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

This article asks under what circumstances may democratic governments act (perhaps, must they act) to ensure that their state apparatus not be captured wholesale for socially destructive forms of intolerance. The problem of democratic intolerance takes on special meaning in deeply fractured societies, in which the electoral arena may serve as a parallel or even secondary front for extraparliamentary mobilizations. Such democratic societies are not without recourse to the threat of being compromised from within. At the descriptive level, the prime method is the prohibition on extremist participation in the electoral arena, a practice that exists with surprising regularity across the range of democratic societies. Seemingly the world has learned something since the use of the electoral arena as the springboard for fascist mobilizations to power in Germany and Italy.

The primary concern in this article is with the institutional considerations that either do or should govern restrictions on political participation, with particular attention to how these have been assessed by reviewing courts in a variety of countries, including Germany, India, Israel, Turkey, the Ukraine, and the United States. The article distinguishes among the types of parties that may be banned or impeded, with the greatest

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1 Reiss Professor of Constitutional Law, New York University School of Law. This paper benefited from early presentations at Tel Aviv University and Hebrew University, and subsequent exposition at the NYU Colloquium on Legal, Political and Social Philosophy and at the University of Chicago Law School. I received particularly helpful comments from Cynthia Estlund, Noah Feldman, Ron Harris, Rick Hills, Barak Medina, Richard Pildes, Catherine Sharkey, Jeremy Waldron and Justice Aharon Barak. The views expressed should, of course, be attributed to no one but myself. I was also greatly helped by the research assistance of Camden Hutchison, Teddy Rave, Ian Samuel and Josh Wilkenfeld.
attention being given to mass antidemocratic parties that actually seek to win elections. Further lines are drawn among types of prohibitions, ranging from the use of criminal sanctions in the U.S. to party prohibitions in most European countries to restrictions on electoral speech and conduct in India. Ultimately, the argument is that democratic societies must have weapons of self-preservation available to them, but that strong institutional protections must be in place before they may be deployed.

**Introduction**

The recent controversy surrounding the Danish cartoons mocking Islam provides an illuminating window on the problem of what may be termed democratic intolerance. Although the political maneuverings and machinations surrounding the sweeping protests were no doubt multifaceted, the core controversy centered on Islamic demands that Denmark be held responsible for its failure to censor the publication of a series of cartoons perceived to be blasphemous attacks on the prophet Mohammad. In commenting on the publication of these cartoons, Ronald Dworkin provocatively proclaimed a right to insult, an argument both moral and instrumental that weak or unpopular minorities must be able to tolerate social insult as a condition of making a claim on the majority for protective antidiscrimination legislation: “If we expect bigots to accept the verdict of the majority once the majority has spoken, then we must permit them to express their bigotry in the process whose verdict we ask them to accept.”

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

At bottom, Dworkin’s argument is an intriguing rallying call for democracies to stand fast against the demand by intolerant groups that democracies lend their governmental authority to the cause of silencing

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2 The term is a loose adaptation of a major contribution to this debate, Gregory H. Fox & Georg Nolte, Intolerant Democracies, 25 HARV. INT’L L. J. 1 (1995).
offending speech. Posed as a question whether democratic regimes should enlist their arsenal of repression in the suppression of unpopular or discordant or simply intemperate speech, the civil liberties answer seems inescapable. Just as a liberal democratic state, such as Denmark, would no doubt prohibit itself from such censorship, no legitimate claim could be made that it enlist its state resources toward such aims on behalf of others. Simply put, democratic tolerance should not succumb to claims for censorship demanded by forces of intolerance.

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

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

From a historical standpoint, it is clear that the inquiry is far from abstract. Hitler’s final push to power occurred within the confines of Weimar democratic processes, something that allowed Joseph Goebbels tauntingly to remark, “This will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed.”6 Nor were the Nazis the last antidemocratic forces to lay siege from within the confines of the electoral process.7 The ability of extremism to find its way into the protective crevices of a liberal protective order gave

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6 Quoted in Fox & Nolte, supra note ___, at 1.
7 For a discussion of the capture of a commanding electoral claim in Algeria, see Fox & Nolte, supra note ___. Algeria witnessed a seizure of power by the military to forestall an elected Islamic party assuming power and carrying out its program of dismantling multiparty democracy. An interesting recent variant is found in the curious letter sent by Iranian President Mahmoud Ahmadinejad, himself elected in apparently legitimate elections, to President Bush articulating the claim that current developments had shown the ultimate failure of liberal democracy itself. Letter from Mahmoud Ahmadinejad, President of Iran, to George W. Bush, President of U.S. (May 9, 2002) http://news.bbc.co.uk/1/sharedbsp/hi/pdfs/09_05_06ahmadinejadletter.pdf).
rise to the idea of “militant democracy,” \textsuperscript{8} or, more recently, “illiberal democracy.” \textsuperscript{9}

The problem of democratic intolerance takes on special meaning in deeply fractured societies, \textsuperscript{10} in which the electoral arena may serve as a parallel or even secondary front for extraparliamentary mobilizations. In the current conflict in the Middle East, for example, Noah Feldman well captures the futility of assuming that democratic politics is the sole or even the primary arena of struggle: “The model of Islamist organizations that combine electoral politics with paramilitary tactics is fast becoming the calling card of the new wave of Arab democratization.” For Feldman, “[t]he fact that Hamas and Hezbollah pursue democratic legitimacy within the state while also employing violence on their own marks a watershed in Middle Eastern politics.” \textsuperscript{11}

Democracies are not without recourse to the threat of being compromised from within. At the descriptive level, the prime method is the prohibition on extremist participation in the electoral arena, a practice which exists with surprising regularity across the range of democratic societies. States can restrict speech within the electoral arena, as India has done with its prohibition on any campaign appeals to religious intolerance or ethnic enmity. Other states forbid the formation of parties hostile to democracy, as Germany has done in banning any successors in interest to the Nazi or Communist parties, and has recently acted to ban an Islamic fundamentalist movement, the Caliphate State. \textsuperscript{12} Yet others impose content restrictions on the views that parties may hold, as with the requirement in Turkey of fidelity to the principles of secular democracy as a condition of eligibility for elected office. Similarly, Israel through its Basic Law excludes from the electoral arena any party that rejects the democratic and Jewish character of the state, as well as any party whose platform is deemed an incitement to racism. \textsuperscript{13} Other countries specifically ban designated parties, as evident by the practice in several of the former Soviet Republics that bar their local communist parties from seeking elected office, as has the United States. And others prohibit parties that are deemed to be fronts for terrorist or paramilitary

\textsuperscript{8} The term is from Karl Loewenstein, \textit{Militant Democracy and Fundamental Rights}, 31 \textit{AM. POL. SCI. REV.} 417 (1937).
\textsuperscript{9} Fareed Zakaria, \textit{The Future of Freedom: Illiberal Democracy at Home and Abroad} 17 (2003).
\textsuperscript{10} This term describes societies riven by ethnic or religious divides, in which political alignments were largely a reflection of prepolitical allegiances based on kinship of some kind. See Samuel Issacharoff, \textit{Constitutionalizing Democracy in Fractured Societies}, 82 \textit{TEX. L. REV.} 1861 (2004).
\textsuperscript{12} See Peter Niesen, \textit{Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties}, 3 \textit{GERMAN L. J.} No. 7 (2002).
\textsuperscript{13} Basic Law: The Knesset, Section 7a.
goups. Thus, Spain has recently banned Batasuna, a political party sharing the objectives of the Basque separatist ETA insurgents, from any participation in Spanish or European parliament elections.14

The list could go on at some length, and the scope of the restrictions has expanded in the aftermath of September 11th and the press of Islamic militancy.15 The key point, however, is not the ubiquity of the prohibitions, but the rationale for them. All these societies recognize that the electoral arena is not simply a forum for the recording of preferences, but a powerful situs for the mobilization of political forces. Elections serve to amplify the ability of all political forces to disseminate their views. They also provide a natural medium for partisans to have their passions raised and to provoke frenzied mob activity. If elected to parliamentary office, even fringe extremist groups typically enjoy parliamentary immunity for incitement from the halls of power. Under most national laws, they can command official resources for their electoral propaganda. And, as with the fascist rise to power in Europe, they can use their positions in parliament to cripple any prospect of effective governance, destabilize power, and launch themselves as successors to a failing democracy.

Whatever the inherent difficulties in the use of state authority to enforce codes of democratic exchange, the problems are presented most acutely in the electoral arena. Seemingly the world has learned something since the use of the electoral arena as the springboard for fascist mobilizations to power in Germany and Italy. Perhaps as well, lessons have been learned that appeals to communal intolerance in countries like India, even if conducted in the safe harbor of democratic processes, lead almost invariably to communal violence in which election rhetoric is a façade from which antidemocratic forces rally the faithful. At some level, all these countries grapple with an intuition that democratic elections require as a precondition to the right of participation a commitment to the integrity of the democratic process.16

At the same time, limiting the scope of democratic deliberation necessarily calls into question the legitimacy of the political process. When stripped down to the essential, all definitions of democracy return ultimately to the primacy of electoral choice and the presumptive claim of the majority to rule. It is of course true that this thin definition of democracy cannot stand

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16 An interesting example is the argument by Justice Barak that there should be a distinction between registering a party (more protected) and banning it from electoral activity (a state protective move). P.C.A. 7504/95, 7793/95, Yassin & Rochley v. The Parties Registrar & Yemin Israel. I return to this point later.
alone, for all electoral systems must assume a background set of rules, institutions, definitions of eligible citizenship that serve as preconditions to the exercise of any meaningful popular choice. And all democracies of the modern era have constitutional constraints that cabin in substance and through procedural hurdles what the majority may do at any given point. But a distinct set of problems emerges whenever a society decides that certain viewpoints may not find expression in the political arena and may never be considered as a contender for popular support.

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

Liberal political theory generally seeks refuge in two arguments, which are certainly important, although insufficient. The first is the historic understanding that the best antidote to bad speech is more speech. The core tradition of free expression, brought to American law forcefully in the famous dissents of Justices Brandeis and Holmes, is to anticipate that the good will prevail in the marketplace of ideas. On this view, suppression of speech is not only ineffective, but likely counterproductive. Only a threat of tremendous immediacy justifies suppression, otherwise, “[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.” The second is a historic quietism that ultimately not much can protect the people from their doom, if that is their charted course. This is found not only in Holmes’s view that judicial invocation of the

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17 This theme is developed at length in the opening sections, and indeed throughout, the treatment presented in SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY (2d ed. 2001).
18 RAWLS, supra note ___, at 217.
19 Id. at 219.
20 Id.
21 The classic account being ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).
constitution cannot thwart a pronounced desire of society to do itself in, but in a broader claim by the Framers that this was a matter of democratic entitlement. Hence Hamilton proclaimed forcefully that “a fundamental principle of republican government” would reserve a right to the people to “alter or abolish the established Constitution, whenever they find it inconsistent with their happiness.”

Even without delving too deeply into the realm of jurisprudence, it bears noting that this has not been a major concern of liberal theory of late. By and large, contemporary liberal theory draws its animating principles from the relation of the individual to the state, primarily through the rights-based defenses that the individual may invoke against state authority, and secondarily to claims of justice that individuals may assert for just rewards from and dignified treatment by the society as a whole. There are of course conflicts that emerge when rights claims by some individuals would impose a burden on others. But these too are limitations on the rights claims of individuals against the state and not generally framed as obligations of the state as such. It is not that the question of enforceable terms of societal interactions are unknown to liberal theory. Jeremy Waldron, for example, finds it useful to frame some fundamental dignitary rights claims as a species of “public goods” and concludes “there should be no difficulty at all in expressing them as human rights, no problem accommodating them to the idiom of that particular discourse.” Rather, it is simply that the juxtaposition between state and individual is where the action is and has been. Further, it is clear that the language of human rights has come to

23 The classic expression is found in Gitlow v. New York, 268 U.S. 652, 673 (1923) (Holmes, J., dissenting) (“If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”) As Justice Holmes elaborated in claiming that it was not the job of the judiciary to stand in the way of popular sentiment, “If my fellow citizens want to go to Hell I'll help them. It's my job.” Oliver Wendell Holmes to Harold Laski, March 4, 1920, 1 HOLMES-LASKI LETTERS 249 (Harvard University Press 1953).

24 See The Federalist No. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961)

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

26 See, e.g., JOSEPH RAZ, THE MORALITY OF FREEDOM 202 (Oxford University Press 1988) ("It is difficult to imagine a successful argument imposing a duty to provide a collective good on the ground that it will serve the interests of one individual").

27 WALDRON, supra note ___, at 354. Waldron argues that such communal goods should not be expressed as individual rights, but that leaves open the question of whether they should be expressed as rights adhering to a society or government.
embrace an individual right of democratic participation into the core values of political liberty, again placing the individual in opposition to the state in terms of democratic values.  

There are of course areas where liberal theorists are eager for the state to act in the name of greater principles of democratic integrity. A particularly salient example in the U.S. is in the area of campaign finance regulation, in which there is widespread support from many liberal quarters for limitations on not only contributions but expenditures. Notably in this area, however, the first move is necessarily to deny the rights claim on the other side of the equation, following in one form or another the admonition of Judge Skelly Wright that "money is not speech." Only then is there a demand that the state act to control access to the political process. It is hard to make a comparable move in the area of prohibitions on participation in the electoral arena. No matter how circumscribed the view of rights protections might be, there is no higher plane for protection of expression than in the domain of politics pure and in the ability to present ideas about the governance of society and candidates committed to that view.

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

My concern in this piece, however, is with the institutional considerations that either do or should govern restrictions on political participation, with particular attention to how these have been assessed by reviewing courts. Initially, let me set out four considerations that courts and legislatures have grappled with in trying to set the parameters of democratic participation from the most general to the most institutionally specific:

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1) May a state draw a line on participation in the democratic process, excluding from the right of participation those who fall on the other side of the line?

2) If so, where does that line lie? Is it based on the ideological positions of the contested party or must it turn on considerations of immediacy of danger?

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

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

I. American Exceptionalism.

The American law governing the prohibition on antidemocratic groups freely espousing their views has settled around the “clear and present danger” test first developed in the dissenting and concurring opinions of Justices Holmes and Brandeis. These great opinions combine rhetorical force and the inevitable sense of not having succumbed to the passions of the times, certainly a tribute to the institutional role that a judiciary is supposed to play in times of panicked assaults on civil liberties. Although rejected in their time, these opinions came to dominate American law, as carefully chronicled by Geoff Stone. Under the Holmes/Brandeis test, there is a heavy presumption in favor of free expression, a presumption that is overcome only by the imminence of direct harm. Only where the likelihood of harm is established and the prohibitions are carefully confined to the perceived threat can governmental prohibitions be justified.

In a series of cases challenging the Smith Act prosecutions of Communist Party members during the McCarthy Era, the Brandeis/Holmes opinions became controlling doctrine, most notably in Dennis v. United States, the leading case upholding the McCarthy era prosecutions of the Communist Party. The clear and present standard, regardless whether it was properly applied in Dennis, is looked to both because it assigns great value to speech for its own sake and sets up a significant hurdle of proving immediacy of harm before the government may act. In effect, Dennis collapses the prohibition on political agitation into the conduct required for the criminalization of the underlying speech. The assumption in the clear and present danger test is that there should be no margin between the criminal code and state-imposed restrictions on political speech. Thus, for

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33 341 U.S. 494 (1951).
example, in his criticism of the Court in *Dennis*, Professor Stone chastises the Court for allowing the Communist Party to be the subject of legal restraints short of the full standards of the criminal code: “to the extent there was criminal conduct, the individuals should have been investigated and prosecuted for their crimes. That is quite different from prosecuting other people – the defendants in *Dennis* – for their advocacy of Marxist-Leninist doctrine.”

I do not want to take issue with Stone’s concerns about the relaxing of the standards for criminalizing speech in the U.S. so much as to address the limitations of the clear and present danger test outside the American context. Not only is the “clear and present danger” test now controlling doctrine in the U.S., but it is looked to by courts in many parts of the world for insight into how they should respond to the threat of antidemocratic incitement. In large part, this is a response to three interesting, but largely underappreciated features of American law.

First, the characteristic response in the U.S., from the Palmer raid period following World War I to the anticommunist prohibitions following World War II, has been to enforce political prohibitions largely through the criminal code. As a result, the issue of freedom of political expression becomes inextricably bound up with the standards for criminal prosecution, including the burdens of proof and the heightened requirements of specificity of the statutory prohibitions. Critics of the American constitutional treatment of free speech have focused on this central feature of American law without full appreciating how distinct it is on the world stage. Thus, for example, Martin Redish, in writing about *Dennis*, declares that “[i]t clearly was, as one historian has described it, little more than ‘a trial of ideas,’ something more appropriately associated with a totalitarian society than what is supposedly a constitutional democracy.” Assuming that the primary form of electoral regulation must be through criminal prosecution is a precondition for Professor Redish to assert that “[i]t is only by assuring that all views . . . are protected can a democratic society survive in any meaningful sense of the term.”

Before sweeping quite so broadly, it is worth pausing to consider how susceptible to generalization the American cases have been. A great deal of the doctrinal work under the First Amendment’s treatment of political speech owes to the specific question that is typically presented in American courts: whether the speech in question is sufficiently inciteful of criminal conduct so as to sustain a criminal prosecution. The landmark cases tended to be either criminal cases (such as *Brandenburg v. Ohio*), *Cohen v. California*, and so

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34 Stone, supra note __, at 410.
36 Id. at 100.
forth) or, “in non-criminal cases such as New York Times v. Sullivan,” the “primary argumentative device” became “the quick (some would say too quick) analogy to the criminal prosecution.” 39 For Professors Schauer and Pildes, “the quick judicial assimilation of all content-based regulations to the criminal law prohibition model” 40 is ill-advised; “different modes of regulation structure might justify different First Amendment responses.” 41 When regulations “do not take the form of criminal prohibitions, courts should not deploy doctrines whose purposes are not actually implicated by the particular context of regulation.” 42

Second, there is a structural dimension to the American response to marginal antidemocratic groups that needs to be weighed in the balance. Over the years, I have resisted the easy claim that proportional representation systems are inherently unstable or even responsible for the rise of fascism, 43 a claim that has even made its way into Supreme Court discussions of the role of the extent to which the two major parties may be protected from electoral competition. 44 Certainly the exceptional characteristics of American democratic practices should dictate some caution before proclaiming their superiority, let alone preferability. After all, the American system of districted legislative elections and independent presidential selection is certainly not the norm in democratic societies. None of the recent democracies created in the aftermath of the collapse of the Soviet empire has attempted to recreate American style governance. Nor did the U.S. try to impose it in efforts to establish democratic governance in regions over which it maintained military control, as in Germany, Japan or Iraq.

Whatever my reluctance on this score, I have now come to the conclusion that there is indeed something in non-parliamentary, non-proportional representation political systems that does provide a buffer against antidemocratic forces, perhaps explaining why the American law is decidedly directed to the truly marginal behavior that might rise to the level of a criminal offense. There is a well trod path in political theory running through Hotelling, 45 Downs, 46 and Duverger 47 explaining the propensity of

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40 Schauer & Pildes, supra note ___ at 1832-33.

41 Id.

42 Id.

43 For an extended discussion of this point, see Richard H. Pildes, Democracy and Disorder, 68 U. Chi. L. Rev. 695, 715-17 (2001).


single-seat, single-winner elections to produce two and only two relatively stable, relatively centrist parties. Third-party efforts and fringe parties, to the extent they can gain electoral traction, tend to tip the scales to the major party furthest from them, thereby dissuading even the polar supporters of the major parties from joining spoiler efforts. Think Ross Perot in 1992 and Ralph Nader in 2000 for shorthand, recent versions of the sophisticated political theory underlying this insight.

Because districted elections force the governing coalition to form before the election and to run as a political party, the inclusion of extreme candidates discredits the entire slate and forces them to the margin. As a result, extreme candidates face formidable hurdles attaining legislative office. This in turn means that they do not readily achieve the immunity from criminal prosecution for incitement that comes with parliamentary office, do not have access to state funds for their political crusades, and are deprived meaningful access to political debates formed around the question of who should govern. To the extent that extreme parties try to use the electoral arena, the structural barriers to meaningful access marginalizes them. Their contributions to the public debate are duly set off on local public access stations where they compete for time with the purveyors of the conspiracy trade and their endless obsessions with fluoridation of the water supply, the latest permutation of the Kennedy assassination, or “proof” that September 11th was an inside job.

A further buffer is created by presidential rather than parliamentary governance. Even were an extremist party to find its way into Congress, its ability to disrupt governance would be limited. Marginal parties in the legislature in a presidential system cannot command a bloc of votes in the parliament that can be used to bring down a shaky coalition government through no-confidence votes or other parliamentary devices. Thus, unlike the National Socialists in Germany they would be unable to wear down the government by disruptive tactics in parliament. Further, unlike fringe parties in many proportional representation systems, Israel being the prime example, they would not be able to leverage their small presence in parliament into significant commands on public policy. Presidentialism puts the choice of head of state in the hands of the national electorate, not in the ability of fractured parliamentary leadership to forge a governing coalition and, in turn, to be able to accommodate the last hold-outs necessary to put them over the

\[46]\textit{Anthony Downs, An Economic Theory of Democracy} 115-17 (1957)\ (applying the spatial market approach to describe competition for the median voter as key to winning two-party elections).

\[47]\textit{Maurice Duverger, Political Parties} (3d. ed. 1963)\ (coining “Duverger’s Law” that in first-past-the-post elections there would be two and only two relatively centrist parties).
Finally, there is the unmistakable stability of politics in the U.S., a stability that perhaps leads Americans to undervalue the need to protect the democratic processes elsewhere from real threats, even those masquerading as contenders for democratic election. The 20th century witnessed two world wars, at least four regional wars, a protracted stand-off with a major foreign power, two presidential assassinations, two presidents who died in office, a major depression followed by a significant overhaul of the administrative state, a major upheaval in race relations, and through it all the same two political parties remained in charge. Despite hard fought elections and periodic social unrest, changes in governance were incremental and the electoral system remained intact at all times. Indeed, perhaps uniquely among democratic states, the U.S. has held regular elections during wartime, even during the Civil War. The short of it is that the U.S. has been a remarkably stable political system since the Civil War.

It is possible that the seeming doctrinal attachment to strong protections of political organization in the U.S. may be attributable to some unique variables, beginning with the comparative political stability of 20th century America relative to more embattled, more fragile democracies. That stability is enhanced by the distinct electoral structures in the U.S. which marginalize minor parties from governance. Further, as a doctrinal matter, it is quite likely that the propensity toward criminal prosecutions of political dissidents in the U.S. has also contributed to the lack of an administrative law of electoral exclusion. All of these features are important, but the unique national setting should dictate caution in readily attempting to export the clear and present danger test to the administrative prohibition on political participation in much more fragile institutional settings.

The clear and present danger test aptly captures the stakes in the criminal prohibition of organizations whose aims are fundamentally antithetical to democracy and who are being charged, in effect, with unlawful conduct. As will be developed below, the threat of criminal conduct by marginal groups captures only a subset of the threats faced by democracies, particularly in far less stable national settings. In such circumstances,

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48 For an overview of the propensity in Latin America toward overconcentration of power in the executive, see Scott Mainwaring & Matthew Soberg Shugart, Presidentialism and Democracy in Latin America (Cambridge Univ. Press 2003). Another leading treatment of this issue in Latin America is found in Juan J. Linz, Presidential or Parliamentary Democracy: Does It Make A Difference?, in The Failure of Presidential Democracy 3 (Juan J. Linz & Arturo Valenzuela eds., 1994) For advocacy of parliamentarism to replace the independent selection of the president in the U.S., see Bruce Ackerman, The New Separation of Powers, 113 Harv. L. Rev. 633, 639 (2000).
unfortunately, a focus on the immediacy of the threat of unlawful activity is insufficient to capture the gravity of the threat.

II. Typologies of Prohibitions.

Most discussions of restrictions on antidemocratic groups begin (and tend to end) with the question whether a democracy has the right to impose viewpoint constraints on extreme dissident views. Professors Fox and Nolte, for example, in their important contribution to the debate devote their primary attention to the ability to restrict political participation consistent with international law, particularly the guarantees of the 1966 International Covenant on Civil and Political Rights. The responses to Fox and Nolte assume the same analytic framework and challenge the capacity of any society to police the boundaries of something as nebulous as “democracy” and more so whether the remaining product is worthy of the name: “[i]f one is to say to the people, in essence, ‘the fundamental principle of democracy dictates that you can have any government except the one the majority of you presently think you want,’ there had better be a more compelling argument for democracy than that it enables the people to choose. There is nothing intrinsically valuable about choosing among undesired options.” Although these critiques take a back seat to claims that suppression does not work, all of these arguments tend to lump together the different sorts of responses that might be deployed against antidemocratic threats.

Rather than start from the question whether a prohibition of antidemocratic forces may be had, I prefer to start by asking what kinds of prohibitions are being contemplated. Here, I depart considerably from the American case law, which collapses the question into the standards associated with justified criminal sanctions. The question presented in this section is what are the forms of political restraint that operate outside the bounds of the criminal justice system. In short form, the inquiry concerns the existence of a space between the standards that justify incarceration and those that might suffice to justify a prohibition on electoral participation. Put simply, are there methods to suppress antidemocratic political mobilizations that are distinct from criminally prosecuting their adherents and can they be justified even if we would not tolerate incarceration for those who share the antidemocratic viewpoints?

49 See Martii Koskenniemi, Brad Roth, Gregory Fox & Georg Nolte, Responses, 37 Harv. Int’l L.J. 231, 236 (1996) (Roth) (“‘democracy’ has in recent parlance been transmogrified into a repository of political virtues . . . [t]he consequence of this indeterminacy is that ‘democracy’ becomes identified with whichever choice engages our sympathies”).

50 Id.

In rough form then, we should consider three different approaches to antidemocratic mobilizations in the electoral arena that are distinct from criminal prosecutions of the advocates of the underlying positions: first, an electoral code governing the content of political appeals; second, a proscription of political parties that fail to accept some fundamental tenet of the social order; and, third, a ban on some political parties enjoying the use of the electoral arena, even if permitted to maintain a party organization.

A. Content Restrictions on Electoral Speech.

Hinduism will triumph in this election and we must become hon’ble recipients of this victory to ward off the danger on Hinduism, elect Ramesh Prabhoo to join with Chhagan Bhujbal who is already there. You will find Hindu temples underneath if all the mosques are dug out. Anybody who stands against the Hindus should be showed or worshipped with shoes. A candidate by the name Prabhoo should be led to victory in the name of religion.52

Thus runs a typical speech from an extreme Hindu nationalist agitator, Bal Thackeray, made during a campaign appearance on behalf of a local candidate of the extremist Shiv Sena party. That the ideas are coarse is not a subject of meaningful debate, even if the cultural significance of being shown shoes does not readily cross all national frontiers. Thackeray is a rather notorious political operative in Bombay, a city that he was instrumental in renaming Mumbai. Among his sources of political inspiration he counts Adolf Hitler, whom he characterizes as “an artist who wanted Germany to be free from corruption.”53

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

52 Prabhoo v. Kunte, 1996 AIR 1113 (Supreme Court of India, 1996), at 6 (emphasis added).
In 1992, agitation turned to reality when a Hindu mob destroyed the mosque and then attacked other Muslim sites and homes in Ayodhya. The ensuing ethnic riots left thousands dead in a wave of communal violence not seen since the initial partition of India and Pakistan in 1947.\textsuperscript{54} At the organizational center of the mob assault were the Hindu nationalist political parties, including the most prominent Hindu nationalist party, the Bharatiya Janata Party (“BJP”), a party that was to hold the prime ministership in India a decade later. That the 1987 speech by Thackeray did not give rise to a similar conflagration was a matter of happenstance; the ethnic tinderbox was just as much present. Indeed Thackeray and Shiv Sena did reemerge in 1992 as instigators in the violence in Bombay, the worst carnage following the attack on the mosque in Ayodhya.\textsuperscript{55}

Indian history does not lack for examples of election agitation leading to scores of deaths. The question is what steps may be taken to permit genuine, even if distasteful, political expression yet protect public order against likely violent outbursts.\textsuperscript{56} As a doctrinal matter, any restriction has to balance between the Indian constitutional guarantees of freedom of expression and the reserved constitutional emergency powers to protect public order.\textsuperscript{57}

India’s response is to turn to a restriction on permissible political speech. This is perhaps the least intrusive form of regulation of antidemocratic agitation, and paradoxically the one that may raise the most traditional vagueness concerns in the First Amendment tradition. India couples a strong constitutional commitment to freedom of expression with a rigid Electoral Code prohibition on seeking electoral support by appealing to “enmity and hatred between different classes of the citizens of India on the grounds of religion, race, caste, and community.”\textsuperscript{58} The Act prescribes

\textsuperscript{55} BARBARA D. METCALF & THOMAS R. METCALF, A CONCISE HISTORY OF INDIA 279 (2002).
\textsuperscript{56} This issue is by no means limited to India. Bosnia’s fragile ethnic peace is currently threatened by an inflationation of ethnic tensions during its current election campaign. In the words of Christian Schwarz-Schilling, a senior international official in Bosnia, “Inflammatory rhetoric raises tensions, and this in turn can all too easily escalate into violence in a society where weapons are everywhere, alcohol plentiful, and the summer is long and hot . . . . The more abusive the campaign rhetoric now, the more difficult it will be to find the necessary partners to create functioning institutions.” Quoted in Nicholas Wood, Fiery Campaign Imperils Bosnia’s Progress, Officials Warn, The New York Times, Aug. 27, 2006, at A3. The problems in Bosnia are exacerbated by the formal ethnic divisions of political power emerging from the Dayton accords. See Anna Moraweic Mansfield, Ethnic but Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina, 100 COLUM. L. REV. 2052 (2003).
\textsuperscript{57} “Nothing . . . shall . . . prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.” Constitution of India, art. 19, cl. 2.
\textsuperscript{58} Representation of the People Act, 1951.
what are termed “Corrupt Practices,” which are defined as an appeal to vote for or against a candidate “on the ground of his religion, race, caste, community of language or the use of, or appeal to, religious symbols. . . .” That power is in turn delegated to an Election Commission which has the capacity to identify corrupt practices and seek extraordinary remedies, including the exclusion from office for an improperly prevailing candidate.

The leading case from India provides a clear example of an election code in practice. In *Prabhoo v. Kunte*, the Indian Supreme Court confronted the decision of the Electoral Commission that the election of Dr. Remesh Yeshwant Prabhoo to state legislative office in Maharashtra should be set aside. The Commission had found that Prabhoo’s campaign had been organized by Bal Thackeray, the leader of the Shiv Sena party, whose comments above formed only a mild part of his inflammatory arsenal. Consistent with the statutory definition of corrupt practices, the Electoral Commission deemed there to have been appeals for Hindus to vote for Prabhoo on the basis of his religion. The appeals to Hindu solidarity were coupled with tirades on the threats that Muslim candidates or candidates urging appeasement of Muslims would present. Thackeray’s campaign speeches referred to Muslims as snakes (a particularly loaded religious image), and basically called on a Hindu assertion of power to thwart the perceived Muslim threat.

In upholding the Electoral Commission, including the reversal of the election result, the Supreme Court rejected the claim that only a manifest threat to public safety could justify an electoral prohibition. The narrow basis for the ruling was that the perceived threat to public order allowed for the invocation of the government’s reserved constitutional powers to protect domestic order. As applied to the facts of any particular case, the constitutionality of the prohibition would turn on the nature of the speech itself, not on whether it imposed a clear and present danger. The Court found general guidance in an earlier decision in the *Ayodhya* case, which read the constitutional guarantee of equality of religion to be an affirmative commitment to secularism “as the central golden thread in the fabric depicting the pattern of the scheme in our Constitution.” Secularism provided the substantive basis for restricting campaign speech that threatened significant public disorder. But the Court could not place any invocation of religion outside the bounds of electoral politics. The guarantees of free expression would protect the right to claim discrimination or unequal

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60 Clause (2) of Article 19 of the Indian Constitution allows for the exercise of emergency powers to protect public order or prohibit the incitement to an offense.
61 Opinion at 12.
62 Dr. M. Ismael Faruqui and Others v. Union of India and Others, 6 SCC 360 (1994).
63 *Id.* at 402.
treatment based upon religion. But the Court carefully distinguished appeals made to religious bigotry as implicating conflicting constitutional concerns between public order and freedom of religious expression.64

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

No democratic and political order, in which the conditions of freedom and their progressive expansion for all make some regulation of all activities imperative, could endure without an agreement on the basic essentials which could unite and hold citizens together despite all the differences of religion, race, caste, community, culture, creed and language. Our political history made it particularly necessary that these differences, which can generate powerful emotions depriving people of their powers of rational thought and action, should not be permitted to be exploited lest the imperative conditions for the preservation of democratic freedoms are disturbed.65

Second, the Court found significant that the prohibition on speech was only directed to the election period itself and thus to the integrity of democratic appeals free of incitement to communal hatred: “The restriction is limited to the appeal for votes to a candidate during the election period and not to the freedom of speech and expression in general or the freedom to profess, practise, propagate religion unconnected with the election campaign.”66

The Indian approach to antidemocratic appeals has two major limitations. First, in terms of practical effect, it is intended only to address the problem of accentuation of communal antipathies in the crucible of a contested election campaign. To the extent that parties organize on an antidemocratic platform outside the electoral arena, there is little or no effect. To the extent that parties moderate their language for the election campaign itself, a seemingly inevitable problem with what amount to speech codes, the definition of corrupt practices in India does not regulate their conduct. Thus, for example, the Spanish decision to ban the Basque separatist Basatuna party might have been difficult to enforce as a speech ban on a party that

64 Thus in an earlier case involving two Muslim candidates, it was considered permissible to air grievances of the Muslim community, but impermissible for one candidate, in the last stages of the campaign, to charge his opponent with not being a true Muslim. See Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramda Mehta and Others, 1975 (Supp.) SCR 281.
65 Bukhari v. Mehta, supra.
66 Opinion at 21.
promoted the claimed plight of the Basque people. Even in India, the Electoral Commission has had to push further, ruling for example that no elections could be held in Gujarat in 2002 after the local BJP government helped instigate anti-Muslim riots that left thousands dead. More aggressive yet was the decision of the Indian Supreme Court upholding the dismissal from office of three state governments on grounds of complicity or acquiescence in mob violence in the aftermath of the destruction of the Babri mosque in Ayodhya.

Second, and perhaps more significant, the Indian approach would require setting aside qualms that many – including many educated in the American First Amendment tradition – might have with what amount to governmental speech codes employed without clear guidance and largely after the fact. It is ironic that the least restrictive form of electoral prohibition, one that does not require banning parties or individuals wholesale, is likely to have the most capacity for as applied abuse. As with all rules governing the electoral process, any departure from prospective application means that the application of any rule will have outcome determinative effects. In Prabhoo itself, for example, the effect was to remove from office a candidate supported by the majority of voters. To the extent that electoral officials and reviewing judges are always at risk of succumbing to political pressures, or at least being perceived as having done so, any regulatory approach that applies retroactively necessarily raises genuine legitimacy concerns.

Not only does the Indian approach invite content and viewpoint regulation of speech, it embraces it. In the Ayodhya Reference Case, for example, Justice Verma invoked Rawls directly to set the secular contours for limiting the role of religion in the electoral and governmental spheres. For Justice Verma, India is a “pluralist, secular polity” in which “law is perhaps the greatest integrating force.” The substantive commitment to tamp down religious appeals draws on a “Rawlsian pragmatism of ‘justice as fairness’” that in turn permits an “‘overlapping consensus’ . . . of

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67 Indeed, the ultimate dissolution of Batsuna turned on the refusal of the party to condemn acts of violence by ETA, something that would not have been reached by a speech code. See Thomas Ayres, Batsuna Banned: The Dissolution of Political Parties Under the European Convention of Human Rights, 27 B.C. INT’L & COMP. L. REV. 99 (2004).
68 See Edward Luce, Appeal on Indian election ruling, The Financial Times, August 19, 2002, at p.6 (detailing electoral commission’s decision to postpone and legal appeals that followed).
69 S.R. Bommai v. Union of India, 3 SC 1 (1994). For a fuller discussion of the political and ethnic dimensions of these decisions, see JACOBSOHN, supra note ___, at 126-32.
fundamental questions of [the] basic structure of society for deeper social unity...

Further, the Indian approach, while deeply committed to maintaining public order during a heated election, exposes deep uncertainty about the reasons for how voters exercise the franchise. There is a lingering concern in democratic theory for the base instincts that may come to command voters. For Madison, for example, this was the risk of the descent into the vice of “passion” by which the masses of voters could be swayed by greed or envy of the wealthy to use democratic power for confiscatory aims. The Indian cases applying the Corrupt Practices Act follow in this tradition, finding a compelling governmental interest in not permitting appeals to base instincts that will, in heated moments, overwhelm the higher aspirations of republican discourse:

Under the guise of protecting your own religious, culture or creed you cannot embark on personal attacks on those of others or whip up low hard instincts and animosities or irrational fears between groups to secure electoral victories.

[O]ur democracy can only survive if those who aspire to become people’s representatives and leaders understand the spirit of secular democracy. This spirit was characterized by Montesquieu long ago as one of “virtue... For such a spirit to prevail, candidates at election have to try to persuade electors by showing them the light of reason and not by inflaming their blind and disruptive passions. Heresy hunting propaganda or professedly religious grounds directed against a candidate may be permitted in a theocratic state but not in a secular republic like ours.

There is a disturbing quality to regulating speech in order to protect the electorate against its likely submission to its base instincts once those are appealed to in the heat of electoral debate. Even so, the specter of communal violence, which is never too far from the surface in heated Indian political battles, yields a constitutional accommodation between civil liberties and

70 Quoted in JACOBOHN, supra note ___, at 169-70. See Ayodhya Reference Case, (1994) 6 S.C.C. 361 (imposing a ban on religious activity around a disputed holy site claimed by both Hindus and Muslims).
71 See The Federalist No. 49, at 317 (James Madison) (Clinton Rossiter ed., 1961) (expressing concern that such passions “ought to be controlled and regulated by the government”)
public order. It is hard to contest the claim that fewer people have died as a result of a modicum of caution being imposed on politicians lest they be removed from office. It is worth noting that the BJP, after being instrumental in the incendiary storming of the mosque in Ayodhya subsequently tempered its rhetoric in order to remain fully viable electorally. In its mildly gentler form, the BJP managed to prevail in national elections, put together a fragile governing coalition, fail in its efforts at governance, and lose in subsequent election to a coalition that would select India’s first Sikh prime minister.\(^7\)

### B. Party Prohibitions.

All constitutions constrain the choices available to majoritarian choice. Constitutions vary in the level of “obduracy” of their provisions.\(^7\) Some allow change by supermajority; others require simple majority ballots cast over an extended period of time to suffice.\(^7\) Many also have unamendable provisions, ones that are intended to define the society indefinitely and are not subject to review absent a complete overhaul of the society. Examples of unamendable provisions include the German Basic Law and, presumably, Article V of the American constitution, both as to the mechanics of amendment and the specific prohibition on any state being denied its representation in the Senate. Other constitutions take the basic form of governance off the table, as with Article 139 of the Italian Constitution which prohibits any amendment altering the republican form of government, or Article 112 of the Norwegian Constitution prohibiting amendments that “contradict the principles embodied in this Constitution.”\(^7\)

Which provisions are off the table for internal change generally reflect the birth pangs of that particular society.\(^7\) Whether through the numerous

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\(^7\) LAWRENCE SAGER, *JUSTICE IN PLAIN CLOTHES: A THEORY OF CONSTITUTIONAL PRACTICE* 82 (Yale Univ. Press 2005).

\(^7\) See, e.g., Fin. Const. art. 73 (providing that a constitutional amendment introduced in one parliamentary session may only be approved after an intervening parliamentary election); Fr. Const. tit. XIV, art. 89 (requiring that amendments be approved by two successive assemblies and then by a referendum).

\(^7\) These last two examples are from JACOBSOHN, supra note ___, at 138. On the general point of constitutions as precommitment pacts against current majoritarian preferences see Samuel Issacharoff *The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections*, 81 TEX. L. REV. 1985 (2003).

\(^7\) This is hardly a new insight. The idea that a constitution is a document directed to the political realities of the society in which it arises goes back at least to Aristotle. ARISTOTLE,
protections of slavery in the original American constitution, or the tormented recognition of the Nazi period in the post-War Germany, constitutions shore up the weak points in the social order that cannot bear direct political conflict. In turn, many countries prohibit political participation to parties that do not share the fundamental aims of the constitutional order. Thus it is not surprising to find in the West German constitution the foundations for a ban on the descendants of the Nazi and Communist parties, or to see a corresponding early prohibition of Communist parties in the Ukraine and other former Soviet controlled countries. As expressed by Czechoslovakian Constitutional Court in a 1992 decision upholding the lustration law against a constitutional challenge, “A democratic state has not only the right, but also the duty to assert and protect the principles on which it is based.”

But in many countries, the prohibition goes significantly further to define the permissible bounds of democratic deliberation and to ban outright parties that raise claims outside these boundaries. Common examples are found in the banning of parties that challenge the territorial integrity of the country (resulting in prohibitions on separatist movements having an electoral expression) or that seek to reconstitute the society along religious lines. Here the best examples are found in a series of decisions by the Turkish Constitutional Court upholding bans on parties advocating Kurdish independence or fidelity to Sharia; both of which were deemed violative of the constitutional commitment to the integrity of Turkey as an organic secular state.

Most democratic countries appear to draw some form of protective line around the legal status of the political party. This means that the constitutional definition of the permissible scope of democratic politics is also the defining boundary for the right to organize a political party. For example, West German (now German) constitutional law grants significant

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78 See Socialist Reich Party Case, 2BVerfGE 1 (1952); Communist Party Case, 5 BVerfGE 85 (1956).

79 Following independence from the Soviet Union in 1991, a committee of the Ukrainian parliament banned the Communist Party of Ukraine and seized its assets. Subsequently, the Ukrainian Constitutional Court in 2001 reversed the ban on the grounds that the party’s charter had been amended to follow the constitution and found that the organic links to the Soviet Union and the party’s past had been broken (which also resulted in no return of the seized assets). See Alexi Trochev, Ukraine: Constitutional Court Invalidates Ban on Communist Party, 1 Int’l J. Const. L. 534 (2003).


81 See Dicle Kogacioglu, Progress, Unity and Democracy: Dissolving Political Parties in Turkey: Judicial Delimitation of the Political Domain, 18 Int’l Sociology 258 (2003).
protections to the ability of political parties to form and operate effectively in the electoral arena. Nonetheless, that protection is granted only to those parties that are entitled to legal status as proper actors in a democratic society. Article 21(2) of the German constitution provides: “Parties which, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free and democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall decide on the question of unconstitutionality.” The Court, in the early days of the Federal Republic, twice exercised its Article 21 power to declare parties unconstitutional: In 1952, in Socialist Reich Party Case, it declared a neo-Nazi party unconstitutional; and in 1956, in the Communist Party Case, it declared the Communist Party of Germany unconstitutional. In each case, the constitutional limitation on the scope of what may properly be put before the electorate also defined the limits on the organization of a legal political party.

While there are different forms of implementation, the basic understanding is that parties are either within or without the democratic process. If their aims are sufficiently antithetical to core democratic principles, they may be banned. Most of the bans derive their authority from the constitution directly; France is exceptional in this regard in relying on a 1936 statute regulating the existence of private militias. Some of the constitutional prohibitions are quite open-textured, as with Article 49 of the Italian Constitution which enjoins parties from violating the “democratic method.” Most are more specific, as with Article 21 of the German Basic Law, which guarantees the right of free formation of political parties, but requires that “[t]heir internal organization must bespeak democratic principles” and flatly prohibits parties that “seek to impair or to do away with the liberal democratic order, or to endanger the existence of the Federal Republic of Germany.”

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83 Grundgesetz fur die Bundesrepublik Deutschland (federal constitution) GG, Art. 21(2), reprinted in DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY at app.; see also id., Art. 9(2) (prohibiting associations whose purposes or activities are directed against the constitutional order); id., Art. 5 (on freedom to teach).
84 KOMMERS, supra note ___, at 218 (translated from Socialist Reich Party Case, 2 BVerGE 1 (1952)).
85 Id. at 222 (translated from Communist Party Case, 5 BVerGE 85 (1956)).
86 Paul Franz, Unconstitutional and Outlawed Political Parties: A German-American Comparison, 5 B.C. INT’L & COMP. L. REV. 51, 63 (1982) (under German law, parties “are to be free from government discrimination and governmental intervention as long as the Constitutional Court has not found the party to be unconstitutional”).
Republic of Germany . . . “ Nonetheless, the flip side to the inquiry is that if parties are not banned, they enjoy plenary rights of free expression; according to the German Court, “[t]he Basic Law tolerates the dangers inherent in the activities of such a political party until it is declared unconstitutional.”

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

These categories need not be entirely exclusive of each other. For example, the Hezbollah platform in Lebanon arguably contains elements of all three. So too, the Turkish government has justified its suppression of parties supporting Kurdish nationalism on the grounds that they engaged or supported guerrilla actions against the government. The same could be said of the Batasuna party in Spain, a political organization clearly devoted to Basque independence but whose banning turned on its relations to the outlawed terrorist group ETA.

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

1. Insurrectionary Parties.

89 Translated in Franz, supra note ___ , at 55.
90 Id.
It is best to begin by setting off a category of parties that may seek to participate in the electoral process for purposes of propagandizing their views, but without any real prospect of seriously competing for political office. This describes many minor parties around the world, including all third parties in the United States. What is more difficult is when such parties use the electoral arena as either an organizing forum or an outlet for insurrectionary attacks on the state or in defense of outlawed activities. This may include both parties that are funded by criminal enterprises, such as drug cartels, as well as those acting in service of a hostile foreign power. While both raise issues about the boundaries of the electoral systems, the best and most troubling examples are drawn not from the electoral efforts of drug cartels but from the communist party cases in various democracies.

Germany here provides the best example, even clearer than the Smith Act cases in the U.S. In reviewing the German party exclusion cases, there is a natural tendency to run together the Socialist Reich Party and Communist Party cases. Both had ties to totalitarian ideologies and both emerged at a time of real vulnerability for West Germany. As I will return to later, however, the Socialist Reich Party was for all practical purposes a vehicle for destabilizing German democracy in an attempt to recreate Nazi rule. The German court dealt with that quickly and without much hesitation, though not without some analytic difficulties. With regard to the Communist Party, by contrast, the Court took six years to issue a complicated, 300 page decision. The opinion focused heavily on the nature of Marxist-Leninist ideology. The aim of this ideology, the Court found, was to organize the Party’s activities under democracy “as a transition stage for easier elimination of the free democratic basic order as such”:

Therefore the KPD must actually deny all other parties... any right to exist in the sense of a lasting partnership with equal rights. But precisely such a right is the prerequisite for the functioning of the multi-party principle — and for the struggle for power between several parties — within a free democracy.

[] The same is basically true of the KPD’s parliamentary activity. In the parliamentary system of liberal democracy, each party participating in forming the popular political will is to be given a chance to come as close as possible to achieving its own goals through its activity in parliament. But no party may pursue material that, when reached, would

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91 An extreme example was the charge that the victorious presidential candidate in Colombia in 1994, Ernesto Samper Pizano, was propped up by campaign funding by the Cali cartel. See http://www.pbs.org/newshour/bb/latin_amERICA/colombia_3-20.html.
forever exclude existence of other parties. But . . . this is exactly the KPD’s goal.92

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

Nonetheless, the opinion does include hints of the need to tolerate ideas about communism outside the immediately perilous setting. For example, the Court adds that “[b]anning the KPD is not incompatible with reauthorization of a Communist party were elections to be held throughout Germany,”93 a clear invitation to revisiting the Court’s holding outside the immediate cold war setting – something that seemed neither too distant nor particularly “cold” in Germany in the 1950s. In effect, the Court treated the German Communist Party as one that was trying to use the electoral system to demoralize and destabilize German politics in order to further the aims of an enemy amassed at the border. The privation that followed the War and the presence of foreign troops throughout Germany was all too reminiscent of the period following World War I in which German democracy could not secure its footing. Under these circumstances, the Communist Party became more than an electoral outlier and instead assumed the role of being an ally of forces seeking to unwind the German democratic state not through elections as such, but in conjunction with a real foreign threat.

During the years in which the case was pending, and more so in the following decades, the Communist Party lost its residual appeal from its opposition to Hitler before and during the War. The fading sense of immediacy was likely one of the reasons the opinion does not stand up to exacting review. Moreover, during the same period, the West German economy flourished and the perceived threat from the East diminished. By 1968, when a new organization known as the German Communist Part (DKP) was organized, the government took no steps to dismantle it. While it

93 Id. at 626.
is true that the new party had dropped inflammatory invocations of the dictatorship of the proletariat from its official rhetoric, the only genuine difference appeared to be the lack of perceived threat – any semblance of a clear and present danger – from a party identified with East German and the Soviet bloc.

Perhaps this is really what the Smith Act cases were ultimately about as well. In each case the claim was that the Communist Party was merely a conduit for recruitment, financing and propaganda on behalf of a powerful military adversary. Although not exactly expressed in these terms, the cases tend to ask questions consistent with this understanding. The tests amount to examining either the scope of the danger, defined primarily in military or insurrectionary terms, or the extent to which the party in question is directly tied to an adversarial order.

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

Understood in this light, the “clear and present danger” test makes more sense for such insurrectionary parties. The German court could be seen to be searching for a principle that would distinguish blanket prohibitions on communist parties, an overly broad ideological prohibition, with an acceptance of exigency during the early days of the Cold War. It is this

94 Alexi Trochev, Ukraine: Constitutional Court Invalidates Ban on Communist Party, 1 INT’L J. CONST. L. 534, 535 (2003). The PVR was subsequently abolished by constitutional amendment. See id., 535 n.2.
96 Id. at 538.
feature of *Dennis*, to return to the American context, that remains disturbing. The “clear and present danger” test seems reasonably well suited to measuring the extent to which a party with an ideological affinity for a hostile power does indeed pose a national security threat. In fact, there is little that distinguishes this form of party organization from a conspiracy to engage in criminal or treasonous conduct. And this is how the Smith Act cases began, as criminal inquiries. But what began as an investigation into the scope of Soviet espionage had been transformed in *Dennis* into a prosecution over conspiracy to advocate the overthrow of the government through force and violence. Because of the inchoate nature of the charge, *Dennis* does little to elucidate the level of threat a democracy must be able to tolerate before deciding that its core commitment to popular choice is at risk of being subverted – a necessarily difficult question to answer in the abstract. But the nature of the charge in *Dennis* allowed ideas to be the basis of a criminal prosecution rather than addressing the extent to which the Communist Party as an organization was for all practical purposes a stalking horse for a military challenge to the U.S.

2. Separatist Parties.

On first impression, separatist parties raise much the same problem as an insurrectionary party. Each aligns itself with a movement that seeks to alter the preexisting form of the state; each eschews any realistic prospect of gaining the adherence of a majority of citizens in the broad body politic. Oftentimes the separatist movement will have a paramilitary component that threatens the physical security of the democratic state or its citizens. In such cases, a democratic society will claim a compelling security interest in protecting itself against armed insurrection and may seek to extend the prohibition to the non-military political party promoting separatist aims. Unlike an insurrectionary party that allies itself with a foreign power, however, or even one that draws from a criminal element within the nation, these separatist parties seem to invariably find their support in the perceived oppression of a distinct regional or ethnic subset of the population. In championing the cause of oppressed groups within the broader polity, these separatist parties frequently develop an uneasy and oftentimes uncertain relationship with armed groups fighting for the same general objectives. Further, and also unlike the insurrectionary parties, they typically do not seek to take control of the entire state through electoral, paramilitary or any other means. Rather, they seek to challenge the political will of the majority to continue its hold over a distinct region of the country and they often promote themselves as upholding the democratic claims of a majority of the contested

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98 *STONE, supra* note ___ at 367.
99 *Id.* at 396.
area to self-determination. Their object is typically independence, not conquest of the entire state. Because of their identification with a broader claim for the rights of a regionally-defined, generally subordinated section of the nation, separatist parties readily invoke the language of self-determination to claim independent democratic grounds for their right to advocate dissolution of the broader polity.

Separatist parties are frequent targets for exclusion from the electoral arena for two distinct reasons. First, like insurrectionary parties, they may serve to provide legal cover for attacks on the state through force or violence. This is in effect the story of Batasuna in Spain, as well as its affiliated Herritaren Zerrenda party that sought to present the same platform in European parliamentary elections. The same issues are posed by the various Kurdish nationalist parties in Turkey, Sinn Fein in Northern Ireland, and the list could go on at some length. Second, any state – France, Turkey, Iraq, Israel and Spain offering ready examples – can declare that its territorial boundaries are beyond the scope of proper political debate.

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

An extreme example is presented by Latvia after its reconquest of national independence from the Soviet Union. As part of its newly-gained freedom, Latvia decreed that Latvian would be the official language of the polity and that all candidates for national office would have to demonstrate Latvian language proficiency for the expressed purpose of being able to conduct the business of the country effectively. The effect was to curtail

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

101 For an examination of the relation between international law norms and the claims of self-determination, see Macklem, supra note __, at 507-08 (setting forth debate in European law on scope of claims to self-determination as core democratic right).

the ability of the Russian language minority (which constituted forty percent of the population) to participate in government, a problematic issue since the Russian population came to Latvia largely with the Soviet occupation, but now was largely comprised of persons who knew no other homeland. In reviewing the exclusion of a candidate for failing to prove Latvian proficiency, the ECHR both allowed that having “sufficient knowledge of the official language pursues a legitimate aim,”¹⁰³ and struck down its application as being a pretext for discrimination against a political party advocating the civil rights of the Russian population.¹⁰⁴

Turkey provides the most fertile testing ground for the range of permissible prohibitions on political parties, particularly as it applies to separatist claims. The Turkish Constitution is an extraordinary document, reflecting its origins in the muscular efforts of Kemal Ataturk to compel a rapid Westernization after the collapse of the Ottoman Empire. As a guiding principle, the Turkish Constitution’s preamble enshrines the principles of Ataturk, “the immortal leader and unrivaled hero” of the Republic of Turkey¹⁰⁵ and provides an explicit textual commitment to the territorial integrity of the country:

No protection shall be afforded to thoughts or opinions contrary to Turkish national interests, the principle of the indivisibility of the existence of Turkey as an indivisible entity with its state and territory. . . .¹⁰⁶

The Turkish constitution goes on to expressly forbid challenges to the “independence of the state, its indivisible integrity with its territory and nation . . . “¹⁰⁷ Beyond merely asserting such requirements, though, the Constitution requires the Constitutional Court to permanently dissolve any political party that threatens the state in any of the ways enumerated above.¹⁰⁸ Guidance is provided by the Law on the Regulation of Political Parties, which forbids parties from aiming to “jeopardise the existence of the Turkish State and Republic, abolish fundamental rights and freedoms, introduce discrimination on grounds of . . . religion or membership of a religious sect, or establish . . . government based on any such notion or concept.”¹⁰⁹ That law had been used to uphold a ban on the Turkish Communist Party on the

¹⁰³ Id. at *9.
¹⁰⁴ Id. at *10.
¹⁰⁵ Turk. Const. Preamble, quoted in Dicle Kogacioglu, Dissolution of Political Parties by the Constitutional Court in Turkey: Judicial Delimitation of the Political Domain, 18 INT’L SOCIOLOGY 258 (2003) [hereinafter Kogacioglu, Dissolution]. at 260 (translation of Const. of Turkey, pmbl.).
¹⁰⁶ Id. There are similar and more specific provisions in the body of the constitution. See id.
¹⁰⁷ Turk. Const. Art. LXVIII.
¹⁰⁸ Turk. Const. Art. LXIX.
¹⁰⁹ Law No. 2820 on the Regulation of Political Parties § 78.
Fragile Democracies

grounds that its program “covering support for non-Turkish languages and cultures were intended to create minorities, to the detriment of the unity of the Turkish nation,”¹¹⁰ a prohibition subsequently overturned by the European Court of Human Rights.¹¹¹

Similar application of the territorial integrity principle led to direct prohibitions on various Kurdish parties. These are difficult cases because the suppression of Kurdish political advocacy comes very close to the outright repression of a disfavored national minority.¹¹² In 1992, the government accused the Kurdish Halkin Emek Partisi (People’s Labor Party or HEP) of promoting Kurdish separatism with the aim of destroying the “inseparable unity” of the Turkish state.¹¹³ In deciding to dissolve the party, the Turkish Constitutional Court attempted to draw a distinction between everyday life, where following a distinct cultural tradition is legitimate, and politics, where invoking that same tradition becomes an illegitimate political claim that threatens state unity and public order.¹¹⁴ The Court found that the use of the Kurdish language in the realm of politics was, among other activities, an indication of a forbidden commitment to “separatism” that potentially compromised the unity of the state.

The Turkish Court’s rulings in the HEP case was later overturned by the European Court of Human Rights, which ruled that dissolving HEP was a violation of the right of free association and fined the Turkish government.¹¹⁵ This was hardly the last word on the issue. Again in 1999 and in 2002, the ECHR ruled against Turkey in further efforts to ban Kurdish parties. The Turkish Court had again upheld the suppression of Kurdish parties on the grounds that their endorsement of Kurdish national claims and championing of Kurdish grievance violated the territorial integrity of the Turkish state or represented a rejection of democracy as such.¹¹⁶

Yazar v. Turkey from 2002, again involving the HEP, is particularly instructive. The Turkish Constitutional Court had upheld the banning of the HEP on the grounds that the party’s platform undermined the integrity of the State by “seeking to divide the Turkish nation into two, with Turks on one side and Kurds on the other, with the aim of setting up separate states....”¹¹⁷ A critical part of the finding was the refusal of the HEP to denounce the aims of the PKK, an insurrectionary Kurdish force with a history of terrorist

¹¹¹ Id.
¹¹² The decision of the Constitutional Court has not been translated from the Turkish. It is thoughtfully discussed in Kogacioglu, Dissolution, supra.
¹¹³ Id. at 263.
¹¹⁴ Id. at 265.
¹¹⁵ Id. at 271.
¹¹⁷ 36 E.H.R.R. at *4-6 (setting out findings by Turkish court).
attacks on Turkish targets. According to the Turkish court, the HEP referred to the PKK as “freedom fighters” and described the guerrilla fighting as an “international” conflict between distinct national forces.

The ECHR overturned the prohibition under Article 11 of the European Convention, the basic guarantee of the rights of association and assembly, including the right to form political parties. Article 11 denies to states the ability to restrict the right of association except to the extent that such measures “are necessary in a democratic society in the interests of national security or public safety . . . or for the protection of the rights and freedoms of others.” In rejecting Turkey’s claim that the HEP’s propaganda lent tacit support to the PKK, the Court appeared particularly solicitous of the right of advocacy on behalf national minorities, so long as there was no direct advocacy of the use of force or violence and so long as the political party remained faithful to democratic principles. “In the absence of incitement to use force or other unlawful means,” the Court in its rendition of the clear and present danger test, decreed that

If it were considered that merely by advocating those principles [of national self-determination] a political grouping was supporting acts of terrorism, this would diminish the possibility of dealing with related questions with the framework of democratic debate and allow armed movements to monopolise support for the principles concerned . . . .

The Court further considers that even where proposals informed by such principles are likely to clash with the main strands of government policy or the convictions of a majority of the public, the proper functioning of democracy requires political groupings to be able to introduce them into public debate in order to help to find solutions to problems of general interest concerning politicians of all persuasions.

118 Id.
119 Id.
121 Eur. Conv. on Human Rights, Art. 11, Para. 2.
122 Yazar, at *12. See also id. at *13 (“the HEP did not give any express support or approval to the use of violence for political ends. Incitement to ethnic hatred and incitement to insurrection are, moreover, criminal offences in Turkey. At the time of the facts in question, none of the HEP’s officials had been convicted of such an offence”).
123 Id. at *14.
The result is that under emerging European law, separatist parties, like insurrectionary parties, are given a broad swath of protection so long as they are not engaged in actual incitement or actual violent acts against the democratic regime. In the case of separatist parties, the overlay with the claims of an embattled minority should properly enhance the level of judicial solicitude for these parties and restrict the ambit of permissible state suppression.

3. Antidemocratic Majoritarian Parties.

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

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

No protection shall be afforded to thoughts or opinions contrary to . . . [t]he reforms of Atatürk and his embracement of values of modern civilization; and as required by the principle of secularism, there shall be no interference whatsoever of sacred religious feelings in state affairs and politics.125

124 Turk. Const. Preamble, quoted in Dicle Kogacioglu, Dissolution of Political Parties by the Constitutional Court in Turkey: Judicial Delimitation of the Political Domain, 18 INT’L SOCIOLOGY 258 (2003) [hereinafter Kogacioglu, Dissolution].at 260 (translation of Const. of Turkey, pmbl.).

125 Id. There are similar and more specific provisions in the body of the constitution. See id.
Based on the Kemalian vision of Turkey as a “democratic, secular…state,”126 the Constitution prohibits political parties from interfering with “the principles of the democratic and secular republic; they shall not aim to protect or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime.”127

The history of enforced secularism under the Turkish Constitution is complicated, to say the least. When threatened by the rise of charismatic Islamic politicians or by mass-based Islamic parties, the Court and the military have emerged as the two institutions most inclined to bar any kind of Islamic political mobilization. The history includes military interventions of the overt and “soft” form, jailing of opposition leaders, and a host of measures beyond the scope of the democratically tolerable.128 But, particularly since Turkey has sought integration into the European Union, the banning of Islamic parties has taken largely legal forms.

The leading case in Turkey concerns the Refah Partisi (Welfare Party), a mass-based Islamic organization that not only became the largest single party in the Turkish parliament, but one that in 1996 had formed a coalition government in which it was the dominant player.129 Despite its popular support, and in expectation of Refah commanding an outright majority of parliament in the next election, the party was charged with activities “contrary to the principle of secularism.”130 The Turkish Constitutional Court ordered the party disbanded, its assets surrendered to the state, four of its members removed from parliament, and its leaders barred from elective office for five years.131

By the time the Welfare Party issue reached the ECHR, however, the rise of Islamic political claims had come to dominate Turkish politics. The current history begins in 1970 when Professor Necmettin Erbakan founded the Milli Nizam Partisi (National Order Party) (“NOP”), the first in a sequence of political parties promoting to greater or lesser extents the imposition of Islamic law in Turkey, primarily in the life of Muslims in the country, but extending to all facets of public life. At the core of the NOP’s platform was a plan for what it termed domestic spiritual overhaul, including permitting public exercise of religion132 and closing secular entertainment venues.133 The Constitutional Court found this set of positions to promote

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126 Turk. Const. Art. II.
128 For a good overview from the perspective of defending the democratic rights of Islamic parties, see NOAH FELDMAN, AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY 105-11 (2003).
130 Id.
131 The facts are laid out more fully in the earlier opinion of a panel of the ECHR. See Refah Partisi (Welfare Party) v. Turkey, (2002), 35 E.H.R.R.3.
133 Id. at 84.
“Revolutionary Religion,” in violation of the constitution, and dissolved the party.134 A successor party, the Milli Selamet Partisi (National Salvation Party), also founded by Professor Erbakan,135 met a similar fate, only this time when a military regime took power in 1980, dissolved all political parties, and ordered the Islamic political leaders to stand trial.136

Upon the reinstatement of civilian rule, the same minuet resumed. Erbakan founded the Welfare Party, a party little changed from its earlier incarnations. The Welfare Party emerged as the strongest force in parliament and formed a government with two smaller, more centrist parties. When the time came for the Welfare Party to assume control of the government under its coalition agreement, its coalition parties recoiled and the Constitutional Court dissolved the party, holding that Refah Partisi was a “centre...of activities contrary to the principles of secularism.”137 Although the Turkish Constitutional Court found some evidence of a threat to public order posed by the Welfare Party’s invocation of jihad in its public messages,138 the issue presented on appeal to the European Court of Human Rights focused directly on whether the substantive views of the Welfare Party were compatible with liberal democracy. The first real controversial position taken by the Welfare Party was the proposal to have each religious community in Turkey governed according to the religious laws of its faith, a throwback to the Ottoman practice of allowing broad autonomy over civic life to each of the peoples subsumed in the empire. More controversial yet was the party’s professed commitment to Shari’a as the source of all basic law, thereby presenting the ECHR straightforwardly with the question whether a party could be banned because of its commitment to Shari’a, and whether a state commitment to secularism could serve as the justification for that prohibition. Whether the charges were true or pretextual remains a disputed issue in Turkey. But the concern here is with the treatment of a claimed national interest in suppressing excessive Islamist politics by the European Court of Human Rights.

The ECHR began with a surprisingly ringing endorsement of secularism as “one of the fundamental principles of the [Turkish] State which are in harmony with the rule of laws and respect for human rights and democracy.”139 By contrast, “[a] plurality of legal systems, as proposed by

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134 Id.
138 Refah Partisi v. Turkey, (2002) 35 E.H.R.R. 3, *68 (quoting the Court finding “Welfare Party will establish a just order...will the transition be achieved...harmoniously or by bloodshed?”).
Refah, is not compatible with the [European] Convention system.” Even more categorical is the blanket conclusion that “Sharia is entirely incompatible with the fundamental principles of democracy as set forth in the Convention.” This led to the critical determination of the ECHR reaffirming the power inherent in democratic states to take preemptive action against threats to pluralistic democratic rule:

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

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

On first impression, the opinion jars many democratic sensibilities, particularly those formed in the free speech environment of the United States. The is condemnation of all Shari’a is likely far too sweeping and almost certainly applies a different standard to Islamic religious belief than would have been applied to any Christian faith. Further, the use of a deferential “reasonableness” standard for the political exclusion of a party with broad popular support gives a great deal of latitude to national determinations that are necessarily problematic. Nonetheless, the effect seemed the best that anyone could have hoped for. Under the pressure of

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140 Id. at *4.
141 Id.
142 Id. at *3.
143 Id. at *4.
prohibitions for its proclaimed aim of imposing clerical rule, the Welfare Party fractured.

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

The result was that a more moderate wing, led by former Istanbul mayor Recep Tayyip Erdoğan, himself a former protégé of Erbakan, broke off to form the Justice and Development Party, a far more moderate Islamic Party. In 2002, Erdoğan became Prime Minister when Justice and Development emerged as the largest bloc in Parliament. Under his tutelage, Turkey has pursued its efforts at EU integration and remains a bastion of moderation in the Middle East. Far from creating an insuperable barrier to an Islamic voice in Turkish politics, the effect of the dissolution of the Welfare Party appears to have sparked a realignment in which committed democratic voices from the self-proclaimed Islamic communities found a means of integration into mainstream Turkish political life. Undoubtedly this is not the last word in the struggle between a constitutional commitment to secularism and significant popular support for Islamic politics. But under the circumstances, it is difficult to imagine a better outcome.

C. Party Exclusion from the Electoral Arena.

In many countries, the election arena appears entitled to greater constitutional protection than parties themselves. For example, the Federal Constitutional Court in Germany in the Radical Groups Case struck down a denial of television and radio broadcast time to left-wing parties on the grounds that, so long as the political advertisements related to the election, “Radio and television stations have no right to refuse broadcasting [time to a party] merely because its election ad contains anticonstitutional ideas.” The controlling idea, one that is familiar to American law, is that democracies require wide-open and robust political debate, and that nowhere is the right of expression more important than in matters having to do with

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This follows from the basic approach of regulating the legal status of political parties, but granting a broad swath of protection from state interference to those entities that are legally entitled to form a political party.

As the Indian approach indicates, however, it is possible to treat conduct in the electoral arena separately from the question of the legal status of a political party. Indeed, in pursuing the idea of a less-restrictive protection of the democratic process, it is possible to envision a code of electoral administration that is not only more supple than the criminal standards at issue in *Dennis v. U.S.*, but that might establish different standards for electoral participation as opposed to the formation of political parties.

An interesting variation on this approach comes from Israel. The precipitating event was the effort to bar the Kach movement, whose founder, Meir Kahane, had previously been the leader of the Jewish Defense League in the United States. There is little doubt that Kach promoted racial hostility and ventured sufficiently far to the extremes as to be labeled a “quasi-fascist movement.” Kahane advocated a policy of “terror against terror” in which Jewish vigilante groups should count on the active support of the Israeli government. While Kach directed itself to political organization, there seemed little dispute that Kahane’s followers engaged in occasional anti-Arab attacks. Further, Kach not only praised specific acts of anti-Arab violence committed by non-Kach Israelis, but would make the perpetrators of violence honorary members of Kach and provide funding for their legal defenses.

The first effort to ban the Kach party came on the unilateral initiative of the Central Elections Committee (“CEC”), an administrative body charged with the conduct of elections in Israel, including verification of the eligibility of political party slates for inclusion on the ballot. The CEC disqualified the Kach party on the grounds that its platform was antidemocratic and advocated racism, a ban that it also extended to a minor Arab party, the Progressive List for Peace. In *Neiman v. Chairman of the Central Elections Committee for the Eleventh Knesset*, the Israeli Supreme Court struck down the independent actions of the CEC on the grounds that its statutory

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146 An interesting twist on this argument is provided by then Professor Bork, *supra* note __, who argued for limitations on the application of the First Amendment to matters that did not touch on the fundamental questions of political self-governance.


148 Id.

149 *Id.*


mandate consisted only of mechanically checking the petition signatures and other qualifications issues of parties, and did not include any political assessment of a party’s platform. The Court rejected the views of Justice Aharon Barak, in a separate concurrence, that the Elections Committee could on its own accord ban a political party, so long as there was appropriate judicial review after the fact.\footnote{Concurring opinion of Justice Barak, at 1-3.} Nonetheless, the Court agreed that a party that rejected either the existence of the Israeli state or its democratic character, could be banned, although the Court then split on whether the threat had to be a probability, per the lead opinion of President Shamgar of the Court, or whether it need only be a reasonable possibility, as then Justice Barak would have had it.\footnote{The debate on the standard of proof both invoked and was reminiscent of Learned Hand’s formulation of the clear and present danger test in the Second Circuit opinion in \textit{Dennis}: “in each case [courts] must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such an invasion of free speech as is necessary to avoid the danger.” United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950).}

In the aftermath of \textit{Neiman}, Israel amended both its Basic Law governing eligibility for the Knesset and its statutory requirements for the registration of political parties. The immediate aim of the reforms was to provide a sound legal basis for banning parties, which then resulted in the banning of the Kach part in 1988 and 1992, and the banning of its related entity, Kahane is Alive, in 1992.\footnote{See Raphael Cohen-Almagor, \textit{Disqualification of Political Parties in Israel, 1988-1996}, 11 \textit{Emory Int’l L. Rev.} 67, 67 (1997).} What is particularly intriguing is not so much the application to the Kach militants, but the apparent efforts to create a gap between the conditions for running for parliament and the conditions for creating a political party. Under amended Section 7a of the Basic Law on the Knesset, no party list may stand for office if it meets one of three conditions “in its purposes or deeds.”\footnote{Basic Law: Knesset 71, quoted at id. at70.} As most recently amended in 2002, these three conditions are: (1) negation of the existence of the State of Israel as a Jewish and democratic state; (2) incitement to racism; (3) support for armed struggle by a hostile state or a terrorist organization against the State of Israel.\footnote{I am grateful to Barak Medina for walking me through the amendments to the Israeli laws and for the translation of the 2002 provisions.} The language of the party registration law is quite similar but adds one more consideration: whether “implicitly or explicitly” there are reasonable ground to deduce that the party will serve as a cover for illegal actions.\footnote{Parties Law, 1992, quoted in id at 92.} At least in theory, the ban on running for the Knesset is seen as less draconian than outlawing an entire party. The focus on the implicit or explicit direct tie to unlawful conduct in the party prohibition can be seen as inviting a more
stringent standard before a party is outlawed altogether, as opposed to being disqualified from having its members elected to the Knesset.

Both commentators and the Israeli Supreme Court treated these mild differences in formulation (specifically the introduction of the reasonable basis for tying a party to illegal activity in the Parties Law) as creating a political space in which it was possible to organize a party around ideas, even if reprehensible ones, while at the same time denying such a party the right of representation in the Knesset. While there has not yet been any case allowing for the distinction between political organization and parliamentary challenge to be applied, President Barak’s opinion for the Court in *Yassin & Rochley v. The Parties Registrar & Yemin Israel* 158 provided the rationale for treating the two forms of political activity differently. As summarized by Professor Cohen-Almagor:

In his judgment, President Barak explained that the basis of . . . the Parties Law is the idea of balancing. We need to strike a balance between two conflicting trends. On the one hand we need to enable every individual to form with other individuals an association through which they may further political and social ends. On the other hand, we should safeguard the character of Israel as a Jewish democratic state that shrinks from racism. President Barak emphasized that the right to elect and to be elected was fundamental, and went on to stress that democracy is entitled to defend itself against those who aim at undermining its existence. This is the essence of the right to democratic self-defence.159

The prospect of parties that are allowed to exist and recruit members, but are excluded from the electoral arena and, by extension, political office poses directly the question whether democracies may regulate the political arena on a basis distinct from speech, association and assembly generally. Should the freedom of expression concerns be lessened, under the American First Amendment, for example, when the repercussions are civil and confined to elective office rather than criminal? Do we think differently of a society that while not incarcerating antidemocratic forces, nonetheless denies them access to the electoral arena as a platform for antidemocratic agitation?160

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158 P.C.A. 7504/95, 7793/95, *Yassin & Rochley v. The Parties Registrar & Yemin Israel*.  
159 Cohen-Almagor, supra note ___, at 96. There are no English translations of *Yassin & Rochley* available.  
160 For the importance of the distinction between criminal prosecution of parties and the prospect of banning them from the electoral arena, see Comella, supra note ___, at 138-39 (arguing that precisely because the incarceration of individual party members is not as stake there should be a relaxation of the standards for prohibiting parties administratively).
Without a clear template in any country’s actual experience, we are left to hypothesize what it would mean to allow a party to exist but to restrict nonetheless its electoral participation. This is likely not to be a stable arrangement. But the experience of the Turkish Welfare Party and the Indian BJP suggests that even strongly religiously-based or nationalistic parties are comprised of coalitions whose more moderate members or whose leaders with greater ambition for elective office may temper to the confines of democratic life.161

It is, of course, unlikely that a prohibition on electoral participation can forestall mass antidemocratic fervor in the long run. By the time that Algerian electoral politics are commanded by parties with an express commitment to the abolition of civil liberties and further elections, little hope remains.162 A democracy without a corresponding democratic commitment in the broader society will not survive. At the same time, Algeria offers the caution that in the absence of democratic integrity to the ruling government, any repression of even avowedly antidemocratic elements will resonate as simply another corrupt effort to preserve a failed ruling elite.163 But such failures of cancerous regimes provide no evidence that a relatively healthy democratic society cannot test the antidemocratic mettle of the parties by frustrating the electoral ambitions of some, perhaps in the process emboldening more moderate elements and forestalling the use of the electoral arena for the worst antidemocratic ends.

III. The Safeguards of Democracy.

Extremist groups threaten democracy both in terms of what they might try to do through elections and governmental office, and through what they

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161 See Kang, supra note ____, for an account of how different forms of legal regulation empower distinct constituencies in political parties.

162 In June of 1990, the newly-formed Front Islamique du Salut (FIS) won 62 percent of the votes cast in local elections in Algeria. The FIS was an Islamist party that garnered tremendous popular support as an alternative to the corrupt and weak post-independence rulers. But the relationship of the FIS to democracy was uneasy, at best. The second-in-command, Ali Benhadj, was well known for his fiery rhetoric and openly denounced multiparty democracy as a threat to sharia. The party went on to win 188 seats out of 429 in the first round of national elections. Though the constitution called for a second round, the ruling FLN canceled them at the demand of Algerian generals, effecting a military coup; the leaders of the FIS were jailed and the party was banned from all future elections. While some of the moderate leaders tried to accommodate the government, the bulk of the FIS split off and began armed resistance, igniting a civil war in which over 100,000 people have been killed. See Lisa Garon, The Press and Democratic Transition in Arab Society: The Algerian Case, in POLITICAL LIBERALIZATION & DEMOCRATIZATION IN THE ARAB WORLD 149, 149-65 (Rex Brynen, Baghat Korany, and Paul Noble, eds. 1995).

163 For a further claim that expansive constitutional review performs a similar function by allowing secular elites to hold religiously-inspired majorities at bay, see RAN HIRSCHL, TOWARDS JURISTOCRACY (2004).
might provoke democratic societies to do in order to ward off the perceived threat. The threat is real, from both directions. That there are antidemocratic groups trying to worm their way into governmental positions so as to undermine tolerant, pluralistic democratic societies is not a new development. What is perhaps new is the increasing likelihood that these will be clerically inspired rather than driven by the messianic social visions of communism or fascism. But there is the corresponding threat that the ambit of democratic deliberation will be drawn too narrowly, using the threat to social peace increasingly to drive out the uncomfortable voices of dissent.

In most circumstances, efforts to root out parties by prohibition are probably ill advised. As nettlesome as the Quebec independence movement has been for Canada, the ability to channel the disputes through the political process and even the Supreme Court is far preferable to any attempt to drive the party underground.164 But Canada is not the world, and the relative civility and tolerance of debate there is unfortunately not the norm. So the question becomes what preconditions must exist for the banning of parties or other restrictions on political expression in the political arena. Here I wish to leave to the side the parties claimed to be allied with insurrectionary or regional minority forces. For those, the directness of the organizational link to unlawful activity and the immediacy of the likely harm serve as workable responses to the problems posed, at least in theory. Thus, the starting point for any discussion of the banning of political parties, political participation, or political speech should be, as set forth in the Guidelines issued by the European Commission for Democracy through Law, that the presumption is in favor of freedom of political expression and association: “The prohibition or dissolution of a political party is an exceptional measure in a democratic society. If relevant state bodies take a decision to seize the judicial body on the question of prohibition of a political party they should have sufficient evidence that there is a real threat to the constitutional order or citizens’ fundamental rights and freedoms.”165

The more difficult concern is with parties that genuinely vie for governmental office and even majority status in an effort to unwind liberal democracy. It is easy to identify what may go wrong in party prohibitions. The ability to cordon off certain areas of democratic deliberation invites censorship or suppression of political opposition, a move that can be utilized to insulate incumbent power from electoral challenge or as a pretext to impose its own form of orthodoxy on political exchange. But, if history is a guide, the threat comes from the direction of excessive tolerance as well. We can begin to test the range of permissible state responses to antidemocratic

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mass movements through the familiar categories of procedural limitations and substantive definitions of prohibited conduct.

I wish to put to the side two technical objections to the exercise. The first is that democratic suppression will not work, that ultimately it will induce greater antidemocratic mobilization than the free ventilation of all viewpoints. I view this as an empirical claim about what actually works. In the stable framework of the United States, it may well be that reactions to suppress political participation have been overwrought and largely unnecessary. I am far less confident that this is true elsewhere. That India, a country forged in fratricidal religious conflict, seeks to suppress election day incitements likely to engender communal violence is not a move so readily discounted. That Turkey suppressed Islamic extremism and saw its Islamic opposition mature and develop an appetite for competent governance is also not so easily cast as unwise or ineffectual. And even the most extreme cases, such as the Algerian military intervention to forbid a parliament from forming around a platform of eliminating democracy, are not so easily dismissed as simply a counterproductive exercise, despite the resulting military confrontation.

The other objection is to the specifics of electoral prohibitions as being either void for vagueness or unacceptably overbroad. These dangers are ever present in the exercise. But if the claim is that all efforts to bar impermissible opponents are overbroad or vague, that would not address the ability of democratic states to engage in the exercise unless the claim was that any effort at suppressing antidemocratic opposition must, of necessity, reach beyond acceptable parameters. If so, there need be some theoretical explanation for the claim, not simply an attack on a particular law or ruling as having that effect.

A. Procedural Protections.

Across the range of cases in which democratic regimes have sought to suppress antidemocratic elements from securing the advantages of the

166 Although the subject is too broad for this paper, it is important to note that the complex nature of political parties is also a factor that interacts with the imposition of legal restraints on certain kinds of activity or expression. Political parties invariably reflect deep internal tensions between their mass base, their elected officials, and the internal apparatus of the party. This is the basic analysis of political parties developed in the U.S., initially in V. O. Key, PARTIES, POLITICS AND PRESSURE GROUPS (5th ed. 1964); see Nathaniel Persily & Bruce E. Cain, The Legal Status of Political Parties: A Reassessment of Competing Paradigms, 100 COLUM. L. REV. 775 (2000). For a broader theoretical account of how parties respond to the incentives created by legal regulation, see Michael S. Kang, The Hydraulics and Politics of Party Regulation, 91 IOWA L. REV. 131 (2005).

electoral arena, three forms of procedural concerns emerge. Although there is no judicial discussion that I am aware of setting out these considerations in comprehensive fashion, taken together they highlight some of the primary protections against the potential misuse of viewpoint-based suppression of political activity.

The first, and undoubtedly most significant procedural safeguard is the concentration of the power to suppress away from self-interested political actors. In all these cases, the active agent is the judiciary either through petition by the government or by charges brought by the public prosecutor, \(^{168}\) but in all cases acting as an independent arbiter of the legitimacy of the government’s claimed need to suppress a perceived antidemocratic threat. The best example of the role of independent judicial review is found in Germany, beginning with the seminal cases after World War II. The German Basic Law both accepts the importance of political parties in a democratic order and the need to ban those that seek to destroy democracy from within, a necessarily perilous line to draw. Under the German constitution, however, an important procedural protection for political parties is that only the Federal Constitutional Court can declare a political party unconstitutional.\(^{169}\) The court addressed this topic in the Socialist Reich Party Case, stating that the framers of the German constitution, in deciding to limit the freedom of parties “seeking to abolish democracy by formal democratic means…also had to take into account the danger that the government might be tempted to eliminate troublesome opposition parties.”\(^{170}\) Therefore they committed the decision on unconstitutionality to the Federal Constitutional Court. The court differentiated Article 9(2) which allows the executive to ban “associations whose purposes or activities . . . are directed against the constitutional order.”\(^{171}\) Precisely “because of the special statutes granted only to parties,” they cannot be banned under the general executive powers of Article 9(2), and can only be declared unconstitutional by the Federal Constitutional Court.\(^{172}\)

Later cases confirmed the Court’s exclusive jurisdiction in determining the constitutionality of political activity. The reasoning of the German Constitutional Court in the Radical Groups Case,\(^{173}\) the case striking down a decision of state radio and television stations denying airtime to radical left-
wing parties, is instructive. The Court held that so long as the advertisement is related to the election, and so long as the party has not been declared illegal by the Court, content-based interference with expression based on the ideas expressed is beyond the power of the broadcast media or the government. An organization acquires rights of expression as a political party and only the court has the authority to rule on the constitutionality of a party: “[t]he jurisdictional monopoly of the Federal Constitutional Court categorically precludes administrative action against the existence of a political party, regardless of how anticonstitutional the party’s program may be . . . .”

A similar form of procedural protection emerged in France after World War II in the Fifth Republic. By contrast to the concentration of power in the legislature under the Fourth Republic, the post-1958 French constitutional order hewed much more closely to a formal recognition of separation of powers in which judicial oversight emerged as a late additional source of power – a surprisingly late development in the land of Montesquieu. Perhaps the most significant decision of the Conseil constitutionnel in establishing the principle of independent judicial oversight came in 1971 precisely in the area of the banning of political parties. The Conseil declared unconstitutional a law that would have vested in the executive branch the ability to prohibit the formation of a political party, a power it had previously denied to the legislature acting on its own accord.

Russia provides an interesting contrast. In the wake of an unsuccessful military coup in 1991, the Russian president issued a series of decrees banning the Communist Party and confiscating its property, which in turn prompted a challenge before the newly formed Russian Constitutional Court. After a politically charged trial, the Court in the Communist Party Case

\footnotesize{174 Id.\r
175 Id.\r
178 Judgment of July 16, 1971, Con. constit., No. 71-44DC.
179 The French cases are discussed at length in Neuborne, supra note ___, at 390-94.
181 For more details on the formation and rise of the Russian Constitutional Court and the context surrounding the Communist Party Case see Yuri Feofanov, The Establishment of the}
Case held that the decree banning the party was constitutional, even in the absence of a state of emergency, because it was rooted in a constitutional provision that “prohibits activity by parties, organizations, and movements having the aim or method of action, in particular, of forcible change to the constitutional order and undermining State security.” The difficulty was the absence of any established procedures and the fact that the actual banning had occurred through unilateral presidential action. Even so, the Court found the fact that there was a right of appeal prior to the effectuation of the ban to be a sufficient protection of the party’s rights, and upheld the ban on the merits.

The second procedural protection derives from the form of governmental action to be taken. In none of the cases that have been discussed, with the exception of the American Smith Act cases, did the party face criminal sanctions. The typical sanctions include removing members of proscribed parties from legislative office, the compelled disbanding of parties, and the seizure of party assets. As discussed earlier, that alone diminishes the requirement of proof of immediate threat required by the American clear and present danger test. Even under American constitutional law, the level of procedural rigor of proof is directly tied to the interests at issue and the potential severity of the punishment.

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

A least restrictive means requirement gives considerable force to the Indian and Israeli approaches of removing certain kinds of agitation from the

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183 Id. at 442.
184 This is the basic lesson of Mathews v. Eldridge, 424 US 319 (1976), and its progeny.
electoral arena, even if the political parties that stand behind those views are allowed to persist as organized entities. Both of these approaches maintain distinct rules for conduct in the electoral arena, either by regulating speech and agitation in the Indian fashion, or by reserving the right to exclude even legal parties from electoral participation, as under Israeli law. This leaves uncertain “what a democracy should do when it is faced with a party that says it is democratic, but in fact looks suspiciously undemocratic.”\textsuperscript{187} But the focus on conduct and popular proclamations does provide guidance to policing the electoral process on a basis distinct from speech and political organization outside the electoral arena. It bears emphasizing that the corollary of banning parties is the willingness to use police authority to prevent like-minded individuals from gathering, agitating for common views, even protesting governmental conduct that they find objectionable. If there is indeed something distinct about the electoral arena in terms of magnifying the dangers of extremist groups, it is perhaps best to reserve the use of state authority to policing the integrity of the electoral system without reaching so broadly into party organization.

Taken together, the three forms of procedural protection lead to a concept that has thus far been absent as a formal matter of American law: a distinct electoral arena that relaxes the restraints on the regulatory power of the state over core matters of political speech, assembly and organization. American law has generally resisted treating electoral activity as a separate category, allowing the general First Amendment prohibitions on content and viewpoint discrimination to frame legal oversight of campaigns and political parties. At the same time, even in the United States, and even without a deep-seated threat to democracy in this country, there is some hint of a distinct administrative period for elections beginning to appear in American law. Under the Bipartisan Campaign Reform Act, the BCRA law generally referred to as McCain-Feingold, Congress for the first time introduced the concept of a distinct election period for restrictions on what are termed “electioneering communications.”\textsuperscript{188} As upheld by the Supreme Court in \textit{McConnell v. FEC},\textsuperscript{189} BCRA created specific limitations on campaign funding and distinct disclosure requirements for the immediate period surrounding the primary and general elections. The administrative powers assumed by the Electoral Commission in a country like India, however, are a far step beyond anything that has been recognized in American law. But it is nonetheless worth noting that some pressures toward an administrative law of elections are beginning to present themselves here as well.

\footnotesize{187} Feldman, \textit{supra} note \textcolor{#999999}{___}, at 111.

\footnotesize{188} The definition of “electioneering communication” under BCRA, the subject of special disclosure and contribution rules, is limited to the period 60 days before a general election and 30 days before a primary election. 2 U.S.C. § 434(f)(3)(A)(i) (Supp. II). This marks the first formal introduction into American law of a designated electoral period with special communication limitations.

\footnotesize{189} 540 U.S. 93 (2003).}
B. The Substance of AntiDemocracy.

More challenging than the procedural domain is the effort to define substantively the nature of the threat to the democratic order that justifies party suppression, something that will necessarily require much case specific analysis. Relatively few parties announce their antidemocratic objectives overtly. More typically, especially in the case of parties seeking a mass audience, the antidemocratic nature of the party emerges contextually, as with the invocation of the imagery of temples buried beneath mosques in India or with the insistent claims of the post-War German Communist Party that the newly installed West German government was a corrupt lackey of the Western powers. Absent a strong mooring in the lived domestic context, it is extraordinarily difficult to formulate broad substantive principles that cover the wide range of potential antidemocratic threats.

The Socialist Reich Party case from Germany is a useful warning of the difficulty of defining with any precision the exact nature of an impermissibly antidemocratic party. The party in question was as menacing to a democratic order as could be. It looked back with unquestioned ardor upon the country’s recent Nazi past. It drew its leaders from the ranks of the SS and other notorious forces of the Third Reich, characterized for recruitment purposes as “old fighters” who were “100 percent reliable.” It emerged against the disorder and privation of defeated Germany. For all intents and purposes, it looked to tap into the same founts of discontent and hatred as its precursor National Socialist Party did under Weimar.

In order to ban the party, however, the Court needed to find some clear intention to overturn democratic governance, even in the absence of any proof of immediate likelihood of realizing that objective. A number of considerations were aired, some more serious, some more troubling. For example, the Court examined the party’s platform and found that it “in indulges in platitudes, lays down general demands that are common property of almost all parties or have already become reality, and makes vague utopian promises that are hardly compatible with each other . . . .” One can only imagine how the Court might have analyzed slogans about “Put America First” or “Build a Bridge to the 21st Century” or similar sound bites that mindlessly dominate current American campaigns.

A more interesting approach builds on the German Constitutional requirement that parties reflect their commitment to democracy in their internal structure. The Court translated this into a requirement that a

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191 Id.
political party “must be structured from the bottom up, that is, the members must not be excluded from decision-making processes, and that the basic equality of members as well as freedom to join or to leave must be guaranteed.”193 While this principle is grounded in the German constitution, it is not clear what the state interest is in controlling so tightly the internal governance of political party.

The attempt to impose a distinct internal structure on political parties raises paradoxical concerns about the relation between political parties and the state. As the German court observed in the Socialist Reich Party case, one of the telltale antidemocratic signposts of the neo-Nazis was their desire to merge the form of organization of the party and the state. Indeed, this is the characteristic of totalitarian and even authoritarian regimes of the 20th century. Almost invariably these oppressive regimes use a disciplined party structure as the basis for governance and collapse any wall between party and state. Thus, for example, several commentators have looked to the role of political parties in forming a democratic polity to argue that the parties themselves must reflect a commitment to just such democratic politics, something that authoritarian parties invariably reject.194 Yigal Mersel takes this argument one step further to claim that because political parties are indispensable to a modern democracy, the parties themselves must be held to the core conditions of democracy itself.195

Nonetheless, premising the right of participation in the electoral arena on the form of internal party organization brings the force of state authority deeply into the heart of all political organizations. One of the reasons that the banning of political parties is so problematic for liberal democratic thought is precisely that parties are a critical form of intermediary organization that allows meaningful popular mobilization outside and against state authority. It is for this reason that the right to organize and maintain political parties is a keystone of modern constitutionalism.196 Imposing the pluralist values of a democratic society onto the internal life of all political parties, however, threatens to compromise both the political integrity and the organizational independence of parties from the state. Under American constitutional law, for example, the state is held to a standard of neutrality on

193 Murphy & Tanenhaus, supra note ___, at 604.
195 See Mersel, supra note ___ at 96.
196 For an argument that the U.S. constitution shows its age in its inattention to political parties, see Samuel Issacharoff & Richard H. Pildes, Politics as Markets: Partisan Lockups of the Political Process, 50 STAN. L. REV. 643 (1998). Indeed, the American constitution was formed as a Constitution against parties, something that collapsed by the contested election of 1800. Id. at 712-14; Samuel Issacharoff, Law, Rules and Presidential Selection, 120 POL. SCI. Q. 113 (2005).
matters of religion, as is indeed the case in many democracies. Would that mean that a Christian Democratic party must be banned as violative of the state’s obligation of neutrality? Clearly not, but the example illustrates the difference between the state and political parties, even parties that are vying for a position in government.

The problem, however, goes beyond simply a matter of the restrictions on ideological commitments of a democratic state. Political parties play a key role in providing a mechanism for informed popular participation in a democracy precisely because they are organizationally independent of the state. Not only do most modern constitutions grant significant autonomy rights to political parties, but even in the U.S. a large body of constitutional law has emerged to protect the independence of political parties from the state, even in the absence of any textual commitment to such a principle. Thus, for example, a requirement that all voters be able to select the candidates of a party, regardless of prior fidelity to the party or its program, has been struck down as a violation of fundamental First Amendment rights of association and speech.\footnote{California Democratic Party v. Jones, 530 U.S. 567 (2000). At issue in \textit{Jones} was the use of a “blanket primary” in which voters were free to vote among Democratic or Republican candidates on a line-by-line basis in the primary (e.g. vote among Democrats for Governor, voter among Republicans for Senator, etc.), regardless of prior identification or enrollment in a particular party. The effect was to dampen the distinct identity of each party and to allow the broad electorate to select the party’s standardbearer in the general election.} Moreover, the grounds for striking down such attempts to impose the general principle of full democratic accountability on internal party structure raise questions even about the requirement of primaries as opposed to executive committee selection as the basis for designating candidates in the general election.\footnote{This argument is more fully developed in Samuel Issacharoff, \textit{Private Parties With Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition}, 101 COLUM. L. REV. 274 (2001).}

Any requirement that parties must have an open and democratic internal structure puts at risk ideologically-based and religious parties that may be organized around certain fixed principles not amenable to internal majoritarian override. Also at risk would be parties formed around popular leaders which may or may not evolve into true mass parties, with examples including the early days of Peronism in Argentina or the creation of Kadima in Israel largely around the personal authority of then Prime Minister Ariel Sharon. Precisely because parties are not the state, membership exit or electoral defeat is a perfectly appropriate response to the hoarding of power by an unrepresentative central cadre.\footnote{The basic argument here draws from ALBERT O. HIRSCHMAN, \textit{Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States} (1970).} And because parties are not the state, the need for pluralist competition in a democratic society does not necessarily require the same pluralist competition within all the contending parties. By analogy, we may find a perfectly diverse and competitive set of
offerings across a city’s restaurant row, even if each restaurant restricts itself to one particular cuisine. There appears no compelling reason why we should demand that all parties adhere to the same internal structure so long as the ultimate objective is meaningful voter voice and the pluralist capacity to elect out of office, a point I will return to shortly.

To return for the moment to the most obvious case for the banning of a political party, the Socialist Reich Party case in Germany, ultimately what determined the outcome was neither the lack of internal democracy nor the platitudinous propensities of its rhetoric. Rather, the key element was the most obvious: the direct tie of the Socialist Reich Party to the Nazi past. The Court found that the party modeled its uniforms on the Hitler Youth and that “[f]ormer Nazis hold key positions in the party to such an extent as to determine its political and intellectual image, and no decision can be made against their will.” The inescapable conclusion was that dissolution was proper given the party’s aim to “transplant its own organizational structure onto the nation as soon as it has come to power and thus eliminate the free democratic basic order.” At the end of the day, the simple compelling fact was that this was a party of Nazis, complete with a heroic worship of the “Reich,” serious elements of anti-semitism, and a conspicuous refusal to disavow any link to the Hitler government. It was these specifics in the context of post-War Germany that placed the Socialist Reich Party outside the bounds of democratic tolerance.

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

C. Preservation of Pluralist Competition.

Unlike the situation facing the German Court a half century ago, there is now a considerably enlarged set of experiences with democratic governments acting to protect the viability of threatened democracies. The general contours of how such bans may be implemented are suggested by the experience of democratic countries with prohibiting extremist parties. But this experience also indicates the high level of abstraction of any effort to define the exact criteria that justify a prohibition. It is instructive that the

200 Murphy & Tanenhaus, supra note ___, at 604..
201 Id.
efforts of the European Commission yield rather broad commands focusing on the extent to which parties are organized around a commitment to overthrow constitutional democracy, with some secondary sense of the immediacy of the perceived threat:

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

Obviously, the general situation in the country is an important factor in such an evaluation.202

Typically, the national laws implementing party prohibitions follow the broad outlines suggested by the European Commission. These laws combine a concern for potential recourse to violence that carries some sense of immediacy of the perceived threat with broad notions of fomenting hatred along religious or ethnic lines.203 Almost all of these prohibitions have a heavy dose of the “I know it when I see it”204 that is understandably disquieting to First Amendment sensibilities.

Ultimately, I must qualify the opening definition of democracy. The issue is not really the ability of a temporally-defined majority to select governors. The real definition of democracy must turn on the ability of majorities to be formed and re-formed over time, and to remove from office

202 Venice Commission, at Nos. 15 and 16.
203 As noted in the Venice Commission Report of 1998: “In France parties may be banned for fostering discrimination, hatred or violence towards a person or group of persons because of their origins or the fact that they do not belong to a particular ethnic group, nation, race or religion, or for spreading ideas or theories which justify or encourage such discrimination, hatred or violence. The situation in Spain is similar, but, in addition to race and creed, sex, sexual leaning, family situation, illness and disabilities are also taken into consideration. Political parties which foster racial hatred are also prohibited, for example, by the constitutions of Belarus and Ukraine, while in Azerbaijan the legislation highlights racial, national and religious conflict. Under Bulgarian law parties may be prohibited both for pursuing fascist ideals and for fomenting racial, national, religious or ethnic unrest. The Russian constitution prohibits the creation and activities of social associations whose aims or deeds stir up social, racial, ethnic and religious discord.”
those exercising governmental power. Many deeply antidemocratic groups are willing to vie for power through the electoral arena; few if any are willing to give up power that way. The definition of groups that are tolerable within a democratic order must turn, at the very least, on the capacity to be elected out of office, should they come to hold actual power. The key question in India, for example, would turn not on the objectionable features of the BJP’s past record on ethnic enmity, but on its having matured into a political party that could be removed from office, as indeed it was. The same inquiry would guide the Ukraine through the assessment of the reconstituted Communist Party, Turkey through the realigned Justice and Development Party, and so forth.

On this view, elections play a central role in democratic theory not because they ensure predetermined substantive outcomes but because they prove to be the best (and likely the only) mechanism for ensuring the consent of the governed. In order for elections to play the role of securing the consent of the governed, however, there must be renewability of consent, requiring periodic elections in which the governors must place their continued officeholding in the hands of the governed. Recent events in Iraq and Afghanistan, for example, have shown the difficulty of equating the holding of an election with the creation of an enduring system of democratic governance. Our collective experience with “one man, one vote, one time” in post-colonial regimes dictates great caution in assuming that elections and stable democratic governance are necessarily coterminous.

Placing emphasis on the renewability of consent also provides an insight into the substantive constraints that guide courts through the messy competing claims over the boundaries of democratic participation. In order for consent to be meaningfully renewed, the decisions of a majority-supported government bearing on the construction of the political process

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205 This is a controversial claim that roots democratic legitimacy in the competition among contending groups for the support of the governed. This view is most notably associated with the arguments of Joseph Schumpeter that define the core of democracy as “that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.” JOSPEH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 269 (1950). The concept of competition inheres in most accounts of democratic legitimacy, even ones more infused with a substantive content. See, e.g., Robert A. Dahl, Polyarchy, Pluralism, and Scale, 7 Scandinavian Pol. Stud. 113 (1984)(referring to democracy “as a system of control by competition”), quoted in THE MARKETPLACE OF DEMOCRACY: ELECTION COMPETITION AND AMERICAN POLITICS 1 (Michael McDonald & John Samples, eds., 2006).

206 I am grateful to Bernard Menin for suggesting this formulation.

207 The phrase "one man, one vote, one time" was coined by former Assistant Secretary of State and U.S. Ambassador to Syria and Egypt, Edward Djerjian. Ali Khan, A Theory of Universal Democracy, 16 Wis. Int'l L.J. 61, 106 n.130 (1997). The reference is to the many countries whose first election post-colonial rule turned out unfortunately to be a referendum on who would acquire state authority to settle scores with religious or tribal rivals. In such cases, the first election generally served as the last multiparty election.
must be capable of being reversed by subsequent majorities. Hence a decision to expand the role of religion in the public sphere (as with support to church schools, e.g.) remains within the realm of a reversible political decision while a removal of non-believers from the political process does not. In this sense the strongest part of the Refah Partisi case turns on the efforts to restore a version of the Ottoman millet system by which each religious community would be charged with its own affairs while the dominant Sunni majority alone attended to the affairs of state. The removal of comprehensive political power from accountability to the broad population threatens just the sort of impediment to reversibility that threatens ongoing democratic governance.

The other effect of the focus on renewability of consent is to allow a broader range of initial constitutional arrangements, particularly in deeply divided societies. Rather than viewing constitutions as a fixed array of rights, attention to the prospect of reversible democratic decisionmaking allows more flexibility in constitutional design. As difficult as the inquiry may be, a procedural concern for the renewability of consent allows fragile democracies to attend more to the institutional arrangements that best police the borders of democratic participation than to the no less contested terrain of which rights must be available in a democratic society.

In order to assess potential threats to subsequent democratic accountability, however, democratic countries have to be given the latitude to police the electoral arena in a manner distinct from either the prohibition on party organization and assembly on the one hand, or the imposition of criminal sanctions on the other. At a minimum, such an approach requires an administrative law of elections, an independent body capable of responding to claims of political retaliation against a disfavored group, and sufficient alternative means of expression as to not excessively dampen political debate. In countries such as India that process of independent administrative review followed by judicial oversight appears to have taken hold successfully. Even in Mexico, a country just emerging from overarching one-party rule, an administrative body overseeing a tightly contested presidential election has maintained an aura of independence and legitimacy. One reason this approach appears antithetical to the American First Amendment tradition is that there has been little or no experience here with neutral administration of election, a complete dearth of administrative

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

review, except for the woefully ineffectual Federal Election Commission, and virtually no experience with political agitation being a serious threat to domestic order.\textsuperscript{210} Far from being universal, that experience appears a distinct outlier on the world stage.

**Conclusion**

It is by now well established that all constitutional orders retain emergency powers, either formally or informally. Justice Jackson’s firm admonition that the Constitution is not “a suicide pact”\textsuperscript{211} well sums up the sense that even a tolerant democratic society must be able to police its fragile borders. The discussion in this paper rests on many premises that are, thus far, largely alien to the American experience, or at least the last hundred years of it. The concern in this paper begins with democratic societies that are more fragile and whose political structures are more porous to antidemocratic elements. That alone requires an ability to restrict the capture of governmental authority in anticipation of undermining democracy altogether. The next step is to envision a realm of electoral politics with rules of conduct distinct from the broader constitutional rights of assembly, petition and speech. That distinct political realm requires the ability to discipline electoral activity in a manner that does not rely on the imminence of criminal or insurrectionary conduct, the accepted standard for the criminalization of political speech. Finally, it requires confidence in independent oversight of the political process to prevent the dangerous powers at issue here from being deployed in the name of the self-serving preservation of incumbent political power.

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

The international experience also dictates some caution in readily assuming that any restraints in the political process necessarily lead to a collapse of democratic rights or a fundamental compromising of democratic legitimacy. The experience indicates that virtually all democratic societies define some extremist elements beyond the bounds of democratic tolerance. Despite errors of overreaching, likely inevitable in human affairs, the experience also indicates that this power is largely used with restraint and

\textsuperscript{210} For an exception, see Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869).

\textsuperscript{211} Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).
hesitation. With the benefit of hindsight, therefore, the question that needs to be addressed is whether Weimar Germany could have assembled the tools necessary to fight off the Hitlerian challenge within the bounds of democratic legitimacy? One certainly must hope so.