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ARTICLES

FRAGILE DEMOCRACIES

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FRAGILE DEMOCRACIES

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Democratic regimes around the world find themselves besieged by antidemocratic groups that seek to use the electoral arena as a forum to propagandize their causes and rally their supporters. Virtually all democratic countries respond by restricting the participation of groups or political parties deemed to be beyond the range of tolerable conduct or viewpoints. The proscription of certain views raises serious problems for any liberal theory in which legitimacy turns on the democratic consent of the governed. When stripped down to their essentials, all definitions of democracy rest ultimately on the primacy of electoral choice and the presumptive claim of the majority to rule. The removal of certain political views from the electoral arena limits the choices that are permitted to the citizenry and thus calls into question the legitimacy of the entire democratic enterprise.

This Article asks under what circumstances democratic governments may act (or, perhaps, must act) to ensure that their state apparatus not be captured wholesale for socially destructive forms of intolerance. The problem of democratic intolerance takes on special meaning in deeply fractured societies, in which the electoral arena may serve as a parallel or even secondary front for extraparliamentary mobilizations. Such democratic societies are not powerless to respond to the threat of being compromised from within. At the descriptive level, the prime method is the prohibition on extremist participation in the electoral arena, a practice that exists with surprising regularity across the range of democratic societies. Seemingly, the world has learned something since the use of the electoral arena as the springboard for fascist mobilizations to power in Germany and Italy.

This Article's primary concern is the institutional considerations that either do or should govern restrictions on political participation, with particular attention to how these have been assessed by reviewing courts in a variety of countries, including Germany, India, Israel, Turkey, Ukraine, and the United States. This Article distinguishes among the types of parties that may be banned or impeded, giving the greatest attention to mass antidemocratic parties that actually seek to win elections. Further lines are drawn among types of prohibitions, ranging from the use of criminal sanctions in the United States to party prohibitions in most European countries to restrictions on electoral speech and conduct in India. Ultimately, the argument is that democratic societies must have weapons of self-preservation available to them, but that strong institutional protections must be in place before they may be deployed.

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[*] Reiss Professor of Constitutional Law, New York University School of Law. Substantial portions of this Article were originally prepared as part of the Rosenthal Lectures at Northwestern University School of Law. The Article benefited from early presentations at Tel Aviv University and Hebrew University, as well as subsequent exposition at the NYU Colloquium in Legal, Political and Social Philosophy, and at Harvard Law School and the University of Chicago Law School. I received particularly helpful comments from Cynthia Estlund, Noah Feldman, Moshe Halbertal, Ron Harris, Rick Hills, Barak Medina, Richard Pildes, Catherine Sharkey, Jeremy Waldron, and Justice Aharon Barak. The views expressed should, of course, be attributed to no one but myself. I was also greatly helped by the research assistance of Camden Hutchison, Teddy Rave, Ian Samuel, and Josh Wilkenfeld.

INTRODUCTION

The 2006 controversy surrounding the Danish cartoons mocking Islam provides an illuminating window into the problem of what may be termed democratic intolerance[1] — that is, the intolerance that democratic governments exhibit toward antidemocratic actors in the name of preserving the governments' fundamental democratic character. Although the political maneuverings and machinations surrounding the protests were no doubt multifaceted, the core controversy centered on Islamic fundamentalist demands that Denmark be held responsible for its failure to censor the publication of a series of cartoons perceived to be blasphemous attacks on the prophet Mohammed.[2] In commenting on the publication of these cartoons, Professor Ronald Dworkin provocatively asserted a right to insult; in so doing, he made a moral and instrumental argument requiring weak or unpopular minorities to tolerate social insult as a condition of making a claim on the majority for protective antidiscrimination legislation: "If we expect bigots to accept the verdict of the majority once the majority has spoken, then we must permit them to express their bigotry in the process whose verdict we ask them to accept."[3]

Professor Dworkin's idea that there is a limit to claims by the intolerant — in this case, the Muslim protesters — for accommodation by a tolerant society resonates with core liberal principles. For John Rawls, for example, "[a] person's right to complain is limited to violations of principles he acknowledges himself. A complaint is a protest addressed to another in good faith."[4] The intolerant may complain of the insult felt and of the norms of civility that should be honored, but, per Dworkin, the fear of insult cannot be thought to "justify official censorship."[5] Resisting censorship is part and parcel of ensuring the civil liberties that make robust political exchanges and democratic politics possible.

At bottom, Professor Dworkin's argument is an intriguing rallying call for democracies to stand fast against the demand by intolerant groups that democracies lend their governmental authority to the cause of silencing offending speech. Posed as a question whether democratic regimes should enlist their arsenals of coercion in the suppression of unpopular, discordant, or simply intemperate speech, the

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[1] The term is loosely adapted from a major contribution to this debate, Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L.J. 1 (1995).

[2] *See, e.g.*, *Protesters Burn Consulate over Cartoons*, CNN.COM, Feb. 5, 2006, http://www.cnn.com/2006/WORLD/asiapcf/02/05/cartoon.protests/index.html (detailing the Foreign Minister of Denmark's denials of official responsibility for the publication of the cartoons).

[3] Ronald Dworkin, *The Right to Ridicule*, N.Y. REV. BOOKS, Mar. 23, 2006, at 44.

[4] JOHN RAWLS, A THEORY OF JUSTICE 217 (1971).

[5] Dworkin, *supra* note 3.

civil liberties answer seems inescapable. Just as a liberal democratic state, such as Denmark, would no doubt refuse to engage in such censorship itself, so too no legitimate claim could be made that it should enlist its state resources toward such aims on behalf of others. Simply put, democratically tolerant governments should not succumb to demands for censorship made by the forces of intolerance.

The question for this Article is a variant on the same theme, asking whether democratic governments have a similar duty to resist the use of their electoral arenas as platforms for religious or other socially destructive forms of intolerance. In other words, can democracies act not only to resist having their state authority conscripted to the cause of intolerance, but also, under certain circumstances, to ensure that their state apparatus not be captured wholesale for that purpose?

For purposes of this inquiry, imagine that the Islamic efforts to suppress speech in Denmark took a form different from street protests and the burning of Danish flags in various locations around the world. Imagine instead that the protest took the form of the creation of a political party in Denmark vying for state authority in order to impose speech codes and other forms of repressive legislation in an attempt to root out all traces of blasphemy in Danish society — of which there are, doubtless, quite a few. And imagine further that Denmark chose to respond by using state authority to condition the terms of political participation such that elections could not become the platform for leading an assault on its liberal democratic society.

This is no mere abstract inquiry. Hitler's final push to power occurred within the confines of Weimar democratic processes, something that allowed Joseph Goebbels tauntingly to remark, "This will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed."[6] Nor were the Nazis the last antidemocratic force to lay siege from within the confines of the electoral process.[7] The ability of extremism to find its way into the protective crevices of a liberal democratic order has given rise to what

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[6] Fox & Nolte, *supra* note 1, at 1 (quoting Karl Dietrich Bracher et al., *Introduction* to NATIONALSOZIALISTISCHE DIKTATUR 16 (Karl Dietrich Bracher et al. eds., 1983)).

[7] For a discussion of the capture of a commanding electoral claim by antidemocratic forces in Algeria, see *id.* at 6–9. Algeria witnessed a seizure of power by the military to forestall an elected Islamic party from assuming power and carrying out its program of dismantling multiparty democracy. An interesting recent variant is found in the curious letter sent by Iranian President Mahmoud Ahmadinejad, himself elected in apparently legitimate elections, to President George W. Bush articulating the claim that recent developments in U.S. foreign policy in the Middle East and elsewhere had shown the ultimate failure of "[l]iberalism and Western style democracy" itself. Letter from Mahmoud Ahmadinejad to George W. Bush (May 2006), *available at* http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/09_05_06ahmadinejadletter.pdf.

has been termed "militant"[8] or "intolerant"[9] democracy, that is, the mobilization of democratic institutions to resist capture by antidemocratic forces. The aim is to resist having the institutions of democracy harnessed to what may be termed "illiberal democracy."[10]

The problem of democratic intolerance takes on special meaning in deeply "fractured societies,"[11] in which the electoral arena may serve as a parallel or even secondary front for extraparliamentary mobilizations. With regard to the current conflict in the Middle East, for example, Professor Noah Feldman well captures the futility of assuming that democratic politics is the sole or even the primary arena of struggle: "The model of Islamist organizations that combine electoral politics with paramilitary tactics is fast becoming the calling card of the new wave of Arab democratization."[12] For Professor Feldman, "[t]he fact that Hamas and Hezbollah pursue democratic legitimacy within the state while also employing violence on their own marks a watershed in Middle Eastern politics."[13]

Democracies are not powerless to respond to the threat of being compromised from within. At the descriptive level, the prime method of response is the prohibition on extremist participation in the electoral arena, a practice which exists with surprising regularity across democratic societies. Some states restrict speech within the electoral arena, as India has done with its prohibition on any campaign appeals to religious intolerance or ethnic enmity.[14] Other states forbid the formation of parties hostile to democracy, as Germany has done in banning any successors in interest to the Nazi or Communist parties and in more recently banning an Islamic fundamentalist movement, the Caliphate State.[15] Still others impose content restrictions on the views that parties may hold, as with the requirement in Turkey of fidelity to the principles of secular democracy as a condition of eligibility for elected office.[16] Similarly, Israel, through its Basic Law, excludes from the electoral arena any party that rejects the democratic and Jewish char-

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[8] Karl Loewenstein, *Militant Democracy and Fundamental Rights* (pts. 1 & 2), 31 AM. POL. SCI. REV. 417, 638 (1937).

[9] Fox & Nolte, *supra* note 1, at 6.

[10] FAREED ZAKARIA, THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD 17 (2003).

[11] Samuel Issacharoff, *Constitutionalizing Democracy in Fractured Societies*, 82 TEX. L. REV. 1861, 1863 (2004) (describing societies riven by ethnic or religious divides, in which political alignments are largely a reflection of prepolitical allegiances based on kinship of some kind).

[12] Noah Feldman, *Ballots and Bullets*, N.Y. TIMES, July 30, 2006, § 6 (Magazine), at 9.

[13] *Id.*

[14] *See infra* pp. 1424–25.

[15] *See* Peter Niesen, *Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties* (pts. 1 & 2), 3 GERMAN L.J. No. 7, ¶¶ 4, 8, 46 (2002), http://www.germanlawjournal.com/article.php?id=164.

[16] *See infra* pp. 1442–43.

acter of the state, as well as any party whose platform is deemed an incitement to racism.[17] Other states specifically ban designated parties, as evidenced by the practice in several of the former Soviet Republics of barring their local communist parties from seeking elected office;[18] the United States has taken similar steps.[19] Finally, some states prohibit parties that are deemed to be fronts for terrorist or paramilitary groups. Thus, Spain has recently banned Batasuna, a political party sharing the objectives of the Basque separatist ETA insurgents, from any participation in Spanish or European parliamentary elections.[20]

The list of types of restrictions could go on at some length, and the scope of these restrictions has expanded in the aftermath of September 11 and the press of Islamic militancy.[21] The key point, however, is not the ubiquity of the prohibitions, but the rationale for them. All these societies recognize that the electoral arena is not simply a forum for the recording of preferences, but a powerful situs for the mobilization of political forces. Elections serve to amplify the ability of all political forces to disseminate their views. They also provide a natural medium for partisans to have their passions raised and to provoke frenzied mob activity. If elected to parliamentary office, even fringe extremist groups typically enjoy parliamentary immunity for incitement from the halls of power. Under most national laws, they can command official resources for their electoral propaganda. And, as with the fascist rise to power in Europe, they can use their positions in parliament to cripple any prospect of effective governance, destabilize the state, and launch themselves as successors to a failing democracy.

Whatever the inherent difficulties in the use of state authority to enforce codes of democratic exchange, the problems are presented most acutely in the electoral arena. Seemingly, the world has learned something from the use of that arena as the springboard for fascist mobilizations to power in Germany and Italy. Perhaps as well, the world has learned that appeals to communal intolerance in countries like India, even if conducted from within the safe harbor of democratic processes, lead almost invariably to communal violence in which election rhetoric is a rostrum from which antidemocratic forces rally the faithful. At some level, all these countries grapple with an intuition that democ-

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[17] *See* Basic Law: The Knesset § 7A, *translated in* ISRAEL'S WRITTEN CONSTITUTION (5th ed. 2006).

[18] *See infra* p. 1430.

[19] *See infra* pp. 1416–17.

[20] *See* Víctor Ferreres Comella, *The New Regulation of Political Parties in Spain, and the Decision to Outlaw Batasuna*, *in* MILITANT DEMOCRACY 133, 133–34 (András Sajó ed., 2004).

[21] *See* Patrick Macklem, *Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination*, 4 INT'L J. CONST. L. 488, 493–94 (2006) (giving examples of recent limitations on political party formation).

ratic elections require, as a precondition to the right of participation, a commitment to the preservation of the democratic process.[22]

At the same time, limiting the scope of democratic deliberation necessarily calls into question the legitimacy of the political process. When stripped down to their essentials, all definitions of democracy rest ultimately on the primacy of electoral choice and the presumptive claim of the majority to rule. It is of course true that this thin definition of democracy cannot stand alone, for all electoral systems must assume a background set of rules, institutions, and definitions of eligible citizenship that serve as preconditions to the exercise of any meaningful popular choice.[23] Moreover, all democracies of the modern era have constitutional constraints that cabin, through substantive limits and procedural hurdles, what the majority may do at any given point. However, a distinct set of problems emerges whenever a society decides that certain viewpoints may not find expression in the political arena and may never be considered as contenders for popular support.

At a more theoretical level, the need for such restrictions on democratic participation is acknowledged, albeit uncomfortably, even at the core of liberal theory. To return to Rawls, one finds a basic recognition that constraining the freedoms of intolerant groups may be justified when the freedoms of the society as a whole are at risk: "[J]ust citizens should strive to preserve the constitution with all its equal liberties as long as liberty itself and their own freedom are not in danger."[24] Under "stringent" conditions, in which there are "considerable risks to our own legitimate interests," restrictions on the intolerant may be necessary, even while disfavored.[25] Hopefully, in a stable, well-ordered society, this will not often be necessary, for "[t]he liberties of the intolerant may persuade them to a belief in freedom."[26] But where the practical and theoretical benefits of democratic tolerance fail, societies find themselves in "a practical dilemma which philosophy alone cannot resolve."[27]

Liberal political theory generally seeks refuge in two arguments, which, though certainly important, are insufficient. The first is the traditional understanding that the best antidote to bad speech is more

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[22] An interesting example is the argument by Israeli Justice Aharon Barak that restricting a party's ability to register is more suspect than banning a party from electoral activity altogether, since the latter is more easily understood as a state-protective move. PCA 7504/95, 7793/95 Yassin & Rochley v. Registrar of the Political Parties & Yemin Israel [1996] IsrSC 50(2) 45, 66–67. I return to this point later.

[23] *See generally* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY (2d ed. 2001).

[24] RAWLS, *supra* note 4, at 219.

[25] *Id.* at 218–19.

[26] *Id.* at 219.

[27] *Id.*

speech. The core tradition of free expression,[28] brought to American law forcefully in the famous opinions of Justices Holmes and Brandeis, is that the good will prevail in the marketplace of ideas.[29] On this view, suppression of speech is not only ineffective, but likely counterproductive. Only a threat of tremendous immediacy justifies suppression: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[30] The second argument is the quietism that ultimately not much can protect the people from their doom if that is their charted course. This fatalism is found not only in Justice Holmes's view that judicial invocation of the Constitution cannot thwart a pronounced desire of society to do itself in,[31] but also in a broader claim by the Framers that control of the basic structures of democracy was a matter of democratic entitlement. Hence Alexander Hamilton proclaimed forcefully that a "fundamental principle of republican government" would reserve a right to the people to "alter or abolish the established Constitution whenever they find it inconsistent with their happiness."[32]

Even without delving too deeply into the realm of jurisprudence, it bears noting that this risk posed by intolerant groups has not been a major concern of liberal theory of late. By and large, contemporary liberal theory draws its animating principles from the relation of the individual to the state: primarily through the rights-based defenses that the individual may invoke against state authority,[33] and secondarily through the claims of justice that individuals may assert for just

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[28] The classic account is found in ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

[29] *See* Whitney v. California, 274 U.S. 357, 374–77 (1927) (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616, 627, 630 (1919) (Holmes, J., dissenting).

[30] *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

[31] The classic expression is found in Justice Holmes's dissent in *Gitlow v. New York*, 268 U.S. 652 (1925): "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." *Id.* at 673 (Holmes, J., dissenting). As Justice Holmes elaborated in claiming that it was not the job of the judiciary to stand in the way of popular sentiment, "if my fellow citizens want to go to Hell I will help them. It's my job." Letter from Oliver Wendell Holmes to Harold J. Laski (Mar. 4, 1920), *in* 1 HOLMES-LASKI LETTERS 249 (Mark DeWolfe Howe ed., 1953).

[32] *See* THE FEDERALIST NO. 78, at 468 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[33] In Professor Ronald Dworkin's famous formulation, rights are "political trumps held by individuals" and those "individuals can have rights against the state that are prior to the rights created by explicit legislation." RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi (1977). Indeed, on most accounts, liberal thought "is a heritage which prizes individuality." JEREMY WALDRON, LIBERAL RIGHTS 1 (1993). For a fuller discussion of the role of rights as trumps in liberal theory, see the exchange between Richard H. Pildes, *Dworkin's Two Conceptions of Rights*, 29 J. LEGAL STUD. 309 (2000), and Jeremy Waldron, *Pildes on Dworkin's Theory of Rights*, 29 J. LEGAL STUD. 301 (2000).

rewards from — and dignified treatment by — the society as a whole.[34] There are, of course, conflicts that emerge when rights claims by some individuals would impose burdens on others.[35] But these too are limitations on the rights claims of individuals against the state and are not generally framed as obligations of the state as such. It is not that the question of enforceable terms of societal interaction is unknown to liberal theory. Professor Jeremy Waldron, for example, finds it useful to frame some fundamental dignitary rights claims as a species of "public goods" and concludes that "there should be no difficulty at all in expressing them as human rights, no problem accommodating them to the idiom of that particular discourse."[36] Rather, it is simply that the juxtaposition between state and individual is where the action is and has been. Further, it is clear that the language of human rights has come to embrace an individual right of democratic participation within the core values of political liberty, again placing the individual in opposition to the state in terms of democratic values.[37]

There are, of course, areas where liberal theorists are eager for the state to restrain democratic freedoms in the name of greater principles of democratic integrity. A particularly salient example in the United States is the area of campaign finance regulation, in which there is widespread support from many liberal quarters for limitations on both contributions and expenditures. Notably, however, the first move in this area is necessarily to deny the rights claim on the other side of the equation, following in one form or another the admonition of Judge Skelly Wright that "*money itself is not speech.*"[38] Only then is there a demand that the state act to control access to the political process. It is hard to make a comparable move in the area of prohibitions on participation in the electoral arena. No matter how circumscribed one's view of rights protections might be, there is no higher plane for protec-

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[34] *See* RAWLS, *supra* note 4, at 75–83; *see also* Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

[35] *See, e.g.*, JOSEPH RAZ, THE MORALITY OF FREEDOM 203 (1986) ("It is difficult to imagine a successful argument imposing a duty to provide a collective good on the ground that it will serve the interests of one individual.").

[36] WALDRON, *supra* note 33, at 354. Professor Waldron argues that such communal goods should not be expressed as individual rights, but leaves open the question of whether they should be expressed as rights belonging to a society or government.

[37] *See, e.g.*, Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 88 (1992) ("States' nonaggressiveness . . . depends fundamentally on domestic democracy.").

[38] J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1019 (1976). For examples of arguments denying this rights claim, see OWEN M. FISS, THE IRONY OF FREE SPEECH 5–26 (1996); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 93–119 (1993); and Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS, Oct. 17, 1996, at 19, 23.

tion of expression than in the domain of politics pure and in the ability to present ideas about the governance of society and advocate on behalf of candidates committed to those ideas.[39]

Nonetheless, my aim here is not to engage directly the jurisprudential foundations for the responsibility to maintain the vitality of the democratic process (at least not initially). In much of my writing in this area, I have been drawn to analogies between the political process and economic markets.[40] It does not seem too fanciful a notion to imagine that even the night watchman state has an obligation to maintain the openness of the instrumentalities of political competition in much the same way as the state must protect the integrity of economic markets from theft, fraud, and anticompetitive behavior. One could derive from the principle of political competition a robust role for the state as guardian of the vitality of the democratic process as a whole.

If elections are seen as a marketplace for political competition, and if the state does indeed hold a public trust for ensuring the capacity of the citizens to choose their governors, there is still the critical question of what kinds of restrictions may be utilized to protect the viability of democratic competition, as well as what procedural and substantive protections should be put in place to protect against misuse of those restrictions. My concern in this piece, therefore, is with the institutional considerations that either do or should govern restrictions on political participation, with particular attention to how these have been assessed by reviewing courts.

As an initial matter, it will be useful to set out four questions that courts and legislatures have grappled with in trying to set the parameters of democratic participation, from the most general to the most institutionally specific:

(1) May a state draw a boundary around participation in the democratic process, excluding from the right of participation those who fall on the wrong side of the boundary?

(2) If so, where does that boundary lie? Is it based on the ideological positions of the excluded actors, or must it turn on the immediacy of the danger they present?

(3) If such determinations are to be made, is there an obligation to define legislatively the outer bounds of the right of participation?

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[39] *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26–28 (1971) (defining a limited core of First Amendment rights focused on ideas of self-governance).

[40] *See, e.g.*, Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

(4) If the legislature does so define the boundaries of democratic participation, must there be an independent body to implement exclusion or to avoid the temptation toward political self-dealing or the settling of scores?

To address these questions, this Article looks first to the actual experiences of functioning democracies confronted with antidemocratic challenges from within. First, I turn to the use of the "clear and present danger" test in American law. The rhetorical power of this test, coupled with the salience of American law both here and abroad, compels some accounting for the limitations imposed by any requirement that the suppression of electoral activity be justified on grounds analogous to the bases for criminal prosecutions. Part I therefore shows the distinct context in which American constitutional doctrine arose and its nongeneralizability to more threatened democracies. In Part II, I examine a variety of national settings to identify both the ways in which democracies have sought to protect themselves and the distinct threats posed by different sorts of antidemocratic groups. Surprisingly little attention has been given in the academic literature to the distinct forms that legal restrictions on political activity may take or to the specific threats posed by groups that advocate separatism, insurrection, or clerical rule. Finally, in Part III, the Article considers the substantive and procedural protections necessary to help ensure that suppression of antidemocratic elements does not become simply suppression of political dissent. Ultimately, the Article concludes that the aim of suppressing threats to the existence of embattled democracies must be to secure the prospect of democratic renewal whereby the capacity of citizens to reject their rulers is preserved.

I. AMERICAN EXCEPTIONALISM

The core of this Article will examine the responses of democratic societies to threats from extremist groups and will try to develop some normative principles for assessing the need to suppress antidemocratic mobilizations. Much of this discussion will sound antithetical to core First Amendment principles in American law, and it is likely that American courts would not tolerate most, or perhaps any, of the measures discussed and endorsed later in this Article. One of the points of engagement with American law will be the use of the clear and present danger test that originated in American law to describe how democracies have responded to a subset of the threats they face (as with armed insurrectionist parties and military splinter groups, for example). While the terminology may be similar, it is vital to understand the limits of the parallels between the threats that democracy faces in the United States and in other countries.

As a doctrinal matter, American law governing the prohibition on antidemocratic groups freely espousing their views has settled around

the clear and present danger test as expounded in the dissenting and concurring opinions of Justices Holmes and Brandeis,[41] a test that received its most comprehensive formulation in *Brandenburg v. Ohio*.[42] In its per curiam opinion in *Brandenburg*, the Court held that a state may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[43]

The great Holmes/Brandeis free speech opinions combine rhetorical force with the inescapable sense that their authors had not succumbed to the passions of the times, certainly a tribute to the institutional role that a judiciary is supposed to play in times of panicked assaults on civil liberties. Although rejected in their time, these opinions came to dominate American law, as carefully chronicled by Professor Geoffrey Stone.[44] Under the *Brandenburg* test, there is a heavy presumption in favor of free expression, a presumption that is overcome only by the imminence of direct harm:

> "[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments.[45]

Only where the likelihood of harm is established and the prohibitions are carefully tailored to the perceived threat can governmental prohibitions be justified.

On the evolutionary road to *Brandenburg*, a series of cases challenging the Smith Act prosecutions of Communist Party members during the McCarthy era made the Holmes/Brandeis opinions controlling doctrine. Most notable is the leading case of *Dennis v. United States*.[46] The clear and present danger standard, regardless of whether it was properly applied in *Dennis*, is looked to because it both assigns great value to speech for its own sake and sets up the significant hurdle of proving immediacy of harm before the government may act. In effect, *Dennis* collapsed the distinction between the type of political agitation that could be prohibited and the type that could be criminal-

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[41] *See* Whitney v. California, 274 U.S. 357, 374–76 (1927) (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616, 627, 630 (1919) (Holmes, J., dissenting).

[42] 395 U.S. 444 (1969) (per curiam).

[43] *Id.* at 447.

[44] *See, e.g.*, GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 395–411 (2004) (describing the centrality of the clear and present danger test in *Dennis v. United States*, 341 U.S. 494 (1951)).

[45] *Brandenburg*, 395 U.S. at 447–48 (omission in original) (citations omitted) (quoting Noto v. United States, 367 U.S. 290, 297–98 (1961)).

[46] 341 U.S. 494.

ized. The assumption in the clear and present danger test is that there should be no margin between the criminal code and state-imposed restrictions on political speech. Thus, for example, in his criticism of *Dennis*, Professor Stone chastises the Court for allowing the Communist Party to be subjected to legal restraints that should not have been permitted under the standards of the criminal code: "[T]o the extent there was criminal conduct, the individuals . . . should have been investigated and prosecuted for their crimes. That is quite different from prosecuting *other* people — the defendants in *Dennis* — for their advocacy of Marxist-Leninist doctrine."[47]

I do not want to take issue with Professor Stone's concerns about the relaxing of the standards for criminalizing speech in the United States so much as to address the limitations of the clear and present danger test outside the American context. Not only is the test now controlling doctrine in the United States, but it is looked to by courts in many parts of the world for insight into how they should respond to the threat of antidemocratic incitement. But it would be a mistake for these courts to adopt this test wholesale without understanding the national context in which it arose. In large part, the clear and present danger test is a response to three interesting but largely underappreciated features of American law.

First, the characteristic response to threatening speech in the United States, as with the Palmer raids following World War I and the anticommunist prohibitions following World War II, has been to enforce political prohibitions largely through the criminal code. As a result, freedom of political expression has become inextricably bound up with the standards for criminal prosecution, including burdens of proof and heightened specificity requirements. Critics of American constitutional treatment of free speech have focused on this central feature of American law without fully appreciating how distinct it is on the world stage. For example, Professor Martin Redish declares that *Dennis* "clearly was, as one historian has described it, little more than 'a trial of ideas,' something more appropriately associated with a totalitarian society than what is supposedly a constitutional democracy."[48] Assuming that electoral regulation must be accomplished primarily through criminal prosecution is a precondition for Professor Redish to assert that "only by assuring that all views . . . are protected

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[47] STONE, *supra* note 44, at 410.

[48] MARTIN H. REDISH, THE LOGIC OF PERSECUTION: FREE EXPRESSION AND THE MCCARTHY ERA 97 (2005) (footnote omitted) (quoting PETER L. STEINBERG, THE GREAT "RED MENACE": UNITED STATES PROSECUTION OF AMERICAN COMMUNISTS, 1947–1952, at 157 (1984)).

can a democratic society survive in any meaningful sense of the term."[49]

Before sweeping quite so broadly, it is worth pausing to consider how susceptible to generalization the American cases have been. A great deal of the doctrinal work under the First Amendment's treatment of political speech stems from the specific question that is typically presented in American courts: whether the speech in question is sufficiently inciteful of criminal conduct to sustain a criminal prosecution. The landmark cases in this area have tended to be criminal cases (such as *Brandenburg v. Ohio* and *Cohen v. California*[50]), and in civil cases like *New York Times v. Sullivan*,[51] the "primary argumentative device" has been "the quick (some would say too quick) analogy to the criminal prosecution."[52] For Professors Frederick Schauer and Richard Pildes, "the quick judicial assimilation of all content-based regulations to the criminal law prohibition model"[53] is ill-advised because "different modes of regulation structure might justify different First Amendment responses."[54] When regulations "do not take the form of criminal prohibitions, courts should not deploy doctrines whose purposes are not actually implicated by the particular context of regulation."[55]

Second, there is a structural dimension to the American response to marginal antidemocratic groups that needs to be weighed in the balance. Over the years, I have resisted the easy claim that proportional representation systems are inherently unstable or were even responsible for the rise of fascism,[56] a claim that has even made its way into Supreme Court discussions of the extent to which the two major parties may be protected from electoral competition.[57] Certainly the exceptional characteristics of American democratic practices should dictate some caution before proclaiming these practices superior, let alone preferable. After all, the American system of districted legislative elections and independent presidential selection is not the norm in democ-

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[49] *Id.* at 100.

[50] 403 U.S. 15 (1971).

[51] 376 U.S. 254 (1964).

[52] Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1832–33 (1999); *see also New York Times*, 376 U.S. at 277 (holding that "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel").

[53] Schauer & Pildes, *supra* note 52, at 1833.

[54] *Id.*

[55] *Id.*

[56] For a discussion of this point, see Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 716–17 (2001). *See also id.* at 717 n.83 (citing sources).

[57] *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351, 367 (1997) ("The Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system.").

ratic societies. None of the recent democracies created in the aftermath of the collapse of the Soviet empire has attempted to replicate American-style governance. Nor did the United States try to impose it in seeking to establish democratic governance in regions over which it maintained military control, as in Germany, Japan, and Iraq.

Whatever my reluctance on this score, I have now come to the conclusion that there is indeed something in nonparliamentary, nonproportional representation political systems that provides a buffer against antidemocratic forces, perhaps explaining why American law is decidedly directed to the truly marginal behavior that might rise to the level of a criminal offense. There is a well-trodden path in political theory — running through Harold Hotelling,[58] Anthony Downs,[59] and Maurice Duverger[60] — explaining the propensity of single-seat, single-winner elections to produce two and only two relatively stable, relatively centrist parties. Third parties — including fringe parties, to the extent they gain electoral traction — tend to tip the scales to the major party farthest from them, thereby dissuading even the polar supporters of the major parties from joining spoiler efforts. Think of Ross Perot in 1992 and Ralph Nader in 2000 for shorthand, recent versions of the sophisticated political theory underlying this insight.

Because districted elections force the prospective governing coalitions to form *before* the election and to run as political parties, the inclusion of extreme candidates discredits the entire slate and forces such candidates to the margin. As a result, extreme candidates face formidable hurdles to attaining legislative office. This, in turn, means that they do not readily achieve the immunity from criminal prosecution for incitement that comes with parliamentary office, do not have access to state funds for their political crusades, and are denied meaningful access to political debates formed around the question of who should govern. To the extent that extreme parties try to use the electoral arena, the structural barriers to their participation marginalize them. Their contributions to the public debate are duly set off on local public access stations (or their modern substitute, low-traffic political blogs), where they compete for time with the purveyors of the conspiracy trade, who endlessly obsess over fluoridation of the water supply,

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[58] Harold Hotelling, *Stability in Competition*, 39 ECON. J. 41 (1929) (introducing the "spatial markets" theory of how firms compete for the center).

[59] ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 115–22 (1957) (applying the spatial market approach to describe competition for the median voter as the key to winning two-party elections).

[60] MAURICE DUVERGER, POLITICAL PARTIES 217–28 (Barbara North & Robert North trans., rev. ed., Methuen 1964) (1951) (introducing "Duverger's Law," which states that in first-past-the-post elections there will be exactly two relatively centrist parties).

the latest permutation of the Kennedy assassination, or "proof" that September 11 was an inside job.

A further buffer is created by presidential rather than parliamentary governance. Even were an extremist party to find its way into Congress, its ability to disrupt governance would be limited. Marginal parties in the legislature in a presidential system cannot command a bloc of votes in the parliament that can be used to bring down a shaky coalition government through no-confidence votes or other parliamentary devices. Thus, unlike the National Socialists in Germany, marginal political groups would be unable to wear down the government by disruptive tactics in parliament. Further, unlike fringe parties in many proportional representation systems, Israel being the prime example,[61] they would not be able to leverage their small presence in parliament into significant commands on public policy. Presidentialism puts the choice of head of state in the hands of the national electorate, rather than relying on fractured parliamentary leadership to forge a governing coalition and, in turn, to accommodate the last holdouts necessary to put them over the top. There are many reasons to be wary of presidentialism,[62] but it does serve as a buffer to the threat posed by marginal parties' ability to insinuate themselves into parliament and disrupt governance from within.

Third, and finally, there is the unmistakable stability of politics in the United States, a stability that perhaps leads Americans to underestimate the need to protect democratic processes elsewhere from real threats, even those masquerading as contenders for democratic election. For the United States, the twentieth century witnessed significant turmoil — two world wars, at least four regional wars, a protracted standoff with a major foreign power, four presidents who died in office (two of whom were assassinated), a major depression followed by a significant overhaul of the administrative state, and a major upheaval in race relations — but through it all, the same two political parties remained in charge. Despite hard-fought elections and periodic social unrest, changes in governance were incremental and the elec-

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61 *See* Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51, 60–61 (2001) (describing leverage of small religious parties under Israeli proportional representation system).

62 For an overview of the propensity in Latin America toward overconcentration of power in the executive, see Matthew Soberg Shugart & Scott Mainwaring, *Presidentialism and Democracy in Latin America: Rethinking the Terms of the Debate*, *in* PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA 12 (Scott Mainwaring & Matthew Soberg Shugart eds., 1997). Another leading treatment of this issue is found in Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make A Difference?*, *in* THE FAILURE OF PRESIDENTIAL DEMOCRACY 3 (Juan J. Linz & Arturo Valenzuela eds., 1994). For advocacy of parliamentarism to replace the independent selection of the President in the United States, see Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 643–44 (2000).

toral system remained intact at all times. Indeed, perhaps uniquely among democratic states, the United States has held regularly scheduled elections during wartime, even during the Civil War. The short of it is that the United States has been a remarkably stable political system since Reconstruction.

It is possible that the seeming doctrinal attachment to strong protections of political organization in the United States may be attributable to some unique variables, beginning with the comparative political stability of twentieth-century America relative to more embattled, more fragile democracies. That stability is enhanced by the distinct electoral structures in the United States that marginalize minor parties from governance. Further, as a doctrinal matter, it is quite likely that the propensity toward criminal prosecution of political dissidents in the United States has also contributed to the lack of an administrative law of electoral exclusion. All of these features are important, and the uniqueness of our national setting dictates caution in attempting to export the clear and present danger test to the administrative prohibition on political participation in much more fragile institutional settings.

The clear and present danger test aptly captures what is at stake in the criminal prohibition of organizations whose aims are fundamentally antithetical to democracy and who are being charged, in effect, with unlawful conduct. As is developed below, the threat of criminal conduct by marginal groups captures only a subset of the threats faced by democracies, particularly in far less stable national settings. In such circumstances, unfortunately, focusing on the immediacy of the threat of unlawful activity is insufficient to reflect the gravity of the threat.

II. TYPOLOGIES OF PROHIBITIONS

Most discussions of restrictions on antidemocratic groups begin (and many of them end) with the question whether a democracy has the right to impose viewpoint constraints on extreme dissident views. Professors Gregory Fox and Georg Nolte, for example, in their important contribution to the debate, primarily focused on the possibility of restricting political participation consistent with international law, particularly the guarantees of the 1966 International Covenant on Civil and Political Rights.[63] The responses to Professors Fox and Nolte did not question their analytic framework; instead, they simply challenged the capacity of any society to police the boundaries of something as

[63] *See* Fox & Nolte, *supra* note 1.

nebulous as "democracy"[64] and questioned whether the remaining product was worthy of the name:

> If one is to say to the people, in essence, "The fundamental principle of democracy dictates that you can have any government except the one the majority of you presently think you want," there had better be a more compelling argument for democracy than that it enables the people to choose. There is nothing intrinsically valuable about choosing among undesired options.[65]

Although these critiques take a back seat to claims that suppression does not work,[66] all of these arguments tend to lump together the different sorts of responses that might be deployed against antidemocratic threats.

Rather than starting from the question whether a prohibition of antidemocratic forces is permissible, I prefer to start by asking what kinds of prohibitions are being contemplated. Here, I depart considerably from American case law, which tends to collapse the question of what prohibitions on political parties are acceptable into the debate over what criminal sanctions on political speech are justified. This section therefore considers the forms of political restraint that operate outside the bounds of the criminal justice system. The inquiry concerns the existence of a space between the standards that justify incarceration and those that might suffice to justify a prohibition on electoral participation. Put simply, are there methods to suppress antidemocratic political mobilizations that are distinct from criminally prosecuting their adherents, and can those methods be justified even if we would not tolerate incarceration for those who share the antidemocratic viewpoints?

In rough form, then, we should consider three different approaches to antidemocratic mobilizations in the electoral arena that are distinct from criminal prosecutions of the advocates of the underlying positions: first, an electoral code governing the content of political appeals; second, the proscription of political parties that fail to accept some fundamental tenet of the social order; and third, a ban on electoral participation for some political parties, even if they are permitted to maintain a party organization. The first two approaches represent the general range of established responses to antidemocratic agitation, stretching from regulations of electoral conduct to proscriptions on the

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[64] *See, e.g.*, Brad R. Roth, Response, *Democratic Intolerance: Observations on Fox and Nolte*, 37 HARV. INT'L L.J. 235, 236 (1996) ("'[D]emocracy' has in recent parlance been transmogrified into a repository of political virtues . . . . The consequence of this indeterminacy is that 'democracy' becomes identified with whichever choice engages our sympathies.").

[65] *Id.* at 237.

[66] *See, e.g.*, Edip Yuksel, *Cannibal Democracies, Theocratic Secularism: The Turkish Version*, 7 CARDOZO J. INT'L & COMP. L. 423, 458 (1999).

organization of political parties. The third option — the ban on electoral eligibility but not on party formation — is less established as a form of party regulation. Nonetheless, this intermediate form of regulation offers an intriguing, less restrictive means of addressing the unique problems of antidemocratic mobilization through electoral activity.

A. Content Restrictions on Electoral Speech

> Hinduism will triumph in this election and we must become hon'ble recipients of this victory to ward off the danger on Hinduism, elect Ramesh Prabhoo to join with Chhagan Bhujbal who is already there. *You will find Hindu temples underneath if all the mosques are dug out.* Anybody who stands against the Hindus should be showed or worshipped with shoes. A candidate by the name Prabhoo should be led to victory in the name of religion.[67]

Thus runs a typical speech from an extreme Hindu nationalist agitator, Bal Thackeray, made during a campaign appearance on behalf of a local candidate of the extremist Shiv Sena party. That the ideas are coarse is not subject to meaningful debate, even if the cultural significance of being shown shoes does not readily cross all national frontiers. Thackeray is a rather notorious political operative in Bombay, a city that he was instrumental in renaming Mumbai.[68] Among his sources of political inspiration he counts Adolf Hitler, whom he characterizes as "an artist who wanted Germany to be free from corruption."[69]

But the speech has a significance that goes beyond the merely distasteful. The image of Muslim shrines sitting on the ruins of Hindu temples is a potent incitement to sectarian violence over contested religious shrines, particularly the Babri mosque in Ayodhya in northern India, a site with religious significance and a violent past that is strikingly reminiscent of the Temple Mount in Jerusalem.[70] Beginning in 1984, shortly before the speech in question, the hard-line World Hindu Council had agitated among Hindu followers to tear down the mosque, which, according to legend, was built on the birthsite of Rama, a major Hindu deity.

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[67] Prabhoo v. Kunte, A.I.R. 1996 S.C. 1113, 1118–19 (emphasis added).

[68] *See* Christopher Beam, *Mumbai? What About Bombay?: How the City Got Renamed*, SLATE, July 12, 2006, http://www.slate.com/id/2145650/.

[69] Larissa MacFarquhar, *The Strongman: Where is Hindu-Nationalist Violence Leading?*, NEW YORKER, May 26, 2003, at 50, 50 (quoting Bal Thackeray) (internal quotation marks omitted).

[70] *See* Gary Jeffrey Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763, 1798 & n.169 (2004); Daniel Pipes, *The Temple Mount's Indian Counterpart*, JERUSALEM POST, Jan. 17, 2001, at 8.

In 1992, agitation turned to reality when a Hindu mob destroyed the mosque and then attacked other Muslim sites and homes in Ayodhya. The ensuing ethnic riots left thousands dead in a wave of communal violence not seen since the initial partition of India and Pakistan in 1947.[71] At the organizational center of the mob assault were the Hindu nationalist political parties, including the most prominent Hindu nationalist party, the Bharatiya Janata Party (BJP), a party that was to hold the prime ministership in India a decade later. That the 1987 speech by Thackeray did not give rise to a similar conflagration was a matter of happenstance — the ethnic tinderbox was just as much present. Indeed, Thackeray and Shiv Sena did reemerge in 1992 as instigators of the violence in Bombay, the worst carnage following the attack on the mosque in Ayodhya.[72]

Indian history does not lack for examples of election agitation leading to scores of deaths. The question is what steps may be taken to permit genuine, even if distasteful, political expression while maintaining public order in the face of likely violent outbursts.[73] As a doctrinal matter, any restriction has to balance the Indian constitutional guarantee of freedom of expression[74] and the reserved constitutional emergency power to protect public order.[75]

India's response is to narrow the definition of permissible political speech. This is perhaps the least intrusive form of regulation of antidemocratic agitation, but paradoxically it may be the one that raises the most vagueness concerns in the American First Amendment tradition. India couples a strong constitutional commitment to freedom of expression with a rigid electoral code prohibition on seeking electoral

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71 *See* GARY JEFFREY JACOBSOHN, THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT 129 (2003).

72 BARBARA D. METCALF & THOMAS R. METCALF, A CONCISE HISTORY OF INDIA 279 (2002).

73 This issue is by no means limited to India. Bosnia's fragile ethnic peace was threatened by an inflammation of ethnic tensions during its most recent election campaign. In the words of Christian Schwarz-Schilling, a senior international official in Bosnia:

> "Inflammatory rhetoric raises tensions, and this in turn can all too easily escalate into violence in a society where weapons are everywhere, alcohol plentiful and the summer long and hot" . . . . "The more abusive the campaign rhetoric now, the more difficult it will be to find the necessary partners to create functioning institutions . . . ."

Nicholas Wood, *Fiery Campaign Imperils Bosnia's Progress, Officials Warn*, N.Y. TIMES, Aug. 27, 2006, at A3 (quoting Christian Schwarz-Schilling). The problems in Bosnia are exacerbated by the formal ethnic divisions of political power emerging from the Dayton Accords. *See* Anna Morawiec Mansfield, Note, *Ethnic but Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina*, 103 COLUM. L. REV. 2052, 2054–65 (2003).

74 INDIA CONST. art. 19, § 1.

75 *Id.* art. 19, § 2 ("Nothing . . . shall . . . prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right to free expression in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.").

support by promoting "enmity or hatred . . . between different classes of" Indian citizens "on grounds of religion, race, caste, [or] community."[76] The election code proscribes "corrupt practices," which are defined as including an appeal to vote for or against a candidate "on the ground of his religion, race, caste, community or language or the use of, or appeal to, religious symbols."[77] The power to enforce this prohibition is in turn delegated to an Election Commission which has the authority to identify corrupt practices and seek extraordinary remedies, including the exclusion from office of victorious candidates who relied upon prohibited speech.[78]

The leading Indian case on this topic provides a clear example of an election code in practice. In *Prabhoo v. Kunte*,[79] the Indian Supreme Court confronted the decision of the Bombay High Court that the election of Ramesh Yeshwant Prabhoo to state legislative office in Maharashtra should be set aside. The High Court had found that Prabhoo's campaign had been organized by Bal Thackeray, the leader of the Shiv Sena party, whose comments above formed only a mild part of his inflammatory arsenal. Consistent with the statutory definition of corrupt practices, the High Court found that the campaign had appealed to Hindus to vote for Prabhoo on the basis of his religion.[80] The appeals to Hindu solidarity were coupled with tirades on the threats that Muslim candidates or candidates urging Muslim appeasement would present. Thackeray's campaign speeches referred to some Muslims as snakes and used other religious imagery[81] that was understood as a basic call for a Hindu assertion of power to thwart the perceived Muslim threat.

In upholding the High Court's conclusions, including its reversal of the election result, the Supreme Court rejected the claim that only a manifest threat to public safety could justify an electoral prohibition. The narrow basis for the ruling was that the perceived threat to public order allowed for the invocation of the government's reserved constitutional powers to protect domestic order.[82] The court found that the statute prohibited any appeal to vote for or against a candidate based on his religion, regardless of whether the appeal was "prejudicial to the public order."[83] It held the prohibition to be constitutional as a rea-

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[76] The Representation of the People Act, No. 43 of 1951; INDIA A.I.R. MANUAL (1989), v. 41 § 125.

[77] *Id.* § 123(3).

[78] *Id.* § 8A.

[79] A.I.R. 1996 S.C. 1113.

[80] *See id.* at 1117.

[81] *See id.* at 1119.

[82] *See* INDIA CONST. art. 19, § 2.

[83] *Prabhoo*, A.I.R. 1996 S.C. at 1121.

sonable restriction in the interest of "decency or morality."[84] It declared that "seeking votes on the ground of the candidate's religion in a secular State is against the norms of decency and the propriety of the society."[85] The legality of any particular electoral appeal would thus turn on the nature of the speech itself, not on whether it presented a clear and present danger. The court found general guidance in an earlier decision dealing with the aftermath of the chaos in Ayodhya, the *Ayodhya Reference Case*,[86] which read the constitutional guarantee of equality of religion to be an affirmative commitment to secularism as "one facet of the right to equality woven as the central golden thread in the fabric depicting the pattern of the scheme in our Constitution."[87] Secularism provided the substantive basis for the *Prabhoo* court to restrict campaign speech that threatened significant public disorder. But the court could not place all invocations of religion outside the bounds of electoral politics — the guarantees of free expression would protect the right to claim discrimination or unequal treatment based upon religion. Instead, the court carefully distinguished appeals made to religious bigotry as implicating conflicting constitutional concerns between public order and freedom of religious expression.[88]

The court resolved the constitutional conflict by making two distinct findings about the constitutional status of the election period. First, the court reiterated an earlier understanding that the Constitution itself expresses a commitment to a democratic political order:

> No democratic political and social order, in which the conditions of freedom and their progressive expansion for all make some regulation of all activities imperative, could endure without an agreement on the basic essentials which could unite and hold citizens together despite all the differences of religion, race, caste, community, culture, creed and language. Our political history made it particularly necessary that these differences, which can generate powerful emotions depriving people of their powers of rational thought and action, should not be permitted to be exploited lest the imperative conditions for the preservation of democratic freedoms are disturbed.[89]

Second, the court found it significant that the prohibition on speech was directed only to the election period itself and thus to maintaining the integrity of the democratic process by preventing the incitement of

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[84] *Id.* at 1126 (quoting INDIA CONST. art. 19, § 2).

[85] *Id.*

[86] Ismail Faruqui v. Union of India, A.I.R. 1995 S.C. 605.

[87] *Id.* at 630.

[88] Thus, in an earlier case involving two Muslim candidates, it was considered permissible to air grievances of the Muslim community, but impermissible for one candidate, in the last stages of the campaign, to charge his opponent with not being a true Muslim. *See* Bukhari v. Mehra, (1975) Supp. S.C.R. 281.

[89] *Prabhoo*, A.I.R. 1996 S.C. at 1124 (quoting *Bukhari*, (1975) Supp. S.C.R. at 288).

communal hatred: "The restriction is limited only to the appeal for votes to a candidate during the election period and not to the freedom of speech and expression in general or the freedom to profess, practise and propagate religion unconnected with the election campaign."[90]

The Indian approach to antidemocratic appeals has two major limitations. First, in terms of practical effect, it is intended only to address the problem of accentuation of communal antipathies in the crucible of a contested election campaign. Parties can easily organize on antidemocratic platforms outside the electoral arena. To the extent that parties moderate their language for the election campaign itself — a seemingly inevitable problem with election statutes that amount to speech codes — the definition of corrupt practices in India does not regulate their conduct. Thus, for example, the Spanish decision to ban the Basque separatist Batasuna party might have been difficult to enforce as a speech ban on a party that promoted the claimed plight of the Basque people.[91] Even in India, the Electoral Commission has had to push further, ruling for example that no elections could be held in Gujarat in 2002 after the local BJP government helped instigate anti-Muslim riots that left more than 1000 people dead.[92] More aggressive still was the decision of the Indian Supreme Court upholding the dismissal from office of three state governments on grounds of complicity or acquiescence in mob violence in the aftermath of the destruction of the Babri mosque in Ayodhya.[93]

Second, and perhaps more significantly, the Indian approach would require setting aside qualms that many — including many educated in the American First Amendment tradition — might have with governmental speech codes that lack clear guidance and are largely applied after the fact. It is ironic that the least restrictive form of electoral prohibition, one that does not require banning parties or individuals wholesale, is likely to have the most capacity for as-applied abuse. As with all rules governing the electoral process, any departure from prospective application means that the application of a rule will have outcome-determinative effects. In *Prabhoo*, for example, the effect was to remove from office a candidate supported by the majority of voters. To the extent that electoral officials and reviewing judges are always at risk of succumbing to political pressures, or at least of being perceived

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[90] *Id.* at 1125–26.

[91] Indeed, the dissolution of Batasuna ultimately turned on the party's refusal to condemn acts of violence by ETA, an omission that would not have been reached by a speech code. *See* Thomas Ayres, *Batasuna Banned: The Dissolution of Political Parties Under the European Convention of Human Rights*, 27 B.C. INT'L & COMP. L. REV. 99, 109 (2004).

[92] *See* Edward Luce, *Appeal on Indian Election Ruling*, FIN. TIMES, Aug. 19, 2002, at 6 (detailing the Electoral Commission's decision to postpone and the legal appeals that followed).

[93] *See* S.R. Bommai v. Union of India, A.I.R. 1994 S.C. 1918. For a fuller discussion of the political and ethnic dimensions of these decisions, see JACOBSOHN, *supra* note 71, at 126–32.

as having done so, any regulatory approach that applies retroactively necessarily raises genuine legitimacy concerns.

The Indian approach not only invites content and viewpoint regulation of speech, but embraces it. In the *Ayodhya Reference Case*, for example, Justice Verma invoked Rawls directly to set the secular contours for limiting the role of religion in the electoral and governmental spheres. For Justice Verma, India is a "pluralist, secular polity" in which "law is perhaps the greatest integrating force."[94] His substantive commitment to tamp down religious appeals draws on a "Rawlsian pragmatism of 'justice as fairness'" that in turn permits an "'overlapping consensus' . . . on fundamental questions of [the] basic structure of society for deeper social unity."[95]

Further, the Indian approach, while committed to maintaining public order during a heated election, exposes uncertainty about voters' motivations in exercising the franchise. There is a lingering concern in democratic theory that base instincts may come to command voters. For example, James Madison was concerned about the descent into the vice of passion, by which the masses of voters could be swayed by greed or envy of the wealthy to use democratic power for confiscatory aims.[96] The Indian cases applying the electoral speech code contained in the Corrupt Practices Act follow in this tradition, finding a compelling governmental interest in outlawing appeals to base instincts that might, in heated moments, overwhelm the higher aspirations of republican discourse:

> Under the guise of protecting your own religion, culture or creed you cannot embark on personal attacks on those of others or whip up low hard instincts and animosities or irrational fears between groups to secure electoral victories.
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> . . .
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> . . . [O]ur democracy can only survive if those who aspire to become people's representatives and leaders understand the spirit of secular democracy. That spirit was characterised by *Montesquieu* long ago as one of "virtue." . . . For such a spirit to prevail, candidates at elections have to try to persuade electors by showing them the light of reason and not by inflaming their blind and disruptive passions. Heresy hunting propaganda on professedly religious grounds directed against a candidate . . . may be permitted in a theocratic state but not in a secular republic like ours.[97]

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[94] Ismail Faruqui v. Union of India, A.I.R. 1995 S.C. 605, 630. Here, the court was quoting from "a paper on 'Law in a Pluralist Society' by M.N. Venkatachalia." *Id.*

[95] *Id.* at 630–31. This passage is also quoted from Venkatachalia. *Id.* at 630.

[96] *See* THE FEDERALIST NO. 10 (James Madison), *supra* note 32, at 73–75; *see also* THE FEDERALIST NO. 49 (James Madison), *supra* note 32, at 314 (expressing the view that such passions "ought to be controlled and regulated by the government").

[97] Bukhari v. Mehra, (1975) Supp. S.C.R. 281, 288, 296.

There is a disturbing quality to regulating speech in order to protect the electorate against the likelihood that it will submit to its base instincts in the heat of electoral debate. Even so, the specter of communal violence, which is never too far from the surface in heated Indian political battles, yields a constitutional accommodation between civil liberties and public order. It is hard to contest the claim that fewer people have died as a result of a modicum of caution being imposed on politicians lest they be removed from office. It is also worth noting that the BJP, after being instrumental in the incendiary storming of the mosque in Ayodhya, subsequently tempered its rhetoric in order to preserve its electoral viability. In its mildly gentler form, the BJP managed to prevail in national elections and put together a fragile governing coalition, only to fail in its efforts at governance and lose in a subsequent election to a coalition that would select India's first Sikh prime minister.[98]

B. Party Prohibitions

All constitutions constrain the options available to majoritarian choice. However, they vary in the degree of "obduracy" of their provisions.[99] Some allow change by supermajority; others require that approval be demonstrated over an extended period of time.[100] Many also have unamendable provisions that are intended to define the society indefinitely and are not subject to review absent a complete overhaul of the society. Examples of unamendable provisions include the German Basic Law and, presumably, Article V of the U.S. Constitution, as to both the mechanics of amendment and the specific prohibition on any state being denied its representation in the Senate. Other constitutions take the basic form of governance off the table, as with Article 139 of the Italian Constitution, which prohibits any amendment altering the republican form of government, or Article 112 of the Norwe-

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[98] *See* David Gardner, *Power Leaks to the Regions*, FIN. TIMES, Nov. 19, 1999, at 2 (detailing BJP victories in 1999 national elections); Editorial, *Massaging the Temple: Not Enough to Cure BJP's Headache*, STATESMAN (Calcutta), Nov. 2, 2004, at 8 (reviewing the BJP's failed attempts at governance); S.M. Hali, *Advani's Volte-Face!*, NATION (Pakistan), June 21, 2005, LEXIS, News Library, NTNPK file (describing the aftermath of the BJP's unexpected defeat in 2004); Soutik Biswas, *India's Architect of Reforms*, BBC News, Oct. 14, 2005, http://news.bbc.co.uk/2/hi/south_asia/3725357.stm (detailing rise of Manmohan Singh, India's first Sikh prime minister).

[99] LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 81–82 (2004).

[100] *See, e.g.*, FIN. CONST. art. 73 (providing that a constitutional amendment introduced in one parliamentary session may only be approved after an intervening parliamentary election); 1958 FR. CONST. art. 89 (requiring that amendments be approved by two successive assemblies and then by a referendum).

gian Constitution, which prohibits amendments that "contradict the principles embodied in the Constitution."[101]

Which provisions are off the table for internal change generally reflects the birth pangs of that particular society.[102] Whether through the numerous protections of slavery in the original U.S. Constitution, or the tormented recognition of the Nazi period in the postwar German Constitution, such provisions shore up the weak points in the social order that cannot bear direct political conflict. In turn, many countries prohibit political participation by parties that do not share the fundamental aims of the constitutional order. Thus, it is not surprising to find in the West German Constitution the foundations for a ban on the descendants of the Nazi and Communist parties,[103] or to see a corresponding early prohibition of Communist parties in Ukraine[104] and other former Soviet-controlled countries. As expressed by the Czechoslovakian Constitutional Court in a 1992 decision upholding that country's lustration law against a constitutional challenge, "A democratic State has not only the right, but also the duty to assert and protect the principles on which it is based."[105]

But in many countries, the prohibition goes significantly further, defining the permissible bounds of democratic deliberation and banning outright parties that raise claims outside these limits. Common examples are found in the banning of parties that challenge the country's territorial integrity (resulting in prohibitions on electoral participation by separatist movements) or that seek to reconstitute society along religious lines. Here, the best examples are found in a series of

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[101] *See* JACOBSOHN, *supra* note 71, at 138 (quoting ITALY CONST. art. 139; NOR. CONST. art. 112). For a fuller discussion of constitutions as precommitment pacts against current majoritarian preferences, see Samuel Issacharoff, *The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections*, 81 TEX. L. REV. 1985 (2003).

[102] This observation is hardly new. The idea that a constitution is a document directed to the political realities of the society in which it arises goes back at least to Aristotle. *See* ARISTOTLE, POLITICS § 1296b10, reprinted in ARISTOTLE, *THE POLITICS* AND *THE CONSTITUTION OF ATHENS* 9, 109 (Stephen Everson ed. 1996) (asserting that constitutions must be measured by what is best in relation to actual conditions).

[103] *See* Socialist Reich Party Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 23, 1952, 2 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (F.R.G.), *translated in part in* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 218 (2d ed. 1997); Communist Party Case, BVerfG Aug. 17, 1956, 5 BVerfGE 85, *translated in part in* WALTER F. MURPHY & JOSEPH TANENHAUS, COMPARATIVE CONSTITUTIONAL LAW 621 (1977).

[104] *See infra* pp. 1435–36.

[105] 3 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 346, 350 (Neil J. Kritz ed., 1995) (presenting edited translation of Czech and Slovak Federal Republic Constitutional Court Decision on the Screening Law, Nov. 26, 1992). For a discussion of the comparable Hungarian treatment of lustration issues, see Gábor Halmai & Kim Lane Scheppele, *Living Well Is the Best Revenge: The Hungarian Approach to Judging the Past*, *in* TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES 155, 171–78 (A. James McAdams ed., 1997).

decisions by the Turkish Constitutional Court upholding bans on parties advocating Kurdish independence or fidelity to sharia, campaigns which were deemed violative of the constitutional commitment to the integrity of Turkey as an organic secular state.[106]

Most democratic countries appear to draw some form of protective line around the legal status of the political party. This protection means that the constitutional definition of the permissible scope of democratic politics is also the defining boundary for the right to organize a political party. For example, German (formerly West German) constitutional law grants significant protections to the ability of political parties to form and operate effectively in the electoral arena.[107] Nonetheless, that protection is granted only to those parties that are entitled to legal status as proper actors in a democratic society. Article 21(2) of the German Constitution provides: "Parties which, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall decide on the question of unconstitutionality."[108] The court, in the early days of the Federal Republic, twice exercised its Article 21 power to declare parties unconstitutional: in 1952, in the *Socialist Reich Party Case*,[109] it declared a neo-Nazi party unconstitutional; and in 1956, in the *Communist Party Case*,[110] it declared the Communist Party of Germany (KPD) unconstitutional. In each case, the constitutional limitation on the scope of what could properly be put before the electorate also defined the limits on the organization of a legal political party.

While there are different modes of implementation, the basic understanding on which these party prohibitions are based is that parties are either within or without the democratic process.[111] If their aims

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106 *See* Dicle Kogacioglu, *Dissolution of Political Parties by the Constitutional Court in Turkey: Judicial Delimitation of the Political Domain*, 18 INT'L SOC. 258 (2003).

107 *See* Party Finance Case III, BVerfG July 19, 1966, 20 BVerfGE 56, *translated in part in* KOMMERS, *supra* note 103, at 204; Party Finance Case II, BVerfG June 24, 1958, 8 BVerfGE 51, *translated in part in* KOMMERS, *supra* note 103, at 201.

108 GRUNDGESETZ [GG] [Basic Law] art. 21(2), *translated in* KOMMERS, *supra* note 103, at 507, 511; *see also id.* art. 9(2), *translated in* KOMMERS, *supra* note 103, at 507, 509 (prohibiting "[a]ssociations whose purposes or activities . . . are directed against the constitutional order"); *id.* art. 5(3), *translated in* KOMMERS, *supra* note 103, at 507, 508 (declaring that teaching "shall not absolve [a person] from loyalty to the Constitution").

109 BVerfG Oct. 23, 1952, 2 BVerfGE 1, *translated in part in* KOMMERS, *supra* note 103, at 218.

110 BVerfG Aug. 17, 1956, 5 BVerfGE 85, *translated in part in* MURPHY & TANENHAUS, *supra* note 103, at 621. For a general discussion of the case, see KOMMERS, *supra* note 103, at 222–24.

111 *See* Paul Franz, *Unconstitutional and Outlawed Political Parties: A German-American Comparison*, 5 B.C. INT'L & COMP. L. REV. 51, 63 (1982) (noting that under German law, parties

are sufficiently antithetical to core democratic principles, they may be banned. Most bans derive their authority from the constitution directly; France is exceptional in this regard in relying on a 1936 statute regulating the existence of private militias.[112] Some constitutional prohibitions are quite open-textured, as with Article 49 of the Italian Constitution, which enjoins parties from violating the "democratic method."[113] Most are more specific, as with Article 21 of the German Basic Law, which guarantees the right of free formation of political parties but dictates that "[t]heir internal organization must conform to democratic principles" and which flatly prohibits parties that "seek to impair or abolish the free democratic order, or to endanger the existence of the Federal Republic of Germany."[114] Nonetheless, the flip side to the inquiry is that if parties are not banned, they enjoy plenary rights of free expression; according to the German court, "[t]he Basic Law tolerates the dangers inherent in the activities of such a political party until it is declared unconstitutional."[115]

Each party prohibition is backed by at least one of three distinct rationales, each of which raises a separate set of concerns. First, there are the prohibitions on parties that appear to operate as legal or propagandistic fronts for terrorist or insurrectionary groups that are independently subject to criminal prosecution or defensive military operations. Second, there are prohibitions on parties that align themselves with regional independence forces, generally premised on religious or ethnic distinctions, that take a political stance opposing the continued territorial integrity of the country. Finally, there are prohibitions on parties that seek a platform for a sustained challenge to the core values of liberal democracy, as espoused in the preexisting constitutional order, but whose objective is (to greater and lesser extents) to claim power through a majority mandate in the electoral arena.

These categories need not be mutually exclusive. For example, the Hezbollah platform in Lebanon arguably contains elements of all three. The Turkish government has justified its suppression of parties supporting Kurdish nationalism on the ground that they engaged in or supported guerrilla actions against the government. The same could be said of the Batasuna party in Spain; though the organization is de-

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"are to be free from government discrimination and governmental intervention as long as the Constitutional Court has not found the party to be unconstitutional").

112 *See* Yigal Mersel, *The Dissolution of Political Parties: The Problem of Internal Democracy*, 4 INT'L J. CONST. L. 84, 92 n.41 (2006) (contrasting French statutory authority with constitutional provisions in Croatia, Italy, Germany, Poland, and Spain).

113 Niesen, *supra* note 15, at ¶ 19 (quoting ITALY CONST. art. 49).

114 GG art. 21(1), (2), *translated in* KOMMERS, *supra* note 103, at 507, 511.

115 Radical Groups Case, BVerfG Feb. 14, 1978, 47 BVerfGE 198, *translated in part in* KOMMERS, *supra* note 103, at 224, 227.

voted to Basque independence, its banning turned on its relations with the outlawed terrorist group ETA.[116]

Even if the categories cannot be hermetically walled off from each other, they do provide some insight into the changing nature of current antidemocratic political organizations. The first two categories, insurrectionary and regional independence parties, represent minority attacks on the polity. Each seeks to use the electoral arena to erode the will of the broader polity to resist attacks on the core organizational structure of the state. Each poses different problems for democratic societies, particularly since political platforms of the regional independence parties are likely to be heavily infused with legitimate claims concerning discriminatory treatment of national or ethnic minorities within the broader society. But it is the third category that is the most problematic and, I would maintain, the most dangerous. The strategy for gaining power employed by parties in this category was the one used by the Nazis, as reflected in the introductory quotation from Goebbells. And it is this aspect of the clericalist Islamic parties, such as Hamas and Hezbollah, that has been so dispiriting for the hopeful champions of democracy in the Middle East.

1. Insurrectionary Parties. — It is best to begin by setting off a category of parties that may seek to participate in the electoral process for the purpose of propagandizing their views, but without any real prospect of seriously competing for political office. This category describes many minor parties around the world, including all third parties in the United States. Despite their lack of political capital, these parties can cause problems for the political order if they use the electoral arena as an organizing forum for insurrectionary attacks on the state or as an outlet for defending illegal activities. This dangerous subset may include both parties that are funded by criminal enterprises, such as drug cartels,[117] and parties acting in service of a hostile foreign power. While both types of parties raise issues about the boundaries of the electoral systems, the best and most troubling examples are drawn not from the electoral efforts of drug cartels, but from the communist parties within various democracies.

Germany here provides the best example, one even clearer than the Smith Act cases in the United States. In reviewing the German party exclusion cases, there is a natural tendency to run together the *Socialist Reich Party* and *Communist Party* cases; both parties had ties to totalitarian ideologies and both emerged at a time of real vulnerability

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116 Comella, *supra* note 20, at 134–35.

117 In an extreme example, Colombian president Ernesto Samper was charged with accepting $6 million from the infamous Cali Cartel to fund his 1994 campaign. *See* Interview by Charles Krause with Ernesto Samper, Former President of Colombia (Mar. 20, 1996), *available at* http://www.pbs.org/newshour/bb/latin_america/colombia_3-20.html.

for West Germany. As I explain later, however, the Socialist Reich Party was for all practical purposes a vehicle for destabilizing German democracy in an attempt to recreate Nazi rule.[118] The German court dealt with that case quickly and without much hesitation, though not without some analytic difficulties. With regard to the Communist Party, by contrast, the court took six years to issue a complicated, 300-page decision, which focused heavily on the nature of Marxist-Leninst ideology. The aim of this ideology, the court found, was to organize the party's activities under democracy "as a transition stage for easier elimination of the free democratic basic order as such"[119]:

> Therefore the KPD must actually deny all other parties . . . any right to exist in the sense of a lasting partnership with equal rights. But precisely such a lasting partnerships is the prerequisite for the functioning of the multi-party principle — and for the struggle for power between several parties — within a free democracy.
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> . . . The same is basically true of the KPD's parliamentary activity. In the parliamentary system of liberal democracy, each party participating in forming the popular political will is to be given a chance to come as close as possible to achieving its own goals through its activity in parliament. But no party may pursue material goals that, when reached, would forever exclude existence of other parties. . . . But . . . this is exactly the KPD's goal.[120]

The difficulty is that the question before the court was not whether the KPD's embrace of Marxism-Leninism was contrary to or even hostile to liberal democratic values; that much could be said of Marxist university professors or social activists. Rather, the question before the court was the constitutional legitimacy of banning a party that advocated ideas that certainly formed part of Germany's intellectual legacy. The KPD was careful to couch its electoral appeals in terms of a critique of the treatment of class and other political and social issues by Germany and its allies, not in advocacy of military conquest by a foreign power. The court's opinion remains unsatisfying because of its failure to tie the Communist Party directly to the real perceived threat to German democracy: the Warsaw Pact forces assembled within shooting distance of the West German border. The opinion repeatedly returns to the party's efforts to disparage all the institutions of West Germany and to agitate against the country's ties to the United States, leaving unproven the KPD's implicit endorsement of the other side in the Cold War.

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[118] *See infra* p. 1459.

[119] Communist Party Case, BVerfG Aug. 17, 1956, 5 BVerfGE 85, *translated in part in* MURPHY & TANENHAUS, *supra* note 103, at 621, 625.

[120] *Id.*, *translated in part in* MURPHY & TANENHAUS, *supra* note 103, at 621, 624 (first and third omissions in original).

Nonetheless, the opinion does include hints of the need to tolerate *ideas* about communism outside the immediately perilous setting. For example, the court added that "[b]anning the KPD is not legally incompatible with reauthorization of a Communist party were elections to be held throughout Germany,"[121] a clear invitation to revisit the court's holding outside the context of the Cold War — a conflict that seemed neither very distant nor particularly "cold" in Germany in the 1950s. In effect, the court treated the KPD as an organization that was trying to use the electoral system to demoralize and destabilize German politics in order to further the aims of an enemy amassed at the border. The privation that followed World War II and the presence of foreign troops throughout Germany were all too reminiscent of the period following World War I, during which German democracy could not secure its footing. Under these circumstances, the Communist Party became more than an electoral outlier and instead assumed the role of an ally of forces seeking to unwind the German democratic state, not through elections as such, but in conjunction with a real foreign threat.

During the years in which the case was pending, and more so in the following decades, the Communist Party lost its residual appeal stemming from its opposition to Hitler before and during the war. The fading sense of immediacy is likely one of the reasons the opinion does not stand up to exacting review. Moreover, during the same period, the West German economy flourished and the perceived threat from the East diminished. By 1968, when a new organization known as the German Communist Party (DKP) formed, the government took no steps to dismantle it. Although it is true that the new party had dropped inflammatory invocations of the dictatorship of the proletariat from its official rhetoric, the only genuine difference appeared to be the lack of perceived threat — any semblance of a clear and present danger — from a party identified with East Germany and the Soviet bloc.

Perhaps this attention to a perceived threat is really what the Smith Act cases were ultimately about as well. In each case, the government claimed that the Communist Party was merely a conduit for recruitment, financing, and propaganda on behalf of a powerful military adversary. Although not decided in exactly these terms, the cases tended to ask questions consistent with this understanding. The Court essentially examined either the scope of the danger — defined primarily in military or insurrectionary terms — or the extent to which the party in question was directly tied to an adversarial order.

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[121] *Id.*, *translated in part in* MURPHY & TANENHAUS, *supra* note 103, at 621, 626.

Another good example is found in Ukraine, where within days of the declaration of independence from the Soviet Union in 1991, a special committee of the new legislature issued a pair of decrees banning the Communist Party of Ukraine and seizing its assets.[122] In 1997, after several years of failed legislative attempts to get the ban lifted, the Communist Party challenged the decree before the Ukrainian Constitutional Court. In 2001, a full ten years after the overthrow of Soviet rule, the court finally struck down the ban on the Communist Party.[123] The court noted that the party's charter had been changed and the party now aspired "to follow the laws and the Constitution."[124] Most crucial, however, was the finding that the party was a newly constituted, independent organization and not a continuation of the Communist Party of the Soviet Union (CPSU), which the court said was not a regular political party because it "retained its leadership from the Soviet era."[125] Indeed, the Russian Constitutional Court applied virtually the same approach in upholding the dissolution of the governing apparatus of the CPSU and the Russian Communist Party, while allowing regional communist parties to reconstitute themselves independent of any material or other support directly derived from the former Soviet regime.[126]

Understood in this light, the clear and present danger test makes more sense for such insurrectionary parties. The German court could be seen as searching for a principle that would accommodate the exigency of the early days of the Cold War, but would exclude blanket prohibitions on communist parties as overly broad ideological suppression. The clear and present danger test seems reasonably well suited to measuring the extent to which a party with an ideological affinity for a hostile power does indeed pose a national security threat. In fact, there is little that distinguishes this form of party organization from a conspiracy to engage in criminal or treasonous conduct.

Where the danger to democratic stability posed by a party arises from the threat of extralegal conduct, the clear and present danger test properly directs a court's attention to the imminence and likelihood of

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122 *See* Alexei Trochev, *Ukraine: Constitutional Court Invalidates Ban on Communist Party*, 1 INT'L J. CONST. L. 534, 535 (2003).

123 *See id.* at 536–39 (discussing Rishennia KSU (Konstytutsijnogo Sudu Ukrainy) [Decision of the Constitutional Court of Ukraine], No. 20-RP/2001 of Dec. 27, 2001, Visnyk Konstytutsijnogo Sudu Ukrainy (bimonthly), 2001, No. 6, at 39–45 [hereinafter Decision No. 20-RP/2001]).

124 *Id.* at 538 (quoting Decision No. 20-RP/2001, ¶ 7) (internal quotation marks omitted).

125 *Id.*

126 *See* Yuri Feofanov, *The Establishment of the Constitutional Court in Russia and the Communist Party Case*, 19 REV. CENT. & E. EUR. L. 623 (1993).

the harm.[127] The imminence requirement serves the same purpose as the requirement that there be an overt act in the law governing criminal conspiracies. And this is how the Smith Act cases began — as criminal inquiries. Yet, returning to the American context, it is this precise feature of *Dennis* that remains disturbing. What had begun as an investigation into the scope of Soviet espionage[128] was transformed by the time of *Dennis* into a prosecution for conspiracy to advocate the overthrow of the government through force and violence.[129] Because of the inchoate nature of the charge, *Dennis* does little to elucidate the level of threat a democracy must be able to tolerate before deciding that its core commitment to popular choice is at risk of being subverted — a necessarily difficult question to answer in the abstract. But the nature of the charge in *Dennis* allowed the Court to focus on ideas rather than address the extent to which the Communist Party was for all practical purposes a stalking horse for a military challenge to the United States.

2. Separatist Parties. — On first impression, separatist parties raise much the same problems as insurrectionary parties. Each aligns itself with a movement that seeks to alter the preexisting form of the state; each eschews any realistic prospect of gaining the adherence of a majority of citizens in the broad body politic. Oftentimes the separatist movement will have a paramilitary component that threatens the physical security of the democratic state or its citizens. In such cases, a democratic society can claim a compelling security interest in protecting itself against armed insurrection and may seek to prohibit the nonmilitary political party promoting separatist aims.

However, unlike an insurrectionary party that allies itself with a foreign power or draws from a criminal element within the nation, these separatist parties seem invariably to find their support by opposing the perceived oppression of a distinct regional or ethnic subset of the population. In championing the cause of oppressed groups within the broader polity, these separatist parties frequently develop an uneasy and oftentimes conflicting relationship with armed groups fighting for the same general objectives. Further, and also unlike the insurrectionary parties, they typically do not seek to take control of the entire state through electoral, paramilitary, or any other means. Rather, they seek to challenge the political will of the majority to continue its hold over a distinct region of the country, and they often promote themselves as upholding the claims of a majority of citizens in

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[127] *See* Shlomit Wallerstein, *Criminalizing Remote Harm and the Case of Anti-democratic Activity*, 28 CARDOZO L. REV. (forthcoming 2007) (examining application of criminal law principles to antidemocratic incitement).

[128] *See* STONE, *supra* note 44, at 367.

[129] *Id.* at 396.

the contested area to democratic self-determination.[130] Their object is typically independence, not conquest of the entire state. Because of their identification with a broader claim for the rights of a regionally defined, generally subordinated section of the nation, separatist parties readily invoke the language of self-determination to claim independent democratic grounds for their right to advocate dissolution of the broader polity.[131]

Separatist parties are frequent targets for exclusion from the electoral arena for two distinct reasons. First, like insurrectionary parties, they may serve to provide legal cover for attacks on the state through force or violence. This is in effect the story of Batasuna in Spain, as well as that of its affiliated Herritarren Zerrenda party, which sought to present the same platform in European parliamentary elections.[132] Various Kurdish nationalist parties in Turkey, Sinn Fein in Northern Ireland, and numerous other examples pose the same issues. Second, any state — France, Turkey, Iraq, Israel, and Spain offer ready examples — can declare that its territorial boundaries are beyond the scope of proper political debate.

Precisely because such regional minorities, particularly if they are set off by linguistic, religious, or ethnic divides, are likely to be the subjects of discrimination in many walks of civic life (not to mention outright police repression, even in relatively tolerant democratic societies), the risk of official misconduct is great. In American constitutional terms, this is where we would hope to see the most exacting judicial solicitude. There is an extraordinary risk of defining politics as closing out the political expression of grievances of the minority. Here, as with the case of insurrectionary parties, we can again turn to the clear and present danger test as an appropriately high screen on governmental efforts to deny political voice to embattled minorities.

The case of Latvia after its achievement of national independence from the Soviet Union presents an extreme example. As part of its newly gained freedom, Latvia decreed that Latvian would be the official language of the polity and that all candidates for national office would have to demonstrate Latvian language proficiency for the osten-

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[130] There are exceptions that complicate the picture. Israeli Arabs can be expected to chafe at the Basic Law's proclamation of the Jewish character of the Israeli state. The unwillingness of Arab parties in Israel to accept this characterization has led to numerous efforts to ban such parties, which have generally been resisted by the courts absent some tie to the PLO or terrorism. For a comprehensive history of the early bans on Arab parties, see Ron Harris, *A Case Study in the Banning of Political Parties: The Pan-Arab Movement El Ard and the Israeli Supreme Court* (Aug. 22, 2004) (unpublished manuscript, on file with the Harvard Law School Library).

[131] For an examination of the relationship between international law norms and claims of self-determination, see Macklem, *supra* note 21, at 504–10 (describing the debate in European law over the scope of claims to self-determination as a core democratic right).

[132] *See* Ayres, *supra* note 91.

sible purpose of being able to conduct the business of the country effectively.[133] The effect was to curtail the ability of the Russian language minority (which constituted forty percent of the population) to participate in government — a particularly problematic issue since the Russian population came to Latvia largely with the Soviet occupation but now was mainly comprised of persons who knew no other homeland. In reviewing the exclusion of a candidate for failing to prove Latvian proficiency, the European Court of Human Rights (ECHR) allowed that requiring "sufficient knowledge of the official language pursues a legitimate aim,"[134] but nevertheless struck down the application of the language requirement as lacking basic procedural fairness.[135]

Turkey provides the most fertile testing ground for the range of permissible prohibitions on political parties, particularly as it applies to separatist claims. The Turkish Constitution is an extraordinary document, reflecting its origins in the muscular efforts of Kemal Ataturk to compel a rapid Westernization after the collapse of the Ottoman Empire. As a guiding principle, the Turkish Constitution's preamble enshrines the principles of Ataturk, "the immortal leader and the unrivalled hero" of the Republic of Turkey,[136] and provides an explicit textual commitment to the territorial integrity of the country: "[N]o activity can be protected contrary to Turkish national interests . . . [or] the principle of the indivisibility of the existence of Turkey with its state and territory . . . ."[137]

The Turkish Constitution goes on to expressly forbid challenges to "the independence of the State, its indivisible integrity with its territory and nation."[138] Beyond merely asserting such requirements, though, the constitution requires the Constitutional Court to dissolve permanently any political party that threatens the state in any of the ways enumerated.[139] Guidance is provided by Law No. 2820 on the regulation of political parties, which forbids parties from aiming to "jeopardise the existence of the Turkish State and Republic, abolish fundamental rights and freedoms, introduce discrimination on grounds

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133 The background legal rules are described in *Podkolzina v. Latvia*, 2002-II Eur. Ct. H.R. 443, 452–56.

134 *Id.* at 460.

135 *Id.* at 460–61.

136 TURK. CONST. pmbl., *translated in* 18 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: TURKEY 1 (Gisbert H. Flanz ed., Ömer Faruk Genckaya trans., 2003) [hereinafter CONSTITUTIONS OF THE WORLD: TURKEY].

137 *Id.*, *translated in* 18 CONSTITUTIONS OF THE WORLD: TURKEY, *supra* note 136, at 1.

138 *Id.* art. 68, *translated in* 18 CONSTITUTIONS OF THE WORLD: TURKEY, *supra* note 136, at 22.

139 *Id.* art. 69, *translated in* 18 CONSTITUTIONS OF THE WORLD: TURKEY, *supra* note 136, at 22–23.

of . . . religion or membership of a religious sect, or establish . . . a system of government based on any such notion or concept."[140] That law was used to uphold a ban on the Turkish Communist Party on the ground that its program "covering support for non-Turkish languages and cultures [was] intended to create minorities, to the detriment of the unity of the Turkish nation,"[141] a prohibition subsequently overturned by the ECHR.[142]

Similar application of the territorial integrity principle led to direct prohibitions on various Kurdish parties. These are difficult cases because the suppression of Kurdish political advocacy comes very close to the outright repression of a disfavored national minority. In 1992, the government accused the Kurdish Halkin Emek Partisi (People's Labor Party or HEP) of promoting Kurdish separatism "with the aim of destroying the 'inseparable unity'" of the Turkish state.[143] In deciding to dissolve the party, the Turkish Constitutional Court[144] attempted to draw a distinction between everyday life, where following a distinct cultural tradition is legitimate, and politics, where invoking that same tradition becomes an illegitimate political claim that threatens state unity and public order.[145] The court found that the use of the Kurdish language in the realm of politics was, like other activities of HEP, an indication of a forbidden commitment to "separatism" that threatened to compromise the unity of the state.[146]

The Turkish court's rulings in the HEP case were later overturned by the ECHR, which held that dissolving HEP was a violation of the right of free association and fined the Turkish government.[147] However, this was hardly the last word on the issue. The Turkish court again upheld the suppression of Kurdish parties on the grounds that their endorsement of Kurdish national claims and championing of Kurdish grievances violated the territorial integrity of the Turkish state or represented a rejection of democracy as such, decisions that the ECHR overruled in 1999 and 2002.[148]

The 2002 case of *Yazar v. Turkey*,[149] again involving HEP, is particularly instructive. The Turkish Constitutional Court had upheld the

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[140] Law No. 2820 has not been translated from Turkish. The relevant provision, § 78, is translated in Refah Partisi (Welfare Party) v. Turkey, 35 Eur. H.R. Rep. 56, 74 (2002).

[141] United Communist Party of Turkey v. Turkey, 1998-I Eur. Ct. H.R. 1, 10.

[142] *Id.* at 39.

[143] Kogacioglu, *supra* note 106, at 263.

[144] The decision of the Constitutional Court has not been translated from Turkish. It is thoughtfully discussed by Dicle Kogacioglu. *See id.*

[145] *See id.* at 265.

[146] *Id.*

[147] *See id.* at 271.

[148] *See* Yazar v. Turkey, 2002-II Eur. Ct. H.R. 395; Freedom and Democracy Party (ÖZDEP) v. Turkey, 1999-VIII Eur. Ct. H.R. 293.

[149] 2002-II Eur. Ct. H.R. 395.

banning of HEP on the ground that the party's platform undermined the integrity of the State by "seeking to divide the Turkish nation in two, with Turks on one side and Kurds on the other, with the aim of establishing separate States."[150] A critical underpinning of this finding was HEP's refusal to denounce the aims of the Partiya Karkerên Kurdistan (PKK), an insurrectionary Kurdish force with a history of terrorist attacks on Turkish targets.[151] According to the Turkish court, HEP referred to the PKK as "freedom fighters" and described the guerrilla fighting as an "international" conflict between distinct national forces.[152]

The ECHR overturned the prohibition under Article 11 of the European Convention, which guarantees basic rights of association and assembly, including the right to form political parties.[153] Article 11 denies states the ability to restrict the right of association except to the extent that such measures "are necessary in a democratic society in the interests of national security or public safety . . . or for the protection of the rights and freedoms of others."[154] In rejecting Turkey's claim that HEP's propaganda lent tacit support to the PKK, the court appeared particularly solicitous of the right of advocacy on behalf of national minorities so long as there was no direct advocacy of the use of force or violence and so long as the political party remained faithful to democratic principles.[155] "In the absence of any calls for the use of violence or any other illegal methods," the court, in its rendition of the clear and present danger test, decreed:

> [I]f merely by advocating those principles [of national self-determination] a political group were held to be supporting acts of terrorism, that would reduce the possibility of dealing with related issues in the context of a democratic debate and would allow armed movements to monopolise support for the principles in question. . . .
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> Moreover, the Court considers that, even if proposals inspired by such principles are likely to clash with the main strands of government policy or the convictions of the majority of the public, it is necessary for the proper functioning of democracy that political groups should be able to in-

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150 *Yazar*, 2002-II Eur. Ct. H.R. at 402 (quoting Turkish Constitutional Court) (internal quotation marks omitted).

151 *Id.*

152 *Id.*

153 The application of Article 11 to political parties originated in *United Communist Party of Turkey v. Turkey*, 1998-I Eur. Ct. H.R. 1.

154 European Convention for the Protection of Human Rights and Fundamental Freedoms art. 11, ¶ 2, Nov. 4, 1950, 213 U.N.T.S. 221, *reprinted in* FRANCIS G. JACOBS & ROBIN C.A. WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 422, 426 (2d ed. 1996).

155 *Yazar*, 2002-II Eur. Ct. H.R. at 413–14; *see also id.* at 413 ("[T]he HEP did not express any explicit support for or approval of the use of violence for political ends. Furthermore, incitement to ethnic hatred and incitement to insurrection are criminal offences in Turkey. At the material time, however, none of the HEP's leaders had been convicted of any such offence.").

> troduce them into public debate in order to help find solutions to general problems concerning politicians of all persuasions . . . .[156]

The result is that under emerging European law, separatist parties, like insurrectionary parties, are given a broad swath of protection so long as they are not engaged in actual incitement or violent acts against the democratic regime. In the case of separatist parties, the overlay with the claims of an embattled minority should enhance the level of judicial solicitude for these parties and restrict the ambit of permissible state suppression.

3. Antidemocratic Majoritarian Parties. — Ultimately the greatest challenge for a democracy, at least conceptually, comes from the threat of being assaulted not from without but from within. Neither the insurrectionary parties nor the separatist parties have any realistic hope of seizing power from within the national electorate. Thus, for example, the Kurdish parties in Turkey have never seriously intended to command a national majority to unwind either liberal democracy or the territorial integrity of Turkey. It may be necessary to suppress such parties if they resort to unlawful means. But in such cases their prohibition must stand or fall in relation to their commitment to peaceable as opposed to paramilitary forms of struggle for national separation. The same cannot be said of parties that seek to use majoritarian democratic processes to dismantle liberal democracy, as in the case of Islamic parties seeking majority status for purposes of imposing clerical law.

Turkey provides the most dramatic and difficult confrontation with this issue. Returning to the basic principles of Turkish constitutionalism takes us to the prohibition on all expression of religion in the civic arena, a prohibition that the Turkish Constitution's preamble identifies as one of the core principles inherited from Ataturk.[157] The preamble provides an explicit textual commitment to a secular political culture, even at the price of freedom of expression, and it explicitly withdraws protection from contrary opinions:

> [N]o activity can be protected contrary to . . . [the] reforms and modernization of Atatürk and . . . , as required by the principle of [secularism], sacred religious feelings can in no way be permitted to interfere with state affairs and politics.[158]

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156 *Id.* at 413–14.

157 TURK. CONST. pmbl., *translated in* 18 CONSTITUTIONS OF THE WORLD: TURKEY, *supra* note 136, at 1 ("[S]acred religious feelings can in no way be permitted to interfere with state affairs and politics.").

158 *Id.*, *translated in* 18 CONSTITUTIONS OF THE WORLD: TURKEY, *supra* note 136, at 1. There are similar and more specific provisions in the body of the constitution. *See, e.g.*, *id.* art. 14, *translated in* 18 CONSTITUTIONS OF THE WORLD: TURKEY, *supra* note 136, at 4 ("None of the rights and freedoms embodied in the Constitution can be exercised for activities undertaken with the aim of . . . endangering the existence of the democratic and [secular] Republic . . . .").

Based on the Kemalian vision of Turkey as a "democratic, [secular] . . . state,"[159] the constitution prohibits political parties from interfering with "the principles of the democratic and [secular] republic"; it also mandates that they "can not aim to support or to establish a dictatorship of class or group or dictatorship of any kind, and nor [can] they encourage the commitment of offence."[160]

The history of enforced secularism under the Turkish Constitution is complicated, to say the least. When the state has been threatened by the rise of charismatic Islamic politicians or mass-based Islamic parties, the court and the military have emerged as the two institutions most inclined to prevent any kind of Islamic political mobilization. This history includes military interventions both overt and covert, jailing of opposition leaders, and a host of measures beyond the scope of the democratically tolerable.[161] But, particularly since Turkey sought integration into the European Union, the Turkish state's resistance to Islamic parties has recently taken largely legal forms.

The leading case in Turkey concerns the Refah Partisi (Welfare Party), a mass-based Islamic organization that not only became the largest single party in the Turkish parliament, but also in 1996 formed a coalition government in which it was the dominant player.[162] Despite Refah's popular support, and in expectation of Refah's commanding an outright majority of Parliament in the next election, the party was charged with "activities contrary to the principle of secularism."[163] The Turkish Constitutional Court ordered the dissolution of the party, the surrender of its assets to the state, and the removal of four Refah members from Parliament, and banned its leaders from elective office for five years.[164]

By the time the Welfare Party issue reached the ECHR, however, Islamic political claims had come to dominate Turkish politics. The current history begins in 1970, when Professor Necmettin Erbakan founded the Milli Nizam Partisi (National Order Party or NOP), the first in a sequence of political parties promoting to greater and lesser extents the imposition of Islamic law in Turkey — primarily in the lives of Muslims in the country, but extending to all facets of public

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159 *Id.* art. 2, *translated in* 18 CONSTITUTIONS OF THE WORLD: TURKEY, *supra* note 136, at 2.

160 *Id.* art. 68, *translated in* 18 CONSTITUTIONS OF THE WORLD: TURKEY, *supra* note 136, at 22.

161 For a good overview from the perspective of defending the democratic rights of Islamic parties, see NOAH FELDMAN, AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY 105–11 (2003).

162 *See* Refah Partisi (Welfare Party) v. Turkey, 2003-II Eur. Ct. H.R. 267, 269.

163 *Id.* at 275–76.

164 The facts are laid out more fully in the earlier opinion of a panel of the ECHR. *See* Refah Partisi (Welfare Party) v. Turkey, 35 Eur. H.R. Rep. 56, 63–73 (2002).

life. At the core of the NOP's platform was a plan for what it termed domestic spiritual overhaul, which included permitting public exercise of religion and closing secular entertainment venues.[165] The Constitutional Court found this set of positions to promote "Revolutionary Religion," in violation of the constitution, and dissolved the party.[166] A successor party, the Milli Selamet Partisi (National Salvation Party), also founded by Professor Erbakan,[167] met a similar fate, only this time at the hands of a military regime that took power in 1980, dissolved all political parties, and ordered the Islamic political leaders to stand trial.[168]

Upon the reinstatement of civilian rule, the same minuet resumed. Professor Erbakan founded the Welfare Party, a party little changed from its earlier incarnations. The Welfare Party emerged as the strongest force in Parliament and formed a government with two smaller, more centrist parties. When the time came for the Welfare Party to assume control of the government under its coalition agreement, its coalition partners recoiled and the Constitutional Court dissolved the party, holding that it was a "'centre' . . . of activities contrary to the principles of secularism."[169] Although the Turkish Constitutional Court found some evidence of a threat to public order posed by the Welfare Party's invocation of jihad in its public messages,[170] the exclusive issue presented on appeal to the ECHR was whether the substantive views of the Welfare Party were compatible with liberal democracy. The first real controversial position taken by the Welfare Party was the proposal to have each religious community in Turkey governed according to the religious laws of its faith, a throwback to the Ottoman practice of allowing broad autonomy over civic life to each of the peoples subsumed in the empire. More controversial yet was the party's professed commitment to sharia as the source of all basic law, thereby presenting the ECHR straightforwardly with the questions whether a party could be banned because of

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165 *See* Susanna Dokupil, *The Separation of Mosque and State: Islam and Democracy in Modern Turkey*, 105 W. VA. L. REV. 53, 83 (2002).

166 *Id.* at 84.

167 *See id.*

168 *See* Talip Kucukcan, *State, Islam, and Religious Liberty in Modern Turkey: Reconfiguration of Religion in the Public Sphere*, 2003 BYU L. REV. 475, 492.

169 Lance S. Lehnhof, Note, *Freedom of Religious Association: The Right of Religious Organizations To Obtain Legal Entity Status Under the European Convention*, 2002 BYU L. REV. 561, 578 (quoting Refah Partisi (Welfare Party) v. Turkey, 2003-II Eur. Ct. H.R. 267, 276) (internal quotation marks omitted).

170 *See* Refah Partisi (Welfare Party) v. Turkey, 35 Eur. H.R. Rep. 56, 68 (2002) (quoting the following portion of a speech by Erbakan relied upon by the Turkish Court as evidence of the Welfare Party's anti-secular activities: "Refah will come to power and a just [social] order will be established. The question we must ask ourselves is whether this change will be violent or peaceful; whether it will entail bloodshed." (alteration in original)).

its commitment to sharia and whether a state's commitment to secularism could serve as the justification for that prohibition. Although the question whether the charges were true or pretextual remains a disputed issue in Turkey, the concern here is with the ECHR's treatment of an asserted national interest in suppressing excessive Islamist politics.

The ECHR began with a surprisingly ringing endorsement of secularism as "one of the fundamental principles of the [Turkish] State which are in harmony with the rule of law and respect for human rights and democracy."[171] By contrast, "a plurality of legal systems, as proposed by Refah, cannot be considered to be compatible with the [European] Convention system."[172] Even more categorical was the court's blanket conclusion that "sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention."[173] This led to the ECHR's critical reaffirmation of the power inherent in democratic states to take preemptive action against threats to pluralistic democratic rule:

> [A] State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy, even though the danger of that policy for democracy is sufficiently established and imminent. . . . [W]here the presence of such a danger has been established by the national courts, after detailed scrutiny subjected to rigorous European supervision, a State may "reasonably forestall the execution of such a policy . . . before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country's democratic regime" . . . .[174]

At no point did the ECHR demand proof of the imminence of democracy's demise. The court noted that "Refah had the real potential to seize political power"; however, that was evidence not of the immediacy of the threat posed by its principles, but simply of the fact that the threat could have been realized.[175] There was no suggestion that Refah's program was sufficiently "clear and present" as to constitute a direct threat of the sort posed by an insurrectionary party. But more to the point, what was undertaken in Turkey was not a criminal prosecution of Refah members or leaders, but a disqualification from organizing an electorally based political party to pursue what the courts perceived to be intolerant aims.

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171 *Refah Partisi*, 2003-II Eur. Ct. H.R. at 302.
172 *Id.* at 310.
173 *Id.* at 312.
174 *Id.* at 305 (quoting *Refah Partisi*, 35 Eur. H.R. Rep. at 91).
175 *Id.* at 307.

On first impression, the opinion jars many democratic sensibilities, particularly those formed in the free speech environment of the United States. The condemnation of all sharia likely was far too sweeping and almost certainly applied a different standard to Islamic religious belief than would have been applied to any Christian faith. Further, the use of a deferential "reasonableness" standard for the political exclusion of a party with broad popular support gives a great deal of latitude to national determinations that are necessarily problematic. Nonetheless, the effect of the court's ruling seemed the best that anyone could have hoped for. Under the pressure of prohibitions for its proclaimed aim of imposing clerical rule, the Welfare Party fractured.

Unlike the earlier prohibitions, which simply declared the various incarnations of Professor Erbakan's movement illegal through either court action or military intervention, the Turkish Constitutional Court decision upheld by the ECHR targeted certain electoral objectives more surgically. The decision left in place a sizeable block of the former Refah Party in Parliament, still with tremendous authority over national politics. Under these circumstances, as with the BJP in India, the prospect of reintegration into Turkish politics remained present subject to a tempering of the perceived threats to continued democratic order.

The result was that a moderate wing led by former Istanbul mayor Recep Tayyip Erdogan, himself a former protégé of Professor Erbakan, broke off to form the Justice and Development Party, a far more moderate Islamic party. In 2002, Erdogan became Prime Minister when Justice and Development emerged as the largest bloc in Parliament. Under his tutelage, Turkey has pursued its efforts at EU integration and remains a bastion of moderation in the Middle East.[176] Far from creating an insuperable barrier to an Islamic voice in Turkish politics, the dissolution of the Welfare Party appears to have sparked a realignment in which committed democratic voices from the self-proclaimed Islamic communities found a means of integration into mainstream Turkish political life. The political aspirations of Islamic parties as electoral forces present, as Professor Nancy Rosenblum argues, an opportunity for democratic integration as "political entrepreneurs come to judge that their ambitions are better served by effectively signaling moderation than by maintaining oppositional poses to preserve 'base' support; and perhaps above all by the iteration of elections and political learning."[177] Undoubtedly, this is not the last word in the struggle between a constitutional commitment to secularism and

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[176] *See* Thomas Patrick Carroll, *Turkey's Justice and Development Party: A Model for Democratic Islam?*, 6 MIDDLE E. INTELLIGENCE BULL. No. 6–7 (2004), http://www.meib.org/articles/0407_t1.htm.

[177] Nancy Rosenblum, *Banning Parties*, 1 LAW & ETHICS HUM. RTS. 17, 74 (2007).

significant popular support for Islamic politics. But under the circumstances, it is difficult to imagine a better outcome.

C. *Party Exclusion from the Electoral Arena*

In many countries, the electoral arena appears entitled to greater constitutional protection than parties themselves. For example, the Federal Constitutional Court in Germany in the *Radical Groups Case*[178] struck down a denial of television and radio advertisement time to left-wing parties on the ground that, so long as the political advertisements related to the election, "[r]adio and television stations have no right to refuse broadcasting [time to a party] merely because its election ad contains anticonstitutional ideas."[179] The controlling idea — one that is familiar to American law — is that democracies require open and robust political debate and that nowhere is the right of expression more important than in matters having to do with self-governance.[180] This principle follows from the basic approach of regulating the legal status of political parties while granting a broad swath of protection from state interference to those entities that are legally entitled to form a political party.

As the Indian example demonstrates, however, it is possible to treat conduct in the electoral arena separately from the question of the legal status of a political party. Indeed, in pursuing less restrictive ways of protecting the democratic process, it is possible to envision a code of electoral administration that not only is more supple than the criminal standards at issue in *Dennis*, but also might establish standards for electoral participation as opposed to party formation.

An interesting variation on this approach comes from Israel. The precipitating event was the effort to bar the Kach movement, whose founder, Rabbi Meir Kahane, had previously been the leader of the Jewish Defense League in the United States. There is little doubt that Kach promoted racial hostility and ventured sufficiently far to the extreme to be labeled a "quasi-fascist movement."[181] Kahane advocated a policy of "*Terror Neged Terror*" (Terror Against Terror) according to which Jewish vigilante groups would be able to count on the active

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[178] BVerfG Feb. 14, 1978, 47 BverfGE 198, *translated in part in* KOMMERS, *supra* note 103, at 224.

[179] *Id.*, *translated in part in* KOMMERS, *supra* note 103, at 224, 226 (second alteration in original).

[180] An interesting twist on this argument is provided by then-Professor Bork, who argues against applying the First Amendment to speech that does not touch on fundamental questions of political self-governance. *See* Bork, *supra* note 39, at 20.

[181] Ehud Sprinzak, *Kach and Meir Kahane: The Emergence of Jewish Quasi-Fascism I: Origins and Development*, PATTERNS OF PREJUDICE, July 1985, at 15, 16, *available at* http://www.geocities.com/alabasters_archive/kach_and_kahane.html; *see also* EHUD SPRINZAK, THE ASCENDANCE OF ISRAEL'S RADICAL RIGHT 80–87 (1991).

support of the Israeli government.[182] While Kach purportedly directed itself only to political organization, there seemed little dispute that Kahane's followers engaged in occasional anti-Arab attacks.[183] Further, Kach not only praised specific acts of anti-Arab violence committed by non-Kach Israelis, but also made the perpetrators of violence honorary members of Kach and provided funding for their legal defenses.[184]

The first effort to ban the Kach party came on the unilateral initiative of the Central Elections Committee (CEC), an administrative body charged with the conduct of elections in Israel, including verification of the eligibility of political party slates for inclusion on the ballot. The CEC disqualified the Kach party — along with a minor Arab party, the Progressive List for Peace — on the grounds that its platform was antidemocratic and advocated racism. In *Neiman v. Chairman of the Central Elections Committee for the Eleventh Knesset*,[185] the Israeli Supreme Court struck down these independent actions of the CEC on the ground that the CEC's statutory mandate was limited to mechanically checking the petition signatures and other technical qualifications of parties and did not include any political assessment of a party's platform. The court rejected the view of Justice Aharon Barak, expressed in a separate concurrence, that the CEC could ban a political party of its own accord so long as there was appropriate judicial review after the fact.[186] Nonetheless, the court agreed that a party that rejected either the existence of the Israeli state or its democratic character could be banned, although the court then split on whether the threat posed by the party had to be a substantial probability, per the lead opinion of President Shamgar of the court,[187] or whether it only had to be a reasonable possibility, as Justice Barak would have had it.[188]

In the aftermath of *Neiman*, Israel amended both its Basic Law governing eligibility for the Knesset and its statutory requirements for the registration of political parties. The immediate aim of the reforms was to provide a sound legal basis for banning parties, which then re-

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[182] Ehud Sprinzak, *Kach and Meir Kahane: The Emergence of Jewish Quasi-Fascism II: Ideology and Politics*, PATTERNS OF PREJUDICE, July 1985, at 3, 8, *available at* http://www.geocities.com/alabasters_archive/kach_and_kahane.html.

[183] *See* Sprinzak, *supra* note 181, at 18–19.

[184] *See* Ehud Sprinzak, *Extremism and Violence in Israel: The Crisis of Messianic Politics*, 555 ANNALS AM. ACAD. POL. & SOC. SCI. 114, 121 (1998).

[185] EA 2/84, 3/84 [1985] IsrSC 39(2) 225.

[186] *See id.* at 304–05 (Barak, J., concurring).

[187] *See id.* at 275 (opinion of Shamgar, C.J.).

[188] *See id.* at 315–16 (Barak, J., concurring). The debate on the standard of proof both invoked and was reminiscent of Learned Hand's formulation of the clear and present danger test in the Second Circuit opinion in *Dennis*: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950).

sulted in the banning of the Kach party in 1988 and 1992 and the banning of its related entity, Kahane Is Alive, in 1992.[189] What is particularly intriguing is not so much the application of the new laws to the Kach militants as the apparent efforts of the reformers to create a gap between the conditions for running for Parliament and the conditions for creating a political party. Under amended section 7a of the Basic Law on the Knesset, no party list may stand for office if it meets one of three conditions in its "objectives or acts."[190] As most recently amended in 2002, these three conditions are: first, "negation of the existence of the State of Israel as a Jewish and democratic state"; second, "incitement to racism"; and third, "support for armed struggle — by an enemy state or by a terrorist organization — against the State of Israel."[191] The language of the party registration law is quite similar but adds an additional necessary condition: whether "any of its purposes or deeds, implicitly or explicitly, contains . . . reasonable ground to deduce that the party will serve as a cover for illegal actions."[192] At least in theory, a ban on running for the Knesset is less draconian than outlawing an entire party. Therefore, the focus on the implicit or explicit direct tie to unlawful conduct in the party prohibition laws can be seen as inviting courts to apply a more stringent standard before a party is outlawed altogether, and a less rigorous standard when a party is simply being disqualified from having its members elected to the Knesset.

Both commentators and the Israeli Supreme Court treat these mild differences in formulation — specifically, the introduction of the reasonable basis for tying a party to illegal activity in the Parties Law — as creating a political space in which it is possible to organize a party around ideas, even if reprehensible ones, while at the same time denying such a party the right of representation in the Knesset. Although there has not yet been any case challenging the distinction between political organization and parliamentary candidacy, President Barak's opinion for the court in *Yassin & Rochley v. Registrar of the Political Parties & Yemin Israel*[193] provided the rationale for treating the two forms of political activity differently. As summarized by Professor Cohen-Almagor:

> In his judgment, President Barak explained that the basis of . . . the Parties Law is the idea of balancing. We need to strike a balance between two conflicting trends. On the one hand, we need to enable every individ-

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189 *See* Raphael Cohen-Almagor, *Disqualification of Political Parties in Israel: 1988–1996*, 11 EMORY INT'L L. REV. 67, 67 (1997).

190 Basic Law: The Knesset § 7A, *translated in* ISRAEL'S WRITTEN CONSTITUTION (5th ed. 2006).

191 *Id.* I am grateful to Professor Barak Medina for walking me through the amendments to the Israeli laws and for the translation of the 2002 provisions.

192 Cohen-Almagor, *supra* note 189, at 92 (translating Parties Law, 1992, S.H. 190).

193 PCA 7504/95, 7793/95 [1996] IsrSC 50(2) 45.

> ual to form with other individuals an association through which they may further political and social ends. On the other hand, we should safeguard the character of Israel as a Jewish democratic state that shrinks from racism. President Barak emphasized that the right to elect and to be elected was fundamental, and went on to stress that democracy is entitled to defend itself against those who aim at undermining its existence. This is the essence of the right to democratic self-defence.[194]

The prospect of parties that are allowed to exist and recruit members, but are excluded from the electoral arena and by extension from political office, leads directly to the question whether democracies may regulate the political arena on a basis distinct from that underlying the regulation of speech, association, and assembly generally. Should we be less concerned about restricting expression — under the American First Amendment, for example — when a government imposes a civil penalty against a speaker by denying him access to elective office than when a government imposes a criminal penalty against that speaker? Do we think differently of a society that, while not incarcerating antidemocratic forces, nonetheless denies them access to the electoral arena as a platform for antidemocratic agitation?[195]

Without a clear template in any country's actual experience, we are left to hypothesize about what it would mean to allow a party to exist but to nonetheless restrict its electoral participation. This is likely not to be a stable arrangement. But the experience of the Turkish Welfare Party and the Indian BJP suggests that even strongly religious or nationalistic parties are coalitions and that their more moderate members (or more electorally ambitious leaders) may temper their ideals to the requirements of democratic life.[196]

It is, of course, unlikely that a prohibition on electoral participation can forestall mass antidemocratic fervor in the long run. As the Algerian example demonstrates, by the time electoral politics are commandeered by parties with an express commitment to abolishing civil liberties and cancelling elections, little hope remains.[197] A democracy

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[194] Cohen-Almagor, *supra* note 189, at 96 (footnotes omitted). There are no English translations of *Yassin & Rochley* available.

[195] For the importance of the distinction between prosecuting parties criminally and banning them from the electoral arena, see Comella, *supra* note 20, at 138–39, in which the author argues that, because the incarceration of individual party members is not at stake, the standards for prohibiting parties administratively may be more relaxed than those used in criminal trials.

[196] *See* Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131 (2005) (exploring how different forms of legal regulation empower distinct constituencies in political parties).

[197] In June 1990, the newly formed Front Islamique du Salut (FIS) won a majority of the votes cast in local elections in Algeria. The FIS was an Islamist party that garnered tremendous popular support as an alternative to the corrupt and weak post-independence rulers, the Front de Libération Nationale (FLN). But the relationship of the FIS to democracy was uneasy at best: its second-in-command, Ali Belhadj, was well known for his fiery rhetoric and openly denounced

without a corresponding democratic commitment in the broader society will not survive. At the same time, Algeria offers the caution that in the absence of democratic integrity within the ruling government, any repression of even avowedly antidemocratic elements will resonate as simply another corrupt effort to preserve a failed ruling elite.[198] But such failures of cancerous regimes provide no evidence that a relatively healthy democratic society cannot test the antidemocratic mettle of its parties by frustrating the electoral ambitions of some, perhaps in the process emboldening more moderate elements and forestalling the use of the electoral arena for the worst antidemocratic ends.

III. THE SAFEGUARDS OF DEMOCRACY

Extremist groups threaten democracy in terms of both what they might try to do through elections and governmental office and what they might provoke democratic societies to do in order to ward off the perceived danger. The threat is real, from both directions. That there are antidemocratic groups trying to worm their way into governmental positions so as to undermine tolerant, pluralistic democratic societies is not a new development. What is perhaps new is the increasing likelihood that these groups will be clerically inspired rather than driven by the messianic social visions of communism or fascism. But there is the corresponding threat that, as a result, the ambit of democratic deliberation will be drawn too narrowly and the threat to social peace will increasingly be used to drive out the uncomfortable voices of dissent.

In most circumstances, efforts to silence parties by prohibition are probably ill-advised. As nettlesome as the Quebec independence movement has been for Canada, the national government's ability to channel disputes over Quebec's status through the political process and even the Supreme Court is far preferable to any attempt to drive the party underground.[199] But Canada is not the world, and the relative civility and tolerance of debate there is unfortunately not the

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multiparty democracy as a threat to *sharia*. The party went on to win 188 seats out of 430 in the first round of national elections. Although the constitution called for a second round of voting, the leaders of the Algerian military effected a coup d'état and cancelled the planned elections. The leaders of the FIS were jailed and the party was formally dissolved. While some of the more moderate FIS leaders tried to accommodate the government, the bulk of the party split off and began armed resistance, igniting a civil war in which over 100,000 people have been killed. *See generally* MICHAEL WILLIS, THE ISLAMIST CHALLENGE IN ALGERIA 107–392 (1996); Lise Garon, *The Press and Democratic Transition in Arab Societies: The Algerian Case*, *in* I POLITICAL LIBERALIZATION AND DEMOCRATIZATION IN THE ARAB WORLD 149 (Rex Brynen et al. eds., 1995).

198 For a related claim that expansive constitutional review performs a similar function by allowing political and economic elites to hold illiberal majorities at bay, see RAN HIRSCHL, TOWARDS JURISTOCRACY 214 (2004).

199 *See* Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

norm. So the question becomes what preconditions must exist for the banning of parties or for other restrictions on political expression in the electoral arena. Here I wish to leave to the side the parties alleged to be allied with insurrectionary or regional military forces. With respect to such parties, the directness of the organizational link to unlawful activity and the immediacy of the likely harm serve as workable responses to the problems posed, at least in theory. Thus, the starting point for any discussion of the banning of political parties, political participation, or political speech should be, as set forth in the *Guidelines on the Prohibition and Dissolution of Political Parties and Analogous Measures* issued by the European Commission for Democracy Through Law, that the presumption is in favor of freedom of political expression and association:

> The prohibition or dissolution of a political party is an exceptional measure in a democratic society. If relevant state bodies take a decision to seize the judicial body on the question of prohibition of a political party they should have sufficient evidence that there is a real threat to the constitutional order or citizens' fundamental rights and freedoms.[200]

The more difficult concern is with parties that genuinely vie for governmental office and even majority status in an effort to unwind liberal democracy. It is easy to imagine what may go wrong with party prohibitions. The ability to cordon off certain areas of democratic deliberation from particular kinds of speech invites censorship or suppression of political opposition, a move that can be utilized to insulate incumbents from electoral challenge or as a pretext to impose the ruling majority's own form of orthodoxy on political exchange. But if history is a guide, excessive tolerance is dangerous as well. We can begin to test the range of permissible state responses to antidemocratic mass movements through the familiar categories of procedural limitations on and substantive definitions of prohibited conduct.

I wish to put to the side two technical objections to this exercise. The first is that democratic suppression will not work: that ultimately it will induce greater antidemocratic mobilization than the free ventilation of all viewpoints. I view this as an empirical claim about what actually works. In the stable framework of the United States, it may well be that reactions to suppress political participation have been overwrought and largely unnecessary. I am far less confident that — as an empirical matter — this is universally true. The decision of India, a country forged in fratricidal religious conflict, seeking to suppress election day incitements likely to engender communal violence is

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[200] European Comm'n for Democracy Through Law (Venice Comm'n), *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures*, art. III, § V, ¶ 14 (Jan. 10, 2000) [hereinafter *Democracy Through Law Guidelines*], *available at* http://www.venice.coe.int/docs/2000/CDL-INF(2000)001-e.asp.

not a move so readily discounted. Turkey's suppression of Islamic extremism, which led its Islamic opposition to mature and develop an appetite for competent governance, is also not so easily cast as unwise or ineffectual.[201] Even the most extreme cases, such as the Algerian military intervention to prevent a parliament from forming around a platform of eliminating democracy, are not so readily dismissed as simply counterproductive exercises, despite the resulting military confrontation.

The second objection is that electoral prohibitions tend to be either void for vagueness or unacceptably overbroad. These dangers are ever present in the exercise. But if the claim is that all efforts to bar impermissible viewpoints are overbroad or vague, that does not mean that all efforts at suppressing antidemocratic opposition *must*, of necessity, reach beyond acceptable parameters. Thus, such criticism of electoral prohibitions must be grounded in theory, not in an individual attack on a particular law or ruling as having an undemocratic effect.

A. Procedural Protections

Across the range of cases in which democratic regimes have sought to prevent antidemocratic elements from securing the advantages of the electoral arena, three forms of procedural concerns emerge. Although there is no judicial discussion (that I am aware of) setting out these considerations in comprehensive fashion, taken together they highlight some of the primary protections against the potential misuse of viewpoint-based suppression of political activity.

The first and undoubtedly most significant procedural safeguard is the concentration of the power to suppress away from self-interested political actors. In all these cases, the judiciary acts based on the government's petition or the public prosecutor's charges,[202] but it acts as an independent arbiter of the legitimacy of the government's professed need to suppress an antidemocratic threat.

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[201] Although the subject is too broad for this Article, it is important to note that the complex nature of political parties is a factor that interacts with the imposition of legal restraints on certain kinds of activity or expression. Political parties invariably reflect deep internal tensions among their mass bases, their elected officials, and their internal apparatus. This is the basic analysis of political parties developed in the United States, initially in V.O. KEY, JR., POLITICS, PARTIES, & PRESSURE GROUPS (5th ed. 1964). *See also* Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775 (2000). For a broader theoretical account of how parties respond to the incentives created by legal regulation, see Kang, *supra* note 196.

[202] "The role of the judiciary is essential in the prohibition or dissolution of political parties. . . . [T]here can be different judicial bodies competent in this field. In some states it lies within the sole competence of Constitutional courts whereas in others it is within the sphere of ordinary courts." *Democracy Through Law Guidelines*, *supra* note 200, art. III, § VI, ¶ 18.

Independent judicial review takes on particular significance in parliamentary systems. There is an ever-present risk in democratic systems that the claimed exigencies necessitating the use of emergency powers, including the power to suppress antagonistic political speech, will become the rule that swallows the exception. Too many putative democracies, particularly in the immediate post-colonial world, have succumbed to one-party rule under the claimed necessity of domestic emergencies for any prescriptive account to ignore this threat. The common feature of fledgling democracies that collapse into strongman regimes is the concentration of unilateral power in the executive, an inherent risk whenever there is a claimed threat to national security.

In the United States, the separation between presidential and legislative election allows the Congress to play a checking role on claims of unilateral presidential authority, even over the nation's response to military threats. Indeed, the role of the courts in American national security cases has largely been to ensure that the executive not act beyond the scope of congressional authorization.[203] Because parliamentary systems vest executive power in representatives of the legislative majority, such separation of powers is not likely to have the same force as in presidential systems. But separation of powers remains a critical protection in preventing the use of extraordinary powers for quotidian political gain.

Requiring that there be an independent source of legislative authority for the prohibition of a political party and that there be a source of review independent of the executive provides a check on the misuse of this dangerous power. Perhaps the clearest example is the use of international tribunals, such as the European Court of Justice, to review party prohibitions. Such crossnational bodies are removed from any immediate accountability to domestic political processes and are unlikely to respond narrowly to partisan or sectional interests. Even at the domestic level, the requirement of independent review of such charged decisions as a ban on a political party may be thought of as a form of "constrained parliamentarianism" that protects democratic integrity by "insulating sensitive functions from political control."[204]

Germany provides the best example of the role of independent judicial review within a national setting, beginning with the seminal cases after World War II. The German Basic Law accepts both the

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[203] *See, e.g.*, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006). For a historical account of the role of the Supreme Court in checking impulses toward executive unilateralism, see Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1 (2004), *available at* http://www.bepress.com/til/default/vol5/iss1/art1.

[204] Bruce Ackerman & Susan Rose-Ackerman, Op-Ed., *Britain Needs a New Agency To Fight Corruption*, FIN. TIMES, Feb. 2, 2007, at 13.

importance of political parties in a democratic order and the need to ban those that seek to destroy democracy from within, a necessarily perilous line to draw. Under the German constitution, however, an important procedural protection for political parties is that only the Federal Constitutional Court can declare a political party unconstitutional.[205] The court addressed this topic in the *Socialist Reich Party Case*, stating that the framers of the German constitution, in deciding to limit the freedom of parties "seeking to abolish democracy by using formal democratic means," had to consider "the danger that the government might be tempted to eliminate troublesome opposition parties."[206] Therefore, the framers committed the decision on unconstitutionality to the Federal Constitutional Court. The court distinguished Article 9(2), which allows the executive to ban "associations whose purposes or activities . . . are directed against the constitutional order."[207] Precisely "[b]ecause of the special importance of parties in a democratic state," they could not be banned under the general executive powers of Article 9(2), and could be declared unconstitutional only by the Federal Constitutional Court.[208]

Later cases confirmed the court's exclusive jurisdiction to determine the constitutionality of political activity. The reasoning of the German Constitutional Court in the *Radical Groups Case*, which struck down a decision of state radio and television stations denying airtime to radical left-wing parties, is instructive.[209] The court held that so long as an advertisement was related to the election, and so long as the party had not been declared illegal by the court, content-based interference with expression was beyond the power of the broadcast media or the government. An organization acquires rights of expression as a political party, and only the court has the authority to rule on the constitutionality of a party: "The jurisdictional monopoly of the Federal Constitutional Court categorically precludes administrative action against the existence of a political party, regardless of how anticonstitutional the party's program may be."[210]

A similar form of procedural protection emerged in France after World War II, in the Fifth Republic. By contrast to the concentration of power in the legislature under the Fourth Republic, the post-1958

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[205] *See* GG art. 21(2), *translated in* KOMMERS, *supra* note 103, at 507, 511 ("The Federal Constitutional Court shall decide on the question of unconstitutionality.").

[206] Socialist Reich Party Case, BVerfG Oct. 23, 1952, 2 BVerfGE 1, *translated in part in* KOMMERS, *supra* note 103, at 218, 219.

[207] GG art. 9(2), *translated in* KOMMERS, *supra* note 103, at 509.

[208] *Socialist Reich Party*, 2 BVerfGE 1, *translated in part in* KOMMERS, *supra* note 103, at 218, 220.

[209] *See* Radical Groups Case, BVerfG Feb. 14, 1978, 47 BVerfGE 198, *translated in part in* KOMMERS, *supra* note 103, at 224.

[210] *Id.*, *translated in part in* KOMMERS, *supra* note 103, at 224, 227.

French constitutional order hewed much more closely to a formal recognition of separation of powers in which judicial oversight emerged as an additional source of power[211] — a surprisingly late development in the land of Montesquieu.[212] Perhaps the most significant decision of the Conseil Constitutionnel in establishing the principle of independent judicial oversight came in 1971, precisely in the area of the banning of political parties.[213] The Conseil declared unconstitutional a law that would have vested in the executive branch the authority to prohibit the formation of a political party, a power it had previously denied to the legislature acting on its own accord.[214]

Russia provides an interesting contrast. In the wake of an unsuccessful military coup in 1991, the Russian president issued a series of decrees banning the Communist Party and confiscating its property,[215] which in turn prompted a challenge before the newly formed Russian Constitutional Court.[216] After a politically charged trial, the court in the *Communist Party Case*[217] held that the decree banning the party was constitutional, even in the absence of a state of emergency, because it was rooted in a constitutional provision that "prohibits activity by parties, organizations, and movements having the aim or method of action, in particular, of forcible change to the constitutional order and undermining State security."[218] The difficulty was that the ban had been imposed through unilateral presidential action and in the absence of any established procedures. Even so, the court found the existence of a right of appeal prior to the execution of the ban to be a sufficient

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211 For a discussion of the development of judicial review by the Conseil Constitutionnel, see John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671 (2004), which describes the emergence of French judicial review as an "instrument of a 'moderate,' or limited government — a mechanism of the liberal tradition, which guards against potentially tyrannical majorities." *Id.* at 1685 (footnote omitted); *see also* Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 377–410 (1982).

212 On the difficult relationship between Montesquieu's advocacy of separation of powers, civil codes, and independent judicial review, see Olivier Moréteau, *Codes as Straight-Jackets, Safeguards, and Alibis: The Experience of the French Civil Code*, 20 N.C. J. INT'L L. & COM. REG. 273 (1995).

213 CC decision no. 71-44DC, Jul. 16, 1971, Rec. 29.

214 The French cases are discussed at length in Neuborne, *supra* note 211, at 390–93.

215 *See* 3 TRANSITIONAL JUSTICE, *supra* note 105, at 432–35 (translating the presidential decrees).

216 For more details on the formation and rise of the Russian Constitutional Court and the context surrounding the *Communist Party Case*, see Feofanov, *supra* note 126.

217 3 TRANSITIONAL JUSTICE, *supra* note 105, at 436–55 (translating in part the November 30, 1992, decision of the Russian Constitutional Court).

218 *Id.* at 442.

protection of the party's rights,[219] and therefore it upheld the ban on the merits.[220]

The second procedural protection derives from the form of governmental action to be taken. In none of the cases that have been discussed, with the exception of the American Smith Act cases, did the party face criminal sanctions. The typical sanctions included removing members of proscribed parties from legislative office, compelling the disbanding of parties, and seizing the assets of parties. As discussed earlier, the nature of the available sanctions alone diminishes the proof of immediate threat required by the American clear and present danger test. Even under American constitutional law, the evidentiary requirements for a party to satisfy its burden of proof are directly tied to the interests at stake and the potential severity of the punishment.[221]

Finally, lurking in discussions of the ability to thwart antidemocratic elements is the sense that democratic governments must employ the least restrictive means to achieve that objective. In the ECHR's treatment of a Russian-speaking candidate in Latvia and its analysis of the banning of the Refah party in Turkey, for example, there was implicit consideration of whether the government's conduct was excessive in light of the perceived threat. Thus, in Latvia, where the government's claimed interest was the ability of the parliament to function in Latvian, the banning of a candidate whose examination in the Latvian language turned into an inquiry into her political views was deemed to threaten the capacity of the Russian-speaking minority to have a voice in the national parliament.[222] In Turkey, on the other hand, the fact that the overwhelming majority of Refah representatives would continue to sit in Parliament seemed to provide ample political representation while at the same time disabling the party's organizational commitment to the imposition of clerical law.[223]

A least restrictive means requirement lends considerable support to the Indian and Israeli approaches, which focus on removing certain kinds of agitation from the electoral arena while allowing the political parties that stand behind those views to persist as organized entities. Both of these approaches maintain distinct rules for conduct in the electoral arena, either by regulating speech and agitation in the Indian fashion, or by reserving the right to exclude even legal parties from electoral participation, as under Israeli law. This leaves uncertain

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219 *Id.* at 443.

220 *Id.* at 454.

221 This is the basic lesson of *Mathews v. Eldridge*, 424 U.S. 319 (1976), and its progeny.

222 *See* Podkolzina v. Latvia, 2002-II Eur. Ct. H.R. 443.

223 Refah Partisi (Welfare Party) v. Turkey, 2003-II Eur. Ct. H.R. 267, 315 (citing Refah Partisi (Welfare Party) v. Turkey, 35 Eur. H.R. Rep. 56, 91 (2002)).

"what a democracy should do when it is faced with a party that *says* it is democratic but in fact looks suspiciously undemocratic."[224] But the focus on conduct and popular proclamations does facilitate the policing of the electoral process on a basis distinct from speech and political organization outside the electoral arena. It bears emphasizing that the corollary of banning parties is a willingness to use police authority to prevent like-minded individuals from gathering, agitating for common views, or even protesting governmental conduct that they find objectionable. If there is indeed something distinct about the electoral arena that magnifies the dangers presented by extremist groups, it is perhaps best to reserve the use of state authority for policing the integrity of the electoral system without reaching deeper into party organization.

Taken together, the three forms of procedural protection suggest a concept that has thus far been absent, at least as a formal matter, from American law: a distinct electoral arena within which the restraints on the regulatory power of the state over core matters of political speech, assembly, and organization are relaxed. American law has generally resisted treating electoral activity as a separate category, allowing the general First Amendment prohibitions on content and viewpoint discrimination to frame legal oversight of campaigns and political parties. At the same time, even without a deep-seated threat to democracy in this country, there is some hint of a distinct administrative period for elections beginning to appear in American law. In passing the Bipartisan Campaign Reform Act of 2002[225] (BCRA), generally referred to as McCain-Feingold, Congress for the first time introduced the concept of a distinct election period for restrictions on what are termed "electioneering communications."[226] As upheld by the Supreme Court in *McConnell v. FEC*,[227] BCRA created specific limitations on campaign funding and distinct disclosure requirements for the periods immediately preceding primary and general elections. The administrative powers granted to an entity like India's Electoral Commission, however, are a far step beyond anything that has been recognized in American law. Nonetheless, it is worth noting that some pressures toward an administrative law of elections are beginning to present themselves here as well.

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[224] FELDMAN, *supra* note 161, at 111.

[225] Pub. L. No. 107-155, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.).

[226] 2 U.S.C. § 434(f)(3) (Supp. III 2003). The definition of "electioneering communication" under BCRA, which, if met, triggers special disclosure and contribution rules, is limited to the period sixty days before a general election or thirty days before a primary election. *Id.* § 434(f)(3)(A)(i).

[227] 540 U.S. 93 (2003).

B. The Substance of Antidemocracy

More challenging than reform in the procedural domain is the effort to define substantively the type of threat to the democratic order that would justify party suppression, an endeavor that will necessarily require much case-specific analysis. Relatively few parties openly announce their antidemocratic objectives. More typically, especially in the case of parties seeking a mass audience, the antidemocratic nature of the party must be inferred from subtle contextual clues, such as the invocation of the imagery of temples buried beneath mosques in India or the insistent claims of the postwar German Communist Party that the newly installed West German government was a corrupt lackey of the Western powers. Absent a strong mooring in the lived domestic context, it is extraordinarily difficult to formulate broad substantive principles that cover the wide range of potential antidemocratic threats within that context.

The *Socialist Reich Party Case* from Germany is a useful illustration of the difficulty of defining with any precision the nature of an impermissibly antidemocratic party. The Socialist Reich Party (SRP) was as menacing to a democratic order as any party could be. It looked back with unquestioned ardor upon the country's recent Nazi past.[228] It drew its leaders from the ranks of the SS and other notorious forces of the Third Reich, characterized for recruitment purposes as "old fighters" who were "100 percent reliable."[229] Against the backdrop of the disorder and privation of defeated Germany, it looked to tap into the same founts of discontent and hatred as its precursor National Socialist Party had under Weimar.[230]

Despite the SRP's clear ties to the Nazis, in order to ban the party the court needed to find, if not an immediate likelihood of overturning democratic governance, at least a concrete intention to realize that objective. A number of considerations were aired, some less convincing than others. For example, the court examined the party's platform and found that "it indulges in platitudes, lays down general demands that are common property of almost all parties or have already become reality, and makes vague, often utopian promises that are hardly compatible with each other."[231] One can only imagine how the court might have analyzed slogans like "Put America First" or "Build a Bridge to the Twenty-First Century" or any of the other mindless sound bites that dominate contemporary American campaigns.

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[228] Socialist Reich Party Case, BVerfG Oct. 23, 1952, 2 BVerfGE 1, *translated in part in* MURPHY & TANENHAUS, *supra* note 103, at 602, 604–05.

[229] *Id.*, *translated in part in* MURPHY & TANENHAUS, *supra* note 103, at 602, 604.

[230] *Id.*, *translated in part in* MURPHY & TANENHAUS, *supra* note 103, at 602, 605–06.

[231] *Id.*, *translated in part in* MURPHY & TANENHAUS, *supra* note 103, at 602, 604.

A more interesting approach builds on the German constitutional requirement that parties reflect their commitment to democracy in their internal structure.[232] The court translated this provision into a rule that a political party "must be structured from the bottom up, that is, that the members must not be excluded from decision-making processes, and that the basic equality of members as well as freedom to join or to leave must be guaranteed."[233] Though this principle is grounded in the German Constitution, it is difficult to identify the state's interest in controlling so tightly the internal governance of a political party.

The attempt to impose a distinct internal structure on political parties raises paradoxical concerns about the relationship between political parties and the state. As the German court observed in the *Socialist Reich Party Case*, one of the telltale antidemocratic signposts of the SRP was its desire to impose its own organizational structure on the state.[234] Indeed, this ambition is characteristic of totalitarian and even authoritarian regimes of the twentieth century. Almost invariably, these oppressive regimes use a disciplined party structure as the basis for governance and seek to collapse any wall between party and state. Thus, for example, several commentators have looked to the role of political parties in forming a democratic polity to argue that the parties themselves must reflect a commitment to just such democratic politics, something that authoritarian parties consistently reject.[235] Yigal Mersel takes this argument one step further and claims that because political parties are indispensable to a modern democracy, the parties themselves must be held to the core conditions of democracy.[236]

Premising the right to participate in the electoral arena on internal party organization, however, brings the force of state authority deep into the heart of all political organizations. One reason the banning of political parties is so problematic for liberal democratic thought is precisely that parties are critical intermediary organizations that allow meaningful popular mobilization outside of and against state authority. It is for this reason that the right to organize and maintain political

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232 GG art. 21(1), *translated in* KOMMERS, *supra* note 103, at 507, 511.

233 *Socialist Reich Party*, 2 BVerfGE 1, *translated in part in* MURPHY & TANENHAUS, *supra* note 103, at 602, 604.

234 *Id.*, *translated in part in* MURPHY & TANENHAUS, *supra* note 103, at 602, 604.

235 *See* Mersel, *supra* note 112, at 97 (arguing that "[l]ack of internal democracy may be seen as evidence of external nondemocracy"); *see also* James A. Gardner, *Can Party Politics Be Virtuous?*, 100 COLUM. L. REV. 667, 683–85 (2000) (arguing that "broadly inclusive internal procedures" can alleviate democratic concerns arising from party leaders' control over party positions and candidate selection).

236 *See* Mersel, *supra* note 112, at 96–98 (claiming, as one of several justifications for requiring internal party democracy, that because individuals in a democratic state enjoy rights to equality and liberty, and because political parties are important components of a democratic regime, individuals should enjoy the same rights within the parties).

parties is a keystone of modern constitutionalism.[237] Imposing the pluralist values of a democratic society on the internal life of all political parties, however, threatens to compromise parties' political integrity and organizational independence from the state. Under American constitutional law, for example, the state is held to a standard of neutrality on matters of religion, as is indeed the case in many but not all democracies.[238] Does this mean that a Christian Democratic party would have to be banned for violating the state's obligation of neutrality? Clearly not, but the example illustrates the importance of applying different standards to the state than to political parties, even parties that are vying for a position in government.

The problem goes beyond the restrictions on ideological commitments of a democratic state. Political parties play a key role in providing a mechanism for informed popular participation in a democracy precisely because they are organizationally independent of the state. Not only do most modern constitutions grant significant autonomy rights to political parties,[239] but even in the United States a large body of constitutional law has emerged to protect the independence of political parties from the state, despite the absence of any textual commitment to such a principle. Thus, for example, the Supreme Court struck down as a violation of the First Amendment right to freedom of association a requirement that all voters be able to select the candidates of a party regardless of prior fidelity to the party or its program.[240] Moreover, the grounds for striking down such requirements raise questions about the constitutional validity of even more modest attempts to impose the general principle of full democratic accountability on internal party structure — for example, the requirement that

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[237] For an argument that the U.S. Constitution shows its age in its inattention to political parties, see Issacharoff & Pildes, *supra* note 40, at 712–16. Indeed, the Constitution was supposed to create a political structure without parties, *see id.* at 713–14 — an idea that collapsed by the contested election of 1800. *See* JOHN FERLING, ADAMS VS. JEFFERSON (2004); *see also* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

[238] For a comparison of democracies with and without established churches, see Richard Albert, *American Separationism and Liberal Democracy: The Establishment Clause in Historical and Comparative Perspective*, 88 MARQ. L. REV. 867, 901–23 (2005).

[239] *See* ISSACHAROFF, KARLAN, & PILDES, *supra* note 23, at 346 note a; Issacharoff & Pildes, *supra* note 40, at 691; Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 31–34 (2004).

[240] *See* Cal. Democratic Party v. Jones, 530 U.S. 567 (2000). At issue in *Jones* was the use of a "blanket primary" in which voters were free to vote among Democratic or Republican candidates on a line-by-line basis — choosing, for example, among Democrats for Governor and among Republicans for Senator — regardless of prior identification or enrollment in a particular party. *Id.* at 570. The effect was to dampen the distinct identity of each party by allowing the broad electorate to select the party's standard-bearer. *Id.* at 581–82.

parties select their general election candidates through primaries rather than by executive committee.[241]

Any requirement that parties have open and democratic internal structures would put at risk ideological and religious parties that may be organized around certain fixed principles not amenable to internal majoritarian override. Also at risk would be parties formed around popular leaders, which might or might not evolve into true mass parties. Historical examples include early Peronism in Argentina and the creation of Kadima in Israel largely around the personal authority of then–Prime Minister Ariel Sharon. Precisely because parties are not the state, membership exit or electoral defeat is a perfectly appropriate response to the hoarding of power by an unrepresentative central cadre.[242] Furthermore, because parties are not the state, the need for pluralist competition in a democratic society does not necessarily require the same pluralist competition within all of the contending parties. By analogy, we may find a perfectly diverse and competitive set of offerings across a city's restaurant row, even if each restaurant restricts itself to one particular cuisine. There appears to be no compelling reason why we should demand that all parties adhere to the same internal structure so long as the ultimate objective is meaningful voter voice and the capacity to vote politicians out of office, a point I will address shortly.

To return for the moment to the most famous adjudication of a political party ban, the *Socialist Reich Party Case* in Germany: Ultimately, what determined the outcome in that case was neither the SRP's lack of internal democracy nor the platitudinous propensities of its rhetoric. Rather, the key element was the most obvious one: the SRP's direct ties to the country's Nazi past. The court found that the party modeled its uniforms on those of the Hitler Youth and that "[f]ormer Nazis [held] key positions in the party to such an extent as to determine its political and intellectual image, and no decision [could] be made against their will."[243] The logical conclusion was that dissolution was proper given the party's aim "to transplant its own organizational structure onto the nation as soon as it has come into power and thus eliminate the free democratic basic order."[244] At the end of the day, the simple, compelling fact was that this was a party of Nazis,

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[241] This argument is more fully developed in Samuel Issacharoff, *Private Parties With Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274 (2001).

[242] The basic argument here draws from ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970).

[243] Socialist Reich Party Case, BVerfG Oct. 23, 1952, 2 BVerfGE 1, *translated in part in* MURPHY & TANENHAUS, *supra* note 103, at 602, 604.

[244] *Id.*, *translated in part in* MURPHY & TANENHAUS, *supra* note 103, at 602, 604.

complete with a heroic worship of the "Reich," serious elements of anti-Semitism, and a conspicuous refusal to disavow any link to the Hitler government.[245] It was these specifics, in the context of postwar Germany, that placed the SRP outside the bounds of democratic tolerance.

If there were a model for a party that should be banned, it would be a political mobilization of unrepentant Nazi combatants seeking to destabilize and overturn the fledgling German democracy right after World War II. With its worship of the "Führer" and the "Reich," the challenge to democracy posed by the SRP could not have been more clear. Yet the German court's difficulty in crafting principles of general application even in this context should serve as a caution regarding the difficulty of defining with precision the substantive requirements for inclusion in the democratic electoral arena.

C. Preservation of Pluralist Competition

Unlike the situation facing the German court a half century ago, there are now many examples of democratic governments' acting to protect the viability of threatened democracies. The general contours of how such bans may be implemented are suggested by democratic countries' experiences prohibiting extremist parties. But these examples also indicate the high level of abstraction needed to describe the exact criteria that justify a prohibition. It is instructive that the efforts of the European Commission yielded rather broad commands focusing on the extent to which parties are organized around a commitment to overthrow constitutional democracy, with some secondary sense of the immediacy of the perceived threat:

> [T]he competent bodies should have sufficient evidence that the political party in question is advocating violence (including such specific demonstrations of it . . . as racism, xenophobia and intolerance), or is clearly involved in terrorist or other subversive activities. State authorities should also evaluate the level of threat to the democratic order in the country and whether other measures, such as fines, other administrative measures or bringing individual members of the political party involved in such activities to justice, could remedy the situation.[246]

Obviously, the general situation in the country is an important factor in such an evaluation.

Typically, the national laws implementing party prohibitions follow the broad outlines suggested by the European Commission. These laws combine a concern about potential violence, which takes into account the immediacy of the perceived threat, with a broad hostility

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[245] *Id.*, *translated in part in* MURPHY & TANENHAUS, *supra* note 103, at 602, 605–06.

[246] *Democracy Through Law Guidelines*, *supra* note 200, art. III, § V, ¶ 15.

toward those who would foment hatred along religious or ethnic lines.[247] Almost all of these prohibitions have a heavy dose of the "I know it when I see it"[248] principle that is understandably disquieting to First Amendment sensibilities.

Ultimately, I must qualify the opening definition of democracy. The issue is not really the ability of a temporally defined majority to select governors. The real definition of democracy must turn on the ability of majorities to be formed and re-formed over time and to remove from office those exercising governmental power.[249] Many deeply antidemocratic groups are willing to vie for power through the electoral arena; few, if any, are willing to give up power that way. The definition of groups that are tolerable within a democratic order must turn, at the very least, on such groups' willingness to be voted out of office should they come to hold power. The Indian court's decision, for example, would turn not on the BJP's record of promoting ethnic enmity, but on whether it had matured into a political party that could be removed from office, as indeed it had. The same inquiry would guide Ukraine through its assessment of the reconstituted Communist Party, Turkey through its evaluation of the realigned Justice and Development Party, and so forth.

On this view, elections play a central role in democratic theory not because they ensure predetermined substantive outcomes but because they prove to be the best (and likely the only) mechanism for ensuring

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[247] As noted in the Venice Commission Report of 1998:

> In *France* parties may be banned for fostering discrimination, hatred or violence towards a person or group of persons because of their origins or the fact that they do not belong to a particular ethnic group, nation, race or religion, or for spreading ideas or theories which justify or encourage such discrimination, hatred or violence. The situation in *Spain* is similar, but, in addition to race and creed, sex, sexual leaning, family situation, illness and disabilities are also taken into consideration. Political parties which foster *racial hatred* are also prohibited, for example, by the constitutions of *Belarus* and *Ukraine*, while in *Azerbaijan* the legislation highlights racial, national and religious conflict. Under *Bulgarian* law parties may be prohibited both for pursuing fascist ideals and for fomenting racial, national, religious or ethnic unrest. The *Russian* constitution prohibits the creation and activities of social associations whose aims or deeds stir up social, racial, ethnic and religious discord.

Id. at app. I, § I.B.b, ¶ 5.

[248] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[249] This controversial claim roots democratic legitimacy in competition among contending groups for the support of the governed. This view is most notably associated with Joseph Schumpeter's arguments, which define the core of democracy as "that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote." JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 269 (3d ed. 1950). The concept of competition inheres in most accounts of democratic legitimacy, even ones infused with substantive content. *See, e.g.*, Robert A. Dahl, *Polyarchy, Pluralism, and Scale*, 7 SCANDINAVIAN POL. STUD. 225, 230 (1984) (suggesting that democracy can be understood as "a system of control by competition"), *quoted in* Michael P. McDonald & John Samples, *The Marketplace of Democracy: Normative and Empirical Issues*, *in* THE MARKETPLACE OF DEMOCRACY 1, 1 (Michael P. McDonald & John Samples eds., 2006).

the consent of the governed. In order for elections to serve this function, however, there must be renewability of consent,[250] which requires periodic elections in which the governors place their continued office-holding in the hands of the governed. Recent events in Iraq and Afghanistan, for example, have shown that holding an election is not the same as creating an enduring system of democratic governance. Our collective experience with "one man, one vote, one time" in post-colonial regimes dictates great caution in assuming that elections and stable democratic governance are necessarily coterminous.[251]

Emphasizing the renewability of consent also illuminates the substantive constraints that guide courts through messy disputes over the boundaries of democratic participation. In order for consent to be meaningfully renewed, the decisions of a majority-supported government bearing on the structure of the political process must be capable of being reversed by subsequent majorities. Hence, a decision to expand the role of religion in the public sphere (as with support to church schools) remains within the realm of a reversible political decision, while a removal of nonbelievers from the political process does not. In this sense, the strongest justification for the holding of the *Refah Partisi* case turned on the party's efforts to restore a version of the Ottoman millet system, in which each religious community would minister to its own affairs while the dominant Sunni majority alone would attend to the affairs of state. Making political power unaccountable to large segments of the population is just the sort of impediment to reversibility that threatens ongoing democratic governance.

Another result of focusing on renewability of consent is to encourage consideration of a broader range of initial constitutional arrangements, particularly in deeply divided societies. Viewing constitutions as documents that facilitate reversible democratic decisionmaking, rather than as fixed arrays of rights, allows more flexibility in constitutional design. As difficult as the inquiry may be, a procedural concern for the renewability of consent allows fragile democracies to attend more to the institutional arrangements that best police the borders of democratic participation than to the no-less-contested terrain of which rights must be available in a democratic society.

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[250] I am grateful to Bernard Menin for suggesting this formulation.

[251] The phrase "one man, one vote, one time" was coined by former Assistant Secretary of State and U.S. Ambassador to Syria and Egypt Edward Djerejian. *See* Ali Khan, *A Theory of Universal Democracy*, 16 WIS. INT'L L.J. 61, 106 n.130 (1997). The phrase refers to the many countries whose first election after the end of colonial rule turned out to be a referendum on who would acquire state authority to settle scores with religious or tribal rivals. In such cases, the first multiparty election was generally the last. *See* DONALD L. HOROWITZ, A DEMOCRATIC SOUTH AFRICA? 239–40 (1991) (noting that power did not change hands through peaceful elections in Africa between 1967 and 1991).

In order to assess potential threats to subsequent democratic accountability, however, democratic countries need latitude to police the electoral arena in a manner distinct from both the prohibition of particular parties, on one hand, and the imposition of criminal sanctions, on the other. At a minimum, such an approach requires an administrative law of elections, an independent body capable of responding to claims of political retaliation against a disfavored group,[252] and sufficient alternative means of expression to avoid excessively dampening political debate. In several countries, including India, that process of independent administrative review followed by judicial oversight appears to have taken hold successfully. Even in Mexico, a country just emerging from a lengthy period of one-party rule, an administrative body overseeing a tightly contested presidential election has maintained an aura of independence and legitimacy.[253] One reason this approach appears antithetical to the American tradition is that there has been little or no experience here with neutral administration of elections; a complete dearth of administrative review, except for the woefully ineffectual Federal Election Commission; and virtually no experience with political agitation's being a serious threat to domestic order.[254] Far from being universal, that experience appears to be a distinct outlier on the world stage.

CONCLUSION

It is by now well established that all constitutional orders retain emergency powers, either formally or informally. Justice Jackson's firm admonition that the Constitution is not "a suicide pact"[255] well sums up the sense that even a tolerant democratic society must be able to police its fragile borders. The discussion in this Article rests on many premises that are, thus far, largely alien to the American experience, or at least the last hundred years of it. The Article begins by noting that some democratic societies are more fragile, and have political structures more porous to antidemocratic elements, than the United States. That porousness requires an ability to restrict the capture of

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[252] For an insightful account of the different forms of administrative oversight of elections and their relative efficacy, see Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366 (2005).

[253] *See* JULIA PRESTON & SAMUEL DILLON, OPENING MEXICO 496–99 (2004); *see also* Jamin Raskin, *A Right-To-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit*, 3 ELECTION L.J. 559, 564 (2004) (describing the key role an independent electoral commission could play in making political change possible and citing Mexico's commission as a successful example).

[254] For an exception, see *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), in which the Court refused, on jurisdictional grounds, to grant a writ of habeus corpus to the author of incendiary articles.

[255] Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

governmental authority by those who would subvert democracy altogether. The next step is to envision a realm of electoral politics with rules of conduct distinct from the rules that apply to broader constitutional rights of assembly, petition, and speech. In order to manage the unique threats that arise from that distinct political realm, fragile democracies need the ability to discipline electoral activity without regard to the imminence of criminal or insurrectionary conduct, the accepted standard for the criminalization of political speech. Finally, independent oversight of the political process is required to prevent the dangerous powers here argued for from being deployed in the name of the self-serving preservation of incumbent political power.

As an empirical matter, it is entirely possible that democracy faces greater dangers from the promiscuous use of police powers than from domestic enemies. With respect to more stable democracies, I am willing to concede that this is likely the case and that the main task of legal oversight may very well be the preservation of civil liberties. That reality does little to address the problems faced by societies that are more menaced by the indisputable emergence from time to time of mass-based movements seeking to destroy democratic life.

The international experience also cautions against readily assuming that any restraints in the political process necessarily lead to a collapse of democratic rights or a fundamental compromising of democratic legitimacy. Virtually all democratic societies define some extremist elements as beyond the bounds of democratic tolerance. Despite errors of overreaching, likely inevitable in human affairs, it appears that this power is largely used with restraint and hesitation. With the benefit of hindsight, therefore, the question that needs to be addressed is whether Weimar Germany could have assembled the tools necessary to fight off the Hitlerian challenge within the bounds of democratic legitimacy. One certainly must hope so.