Democracy: constrained or militant?
Carl Schmitt and Karl Loewenstein on what it means to defend the constitution

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Abstract
In the recent literature on militant democracy, two claims are made on the relation between its most famous advocate, Karl Loewenstein, and German jurist Carl Schmitt. The first claim is that though the latter came to support the Nazi regime, in the late 1920s he provided an early model of militant democracy that looks more robust and elaborated than Loewenstein's. Schmitt's constrained democracy is believed to cut deeper into that which militancy is supposed to safeguard. The second claim is that this latter model underlies other versions of militant democracy, including Loewenstein's. This article argues that the first claim is largely correct while the second is to be rejected. In doing so, it delves deep into Schmitt's understanding of the materiality of law, that is, the social normativity that he believed the constitution was designed to protect, and casts light on the procedural orientation of Loewenstein's militant democracy. The conclusion is that both these theories espouse a form of conservatism, though different from one another, and that in different ways both can be detrimental to democracy.
Keywords: conservatism; democracy; institutionalism; militant democracy; pluralism.

Introduction

The model of militant democracy has significantly affected European ideas on how democratic states should defend themselves against internal enemies by restricting their fundamental rights.[1] The origin of this model is generally traced back to political scientist and legal scholar Karl Loewenstein, who in 1937 published two seminal articles in *The American Political Science Review*.[2] In his analysis, Loewenstein claimed that it was the democratic ideology of legalism that paradoxically allowed fascist movements and parties to gain the upper hand over the parties loyal to the constitution. Democratic legalism, he argued, is the fideistic conviction that in no way should a democracy curb the rights and liberties of its citizens, even when they conspire against the constitutional order and try to seize power to draw it to an end.

Loewenstein mainly constructed his model on the notion of a procedural defence of the constitution. He harboured a concept of liberal, representative democracy, subject to a strong parliamentarian control, and entrusted to few elites loyal to the basic values of liberalism: the "disciplined authority by liberal-minded men, for the ultimate ends of liberal government: human dignity and freedom."[3] For the protection of this basic institutional core, democratic states should not have shied away from emergency legislation or other administrative means, even if this meant polluting liberal legality with authoritarian tinges. In doing so, Loewenstein did not invoke the set of values and principles that democracy is supposed to be founded on. He straightforwardly solicited tight procedural measures, particularly the temporary suspension of the rule of law for undemocratic groups and their members: "Fascism has declared war on democracy. A virtual state of siege confronts European democracies. State of siege means, even under democratic constitutions, concentration of powers in the hands of the government and suspension of fundamental rights."[4]

Scholars who investigated the theoretical roots of militant democracy have criticized the ambiguous relation between its (seemingly) procedural character and the (unspoken) set of values and principles that it implies. In doing so, they identified the Schmittian derivation of this concept[5] – though the personal relationship of Carl Schmitt and Loewenstein was far from smooth.[6] Schmitt, even before Loewenstein, predicted the suicidal path of the Weimar Republic as it allowed non-democratic forces to enjoy constitutional rights and liberties while their members were overtly against the constitution.[7] Before Schmitt's opportunistic change of mind after the Nazi seizure of power, he explicitly argued that both the NSDAP and the Communist Party should be banned if the Weimar

Republic should survive.[8] In singing the praises of a "constrained democracy"[9] he lamented the poverty of the liberal representative system as it let itself be infiltrated by its internal enemies. Only a few years later, in a series of articles published between 1935 and 1938, Loewenstein perfected his conception, which in effect bears more than some family resemblances to Schmitt's.[10]

While the few strengths and many weaknesses of this specific understanding of militant democracy have been abundantly discussed,[11] in what follows I will argue that the proximity between these two models of democratic militancy should not be overrated. Schmitt's model does not square with Loewenstein's, in that these two scholars had a remarkably different understanding of what democratic militancy was called upon to protect. In this sense, it will be imperative to distinguish between Schmitt's *conservative institutionalism* and Loewenstein's *institutional conservatism*. Certainly, this does not mean that critics of militant democracy are wrong when they point the finger at the exclusionary potential of Loewenstein's model. Rather, my claim will be that Schmitt indicated more clearly and more openly than Loewenstein what is at stake in the struggle between opposed political visions. While the latter's model ends up criminalizing internal enemies as morally and politically abject, Schmitt portrayed the conflict between "friends" and "enemies" of democracy as deriving from the adherence to divergent systems of fundamental values.

This investigation will lead to two major conclusions. First, insofar as democracy wants to preserve itself without tarnishing its democratic nature, it should be honest towards its exclusionary character – though it is doubtless a regime that excludes much less than alternative ones. Second, democratic constitutions should openly recognize that they ask for the *ex-ante* acceptance of a set of fundamental values and principles which might lack a more fundamental justification. This, I think, is the core of Schmitt's legacy as far as democratic militancy is concerned. His idea of what democratic values and principles are can hardly be accepted, in that it recommends a deliberate and systematic exclusion of minority groups – in a way, I daresay, that even exceeds the normative requirements of his model. Schmitt had his conception of what a solid and steady democracy should be, one that cannot but be categorically rejected by those who defend democracy today. However, his theoretical legacy, when contrasted with Loewenstein's conception, has something valuable to say as to what it takes to defend a political regime against its several enemies.

To make my case, I will first home in on the relation that is claimed to exist between the two models. I will then investigate the materialist conception that Schmitt developed while revisiting his notion of the constitution. This revised notion, I will argue, was coupled with a different understanding of social normativity, one that played a central role in his view of what democracy consists of and how it should be protected. In the concluding sections, I will explain in what sense Schmitt's and Loewenstein's models cannot be equated with each other and why the former, though fundamentally unacceptable, is more candid than the latter.

The Schmitt-Loewenstein relationship

Loewenstein's position is considered to stand somewhat in between legal positivism and a substantive understanding of the legal and political order. In particular, he censured purely formalist understandings of the constitution as they allowed parliamentary majorities to circumvent constitutional provisions through *ad hoc* adjustments and without any formal amendments. In his view, the parliament's inflated recourse to such an unorthodox practice had severely impoverished the normative cogency of the Weimar constitution and, in this way, had paved the way for the Nazi dictatorship.[12] This criticism was based on a conception of the constitution as certainly more than a set of provisions. A constitution serves as the norm that shelters the legal order in the light of the constituent will that establishes and solidifies the basic structure of the political community.[13]

Despite his deep distrust of excessive formalism, Loewenstein's analysis of the substantive elements of the law – that is, values, principles, interests, or forces that are extra-positive though they are foundational to the legal order – was far from detailed. He explained that the ultimate purpose of any constitution, that is, the limitation and control of political power, stems from the human quest for

limited, controllable, and legitimate authority. Yet, other than swift allusions to the issue of political power and the need for its balanced allocation, in the two essays specifically devoted to militant democracy no thorough discussion of the *materiality* of law can be found.[14] His call for militancy mainly gestured to legislative and administrative measures amenable to a purely formal analysis.

As an example of his impatience with the substantive aspects of democracy, while reviewing Max Lerner's coeval book on this topic,[15] Loewenstein criticized Lerner for stressing an economic recipe to fend off fascism and concluded: "For the moment, politics has precedence over economics. […] Before the remaining democracies, or what is called by such a name, can begin to reconstruct their social fabric, either by self-adjustment or by deliberate planning efforts, the political danger of fascist power-politics abroad and at home must be removed."[16] In sum, Loewenstein had no penchant for inquiries into the substantive presuppositions of constitutional orders. He justified his model of militant democracy "only because of democracy's institutional character" – a justification that bespeaks a merely "procedural appreciation of liberal democratic institutions."[17]

Nonetheless, as scholars point out, this is a major shortcoming, because militant democracy does imply a set of substantive commitments. To unearth its (unspoken) substantive character, these scholars suggest looking into the type of constrained democracy advanced by Schmitt.[18] They submit that his material approach to legal phenomena brings out the link between substance and procedures – one that also animates most models of democratic militancy, more and less recent ones. In doing so, scholars make two claims that I think should be better differentiated from one another. The first (thinner) claim is that Schmitt's constrained democracy is more robust and elaborated than Loewenstein's militant democracy precisely because the former cut deeper into the substantive commitments of any constitutional regime, including liberal democracy. The second (thicker) claim is that Schmitt's constrained democracy lies beneath other versions of militant democracy, including Loewenstein's. While these two claims are not necessarily correlated, their relationship is mostly underelaborated. My take is that the first is by and large correct but should be refocused (at least in the way it is generally advanced in the existing debate), whereas the second claim should be refuted based on the refocusing of the first one.

In the subsequent section, I will argue that scholars have so far failed to dig deep enough into Schmitt's view of constrained democracy because they did not grasp his understanding of materiality in the early 1930s. For they mainly concentrated on *Constitutional Theory* (1928) and, in its light, on *Legality and Legitimacy* (1932). Based on this analysis, I will contend that the notion of materiality with which Schmitt came up in the early 1930s, precisely at the moment when he was perfecting his conception of a constrained democracy, does a better job at explaining the form of conservatism generally implied by militant democracy.

Schmitt's materialist approach: a restatement

Schmitt is rightly taken to be among the first theorizers of the materiality of law,[19] one that, as I will detail, underlay his idea of constrained democracy. As this notion is presently used in the scholarly debate, materiality is what explains the existence and subsistence of the positive constitutional order.[20] Materialist approaches to the law are not necessarily at odds with formalist ones. Nonetheless, those who insist on there being something extra-positive that shores up the constitutional order believe that a purely formal analysis of the constitution does not get anywhere near a robust understanding of how it works. In the present context, the notion of materiality helps spell out what it means to say that Loewenstein never reached the substantive core of the militant approach, where it shows its true face of an "institutional conservatism".[21]

Invernizzi Accetti and Zuckerman correctly argue that Schmitt put forward a robust theory of militant democracy *avant la lettre*, one that is "much more sophisticated […] than Loewenstein's" in that "it clearly brings out something that had only remained implicit in the latter."[22] However, I think they are not entirely correct when they portray Schmitt's view of the substantive core of democracy. For they argue that this core is the people's fundamental decision that the constitution enshrines. In

this reading, Schmitt made clear that "the decision as to what constitutes a threat for the survival of the democratic order is necessarily an exceptional (i.e. ultimately political) decision, which cannot be subsumed into any prior norm, and must therefore be established arbitrarily by whoever has the power to enforce it."[23] This interpretation of the constitutional order, according to them, lays the foundations for the type of authoritarian democracy that Schmitt yearned for.

To make their case, Invernizzi Accetti and Zuckerman, as most Schmitt scholars do, establish a link between the conceptualization of the constitution offered in *Constitutional Theory* (1928) and the idea of democracy roughly sketched in *Legality and Legitimacy* (1932), where Schmitt warned that the Weimer Republic was on the brink of a catastrophe. While this interpretative strategy is largely correct, I think it suffers from a serious defect precisely when it comes to Schmitt's take on constrained democracy. For it neglects a major theoretical development that is key to deciphering how he came to conceive the relation between democracy and the constitution in the early 1930s.[24] I would now like to reconstruct the way Schmitt developed his model of constrained democracy exactly at the time when he was revising his materialist approach. In particular, a major theoretical modification in his view of the constitution that occurred between 1928 and 1932 needs stressing.

At the end of the 1920s, his concerns were morphing as he had lost faith in the salvific activity of the executive power, no matter how unbound it had become thanks to the use and abuse of article 48 of the constitution on the state of exception.[25] He became more and more concerned with the consolidation of the German political community around a limited and well-selected set of majority groups gathering around the fundamental values that (he claimed) were embedded in the constitutional text.[26] In this scenario, the goal of political power, in keeping with Schmitt's theorizing in another celebrated essay, *The Concept of the Political* (first published in 1927), should be that of attaining political stability by nurturing the fundamental homogeneity between societal groups. In short, he concluded that the fate of the Weimar regime was conditional on a type of social and political homogeneity that could not be produced by any political authority. In light of this, he revised his conception of political power as something that is called upon to preserve a material substance sedimented in the constitution.

A year later, in 1928, Schmitt complemented this conception of political authority with a notion of the constitution that easily accommodated it. *Constitutional Theory* is the cradle of the idea of the constitution as a fixed set of fundamental political decisions that cannot be revised by any political organism. This is because a constitution, in his view, is the consolidation of a concrete social order that is put to work by the constituent power while deciding which the community's fundamental values are. The written constitutional text is nothing but the emergent manifestation of an underlying concrete order embodying a whole *existenziell* form of life. To put it otherwise, the constitution-making decision that realizes such a concrete order rests on a pre-given substance that the constituent power is called upon to bring to the surface and verbalize through jurisprudential means. It is in the light of this substantive core, and not because of the constitution being a fundamental decision, that *Constitutional Theory* is hospitable to the idea of a constrained democracy.

In a few words, in 1928 Schmitt believed that democracy should be constrained because the genuine and legitimate will of the people lay with the constituent decision around the political community's core values. He submitted that growing societal pluralism and short-sighted party politics were producing divisions that jeopardized the constitutional order. If the proper place of democracy, as he viewed it, was constitutional politics, parliamentary politics and the legislative power should be constrained. Therefore, Schupmann's definition of constrained democracy aptly captures Schmitt's conception at this stage: "Constrained democracy is the adoption of constitutional mechanisms that constrain the ability of democratically elected parties to amend liberal constitutionalism out of the constitution legally."[27]

Surely enough, this was Schmitt's orientation at the end of the 1920s, and yet he had not entirely clarified his view on what should be protected through these constitutional mechanisms. As he made his way into the early 1930s, he became more interested in the issue of materiality, that is, the substantive contents that shore up the constitutional charter as the lively frame of the political community.

This profoundly affected his idea of what the Weimar Constitution really was. *Constitutional Theory* still presented the 1919 constitution as a compromise between political forces and their differing worldviews.[28] At the time, he regarded this as a gloomy but unamendable matter of fact. In the early 1930s, however, he changed his mind on this issue. Schmitt became convinced that the task of jurisprudence was to free the constitution from all the internal contradictions deriving from political compromises for it to completely unfold in (what he thought) its intrinsic logic was. As the threat of the end of the Republic loomed large, he held that this materialist approach was the only way to save the constitution.

As he deftly summarized in *Legality and Legitimacy* (1932), in the early 1930s he no longer thought of the constitution as a concoction of contradictory programmes, but as two diverging constitutions within the same document. On his new account, one of these two constitutions should prevail over the other for the Weimar Republic to be rescued. On the one hand, the first part of the Weimar constitution consecrated the bourgeois ideal of the legislative state and its omnipotence. Constitutional provisions had the task of presiding over legitimate law-making but in fact guaranteed the maximum leeway for the decisions of the legislative power. The parliament was entrusted with the authority (albeit with qualified majorities) to change the constitution.[29] On the other hand, however, the second part, on his account, pursued the opposite end of shielding specific material contents. The provisions of this part unequivocally precluded legislative amendments, whether qualified or not. He opined that the unambiguous goal of the second part was to inhibit the transitory, whimsical activities of the parliament and its variously assorted majorities.

In summary, the procedural nature of the first part of the constitution, which allowed far-reaching amendments, was at variance with the legal-material nature of the second part precisely because the former gave full power to the parliament while the second constrained this very power. For Schmitt, this was a startling, perilous opposition that should be resolved in favour of the legal-material part. It was in the light of this flagrant conflict inside the constitutional text that he brought himself to rethink the key notion of institutional guarantees (*institutionelle Garantien*), which he regarded as his major theoretical achievement of the time.[30] Institutional guarantees then became the prism through which he revised the vexed political issue of fundamental rights.

The nature of fundamental rights and the core constitutional values

As Michael Stolleis documented, Schmitt's view was integral to a conservative interpretation of basic rights.[31] While liberals and positivists traditionally regarded fundamental rights as barriers against the executive, conservative scholars viewed them as a system of positivized values entrenched in the constitutional text. These core values stood at the apex of the hierarchy of legal norms and worked as a special kind of legality superior to the activity of the legislature as well as judicial review. As both Stolleis and Stanley Paulson reconstructed, other anti-positivist political and legal theorists were seeking to turn the two-third provision enshrined in the Weimar Constitution into a constraint that bound the parliament.[32]

One main source of this view was French jurist Maurice Hauriou's influential notion of *superlegality*, that is, a set of principles whose legitimacy is claimed to be superior to the text of the written Constitution, though they remain mostly unexpressed. In Hauriou's view, superlegality was a set of general principles that hovered over the positive legal order as well as the execution and interpretation of positive norms. On this account, constitutional legitimacy is always contingent on how much ordinary legislation and judicial practice follow these principles. Schmitt's pondering on superlegality[33] marked a significant shift in the conception of basic rights from *Constitutional Theory* to the two essays *Freiheitsrechte und institutionelle Garantien der Reichsverfassung* and *Grundrechte und Grundpflichten*, respectively published in 1931 and 1932.

He had already discussed basic rights in § 14 of *Constitutional Theory*, entitled 'The Basic Rights', where section IV reads 'Institutional guarantees are distinguishable from basic rights." At this stage, institutional guarantees were presented as constitutional provisions protecting the life of

traditional, state-sponsored institutions in such a way that they may not be eliminated by way of simple legislation. Needless to say, Schmitt conceived no basic rights of sub-state institutions.[34] Institutions fell under the authority of the state and could only exist within the state. As in the Weimar bourgeois constitution the sphere of individual liberty antedated the state, so could institutions be thought of as pre-legal, since they were the outcome of the groups' organized life. Despite this, their legal value as well as their existence as legal entities were entirely contingent on the superior normativity of the state.

However, in the two essays on institutional guarantees and basic rights,[35] a new remarkable distinction appeared between *institutional guarantees* (*institutionelle Garantien*) and *guarantees of institutions* (*Institutsgarantien*). The latter referred to constitutional law guarantees of legal institutions in the sense of typical legal relationships that were traditionally established, such as property in Art. 153, the right of access in Art. 154, marriage in Art. 119. *Institutionelle Garantien*, on the contrary, concerned *public law guarantees* of institutions (such as the autonomous administration of municipalities in Art. 127, the professional bureaucracy in Art. 129, and freedom of education in Art. 142). Far from being purely terminological, this distinction had to do with the public-law nature of institutional guarantees. For Schmitt, the protection of the internal life of legally recognized institutions was an integral part of the public law of the state. The inner normativity of traditional German sub-state communities, along with their institutional normativity, should be regarded as part and parcel of state law.

In sum, according to Schmitt in the early 1930s, the primary purpose of institutional guarantees was to grant constitutional protection to public law institutions so that the ordinary legislator could not have any power over them. He referred to these entities as "institutions" insofar as they were rooted in the history and spiritual life of the German political community.[36] Importantly, these guarantees were not bestowed on individual members, but on collective entities that were integral parts of the German social fabric and thus nurtured the homogeneous societal base of the Weimar Republic. That was a significant turn in his conceptualization of the materiality of the constitutional order, in that he came to think that the inner normativity of tradition-bound, state-sponsored institutions was the cast-iron guarantee of social and political stability. In line with the concept of political power adumbrated a few years earlier in *The Concept of the Political*, Schmitt insisted even more resolutely that administrative policies should make sure that those institutions subsist and flourish for them to preside over the activities of individual members within their normative boundaries.

For Schmitt, this was the genuine kernel of democracy: a set of institutional values nurtured within their context of origin, viz., long-established institutions, which had been selected by the constitution-making power as the values meant to sustain and feed the German political community. These were the fundamental rights and duties – as the title of Schmitt's essay stipulated – of the German population that were contained in the second part of the Weimar constitution and that constitutional provisions made impermeable to the legislative power. The Weimar constitutional order, Schmitt clearly stated in 1931 and 1932, was a constrained democracy in the sense that the democratic system was structurally based on those rights and duties and therefore the parliament could not alter them by any means. It behoved jurisprudence, he concluded, to establish once and for all the preeminence of the material nature of the second part of the constitution as the heart and the guarantee of the Republic.

Amending what?

Understandably, a key jurisprudential but no less political issue at the time was how, and how much, the Weimar constitution could be changed. Art. 76 provided that its contents could be amended by the Reichstag if two-thirds of the members were present and at least two-thirds of them consented. The drafters in 1918 wanted the constitution not to impose any tight constraints on future generations who might desire to change the basic structure of their own political community. This constitutional decision made it hard for jurists and experts to determine what (if any) the limit was.

Positivist constitutional lawyers, in particular Gerhard Anschütz, argued that no material limits on parliamentary amendments could be detected in the constitutional text.[37] Based on the wording of Art. 76, the Weimar foundational document considered the parliament as endowed with potential constituent power, no matter how dormant. Such a normatively higher power of amending the constitution, up to the *de facto* production of a brand-new one, could be revived at any time. In his *Habilitationsschrift*, completed in 1931, Loewenstein sided with Anschütz as to the material boundlessness of constitutional amendments, although he specified that amendments should be openly recognized as such and should be subject to the constitutional requirement of the strengthened majority.

What he found contemptible was the widespread practice of indirectly amending the constitutional text. On his account, indirect change could be achieved with an ordinary statute extending the scope of constitutional norms when they did not express any specific provision (*Verfassungserweiterung*). Other forms of indirect amendments were possible, such as the complete abolition of a constitutional provision (*Verfassungsverdrängung*) and its temporarily limited suspension (*Verfassungshemmung*). To define what constitutionally dutiful conduct was, Loewenstein strove to identify a formal criterion that could limit the repeated distortions of the constitutional text via indirect amendments.[38] In doing so, he tried to strike a balance between materiality and formality by referring to the ultimate purpose of the constitution as a political project.[39]

Ultimately, though, Loewenstein did not believe that a material constraint could be found. He concluded that Schmitt's theory of the material limits of constitutional amendments should be rejected because the parliament owned the legitimate authority to shape the constitution as it saw fit, up to its complete abolition. While arguing so, however, the materiality of the constitution Loewenstein had in mind was notably different from Schmitt's. As can be also evinced from later texts, even his more pondered works on constitutionalism considered constitutional materiality as consisting of the question of political power and its allocation. For example, in his famous book from the 1960s, *Political Power and the Governmental Process*, Loewenstein explained that the substance of the constitution comprises five basic features: (1) A differentiation of the various state functions and their attribution to different state organs. (2) A planned mechanism for cooperation among those organs. (3) A mechanism for avoiding deadlocks between them. (4) A method for peaceably adjusting the fundamental order to the morphing socio-political conditions. (5) The explicit recognition of the citizens' basic rights and fundamental liberties shielded from the government.[40]

It should be noted that obviously, in his *Habilitationsschrift*, the refutation of Schmitt's notion of material limits took into consideration *Constitutional Theory*, where, as I underlined above, Schmitt still considered the substance of the constitution to be inherent in the fundamental decision on the political form.[41] Before his revisitation of the nature and function of institutional guarantees, Schmitt thought he had identified a normative, positive limit to the scope of Art. 76 in the "qualitative" difference (that he thought he could infer) between *making* and *changing* the constitution. From this distinction, a further distinction could be derived between the constitution as a totality and constitutional provisions.[42] This somewhat resonated with Loewenstein's view that the constitution is not a mere series of constitutional norms, because the former pursues an objective end. But even at this stage, Schmitt's view pivoted on a heavier notion of materiality than Loewenstein's, in that the constitution does not only have an objective end but fixes it by way of a written-down decision for the concrete form of the German people's political existence. Based on this understanding, in 1928 Schmitt was adamant that Art. 76 regulated how to amend constitutional provisions, not the constitution as a whole.

In sum, Schmitt's reasoning that Loewenstein refuted revolved around a jurisprudential analysis of the theoretical presuppositions of what it takes to make a constitution. For him, the positivist conclusion that the parliament had a constituent power proper was absurd. For the constitution to be significantly and incisively changed, a new constituent body would be needed that expressed a new fundamental decision on the part of the German people. If the constitution-making assembly which crafted the Weimar constitution "were not qualitatively different from a properly constituted parliament, one would be led to the nonsensical and unjust result that a parliament could bind all subsequent

parliaments (selected by the same people according to democratic electoral methods) through simple majority decisions and could make a qualified majority necessary for the elimination of certain (not qualitatively different) laws, which came about through simple majority."[43] This is the gist of Schmitt's conception that Loewenstein deemed to be untenable.

However, even later in the 1930s, when Loewenstein was aware of Schmitt's novel theorization of the institutional guarantees, he neglected the profound sense of the latter's materialist approach. For example, in an article devoted to how Nazis had manipulated the constitutional order, Loewenstein wrote: "The only restriction on the dictatorial exercise of the amending power imposed on the government consisted in the nominal preservation of the 'institutional guarantees' of the Reichstag and Federal Council as such and the maintenance of the presidential powers."[44] In all evidence, Loewenstein again thought of the material limits, including institutional guarantees, as a matter of power allocation among political bodies as well as the peaceful cooperation among those bodies – which, he rightly argued, had been severely disrupted by the concrete activities of the parliament within the first years of the Nazi regime.

Tellingly, in a footnote from the same essay, Loewenstein referred to the early-1930s German debate on the difference between guarantees of constitutional rights and institutional guarantees by saying that, based on the latter, "an institution of the state was protected by the constitution only in so far as its bare existence had to be preserved."[45] This is evidence that he paid no heed to the substance that Schmitt had detected in the public-law nature of institutions. These had to be preserved not because of their "bare existence", but because they were the seedbed of those fundamental values that German citizens had to interiorize and reproduce. All of this is indicative of the fundamental difference that existed between what Schmitt and Loewenstein thought should be preserved of a democratic regime.

Conservative institutionalism vs. Institutional conservatism

Regarding militant democracy, *institutional conservatism* has recently been defined as a conception recommending that democratic institutions should hinder the "transformation of the existing order."[46] While this portrays Loewenstein's model, it fails to capture Schmitt's. Nor did the latter ever theorize "democratic militancy as an institutional guarantee for democratic institutions."[47] Based on my analysis above, Schmitt's notion of institutional life, in the early 1930s, when he was perfecting his constrained democracy, implied the idea of public law entities producing normativity of their own and presiding over the formation of German citizens within their normative boundaries. This notion of institution remarkably differed from Loewenstein's. It was indebted to a jurisprudential stream of thought that at the beginning of the 20th century was fostering a novel conception of what social institutions are and how they contribute to the life of the legal order and the political community.[48]

In this light, Schmitt's main claim was that established institutions such as the churches, the army, the bureaucracy, and other pillars of the German political community were the source of normative content that was embedded in the constitution and should be made impervious to any amending power of the legislature. Between 1930 and 1932, he concluded that these contents were the expression of a type of state that had eventually superseded the bourgeoise state of the 19th century. This is why he insisted that the task of an institutional legal theory was to cleanse the constitution of its internal contradictions and to emphasize the homogeneity of fundamental values. In a Schmittian vein, this is what democratic militancy amounts to. His defending democracy implied carving out the substantive contents of the constitution and demonstrating that no political body of any nature had the power to encroach on it. Certainly, this is an extreme, far-right type of conservative thinking.[49]

For this reason, I would rather qualify Schmitt's as *conservative institutionalism*, in the sense that social institutions are claimed to produce normative content that it is up to the administrative and judicial powers to protect from the whims of ephemeral legislative majorities. Importantly, as I elucidated, Schmitt's more refined view in the early 1930s had dismissed the previous constitutional theory that revolved "around the opposition between a voluntaristic conception of the 'constitution-

making power' and the rationalism of the liberal conception of the *Rechtsstaat* as 'rule of law'."[50] Therefore, it cannot be this view of the constitution that underlies Schmitt's constrained democracy. When he advanced his notion of a democracy that should be constitutionally protected, he considered the much-debated conflict between the Weimar constitution's two souls as outdated. His novel conception of the materiality of institutional guarantees led him to think that the second part of the constitution was normatively and logically prior to the first part and hence fundamentally untouchable.

Loewenstein's militant democracy, on the contrary, worked with a more basic understanding of institutions as constitutional bodies that are legally granted power and exercise it within legally binding limits. Democracy had no materiality to safeguard other than the balanced allocation of power and the basic rights of the liberal tradition. Accordingly, he clung to an instrumentalist conception of the constitution. As he maintained in *Political Power and the Governmental Process*, political systems can be classified as autocratic or constitutional depending on whether they have operative techniques for the balanced and mutually checked exercise, while the supreme power holder, that is, the people, can effectively hold power holders accountable: "The constitution, thus, became the basic instrumentality for the control of the power process."[51]

Conclusion

My argument so far serves as a twofold answer to the two claims to which I referred above. As to the thinner claim, I concur with those who deem the model of constrained democracy to be more robust and more instructive than the model of militant democracy because he clarified what it is that must be protected. He invited those who take democracy to heart to see that they are defending specific material contents, not procedures. His outspokenness escapes one of militant democracy's glaring contradictions when its champions recommend that the liberal core of democratic procedures be armoured with dictatorial procedures. Certainly, this does not mean that limitations on fundamental rights of expression and participation that are enacted to preserve democracy are necessarily incompatible with today's liberal constitutionalism.[52] More judiciously, this requires openly recognizing that there are limits to the power of rational justifications for democracy and to its attractiveness in the eyes of those who do not cherish democratic values.

Defending democracy, Schmitt pointed out, implies acknowledging its substantive set of values and principles that democracy's many enemies are likely to consider as a set among others. This sets the stage for an existential opposition that should not be framed, as democratic militants tend to so, as a civilizing war on human aberration and moral indecency. Unquestionably, Schmitt's view of democracy was radically conservative and fiercely anti-pluralist – and this makes his notion of materiality incompatible with contemporary liberal regimes hospitable to societal pluralism and multiculturalism. He wanted the normative contents of the traditional institutions to be safeguarded and constitutionally entrenched, while potential alternatives should be countered with legal and political means. Despite this, what counts in the present context is how, and based on what arguments, he insisted that there is no ultimate theoretical justification for why one should want to hold onto those institutions and not others. All that one can say, he alleged, is that a context-specific constitution is meant to incorporate and preserve the values and principles produced by the institutional life that makes a national tradition what it is.

This also makes clear that Loewenstein's call for brute measures against fascism was just as unjustified in theoretical terms. And most likely he was aware of that. Despite this, his impetuous pragmatism was myopic to the *inherently political* character of defending liberal constitutionalism – where "political" takes on the Schmittian sense of being disposed to wage war on enemies when the circumstance requires it. As Schmitt averred, the refusal fully to embrace the "politicness" of militant democracy ends up charging the enemies of democracy with moral abjection, and so prevents hammering home the critical potential that, consciously or not, their antagonism embodies. Liberal democracy that "becomes militant" appoints itself as inherently superior to any other system and

appraises this superiority by internal standards. Furthermore, this self-complacency makes it useless for democracies to think of alternative ways of defending themselves.[53]

As far as the thicker claim is concerned, I think it should be rejected. Loewenstein's model does not piggyback on Schmitt's. As I emphasized, his democratic militancy intended to preserve the procedural core of democratic regimes on account of the degree of freedom and institutional control that they ensure vis-à-vis other regimes. He never cared to scrutinize the specific material contents that specific historical constitutions incorporate, nor did he ever root his appeal to militancy on such an analysis. Over time, Loewenstein remained loyal to the understanding of the constitution that animated his *Habilitation* work on Art. 76 of the Weimar constitution, in which he teamed up with positivists and those who denied there being material limits to the parliament's amending power.

This difference could not be more enlightening. Both models call to arms, but their arms are not the same. Schmitt's far-right conservatism in the 1930s was based on the material value of the normative life of historical institutions. Thoughtful material constitutionalism, he assumed, was required to tease out their normative core, harmonize it with the normative core of the other state-sponsored institutions, and make their intersection intangible by parliamentary legislation. Democracy, as he peculiarly understood it, had to stay permanently militant, in the sense that the executive and judicial powers constantly watch over the stable reproduction of institutions. His major worry was the mere possibility that alternatives to existing institutions might materialize and spread. On the contrary, Loewenstein relied on an elitist principle that the masses are not suitable for the government as they are over-emotional and manipulable. What should be watched over, then, was who was in power and what their political ideals were. Liberal constitutions had the task of ensuring that political power remained firmly in the hands of liberal-minded, politically-educated personalities. Fascism was structurally linked to the entry of an unfit public into the political arena. This meant that the defence of democracy did not amount to the defence of specific material contents. It meant ensuring procedures that would break the dangerous link between selfish political movements and capricious, naive crowds.

Sure enough, both models are exclusionary, but what gets targeted by democratic militancy changes in a few significant respects. Schmitt feared societal pluralism and political heterogeneity, Loewenstein mass and direct democracy. Both were sceptical of parliamentary majorities. Both thought that it was up to the executive and the judiciary to thwart volatile legislatures in that they could harm the constitution if constitutional provisions were not restricting enough. Yet their legacy cannot be underestimated. As has been noted, after WWII, when higher courts took it upon themselves to implement militant democracy, especially (but not only) in Germany, "Europeans used a Kelsenian instrument (the constitutional court) to pursue a Schmittian strategy (of denying all political contestants an equal chance[54] of gaining power)."[55] Constrained democracy and militant democracy are still the prevailing models of how to defend the constitution. Unfortunately, either model can easily be taken over by democracy's enemies: both those who want other institutions to prevail and those who, genuinely or not, believe they are new enlightened elites for a new epoch.

Bibliography

Anschütz, Gerhard. *Die Verfassung des Deutschen Reichs vom 11. August 1919*, *Ein Kommentar für Wissenschaft und Praxis* (14th ed.). Berlin: Georg Stilke, 1933.

Bendersky, Joseph W. "Carl Schmitt in the Summer of 1932: A Reexamination." *Revue européenne des sciences sociales* 16, no. 44 (1978): 39-53.

Bendersky, Joseph W. "Carl Schmitt's Path to Nuremberg: A Sixty-Year Reassessment." *Telos* 139, (2007): 6-34.

Capoccia, Giovanni. *Defending Democracy*. Baltimore, MD: The Johns Hopkins University Press, 2005.

Capoccia, Giovanni. "Militant Democracy: The Institutional Bases of Democratic Self-Preservation." *Annual Review of Law and Social Science*, 9 (2013): 207-226.

Colón-Ríos, Joel. *Constituent Power and the Law*. Oxford: Oxford University Press, 2020.
Dyzenhaus, David. *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar.* Oxford: Oxford University Press, 1997.
Goldoni, Marco. "The Material Constitution". In *The Cambridge Handbook of Constitutional Theory*, edited by Richard Bellamy and Jeff King, 537-552. Cambridge: Cambridge University Press, 2024.
Goldoni, Marco, and Wilkinson, Michael A. *The Cambridge Handbook on the Material Constitution.* Cambridge: Cambridge University Press, 2023.
Górnisiewicz, Arkadiusz. "Personal Enemies, Conceptual Friends: Karl Loewenstein and Carl Schmitt on Self-Destructive Legalism." *Journal of Political Ideologies* 0, no. 0 (2023): 1-21.
Kostal, Rande W. "The Alchemy of Occupation: Karl Loewenstein and the Legal Reconstruction of Nazi Germany, 1945-1946." *Law and History Review* 29, no. 1 (2011): 1-52.
Invernizzi Accetti, Carlo, Zuckerman, Ian. "What's Wrong with Militant Democracy?" *Political Studies* 65, no. 1S (2017): 182-199.
Invernizzi Accetti, Carlo, Zuckerman, Ian. "Militant Democracy as Decisionist Liberalism." In *The Decisionist Imagination: Sovereignty, Social Science and Democracy in the 20th Century*, edited by Daniel Bessner and Nicolas Guilhot, 64-84. New York: Berghahn Books, 2019.
Lang, Markus. *Karl Loewenstein. Transatlantischer Denker der Politik*. Stuttgart: Franz Steiner, 2007.
Lerner, Max. *It Is Later Than You Think: The Need for a Militant Democracy.* New York: The Viking Press, 1938.
Lindahl, Hans. *Fault Lines of Globalisation*. Oxford: Oxford University Press, 2013.
Loewenstein, Karl. *Erscheinungsformen der Verfassungsänderung. Verfassungsrechtsdogmatische Untersuchungen zu Artikel 76 der Reichsverfassung*. Tübingen: J.C.B. Mohr, 1931.
Loewenstein, Karl (1935a). "Autocracy versus democracy in contemporary Europe I." *American Political Science Review* 29, no. 4 (1935): 571-593.
Loewenstein, Karl. "Autocracy versus democracy in contemporary Europe II." *American Political Science Review* 29, no. 5 (1935): 755-784.
Loewenstein, Karl. "Militant Democracy and Fundamental Rights, I." *American Political Science Review* 31, no. 3: 417-432.
Loewenstein, Karl. "Militant Democracy and Fundamental Rights, II." *American Political Science Review* 31, no. 4 (1937): 638-658.
Loewenstein, Karl. "Dictatorship and the German Constitution: 1933-1937." *The University of Chicago Law Review* 4, no. 4 (1937): 537-574.
Loewenstein, Karl. "Legislative control of political extremism in European democracies I." *Columbia Law Review* 38, no. 4(1938): 591-622.
Loewenstein, Karl. "Legislative Control of Political Extremism in European Democracies II." *Columbia Law Review* 38, no. 5 (1938): 725-774.
Loewenstein, Karl. "Review of *It Is Later Than You Think: The Need for a Militant Democracy* by Max Lerner." *The American Political Science Review* 33, no. 3(1939): 519-521.
Loewenstein, Karl. *Political Power and the Governmental Process*. Chicago and London: The University of Chicago Press, 1965.
Loewenstein, Karl. "Constitutions and Constitutional Law in the West and in the East." *The Indian Journal of Political Science* 30, no. 3 (1969): 203-248.
Loughlin, Martin. *Political Jurisprudence*. Oxford: Oxford University Press, 2017.
McCormick, John "Identifying or Exploiting the Paradoxes of Constitutional Democracy? An Introduction to Carl Schmitt's *Legality and Legitimacy*." In Carl Schmitt, *Legality and Legitimacy*, xiii-xliii. Durham and London: Duke University Press, 2004.
Maddox, Graham. "Karl Loewenstein, Max Lerner, and Militant Democracy: An Appeal to 'Strong Democracy."" *Australian Journal of Political Science* 54, no. 4 (2019): 490-504.

Malkopoulou, Anthoula, and Kirshner, Alexander. *Militant Democracy and its Critics: Populism, Parties, Extremism*. Edinburgh: Edinburgh University Press, 2019.
Malkopoulou, Anthoula, and Norman, Ludvig. "Three Models of Democratic Self-Defence: Militant Democracy and Its Alternatives." *Political Studies* 66, no. 2 (2018): 442-458.
Meierhenrich, Jens (2023). "The Soul of the State: The Question of Constitutional Identity in Carl Schmitt's *Verfassungslehre*." In *The Cambridge Handbook on the Material Constitution*, edited by Marco Goldoni and Michael A. Wilkinson, 45-63. Cambridge: Cambridge University Press, 2023.
Müller, Jan-Werner. "The triumph of what (if anything)? Rethinking political ideologies and political institutions in twentieth-century Europe." *Journal of Political Ideologies* 14, no. 2 (2009): 211-226.
Müller, Jan-Werner. "Militant Democracy." In *The Oxford Handbook of Comparative Constitutional Law*, edited by Michel Rosenfeld and András Sajó, 1253-1269. Oxford: Oxford University Press, 2012.
Nitzschner, Patrick. "On Militant Democracy's Institutional Conservatism." *Philosophy and Social Criticism*, 0, no. 0 (2023): 1-21.
Paulson, Stanley L. "Review of *The Theory of Public Law in Germany 1914-1945*." *Oxford Journal of Legal Studies* 25, no. 3 (2005): 525-545.
Paulson, Stanley L. "Some Issues in the Exchange between Hans Kelsen and Erich Kaufmann." *Scandinavian Studies in Law* 48, (2005): 269-290.
Rijpkema, Bastiaan. *Militant Democracy: The Limits of Democratic Tolerance*. Abingdon: Routledge, 2018.
Rijpkema, Bastiaan. "Militant Democracy beyond Loewenstein: George van den Bergh's 1936 Inaugural Lecture." In *Militant Democracy: Political Science, Law and Philosophy*, edited by Afshin Ellian and Bastiaan Rijpkema, 117-152. Cham: Springer, 2018.
Rubinelli, Lucia. "Costantino Mortati and the Idea of Material Constitution." *History of Political Thought* 40, no. 3 (2019): 515-546.
Scheuerman, William E. *The End of Law*: *Carl Schmitt in the Twenty-First Century*. Lanham: Rowman and Littlefield, 2020 (2nd ed.).
Schmitt, Carl. "Freiheitsrechte und institutionelle Garantien der Reichsverfassung (1931)." In Carl Schmitt. *Verfassungsrechtliche Aufsätze aus den Jahren 1924 1954. Materialien zu einer Verfassungslehre*, 140-173. Berlin: Duncker and Humblot, 1958.
Schmitt, Carl. "Grundrechte und Grundpflichten (1932)." In Carl Schmitt. *Verfassungsrechtliche Aufsätze aus den Jahren 1924 1954. Materialien zu einer Verfassungslehre*, 181-231. Berlin: Duncker and Humblot, 1958.
Schmitt, Carl. *Legality and Legitimacy.* Durham and London: Duke University Press, 2004.
Schmitt, Carl. *Political Theology: Four Chapters on the Concept of Sovereignty*. Chicago and London: The University of Chicago Press, 2005.
Schmitt, Carl. *The Concept of the Political*. Chicago and London: The University of Chicago Press, 2007 (expanded edition).
Schmitt, Carl. "Carl Schmitt an Ludwig Feuchtwang (13.06.1931)." In *Carl Schmitt – Ludwig Feuchtwanger: Briefwechsel 1918-1935*, 342-344. Berlin: Duncker & Humblot, 2007.
Schmitt, Carl. *Constitutional Theory*. Durham and London: Duke University Press, 2008.
Schupmann, Benjamin A. *Carl Schmitt's Constitutional and State Theory: A Critical Analysis*. Oxford: Oxford University Press, 2017.
Schupmann, Benjamin A. "Liberalism, Legal Revolution and Carl Schmitt." *Philosophy and Social Criticism* 47, no. 2 (2020): 163-167.
Schupmann, Benjamin A. "Constraining Political Extremism and Legal Revolution." *Philosophy and Social Criticism* 46, no. 3 (2020): 249-273.
Stolleis, Michael. *A History of Public Law in Germany 1914-1945*. Oxford: Oxford University Press, 2004.

Vinx, Lars. "Democratic Equality and Militant Democracy." *Constellations* 27, 2020: 685-701.
Vinx, Lars. "The Material Constitution of the Dual State." In *The Cambridge Handbook on the Material Constitution*, edited by Marco Goldoni and Michael A. Wilkinson, 100-1113. Cambridge: Cambridge University Press, 2023.

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[1] On the impact of militant democracy on both political thought and concrete policies, see e.g. Müller, "The triumph of what (if anything)?", 211-26, and Capoccia, *Defending Democracy* (particularly, 47-67).

[2] See Karl Loewenstein, "Militant Democracy and Fundamental Rights, I", and Karl Loewenstein "Militant Democracy and Fundamental Rights, II". It is worth noting that, while Loewenstein is generally considered to be the founder of the theory, in his investigation into the origin of the topic, Bastiaan Rijpkema shows that, in those same years, the term was first launched by Dutch jurist George van den Bergh, precisely on 28 September 1936, in a lecture entitled "The Democratic State and Non-Democratic Parties" (see Rijpkema, "Militant Democracy beyond Loewenstein"). Apart from the co-ownership of the label, which according to Rijpkema still is to be fully recognized in the copious literature on militant democracy, Rijpkema thinks van den Bergh's model is free of the theoretical weaknesses that are generally attributed to Loewenstein's (see Rijpkema, *Militant Democracy*, 22-68).

[3] Loewenstein, "Militant Democracy and Fundamental Rights, II", 658.

[4] Loewenstein, "Militant Democracy and Fundamental Rights, I", 432.

[5] See e.g. Invernizzi Accetti and Zuckerman, What's Wrong with Militant Democracy?"; Müller, "Militant Democracy", 1257; Górnisiewicz, "Personal Enemies, Conceptual Friends"; Nitzschner, "On Militant Democracy's Institutional Conservatism"; Schupmann, *Carl Schmitt's Constitutional and State Theory*, 201-20; Schupmann, "Liberalism, Legal Revolution and Carl Schmitt".

[6] In truth, before the Nazis' rise to power, there was mutual respect. In particular, Loewenstein regarded Schmitt as one of the most prominent jurists in the German tradition. Nevertheless, Loewenstein thought that Schmitt's conception of democracy was misguided and dangerous because it advocated a strong executive branch with the approval of the people through the plebiscite. Schmitt resented this reading of his own theory. On 30 May 1931, in a letter to Ludwig Feuchtwanger, an editor at the Duncker& Humblot publishing house, he wrote that "Loewenstein's book [...] could put to shame most of the full professors I've worked with", "despite silly remarks about my 'romantic' preference for acclamation and the like – remarks that Loewenstein parrots Richard Thoma and proves that he doesn't know what romanticism is or what an acclamation is, but you can't ask him to" (Schmitt, "Carl Schmitt an Ludwig Feuchtwanger", 338). Loewenstein maintained his high opinion of Schmitt even after the latter joined the Nazis, but this continued respect made his assessment of Schmitt's political decisions harsher, if possible. Famously, in 1945 Loewenstein, who in 1933 had to flee from Munich because of his Jewish origins, was hired by the Director of the Legal Division in Berlin to supervise the implementation of the legal provisions of the Potsdam Protocol. In that circumstance, in November of the same year, he produced a report titled *Observations on the Personality and the Work of Professor Carl Schmitt*. Here he sketched a short biography of Schmitt and argued that he should be treated with the utmost severity. Loewenstein's admiration for his colleague went hand in hand with his resolution that brilliant minds who supported the Nazi regime deserved no mercy. On Loewenstein's contribution to the process of denazification, see Kostal, "The Alchemy of Occupation". On the relationship between Loewenstein and Schmitt on that occasion, see Bendersky, "Carl Schmitt's Path to Nuremberg".

[7] It is worth noting that Loewenstein did not really foresee the imminent end of the Republic. However, given his penchant for British liberal constitutionalism, he never really regarded German democracy as a mature democracy. It was contaminated by the germ of radical democracy and the associated ideology of popular sovereignty as the source of all power and legitimacy. In contrast to the influential jurists Anschütz and, above all, Richard Thoma, in the late 1920s and early 1930s Loewenstein considered the degeneration of the Weimar Constitution more than possible.

[8] The jury is out on whether Schmitt was concerned about the imminent break of the constitutional order. Scholars such as David Dyzenhaus (*Legality and Legitimacy*, 70-85), John McCormick ("Identifying or Exploiting the Paradoxes of Constitutional Democracy"), and William Scheuerman (*The End of Law*, 111-116) doubt his genuine intent to preserve the Republic in the early 1930s. His theorizing, they submit, favoured a plebiscitarian regime that would open the way to a totalitarian leadership. I rather concur with Joseph Bendersky that 'the restoration of stability through a strong existing constitution, based upon the existing constitution, was obviously Schmitt's first priority' (Bendersky, "Carl Schmitt in the Summer of 1932: A Reexamination", 51).

[9] Schupmann, *Carl Schmitt's Constitutional and State Theory*.

[10] See Karl Loewenstein, "Autocracy versus democracy in contemporary Europe II"; Karl Loewenstein, "Militant Democracy and Fundamental Rights, I"; Karl Loewenstein, "Militant Democracy and Fundamental Rights, II", Karl Loewenstein, "Dictatorship and the German Constitution: 1933-1937"; Karl Loewenstein. "Legislative control of political extremism in European democracies I"; Karl Loewenstein, "Legislative Control of Political Extremism in European Democracies II".

[11] See e.g. Invernizzi Accetti and Zuckerman, What's Wrong with Militant Democracy?"; Rijpkema, *Militant Democracy*; Maddox, "Karl Loewenstein, Max Lerner, and Militant Democracy"; Malkopoulou and Kirshner, *Militant Democracy and its Critics*; Malkopoulou and Norman, "Three Models of Democratic Self-Defence"; Nitzschner, "On Militant Democracy's Institutional Conservatism".

[12] See Loewenstein, "Dictatorship and the German Constitution: 1933-1937".

[13] Over time, Loewenstein remained faithful to this understanding of the constitution. For example, later in his scholarly career, he wrote: "By no means does a written constitution contain all rules that essential for the conduct of the political process, let alone all constitutional law. As a matter of fact, even in those states that possess a written constitution, unwritten rules or constitutional conventions implement the written norms proper or, as the case may be, they even supersede them" (Loewenstein, "Constitutions and Constitutional Law in the West and in the East", 208).

[14] As I will clarify, by materiality I mean, in the most abstract sense, a set of purposes or goals pursued by political subjects and institutions (see Goldoni, "The Material Constitution").

[15] On the relation between these two models see Maddox, "Karl Loewenstein, Max Lerner, and Militant Democracy".

[16] Loewenstein, "Review of *It Is Later Than You Think*", 521.

[17] Nitzschner, "On Militant Democracy's Institutional Conservatism", 7.

[18] See e.g. Schupmann, *Carl Schmitt's Constitutional and State Theory*; Invernizzi Accetti and Zuckerman, "What's Wrong with Militant Democracy?"; Malkopoulou and Norman, "Three Models of Democratic Self-Defence", 447; Górnisiewicz, "Personal Enemies, Conceptual Friends".

[19] See e.g. Meierhenrich, "The Soul of the State"; Vinx, "The Material Constitution of the Dual State"; Goldoni, "The Material Constitution". More generally, on Schmitt's material approach to law, see e.g. Croce, "The Enemy as the Unthinkable"; Croce and Salvatore, "Beyond Emergency Politics"; Lindahl, *Fault Lines of Globalisation*; Loughlin, *Political Jurisprudence*. It is worth noting that although Schmitt was not among those who advocated a theory of the constitution in the material sense, fully developed by the Italian jurist Costantino Mortati (see Rubinelli, "Costantino Mortati and the Idea of Material Constitution"), he adopted a materialist lexicon in the early 1930s, when the debate over the materiality of the constitution was on the rise. For example, he spoke of "Gesetz im materiellen Sinne" to qualify the difference between the first, procedural part of the Weimar Constitution and the second, substantive part. Loewenstein, too, endorsed the "the useful distinction" between "formal constitutional law, incorporated in a single document called the 'constitution', and material or substantive constitutional law, consisting of statutes and constitutional conventions" (Loewenstein, *Political Power and the Governmental Process*, 138). Needless to say, Schmitt and Loewenstein had different ideas about what this materiality was. But this disagreement illustrates that before Mortati clarified and elaborated the notion of materiality in his influential way, there was a semantic struggle over this notion and what it implied.

[20] Goldoni puts it as follows: "The material constitution is one term (the *explanans*) of an explanatory relation. The other pole (the *explanandum*) is the constitutional order. The analytical function of the material constitution is to grasp the relation between the organisation of the social order and the form of the constitution" (Goldoni, "The Material Constitution", 537).

[21] Nitzschner, "On Militant Democracy's Institutional Conservatism".

[22] Invernizzi Accetti and Zuckerman, "What's Wrong with Militant Democracy?", 186.

[23] Invernizzi Accetti and Zuckerman, "What's Wrong with Militant Democracy?", 186.

[24] It should be noted that Schupmann's analysis in *Carl Schmitt's Constitutional and State Theory* is one of the few that cannot be charged with overlooking the Schmittian texts and themes which I will refer to in what follows. However, I think it is important to supplement Schupmann's largely accurate analysis with an inquiry into the relation between the materiality of law and democratic militancy.

[25] For a more detailed analysis of this theoretical change, see Croce and Salvatore, "Little Room for Exceptions"; Croce and Salvatore, "Beyond Emergency Politics".

[26] For a comprehensive account of Schmitt's thinking in these years, see Croce and Salvatore, *Carl Schmitt's Institutional Theory*.

[27] Schupmann, "Constraining Political Extremism and Legal Revolution", 252.

[28] Schmitt defined the constitutional document as "a hodgepodge of programs and positive provisions, which provides the foundation for the most diverse political, social, and religious matters and convictions" (Schmitt, *Constitutional Theory*, 83).

[29] As I will show in the subsequent section, such an amending power was regulated by Art. 76 of the Weimar constitution.

[30] He made this clear, for example, when in the Preface to the second edition of *Political Theology* (dated November 1933) he stated that his comprehensive revision of decisionism, conducted in the late 1920s, also came "as a result of discussions of my notion of "institutional guarantees" in German jurisprudence" (Schmitt, *Political Theology*, 2).

[31] See Stolleis, *A History of Public Law in Germany 1914-1945*, 87-93.

[32] See Stolleis, *A History of Public Law in Germany 1914-1945*; Paulson, "Review of *The Theory of Public Law in Germany 1914-1945*"; Paulson, "Some Issues in the Exchange between Hans Kelsen and Erich Kaufmann".

[33] On the relevance of this Hauriouvian topic to Schmitt's overall reflection from that period, it is worth noting that, again in the Preface to the second edition of *Political Theology*, along with his new conception of institutional guarantees, he mentioned his "own studies of the profound and meaningful theory of institutions formulated by Maurice Hauriou" (Schmitt, *Political Theology*, 2-3) as a factor that effected a major shift.
[34] For example, he maintained: "The family as such can have no basic right in the genuine sense, no more so than can one of its members. The family can only be protected constitutionally as an institution. The same is true of localities or associations of localities' (Schmitt, *Constitutional Theory*, 211).
[35] Schmitt, "Freiheitsrechte und institutionelle Garantien der Reichsverfassung (1931)"; Schmitt, "Grundrechte und Grundpflichten (1932)".
[36] On the problem this very term created after his adhesion to Nazism, see Croce and Salvatore, *The Legal Theory of Carl Schmitt*, 56–7.
[37] Anschütz, *Die Verfassung des Deutschen Reichs vom 11. August 1919*, 401-02, Art. 76.
[38] Loewenstein, *Erscheinungsformen der Verfassungsänderung*.
[39] For a careful analysis of the various aspects of this work, as well as its potential contradictions, see Lang, *Karl Loewenstein*, 99-113.
[40] Loewenstein, *Political Power and the Governmental Process*, 125-33.
[41] Loewenstein, *Erscheinungsformen der Verfassungsänderung*.
[42] See Colón-Ríos, *Constituent Power and the Law*, 203-25.
[43] Schmitt, *Constitutional Theory*, 80.
[44] Loewenstein, "Dictatorship and the German Constitution: 1933-1937", 542.
[45] Loewenstein, "Dictatorship and the German Constitution: 1933-1937", 542, fn. 13.
[46] Nitzschner, "On Militant Democracy's Institutional Conservatism", 2.
[47] Nitzschner, "On Militant Democracy's Institutional Conservatism", 7.
[48] On French and Italian legal institutionalism as well as Schmitt's relation to this influential scholarly tradition, see Croce and Salvatore, *The Legal Theory of Carl Schmitt*, 94–139.
[49] As one of the reviewers notes, while Schmitt would eventually appropriate from his own constitutional theory to pursue these goals, his theory of constrained democracy also helped lay the normative foundation for the Basic Law of the Federal Republic of Germany. And this is certainly true. But I am not arguing that any ex-ante commitment to fundamental values is tantamount to an extreme, far-right kind of conservative thinking. Schmitt's materialist constitutionalism can be translated into very different institutional forms. Distinguishing between these forms depends on what the core values are, how much pluralism they allow, and what forms of containment are used. In general, a commitment to substantive constitutionalism implies that the constitution is based on material contents that are used as normative standards to determine who can participate in the political game and who should be excluded because they do not subscribe to those material contents. Schmitt's own translation of his materialist constitutionalism was right-wing because of the institutionalist values he considered fundamental and his conviction that pluralism should be kept to a minimum.
[50] Invernizzi Accetti and Zuckerman, "Militant Democracy as Decisionist Liberalism", 66.
[51] Loewenstein, *Political Power and the Governmental Process*, 123.
[52] See Capoccia, Militant Democracy", 219.
[53] See Malkopoulou and Norman, "Three Models of Democratic Self-Defence", 455.
[54] On the relation between the principle of equal chance and Schmitt's interpretation of defending democracy, see Vinx, "Democratic Equality and Militant Democracy".
[55] Müller, "Militant Democracy", 1262.