provides that the statutes and programs of political parties, as well as their activities, must not be in conflict with the independence of the state, its indivisible integrity as a territory, and its sovereignty as a nation. Nor may they be in conflict with human rights, the principles of equality and rule of law, and the principles of the democratic and secular republic. They may not aim to protect or establish class or group dictatorship or dictatorship of any kind, nor incite citizens to crime. If a political party violates these principles through its activities, it can be dissolved following the Turkish Constitutional Court's decision to this effect (see Article 68(4) of the Turkish Constitution).

In the past the Turkish Constitutional Court has made extensive, if not excessive, use of this prerogative. In the two decades following the return to democratic party politics in 1983, the Turkish Constitutional Court closed down eighteen political parties, rejecting only thirteen out of a total of thirty-two applications, turning Turkey into an outlier among the member states of the Council of Europe (Shambayati 2008, 113). While the Turkish experience thus demonstrates the risk of an abuse of this instrument, it also cautions against the argument that it is useless and does not contribute anything substantial to the defense of democracy. The AKP was also targeted by the procedure before its leadership took an authoritarian turn following the failed coup of 2016. The proceedings were justified on the grounds that the AKP had become the focal point of activities directed against the founding principles of the Federal Republic, and in particular against the principle of secularism. Although the application ultimately failed, this was only because the required qualified majority of seven (out of eleven) judges had not been reached: only six members of the Court voted in favor of a total ban, falling just one vote short of the necessary qualified majority. However, ten out of the eleven judges in the *AKP Case* found that the party had exploited religious feelings for the sake of political gain and had become the focus of anti-republican and anti-secularist activities. The Court decided to deprive the AKP of half its public funding for one

3. Only four applications have been brought, the last two in 1992. All of them were dismissed by the Constitutional Court, the two most recent ones as manifestly unfounded, without the Court bothering to give reasons (Article 18(12); see Brenner 2018).

year, a sanction provided for in the Constitution for lesser violations of the constitutional limits on party political activity.

2. Limiting Constitutional Revisions: Enforcing the "Eternity Clause"

Another device against the slide toward authoritarianism is the entrenchment of core constitutional principles and values against encroachment through subsequent revision. The safeguard may be of a procedural and relative nature, that is, requiring qualified parliamentary majorities for the enactment of a constitutional amendment. or it may be substantive and absolute, for example, by exempting certain core elements of the Constitution from any constitutional revision, with or without qualified majority. The Constitution of the Weimar Republic had not formulated any substantive limits for the exercise of the constitutional amending power, thus paving the way for the transformation of the democratic order of the Weimar Republic into the *Führerstaat* by way of constitutional amendment (Schneider 1968, 427). In response, the Basic Law limits the amending power of the legislative assemblies in both procedural and substantive ways, with the aim of preventing a piecemeal erosion of the substance of the free democratic order established by the Basic Law.[4] An amendment to the Basic Law is valid only if it is adopted by two-thirds of the votes in the Bundestag and the Bundesrat (Article 79(2) of the Basic Law) and if it respects the substantive limitations of the amending power defined in Article 79(3): the division of the Federation into Länder, their participation in principle in the legislative process, and the principles laid down in Articles 1 and 20. The latter include the inviolability of human dignity affirmed in Article 1(1), which principle, given its prominence here in the first sentence of the operative part of the Basic Law, constitutes the cornerstone of the whole constitution. The principles enshrined in Article 20, in contrast, define the essential characteristics of the state structure, namely, its democratic and social character and the rule of law.

In a series of cases since the late 1960s, the Federal Constitutional Court was petitioned to pronounce on the constitutionality of constitutional amending laws and the scope of the limitation clause. In none of these cases did the Court actually find a violation of Article 79(3), although the reforms submitted to its scrutiny included some far-reaching changes to key constitutional rights, such as the right

4. In the *Lisbon Treaty Case* (2010) the Federal Constitutional Court described the function of Article 79(3) of the Basic Law in the following terms: "Through what is known as the eternity guarantee, the Basic Law reacts . . . to the historical experience of a creeping or abrupt erosion of the liberal substance of a democratic fundamental order."

to secrecy of telecommunications (Article 10, *Eavesdropping Case*) and the right to asylum (Article 16, *Asylum Case*). More recently, Article 79(3) has become a key issue in the debate about constitutional limits to further European integration, giving the Court in the *Lisbon Treaty Case* the opportunity to rule that a transformation of the European Union into a truly federal state would have a direct impact on this "basic structure" and could thus not be validly ratified in the parliamentary procedure envisaged in Article 79, but only by way of constitutional referendum provided for in Article 146 for the adoption of a new constitution. But so far, the Court has always held that the powers gradually transferred to EU institutions over the last decades, and most recently in the Lisbon Treaty, have not deprived the German people of meaningful democratic self-determination to such an extent that the principle of democracy enshrined in Article 20 is affected.

These decisions of the Federal Constitutional Court can be seen as evidence that the substantive limits on constitutional revisions established by Article 79(3) are ultimately of limited practical effect. Numerous constitutional amendments to the Basic Law have been adopted since 1949, which make it one of the most frequently amended constitutions in Europe.[5] Among political analysts, views on the cumulative impact these amendments have had on the liberal substance of the German constitutional system have varied wildly, ranging from the assessment that these accumulated changes have left the core of the Basic Law untouched to the damning verdict that they have "systematically hollowed out" the constitution's democratic content, with the latter view having become less common since the 1980s (Busch 2000, 41). If the constitutional limits, in the view of the Constitutional Court, have always been respected thus far, it is because the legislative assemblies have been dominated by democratic political parties, which are seen as less prone to pushing constitutional amendments designed to undermine key principles of the liberal, democratic order. Once illiberal parties determined to do just that have the required strength in the Bundestag and the Bundesrat, however, the Constitutional Court's intervention, through the blocking of unconstitutional amendments, may come too late and have little effect.

Few other constitutions provide for express substantive limits to the constitutional amending powers of the legislature, and where they do, the list of unamendable principles and provisions is not remotely as comprehensive as that of Article 79(3). The French Constitution merely states that the Republican form of government may not be the object of any constitutional amendment (see Article

5. Among the OECD countries, Germany has one of the highest rates of constitutional change (see Busch 2000, 41).

89(5) of the Basic Law and section III of this paper). A similar clause is contained in Article 139 of the Italian Constitution.[6] In contrast, Article 288 of the Portuguese Constitution contains a highly detailed list of the principles that all laws revising the Constitution must safeguard. However, so far there is little evidence that such substantive limits have indeed been effective in stopping a slide toward authoritarianism.[7]

3. The Ghost of Article 48: Emergency Powers in the Basic Law

The Basic Law has also taken great care in carefully regulating emergency powers that could be used by an executive with authoritarian leanings to subvert the constitutional order, as had happened with the powers of the Reichspräsident under Article 48 of the Weimar Constitution. Presidential powers were used by successive governments since 1930 to circumvent the parliamentary procedures prescribed in the Constitution, thus replacing parliamentary government by largely unchecked executive rule even before Hitler came to power (Friedrich 1933, 196).[8]

In its original version the Basic Law, with the three West German occupation zones still subject to Allied control, did not include legal rules dealing with emergency powers. Not until 1960 did the government produce its first draft for the introduction of emergency provisions into the Basic Law.[9] The draft did not distinguish between different types of emergency, in particular internal disturbances of public security and external crises, but provided for a concentration of

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6. See the complete list of existing explicit substantive limitation clauses on constitutional amendments in Roznai (2017, 235).

7. See Venice Commission, "Report on Constitutional Amendment of december 11–12, 2009," CdL-deM (2010)001, para. 228: "[e]ven in those countries which do from time to time conduct judicial review of constitutional amendments, these are very rarely if at all set aside as breaching unamendable principles or provisions." The Commission arrives at a skeptical overall conclusion with regard to the usefulness of substantive limits to constitutional amendments (para. 219): "All historical evidence indicate that for constitutions that function over any period of time, absolute entrenchment will never in practice be absolute. If circumstances change enough, or if the political pressure gets too strong, then even 'unamendable' rules will be changed—one way or the other. In such situations, constitutional unamendability may even have the negative effect of unduly prolonging conflicts and thereby building up pressure and increasing the costs to society of eventually necessary reform."

8. Article 48(2) of the Weimar Constitution provided that "[i]f public security and order are seriously disturbed or endangered within the German Reich, the President of the Reich may take measures necessary for their restoration, intervening if need be with the assistance of the armed forces. For this purpose he may suspend for a while, in whole or in part, the fundamental rights provided in Articles 114, 115, 117, 118, 123, 124, and 153."

9. See Bundestags-Drucksache III/1800.

emergency powers in the hands of the government, including the power to enact emergency legislation and to restrict fundamental political rights by decree. This initial draft met with considerable resistance from all political groups in parliament, including the majority parties. A second draft abandoned the concept of a uniform regulation of emergencies, introducing a basic distinction between internal and external emergencies, but it still stuck to the idea that special governmental powers to issue emergency decrees were central to any successful attempt to overcome a grave political or military crisis.[10] In the parliamentary discussions, legislators developed the idea of a special parliamentary committee that would take over the functions of the Bundestag if the latter were no longer able to convene and deliberate. The new institution was designed to maintain a meaningful separation of powers even in emergency situations by fully involving the parliamentary committee in all decisions, including determining whether the conditions for an emergency were met, thereby eliminating the need to grant the government broad powers to legislate by decree.[11]

Nevertheless, the final parliamentary discussions in the summer of 1968 took place against the backdrop of a heated public debate and sometimes violent street protests against the adoption of the emergency provisions. No other constitutional reform in the history of the Federal Republic of Germany provoked such an intense and controversial public discussion, stoked by fears that *any* constitutional regulation and thus legitimation of emergency powers would facilitate a *coup d'état* or a development similar to that which had led to the destruction of the Weimar Republic (Ipsen 1987, 134; see also Oberreuter 1978, 225–34). In response, any provisions for the suspension of political rights like freedom of speech and assembly in times of crisis were dropped and the role of the emergency parliament was further strengthened with regard to the declaration and the termination of the state of defense.[12]

As a result, the provisions finally incorporated in the Basic Law allow for the use of emergency powers only in very limited circumstances, in conditions strictly defined in the Constitution itself, and subject to parliamentary control. The provisions regulating the use of emergency powers are governed throughout by the

10. See Second Governmental Draft of a constitutional amendment containing emergency provisions, Bundestags-Drucksache IV/891.

11. See "Report of the Legal Affairs Committee on the Governmental Draft" for a constitutional amendment containing emergency provisions, Bundestags-Drucksache IV/3494.

12. The public protests subsided as quickly as they had come once the constitutional amendments had been voted by the necessary qualified majorities in the Bundestag and the Bundesrat. The provisions regulating emergencies in the Basic Law count today among the most neglected parts of the German Constitution.

principle of proportionality. They try to keep to the absolute minimum the modifications of the normal constitutional order necessary in emergency conditions.[13] In other words, the constitutional regulation of emergencies in the Basic Law is an emphatic rejection of the model followed by the (in)famous Article 48(2) of the Weimar Constitution, with its emphasis on the executive's broad emergency powers, including the power of the Reichspräsident to suspend key civil and political rights. The Basic Law denies the executive any special regulatory powers in emergency situations, thus obliging the government to turn to the Bundestag (or, in extreme circumstances, to the Joint Parliamentary Committee acting in its place) for legislative support of the emergency measures it deems necessary. The role of the judiciary, and particularly that of the Federal Constitutional Court, is preserved in full, and only the most cautious adjustments are made to the provisions on fundamental rights protection.

On the flipside, the constitutional provisions on emergencies are rigid, lacking the flexibility that might very well be needed in times of a real emergency. One of the main criticisms is therefore that the constitutional rules ignore the challenges most likely to arise in an emergency instead of tackling them with rules flexible enough to accommodate unforeseen developments and problems. They are, it is argued, too closely modeled on the rules applying under conditions of normality to be of any use in genuine emergencies (Böckenförde 1978, 1881). So far, this proposition has not been put to a test, as a situation that would trigger the application of the constitutional emergency rules has not yet arisen.

Within the European Union, only Sweden provides in its Basic Laws for a similarly detailed set of rules concerning the state of emergency,[14] although it has to be noted that more recently the framers of constitutional texts, especially in countries with fresh memories of a dictatorial past like Spain, Portugal, and Greece, have shown an increasing willingness to address the problem and to include a certain number of basic safeguards against the abuse of emergency powers.[15] However, none of these constitutions quite matches the level of complexity and technical perfection of the Basic Law when it comes to the regulation of different types of

13. Ipsen, "State of Emergency," 136n18.

14. Chapter 10 of the Swedish Instrument of Government.

15. All three constitutions contain a rather detailed set of provisions on the declaration and the legal consequences of the state of siege and the state of emergency (see Art. 48 of the Greek Constitution; Arts. 19, 134d, 135c, and 138 of the Portuguese Constitution; and Arts. 55 and 116 of the Spanish Constitution). More elaborate rules on the state of emergency and state of war have also been included in some of the recently adopted or amended Eastern European constitutions (see esp. Arts. 19A–e of the Hungarian Constitution and Arts. 228 to 234 of the Polish Constitution).

emergency situations and the legal consequences pertaining to each. It is therefore no exaggeration to speak of a "constitution within the constitution." So far, however, these complex rules have never been put into practice. Thus the criticism that the constitutional regulation of emergency powers is too complicated to be workable in practice has not been disproved.

4. The Constitutional Court as Guardian of Constitutional Democracy

The constitutional rules would offer only weak protection against a slide toward authoritarianism were their application and development left in the hands of elected politicians. The response of the framers of the Basic Law has been the creation of a new institution, the Federal Constitutional Court, which is competent to give a final and binding ruling on all issues concerning the interpretation of the constitution, including those of its rules that have been specifically designed to protect the pillars of the liberal democratic order against erosion and destruction. In the Weimar Republic, only a nonpermanent court with limited constitutional jurisdiction had existed. In the one case in which its intervention could have mattered, the case concerning the legality of the Reich's takeover of government powers in the largest state, Prussia, in 1932 it upheld the legality of the takeover, thereby acquiescing in the removal of the state government which until then had been the Republic's most important democratic bulwark (Bracher 1971, 551). The Federal Constitutional Court, by contrast, quickly developed into a highly influential institution that soon transcended the rather limited functions assigned to specialized constitutional courts in the Kelsenian model and came to influence a new generation of constitutional courts in Europe and beyond.

The establishment of an independent Constitutional Court with far-reaching review powers can in many ways be seen as the crowning achievement of the Basic Law. This outcome was not a foregone conclusion, however. In the Bundestag the nature of the new court was the object of much controversy. While some proposed a tribunal in the tradition of Weimar's Court of State (Staatsgerichtshof), which would serve mainly as an organ for resolving conflicts between different branches and levels of government, others advocated the establishment of two separate courts, one to review the constitutionality of legislation and the other to decide "political" disputes among branches and levels of government (Kommers and Miller 2012, 8). The drafters of the Basic Law finally settled for a compromise that combined both functions within a single institution with exclusive jurisdiction over all constitutional disputes. The final version of the Basic Law extended the court's jurisdiction

to twelve categories of disputes while leaving the door open to its intervention on matters assigned to it by federal law. However, the drafters did not follow proposals to confer on private parties the right to petition the Court to review acts by public authorities that allegedly violated their constitutional rights. But this right was to be restored within two years by the Federal Constitutional Court Act (FCCA) of 1951 and would finally be incorporated in the Basic Law by the constitutional reform of January 29, 1969. Roughly 90 percent of the decisions handed down by the Federal Constitutional Court each year are issued in the individual complaints procedure, contributing greatly to the profile of the Court as a bulwark of fundamental rights protection against encroachments by the executive and legislative powers as well as by the ordinary judiciary.

The vast powers of the Federal Constitutional Court also include the power to review amendments to the Constitution for their constitutionality, with regard not only to the procedural requirements fixed in the Constitution but also to the substantive principles referred to in Article 79(3). The fundamental structure of the constitutional order is thus removed from the reach of elected politicians altogether, and the policing of the limits to the conditional amendment powers is placed in the hands of the Constitutional Court (see section on limiting constitutional revisions, above). The same applies to the instruments for the defense of democracy against extremist political movements and parties. The Constitutional Court has a monopoly on the decision to ban political parties from the political life of the Federal Republic in accordance with the provision in Article 21(2) of the Basic Law. Similarly, the forfeiture of basic rights mentioned in Article 18 by persons who abuse these rights to combat the liberal democratic order established by the Basic Law can be declared only by the Constitutional Court. Finally, although associations whose aims or activities are directed against the constitutional order may be banned by the executive authorities under Article 9(2) and the statutory laws implementing this provision, judicial protection against such executive orders can be sought from the administrative law courts which may in turn be appealed in the Federal Constitutional Court in the constitutional complaints procedure. Thus it is the Constitutional Court that is the final (and in many cases also the first) arbiter in all disputes concerning the interpretation and enforcement of the numerous constitutional provisions designed to protect the essence of the liberal democratic order established by the Basic Law against any form of encroachment, intentional or unintentional, by any state authority as well as against any activity by groups or individuals trying to subvert that order.

Nor may these powers be curtailed under the pretext of a public emergency that allegedly makes it necessary to suspend or at least restrict the review powers

of the Court. With regard to the gravest of these emergencies, the threat to the institutional order resulting from a direct foreign attack on the Federal Republic, Article 115(g) expressly provides that action taken by the competent state organs to counter this threat may not impair the status or the functioning of the Federal Constitutional Court. If emergency measures affect the Court's normal functioning, they must take the form of express amendments to the Law on the Constitutional Court. In order to be admissible the amendments must have the purpose to ensure that the Constitutional Court can continue to perform its review functions. Procedurally, any such amendment can be validly adopted only if it is submitted to, and approved by, the Constitutional Court itself.

So far, this provision has never been put to a test. It is highly unlikely that even in the absence of a formal consultation and the approval required in normal times, any amendment to the Law of the Constitutional Court significantly modifying the Court's powers would ever be adopted against the determined opposition of the Court, since any such law would end up before the Court in the abstract review or individual complaints procedure. The Court has accumulated, over the decades, such a high degree of authority not only with the public authorities and the ordinary courts but above all with the public, which views it as the supreme defender of its rights and freedoms, that any direct attack on the Court's position is fraught with a huge political risk.

5. Return to Federalism and a Weak Presidency

Another important institutional feature of Germany's liberal democracy that is a direct response to the negative experience of democratic erosion is the reform of the basic structure of the German political system. The common denominator of the reforms is a strengthening of the checks and balances within the political system, vertically as well as horizontally. Vertically, the Basic Law sets great store by the restoration of a federal structure that the National Socialists abolished soon after coming to power[16] and that had suffered in the Weimar Republic from the imbalances resulting from the domination of the state of Prussia, representing more than half of the Weimar Republic's total population (Friedrich 1933, 196). The framers of the Basic Law seized the opportunity created by the abolition of Prussia, decreed by the Allied Control Council on February 25, 1947, to reestablish a viable federal system not dominated by a single federal entity and with meaningful powers for the

16. A series of laws adopted by the National Socialist government culminating in the Law on the Restructuring of the Reich (Gesetz *über* den Neuaufbau des Reichs) of January 30, 1934, transferred all government powers from the Länder to the Reichsregierung and turned the former into mere administrative districts of the Reich (see Talmon 2002, 112).

constituent Länder. The basic federal structure may not even be altered by constitutional amendment, for according to the express provision in Article 79(3), any constitutional amendment affecting the division of the Federation into Länder or the principle of participation of the latter in the legislative process is inadmissible.

Similarly, the institutional setup at the federal level reflects the negative experience with the fatal role played by Reichspräsident Hindenburg in bringing Adolf Hitler to power and offering no resistance to the radical transformation of the Weimar Republic sought by the latter, culminating in the presidential Reichstag Fire decree of February 28, 1933, which by suspending key civil and political liberties paved the way for the establishment of the National Socialist dictatorship. In response, the drafters of the Basic Law were determined to deny the head of state a role similar to that played by the Reichspräsident in the Weimar Republic, on the basis of a popular election and with the broad emergency powers granted to him in Article 48 of the Constitution (Lange 1978, 629). The Basic Law restricts the Bundespräsident (elected by a special assembly consisting of the members of the federal parliament and an equivalent number of delegates chosen by the state parliaments) to a largely ceremonial role; to be valid, the orders and directions the Bundespräsident may issue in the exercise of his or her constitutional functions require the federal chancellor or a competent minister to countersign them (Article 58). This applies also to emergency situations: unlike the Weimar Constitution, the Basic Law does not give the president any special powers in these situations; he or she remains confined to a secondary role, with the strictly limited emergency powers reserved for the emergency parliament and the federal government.

The bulk of executive power, in contrast, is vested in the federal government under the direction of the Federal Chancellor (Bundeskanzler), whom the Basic Law has made the real head of federal executive power. The Weimar Constitution required the chancellor and the ministers to have the confidence of parliament for the administration of their office. Each of them had to resign if, by formal vote, the members of parliament withdrew their confidence. Under the Basic Law, however, the Bundeskanzler is elected by a majority of the Bundestag upon proposal by the Bundespräsident without debate and before the latter appoints the rest of the government upon proposal by the former (Articles 62, 64). The Bundestag may express its lack of confidence only in the Bundeskanzler, not in the government as a whole; the only way to do so is by electing a successor with the required absolute majority (Article 67). Article 69 makes this dependence of the individual ministers on the Chancellor explicit: the office of a minister ends when a new Bundestag convenes and "on any other occasion on which the Federal Chancellor ceases to hold office."

Only the Chancellor may bring about early parliamentary elections by asking the Bundestag for a vote of confidence which does not obtain the support of an absolute majority (Article 68). While the formal decision to dissolve the Bundestag in such a situation has to be pronounced by the Bundespräsident, who enjoys discretion in the matter, the latter is likely to defer to the Chancellor's assessment of the situation. In all three cases in which early elections have been called since 1949, the president followed the Chancellor's cue, but only in the first case had the Chancellor really lost the parliamentary majority, whereas in the other cases he was driven by the desire for fresh democratic legitimacy at the polls.

Finally, and also in response to negative experiences in the Weimar Republic,[17] the framers excluded from the Basic Law any mechanisms of direct democracy like popular initiatives and referendums in order to prevent their being hijacked by populists and demagogues. The Basic Law sticks to a strictly representative model of democracy and excludes the people from any direct intervention in the political process outside parliamentary elections. Although Article 20(2) vests sovereignty in the people, they may exercise this sovereignty only through elections and other occasions to vote and through specific legislative, executive, and judicial bodies. While the second sentence of Article 20(2) hints at the possibility that the people may also participate in the political decision-making process outside elections through "votes," such a vote is so far only provided for in the case of measures proposing redefinition of the existing division of the federal territory into Länder (Article 29). In such cases only the population in the territories directly affected by the reform, not the German population as a whole, may take part in the plebiscite. By contrast, the Basic Law does not allow the organization of nationwide referenda or popular initiatives at the federal level. Although instruments of participatory democracy like referenda and popular initiatives have gradually been introduced into virtually all Länder constitutions, the federal constitution has remained a model of the strictly representative type of democratic government. In contrast to most European constitutions which provide for the possibility of popular initiatives and referenda,[18] and despite proposals for the introduction of procedures of direct

17. In particular, the popular initiative against the Young Plan, a scheme drawn up by a committee chaired by the American industrialist Owen Young to settle the issue of the outstanding German reparations for World War I, which soon became the target of a popular initiative promoted by the nationalist political parties, including the National Socialists, was often quoted as a practical example of the destabilizing nature of this instrument in a polarized political environment (see Schwieger, 2005, 340).

18. Council of Europe, Venice Commission, Referendums in Europe—An Analysis of the Legal Rules in European states, CDL-AD (2005) 034. The exceptions are Belgium, Cyprus, the Netherlands, and Norway.

democracy at the federal level, no changes have been made so far to the strictly representative nature of the Federal Republic's democratic system.

III. INSTITUTIONAL DESIGN SHOULD NOT BE OVERESTIMATED: FRANCE AND THE REPUBLICAN TRADITION

Resilience against authoritarian tendencies may result not only from more or less elaborate institutional and procedural safeguards but also from the existence of a strong democratic and/or republican tradition in a country. France can be seen as a prominent example of the latter approach. Democracy did not take root in France easily. The abolition of the monarchy and the establishment of the Republic was vividly contested for a long time after 1789, and France switched several times between monarchy, constitutional monarchy, republic, and empire during the first century following the French Revolution. After the fall of the empire of Napoleon III in the German-French war in 1870–1871, the future of the republican form of government still hung very much in the balance for years; a republican government was secured only in 1884, when the National Assembly voted an amendment to the constitutional law on the organization of public powers providing that "the Republican form of government may not be the object of a constitutional revision" (*la forme républicaine du government ne peut faire l'objet d'une proposition de revision*).

Apart from this limit on constitutional revisions, neither constitutional doctrine nor political practice did embrace any of the concepts or institutions for the defense of constitutional democracy discussed and implemented elsewhere, and notably in (West) Germany after World War II. In the 1930s the French republican institutions proved strong enough to resist the rising tide of authoritarianism and totalitarianism overwhelming democratic politics in neighboring European countries. The Popular Front, which came to power in 1936, banned the sort of paramilitary groups that had paved the way for the ascendancy of Fascists and National Socialists elsewhere. French conservative parties declined to ally themselves with movements from the extreme right of the political spectrum (Ginsburg and Huq 2018, 166). The establishment of the authoritarian regime of Marshall Philippe Pétain in 1940 was the direct consequence of the catastrophic military defeat against Germany in World War II, not of a breakdown of the domestic republican institutions. When the Republic was restored in France following the end of German occupation, the framers of the constitution of 1946 devoted a lot of attention to the issue of governmental stability, which had been a recurring problem of the Third Republic, with one short-lived cabinet following the other. The institutional reforms adopted

did not, however, call into question the fundamental structure of the republican institutions but limited themselves to a rationalization of the established forms and procedures of parliamentary government. Very few of the features that played such a big role in the drafting of West Germany's postwar constitution played even a marginal role in the French constitutional debate.

Change of a fundamental kind came only in 1958, when the unrest in Algeria brought France to the brink of civil war. However, the focus this time was on the preservation of the Republic through the creation of a powerful executive with the means necessary to bring an end to the Algerian war and to restore domestic peace and tranquility. This was achieved through far-reaching reforms of the parliamentary institutions that had evolved in the Third and Fourth Republic, reforms that to the political opposition seemed to signal a break with the traditions of the Republic and to create a dangerous opening for prolonged authoritarian rule.

The focus of the framers of the Constitution of the Fifth Republic was on the creation of a strong, powerful executive able and willing to defend France against all external and internal threats, an approach that while still remaining within the limits of the Republican tradition—but only just—stretched this tradition to its very limits.[19] The new Constitution rehabilitated and strengthened the role of the president of the Republic and of the Prime Minister, at the same time drastically curtailing the powers of Parliament, with the avowed aim of ending the submission of the executive to the will of Parliament, which in the eyes of its framers had been the main cause for the instability and weakness of governments in the Third and Fourth Republic. It gave the government, led by the Prime Minister, all necessary powers to effectively direct the political and legislative agenda of Parliament, including substantial autonomous rule-making powers of its own, while entrusting to the President of the Republic the mission to ensure the proper functioning of the public authorities and the continuity of the state as well as to guarantee the nation's independence and the integrity of its territory. Nowhere is this executive-centered design more visible than in the almost unlimited powers given to the President of the Republic in times of national emergency. When the nation's institutions, independence, or territorial integrity or the fulfillment of its international commitments is under serious and immediate threat, and when the proper functioning of the public authorities is interrupted, the president of the Republic may take the measures required by the circumstances. Although in

19. This was captured well in a 1974 book by France's leading political scientist Maurice Duverger, *La Monarchie républicaine*, highlighting the unique blend of monarchical and republican elements that give the 1958 Constitution its peculiar outlook.

such a situation the President is under a duty to consult the Prime Minister, the Presidents of the Houses of Parliament and the Constitutional Council, he or she is not bound by their advice.

Once having invoked Article 16 in the manner prescribed by the provision—that is, through a message addressed to the nation—the President of the Republic is free to adopt any measures required by the circumstances. He may therefore also issue measures that in normal times would require the government to turn to Parliament to have them enacted by way of parliamentary statute. Nor are the measures taken by the President under Article 16 subject to any kind of judicial control: they constitute "*actes de gouvernement*"; that is, they belong to a category of executive acts that are exempt from review by the Conseil d'Etat according to the latter's ruling in the *Rubin de Servens* case.

Article 16 thus creates the constitutional basis for a fusion of powers in the hands of the President of the Republic in times of a national emergency within the meaning of Article 16. Even more worrying, it is the President of the Republic who determines whether the conditions for an application of Article 16 powers are fulfilled, with no independent external control by the government, Parliament, or the judiciary. Article 16 constitutes the countermodel to the highly restrictive regulation of emergency powers in the German Basic Law, reviving instead the concept of the executive's unfettered emergency powers that had been enshrined in Article 48 of the Weimar Constitution. It is no wonder, then, that many contemporary critics saw it as the essence of the 1958 Constitution, giving the most perfect expression to the spirit of a "*coup d'état permanent*" that animated it.[20]

However, although the years of the independence war in Algeria (1958–1962) were marked by strong and decisive presidential leadership, including the invocation of the Article 16 powers in 1961, France did not at any point degenerate into an authoritarian regime. On the contrary, when Charles de Gaulle finally left power in 1969, first institutional practice and subsequently the constitutional text as well underwent a process of gradual liberalization. Starting with its famous decision *Liberté d'association of July 1971* the French Conseil Constitutionnel liberated itself from the straightjacket of its role of "watchdog" of Parliament and transformed itself into the guardian of the Rights of Man and of the Citizen enshrined in the great rights declarations referred to in the Preamble of the

20. This highly negative view of the institutions of the Fifth Republic was made popular by Francois Mitterrand in his 1964 book *Le coup d'état permanent*. Mitterrand was one of the most visceral critics of the institutions of the Gaullist Republic. Even in old age, when he had himself become the beneficiary of the unparalleled presidential powers established by the 1958 Constitution, he still considered this book to be his finest.

Constitution of the Fifth Republic. The constitutional reform of 1974 extended the right to refer Acts of Parliament to the Constitutional Council for a review of their constitutionality prior to promulgation for the first time to members of the political opposition. Under the new rules, the procedure could be initiated by sixty members of the National Assembly or sixty Senators, resulting in a dramatic increase in the number of laws subjected to constitutional review. Another constitutional reform in 2000 reduced the term of office of the President of the Republic from seven to five years, bringing it into line with the vastly increased political responsibilities of the French President in the political practice of the Fifth Republic. Finally, a further constitutional reform in 2008 granted Parliament important powers with regard to presidential appointments to public and military offices, including members of the Conseil Constitutionnel: Parliament may now block appointments if the negative votes cast on the proposed nominations in the competent standing committees of both Houses represent at least three-fifths of the total vote. Equally important—although perhaps more symbolically than practically, given the nonapplication of the provision after 1961—is the reform of Article 16, which for the first time gives members of Parliament the right to initiate a review of the use of presidential emergency powers under Article 16: after these powers have been exercised for thirty days, a group of sixty Deputies or Senators may petition the Constitutional Council to determine whether the constitutional conditions for use of the emergency powers continue to exist.

Thus a constitution that could have lent itself easily to an authoritarian practice of government—and was indeed (ab)used in this way in many North, West, and Central African states that, following independence from France, turned to the 1958 constitution as blueprint for the design of their own post-independence institutions—did in fact *not* give rise to a political practice that was markedly more illiberal than in other Western democracies at the time and proved amenable to progressive liberalization once its framers had left office. The resilience of the republican tradition in France even in troubled times during the twentieth century thus cannot be attributed to an elaborate system of institutional arrangements, or of checks and balances, because the 1958 constitution originally lacked any such safeguards and even in its present version is much less developed in this respect than the German constitution. Nevertheless, France, unlike Germany and Italy, did not succumb to the rise of fascism in the 1930s, nor did the Gaullist institutions created by the Constitution of the Fifth Republic at any point, not even at the height of the civil war in Algeria and in the heyday of Gaullism, seem on the verge of degenerating into an authoritarian regime (i.e., a regime without genuine democratic

competition and a wide-ranging suspension of the rule of law). The most plausible explanation for this resilience cannot be found in the institutional setup—which often gave rise to the emergence of authoritarian regimes in former colonies following it—but in the strong roots the republican tradition had developed in French society and the French state, a tradition that had permeated the thinking and practice of the French authorities as well as of politicians and ordinary citizens. This did not happen of itself, however; it was the fruit of the hard work of the republican politicians of the late nineteenth and early twentieth century, but also of the numerous *instituteurs*, teachers at the French public schools, who labored hard (and successfully) to imbue their pupils with the republican values in the Third Republic (Ozouf and Ozouf 1992, 118), as well as of leading intellectuals, who intervened vigorously on the side of the Republic in the great public controversies of the time like the *Dreyfus* affair, when they felt that republican values were under threat from nationalist, militarist, and clerical groups.[21]

IV. CONCLUSION: THE POTENTIAL AND LIMITS OF INSTITUTIONAL DESIGN

The stability that German postwar democracy has enjoyed since 1949 suggests that the drafters of the Basic Law learned the right lessons from the failure of the Weimar Republic and succeeded in creating strong protections against democratic decline. As the closer analysis in section II of this article has shown, however, this assessment must be qualified. The instruments of militant democracy, in particular the prohibition of extremist political parties and the forfeiture of fundamental rights of individuals, have not been used since the late 1950s. While they may still have an effect on democratic debate in Germany as a warning sign to political parties toying with extremist views, their use or the threat of their use may, in times of rising populism, also be viewed by part of the electorate as an illegitimate means to silence outsiders' challenges to the established political order. That they can be used as a weapon to stifle democratic competition and free political debate if they fall into the wrong hands is difficult to deny, which gives them a distinctly ambivalent character. Similarly, the introduction of broad substantive limitations to the constitutional amendment power may be seen as an obstacle to free-ranging debate of necessary constitutional reform rather than an indispensable instrument for preserving the essence of liberal democracy.

21. It has been said that as a result of the *Dreyfus* affair, "the Republic achieved maturity . . . and was evidently accepted by the vast majority of the electorate as the only regime possible for France" (Lee 1982, 131). On the origins, unfolding, and repercussions of the affair on French political life, see Whyte (2005).

Their existence has not prevented the German constitution from becoming one of the most frequently amended in the OECD, with the Constitutional Court regularly reviewing constitutional amendments for their consistency with the principles listed in Article 79(3), albeit without having found any violation thus far. The restrictive regulation of emergency powers in the Basic Law, on the other hand, has never been put to a test. Instead, it has been claimed that it is ill-suited in practice to the kind of existential threats to the constitutional order most likely to arise. The reconfiguration of the system of government has produced tangible results in the form of stable majority governments. This, however, has been greatly helped by measures at the sub-constitutional level, namely, the statutory introduction of a 5 percent threshold for political parties in federal as well as in state elections, which, at least for a time, have made multiparty coalition governments less likely (although this phenomenon is increasingly reappearing in German politics). The unprecedented influence of constitutional jurisprudence in German politics after the war—the result of the main institutional innovation of the Basic Law, the creation of the Federal Constitutional Court—can hardly be viewed as a model beyond Germany, given recent experiences in countries like Hungary and Spain. They demonstrate that support for, or at least acceptance of, German-style activism of the constitutional judiciary by the public and the political branches is much more shaky elsewhere.

In addition, a focus on these institutional features is in danger of ignoring or underestimating other, noninstitutional factors in the success of Germany's postwar democracy. These include a number of favorable external and internal factors, from the generous Allied support of the fledgling German democracy (under the Marshall Plan), to the tight integration of postwar Germany into the new Western and European organizations for political and economic cooperation and integration, expressly or implicitly committed to the promotion of democracy, rule of law, and human rights, such as the Council of Europe (1949) and the European Communities and later the European Union. German postwar democracy was thus deeply embedded right from the start in international and supranational structures that contributed significantly to its political and economic stabilization. At the level of domestic politics, the social market economy introduced by the first postwar governments proved a huge success in reviving an economy ruined by war and provided the growth necessary to sustain a generous welfare state needed to promote domestic peace and to prevent a recurrence of the mass poverty and deep social rifts that had undermined the Weimar Republic.

A closer look at the factors that have contributed to the robustness of Germany's postwar democracy therefore suggests that factors other than institutional design have played an equally important role. The Federal Constitutional Court's

ruling in the *NPD Party Ban Dismissal Case II* that a ban of the NPD would be disproportionate because the NPD lacks substantial voter support and thus does not constitute a genuine threat to Germany's democratic order, can be seen as an official endorsement of this view by Germany's highest court. The emphasis on nonlegal means in combating political extremism implicit in the ruling brings Germany closer to France, where nonlegal mechanisms have never acquired such prominence despite a protracted struggle between authoritarianism and republicanism for much of the twentieth century and right up to the early twenty-first century, which in view of the strong entrenchment of the *Front National* in the French political system cannot be said to be a thing of the past. However, the nonlegal factors influencing the degree of democratic resilience in Germany differ in some respects from the factors that have contributed to the longevity of the republican tradition in France. In France, relevant factors included the success of the education system in instilling republican values in large sectors of the public, the quality of public discourse, or the role of intellectuals in important political debates, among others. External factors, by contrast, did not play a major role. In Germany, by contrast, such factors played a very significant role, as Germany's postwar democracy was built with the help and under the supervision of former war enemies turned allies. Whether the legal or extralegal elements of democratic resilience are more important is impossible to determine in the abstract, and difficult enough to determine with regard to individual countries, because the relevant lessons of history are also subject to constant reevaluation in light of contemporary needs and preferences. What may be said with some confidence, though, is that lasting democratic stability has rarely, if ever, been in the main the product of clever institutional design. Nevertheless, debates on a more resilient institutional design are an important step in a learning process that may lead to enhanced resilience over time. In this process institutional safeguards and "soft" factors like civic education should be viewed not in isolation, but as complementary and mutually reinforcing. In this perspective the existence of constitutional powers and procedures to fight political extremism may well help to raise public awareness of the threat that such tendencies, if unchecked, pose to the endurance of a democratic constitutional order.

REFERENCES

Böckenförde, Ernst-Wolfgang. 1978. "Der verdrängte Ausnahmezustand." *Neue Juristische Wochenschrift* 31:1881–90.

Bracher, Karl Dietrich. 1971. *Die Auflösung der Weimarer Republik. Eine Studie zum Problem des Machtzerfalls.* Villingen, Germany: Ring-Verlag.

Brenner, M. 2018. Article 18. In *Grundgesetz*. Vol. 1. 7th ed., ed. P. M. Huber and A. Voßkuhle. Munich: C.H. Beck.

Busch, Andreas. 2000. "The Grundgesetz after 50 Years: Analysing Changes in the German Constitution." *German Politics* 9 (1): 41–60.

Duverger, Maurice. 1974. *La Monarchie républicaine*. Paris: Robert Laffont.

Friedrich, Carl J. 1933. "The Development of Executive Power in Germany." *American Political Science Review* 27 (2): 185–96.

Ginsburg, Tom, and Aziz. Z. Huq. 2018. *How to Save a Constitutional Democracy.* Chicago: University of Chicago Press.

Ipsen, Knut. 1987. "States of Emergency." In *Rights, Institutions and Impact of International Law according to the German Basic Law*, ed. Christian Starck, 134. Baden-Baden: Nomos.

Kommers, Donald, and Russell A. Miller. 2012. *The Constitutional Jurisprudence of the Federal Republic of Germany.* 3rd ed. Durham, NC: Duke University Press.

Lange, Erhard H. M. 1978. "Die Diskussion um die Stellung des Staatsoberhaupts 1945–1949 mit besonderer Berücksichtigung der Erörterungen im Parlamentarischen Rat." *Vierteljahresheft für Zeitgeschichte* 26:601–51.

Lee, S, 1982. *Aspects of European History, 1789–1980*. London: Routledge.

Löwenstein, Karl. 1937a. Militant Democracy and Fundamental Rights, I." *American Political Science Law Review* 31 (3): 417–32.

Löwenstein, Karl. 1937b. Militant Democracy and Fundamental Rights, II." *American Political Science Law Review* 31 (4): 635–58.

Mitterrand, Francois. 1964. *Le coup d'état permanent*. Paris: Plon.

Oberreuter, Heinrich. 1978. Notstand und Demokratie, Vom monarchischen 0brigkeits-zum demokratischen Rechtsstaat. Munich: Voegel.

Ozouf, Jacques, and Mona Ozouf.1992. *La République des instituteurs*. Paris: Gallimard.

Roznai, Yaniv. 2017. *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers.* Oxford: Oxford University Press.

Schneider, Hans. 1968. "Das Ermächtigungsgesetz vom 24. März 1933." In *Von Weimar zu Hitler, 1930–33*, ed. Gotthard Jasper, 405–42. Cologne: Kiepeheuer und Wietsch.

Schwieger, C. 2005, *Volksgesetzgebung in Deutschland*, Berlin: Duncker & Humblot.

Shambayati, Hootan. 2008. "The Guardian of the Regime: The Turkish Constitutional Court in Comparative Perspective." In *Constitutional Politics in the Middle East*, ed. Said Amir Arjomand, 99–100. Oxford: Hart Publishing.

Talmon, S. 2002. "Ende des Föderalismus. Gleichschaltung der deutschen Länder von der nationalsozialistischen Machtergreifung bis zur Auflösung des Reichsrats." *Zeitschrift für neuere Rechtsgeschichte* 24 (2): 112–55.

Whyte, George R. 2005. *The Dreyfus Affair: A Chronical History*. London: Palgrave Macmillan.

CASES CITED

Socialist Reich Party Case, 2 BVerfGE 1 (1952)

Communist Party Case, 5 BVerfGE 85 (1956)

Lisbon Treaty Case, 123 BVerfGE 267 (2010)

NPD Party Ban Dismissal Case I, 107 BVerfGE 339 (2003)

NPD Party Ban Dismissal Case II, 144 BVerfGE 20 (2017)

AKP Case, Turkish Constitutional Court, ruling K. 2008/2, Official Gazette No. 27034, October 24, 2008

Liberté d'association, Decision 71-44 DC of July 16, 1971, Rec. 29

Rubin de Servens, C.E. Ass. 2 mars 1962