German Law Journal (2023), **24**, pp. 1648–1676
doi:10.1017/glj.2023.117

CAMBRIDGE UNIVERSITY PRESS

ARTICLE

Regulating Parties by Constitutional Rules in Liberal Democracies

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(Received 06 February 2023; accepted 24 March 2023; first published online 14 December 2023)

Abstract
When establishing constitutional rules that regulate political parties, liberal democracies struggle between civil liberties—thus tolerating anti-democratic parties—and potential threats of democratic breakdown, which can be reduced by prosecuting and prohibiting anti-democratic parties. We suggest that liberal democracies must balance false positives and false negatives by combining *ex ante* and *ex post* regulatory mechanisms. By making use of a unique dataset of thirty-seven liberal democracies collected by the authors, we find empirical results consistent with our positive theory. An extensive review of the normative debate and case law provides additional qualitative support.

Keywords: Political parties; civil liberties; democracy; empirical legal reasoning; false positives and false negatives; normative debate; case law; militant democracy; democratic backsliding

A. Introduction

This article offers empirical, positive, and normative arguments on the regulation of political parties. There is surely vast literature from the standpoint of election law in political science and in comparative constitutional law. As there is surely vast literature on political parties, their campaigning, financing, and internal organization in comparative politics. However, apart from studies on specific party ban practices,[1] the comparative literature about modes of regulating political parties,[2] the main institutional actors of elections, is less developed.[3] Modes of regulation of political parties is usually a footnote in comparative election law debates, perceived to be on the fringe of a minor issue. We attempt to bridge the divide between the hitherto disparate literatures.

The concern about political parties undermining democracy while tolerated by democracy is not new. Historically, the scrutiny has been on fascism before and during WWII as well as communist parties during the Cold War. Lately, the disquieting rise in populism on the right and on the left in Europe, the US, and in other areas of the globe has reintroduced the debate. This is, therefore, an auspicious time to get a handle of the state of the debate. There are so many important questions: Are and should political parties be mentioned or protected by the

[1]Angela K. Bourne & Fernando Casal Bértoa, *Mapping "Militant Democracy": Variation in Party Ban Practices in European Democracies (1945–2015)*, 13 EUR. CONST. L. REV. 221 (2017).

[2]A notable exception is HANS-MARTIEN TEN NAPEL & INGRID VAN BIEZEN, REGULATING POLITICAL PARTIES: EUROPEAN DEMOCRACIES IN COMPARATIVE PERSPECTIVE 17–278 (2014).

[3]Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 710 (1998).

constitution? They are not in the US, for example. Are political parties any different from other freedoms of association? Not in the US or in the UK before the Political Parties, Elections and Referendums Act 2000. How can or should constitutional democracies deal with potentially anti-democratic activities by political parties? This can be envisaged as a broader constitutional question—e.g., political parties undermining democracy, or a narrower criminal question—e.g., addressing illegal funding, money laundering, corruption, and so on.

Unsurprisingly, these general issues have generated an extensive normative discussion. Almost one century ago, Karl Mannhein asked, "Is there a possibility of transforming our neutral democracy into a militant one?"[4] During the first half of the last century, when addressing "the peoples of the subjugated countries of Europe,"[5] many intellectuals believed that "only militant democracy [could] win this war which, after all, is a war of ideas."[6]

Different scholars emphasize distinct philosophical priorities in approaching the subject of political parties undermining democracy. Political sterilization through the regulation and abolition of anti-democratic political parties is problematic. Some scholars suggest the focus of outlawing parties should be on the actions, e.g., criminal behavior, and not on the actors or the ideas.[7] Others believe that mitigated forms of militant democracy might be defensible.[8] In either event, political freedoms are of paramount importance. But the same can be said of many other—if not all—fundamental rights. In Section B, we provide an extensive review of the main normative arguments in favor of and against more severe regulation of activities by political parties.

After revising the normative arguments, we develop a novel positive theory of party regulation based on the idea of *ex ante* and *ex post* control mechanisms. When establishing constitutional rules that regulate political parties, liberal democracies struggle between civil liberties—thus, tolerating parties likely to be engaged in undermining democracy—and potential threats of democratic breakdown, which can be reduced by prosecuting and prohibiting anti-democratic parties. We suggest that liberal democracies struggle to balance false positives, such as tolerating anti-democratic parties by mistake, and false negatives, such as banning truly democratic parties by mistake, by combining *ex ante* and *ex post* regulatory mechanisms. We also address the distinction between first and second order regulation in this regard. Our positive theory is fully explained in Section C.

We explore a unique dataset of thirty-seven liberal democracies collected by the authors. The empirical results are consistent with our theory. Regulation of political parties fluctuates across these thirty-seven liberal democracies. Variance is associated with independent variables measuring freedom and common-law legal family. Remarkably, we do not find a statistically significant association between regulation of political parties and specifics of election law, such as proportional system or effective threshold to elect representatives. In Section D, we present our empirical exploration.

Our theoretical and empirical findings are contextualized in Section E with case law from Germany, Israel, Greece, Spain, and Turkey. Case law shows that courts respond to distinct freedom concerns and political contexts. The article concludes with Section F.

[4]Karl Mannheim, Diagnosis of Our Time: Wartime Essays of a Sociologist 8 (Routledge & Kegan Paul 1936) (1943).

[5]Mannheim, *supra* note 4, at 61.

[6]Mannheim, *supra* note 4, at 68.

[7]Carlo Invernizzi Accetti & Ian Zuckerman, *What's Wrong with Militant Democracy?*, 65 Pol. Stud. 182, 194–95 (2017).

[8]*See* Ami Pedahzur, The Defending Democracy and the Extreme Right: A Comparative Analysis, in Western Democracies and the Extreme Right Challenge 193 (R. Eatwell & C. Mudde eds., 2004); András Sajó, Militant Constitutionalism, in Militant Democracy and its Critics: Populism, Parties, Extremism (A. Malkopoulou & A. Kirshner eds., 2019); Jerg Gutmann & Stefan Voigt, *Militant Constitutionalism: A Promising Concept to Make Constitutional Backsliding Less Likely*, 195 Pub. Choice 377, 377–404 (2021); Stefan Rummens & Koen Abts, *Defending Democracy: The Concentric Containment of Political Extremism*, 58 Pol. Stud. 649, 649–55 (2010).

https://doi.org/10.1017/glj.2023.117 Published online by Cambridge University Press

B. Normative Theory of Party Regulation

Regulating political parties is a perilous exercise.[9] The experiences of the World Wars brought political and legal consequences regarding political parties and the envision of democracy per se. One of the most vicious faces of Nazism, Joseph Goebbels, ridiculed the Weimar legal arena, while declaring that "[t]his will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed."[10] The first president of the Spanish Constitutional Court epitomizes the democratic state of the last century as the "state of parties," in his book by the same title.[11] Still, democracy is a difficult concept to define.[12] Moreover, there is uncertainty regarding what constitutes an anti-democratic party.[13]

I. Democracy and Its Enemies: The Militant Democracy

All political parties aim at conquering power.[14] However, some use the legal arena to later fulfil their illiberal or antidemocratic agendas. In the first half of the last century, Karl Löwenstein wrote his famous "militant democracy" (*wehrhafte/streitbare Demokratie*)[15] approach to fascism, arguing that "fire should be fought with fire."[16] In this sense, legal orders should ensure that the enemies of democracy will not be able to "exploit the freedoms inherent in democracy."[17]

Somewhat ironically though, the idea of militant democracy has roots on Carl Schmitt's constitutional theory, when he addressed the notion of a "constitutional core."[18] But it goes way back in history. The French revolutionary Saint-Just wrote the famous expression "*pas de liberté pour les ennemis de la liberté*" (there is no freedom to the enemies of freedom).[19] How can the ultimate democratic goal be ethically defended through undemocratic means? Such enthralling paradox is hard to unveil.[20]

Yet, Löwenstein was not alone in his militant war of ideas before and during WWII. Joining the "never-again" mentality, Karl Mannheim offered his sociological diagnosis in the reflection "*The Third Way: A Militant Democracy*."[21] As he clearly wrote, that "the principle of laissez-faire will not help us any further"[22] and that "our democracy has to become militant if it is to survive."[23] Löwenstein and Mannheim were two German scholars forcibly exiled in the United States of America for their Jewish origin. These famous pieces of "literature in exile" revealed that several intellectuals were not aligned with the Nazi world at home.[24]

[9]Zachary Elkins, *Militant Democracy and the Pre-Emptive Constitution: From Party Bans to Hardened Term Limits*, 29 Democratization 174, 183 (2022).

[10]Hans Adolf Jacobsen, Karl Dietrich Bracher & Manfred Funke, Nationalsozialistische Diktatur 1933–1945: Eine Bilanz (1986), *apud* András Sajó, *From Militant Democracy to Preventive State*, 27 Cardozo L. Rev. 2255, 2262 n.18 (2006).

[11]*See* Manuel García-Pelayo, El Estado de partidos (1986).

[12]Martti Koskenniemi, *Whose Intolerance, Which Democracy?*, *in* Democratic Governance and International Law 436 (G. Fox & B. R. Roth eds., 2000).

[13]Antonios Kouroutakis, *Anti-Democratic Political Parties as a Threat to Democracy: Models of Reaction and the Strategic Democracy*, 29 Pub. L. Rev. 310, 311 (2019).

[14]Giovanni Sartori, Partidos y sistemas de partidos 82 (1999).

[15]Karl Löwenstein, *Militant Democracy and Fundamental Rights: I*, 31 Am. Pol. Sci. Rev. 417, 417–32 (1937).

[16]Karl Löwenstein, *Militant Democracy and Fundamental Rights: II*, 31 Am. Pol. Sci. Rev. 638, 656–57 (1937).

[17]Donald P. Kommers & Russell A. Miller, The Constitutional Jurisprudence of the Federal Republic of Germany 285 (2012).

[18]Carl Schmitt, Constitutional Theory 76–78 (2008).

[19]*See* Bernard Vinot, *Les origines familiales de Saint Just et son environnement social*, 248 Annales historiques de la Révolution française 161, 161–80 (1982) (Fr.).

[20]*See* Elkins, *supra* note 9, at 179.

[21]Mannheim, *supra* note 4, at 4–7, 60–72.

[22]Mannheim, *supra* note 4, at 4.

[23]Mannheim, *supra* note 4, at 7.

[24]*See* W.M. K. Pfeiler, German Literature In Exile: The Concern of the Poets 19 (1957) (coining the expression "literature in exile").

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According to John Rawls, "an intolerant's freedom can be restricted ultima ratio, when there is real danger to 'the institutions of liberty.'"[25] Notably, it was Karl Popper that addressed his famous paradoxes of freedom, tolerance, and democracy. Under his understanding, unlimited tolerance to those who are intolerant will ultimately destroy not only the tolerant, but also tolerance itself.[26]

So, where does this leave us? Will militant democracy hinder or strengthen democracy itself? Does militant democracy taper democracy to a specific orientation? Would it mean banning political parties? One can certainly expand militant democracy beyond the strict domain of political parties.[27] Both emergency clauses[28] and eternity clauses[29] belong to the "constitutional arsenal" of militant democracy.[30] The militant democracy approach is visible today outside the confinements of political organizations. Taking this idea even further, András Sajó considers that wearing religious garbs in public creates the same emotional mechanisms of paramilitary uniforms.[31]

Historically-speaking, jurisdictions that have not experienced totalitarianism and authoritarianism might raise some eyebrows and be warier of the militant democracy motto.[32] In fact, American scholarship considered the concept of militant democracy one of the most "startling aspects" of European constitutionalism.[33] One possible explanation for such wariness could be that the original German expressions *wehrhafte/streitbare Demokratie* were translated to English as "militant democracy" instead of being more literally translated to "defensive democracy." If, on the one hand, the word "militant" is more captivating, on the other hand, though, it can be perceived as politically biased or politically compromised.

At a more fundamental level, many noted that the concept of militant democracy for a long time lacked consistent theorization.[34] However, recent scholarly efforts tried to densify it in the context of the contemporary constitutional theory.[35] To Müller, militant democracy is the preemptive willingness to adopt "prima facie illiberal measures" to thwart the destruction of the democratic regime.[36] To put this another way: The idea of militant democracy is that in order to play the game, political parties need to stand by some constitutional principles. In the aftermath of WWII, democracy can no longer be relativist or politically agnostic, as it ought to resist

[25]John Rawls, A Theory of Justice 193 (1999).

[26]Karl Popper, The Open Society and Its Enemies 369 (1944). To unveil this paradox, see Jan-Werner Müller, *Protecting Popular Self-Government from the People? New Normative Perspectives on Militant Democracy*, 19 Ann. Rev. Pol. Sci. 249 (2016), and Ulrich Wagrandl, *Transnational Militant Democracy*, 7 Glob. Constitutionalism 143 (2018) (arguing for an ample concept of tolerance).

[27]Elkins, *supra* note 9, at 175.

[28]Elkins, *supra* note 9, at 181.

[29]Catarina Santos Botelho, *Constitutional Narcissism on the Couch of Psychoanalysis: Constitutional Unamendability in Portugal and Spain*, 21 Eur. J. L. Reform 346, (2019).

[30]Elkins, *supra* note 9, at 181.

[31]András Sajó, *Militant Democracy and Emotional Politics*, 19 Constellations 562, (2012).

[32]Elkins, *supra* note 9, at 175.

[33]David P. Currie, The Constitution of the Federal Republic of Germany 213 (1994). Ulrich Wagrandl, *supra* note 26, at 143, considers the European Union as a "transnational militant democracy." With a distinct perspective, Signe Rehling Larsen, *The European Union as 'Militant Democracy'?*, *in* European Constitutional Imaginaries: Between Ideology and Utopia 77 (Komárek ed., 2023) remarks that not all EU member states were influenced by post-fascist constitutionalism. According to Tom Theuns, *Is the European Union a Militant Democracy? Democratic Backsliding and EU Disintegration*, Glob. Constitutionalism 1 (2023), even if we were to admit, with some limitations, that the EU is a militant democracy, that label would still be "normatively undesirable from a democratic perspective."

[34]Gregory Fox & Georg Nolte, *Intolerant Democracies*, 36 Harv. Int'l L.J. 1, 14 (1995); Samuel Issacharoff, *Fragile Democracies*, 120 Har. L. Rev. 1405, 1409 (2007).

[35]*See* Accetti & Zuckerman, *supra* note 7, at 183; Svetlana Tyulkina, Militant Democracy: Undemocratic Political Parties and Beyond (2015).

[36]Jan-Werner Müller, *Militant Democracy, in* The Oxford Handbook of Comparative Constitutional Law 1253 (Rosenfeld & Sajó eds., 2012); Gur Bligh, *Defending Democracy: A New Understanding of the Party-Banning Phenomenon*, 46 Vand. J. Transnat'l L. 1321, 1326 (2013).

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totalitarian attempts.[37] That is to say, if fascism employed "emotional mobilization" as opposed to reason, militant democracy opposes such emotionality.[38]

On the other side of the spectrum, others fail to see the validity of militant democracy in contemporary societies. The concept of militant democracy raised acute critique, mainly due to its exceedingly legalistic reaction to extremism.[39] As we will see, there is some doctrinal support for this perspective.

Conceptually, militant democracy might be labelled as paternalistic, because it treats the electors as politically unqualified and eliminates public discussion of all political perspectives.[40] Militant democracy brings a "re-politicization of the question of membership in the demos."[41] For the sake of this argument, it diminishes the people, who are left "deprived of effective citizenship."[42]

This idea resonates with the call for better arguments.[43] Bearing this in mind, instead of excluding problematic parties, some argue that they should be welcomed in the democratic arena, with hopes that they will become more moderate.[44]

If some believe that the concept of militant democracy can be invoked in a non-arbitrary way,[45] others argue for "an irreducible element of arbitrariness" when deciding about the enemies of democracy.[46] Such arbitrariness might even be biased or selective, purposely excluding from the democratic game target political competitors.[47] Accordingly, the danger of a cascading effect rises, because banning could be used to tackle any expression of dissent.[48]

From the beginning, strong reasons grounded within philosophical liberalism advocate against outlawing political parties only on the basis of their ideology, unless they commit specific criminal acts punished by criminal law.[49] Issacharoff, while acknowledging the need for self-preservation, stresses that beforehand the most significant thing is to build strong institutional protections.[50] Furthermore, many claim that the concept of militant democracy was narrowly designed as a response to fascism, which no longer comprises a critical threat.[51] To Müller, militant democracy cannot be legitimated or normalized, as it requires the use of illiberal measures.[52] Quite

[37]Pablo Lucas Murillo de la Cueva, *Consideraciones Sobre el Régimen Jurídico de los Partidos Políticos*, 4 Revista de Política Comparada [R.D.P.C.], 165, 176 (1981) (Ecuador).

[38]Sajó, *supra* note 31, at 562–74.

[39]Accetti & Zuckerman, *supra* note 7, at 195; Militant Democracy and Its Critics: Populism, Parties, Extremism (A. Malkopoulou & A. Kirschner eds., 2021); Benjamin A. Schupmann, *Constraining Political Extremism and Legal Revolution*, 46 Phil. Soc. Criticism 249, 255 (2020); Markus Thiel, The "Militant Democracy" Principle in Modern Democracies 384 (2016); Rune Møller Stahl & Benjamin Ask Popp-Madsen, *Defending democracy: Militant and Popular Models of Democratic Self-Defense*, 29 Constellations 310, 317 (2022).

[40]John Anderson, *The Politics of Proscription*, 20 Austl. Q. 7, (1948); Jasper Doomen, *Mitigated Democracy*, 102 Archives for Phil. L. & Soc. Phil. 278, 291 (2016).

[41]*See* Accetti & Zuckerman, *supra* note 7, at 187.

[42]Anderson, *supra* note 40, at 7.

[43]The idea of democracies having to convince its citizens of why democracy is the best political choice also appears within the work of Anderson, *supra* note 40, at 7–15; Schupmann, *supra* note 39, at 256; Johannes Lameyer, Streitbare Demokratie: Eine verfassungshermeneutische Untersuchung 205–08 (1978).

[44]Accetti & Zuckerman, *supra* note 7, at 184.

[45]Sajó, *supra* note 31, at 562–74.

[46]Accetti & Zuckerman, *supra* note 7, at 183. See also Anthoula Malkopoulou & Benjamin Moffitt, *How not to Respond to Populism*, 21 Compar. Eur. Pol. 861 (2023); Elkins, *supra* note 9, at 175.

[47]Accetti & Zuckerman, *supra* note 7, at 183–84.

[48]Anderson, *supra* note 40, at 9.

[49]Ioanna Tourkochoriti, *Should Hate Speech Be Protected? Group Defamation, Party Bans, Holocaust Denial, and the Divide Between (France) Europe and the United States*., 45 Colum. Hum. Rts. L. Rev., 552, 604–11 (2014).

[50]Issacharoff, *supra* note 34, at 1406.

[51]Angela Bourne, *The Proscription of Political Parties and "Militant Democracy,"* 7 J. Compar. L. 196, 197 (2012); Bligh, *supra* note 36, at 1335–36.

[52]Müller, *supra* note 36, at 1255.

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paradoxically, democracy while fearing its death, would commit suicide. In other words, to defend itself, democracy betrays its own foundations.[53]

Still, others consider either adhering to the original militant democracy thesis or to other variations, that some democratic defensiveness is needed. To borrow Barak's thought, "defensive democracy: Yes; uncontrolled democracy: No."[54] Building on Sajó's distinction between militant democracy and "militant constitutionalism,"[55] Gutmann and Voigt pushed this line of thinking even further, arguing that militant constitutionalism is a "constitutional design feature that aims at safeguarding constitutionalism." To them, militant democracy is a distinct concept, as it operates in a preventive way and merely addresses the government.[56] With a very interesting argument, Elkins states that militant democracy takes "the low road," as it preserves democracy while engaging in anti-democratic measures. Instead, constitutionalism takes "the moral high road" as it adheres to "a higher democratic commitment."[57]

Some claim that "defensive democracy," which is inspired by the idea of self-defense against democratic threats,[58] is a more comprehensive concept when compared with "militant democracy."[59] Others downplay the relevance of such distinction, because both terms are used to portray anti-democratic actions aiming to combat threats to democracy itself.[60] The stakes in this debate then are high. Doomen, after rejecting the concept of militant democracy,[61] pivots attention to a "mitigated democracy," which consists of protecting the rule of law and certain rights "against democracy."[62] Likewise, Schupmann advocates a "constrained democracy," which is the adoption of constitutional mechanisms such as eternity clauses that prevent democratic parties from amending liberal constitutionalism out of the constitution.[63] Emphasizing the social dimension, Malkopoulou and Norman reject militant democracy's "anti-participatory and elitist logic" and instead merge proceduralism's adherence to dissensus with a social-democratic logic in the design of democratic constitutions.[64]

While some scholarship equates democracy with liberal democracy,[65] others stress that democracy does not equal liberal democracy. Following Joseph Raz,[66] some scholars remind us that "not every country that can plausibly advertise itself as a democracy is a *liberal* democracy."[67]

[53]Bernd Höver, Das Parteiverbot und seine rechtlichen Folgen 147–48 (1975). *See also*, Malkopoulou & Moffitt, *supra* note 46, at 849.

[54]Aharon Barak, The Judge in a Democracy 287 (2008).

[55]Sajó, *supra* note 8.

[56]*See* Gutmann & Voigt, *supra* note 8.

[57]Elkins, *supra* note 9, at 181.

[58]Giovanni Capoccia, *Defending Democracy: Reactions to Political Extremism in Inter-War Europe*, 39 Eur. J. Pol. Rsch. 431, 437 (2001); Walter F. Murphy, *Excluding Political Parties: Problems for Democratic and Constitutional Theory*, *in* Germany and Its Basic Law 173, 180 (Kirchhof & Kommers eds., 1993).

[59]Pedahzur, *supra* note 8, at 193–212. *See* Rummens & Abts, *supra* note 8.

[60]Suzie Navot, *Fighting Terrorism in the Political Arena: The Banning of Political Parties*, 14 Party Pol. 91, 105 (2008).

[61]Doomen, *supra* note 40, at 292 (arguing that militant democracy is "a confusing notion and in fact a contradiction in terms").

[62]Doomen, *supra* note 40, at 290.

[63]Schupmann, *supra* note 39, at 259.

[64]*See* Anthoula Malkopoulou & Ludvig Norman, *Three Models of Democratic Self-Defence: Militant Democracy and Its Alternatives*, 66 Pol. Stud. 442, 444 (2018). In a similar vein, Stahl & Popp-Madsen, *supra* note 39, at 311, argue that some expressions of militant democracy, such as limiting popular participation and expression, are "questionable", as they rest on "depoliticizing, elitist, and exclusionary understanding of politics."

[65]Stein Ringen, What Democracy is For: On Freedom and Moral Government 5 (2009).

[66]Joseph Raz, *The Rule of Law and Its Virtue*, 93 L. Q. Rev. (1977), *reprinted in* Readings in Philosophy of Law 14 (Keith C. Culver ed., 1999).

[67]Michael J. Perry, The Political Morality of Liberal Democracy 9 (2010). See also Doomen, *supra* note 40, at 285, and Marc F. Plattner, *From Liberalism to Liberal Democracy*, 10 J. Democracy 121, (1999); For a generous vison of what a liberal democracy is, see Jasper Doomen, Freedom and Equality in a Liberal Democratic State 5 (2014) (arguing that the concept of liberal democracy need not necessarily include the classical elements of limitation to government, rule of law, and the protection of individual rights).

https://doi.org/10.1017/glj.2023.117 Published online by Cambridge University Press

Resistance to dictatorship and fear of historical setbacks gave rise to concepts such as militant democracy, in the period of the World Wars, or of a "limited democracy" (*democradura*)[68] or "constitutional patriotism,"[69] in the transitioning democracies of the end of the 20th century.

Historically, restrictions on the freedoms of individuals or groups took several forms and appeared in the form of hybrids, transitioning or even façade democracies such as "illiberal democracy,"[70] "protected democracy,"[71] or "tutelary democracy."[72] However, militant democracy bears distinctive traits. In fact, while militant democracy was an attempt to strengthen the democratic core values, the abovementioned subtypes diminished them. Moreover, militant democracy "has all the mobilizational power of a vanguard movement."[73]

In either event, contemporary scholarship that revisits and enriches the theoretical grounds of militant democracy offers new perspectives. Whether reconceptualizing militant democracy "as a matter of degree" or replacing the label of militant democracy with "new vocabulary," the discussion is very much still alive.[74] As Tyulkina advocates, militant democracy "is not an isolated, old-fashioned, abstract idea from postwar Europe."[75]

In sum, untangling the democratic paradox within the penumbras of populism is a difficult exercise. Some argue for a more robust conception of deliberative democracy,[76] while others substantively narrow militant democracy to "help attain an intermediate end."[77] Be that as it may, cautiousness is recommended.

II. Banning Political Parties

It is undeniable that political parties are crucial to the democratic system.[78] Consistent with this general understanding, if political parties are leading figures of politics, then they carry enough significance to justify legal regulation by the state.[79] Still, at its core, it is of paramount importance not to confuse parties and the state.[80] From a purely pragmatic perspective, at best, party bans are the most visible form of preemptive defense to the political rights of future generations.[81] At worst, bans are "the mark of tyranny."[82]

According to Niesen's definition, party bans refer to "all juridical forms that effectively prevent the founding and continued operation of political parties, whether in the form of dissolution,

[68]Guillermo O'Donnell & Philippe C. Schmitter, Transitions from Authoritarian Rule: Tentative Conclusions About Uncertain Democracies 40–45 (1986).

[69]Tyulkina, *supra* note 35, at 16.

[70]Fareed Zakaria, The Future of Freedom: Illiberal Democracy at Home and Abroad 17 (2003) ("[T]oday the two strands of liberal democracy … are coming apart across the globe. Democracy is flourishing; liberty is not."). For the Hungarian example, see Gábor Halmai, *An Illiberal Constitutional System in the Middle of Europe*, Eur. Y.B. Hum. Rts. 497, (2014).

[71]*See* Brian Loveman, *"Protected Democracies" and Military Guardianship: Political Transitions in Latin America, 1978–1993*, 36 J. Interamerican Stud. World Affs. 105, (1994).

[72]*See* Adam Przeworski, *Democracy as a Contingent Outcome of Conflicts*, 59 Constitutionalism Democracy 59, 63 (1988).

[73]Elkins, *supra* note 9, at 182.

[74]Angela Bourne, Democratic Dilemmas: Why Democracies Ban Political Parties 16–17 (2020).

[75]Tyulkina, *supra* note 35, at 20–21.

[76]*See* Rummens & Abts, *supra* note 8.

[77]Alexander Kirshner, A Theory of Militant Democracy: The Ethics of Combatting Political Extremism 7 (2014).

[78]Fernando Flores Giménez, *Los Partidos Políticos: Intervención Legal y Espacio Político, a la Búsqueda del Equilibrio*, 35 Teoría y Realidad Constitucional [Hereinafter "T.Y.R.C."] 355, 356 (2015).

[79]Giménez, *supra* note 78, at 360.

[80]*See* Richard S. Katz & Peter Mair, *Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party*, 1 Party Pol. 5, (1995).

[81]Fox & Nolte, *supra* note 34, at 407.

[82]Bourne, *supra* note 74, at 1.

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substantive registration requirements, temporary suspension, or prohibition of and prosecution for party formation."[83] Proscribing political parties is the most aggressive measure available[84] and will have key implications for "electoral stability, electoral and parliamentary fragmentation, and government formation."[85]

Notwithstanding the possible harm to the overall quality of the democratic system,[86] dissolution of political parties collides with political competition and the right to free participation in the political arena.[87] Furthermore, it is inevitable to conclude that the decision as to what truly threatens the democratic order "is necessarily an exceptional decision."[88]

Why should a democratic government act in a "totalitarian way?"[89] The main effects of party banning were addressed in the available literature.[90] One possible effect is the further radicalization of the banned party.[91] Proscribing a certain party might romanticize their cause or even trigger the martyr effect.[92] Accordingly, the party ban would be a short-term measure and the party could even re-emerge under a distinct label.[93] The protection of minority rights and democratic pluralism is also a preoccupation, if minority parties are targeted.[94]

To Fox and Nolte, when considering party bans, legal traditions are relevant. They distinguish between 'tolerant' and 'intolerant' democracies, focusing on whether a given constitutional tradition is a procedural democracy or a substantive democracy. On the one hand, a procedural democracy will prioritize a party's external respect for democratic rules, notwithstanding its ideology/practice.[95] To hinder the "danger of democide," procedural models hinge on institutional checks and balances and sanctioning criminal acts of leaders and members of antidemocratic parties.[96] On the other hand, substantive democracy also focuses on the party's ideology/practice being democratic.[97]

Malkopoulou proposes to rename the procedural model as "the criminal model," as the expression "procedural" might ignore the substantive values.[98] Bourne built on a third element to this distinction: Whether party proscriptions only boycott "anti-system behavior," such as association with violent groups, or if it also sanctions "anti-system ideology."[99] To give an example, if the American model allows undemocratic ideas, the German model sanctions undemocratic ideas.[100] Bourne and Casal Bértoa's empirical study concluded that procedural

[83]Peter Niesen, *Banning the Former Ruling Party*, 19 CONSTELLATIONS 540, 541 (2012).

[84]ERIK BLEICH, THE FREEDOM TO BE RACIST? 87 (2011).

[85]Fernando Casal Bertóa & Angela Bourne, *Prescribing Democracy? Party Proscription and Party System Stability in Germany, Spain, and Turkey*, 56 EUR. J. POL. RES. 440, 462 (2017).

[86]BOURNE, *supra* note 74, at 10. *See* Capoccia, *supra* note 58.

[87]Angela Bourne, *Democratization and the Illegalization of Political Parties in Europe*, 19 DEMOCRATIZATION 1065, (2012).

[88]Accetti & Zuckerman, *supra* note 7, at 186.

[89]Kouroutakis, *supra* note 13, at 316.

[90]Bertóa & Bourne, *supra* note 85, at 440.

[91]Michael Minkenberg, *Repression and Reaction: Militant Democracy and the Radical Right in Germany and France*, 40 PATTERNS PREJUDICE 25, 36 (2006).

[92]Dan Gordon, *Limits on Extremist Political Parties: A Comparison of Israeli Jurisprudence with that of the United States and Germany*, 10 HASTINGS INT'L & COMP. L. REV. 347, 392 (1987); WILLIAM M. DOWNS, POLITICAL EXTREMISM IN DEMOCRACIES 43 (2012).

[93]Kouroutakis, *supra* note 13, at 317; Minkenberg, *supra* note 91, at 37.

[94]Anderson, *supra* note 40, at 9.

[95]Much in line with the thought of Hans Kelsen. HANS KELSEN, VOM WESEN UND WERT DER DEMOKRATIE 100–01 (1929).

[96]Anthoula Malkopoulou, *Greece: A Procedural Defence of Democracy Against the Golden Dawn*, 17 EUR. CONST. L. REV. 177, 188 (2021).

[97]Fox & Nolte, *supra* note 34, at 1–70; Yigal Mersel, *The Dissolution of Political Parties: The Problem of Internal Democracy*, 4 INT'L J. CONST. L. 84, 94 (2006).

[98]Malkopoulou, *supra* note 96, at 179.

[99]*See* Bourne, *supra* note 51, at 196–213 (explaining how the concept of "anti-systemness is assimilated with anti-democraticness"). *See also* David Collier & Steven Levitsky, *Democracy with Adjectives: Conceptual Innovation in Comparative Research*, 49 WORLD POL. 430, (1997).

[100]PEDAHZUR, *supra* note 8, at 196.

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democracies "are more likely to be 'tolerant democracies' that not only eschew party bans but avoid using existing legal provisions to ban parties."[101]

Mersel distinguishes the "external democracy" of political parties from its "internal democracy."[102] In this sense, external democracy reflects the relation between parties and society or the state. This is the more visible part when courts consider proscribing political parties. By contrast, internal democracy relates to the organization of the party itself. A party can profess democratic values but, at the same time, impede the replacement of the party leadership.[103] Should internal democracy mimic the external form? Although Mersel argues that internal democracy should be as relevant as external democracy when assessing party proscription, when the internal part functions are at stake, he sustains that only the "essentials of democracy" must be imposed on political parties.[104] Such "*minimum democracy*" requirements relate with the representation, participation, and the liberty of individual party members.[105] In these situations, parties enjoy a wider margin of discretion and courts should intervene only as a last resort.[106]

When viewed more closely, there is a clear evolution on the reasons for justifying party banning. Examples include, but are not limited to, the following: (1) If, during WWII, party banning focused on *lato sensu* fascist parties, including Nazi or Nazi-inspired parties; (2) if, during the Cold War, it focused on communist parties; and (3) if, following the 9/11 terrorist attacks, it focused on religious extremism.[107] In the current times, apart from technical reasons—such as failing to comply with membership or financing rules—parties can also be banned for substantive reasons. The main substantive reasons are the following: Endangering the democratic and secular foundations of the state, its territorial integrity, as in Turkey, engaging in a violent or racist agenda, as in the Netherlands, or neglecting democratic internal procedures, as in Portugal or Spain.[108]

To sum up, Bligh distinguishes what he calls the "Weimar" paradigm—which relates to the abovementioned Löwenstein's conception of militant democracy—and the "legitimacy" paradigm.[109] If the former related to targeting anti-democratic ideologies per se, such as fascism or communism, the latter is narrower and threatens certain fundamentals within the liberal constitutional order, namely equality and non-discrimination, or secularism.[110]

The question that follows can be stated thus: In which situation(s) can a party be prohibited? There appears to be a straightforward answer to this question. As Casal Bertóa and Bourne bluntly put it, the effective application of ban provisions is "relatively rare."[111] Because the prohibition of political parties ought to be truly exceptional, then its misuse or instrumentalization should be prevented.[112] As we will address in Section D, the European Court on Human Rights (ECHR) employs self-restraint techniques when deciding on the dissolution of political parties. In fact, activities disputing the organization of the state can be tolerated, inasmuch as they do not undermine democracy itself.[113]

[101]Bourne & Bértoa, *supra* note 1, at 244.
[102]Mersel, *supra* note 97, at 86.
[103]Mersel, *supra* note 97, at 87.
[104]Mersel, *supra* note 97, at 104.
[105]Mersel, *supra* note 97, at 105.
[106]Mersel, *supra* note 97, at 107.
[107]Accetti & Zuckerman, *supra* note 7, at 184.
[108]Bertóa & Bourne, *supra* note 85, at 442.
[109]Bligh, *supra* note 36, at 1321–79.
[110]Bligh, *supra* note 36, at 1345.
[111]Bertóa & Bourne, *supra* note 85, at 442.
[112]Alicia Hinarejos Parga, *La prohibición de partidos políticos como mecanismo de defensa del Estado*, 10 T.Y.R.C. 469, 474 (2003).
[113]Mersel, *supra* note 97, at 85; Refah Partisi (The Welfare Party) v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98, 41344/98, (Feb. 13, 2003), https://hudoc.echr.coe.int/?i=001-60936.

https://doi.org/10.1017/glj.2023.117 Published online by Cambridge University Press

III. Democratic Backsliding

In the contemporary era, the fear of democratic backsliding anchors on the fact that some constitutional democracies are being threatened by illiberal movements. [114] As Ginsburg and Huq note, as the three main predicates of democracy—rule of law, competitive elections, and rights to free speech and association—decline, the danger of democratic reverting becomes a reality.[115] Dixon and Landau imagery of "abusive constitutionalism" also entails the idea of a "minimum core" of rights and institutions "necessary for a true constitutional democratic order".[116] Furthermore, towering social and economic inequalities, toxic polarization, underrepresentation of minorities and women, religious fundamentalism, xenophobia, and social unrest are caveat signs towards gradual democratic erosion.

In this sense, democratic backsliding assumes many forms. On the one hand, it can be triggered by a sudden event, such as a coup d'état or backsliding "by surprise".[117] On the other hand, it can be the outcome of more discrete and gradual measures, such as legal reforms, or even derive from a level of democratic neglect that ultimately will unravel liberal constitutional democracy.[118] Several scholars have raised convincing democratic concerns about populist rhetoric and "executive aggrandizement".[119] In several states, such as Russia, Turkey, Hungary, Poland, Venezuela, Bolivia or Brazil, just to name a few, such aggrandizement aims at circumventing democratic rotation and democratic opposition.[120] Thereby, reducing judicial independence, controlling the media, tilting electoral formulae, restricting the activities of the NGOs, censoring dissenting voices in the academia, all steadily contribute to backsliding.[121]

Some argue that a good constitutional design or strong forms of judicial review can mitigate constitutional erosion.[122] The breakdown of democracy and the upsurge of autocracy is a threat to constitutionalism itself.[123] Furthermore, the COVID-19 pandemic escalated both the number and quality of threats to liberal democracy worldwide.[124] According to V-Dem,

[114] *See* Adam Przeworski, Crises of Democracy (2019); Steven Levitsky & Daniel Ziblatt, How Democracies Die: What History Reveals About Our Future (2019).

[115] Tom Ginsburg & Aziz Huq, How to Save a Constitutional Democracy 17 (2018); Adam Shinar, *Democratic Backsliding, Subsidized Speech, and the New Majoritarian Entrenchment*, 69 Am. J. Comp. L. 335, 335–85 (2021) (discussing how such democratic erosion can be operationalized through selective government funding of private speech).

[116] Rosalind Dixon & David Landau, Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy 24 (2021).

[117] *See* Dorothy Kronick, Barry Plunkett & Pedro Rodríguez, Backsliding by Surprise: The Rise of Chavismo (2021).

[118] *See* Kim Lane Scheppele, *Autocratic Legalism*, 85 U. Chic. L. Rev. 545, 547(2018); Paul Pierson & Eric Schickler, Polarization and Durability of Madisonian Checks and Balances: A Developmental Analysis, *in* Democratic Resilience: Can the United States Withstand Rising Polarization? 35, 57 (R. C. Lieberman, S. Mettler & K. M. Roberts eds., 2021); Ginsburg & Huq, *supra* note 115, at 91; Wojciech Sadurski, Poland's Constitutional Breakdown 12 (2019).

[119] Nancy Bermeo, *On Democratic Backsliding*, 27 J. Democracy 5, 10 (2016).

[120] Adam Shinar, *Deconstructing Mixed Constitutions*, 16 L. & Ethics Hum. Rights, 167, 167–87 (2022); Oran Doyle & Rachael Walsh, Deliberative Mini-Publics as a Response to Populist Democratic Backsliding, *in* Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland 224 (M. Cahill et al. eds., 2021); Richard Bellamy & Sandra Kröger, *Countering Democratic Backsliding by EU Member States: Constitutional Pluralism and "Value" Differentiated Integration*, 27 Swiss Pol. Sci. Rev. 619, 619–40 (2021).

[121] Gretchen Helmke, Mary Kroeger & Jack Paine, *Democracy by Deterrence: Norms, Constitutions, and Electoral Tilting*, 66 Am. J. Pol. Sci. 434, (2022); Zhaotian Luo & Adam Przeworski, *Democracy and Its Vulnerabilities: Dynamics of Democratic Backsliding*, 18 Q. J. Pol. Sci. 105, 105–30 (2023).

[122] Aziz Z. Huq, *A Tactical Separation of Powers Doctrine*, 9 Const. Ct. Rev. 19 (2019); Kim Lane Scheppele, Constitutional Interpretation After Regimes of Horror, *in* Legal Institutions and Collective Memories 233 (Susanne Karstedt ed., 2009); Rivka Weill, *The Strategic Common Law Court of Aharon Barak and Its Aftermath: On Judicially-Led Constitutional Revolutions and Democratic Backsliding*, 14 L. & Ethics Hum. Rights 227, (2020).

[123] Sujit Choudhry, Resisting Democratic Backsliding: An Essay on Weimar, Self-Enforcing Constitutions, and The Frankfurt School, 7 Glob. Const. 54, (2018); Tom Ginsburg, Aziz Z. Huq & Mila Versteeg, The Coming Demise of Liberal Constitutionalism?, 85 U. Chic. L. Rev. 239, (2018).

[124] *See* Miguel Poiares Maduro & Paul W. Kahn, Democracy in Times of Pandemic: Different Futures Imagined 1–18 (2020); Thomas M. Keck, *Erosion, Backsliding, or Abuse: Three Metaphors for Democratic Decline*, 48 L. Soc. Inq. 314, 314–39 (2023).

https://doi.org/10.1017/glj.2023.117 Published online by Cambridge University Press

> the level of democracy enjoyed by the average global citizen in 2021 is down to 1989 levels/ Hence, the last 30 years of democratic advances are now eradicated. The number of liberal democracies is down to 34 in 2021. There have not been so few since 1995, over 26 years ago. Closed autocracies are up from 25 to 30 between 2020-2021. Electoral autocracy remains the most common regime type in the world, as adopted by 60 countries. Together, autocracies now harbor 70% of the world population, approximately 5.4 billion people.[125]

Such a scenario is worrisome. As Scheppele wrote, constitutions cannot defend themselves.[126] The weakening of the separation of powers can only be curtailed by a solid political, cultural, and social defense of constitutional democracy.

C. Positive Theory of Party Regulation

Any form of regulation or legal intervention must address and balance false positives—mistakenly acquitting or not sanctioning noncompliant individuals—and false negatives—mistakenly sanctioning compliant individuals.[127] False positives and false negatives are necessarily costly. Unfortunately, enforcement technologies are imperfect and have not been able to eliminate false positives and false negatives in most human activities regulated by a state. However, one needs to emphasize that false positives and false negatives are not necessarily equally costly. In fact, this cost asymmetry inspires and divides many debates in the literature on regulation.[128]

I. Dealing with False Positives and False Negatives

One possible framework is to approach regulation as a set of policy mechanisms to minimize the joint costs of false positives and false negatives. Therefore, policies will be prone to sanctioning, for example, depending on whether the cost of false positives are less or more significant than the costs of false negatives. At the same time, regulatory policies may reflect the extent to which there is an intrinsic trade-off between these two costs, which may or may not exist depending on available technologies and specific institutional contexts.

How can we apply these general insights from the regulatory literature to how democracies regulate the activity of political parties? Table 1 summarizes the challenge faced by liberal democracies under this framework.[129] Ideally, anti-democratic parties would be fully restrained while democratic parties would not get sanctioned. The main diagonal in Table 1 indicates correct policies given the nature of political parties. However, the minor diagonal in Table 1 identifies the possibility of false positives and false negatives. False positives refer to not restraining anti-democratic parties—which can result in a democratic breakdown. False negatives take place when restraining democratic parties—with excessive limitations to freedom of association.

In a liberal democracy, unlike authoritarian regimes, false negatives are more costly than false positives. In other words, punishing democratic political parties engaged in lawful and compliant activities—but misunderstood otherwise—is socially and politically more costly than not punishing undemocratic parties or parties that promote anti-democratic activities. Therefore, there is a deep asymmetry in terms of regulatory burdens that shifts liberal democracy in the direction of tolerating more false positives than false negatives.

[125]*See* V-DEM- Institute, Democracy Report 2022: Autocratization Changing Nature? 12 (2022).

[126]Scheppele, *supra* note 118, at 583; Botelho, *supra* note 29, at 374–75; David Landau, *Populist Constitutions*, 85 U. Chic. L. Rev. 521, 543 (2018); Richard Albert, *The Cult of Constitutionalism*, 39 Fla. State U. L. Rev. 373, 392 (2012).

[127]The concept derives from statistics, with the null hypothesis being that an individual is compliant with the law.

[128]*See, e.g.,* The Oxford Handbook of Regulation (Robert Baldwin, Martin Cave & Martin Lodge eds., 2010).

[129]We use the term liberal democracy in a broad sense. We acknowledge, though, the more fine-tuned distinction between liberal democracy and electoral democracy. *See* Larry Diamond, Developing Democracy: Toward Consolidation 10 (1999).

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Table 1. FALSE POSITIVES AND FALSE NEGATIVES

	PARTY IS ANTI-DEMOCRATIC	PARTY IS DEMOCRATIC
PARTY IS SUSPENDED/ NOT AUTHORIZED/ RESTRAINED	CORRECT DECISION	FALSE NEGATIVE (VERY COSTLY TO LIBERAL DEMOCRACY—EXCESSIVE LIMITATION OF RIGHTS OF ASSOCIATION)
PARTY IS AUTHORIZED/ UNRESTRAINED	FALSE POSITIVE (VERY COSTLY TO LIBERAL DEMOCRACY—EXCESSIVE LENIENCY WITH ANTI-DEMOCRATIC- FORCES)	CORRECT DECISION

It is important to emphasize that we are not suggesting that liberal democracies should seek zero false negatives and tolerate a plenitude of false positives. Depending on available technology and institutional contexts, a mix of presumably more false positives and presumably fewer false negatives is more desirable. Therefore, the expectation is that constitutional rules regulating the organization and activity of political parties reflect this tension in ways to accommodate the best possible mix.

For example, the most effective constitutional rule to eliminate false positives is prohibition of all political parties. Clearly such a rule violates the minimum standards of liberal democracy. Therefore, liberal democracies, unlike authoritarian regimes, are not expected to engage widely in prohibiting political parties. Now consider the opposite example. The most effective constitutional rule to eliminate false negatives is to shield from prosecution—and civil litigation—all political organizations for any sort of activity, including crimes such as murder, kidnapping, or money laundering. However, it is difficult to envisage a situation where a liberal democracy can tolerate such political organizations without embarking in serious (un)democratic consequences. Each liberal democracy, depending on available technology and institutions, which, in turn, reflects social and political preferences, must find a compromise between these two—obviously unrealistic—extremes.

II. Ex Ante Versus Ex Post Regulation

Following the seminal insights by Steven Shavell[130] in the 1980s, we can further investigate how liberal democracies address this tension between false positives and false negatives. Specifically, the appropriate mix can result from combining *ex ante* and *ex post* regulatory mechanisms which constitutional rules can codify.[131]

Let us start with an *ex ante* mechanism, also called regulation in economic literature. Political parties are subject to a strict entry/formation *ex ante* control by some higher authority, such as an administrative agency, a court, or an independent regulator that is independent from the "regulated industry". In practical terms, there is some sort of licensing procedure by which a political party needs to satisfy some constitutional and legal requirements before being granted legal status.

Now consider an *ex post* mechanism, called litigation in economic literature. In this case, political parties are subject to *ex post* legal proceedings by some higher authority, a criminal court, or a constitutional court, or even the executive and/or legislative branches of government. In this setting, there is no prior assessment or licensing of political organizations. They are simply liable *ex post* when violating constitutional rules or not complying with certain democratic principles.

[130]Steven Shavell, *A Model of the Optimal Use of Liability and Safety Regulation*, 15 RAND J. ECON. 271, 276 (1984); Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 358 (1984).

[131]In a similar vein—although referring to *ex post* or *ex ante* party bans—see Kouroutakis, *supra* note 13, at 312–14.

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It is intuitive that *ex ante* and *ex post* mechanisms prioritize distinct concerns. Suppose false negatives are much more costly than false positives. An *ex post* mechanism seems more appropriate. It is easy to assemble a political party and engage in political activity so that false negatives are avoided. Sanctions operate *ex post* to deter and punish anti-democratic conduct. Because all political parties are allowed and licensing is unrequired, it is possible that anti-democratic parties are formed and take a role in the public debate even within the institutions of liberal democracy. Therefore, *ex post* mechanisms emerge as the viable response to such possibility.

Consider, for sake of completeness, the opposite reasoning. False positives are more costly and constitute a threat to liberal democracy. An *ex ante* mechanism is more adequate. Licensing and some form of pre-approval are more effective in avoiding false positives. At the same time, as long as the *ex ante* mechanism is reasonably effective, there is a limited scope for *ex post* litigation or prosecution because all licensed political parties are democratic in their nature.

As we have hypothesized before, jurisdictions look for a mix of regulation, such as some form of *ex ante* control, and litigation, such as implementing *ex post* liability. Constitutional rules codify a response to the complex challenge of respecting full freedom of political association as part of civil liberties and addressing the political damage of tolerating anti-democratic parties.

III. First Versus Second Order Regulation

Recent scholarship on the regulation of political parties has made an important distinction between first and second order regulation.[132] By first order regulation, one understands the constitutional norms that address party recognition and party bans. By second order regulation, legal scholars have in mind a set of legal norms and practices—mostly, but not necessarily infraconstitutional—that, without addressing the possibility of party bans directly, minimize the effect of false positives. Second order regulatory mechanisms can include election law design or electoral system choices[133], forms of mandatory voting[134], access to public financing and other forms of increasing political participation costs for disloyal parties.[135]

Our positive model has important implications for the debate about first and second order regulation. *Ex ante* regulation is primarily first order regulation; *ex post* regulation can be both first order, such as banning parties, and second order, such as legal norms and practices that undermine the viability of such parties.

The trade-offs discussed previously can easily be applied to *ex post* second order regulation. It can be alleged that false negatives are less costly with second rather than first order regulation because there is no risk of banning truly democratic parties. However, there is still the possibility that some truly democratic parties incorrectly bear additional costs. In fact, for example, *ex post* second order regulation can be easily used to protect and entrench incumbent parties rather than minimize the influence of disloyal parties.[136] Therefore, while potentially protecting democracy from the detrimental consequences from allowing false positives, second order regulation can impose significant costs in terms of limiting electoral choices or providing significant barriers to entry to new democratic parties.

[132]For a general discussion, see Issacharoff & Pildes, *supra* note 3.

[133]*See, e.g.,* Benjamin Reilly, *Electoral Systems for Divided Societies*, 13 J. Democracy 156, 156–69 (2002); Tarunabh Khaitan, *Political Parties in Constitutional Theory*, 73 Current Legal Probs. 89 (2020); Tarunabh Khaitan, *Balancing Accountability and Effectiveness: A Case for Moderated Parliamentarism*, 7 Can. J. Compar. Contemp. L. 81 (2021); Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 Cal. L. Rev. 1773 (2021).

[134]Jason Brennan, Compulsory Voting: For and Against (2014).

[135]Tom Gerald Daly & Brian Christopher Jones, *Parties Versus Democracy: Addressing Today's Political Party Threats to Democratic Role*, 18 Int'l J. Const. L. 509, 512 (2020).

[136]For a general discussion, see Issacharoff & Pildes, *supra* note 3.

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In terms of comparing *ex post* first and second order regulation, our model does not suggest that the latter is always or universally better than the former. Both have costs and benefits. As discussed before, *ex post* first order regulation deals with banning false positives while minimizing false negatives when comparing to *ex ante* regulation. Yet, *ex post* second order regulation avoids banning but develops legal norms and practices that potentially affect all new parties and ossify the old party system, thus, constraining voters' preferences. The balance between *ex ante* control and *ex post* liability, first, and between *ex post* first and second order regulation, second, requires an understanding of specific local determinants. It is important to emphasize that we do not suggest that every jurisdiction should have the exact same mix of *ex ante* control—false negatives—and *ex post* liability—false positives—as we also do not expect that all jurisdictions agree on the appropriate balance between *ex post* first and second order regulation. In other words, there is no unique size that fits all. For example, social and political preferences matter. A country evolving from a totalitarian regime is likely to exhibit less tolerance for false positives than a liberal democracy with no dictatorial past.

D. Exploring the Data

This section provides for a quantitative exploration. We start by describing the dataset. Our first results are derived from clustering analysis. This exercise allows us to identify the main trends in terms of substantive differences across countries. The following step is to consider determinants that can explain these substantive differences. Finally, an application of principal component analysis highlights the relevant distinction between *ex ante* and *ex post* constitutional regulation of political parties.

I. Dataset

The authors have collected information about constitutional regulation of political parties as of 2021 in thirty-seven countries.[137] This set of countries includes most member states of the European Union and OECD plus a sample of other countries in Latin America. This is not a random sample but one for which information could be obtained by consultation with experts in absence of comprehensive information. They are all democratic countries because considerations about autocratic countries are excluded from our discussion.

For each country in the dataset, the authors have considered a survey of eleven questions that cover constitutional reference and regulation of political parties, mechanisms of *ex ante* and *ex post* enforcement, and existing case law.[138] These questions reflect both *de jure* constitutional rules and *de facto* information about actual litigation.

As summarized by Table 2, the survey starts with a more contextual constitutional framework: 70% have constitutions that mention political parties in some way. Within civil liberties, only 32% include an explicit reference to political parties. However, 81% have both explicit and implicit references.

Details of concern include the fact that 46% prohibit certain parties—in more detail, fascist, and similar parties (16%), communist parties (8%), regional parties (8%), other—including violent—parties (13%)—whereas 11% protect specific types of parties, mainly regional minority parties, 11%. At the same time, 51% include certain aspects of regulating the internal organization and activity of political parties. One can also observe that 92% allow nonparty members to participate in general elections, hence providing some limitation to party monopoly in the democratic process. Specifically, the possibility of non-party members in party lists, 87%, and non-party lists or candidates, 60%.

[137]The authors contacted at least one local expert for each of the thirty-seven countries. Moreover, the authors also contacted experts for Finland, Ireland, Latvia, Luxembourg, Malta, and Norway, but did not obtain the requested information.

[138]Catarina Santos Botelho & Nuno Garoupa, *Online Appendix* (including details about the survey.)

https://doi.org/10.1017/glj.2023.117 Published online by Cambridge University Press

Table 2. Survey of 37 countries

Question	Summary	Yes	No
Q1	Are parties mentioned explicitly in the constitution?	70%	30%
Q2A	Does the constitution explicitly refer to political parties as part of civil liberties?	32%	68%
Q2B	Does the constitution implicitly refer to political parties as part of civil liberties?	81%	19%
Q3	Are certain types of parties prohibited in the constitution?	46%	54%
Q4	Are certain types of parties specially protected by the constitution?	11%	89%
Q5	Are there specific constitutional provisions about certain aspects of political parties?	51%	49%
Q6	Are parties subject to constitutionality assessment by the constitutional court/supreme court before registration?	8%	92%
Q7	Are parties subject to specific registration laws?	84%	16%
Q8	Are parties monitored by a regulator on a regular basis—not just for the purpose of elections?	73%	27%
Q9	Are other forms of participation allowed in general elections?	92%	8%
Q10	Can parties be sanctioned or banned for anti-democratic activities?	76%	24%
Q11	Is there recent case law banning parties?	43%	57%

In terms of enforcement, the survey makes a distinction between *ex ante* and *ex post* institutional mechanisms. Only 8% are subject to some form of control before registration, but 84% have specific registration laws for political parties. At the same time, 73% contemplate some form of regular monitoring of political parties' activities—regular monitoring by an independent agency, 16%, an election committee, 38%, constitutional court, 8%, and other public institutions, 41%—and 76% establish the possibility of sanctioning parties for anti-democratic activities—sanctioning by regular courts. 51%, constitutional court, 38%, special courts, 8%, executive branch, 22%, and legislative branch, 11%—while 43% have developed case law in recent times.

As a general first conclusion, most of the countries in the sample have constitutional regulation of political parties, including some degree of monitoring and sanctioning. However, few countries implement *ex ante* enforcement, most rely on *ex post* mechanisms. A significant proportion has produced case law on the subject.

II. Clustering Analysis

The goal of clustering analysis is to identify from the available dataset, rather than traditional legal analysis, the similarities and dissimilarities across jurisdictions when it comes to constitutional rules about political parties. This approach is atheoretical and, therefore, purely data driven. In this respect, we follow the methodology developed by Chang et al. for property law.[139] As these

[139]*See* Yun-Chien Chang, Nuno Garoupa & Martin T. Wells, *Drawing the Legal Family Tree: An Empirical Comparative Study of 170 Dimensions of Property Law in 129 Jurisdictions*, 13 J. Legal Analysis 231, 244 (2021) (discussing technical considerations about average-linkage—or Gower—clustering). As explained,

> average-linkage clustering is one of several methods of agglomerative hierarchical clustering where the clusters are then sequentially combined into larger clusters until all elements end up being in the same cluster. Each step of the clustering algorithm combines the two candidate clusters separated by the shortest distance. In average-linkage clustering, the link between two clusters contains all pairs of elements, and the distance between clusters equals the average distance between those pairs of elements in distinct clusters. Average-linkage clustering avoids a drawback of alternative agglomerative methods where clusters formed via single-linkage clustering may be forced together due to single elements being close to each other, even though many of the elements in each cluster may be very distant from each other. The average-linkage clustering algorithm requires a constant-rate assumption that the distances from the root to every branch tip are equal. *Id.*

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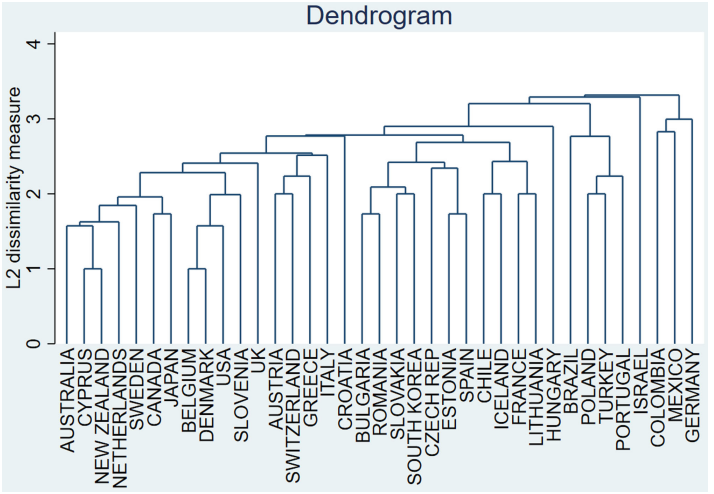

Figure 1. Dendrogram, N = 37.

authors do, an average-linkage agglomerative hierarchical clustering, that is, an unsupervised machine-learning method, is developed to derive a dendrogram that shows how the thirty-seven jurisdictions in our dataset can be categorized into a full family tree. Methodologically, depending on how closely one observes, a family tree can be divided into 2, 3, 4, or even 37 branches. First, we show the complete picture of the family tree. Second, we discuss the results mainly based on a cutoff of five groups, although including twelve subgroups to assist a more qualitative analysis. Notice that more or fewer groupings are equally valid; five and twelve are always arbitrary choices by the authors.

The graphical output of agglomerative hierarchical cluster analysis is called a dendrogram. In our case, it graphically presents all thirty-seven countries grouped at various levels of—Gower—distance, based on the eleven questions surveyed. We used the itemized sub questions rather than the aggregate question, when given the choice, to better reflect possible distinctions.

In Figure 1, all the thirty-seven jurisdictions used in the analysis are placed in the dendrogram. As explained by Chang et al., "the horizontal lines extend upward for each terminal grouping, and at various similarity values, these lines are connected to the lines from other observations with a vertical line. Groups of observations continue to combine until, at the top of the dendrogram, all observations group into a single cluster."[140]

At this point, we can observe that all countries are ranked into some clustering order, starting with Australia, on the left-hand-side, and Germany, on the right-hand-side. The conclusion is that Australia and Germany are the most distinct countries in our study. The disadvantage of the full dendrogram is that we do not get an immediate intuitive explanation for the family tree. Therefore, we present a more detailed summary of the family tree when using cutoffs of five and twelve distinct groups in Table 3.

Combining the information in Table 3, the dataset yields five distinct branches—branch one with twenty-nine countries, going from Australia to Hungary in Figure 1, and itself subdivided in six different subgroups. Branch two has four members: Brazil, Poland, Portugal, and Turkey. Branch three is Israel. Branch four is Mexico and Colombia. Branch five is Germany. Overall, one can conclude that the full family tree suggests twenty-nine countries that are less regulated and eight countries that are more regulated. However, the nature of the regulation mechanism and its implementation differs, thus generating four distinct branches on the right-hand-side of the dendrogram. Notice that the graphical representation does not say that Germany is more

[140]Chang et al., *supra* note 139, at 245.

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Table 3. Clustering by average linkage

Group	Subgroup	Countries
1	1A	Australia, Belgium, Canada, Cyprus, Denmark, Greece, Japan, Netherlands, New Zealand, Slovenia, Sweden, UK, USA
	1B	Austria, Italy, Switzerland
	1C	Croatia
	1D	Bulgaria, Czech Republic, Estonia, Romania, Slovakia, South Korea, Spain
	1E	Chile, France, Iceland, Lithuania
	1F	Hungary
2	2A	Brazil
	2B	Poland, Portugal, Turkey
3		Israel
4	4A	Mexico
	4B	Colombia
5		Germany

regulated than Israel, and Israel, in turn, is more regulated than Portugal. Individual country comparisons of that sort are misleading with this methodology. Still, the dendrogram does convey the message that countries on the left-hand-side are somehow less regulated and constitute a large family, with some subbranches, while jurisdictions on the right-hand-side are more regulated but in varying ways, thus constituting separate branches.

III. Possible Determinants of Clustering Analysis

We investigate possible determinants of the previous clustering analysis. The hypothesis is that countries in the left-hand-side of the dendrogram have an institutional setting more reluctant to limit political activity whereas jurisdictions in the right-hand-side have the opposite context, for example, due to historical reasons or political inclinations. The independent variables are well-known measures provided by different international public and private organizations. Specifically, we consider the freedom score by Freedom House, rule of law by the World Bank Governance Indicators, and liberal democracy by V-Dem. Given the thirty-seven countries in our dataset, we also make a distinction between common-law and civil-law systems and jurisdictions subject to the European Convention of Human Rights.

Two important additional controls are included in the statistical analysis. They both reflect the proportionality of the election system for the main legislative institution, a standard second order regulation mechanism as discussed in the previous section. The least-squares index provides a direct measure of proportionality—it measures disproportionality between the vote distribution and the seat distribution.[141] The effective-threshold index assesses the minimum voting—in percentage—to achieve representation in the main legislative institution.[142] Notice that the interpretation of both variables is similar—a lower number means more proportionality and less

[141]Michael Gallagher, Election Indices 1 (2023).

[142]Rein Taagepera & Matthew Soberg, Seats and Votes: The Effects and Determinants of Electoral Systems 1 (1989) (explaining that the index is based on the authors' work and the statistics calculated by Rein Taagepera and expanded by *The Politics of Electoral Systems*). *See* Michael Gallagher & Paul Mitchell, The Politics of Electoral Systems 3 (2008).

https://doi.org/10.1017/glj.2023.117 Published online by Cambridge University Press

Table 4. Descriptive statistics

Variable	Source	Observ	Mean	Standard Deviation	Minimum	Maximum
Order		37	19	10.82	1	37
Freedom	Freedom House score (2020), divided by 100	37	0.87	0.13	0.32	1
Rule of Law	WB Indicators, Rule of law (2019)	37	1.03	0.71	−0.66	1.91
Liberal Democracy	V-Dem Liberal Democracy score (2019)	37	0.69	0.16	0.10	0.86
Least-Squares Index (Proportionality)	Michael Gallagher website (2019)	37	6.46	4.72	0.63	21.12
Effective-Thresh,Old Index	Taagepera (2002), Gallagher & Mitchell (Table C.6, 2005)	20	1.39	0.84	0.13	3.23
Common law		37	0.16	0.35	0 (no)	1 (yes)
ECHR	European Convention of Human Rights	37	0.70	0.46	0 (no)	1 (yes)

percentage of votes to get elected whereas a higher number means less proportionality and more percentage of votes to get elected.

In Table 4, the descriptive statistics are introduced for both the dependent variable (order in the dendrogram, with Australia being one and Germany being thirty-seven) and the independent controls. Notice that 16% are common-law jurisdictions—with Cyprus and Israel categorized as 0.5 rather than 1, civil-law or 0, common-law—and 70% are subject to the European Convention of Human Rights.

Due to the limited number of observations, we report the ordinary-least squares results for individual specifications (I) to (III) and the full specification (IV) in Table 5. A negative coefficient means that the independent variable produces an impact closer to Australia—left-hand-side of the dendrogram—whereas a positive coefficient has the converse interpretation, that is, closer to Germany—right-hand-side of the dendrogram—in the ordered cluster.

As to the statistical quality of the regressions, there is no indication of multicollinearity—measured by the variance inflation factor, VIF—and of heteroskedasticity—as pointed out by the standard White's test. The goodness of fit indicates that specifications including the independent variable freedom score are better than otherwise.

The statistical results are fully consistent with the hypothesis. In particular, a higher freedom score locates the jurisdiction closer to Australia and further away from Germany, on average. Rule of law and liberal democracy have a similar effect, but only in the absence of freedom scores, in specifications (II) and (III) respectively. This result is indicating that an inclination for more freedom, rather than the quality of democracy or the quality of the legal system, correlates with the relative order in the computed clustering. One can also notice that common-law jurisdictions are more likely to be situated at the left-hand-side of the ordered clustering. The coefficient related to the European Convention of Human Right is negative but never statistically significant. The coefficient associated with the least-squares index is positive but also never statistically significant. Thus, in this case, second order regulation does not seem to be relevant to explain differences across countries.

Unfortunately, concerning the effective-threshold index, we only have data available for 20 countries. Therefore, the inclusion of this control reduces the number of observations. Our findings are reported in Table 6. Goodness of fit and statistical significance are weak by comparison with Table 5. Nevertheless, the results are consistent in terms of the sign and statistical relevance of freedom score.

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Table 5. Regression analysis of dendrogram order by ordinary-least squares

	(I)	(II)	(III)	(IV)
Cons.	55.77***	29.1***	40.31***	58.88***
Freedom	−38.94***			−57.79**
Rule of Law		−5.82**		−0.91
Liberal Democracy			−24.58**	19.80
Least-Squares Index	0.16	0.12	0.16	0.16
Common law	−12.82***	−12.47**	−14.63***	−12.09**
ECHR	−2.55	−4.04	−4.42	−1.82
Obs.	37	37	37	37
Adjusted R2	0.42	0.32	0.33	0.40
VIF	1.23	1.27	1.19	3.23
Heteroskedasticity (IM Test)	9.99	13.45	13.77	22.68

***Significant at 1%
**Significant at 5%
*Significant at 10%

Table 6. Regression analysis of dendrogram order by ordinary-least squares

	(I)	(II)	(III)	(IV)
Cons.	92.65***	44.54***	52.57**	102.05**
Freedom	−78.81**			−126.14
Rule of Law		−14.2**		−5.49
Liberal Democracy			−44.48	59.93
Least-Squares Index	0.12	0.26	0.12	0.26
E-Threshold Index	−1.59	−5.09	−1.48	−3.38
Common law	−9.44	−5.34	−8.93	−8.75
ECHR	−0.21	−2.25	1.05	−3.07
Obs.	20	20	20	20
Adjusted R2	0.28	0.26	0.09	0.28
VIF	1.53	1.62	1.57	3.79
Heteroskedasticity (IM Test)	19.46	17.87	16.46	20.00

***Significant at 1%
**Significant at 5%
*Significant at 10%

The regression analyses provide statistical support to the intuitive interpretation that family branches on the left-hand-side of the dendrogram combine less regulated jurisdictions—on average, with better freedom scores too—whereas family branches on the right-hand-side of the dendrogram tend to be more friendly to regulation of political parties—on average, with worse freedom scores.

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Table 7. Ex ante versus ex post control by principal component analysis

	WEAK *EX ANTE* No specific legal rules	**INTERMEDIATE** Registration	**STRONG *EX ANTE*** Control
WEAK *EX POST* Limited monitoring, limited sanctioning, or absence of case law	2 (Austria, Switzerland)	7 (Brazil, Canada, Cyprus, Greece, Japan, New Zealand, Sweden)	0
INTERMEDIATE Combination	2 (Italy, Netherlands)	14 (Australia, Chile, Colombia, Croatia, Estonia, France, Hungary, Iceland, Lithuania, Mexico, New Zealand, Poland Slovenia, Spain, Sweden, UK)	0
STRONG *EX POST* Monitoring, sanctioning, case law	2 (Belgium, Germany)	7 (Czech Republic, Denmark, Romania, Slovakia, South Korea, Turkey, USA)	3 (Bulgaria, Israel, Portugal)

IV. Principal Component Analysis of Enforcement Mechanisms

Based on the collected information for each of the thirty-seven jurisdictions, following the method already discussed by Garoupa and Santos Botelho,[143] we used factor analysis to construct two indicators to measure enforcement rules—*ex ante* and *ex post*. Factor analysis provides for a statistical indicator that summarizes information about a set of dummy variables by exploring differences in variance—the information about the statistical determination of all indicators is available from the authors upon request. Both *ex ante* and *ex post* reflect in statistical ways the variance across these underlying dummy variables.[144] Therefore, the calculated indicators are driven purely by data considerations, rather than subjective conjectures about the nature or additivity of each variable. Specifically, the weight each of the dummies has on a given indicator, *ex ante* or *ex post*, is determined by factor analysis and not some *ad hoc* consideration. These indicators reveal and illuminate the important regulatory aspects that explain differences across countries.

Considering *ex ante*, we rank countries from low enforcement rules—Austria, Belgium, Germany, Italy, Netherlands, Switzerland—to high enforcement rules—Bulgaria, Israel, Portugal—with a single intermediate category. In relation to *ex post*, the indicator has some more variance—it operates with three dummies rather than two dummies as the previous indicator—reflected in lowest enforcement rules—Cyprus, New Zealand, Sweden, Switzerland—and highest enforcement rules—Belgium, Bulgaria, Czech Republic, Denmark, Germany, Israel, Portugal, Romania, Slovakia, South Korea, Turkey, USA—and more possible categories in between.

In Table 7, one can observe the distribution of the thirty-seven countries in terms of enforcement mechanisms on a 3x3 matrix. The largest group of jurisdictions in our dataset has some form of intermediate enforcement, about thirty countries, with some variations within the two *ex ante* and *ex post* indicators. On the main diagonal, we have two additional important groups – countries with overall weak enforcement rules—Austria, Switzerland—and countries with overall strong enforcement rules—Bulgaria, Israel, Portugal. On the opposite diagonal, we find a small group with strong *ex post* enforcement and weak *ex ante* enforcement rules—Belgium and Germany. No country has the opposite enforcement mechanism, that is, consistent with our theory about political parties in democracies, no country has strong *ex ante* enforcement and weak *ex post* enforcement rules.

[143]Nuno Garoupa & Catarina Santos Botelho, *Measuring Procedural and Substantial Amendment Rules: An Empirical Exploration*, 22 GER. L.J. 216, 222 (2021).

[144]In the case of *ex ante*, the indicator considers questions 6 and 7 in the survey. As to *ex post*, questions 8, 10, and 11 are included in the indicator.

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The results confirm that most jurisdictions have some enforcement rules that combine both *ex ante*, mostly some form of specific registration, and *ex post*, mainly some form of judicial control, although many without actual case law. In line with previous considerations, countries in the different extremes of the distribution are quite limited in number.

E. Case Law

In post-war European constitutional history, the "most muscular forms" of militant democracy[145]—party bans—were beforehand an "instrument of symbolic politics."[146] As we will see though, as democratic consolidation progressed, some high courts decided not to outlaw parties of marginal political relevance.[147]

Although the case law available and the myriad of states that have already banned parties is remarkable, we decided to focus on five constitutional experiences: Germany, Israel, Greece, Spain, and Turkey. All these states are members of the Council of Europe, and therefore it is interesting to compare how domestic jurisdictions and the European Court of Human Rights handled this delicate subject.

Parties' proscription can ultimately be legitimate through its conformity with the rule of law.[148] Indeed, as Backes observes, party banning in autocracies might be left solely to the executives, while most democracies give political parties "the privilege of only being able to be dissolved by a high court decision."[149]

The European Commission for Democracy through Law (the 'Venice Commission') offered some guidelines regarding the prohibition and dissolution of political parties.[150] It stresses that the prohibition or dissolution of political parties is "a particularly far-reaching measure [that] should be used with utmost restraint" and urges states to opt for "less radical measures" that can also prevent democratic distress.[151] In 2020, the Parliamentary Assembly of the Council of Europe called on the governments of member states to "ensure that measures restricting parties cannot be used in an arbitrary manner by the political authorities."[152] In short, both institutions recommended parsimony.

I. Germany

The German Basic Law includes several provisions to safeguard democracy.[153] In a fairly "complex"[154] writing, Article 21 Section 1 of the German Basic Law states that: "Political parties shall participate in the formation of the political will of the people [. . .]." Scholarship and jurisprudence refer to this section as the "party privilege" (*Parteienprivileg*), which grants all political parties the freedom to organize and mobilize the electorate.[155] Article 21 Section 2, however, consecrates that "parties that, by reason of their aims or the behavior of their adherents,

[145]Kommers & Miller, *supra* note 17, at 286.

[146]Uwe Backes, *Banning Political Parties in a Democratic Constitutional State: The Second NPD Ban Proceedings in a Comparative Perspective*, 53 Patterns Prejudice 136, 151 (2019).

[147]Backes, *supra* note 146, at 145.

[148]Backes, *supra* note 146, at 141.

[149]Backes, *supra* note 146, at 141.

[150]Venice Comm'n, *Guidelines on Prohibition & Dissolution of Political Parties & Analogous Measures*, 41st Sess., Doc. No. (2000)001-e (1999).

[151]*Id.* at Guideline § 5.

[152]*See* Parliamentary Assembly Res. 1308, Doc. No. 9526 (2002) (concerning the permissibility of restrictions on political parties).

[153]*See* Kommers & Miller, *supra* note 17, at 285 (referring to such Articles as 9 (2), 11 (2), 18, and 21 (2)).

[154]Hans-Ullrich Gallwas, Der Mißbrauch von Grundrechten 162 (1967).

[155]Gallwas, *supra* note 154, at 163; Horst Rapp, Das Parteienprivileg des Grundgesetzes und seine Auswirkungen auf das Strafrecht 6–65 (1970).

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seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional."[156]

In 1953, the German Federal Constitutional Court (FCC) declared unconstitutional the Socialist Reich Party (SRP)—a successor of the German Imperial Party with a neo-Nazi orientation—and dissolved it.[157] Echoing the abovementioned Schmittian idea of a constitutional core, the FCC considered that exclusion of a political party is justified when "supreme fundamental values of liberal democratic constitutional state" are shaken.[158] The Court considered that the SRP revealed an undemocratic and racist political agenda. Still, at that time, the FCC did not expressly mention the concept of militant democracy.[159]

Contrary to models of negative republicanism,[160] such as Austria or Portugal, in which, respectively, only neo-Nazi[161] or fascist[162] parties are prohibited, in Germany the pendulum swung back and forth to the extreme left and to the extreme right. Such oscillation motion reveals that what was relevant to the FCC was not the righteousness of the political ideas, but their unconstitutional objectives. In accordance, what Article 21 of the Basic Law seeks is to block "any repetition of the one-party state that molded the Third Reich."[163]

The first formal reference to militant democracy, not only in Germany but also in Europe itself, was made on the case of the Communist Party of Germany (KPD). KPD, amid the Cold War, called for the downfall of the Adenauer's government.[164] What was impressive about this case was that, although mentioning militant democracy, it departed from Löwenstein's idea of urgency or "imminence."

In 1956, in "the longest by far of all the Court's opinions" 308 pages,[165] the FCC ruled that the ultimate goals of the party—proletarian dictatorship and revolution—were incompatible with the "free democratic basic order."[166] There is little doubt that, in this case, the application of Article 21 was more problematic than in the previous case.[167] KPD obtained only 2.2% of the popular vote in the 1953 Bundestag election so was not a menace at the time of its banning.[168] Still, despite the inexistence of an "empirical danger," the Court focused on the "logical danger" of the KPD fulfilling its unconstitutional goals in the foreseeable future.[169]

In the Radical Groups Case,[170] in 1978, the FCC followed a "militant dormancy" reasoning.[171] At that time, three radical left-wings parties were denied campaign broadcasting in some German states. Overall, the Court held that such denial threatened the principle of equality of opportunity granted to every political party.

[156]*See* Hans D. Jarass & Bodo Pieroth, Grundgesetz für die Bundesrepublik Deutschland 534–52 (2009) (giving further commentary); Friedhelm Hufen, Staatsrecht II 742–45 (2009).

[157]Judgment of 23 October 1952, 1 BvB 1/51, Oct. 23, 1952 (Ger.) [hereinafter *Judgment of Oct. 23, 1952*]; Kommers & Miller, *supra* note 17, at 289 (explaining that "the program showed that the party was committed to a revival of the mythical notions of an indestructible Reich and German racial superiority").

[158]*Judgment of Oct. 23, 1952* at para. 37.

[159]Accetti & Zuckerman, *supra* note 7, at 190.

[160]Tyulkina, *supra* note 35, at 19.

[161]*See* Rechtsinformationssystem des Bundes, Gesamte Rechtsvorschrift für Verbotsgesetz 1947 (2023); Backes, *supra* note 146, at 139.

[162]*See* Constituição da República Portuguesa [C.R.P.], art. 46, para. 4 ("Armed associations, military, militarised or paramilitary-type associations and organisations that are racist or display a fascist ideology are not permitted.").

[163]Kommers & Miller, *supra* note 17, at 290.

[164]Kommers & Miller, *supra* note 17, at 290–93. See Judgment of 26 March 1956, 5 BVerfGE 85 (1956).

[165]Kommers & Miller, *supra* note 17, at 290.

[166]Bertóa & Bourne, *supra* note 85, at 451.

[167]Kommers & Miller, *supra* note 17, at 290.

[168]Accetti & Zuckerman, *supra* note 7, at 191.

[169]Kommers & Miller, *supra* note 17, at 291.

[170]Decision of 14 February 1978, 47 BVerfGE 198 (1978) (Ger.) [hereinafter, *Decision of Feb. 14, 1978*].

[171]Kommers & Miller, *supra* note 17, at 292.

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In 2003, the FCC considered a petition to ban the extreme right-wing National Democratic Party (NPD), although the proceedings were later dismissed on technical grounds.[172] Quite astonishingly, the Court found out that much of the evidence considered in the admissibility stage had derived from very well-placed state agents and informants working within the NPD.[173]

In 2017, the FCC ruling on NPD disappointed "both opponents and adherents" of militant democracy.[174] It failed opponents, as they anticipated a much more significant increasing of the intervention threshold, and it dissatisfied adherents as the decision was not to ban the NPD.[175] While recognizing NPD affinity with National Socialism, the examination of proportionality, using the criteria of necessity and appropriateness, brought the Court to the conclusion that the NPD's actions lacked "potentiality."[176] As NPD had a shy parliamentary representation and a declining membership, its actions would not succeed in mobilizing the "right-wing extremist movement."[177] This reasoning represented a paramount shift. Uninfluential parties would not be subjected to the extreme political measure of proscription. Still, they could be subjected to other less severe measures—a "soft militant democracy"[178] path—such as the withdrawal of public party financing.

In conclusion, the FCC went from a sheer militant democracy stance to a more mitigated or rhetorical resort to militant democracy. On a surface level, it may seem that the fact that the FCC has now a more tolerant attitude towards antidemocratic or illiberal parties reveals "the evolving maturity of German's democracy."[179] However, upon a closer inspection, such conclusion must be interpreted *cum grano salis*. As unlikely as this may sound, in an empirical study, Bourne and Casal Bértoa unveiled that "against all expectations" states that experienced authoritarianism are equally prone to outlaw parties as those who have not had such historical experiences.[180]

II. Israel

Navot delves into the interesting paradox of the Israeli experience regarding the banning of parties.[181] On the one hand, Basic Law Section 7A and the Parties Law militantly allow "an 'easy' disqualification of terror-supporting parties," as bans can be approved merely for illegitimate political speech.[182] On the other hand though, the Supreme Court of Israel adopts a neutral stance, does not adhere to the legal militant democracy shibboleth, and states that the proscribing of political parties must be reserved when there is unequivocal proof of terroristic actions.[183] This invites a second important point: Is Israel the example of a "softer militant democracy"[184] path?

[172]Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], 2 BvB 1/01, Rn. 62 [hereinafter *Judgment of Mar. 18, 2003*]. *See* Eckhard Jesse, *Die Diskussion um ein neuerliches NPD-Verbotsverfahren—Verbot: kein Gebot, Gebot: kein Verbot*, 59 Zeitschrift für Politik 296, 296–313 (2012) (providing a critique).

[173]Kommers & Miller, *supra* note 17, at 295.

[174]*See* Backes, *supra* note 146, at 136. *See also* Claus Leggewie, Johannes Lichdi & Horst Meier, *"Hohe Hürden" sehen anders aus: Das Abermalige Verbotsverfahren gegen Die NPD*, 53 Recht und Politik 324, 324–49 (2017).

[175]See Backes, *supra* note 146, at 136.

[176]Judgment of 17 January 2017, BVerfGE 144, 20 – 367. *See* Backes, *supra* note 146, at 143.

[177]*Id.*

[178]Müller, *supra* note 26, at 259.

[179]Kommers & Miller, *supra* note 17, at 300–01.

[180]Bourne & Bértoa, *supra* note 1, at 233.

[181]Navot, *supra* note 60, at 103. *See* Raphael Cohen-Almagor, *Disqualification of Political Parties in Israel: 1988-1996*, 11 Emory Int'l L. Rev. 67 (1997) (providing more literature on the Israeli experience); Yigal Mersel, *Judicial Review of Counter-Terrorism Measures: The Israeli Model for the Role of the Judiciary During the Terror Era*, *in* The Right to a Fair Trial 459 (Thom Brooks ed., 2009).

[182]Navot, *supra* note 60, at 103.

[183]Navot, *supra* note 60, at 103.

[184]Tyulkina, *supra* note 35, at 110.

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Right before the 1965 elections, the Israeli Central Elections Committee[185] refused to approve the Socialist List, arguing that it was an illegal association, which denied the "integrity and the very existence of the State of Israel."[186] Adhering to the idea of a defensive democracy, the Supreme Court, in a majority opinion, confirmed the ban.[187]

Two decades later, the problem reemerged, as the extremist right-wing "Kach"—the Kahana movement—sustained a racist agenda against Israel's Arab population.[188] Following Kach's banning by the Central Elections Committee, the Supreme Court, however, approved the party's candidacy, arguing that a democratic society should respect unpopular worldviews.[189] This decision was polemic and triggered legislative changes in electoral law. The Knesset then adopted the aforesaid Parties Law, allowing the outlawing of political parties.[190]

In 2020, the Central Elections Committee disqualified the Balad—the Democratic National Assembly Party—subsequently to the declarations made by Balad's founder, Bishara, in Syria, supporting the terrorist organization Hezbollah.[191] The Supreme Court overturned the decision and decided, by majority, that Bishara could participate in the Knesset elections.[192] It follows that the dipole "speech" versus "actions" was determinant to the Court's conclusion. This confirms the assertion that democracies will be more hesitant to proscribe parties for their anti-democratic ideas than for any anti-democratic actions.[193]

The Court, while acknowledging Bishara's support for a terrorist organization, considered that what was relevant were the actions—which, in this case, did not exist—that transform "an idea into reality" and not the rhetoric goals.[194] Therefore, as Navot writes, "it is preferable for undemocratic pressures to find their expression within the legitimate framework of the democracy, and not externally."[195] Clearly, then, the Court consciously opted to distance itself from this highly political dilemma. To conclude, Israeli democracy "is perhaps a 'defensive democracy,' but primarily 'on paper.'"[196]

III. Greece

The example of Greece is relevant, as, for historical reasons, the Greek Constitution does not allow the dissolution of political parties.[197] By contrast, party banning recalled the memory of anti-communism and dictatorial oppression in Greece.[198] Echoing these concerns, the Greek Constitution foresees that political parties "must serve the free functioning of the democratic form of government."[199] Malkopoulou contends that while the Greek model is procedural, the

[185]*See* Mordechai Kremnitzer, *Disqualification of Lists and Parties: The Israeli Case*, *in* MILITANT DEMOCRACY 158 (András Sajó ed., 2004) (showing that it is composed by representatives of Knesset factions and chaired by a Supreme Court judge).

[186]Navot, *supra* note 60, at 94.

[187]EA 1/65 Yeredor v. Central Elections Committee, 19(3) PD 363 (1965) (Isr.).

[188]Navot, *supra* note 60, at 95.

[189]EA 2/84 Neiman v. Central Elections Committee, 39(2) PD 225 (1985) (Isr.).

[190]*See* The Parties Law, 5752-1992, SH 1395 190 (Isr.) (becoming approved in 1992). A party may not be registered if in one of its objectives or actions, explicitly or suggested, is one of the following: "The rejection of Israel's right to exist as a Jewish and democratic state; incitement of racism; support of the armed struggle of enemy states or terrorist organizations against the state of Israel; and a reasonable basis to conclude that the party will be used for illegal activities."

[191]Navot, *supra* note 60, at 96.

[192]EC 11280/02 Central Elections Committee for the Sixteenth Knesset v. Tibi, 57(4) PD 1 (2020) (Isr.).

[193]Bourne & Bértoa, *supra* note 1, at 225.

[194]EA 11280/02 Central Elections Committee for the Sixteenth Knesset v. Tibi, 57(4) PD 177 (2020) (Isr.). *See* Mersel, *supra* note 189, at 481–82.

[195]Navot, *supra* note 60, at 97.

[196]Navot, *supra* note 60, at 105.

[197]*See* Jörg Kemmerzell, *Why There is No Party Ban in the South African Constitution*, 17 DEMOCRATIZATION 687, (2010) (showing that the same goes to the south-African experience).

[198]Malkopoulou, *supra* note 96, at 182.

[199]1975 SYNTAGMA [SYN.] [CONSTITUTION] 29 (Greece).

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Golden Dawn case provoked "a renewed interest" in consecrating militant democratic provisions.[200]

Proscribing of political parties was not on the political agenda until 2012, when the far right and neo-Nazi party Golden Dawn won twenty-one seats in Parliament.[201] Its ascension was thought to be justified by the major financial and economic crisis that tore apart the Greek's social fabric, which triggered the rise of populism. However, as Kouroutakis explains, the latest elections in central and north Europe rebutted "the theory that correlates the rise of nationalism with the austerity measures and the far right parties as a 'refuge of the poor.'"[202]

In most aspects, instead of a constitutional issue, the problem of extremism within political parties was addressed by a "nexus of criminal and administrative law."[203] Political measures were adopted to tackle racist violence, such as creating special units within the police.[204] In 2013, criminal proceedings took place to arrest Golden Dawn leadership[205] for criminal offences, and the Criminal Code was also amended to include certain forms and expressions of racism and xenophobia.[206] Rules for public funding of political parties were amended to incorporate a temporary suspension of financial support in the event of criminal prosecutions and imprisonment of a party leader or one-fifth of a party's members for criminal offenses.[207] Golden Dawn appealed against this legislation. However, the Council of State dismissed all claims.[208]

Following the criminal procedures started on 2013, in 2020, the Athens Criminal Court unanimously declared Golden Dawn a criminal organization operating "under the cover" of a political party and ruled jail sentences for all the defendants.[209]

IV. Spain

After nearly forty years of dictatorship from 1939–1975, during which political parties were illegal, Spain distanced itself from the German model of militant democracy.[210] Provided that they did not use violence and obey the rule of law, all parties were welcomed in the new established democracy. This constitutional design was distinct from the neighbor state Portugal that, after similarly having endured one of Europe's longest dictatorships from 1933−1974, opted for a clear-cut militant constitutional design.[211]

If the Spanish Constitutional Court (SCC) was more cautious after the transition to democracy precisely to encourage political participation through parties, after the democratic consolidation such restraint disappeared.[212]As the SCC ruled, the political character of parties does not convert them into "state's organs."[213] Instead, they are social organizations with "constitutional relevance."[214]

[200]Malkopoulou, *supra* note 96, at 180.

[201]*See* Kouroutakis, *supra* note 13, at 318 (showing that in 2015, Golden Dawn was the third political power in Greece).

[202]Kouroutakis, *supra* note 13, at 318.

[203]Kouroutakis, *supra* note 13, at 318.

[204]Presidential Decree 132/2012, "Organizing departments of response to the racist violence", published in the State Gazette 239, of 11th December 2012.

[205]*See* Malkopoulou, *supra* note 96, at 178 (writing that the leader and its 18 MPs were arrested and jailed for directing or having joined a criminal organization).

[206]Poinikos Kodikas [P.K.] [Criminal Code] 4285:2014 (Greece).

[207]Law 4203/2013, of 17 October 2013.

[208]Decision of the Council of State no. 518/2015.

[209]Malkopoulou, *supra* note 96, at 178.

[210]*See* Bertóa & Bourne, *supra* note 85, at 454. *See also* Roberto Luis Blanco Valdés, *La Nueva Ley de Partidos y la Defensa del Estado*, *in* La Defensa del Estado 124 (Luis López and Eduardo Espín eds., 1999).

[211]See Botelho, *supra* note 29, at 359–66.

[212]Giménez, *supra* note 78, at 360; Víctor Ferreres Comella, *The New Regulation of Political Parties in Spain, and the Decision to Outlaw Batasuna*, *in* Militant Democracy 141 (A. Sajó ed., 2004).

[213]S.T.C., Feb. 21, 1983 (B.O.E., No. 70) (Spain).

[214]S.T.C., Feb. 7, 1984 (B.O.E., No. 59) (Spain).

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Article 6 of the Spanish Constitution very clearly states that:

> Political parties are the expression of political pluralism; they contribute to the formation and expression of the will of the people and are a fundamental instrument for political participation. Their creation and the exercise of their activities are free in so far as they respect the Constitution and the law. Their internal structure and operation must be democratic.

Furthermore, the SCC has determined that, notwithstanding Article 22 of the Constitution mentioning only to the dissolution of "associations," political parties are also to be considered associations for the purposes of that provision.[215]

Nevertheless, and distinctively from the German experience, it is relevant to mention that the possibility of the dissolution of parties that do not respect internal democracy is not consecrated on the Constitution itself.[216] In 2002, Spain's Congress approved by a vast majority the Law of Political Parties, which introduced new procedures to dissolve political parties threatening to undermine the democratic system, including promoting discrimination, legitimizing violence, and supporting a terrorist organization.[217]

The law followed an agreement—the Agreement for Liberties and Against Terrorism—between the governing party, the right-wing Popular Party (PP), and the main opposition party, the Socialist (PSOE).[218] The focus of the proscription was not the ideology, but the concrete actions.[219] The Law of Political Parties did not intend to metamorphose Spain into a militant democracy. As Ferreres Comella ironically wrote, it was a statute aimed to target parties of the "Batasuna-type" and could very well have been baptized as "Statute to Outlaw Batasuna."[220]

In August 2002, Judge Baltasar Garzón of the court of first instance suspended the activities of Batasuna amid a criminal investigation against eleven individuals suspected of terrorism.[221] In 2003, the Supreme Court unanimously dissolved the Basque party, Batasuna,[222] on the ground that it was supporting terrorism.[223] This decision was confirmed by the SCC on January 16, 2004. Simply put, Batasuna stands for the independence of the Basque Country and has close links with the *Euzkadi ta Askatasuma* (ETA)—the Basque Fatherland and Liberty terrorist group.[224]

This case, as well as similar cases related to the disqualification of electoral lists, was referred to the European Court of Human Rights (ECtHR). As predicted by several scholars, the ECtHR found that Spain's ban on Batasuna served a legitimate aim.[225] So far, in all the cases appealed to the ECtHR regarding the disqualification of lists and parties,[226] the ECtHR upheld the rulings of

[215]S.T.C., June 25, 1986 (B.O.E., No. 174) (Spain). *See* Katherine A. Sawyer, *Comment: Rejection of Weimarian Politics or Betrayal of Democracy?: Spain's Proscription of Batasuna Under the European Convention on Human Rights*, 52 AM. U.L.REV., 1531, 1566 (2003).

[216]Leslie Turano, *Spain: Banning Political Parties as a Response to Basque Terrorism*, 1 INT'L J. CONST. L. 730, 731 (2003).

[217]Law of Political Parties art. 9 (B.O.E. 2002, 154) (Spain). *See* Bertóa & Bourne, *supra* note 85, at 454.

[218]Comella, *supra* note 212, at 133.

[219]Navot, *supra* note 60, at 101.

[220]Comella, *supra* note 212, at 146.

[221]Comella, *supra* note 212, at 134.

[222]Combined rulings of the Spanish Supreme Court no. 6/2002 and no. 7/2002, of 27 March 2003.

[223]*See* Turano, *supra* note 224, at 738–40.

[224]Comella, *supra* note 216, at 134.

[225]Eva Brems, *Freedom of Political Association and the Question of Party Closures*, *in* POLITICAL RIGHTS UNDER STRESS IN 21ST CENTURY EUROPE 120, 169 (Wojciech Sadurski ed., 2006); Sawyer, *supra* note 215, 1567; Thomas Ayres, *Batasuna Banned: The Dissolution of Political Parties Under the European Convention on Human Rights*, 27 B.C. INT'L COMP. L. REV. 99, 100 (2004).

[226]*See* Herri Batasuna and Batasuna v. Spain, App. Nos. 25803/04, 25817/04, (June 30, 2009), https://hudoc.echr.coe.int/?i=001-193789; Etxeberría and Others v. Spain, App. Nos. 35579/03, 35613/03, 35626/03, 35634/03, (June 30, 2009), https://hudoc.echr.coe.int/?i=001-105175; Herritarren Zerrenda v. Spain, App. No. 43518/04, (June 30, 2009), https://hudoc.echr.coe.int/?i=001-193795.

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the Spanish courts.[227] On the Batasuna case, and anchoring on Articles 10(2) and 11(2) of the European Convention on Human Rights, the ECtHR considered that the close link between Batasuna and the terrorist organization ETA could be considered as an "objective threat to democracy."[228]

V. Turkey

Inspired by the German example, the 1982 Turkish Constitution recognized a "militant" type of democracy.[229] The Turkish Constitution states that the Republic of Turkey is a "democratic, secular, and social State based on the rule of law, respectful of human rights in a spirit of social peace."[230]

In the first decade, in most respects, the judiciary banned several parties for formal reasons, such as names or symbols. After that, laws on political parties were focused on ideology—the United Communist Party of Turkey—Kurdish nationalism, or faith—Islamic parties.

In 1998, the Turkish Constitutional Court (TCC) dissolved the largest party in the country, the Refah Party.[231] The banning was very interesting as, contrary to all the cases that we have previously revisited, the outlawed party was not irrelevant or a minority party, but it was the main political party, whose leader, Necbettin Erbakan, was the Prime Minister of Turkey. One might query: Should the Turkish example be considered as super-militancy?[232]

All things considered, Refah was the ruling party by then in a coalition government. It sustained a so-called plural system, whereby citizens of different faiths were allowed to select the legislation, for example, Sharia, regulating certain aspects of their life, such as family and inheritance law.[233] The TCC ruled that this violated the constitutional principles of secularism and the prohibition of non-discrimination.[234]

As far as the ECtHR is concerned, its jurisprudence recognizes the right to associate in political parties as falling within the scope of the freedom of association.[235] On the Refah case, the ECtHR upheld the ban, as the party's support of violence and religious discrimination contradicts the freedoms guaranteed by the European Convention on Human Rights.[236] To conclude, "implicitly"[237] to some, or "explicitly"[238] to others, the ECtHR uplifted militant democracy into a constitutional value at the European level.[239]

[227]BOURNE, *supra* note 74, at 46.

[228]*Batasuna,* App. No. 25803/04 at para. 89.

[229]Bertóa & Bourne, *supra* note 85, at 458.

[230]*See* Dicle Kogacioglu, *Progress, Unity, and Democracy: Dissolving Political Parties in Turkey*, 38 L. SOC'Y REV. 433, 434 (2004). *See also* 1982 ANAYASA [CONSTITUTION] art. 2 (Turk.).

[231]Patrick Macklem, *Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination*, 4 INT'L J. CONST. L. 488, 507–08 (2006).

[232]TYULKINA, *supra* note 35, at 169–84 (arguing that Turkey has "misinterpreted and misused the militant democracy mechanism," as it "uses it to protect a corrupted version of secularism and without observing the pre-conditions of a legitimate militant democracy").

[233]Accetti & Zuckerman, *supra* note 7, at 192; Macklem, *supra* note 239, at 508–09.

[234]Mersel, *supra* note 97, at 86.

[235]*See* Socialist Party and Others v. Turkey, App. No. 20/1997/804/1007, (May 25, 1998), https://hudoc.echr.coe.int/?i=001-58172; Freedom and Democracy Party (ÖZDEP) v. Turkey, App. No. 23885/94, (Dec. 8, 1999), https://hudoc.echr.coe.int/?i=001-58372; Yazar v. Turkey, App. Nos. 22723/93, 22724/93, 22725/93, art. 11 (Apr. 9, 2002), https://hudoc.echr.coe.int/?i=001-66984.

[236]Malkopoulou, *supra* note 96, at 181, n.15.

[237]Accetti & Zuckerman, *supra* note 7, at 192.

[238]Macklem, *supra* note 231, at 508; Comella, *supra* note 212, at 145; Stephan Stohler, *Giving Succor to Extremism? Judicial Behavior Toward Extreme Speech in Constitutional Democracies*, 10 J. L. & CTS. 287, 287 (2022) (arguing that the Strasbourg Court is "substantially less likely to support free speech in cases involving extremist claimants or extreme speech").

[239]Refah Partisi (The Welfare Party) and Others v. Turkey, App. Nos. 41340/98, 41342/98, 41343/98, 41344/98, (July 31, 2001), https://hudoc.echr.coe.int/?i=001-59617.

https://doi.org/10.1017/glj.2023.117 Published online by Cambridge University Press

F. Conclusions

This Article has endeavored to unveil a symbiotic relation between democracy and parties. Drawing out exactly what this means is trickier than it might seem. Democracy is needed in order to maintain parties, and parties are needed in order to maintain democracy. Therefore, and as Flores Giménez wrote, "if political parties exist within evolving societies, it means that the parties themselves can evolve."[240]

Yet not all is well in the land of political parties' regulation. At this juncture, liberal democracies address regulation of political parties in distinct ways. Our positive theory suggests that these differences reflect concerns about false positives and false negatives. The empirical findings document that variance in regulation of political parties is associated with broader concerns about freedom. Thus, diverse approaches to regulating political parties are embedded in social preferences and priorities that vary across jurisdictions.

Normative disagreement about the proper regulating of anti-democratic parties and distinct concerns about false positives and false negatives converge in explaining why different countries have taken different routes. From a comparative constitutional studies perspective, one size does not fit all. For example, the empirical results suggest that perceptions about freedom are more relevant than the specifics of election law in explaining variance.

In sum, "illimited relativism,"[241] or as we prefer to call it—the absolutism of relativism—can challenge the enforcement of human rights and the quality of democracy. Social inequalities, corruption, and populism are so very much a threat, or a reality, even in the so-called consolidated democracies. Hence, the "democratic project"[242] is perhaps never entirely fulfilled.

Remarkably, almost four decades ago, Otto Pardo warned about what he called "the illusion of the legal scholars,"[243] when believing that the mere consecration of norms in a constitution would suffice to magically prevent some political forces from striking down democracy through the democratic process itself.

To be perfectly clear: The world has changed. Not all revolutions are bloody revolutions in the streets. Several illiberal states maintain a façade of a minimum of democratic traits. In so doing, extremism works by manipulating the existing legal arenas. Simply put, as extremists "operate in a world of legalism,"[244] procedural democracy will not be able to address them.

Again, militant democracy and party banning might not be the most intellectually sophisticated and normatively dense strategies to restrain illiberal democracy, but at least it offers a solution, even if it is a fragile one. Thus, the idea would be not a maximum of freedom, but an optimum of freedom—that responds to difficult trade-offs such as false positives and false negatives.[245] As a result, merely striking down these responses without offering alternatives conspicuously fails to consider the bigger picture and surrenders to "political quietism."[246] For one thing, strict procedural democracy "is an unsatisfying response."[247] To conclude, and as Wilkinson astutely outlined, at least regulation on the proscription of political parties reassures the public "that something is being done."[248]

Supplementary material. To view supplementary material for this article, please visit https://doi.org/10.1017/glj.2023.117

[240]Giménez, *supra* note 78, at 356.

[241]Konrad Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland 298 (1999).

[242]Amnon Lev, *Democratie und Menschenrechte*, *in* Menschenrechte: Philosophische und juristische Positionen 59, 81 (Hans-Helmuth Gander ed., 2009).

[243]Ignacio de Otto Pardo, Defensa de la Constitución y partidos políticos 56–58 (1985).

[244]Scheppele, *supra* note 118, at 262. *See* Schupmann, *supra* note 39, at 257.

[245]Höver, *supra* note 53, at 7.

[246]Schupmann, *supra* note 39, at 256.

[247]Schupmann, *supra* note 39, at 256.

[248]Paul Wilkinson, Terrorism Versus Democracy: The Liberal State Response 113 (2000). *See* Tyulkina, *supra* note 35, at 38. *See also* Gordon, *supra* note 92, at 391 (stating similarly about the German experience with banning the Socialist Reich Party).

Acknowledgement. We thank Adam White, Alkmene Fotiadou, Ana Horvat Vuković, Anne Peters, Andrej Kristan, Andrew Geddis, Bronius Sudavičius, Cristina Samboan, Dario Čepo, Demirhan Burak Celik, Elizabeth Hicks, Felipe León Carmona, Gonzalo Ramírez Cleves, Guillaume Tusseau, Holger Hestermeyer, Irene Spigno, Jean-François Gaudreault-DesBiens, Jeong-In Yun, Johanna Fröhlich, Kári Hólmar Ragnarsson, Lilla Nóra Kiss, Konstantinos Kombos, Leonard Besselink, Luísa Netto, Marco Olivetti, Marjan Kos, Martin Belov, Matthias Klatt, Maxim Tomoszek, Maxime Saint-Hilaire, Melanie Maurer, Mikele Schultz-Knudsen, Norbert Tribl, Olivier Rozenberg, Paloma Krõõt Tupay, Patricia García Majado, Patricia Popelier, Patrik Bremdal, Samo Bardutzky, Paul Craig, Satoshi Yokodaido, Tomáš Ľalík, Wojciech Brzozowski, Yaniv Roznai, and other anonymous colleagues for assisting us in gathering the relevant data and/or for recommending literature. Madeline Conn provided excellent research assistance. The usual disclaimers apply.

Funding. The authors declare none.

Competing Interests. Both authors have contributed to our submission in equal terms.

Cite this article: Santos Botelho C, Garoupa N (2023). Regulating Parties by Constitutional Rules in Liberal Democracies. *German Law Journal* **24**, 1648–1676. https://doi.org/10.1017/glj.2023.117