‘Fighting Fire with Fire’: A Normative Exploration of the Militant Democracy Principle

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Abstract

The concept of militant democracy – a democratic regime that institutionalizes mechanisms and is authorized to protect civil and political freedom by preemptively restricting antidemocratic action – has seen a resurgence in the last years, as a response to the rise of extremist political action and the backsliding of democracies into more authoritarian regimes. The goal of a militant democracy has been to oppose anti-democratic attempts at dismantling democratic institutions through fundamental rights restrictions (e.g. freedom of speech, freedom of assembly). While much of the literature has been descriptive analysis by comparative constitutional lawyers and political scientists, others have approached the question in a more philosophical way. Contemporary political theorists ask whether the anti-democratic, illiberal nature of militant democracy can be reconciled with democracy. Theorists believe that democratic states do have a right to defend themselves from internal threats which seek to dismantle a democratic way of life, however, they often point to militant democracy's paradoxical nature and attempt to limit the costs associated with rights restrictions. What has been missing from the literature is an overall normative defense of this institution. This thesis provides such a normative defense and posits a novel model, based on two-levels of justification: the principled level and the political-institutional level. The normative defense of militant democracy lies in its goal: to protect the underlying liberal-democratic values, principles, and norms: moral equality, respect, and toleration. Understanding the goal of militant democracy in this light provides a sound theoretical framework by which to analyze why, whether, and to what extent, militant measures can be used to combat threats to a liberal-democratic state.

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Introduction

Democratic societies are pluralistic. From a sociological point of view, pluralism is a fact: individuals differ in their socio-economic status, the way they were raised, groups they belong to, or the networks they establish and maintain. On a moral level, individuals hold different worldviews: they disagree on what is right or just, and defend different truth claims. When individuals function as political actors, these worldviews translate to radically different conclusions for particular public policies, causing contentious politics to occur.[1] Pluralism leads to disagreement on the fundamental aspects of our society: how it should be (politically) governed, and what values should be prioritized over others when they come into conflict.[2] Following from here, the goal of a liberal, democratic society is twofold: to create conditions for a free expression of legitimate pluralism, and to manage ensuing deep disagreement. The problem is obvious: citizens of a liberal democracy may find themselves at odds with the values that such a regime upholds and with laws it produces. What type of justification can be given to them for the demand that they obey the laws they disagree with?

Such concerns are not merely theoretical. Democratic regimes sometimes come under threat. In such situations, we expect democratic regimes to defend the polity and affirm its core.[3] However, this implies that the state must decide what actions are threatening (or are potentially threatening) and must choose the correct mechanism or process by which to combat such threats. Not all state actions against certain threats are liberally-democratically

[1] Lakoff, George. 2002. *Moral Politics: How Liberals and Conservatives Think*. 2nd ed. Chicago: University of Chicago Press.
[2] Sleat, Matt. 2015. "If Modus Vivendi Is the Answer, What Was the Question (and Is It the Right One to Ask)?" *Working Paper Series*, University of Muenster.
[3] Capoccia, Giovanni. 2013. "Militant Democracy: The Institutional Bases of Democratic Self-Preservation." *Annual Review of Law and Social Science* 9 (1): 207–26.

legitimate. Take, for instance, internal threats to the democratic regime. Such internal threats can come from groups and organizations that use democratic norms, procedures, and institutions to affirm values and achieve goals that are incompatible with democracy (including the goal of doing away with democracy and establishing an alternative political order). A liberal justification of combating such threats is not straightforward. Still, many democratic regimes have institutionalized mechanisms that constrain or fully forbid the room for such political action and remove these agents from the democratic playground. A democratic regime that institutionalizes mechanisms and is authorized to protect civil and political freedom by preemptively restricting antidemocratic action is called a "militant democracy".[4]

A democratic state cannot simply justify using restrictive, antidemocratic, illiberal actions by prioritizing the imperative of stability. One problem with militant democracy is that it apparently deprives some actors of the same fundamental liberal values and constitutional rights that it is explicitly trying to defend. Arguments against such measures begin. If democracy stands for equality in fundamental rights, how could it defend itself to curtailing these without destroying the very basis of its existence and justification? The idea behind militant democracy is to suggest that even before antidemocratic groups and parties that challenge the foundation of a liberal state have the power or ability to take over democracy, they should be pre-emptively restricted from accessing the political arena.[5] However, if a

[4] Loewenstein, Karl. 1937a. "Militant Democracy and Fundamental Rights, I." *American Political Science Review* 31 (03): 417–32.

[5] On what basis, such restrictions are given will be further defined in subsequent chapters of this thesis. Still, I want to highlight that the pre-emptive nature of militant action is a declaration from the state that insists certain actions will not be tolerated. With such a declaration, two assumptions are built into such a constitutional doctrine: one, it can (and will) target certain individuals whose actions are deemed antidemocratic; secondly, that such a doctrine obligates the state to protect both the order and individuals by appealing to certain substantive criteria. Whether this criterion is legitimate is where the normative justification for such a constitutional doctrine holds.

democracy stands for defense of liberty, equality, and pluralism, then the action set forth by this constitutional mechanism is apparently difficult to justify from a principled perspective.

This is where the current debate on militant democracy stands. Some theorists argue that militant democracy directly contradicts democratic principles and should not be part of a democratic state's institutional setup, or at the very least, should be limited by a robust non-interference principle.[6] This restrictive institution is seemingly too difficult a circle to square to be considered a legitimate constitutional doctrine (and instrument) for liberal democracy. To sharpen my approach, I depart from shortly revisiting the existing approaches to militant democracy. Here, I am offering to distinguish between rights-based approaches (bottom-up) and institutionalist approaches (top-down). A rights-based approach focuses on the burdens and restrictions placed on individuals through the state's use of restrictive measures.[7] An institutionalist approach focuses on how the institution functions in practice, how it is legally defined, and what procedures should be adopted to safeguard against its abuse (among other considerations as well).[8]

1.1 Approaches to Militant Democracy

[6] Alexander Kirshner's theory of militant democracy has as one of its three fundamental principles a "self-limiting" principle (find out what this is) that places a large burden on state action through a cost-benefit analysis of action and non-action. When analyzing militant democracy cases, Kirshner relies heavily on this self-limiting principle when balancing between competing interests and parties.

[7] See the following rights-based approaches: Kirshner, Alexander. 2014. *A Theory of Militant Democracy: The Ethics of Combatting Political Extremism*. New Haven: Yale University Press.

8 See the following institutional-based approaches: Niesen, Peter. 2012. "Banning the Former Ruling Party: Banning the Former Ruling Party" *Constellations* 19 (4): 540–61; Pfersmann, Otto. 2004. "Shaping Militant Democracy: Legal Limits to Democratic Stability." In *Militant Democracy*, edited by András Sajó. Utrecht: Eleven Internat. Publ.

Institutionalist approach focuses on mechanisms of militant democracy and asks about their justifiability. This is the route taken by Peter Niesen and Ruti Teitel.[9] Niesen traces the evolution of party-ban paradigms through the protectionist jurisprudence of the German Federal Constitutional Court and the European Court of Human rights to classify and compile several typologies of militant democracy. He clarifies a list of measures that can be considered militant, and then gives an argument for when measures can be considered legitimate state action. For Niesen, a militant democracy should be guided by a "negative republicanism", or rights restrictions that are motivated by a politically "negative" past experience.[10] Teitel compares the basis of judicial interpretation of militant democracy by detailing the analytical process judges utilize when searching for the intentions of antidemocrats.[11] This approach leads her to argue that the only normative defensible account of militant democracy is to understand it as a "transition paradigm", where periods of political transformation "demand closer judicial vigilance" but "may not be appropriate for mature liberal democracies".[12]

Rights-based approaches depart from the primacy of rights to ask whether militant democracy is a legitimate constraint of constitutional democracy. Alexander Kirshner assesses the legitimacy of militant measures by evaluating the costs of restrictive action on citizens' right to democratic participation. Underlying Kirshner's "self-limiting" model of militant democracy is the principle of democratic equality that carries a significant,

[9] Teitel and Niesen are paradigmatic examples of an institutional-based approach. However, they are not the only theorists who use such an approach, as the vast amount of literature on militant democracy tends to use such an approach.
[10] Müller, Jan-Werner. 2016. "Protecting Popular Self-Government from the People? New Normative Perspectives on Militant Democracy." *Annual Review of Political Science* 19 (1): 14.1-14.17.
[11] Teitel, Ruti. 2007. "Militating Democracy: Comparative Constitutional Perspectives." *Michigan Journal of International Law* 29 (1): 49–70.
[12] Ibid., 49.

normative commitment to a robust non-interference principle.[13] In this regard, Kirshner's approach combines rights-based and institutionalist approaches, to provide a substantive, normative core that justifies a militant arrangement. However, combining both a substantive core and procedural safeguards does not help Kirshner escape from the paradox of militant democracy. As Kirshner states, "Ethical action in the face of a threat to democracy depends on democrats' willingness to acknowledge the paradox of militant democracy and to manage its costs".[14] His approach to the paradox does not allow him to escape from its powerful grasp and antidemocratic nature.

Throughout this thesis, I will be returning to these and related theoretical difficulties, providing a more detailed account. Here I simply want to sketch how my approach differs. All the mentioned theories focus on the paradox of militant democracy – they acknowledge it exists, they see its antidemocratic and illiberal nature, they accept that it cannot be solved, and proceed to undertake a cost-benefit analysis of a sort between state action and non-action.

My methodological approach takes a step back from the internal debates surrounding the paradox to ask a set of more fundamental questions that change the focus of the debate. These are the questions that in my view conceptually and normatively precede the problem of militant democracy. The first question asks: how can unjust ideas and ideologies exist in a liberal democracy, and why are liberals ready to tolerate them? Does democratic legitimacy require allowing for their existence? Or, is there a substantive principle that underlines such

[13] Kirshner, Alexander. 2014. *A Theory of Militant Democracy: The Ethics of Combatting Political Extremism*. New Haven: Yale University Press. 12-25.
[14] Ibid., 25.

an assumption?[15] In a liberal democracy, the right to free speech is not tied to truth or justice, so the puzzle here is to better understand why unjust ideologies are permitted in the first instance, and what serves as an underlying principle to justify this. To discuss the case of antidemocratic political behavior and state action, it is necessary to understand the normative commitments and assumptions that is built into the foundations of a tolerant, liberal-democratic state.

My principal aim is to identify and elaborate principles that justify militant democracy. I will later argue that one such principle is respecting the moral equality of individuals. Treating individuals as moral equals requires that all members of the polity are effectively protected as holders of equal constitutional rights. If democracy is an institutional arrangement focused on protecting moral agency and legal equality, it should be enabled to act against those threats that make use of democratic arrangements to undermine equality. For instance, if a group uses democratic arrangements to institutionalize a condition where human lives are no longer seen as equally worthy, then it may be legitimate to restrict their freedom of speech or association. Certain values should be off-limits in a liberal democracy.[16]

This way of defending the legitimacy of militant democracy rests on a certain concept of democracy itself. I will focus on the interplay between substantive and procedural features of democracy. My substantive-procedural reading will show that democracy is not only a procedural institutional arrangement but has a principled substantive core centered on equality. Equality as a substantive principle demands treating individuals equally in moral worth and status, not simply in procedural terms. This value serves to guide and constrain

[15] I am grateful to Mattias Kumm for pointing out the centrality of this question when debating the militant democracy principle.

[16] My concept of reasonableness will be further fleshed out in Chapter One of this dissertation. For now, I briefly introduce my process of analyzing justifications and proposing constraints through the concept of reasonableness.

both state and individual action. How this is to be translated in a principled, non-arbitrary way of distinguishing what can and cannot be tolerated within a democratic framework will be the goal of this dissertation.

My reading of democracy does not see, *prima facie*, a problem with restricting democratic procedures or reversing democratic outcomes from a principled level. What is important to understand in such cases is the justification offered by the state to its subjects. The state must justify its actions from both a principled level and institutional level. From a principled level, it is justified to limit democratic action or reverse outcomes if they undermine the moral equality of its citizens. From an institutional level, the justification on how (and whether) to respond to such threats should take into account additional considerations (i.e. the level of the threat, the cost of using restrictive measures, and so on) that differ across liberal-democratic states. Some states may apply a wider scope to these threats while others may not see the necessity for state action. However this is to be worked out institutionally, only a substantive-procedural reading of democracy can justify these restrictions from a principled level because it requires a procedurally shaped response aimed at protecting the core values of democracy. The general layout of the thesis is as follows.

1.2. An Overview of the Thesis

In Chapter One (Stability and Militant Democracy: An Overview of Perspectives), I provide a critical overview of the state the art of the literature. I clarify what the standard approach is to the question of militant democracy in the literature and explicate my own methodological and analytical position. I argue that most readings of militant democracy are too entrenched in answering the paradox of militant democracy, namely, defending democracy via rights

restrictions underpins the very fabric of what democracy stands for – equality in fundamental rights. I explicate how my approach differs and offer a different reading for militant democracy, one that focuses on the values underpinning a liberal-democratic state.

In Chapter Two (Autonomy, Pluralism, and Stability – The Precarious Balance of This Triad), I return to the theoretical difficulties surrounding the principle of militant democracy and specify how my approach differs: taking a necessary first methodological step that asks a set of more fundamental questions that change the focus of the debate. I offer a preliminary identification of constitution democracy and explore the interplay between autonomy and pluralism and its institutional expression. I further argue that legitimate stability requires a reasonable consensus and emphasize how reason places constraints on citizens and governmental action. Reasonableness serves as a baseline to suggest that not all positions can be defensible in a liberal democracy, and those that fail to reach this threshold can (and should) be contained. I conclude by introducing the role of militant democracy in containing such unreasonable doctrines.

In Chapter Three (Drawing the Line – Militant Democracy in Action), I focus on cases of militant democracy to distinguish on which level a proper justification for militant democracy should lie. I offer a detailed analysis of classic militant democracy cases in order to reflect on the reasoning behind why the party ban was seen as a legitimate legal instrument. I look to uncover the fundamental principles and values underpinning militant action. By analyzing the measure of the party ban, I explicate the criteria of distinction between the principled level and the political-institutional level. I argue that the justification for militant action should always be on the principled level.

In Chapter Four (A Two-Level Approach to Militant Democracy), I provide a novel approach to militant democracy by specifying my theoretical approach and using other cases of militant democracy to show how the justificatory process should play out. I begin by detailing my theoretical model of militant democracy. I then test this model through a detailed analysis of problematic cases of militant democracy.

CHAPTER ONE: STABILITY AND MILITANT DEMOCRACY: AN OVERVIEW OF PERSPECTIVES

Introduction

In this chapter, I will provide a critical overview of the state of the art of the literature, identify and explain points in which I disagree, and then proceed to explicate my own methodological and analytical position. Many would agree that democracy has the right to defend itself against threats to its existence. This sentiment is neatly put forth by John Rawls: "Justice does not require that men stand idly by while others destroy the basis of their existence".[17] To ensure that democracy is safeguarded from such threats, it is limited in a special way: we talk about the interplay between constitutionalism and democracy, or simply, constitutional democracy. I will explore this interplay in Chapter Two, but in this chapter, I focus on the question of whether additional constraints and safeguards are needed and whether they are legitimate. This is the question of militant democracy. I begin by clarifying what the standard approach is to the question of militant democracy in the literature. The theorists who acknowledge the necessity of militant democratic self-defense face a particular challenge: they must demonstrate that this institution is not opposed to the regime of constitutional democracy in general, and to its leading principles of liberty, equality and the rule of law, in particular.

[17] Rawls, John. 1971. *A Theory of Justice*. Cambridge, Mass: Belknap Press of Harvard University Press. 218.

Some theorists fully reject militant democracy.[18] However, most students of militant democracy take a different approach, by first acknowledging the paradoxical nature of this institution and then assessing specific ways that its measures can or cannot be used. The so-called paradox of militant democracy seems an integral aspect of diverse theoretical attempts to come to terms with this institution: if democracy stands for equality in fundamental rights, how could it defend itself by curtailing these rights without "destroy[ing] the very basis of its existence and justification?"[19] Many theorists insist that democratic self-defense via rights restrictions has concerning long-term and short-term anti-democratic implications. It seems that militant democracy challenges core democratic commitments, such as tolerance, political pluralism, and fundamental rights (free speech, association, etc.). Even those theorists who support militant democracy acknowledge the strength of the skeptical argument but still seek to focus on the question of justification.[20]

I distinguish between two families of approaches to militant democracy: a rights-based approach (bottom-up) and an institutionalist approach (top-down). The rights-based approach focuses on individuals, while the institutionalist approach focuses on how the institution functions as an element of the institutional architecture of constitutional democracy. The two approaches share a methodological departure point: they acknowledge the paradox of militant democracy. And not only that: their approach leaves them unable to escape from the

[18] Although Jeremy Waldron has not written specifically on militant democracy, he has argued that its anti-democratic elements would not justify it as a legitimate legal tool and instrument in a liberal democracy (*Science Po Paris Graduate Conference, Paris, 2014)*. Additionally, Carlo Accetti Invernizzi and Ian Zuckerman reject militant democracy on the grounds that it arbitrarily targets enemies of democracy in an apparently illiberal and anti-democratic way. See the following: Invernizzi, Carlo Accetti and Zuckerman, Ian. 2017. "What's Wrong With Militant Democracy", *Political Studies*, Vol. 65: 182-199.

[19] Loewenstein, Karl. 1937b. "Militant Democracy and Fundamental Rights, II." *American Political Science Review* 31 (04): 638–58.

[20] Alexander Kirshner's theory of militant democracy has as one of its three fundamental principles a "self-limiting" principle (principle of limited intervention) that places a large burden on state action through a cost-benefit analysis of action and non-action. When analyzing militant democracy cases, Kirshner relies heavily on this self-limiting principle when balancing between competing interests and parties.

paradox's powerful grasp. My close readings of these different works lead me to offer a new methodological approach that shifts the focus of the debate to a space that conceptually and normatively precedes militant democracy. My approach leads me to understand that there are two levels of justification that can be used to argue in favor or against militant democracy: a first-order justification (as a matter of principles), and a second-order justification (as a matter of political-institutional concerns). This is an important classification that is not readily apparent in the literature.

Here is what follows in the remainder of this chapter. In the first section, I will give a brief genealogy of the institution, and look at the crisis of democracy in the inter-war period. This will situate the debate on non-ideal terms and ask what a democracy is to do when confronted with grave threats. I will then introduce the classical argument in favor of militant democracy set forth by Karl Loewenstein. Loewenstein had both historical and empirical reasons why to favor the argument for use of militant measures, and his core theoretical question asked how to balance freedom with security. Next, I will point to the spread of militant democracy as a constitutional category, and its institutionalization after World War II, specifically in Germany. I will also highlight the stability concern as one argument given in favor of militant democracy.

In the second section, I will give a broad overview of many different perspectives on militant democracy and identify their primary concerns. I will distinguish between three ways that the literature analyzes militant democracy: a normative level, an institutional-constitutional level, and empirical level (as seen in Loewenstein's analysis). In the third section, I will argue that most readings of militant democracy are too entrenched in answering the paradox and misinterpret what the main concern is when giving arguments for or against the institution.

This is due to the fact that most do not locate properly the level at which the question of justification arises. I will then explicate how my approach differs. In turn, this will allow me to discuss the normative, first-order justification in Chapter Two of this dissertation. My approach will also incorporate a "transnational" element to militant democracy that I will further explicate in Chapter Four.

Section One: Genealogy of the Institution – the Crisis of Democracy in the Inter-War Period

1.1. The Path to a Constitutional Doctrine of Militant Democracy

In 1919, the Weimar Republic was formed, and with it brought the hope that democracy would begin to take roots in Germany – the bill of rights was one of the more progressive in Europe, political parties would be able to freely compete in elections, leaving ample room for democratic norms to run their course in German society.[21] Fourteen years later, President Paul Von Hindenburg appointed Adolf Hitler as Chancellor of Germany. After three months, Hitler used his emergency dictatorial powers to rule, and the Weimar Republic was no longer a regime. What happened in between this time period that led to the democratic takeover of the Weimar Republic by the Nazi party? What do these inefficiencies of the democratic setup tell us about modern liberal democracies? What lessons were learned?[22]

[21] Jacobson, Arthur J., and Bernhard Schlink, eds. 2000. *Weimar: A Jurisprudence of Crisis*. Philosophy, Social Theory, and the Rule of Law 8. Berkeley: University of California Press. 7-13

[22] A multitude of literature exists on how Hitler's rise to power came about, be it through a sociological, historical, or political lens. Although these approaches give us a broader, deeper understanding of the many reasons why Hitler was able to be popularly supported, they are beyond the scope of this research. My focus is on the institutional deficiencies that allowed Hitler to legitimately use democratic procedures to solidify his ultimate ruling power through institutional-legal means.

The story of militant democracy begins during this trying time of 1919 – 1933. In theory, the Weimar Republic was set up in a way to give more credence to the ideal of self-government.[23] The Bill of Rights guaranteed every German citizen freedom of speech and religion, as well as equality under the law (rule of law). Men and women over the age of 20 were given the right to vote.[24] There was an elected president and elected Reichstag (parliament), and an appointed government. But there were two apparently major flaws that eventually led to its demise – proportional representation and Article 48. Rather than voting for an MP, Weimar Germans voted for a party. Seats were allocated along such parameters. While the intent was to reduce political conflicts, it resulted in the opposite – many different parties gained seats and there was a deadlock in the parliament. Each party had different aims, and this made it difficult for the Reichstag to govern, leading to political instability.[25] Political extremism was thriving.[26] It was only occasionally that the Republic was able to overcome these moments of political unrest by creating coalitions – one such period occurred when Gustav Stresemann was appointed chancellor. Stresemann created for a great coalition from the *Sozialdemokratische Partei Deutschlands* (SPD) to the *Deutsche Volkspartei* (DVP) in order to consolidate democracy against the extremes of the left and right. But this weakness in the Weimar constitution would only be overcome for a short period of time.

[23] Preuss, Hugo. 2000. "The Significance of the Democratic Republic for the Idea of Social Justice." In *Weimar: A Jurisprudence of Crisis*, edited by In Arthur J. Jacobson and Bernhard Schlink. Philosophy, Social Theory, and the Rule of Law 8. Berkeley: University of California Press. 123.

[24] To have an understanding of how democratic this system was set up, one can look at other democracies to show how much more inclusive the Weimar Republic was. In Great Britain, only women who were over 30 years of age could vote.

[25] In the early 1920's, there were nearly 32 different political parties that were represented in the Reichstag. On the extreme left was the Communist Party (KPD), on the left was the Social Democrats (SDP), in the Center was the Centre Party (ZP) and Democratic Party (DDP), on the Right was the Peoples Party (DVP), Nationalists (DNVP), and on the Extreme Right was the Nazi Party (NSDAP). This list is not exhaustive, but parties can be listed somewhere in this political spectrum.

[26] Right-wing nationalist group *Schwarze Reichswehr* rebelled in Berlin; Nazi fascist groups attempted a *putsch* in Munich; Communist groups took over several governments in the following regions: Saxony, Thuringia, and the Rhineland (declared it independent).

Second, Article 48 was detrimental to the stability of Weimar democracy. The article stated that in times of emergency, the President did not need to have agreement with the Reichstag, but could issue decrees to rule.[27] The major problem with this article was simply that it did not define what an emergency was. Thus, the only "safeguard" against abuse of emergency powers was a presumption of the President's commitment to democratic values. With the Great Depression of 1929, political instability once again came to the forefront. NSDAP and other political extremists exploited the situation and made an intensified appeal to the unemployed middle-class urban and rural masses, creating propaganda against Marxists and Jews. In addition, border parties began to pursue alternative political alliances and "defect[ed] from the political centre".[28] For instance, after 1928, the National Conservatives (DNVP) moved towards the extreme right, and the Great Coalition between centrist forces and the Social Democratic Party broke down, thereby relying on "President Hindenburg to government by decree".[29] Frequent elections had to be held because no workable majority was possible in the Reichstag, and the economic crisis led to increased support for extremist parties.[30] Extremist parties began working closely with one another in an attempt to overthrow the Weimar Republic - the KDP cooperating with the NSDAP, creating instability from both sides of the political spectrum. Following this period, President Hindenburg appointed Hitler as Chancellor of the Republic through constitutional means. Hitler then proceeded to transform the Weimar Republic into a totalitarian dictatorship.

[27] The Weimar Constitution (1919), Article 48.
[28] Capoccia, Giovanni. 2001. "Defending Democracy: Reactions to Political Extremism in Inter-War Europe." *European Journal of Political Research* 39 (4): 431–60.
[29] Ibid.,, 441.
[30] In 1928, the NSDAP polled 2.6 percent in May Reichstag elections. In 1930, the Nazis were second largest party in the Reichstag with 18.3 percent of the vote. In 1932, the NSDAP doubled its representation and became the strongest party in the Reichstag.

While it is true that Hitler did come to power through democratic means, it is not an entirely empirically accurate assessment, given the anti-democratic action, violence, and intimidation during the time of these elections. For instance, during the last months of the Weimar Republic, Capoccia states that, "the political setting of Weimar at the end of 1932 can hardly be defined as 'democratic', but the logic of the strategy is the same: weakening the adversary by attracting the sectors that are ideologically closer and isolating the most radical ones".[31] Measuring the failure of the Weimar Republic in terms of this single denominator would paint an inaccurate picture of Hitler's rise to power. However, it is important for me to show how the absence of institutional safeguards and the limits of legislative responses to extremism in preventing the overthrow of democracy. Indeed, the Weimar Republic did have some special anti-extremist legislation, most notably, through several presidential decrees in 1931 and 1932 that "protect[ed] public order and curb[ed] extremist political propaganda".[32] However, it lacked a "coherent political strategy against extremists", one that would have developed a holistic doctrine of a preemptive nature, to target those groups and individuals who seek to dismantle a democratic way of life.[33] As Reich Minister of Propaganda Joseph Goebbels stated "We enter Parliament in order to supply ourselves, in the arsenal of democracy, with its own weapons. If democracy is so stupid as to give us free tickets and salaries for this bear's work, that is its affair. We do not come as friends, nor even as neutral".[34] This episode in time is the historical birthplace of the idea of a "democracy that should be capable of defending itself" *(wehrhafte Demokratie)*. The idea was introduced and developed by Karl Loewenstein. I will analyze it in the next section.

[31] Capoccia, *Defending Democracy*, 456.
[32] Ibid., 437.
[33] Ibid., 437-438.
[34] Goebbels, Joseph. 1935. *Der Angriff. Aufsätze aus der Kampfzeit.* Munich: Zentralverlag der NSDAP. 71-73.

1.2. Locus Classicus – Loewenstein's Response

Karl Loewenstein (1891-1973) was a German legal theorist who was forced to flee from Germany after the Nazi seizure of power in 1933. He immigrated to the United States and immediately addressed the question of how democratic states can defend themselves from extremist threats. In his seminal work on militant democracy, he begins by discussing the situation of the time, specifying fascist elements throughout different European states.[35] In many of these states, he noticed that constitutional government was being overtaken by "emotional government", thereby leaving states to measure positive law in terms of "unchallengeable command" rather than in terms of "constitutional legality".[36] He understood fascism not as an ideology, but rather, as a political technique:

> The vagueness of the fascist offerings hardens into concrete invective only if manifest deficiencies of the democratic system are singled out for attack. Leadership, order, and discipline are set over against parliamentary corruption, chaos, and selfishness; while a cryptic corporativism is substituted for political representation. General discontent is focused on palpable objectives (Jews, freemasons, bankers, chain stores). Colossal propaganda is launched against what appears as the most conspicuously vulnerable targets.[37]

On both an empirical and analytical-legal level, Loewenstein's diagnosis showed that "only under the extraordinary conditions offered by democratic institutions" can fascism's techniques be victorious.[38] Democracy, governed by compromise, requires adhering to

[35] Loewenstein specified "fascism's pattern of political organization" in a "variety of [different] shades". In Italy, Germany, and Turkey, he showed how dictatorships rule outright. He also labeled other "authoritarian" states, not necessarily fascist, but ones without genuine representative institutions: Austria, Bulgaria, Greece, Portugal, Hungary, Romania, Yugoslavia, Latvia, and Lithuania. As he states: "Without being nominally fascist, all these states are authoritarian to the extent that the group in power controls public opinion as well as the machinery of government." Loewenstein, Karl. 1937a. "Militant Democracy and Fundamental Rights, I." *American Political Science Review* 31 (03): 417–32.
[36] Loewenstein, Karl. 1937a. "Militant Democracy and Fundamental Rights, I." *American Political Science Review* 31 (03): 417–32.
[37] Ibid., 423.
[38] Ibid., 423.

certain democratic principles, such as toleration.[39] The idea here is that democratic principles preach tolerance among opposing worldviews and programs. However, this guarantees the public voice to the advocates of extreme anti-democratic, ideological standpoints, such as Nazism, Fascism, and Communism. Through the use of such democratic institutions, fundamental rights, and the rule of law, anti-democrats are able to achieve their own goals and discredit the democratic order, since "democracy could not, without self-abnegation, deny to any body of public opinion the full use of the free institutions of speech, press, assembly, and parliamentary participation".[40] Loewenstein argues that democratic fundamentalism and legalistic blindness makes democracy legally bound to treat anti-democratic parties with formal equality and "does not see fit to exclude from the game parties that deny the very existence of its rules".[41]

Although Loewenstein knew that the answer to these threats might not be appealing, theoretically or practically, the imminence of the threat meant that something should be done. His intuition was that democracies must be able to proactively defend themselves against internal threats to its existence through legal-institutional means: "If democracy believes in the superiority of its absolute values over the opportunistic platitudes of fascism, it must live up to the demands of the hour, and every possible effort must be made to rescue it, even at the risk and cost of violating fundamental principles".[42] Still, how is a democracy to defend itself in a principled manner when it requires restricting fundamental rights? This was new terrain for democratic theory that is committed to liberal principles. Loewenstein offers an illustration of how this is to be done with militant democracy on an institutional level; however, whether he provides a sound principled justification in answering the paradox of

[39] Ibid., 423.
[40] Ibid., 423-424.
[41] Ibid., 424.
[42] Ibid., 432.

militant democracy is questionable, which is why many theorists tend to depart from Loewenstein.

The first Loewenstein's institutional proposal was to utilize 'sunset laws' against extremists.[43] Such a legislation would only temporarily exclude anti-democrats from the democratic arena, allowing for their re-entry once the period of validity of the law was over. It seems as if this tool would be applied in extraordinary times of instability and when a threat necessitates an immediate response. I see this as the first incarnation of the idea that militant democracy should be self-limiting, a strand that could be seen in today's theories that attempt to attend to the question of how to minimize the costs of rights restrictions.[44] However, rather than staying with such a self-limiting approach to militant democracy, Loewenstein became increasingly convinced that more draconian measures needed to be taken. He argued that there was a need to have a complete transformation of democracies in order to combat any and all threats, so that measures can "correspon[d] to the uniformity of the fascist technique in undermining the democratic state".[45] The idea here is that a constitutional democracy has to be institutionally empowered to fight abuses and that the timing of defense is paramount:

> Naturally, the chances of ultimate success in holding the various local fascist movements at bay are proportional to the time of the enactment of restraining measures (whether early or late), the elaborateness of the measures and the skill with which they have been drafted, the prevailing legal traditions and techniques, and, above all, the zeal and determination in enforcement displayed by the administrative and judicial authorities.[46]

[43] He did so through a series of articles published from 1935 – 1937: "1936b. "Law in the Third Reich." *Yale Law Journal* 45 (779).; "Dictatorship and the German Constitution: 1933-1937." *University of Chicago Law Review* 4 (4).
[44] See Section 2.3 for more details on a self-limiting theory of militant democracy (Kirshner).
[45] Loewenstein, *Militant Democracy II*, 644.
[46] Ibid., 644.

Here, we can see that Loewenstein was taking the idea of militant democracy to its foremost institutional expression – democratic regimes should institutionalize the doctrine through specified measures, in line with specific legal traditions, and political authorities (administrative, judicial, etc.) should adopt a sort of democratic self-defense ethos above all else. This means that extremist action – be it from individuals, groups, or political parties – can be removed through pre-emptive, illiberal measures to prevent the subversion of democracy.[47] Thus, in his approach, we can see that he utilized the following methods: normative, analytical-legal, and empirical. From a normative standpoint, the fact that Loewenstein argues that extremism should be combatted by any and all means necessary (even in limiting fundamental rights) is linked, I argue, to the imminence of the threat at hand. As such, he does not provide a proper, principled argument that would justify, *prima facie*, the ability of restricting the fundamental rights of citizens. He focuses on the stability of the regime as a whole, arguing that this is the first condition for enjoyment of fundamental rights, liberties, and a democratic way of life. His assessment does not go beyond the level of the imminence of the threat, which leads him to concentrate on how militant democracy can be legally institutionalized.

Based on his empirical assessment of the situation at the time, Loewenstein is able to answer who the target of such repressive measures would be in a simple manner. Loewenstein was able to point to who those anti-democratic actors were with ease: fascists, communists, and Nazis. The criterion for banning such political groupings (parties, associations, organizations) or limiting their fundamental rights is that they are subversive: "The fact, however, that a group, by its organization or aims, intends or is prepared unlawfully to usurp functions

[47] Müller, Jan-Werner. 2012. "Militant Democracy." In *The Oxford Handbook of Comparative Constitutional Law*, edited by Michel Rosenfeld and András Sajó, 1st ed. Oxford, U.K: Oxford University Press. p. 1253.

ordinarily belonging to the regular state authorities is as a rule sufficiently indicative of its subversive character".[48] With such a broad characterization, Loewenstein can avoid "specific legal definitions of what constitutes a subversive party".[49] Democracy no longer sits idly by as a value-neutral regime. Rather than insisting that all are equal in the democratic playground, Loewenstein believes that only those who have a strong commitment to democratic ideals can be allowed to benefit from the use of democratic freedoms.

Therefore, the state, according to Loewenstein, should be disciplined. A "disciplined" state may mean two things: one, individuals must adhere to democratic ideals and goals that are compatible with democracy, and two, the state should be proactive in finding those who are against democracy and restricting their ability to sustain antidemocratic action. Loewenstein rejects the idea that a democratic state should never violate individuals' rights. Regimes that collapsed under extremist pressure and that equated popular support for that pressure with democratically legitimate will had "gravely sinned by their leniency".[50] Combatting these anti-democratic actors can come in a variety of forms: banning parties, militias, and similar types of organizations; restricting rights of assembly and free speech; denying individuals access to public office; threatening with revoking of citizenship, and so on.[51] Loewenstein acknowledges the that it is a difficult problem for a democratic state to curb public opinion, free speech, and free expression of anti-democratic actors. But, for him, this problem fades when compared to the nature of the threat.[52]

[48] Loewenstein, *Militant Democracy II*, 646.
[49] Ibid., 646.
[50] Ibid., 653.
[51] Müller, *Militant Democracy*, 1258.
[52] Loewenstein, *Militant Democracy II*, 652-653.

Lastly, to best understand how a state is to be "disciplined" and ready to act preemptively against anti-democrats, Loewenstein insists that a "specially selected and trained political police for the discovery, repression, supervision, and control of anti-democratic and anti-constitutional activities and movements should be established in any democratic state at war against fascism".[53] Not only should the state be proactive searching for such activity - all citizens should join in, to the point where governments should "make it an offense not to report to the competent authorities information concerning unlawful or subversive activities".[54] Despite these legislative provisions and self-defense ethos of authorities and individuals prescribed by Loewenstein, he cautions against being too optimistic about their effectiveness: the institution of militant democracy is only a "subsidiary expedient of the militant will for self-preservation".[55] Where Loewenstein's analysis is not sufficient is in his normative argument for why militant democracy is justified in the first place. He steers too far from liberal-democratic values. The following quote captures the extent to which his positive model goes too far:

> Salvation of the absolute values of democracy is not to be expected from abdication in favor of emotionalism, utilized for wanton or selfish purposes by self-appointed leaders, but by deliberate transformation of obsolete forms and rigid concepts into the new instrumentalities of "disciplined," or even – let us not shy from the word – "authoritarian," democracy.[56]

Although Loewenstein rightfully observes that governments should establish constitutional processes to dismantle the threat of anti-democrats, his redefinition of democracy as authoritarian or disciplined does not stand the test of liberal justification.

[53] Ibid., 655.
[54] Ibid., 655.
[55] Ibid., 655.
[56] Ibid., 657.

1.3. Loewenstein's Lasting Contribution to Militant Democracy

Loewenstein's contribution to militant democracy is not merely coining the concept. His contribution can be seen in the following ways: 1) pointing to the vulnerability of the democracy; 2) highlighting the major paradox surrounding militant democracy; 3) insisting on the constitutionalization of militant democracy. The third point is easy to identify: militant democracy has become a constitutional category, after World War II. According to Ruti Teitel, militant democracy in Germany can be seen as "post-war response to a particular constitutional history: the vulnerability of the pre-War Weimar Republic and its collapse at the hands of a totalitarian political movement".[57] This comes close to changing the normative core of constitutionalism – the Basic Law allows for derogation of some constitutional rights, if they are exercised in a manner that threatens the democratic order.[58] The German Constitutional Court further institutionalizes militant democracy, and this can be seen in several different cases.[59] Throughout several European countries, we find a legal-institutional expression of militant democracy based on the argument of the post-war or post-regime change necessity: the Italian constitution of 1948[60], the French Constitution of 1958, and the Spanish Constitution of 1978. [61] More recently, militant democracy was introduced in the post-communist constitutions, apparently following the same line of argumentation. The Polish constitution forbids political parties devoted to totalitarianism or racial/national hatred.[62] The Ukrainian constitution prohibits parties that threaten the independence of the

[57] Teitel, *Militating Democracy*, 62.
[58] Ibid., 62.
[59] There are two major court cases that I will analyze more soundly in Chapter Three and Four of this dissertation: the bans on the Neo-Nazi SRP in 1952; the Communist Party of Germany in 1956.
[60] The Italian Constitution (1948): "It shall be forbidden to reorganize, under any for whatsoever, the dissolved Fascist Party". (Italian Constitution. "Transitory and Final Provisions", Disposition XII, 1948).
[61] In the Spanish constitution, political parties should be democratically organized, as opposed to parties that are not democratically organized being seen as "hostile" to liberal democracy in general. In the French constitution, it empowers the President to defend the institutions of the Republic.
[62] The Polish Constitution (1997), Article. 13.

state.[63] And on a European level, a "militant" understanding of democracy can be seen in the European Court of Human Rights jurisprudence.[64] I believe that this is one of the more lasting contributions that Loewenstein made – that he sought to have this concept institutionalized.

Still, this is not the only lasting contribution Loewenstein had for militant democracy. His approach and analysis exposed democracies' vulnerable nature (as previously discussed). This contribution highlights the paradoxical nature of the institution: "Democracy stands for fundamental rights. How could it address itself to curtailing these without destroying the vary basis of its existence and justification?"[65] It remains a dominant concern in theoretical controversies over militant democracy – speaking directly to the paradox, acknowledging it exists, and seeking to answer it. Since Loewenstein believed the paradox to be merely superficial - given the dire circumstances that democracies faced - most theorists believe his justificatory argument remains normatively wanting. Basing a normative argument for democratic self-defense purely on the demand for stability is intuitively strong, for if there is no stability, then the state is in disarray and cannot properly provide the public goods for a democracy to flourish (security, rights, freedoms, efficient public institutions, etc.). However, Loewenstein's reading of democratic stability is an instrumental one, not one based on substantive values. In the coming chapters, I will argue that stability, in and of itself, should not be seen as the sole, fundamental concern. A liberal justification here is not straightforward – to uphold a commitment to toleration and respect for equal persons would require acting on the side of constraint, and not to employ extreme methods without acknowledging the consequences on democracy itself. A liberal justification of militant

[63] The Ukrainian Constitution (1996), Article. 37.
[64] See: *Refah Partisi and Others v. Turkey*, No. 67, Strasbourg 31 July, 2001.
[65] Loewenstein, *Militant Democracy II*, 650.

democracy requires that it is appropriately defined in terms of agency, type, timing, and limits of action. Absent such restraints, it "leav[es] fundamental freedoms exposed to the risk of abusive state action" that is authoritarian in nature.[66]

The type of stability matters when trying to understand what can and cannot be justified. A tension still exists between the principled primacy of individual autonomy and the imperative of stability of the democratic regime. In a democratic system, if individuals are autonomous, it would follow that moral and political pluralism, including deep disagreement, are also legitimate. One of my core questions asks about the type of stability that liberal democracy can legitimately achieve and defend - I label it *democratic stability*. The tension that exists between a constitutional democracy and a militant democracy implies that the regime that institutionalizes militant democracy is not politically neutral – by restricting access to the political arena through its institutional mechanisms it appears to treat its citizens in a manner that challenges the core liberal principle of legal and moral equality. Militant democracy discriminates – there are lawful attitudes that still do not stand the test of legitimacy. It works in an apparently illiberal way, for individuals cannot decide on their own life, nor are they on equal footing with others in the processes of democratic self-government.

Seen in this perspective, the main issue about a militant democratic regime appears to be its authority to decide who, how, and in what way can discriminate, going as far as limiting fundamental rights. But this would be a hasty argument – if we want militant democracy to secure liberal-democratic values, and not simply the stability of the regime, stringent constraints would transpire. Understanding militant democracy in this way, as the guardian of

[66] Macklem, Patrick. 2006. "Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination." *International Journal of Constitutional Law* 4 (3): 488–516.

liberal-democratic values, changes the scope and justification of the institution in a profound way. And yet, many theorists who discuss militant democracy remain divided into those who see it as an institution that is inherently detrimental to democracy, and those who agree with Loewenstein's argument and defend some practices of militant democracy. In the next section, I will visit different arguments that have been used to either defend or oppose militant democracy and assess them critically.

Section Two: Different Theoretical Approaches and Perspectives

2.1. Trends and Approaches – State of Research

The literature on militant democracy offers a multitude of perspectives on whether, how, and to what extent, a democracy can safeguard itself against threats to its existence without undermining its normative and procedural core. Many agree with Loewenstein's central argument that democrats should stand up for self-government. However, they also acknowledge that Loewenstein's argument goes too far, and that a justification should be given for how a liberal democracy can engage in self-defense without deterring its core values. I have categorized the literature on this subject into three groups of approaches: 1) normative, 2) analytical-legal, and 3) empirical. Although these categories are quite broad and do contain some overlap, this provisional distinction is a helpful tool for an identification of different theoretical approaches to the subject. My close reading of Loewenstein inspires this categorization. To repeat, his approach combines empirical analysis of the inter-war period, legal analysis of the deficiencies of constitutional democracies, and a set of normative propositions.

2.2. Normative Analyses of Militant Democracy

The normative question is simple: how, if at all, can militant democracy be liberally-constitutionally justified?[67] One question that can guide a normative exploration is the following: is militant democracy compatible with the very nature of democracy? Otto Pfersmann argues that this way of formulating the tension carries with it some background misunderstandings that misplace the seriousness of this question. He believes that all democracies are militant. He comes to this conclusion by investigating militant democracy as a legal structure.[68] He distinguishes "militant democracy" from a "pure democracy". A "pure (open) democracy" would be an ideal system that follows strict majority rule, where majoritarian decisions produce general norms, but the system does not include any requirement other than participation. This means that there is "no obligation, prohibition, or permission that affects all individuals falling under the jurisdiction of the legal system in consideration".[69]

Pfersmann contends that democracies, whether pure or not, must be understood from a legal perspective – analyzed on the basis of what legal structures are present and how these additional legal structures deter from a "pure democracy". Still, democracy cannot be a "purely" legal structure, because even a simple majoritarian democracy devoid of any constitutionalist constraints would have to provide some "minimal criteria for what legally

[67] Other than Kirshner (and his approach is focused on political participation), there is no thorough, normative exploration of the militant democracy principle. Rather, theorists tend to take on specific cases, discuss it through legal reasoning, emphasizing certain empirics, and so forth, but do not dive into the deeper question of whether one can justify militant democracy. This is where I depart from all other inquiries. Even inquiries that I am listing under this normative category tend not to discuss the theory as a whole, but a particular aspect of it.
[68] Again, it is not his investigation of the legal structure that I want to highlight here, but his normative argument. It is precisely why I chose to put him into the normative classification, despite his looking at the question from a legal perspective.
[69] Pfersmann, Otto. 2004. "Shaping Militant Democracy: Legal Limits to Democratic Stability." In *Militant Democracy*, edited by András Sajó. Utrecht: Eleven Internat. Publ. 53.

belongs to it".[70] Where there is this legal articulation of democracy, then there is also an expression of a certain conception of law production that requires determination and differentiation, rather than some spontaneous behaviors. But even in such a structure, there would be an assumption that democracy is legally contingent on "the democratic stances of the majority of direct or higher-order voters".[71] Here is where the paradox appears – if individuals are content with the system as a whole, then they will favor it – but if the majority becomes discontent with it, then "open democracy will openly and democratically disappear".[72] A legal strategy can combat this by introducing legal obstacles at preventing a collapse into anti-democratic government, yet Pfersmann understands that this can have perverse effects, going as far as undermining confidence in democratic structures.[73]

Thus, Pfersmann introduces the term "militant" in a theoretical sense – it is a democracy that has a legal structure containing rules that "prevent a departure from 'open democracy' as the general rule of rule-making".[74] Put more simply, if a democratic state forbids the overthrow of democracy, then it can be seen as "militant". One of the more important aspects of his contribution is his understanding of how militant democracy is no different than other legal structures that depart from "open democracy". Therefore, he not only envisions a paradox of democracy in a classical sense, but he highlights the paradox of militant democracy – how the protection may void the object of which it is to be the guardian.[75] The normative question still carries with it some significant weight, but he shows that the way of asking the question is different than the way most theorists pose it – he moves the tension to another realm, and shows that making democracy more militant than it already is further decreases the liberal

[70] Ibid., 54.
[71] Ibid., 54.
[72] Ibid., 54.
[73] Ibid., 55.
[74] Ibid., 56.
[75] Ibid., 68.

heritage of constitutional democracy. This depends upon the strength of militant provisions, and other "militancy-drive" aspects of the constitution – phasing, competencies of the constitutional court, and so forth.[76]

So, to repeat, Pfersmann's interpretation of the tension between democracy and militant democracy is novel in its claim that all democracies are militant, to the extent they depart from a "pure democracy". A standard constitutional democracy is a militant departure from a "pure" democracy, which already threatens the liberal core of democracy. There are inconsistencies here. First, built-in constraints of constitutional democracy do not necessarily make it less liberal. In fact, having more safeguards built into a legal system further protects rights from abuse and upholds liberal values and principles. What must be looked at more specifically is the nature of these safeguards, their justification, and the consequences of these safeguards on fundamental rights and democratic self-government. I would contend, and this will come later in my analysis, that providing certain militant measures will better adhere to liberal principles than simply having a "pure" democracy. What must be consistent is congruence of these measures with the liberal values underlying a constitutional democracy. I will argue in some cases militant measures will make a constitutional democracy better off – in a liberal sense – by limiting constitutionally guaranteed freedom to undertake certain types of actions.

Where Pfersmann is lacking in his analysis – judging militant actions from the perspective of the protection of liberal values - is taken up by other theorists. This is a concern for liberals who want to defend democracy but are cautious of illiberal measures. Ruti analyzes militant democracy as a potential guardian against a new democracy "backsliding" into

[76] Ibid., 53-68.

authoritarianism. She believes that a normatively defensible account of militant democracy should be a "transition paradigm":[77]

> Militant constitutional democracy ought to be understood as belonging to transitional constitutionalism, associated with periods of political transformation that often demand closer judicial vigilance in the presence of fledging and often fragile democratic institutions; it may not be appropriate for mature liberal democracies.

While Teitel points to a valid point that militant measures should be time-sensitive, I believe that the deeper question is whether a democracy has to defend itself through the restriction of fundamental rights. As Jan-Werner Müller points out, "the logic works also the other way around: in new democracies, power-holders might be more tempted to abuse the provisions of militant democracy to harm legitimate opponents or even push them out of the political game altogether".[78] Müller believes that militant democracy – rather than left at the hands of political actors – should be built as much as possible into the constitution.[79] Still, the fact that militant democracy should be in the constitution does not tell us whether it is justified. One of the more difficult problems for militant democracy, which can be seen in the literature, is establishing whether a government has the authority and legitimacy for targeting anti-democratic actors through such restrictive measures. Here, critics argue that militant democracy makes it possible to target opponents in an arbitrary manner. This is one major criticism that necessitates further discussion.

In a recent piece, Carlo Accetti Invernizzi and Ian Zuckerman define the central problem of militant democracy in the following way: when a liberal-democratic state decides on who is an "enemy of democracy", there is an "irreducible element of arbitrariness in whichever way

[77] Teitel, *Militating Democracy*, 49.
[78] Müller, *Protecting Popular Self-Government*, 14.6.
[79] Ibid., 14.6

that decision is taken".[80] Rather than provide a safeguard for democracy, militant measures actually give anti-democrats the legal instruments to exclude "an indeterminately expansive range of political competitors from the democratic game".[81] Such a criticism should not be taken lightly, as militant democracy can go from being a virtue to a vice, by restricting legitimate political pluralism to preserve a more stable democratic arena for political gains:

> Militant democracy fails *on its own terms* as a non-arbitrary principle for excluding presumptive enemies of democracy in a democratic and constitutional way. The inherent arbitrariness over who is to be treated as an "enemy" of democracy implies that militant democracy must always take the form of a "decisionist" and authoritarian exercise of power that contradicts the very logic of the system it is supposed to protect.[82]

When this logic is applied to religious freedom, the criticism says that the institution's "aim is to artificially reinforce religious and cultural homogeneity at the expenses of genuine pluralism".[83] The state begins to assume a certain substantive vision of democracy that is incompatible with core liberal principles, such as freedom of religion. I find the same criticism to be the central normative element in both David Dyzenhaus and Susana Mancini's analysis. They take particular cases – whether it is a specific provision in a constitution or a case presented before a court – and analyze the empirics surrounding it. Then, they derive their normative concern – the apparent arbitrariness in militant democracy – and offer different answers as to what should be done. I will first highlight Susanna Mancini's analysis to discuss this logic when applied to religious freedom, and then will move on to Dyzenhaus

[80] Invernizzi and Zuckerman, *What's Wrong with Militant Democracy*, 183.
[81] Ibid., 183-184.
[82] Ibid., 189-190.
[83] Mancini, Susanna. 2014. "The Tempting of Europe, the Political Seduction of the Cross." In *Constitutional Secularism in an Age of Religious Revival*, edited by Michel Rosenfeld, First edition. Oxford, United Kingdom ; New York, NY: Oxford University Press. 127.

to explicate specifically how a state should respond to such criticism and prescribe militant democracy in a legitimate manner.

Mancini explicates how militant action can be illiberal, specifically when it excludes certain groups in society (e.g. those who practice Islam).[84] Mancini contends that the normative power and political strength of democracy cannot rest on the idea of exclusion. She sharpens the paradoxical nature of the institution and the issue of its justification: it excludes anti-democratic action to "save" democratic inclusiveness. This is one of the major pitfalls in militant democracy for Mancini, that certain restrictions on political pluralism might be necessary in order to preserve the very possibility of pluralism. The state excludes the individuals' right to participation granted to them in light of being citizens of a polity.[85] She believes that the arbitrariness in targeting certain actors is a "slippery slope" – if a state's inaction allows for anti-democratic parties to gain power, then it will surely end up destroying democracy.[86] In her detailed analysis of this logic, she shows how similar arguments are used to justify the restrictions imposed on Islam and its symbols, the claim being that this worldview may be a threat to democracy.[87] She compares bills, laws, and specific cases that ban or limit the display of Muslim symbols in many different jurisdictions. Many of the cases come from the European Court of Human Rights: *Otto-Preminger Institute v. Austria*[88], *Dahlab v. Switzerland*[89], *Sahin v. Turkey*[90], and *Refah Partisi and Others v.*

[84] Ibid. 127.
[85] Ibid., 125-127.
[86] Ibid., 126.
[87] To an extent, I disagree with the characterization of this logic in militant democracy. I find this logic exists in a more Loewenstenian approach, but one can come up with a more nuanced, contemporary take on militant democracy that does not automatically reinforce this type of logic.
[88] *Otto-Preminger Institute v. Austria*, App. No. 13470/87, 295-A Eur. H.R. Rep. (ser. A) 34 (1994).
[89] *Dahlab v Switzerland*, App. No. 42393/98 (Eur. Ct. H.R. 2001).
[90] *Sahin v. Turkey*, App. No.44774/98, 44 Eur. H.R. Rep. 5 (2007).

Turkey[91]. When analyzing these cases, she argues that the court's jurisprudence relies on a particular view of Islam – as a threat to democracy – and by doing so, vastly misjudges the worldview of many Muslims who are not radical, but simply practice their religion without any anti-democratic agenda.[92]

The issue, once again, points to the "decisionist" turn of militant democracy explicated by Invernizzi and Zuckerman. Through these detailed cases, Mancini shows how it is unwarranted to limit a fundamental right of religious freedom (which includes displaying its symbols in public, like wearing headscarves) when there is no apparent link to any sort of anti-democratic agenda.[93] To answer the criticism of arbitrariness, Dyzenhaus takes a step back, and first tries to uncover which governing body (executive, legislative, judicial) has the authority to define the "enemies of democracy" in the most legitimate manner possible. [94] By exploring the Australian 1949 Communist Party Dissolution Act, he unpacks the Court's arguments to decipher who was to be empowered to declare the limits of the permissible. His normative inferences are that militant democracy should have legal limits, and that the focus should be on the rule of law as a constraint that is inherent to constitutional democratic government. This commitment to the rule of law is what distinguishes democratic militancy from a mere authoritarian abuse of power:

> When governments are tempted to step onto this path judges can require that they live up to this republican ideal and, moreover, it is the judicial duty to do so because that ideal is embedded in the rule of law. That a government can break free of the constraints of the rule of law and that in a democratic political order the government can do

[91] *Refah Partisi (The Welfare Party) & Others v. Turkey*, App. nos. 41340/98, 41342/98, 41343/98 and 41344/98 (Eur. Ct. H.R.G. C. 2003). 41343/98, & 41344/98 (Eur. Ct. H.R. 2001. The 2001 *Refah Partisi* judgment was later referred to the Grand Chamber, which delivered a similar decision in 2003.
[92] Mancini, *The Tempting of Europe*, 126.
[93] Ibid., 127.
[94] Dyzenhaus, David. 2004. "Constituting the Enemy: A Response to Carl Schmitt." In *Militant Democracy*, 15–45. Utrecht: Eleven Internat. Publ.

> so with the blessing of the majority does not show that these constraints are illusory…there is the middle ground of legality – the constitutional values of the rule of law.[95]

Dyzenhaus' analysis and argument are important in order to answer the criticism that militant democracy is an illegitimate institution for a liberal democracy because it arbitrarily targets individuals and their constitutionally guaranteed status. It helps us create certain limits on when (and how) a militant democracy should act, and precisely what is the baseline to prevent the abuse of this institution.[96] In addition, the analysis set forth by Dyzenhaus and Mancini offer a glimpse as to how we can normatively defend the institution of militant democracy. Both authors look at the constraints and exclusions that are inherent in militant democracy and answer whether it can stand the test of liberal legitimacy. They are attempting to answer how liberals should take their own side in an argument without ceasing to be liberals in the case of militant democracy. For Mancini, the answer is clear – in cases where militant measures arbitrarily target all Muslims, there is no sound liberal defense to be made. She does not speak of what can be done, but what has already been established, and then works back to describe these actions as illegitimate. Similarly, Dyzenhaus also looks back, but prescribes that liberals should seek the refuge of the rule of law as a baseline by which governmental action should unfold.

However, a normative defense of this institution offered by the two authors remains incomplete, lacking its overall normative assessment. These works seem to miss a larger discussion on which liberal principles we call upon when defending this institution. As I will

[95] Ibid., 45.
[96] Certainly, many other institutions can be prone to abusive power as well, and militant democracy may not be distinct in this regard. But the fact that the state has full discretion to target which groups can simply be *associated* with anti-democratic agendas is particular to this institution.

later argue, militant democracy can be justified if the aim of the institution is to protect the underlying liberal-democratic principles, norms, and values.

2.2.1. Non-Interference Principles in Militant Democracy

We have seen that the core normative question asks whether and how democracies can defend themselves against anti-democratic challenges without undermining their own democratic core. In response, Alexander S. Kirshner attempts to provide a model of militant democracy that is tolerant to anti-democratic action. To better understand his view on militant democracy, it is necessary to first highlight his procedural reading of democracy. Kirshner insists that if we are to embark on making collective decisions in a legitimate manner, then democratic procedures are the way to do so. If decisions are made with these procedures, then "our mutual respect gives each of us a weighty moral reason to obey a democratic decisions regardless of whether the decision is correct or whether we agree with it…reasonably democratic procedures generate democratic authority".[97] Still, the dilemma remains as to how democrats are to act ethically in their own self-defense – whether they have to stand idly by and watch democracy crumble or whether a defensive action can be taken. Kirshner recognizes this dilemma and believes that democrats can act ethically "without shedding [their] proceduralist principles" against existential threats:

> A procedural democrat can coherently intervene to defend democracy when this appears to be the only way to preserve representative institutions. Yet the toughest theoretical question about popular threats is not when we should defend democracy (when it is necessary to do so), but how we should do so and what we will define as success. From the proceduralist's perspective, a democrat's efforts will be worthwhile only if the sum and the substance of her

[97] Kirshner, Alexander S. 2010. "Proceduralism and Popular Threats to Democracy." *Journal of Political Philosophy* 18 (4): 405–24. 409.

> project reflect her recognition of the illegitimacy of democratic vanguardism.[98]

Kirshner does not reject, *prima facie*, militant democratic action, but rather, tries to reinterpret the concept of militant democracy from a procedural democratic standpoint. As such, his first step is to position himself in opposition to Loewenstein, who he believes "rejected the constraints implied by what I will refer to as the paradox of militant democracy: the possibility that efforts to stem challenges to self-government might themselves lead to the degradation of democratic politics".[99] As Kirshner attempts to apply his self-limiting framework theory of militant democracy, he further distances himself from Loewenstein by insisting that the paradox cannot be resolved "as long as we treat antidemocrats as rights holders" – at best, it can only be managed.[100] In the end, however, I will show that while Kirshner does acknowledge the paradox and attempts to distance himself from Loewenstein, the end result does remain the same: "militant democrats tell antidemocrats that they can play the democratic game, but only if they follow *their* rules and let *them* win".[101] But first, let us shortly analyze Kirshner's concept of militant democracy.

Kirshner's concept of "self-limiting" militant democracy is based on three interlocked principles: the participatory principle, the principle of limited intervention, and the principle of democratic responsibility.[102] The *participatory principle* guarantees citizens full participation in the decision-making process so that their interests can be heard and met. The principle extends to anti-democrats: "Accepting that opponents of self-government possess important democratic interests means that those interests must be taken into account when

[98] Ibid., 424.
[99] Kirshner, *A Theory of Militant Democracy*, 2.
[100] Ibid., 25.
[101] Mudde, Cas. 2015. "A Discussion of Alexander S. Kirschner's A Theory of Militant Democracy: The Ethics of Combatting Political Extremism." *Perspectives on Politics* 13 (03): 789–91.
[102] Kirshner, *A Theory of Militant Democracy*, 6-7.

determining how to respond to democratic action".[103] The *principle of limited intervention* is about the action that the state can take against anti-democrats: only in exceptional circumstances can a democratic state intervene in the democratic process. The threshold that identifies the exceptional circumstance is when antidemocrats seek to violate others' rights: "Militant policies should not be employed in the pursuit of an ideal regime; instead, defensive projects should help attain an intermediate end, an imperfect political system in which capable citizens can play a meaningful role".[104] And finally, the *principle of democratic responsibility* is about acknowledging and assessing the costs that have to be incurred when limiting participation.[105]

However, Kirshner must also admit that, "by implication, defensive practices should be used as often as necessary, but as infrequently as possible".[106] He is aware that action is needed to thwart *some* anti-democratic action: "My account of when militant activity is legitimate focuses on whether individuals have violated others' right to participate". Participation, then, becomes the sole principle in his theory which serves as a value-based benchmark: it is intrinsically valuable.[107] The issue, then, is how participation can be considered intrinsically valuable when his other principles (limited intervention, democratic responsibility) call upon the restriction of participatory rights. Even with such a benchmark, the "self-limiting" model still protects the rights of one group by restricting the rights of another. While the principle of limited intervention seeks to achieve a more democratic regime so that its "practices and

[103] Ibid., 6.
[104] Ibid., 7.
[105] Ibid., 6-7.
[106] Ibid., 7.
[107] How exactly Kirshner does this through policy is through time-sensitive constraints, cost-benefit analysis of limiting democratic participation, and so forth. What I am interested in for this section is simply his arguments of a normative theoretical nature, specifically his use of participation.

institutions are more consistent with individuals' equal claims to participation in a fair political system", how precisely this plays out remains problematic.[108]

Take, for instance, anti-democratic parties and organizations. In Kirshner's view, "the normative challenges posed by antidemocratic movements depend on the size and political influence of those movements…large antidemocratic organizations may require a more extreme response than small, less influential organizations".[109] This would assume that "small" parties should be able to participate, given that their influence is not so widespread. In essence, this would mean that "weak" anti-democratic parties are on equal footing with other parties, but "as the parties extend their influence, they should be subject to stronger and more intrusive regulation that ensures that all citizens' democratic interests are protected".[110] What we can see is that Kirshner limits anti-democratic action only if they have significant impact to gain power, or what he considers a "comprehensive threat to democracy…the capacity and intent to block challenges in the present and shut down normal avenues of democratic opposition in the future".[111]

The issue here is that despite Kirshner's insistence that participation is intrinsically valuable, it may serve more of an instrumental purpose. Participation seems to be a double-edged sword as the sole principle by which to model militant democracy, for it is allowed up to the point "before antidemocrats have conquered the commanding heights of a society's political institutions".[112] Kirshner seems to allow antidemocrats the right to participate, but insofar that their participation does not matter, and when they do have the power and influence to

[108] Ibid., 5.
[109] Ibid., 18.
[110] Ibid., 73.
[111] Ibid., 18-19.
[112] Ibid., 165.

damage democratic institutions, only then do we restrict their participation. The participatory principle works best when threats are not comprehensive – once the threat reaches such a level, then participation can no longer be understood as intrinsic, but rather, it becomes the very right that is restricted to ensure that the regime as a whole is protected. For this reason, I question whether a normative justification lies simply on a participatory principle, and whether this self-limiting theory of militant democracy can be considered a coherent model. While acknowledging Kirshner's contribution to a normative theory of militant democracy, I find his insistence on democratic proceduralism one-sided. I will argue that a strong normative justification of militant democracy should be based on a complex substantive-procedural reading of democracy. I will explicate this stance in the forthcoming chapters.

2.2.2. The Transnational Dimension of Militant Democracy

One interesting trend that in the literature is that of supplementing militant democracy with a "transnational" element. In particular, the judicial practice in the European Union had developed for transnational model of militant democracy that can be applied against Member States who fail to adequately address anti-democratic action. According to Article 7 of the Lisbon Treaty, the EU can punish member states by suspending their voting rights when serious violations occur in regards to the commitment to uphold the fundamental values of the EU: respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights.[113] At a theoretical level, transnational militant democracy has been advocated for by Jan-Werner Müller[114] and Ulrich Wagrandl.[115] The implementation of this model of militant democracy would have the following normative argument: the EU member states have

[113] Treaty of the European Union, Article 7.
[114] Müller, Jan-Werner. *Protecting Popular Self-Government.*
[115] Wagrandl, Ulrich. 2018. "Transnational Militant Democracy." *Global Constitutionalism* 7 (02): 143–72.

a commitment to uphold liberal-democratic values, and only when these states fail to live up to these standards does the EU-level militant democracy step in. While I agree with both the normative and institutional claims here, it requires specifying what these liberal-democratic values are, which I will explore and define in Chapter Two of this thesis. In addition, I will also explore several European Court of Human Rights Cases in subsequent chapters.

2.3. Analytical-legal Analyses of Militant Democracy

Another approach in the literature on militant democracy tries to identify the institution and its goals through an analytical-legal lens: through specific legislation, case studies, or the legal apparatus of militant democracy in other constitutional democracies. The mentioned approaches of Mancini and Dyzenhaus belong to this group. While they tackle the normative question, this dimension of militant democracy remains largely missing from other such accounts: the main question here is how we can identify defensive measures that a democracy can use to safeguard itself from those who want to overthrow it.[116] Militant democracy threatens with negative effect on the rights and freedoms of the people, such as immigration control, access to personal data, individual observation, and intensified security checks at certain places (such as an airport).[117]

Those who use a legal-analytical approach tend to focus more specifically on the task of finding out the institutional goal of militant democracy. Peter Niesen examines both pre-emptive strikes of constitutional courts and the protectionist jurisprudence of the European Court of Human rights.[118] By pre-emptive strikes, Niesen is referring to banning parties, such

[116] Theil, Markus. 2009. "Introduction." In *The "Militant Democracy" Principle in Modern Democracies*, edited by Markus Thiel. Farnham, England ; Burlington, VT: Ashgate.
[117] Ibid., 2-5.
[118] Niesen, Peter. 2012. "Banning the Former Ruling Party." *Constellations* 19 (4): 540–61.

as those totalitarian-leaning parties in post-war Germany that were banned by the Federal Constitutional Court of Germany, limiting constitutionally guaranteed freedom of association. Another pre-emptive strike is through placing content restrictions on electoral speech, thus violating freedom of speech. Protectionist jurisprudence deals specifically with how judges protect the fundamental rights of individuals through ex-post constitutional decisions. In this sense, militant democracy can be seen more as a constitutional *and* moral doctrine, where the interpretation of constitutional provisions is informed by the moral doctrine of the constitutional court as well. Similarly, Patrick Macklem identifies the militant democracy principle at work in different constitutional arrangements and tries to differentiate between its features and pre-emptive stances, as opposed to a constitutional democracy.[119] I will return to a more detailed analysis of Macklem's approach in Chapter 3 in my discussion of the political-institutional approach. These works are important for me analytically, for they help me to identify the institution more specifically. They enrich the conceptual frameworks of militant democracy; however, they do not offer sound normative arguments which can justify the institution from a liberal standpoint.

Other theorists tend to look at different perspectives in the terrain of militant democracy rather than focus on the institution holistically. For example, they would focus on particular freedoms, such as freedom of expression and freedom of association, as opposed to the entirety of the institution. Ruti Teitel compares different constitutional perspectives on these two provisions from a legal lens – she looks at the practice of German Constitutional Court and the European Court of Human Rights to show how militant vigilance against those who want to challenge the "free and democratic basic order" results in the forfeiture of certain

[119] Macklem, Patrick. 2012. "Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe" *Constellations* 19 (4): 575–90.

freedoms.[120] Teitel is trying to understand the basis of legal interpretations of militant democracy, by showing how judges are searching for the intention of the so-called antidemocrats. It is a difficult task, because it involves a twofold interpretation: the Court first has to provide its understanding of the constitutional text (both the specific provisions on militant democracy and the whole of the text); in the next step, the court has to undertake an analysis of the case at hand, and to determine if it qualifies for the implementation of militant measures. The first task of courts is to understand the legal expression of militant democracy within individual states. In this sense, there are two different types of expressions of militant democracy: the first is by looking toward the explicit constitutional expression through a provision – this can be clearly seen in Italy[121], France[122], and Germany.[123] Most states do have provisions for militant democracy in their constitutions.

The other avenue is by showing that militant democracy exists in a constitutional regime, even though it is not institutionally explicit. This can be seen through many of the decisions taken by the European Court of Human Rights and can also been in both cases for Austria

[120] Teitel, *Militating Democracy*, 53.
[121] The Italian Constitution (1948): "It shall be forbidden to reorganize, under any for whatsoever, the dissolved Fascist Party". (Italian Constitution. "Transitory and Final Provisions", Disposition XII, 1948).
[122] French Constitution (1958), Article 16: authorizes the President of the Republic to exercise militant actions in the following circumstances: "When the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfillment of its international commitments are under serious and immediate threat, and when the proper functioning of the constitutional public powers is interrupted".
[123] Basic Law for the Federal Republic of Germany (1949), Article 18: Whoever abuses the freedom of expression, in particular the freedom of the press (paragraph (1) of Article 5), the freedom of teaching (paragraph (3) of Article 5), the freedom of assembly (Article 8), the freedom of association (Article 9), the privacy of correspondence, posts and telecommunications (Article 10), the rights of property (Article 14), or the right of asylum (Article 16a) in order to combat the free democratic basic order shall forfeit these basic rights. This forfeiture and its extent shall be declared by the Federal Constitutional Court. There are two cases in which the German Constitutional Court was called upon to determine whether a neo-Nazi political party constituted such a threat in 1952 – the court ruled it did and banned the party (BVerfGE 1). In 1958, the Court upheld a ban on the German Communist Party as well (BVerfGE 5,85).

and Australia.[124] As Dyzenhaus pointed out with the Australian 1949 Communist Party Dissolution Act, the constitution did not grant the federal government the authority to dissolve political parties. When the High Court addressed this issue, they repealed the act on grounds that such activities could only be outlawed in times of great stress (e.g. war) and did not have legality in peaceful times. Likewise, the Austrian case shows that there are no specific legal provisions to deter those who wish to overthrow democracy through democratic means, and looks elsewhere (e.g. United Nations, European Union) to provide a militancy for their democratic state.[125] Interestingly, the absence of militant measures in a constitution does not necessarily mean that the country does not seek to act militantly, as both of these cases show.

In this sense, militant democracy's basis of legal interpretation rests on a combination of four levels, not all of which are implemented in different cases: legal text, constitutional text (both domestic and transnational), and both domestic and transnational interpretation of different courts. Pointing to the complexity of interpretation is an important inference for my research. It helps me to identify certain aspects of militant democracy that have not been previously uncovered – the insight that legal interpretation rests on three different levels in militant cases. When I begin to analyze cases, I will try to demonstrate the importance of the right reading and ordering of values in the processes of adjudication of the cases of militant democracy.

[124] The Court upheld the dissolution of two Spanish political parties due to their parties' support for violence and sympathies for individuals related to terrorism. *Batasuna v. Spain*, application nos. 25817.04, Chamber Judgment, 30 June 2009. The Court also upheld the dissolution of the Welfare Party, stating that it had been prescribed by law and that such a prohibition was "necessary in a democratic society". *Refah Partisi (The Welfare Party) & Others v. Turkey*, App. nos. 41340/98, 41342/98, 41343/98 and 41344/98 (Eur. Ct. H.R.G. C. 2003). 41343/98, & 41344/98 (Eur. Ct. H.R. 2001. The 2001 *Refah Partisi* judgment was later referred to the Grand Chamber, which delivered a similar decision in 2003.

[125] Auprich, Andreas. 2009. "Austria." In *The "Militant Democracy" Principle in Modern Democracies*, edited by Markus Theil, 37–58. Farnham, England ; Burlington, VT: Ashgate.

2.4. Empirical Analyses of Militant Democracy

This categorization of the literature is quite straightforward. It deals with comparing and classifying different regimes of militant democracy. Much of this work relies on individual cases, such as Canada, Spain, Turkey, or Germany. Of course, many works in this category combine empirical and legal approaches. For example, when Victor Ferreres Comella discusses the *Batasuna* case, he is clearly looking at the empirics, but he is also using a legal analysis to show how the current Spanish constitutional jurisprudence is widening the net to include more 'undemocratic' actions and actors which would fall into the categorization of militant democracy.[126] Some works examine militant democracy with the aim of presenting proposals for developing it further, or developing alternatives, or showing that the institution does not exist in some states. Such is the case with Markus Theil's attempt classifying the legal apparatus and institutional arrangement of different militant democracy models that currently exist.[127]

Much of the work under this approach helps us better understand what measures can effectively protect the democratic system from anti-democratic action. Martin Klamt's work on militant democracy argues that individual rights restrictions that are commonplace in militant democracy models tend to go unused, in comparison to those provisions on anti-democratic associations and parties.[128] Such work is useful because it helps to centralize and debunk some of the main criticisms leveled at militant democracy: that it seeks to limit

[126] Comella, Victor Ferreres. 2004. "The New Regulation of Political Parties in Spain, and the Decision to Outlaw Batasuna." In *Militant Democracy*, edited by András Sajó, 133–56. Utrecht: Eleven Internat. Publ.
[127] Theil, Markus. 2009. "Comparative Aspects." In *The "Militant Democracy" Principle in Modern Democracies*, edited by Markus Thiel. Farnham, England ; Burlington, VT: Ashgate. 379 – 424.
[128] Klamt, Martin. 2007. "Militant Democracy and the Democratic Dilemma: Different Ways of Protecting Democratic Institutions." In *Explorations in Legal Cultures*, edited by Fred Bruinsma and David Nelken, 133–59. The Hague: Elsevier.

fundamental rights of speech and expression. On an empirical level, we find that many of the uses of militant democracy are actually not set forth by many democratic states. Therefore, much of the literature is focused on generating typologies based on restricting extremist parties and associations, where each case offers different insights due to the different empirics surrounding them.

When single cases of militant democracy are presented, I attempt to derive some implications that would be useful for my own model. I look to these cases as a way to better understand what the logic of militant democracy is in different countries. For instance, Helen Irving's work on Australia examines militant democracy in light of banning associations linked with extremism and terrorism.[129] Irving approaches the question through a historical retrospect and shows how there have been many legislative measures that were used to help fight against the erosion of democracy. Most notably, this would include the continuing bans of organizations. In Eduardo Alduante Lizana's analysis on how Chile incorporated the German model of militant democracy in the constitution, I was able to better understand what the criteria would be that would make a party or organization excludable.[130] In addition, Renata Uitz's examination of the political landscape of Hungary shed light on how the use of militant measures are available, yet they are not put into practice.[131] Given the threats and violent incidents by right-wing extremists and nationalists in Hungary, it was interesting to note why militant action could not be taken – most notably, that there lacked a consensus on the legitimacy of the institution in the first place.

[129] Irvin, Helen. 2009. "Australia." In *The "Militant Democracy" Principle in Modern Democracies*, edited by Markus Theil, 16–36. Farnham, England ; Burlington, VT: Ashgate.
[130] Lizana, Eduardo Alduante. 2009. "Chile." In *The "Militant Democracy" Principle in Modern Democracies*, edited by Markus Theil, 59–74. Farnham, England ; Burlington, VT: Ashgate.
[131] Uitz, Renata. 2009. "Hungary." In *The "Militant Democracy" Principle in Modern Democracies*, edited by Markus Thiel, 147-181. Farnham, England ; Burlington, VT: Ashgate.

What I have also found in single case studies is the ability to decipher current trends in militant democracy. The first would be that of terrorism and the use of militant democracy logic to combat such threats. Benyamin Neuberger's work on Israel deals directly with the country's answer to these threats – how it utilizes it, and how one can see it in the Israeli constitutional judicature.[132] Interestingly, Neuberger showed how the influence of experiences in Germany from the collapse of the Weimar Republic was influential here – that the German model of militant democracy was applied in Israeli constitutional judicature. Once again, the model seems to target nationalist and extremist organizations and movements rather than individuals. The second trend is the current transnational turn in militant democracy. Andreas Auprich shows how militant democracy in Austria does not exist, because there exists no legal provision that hinders the democratic abolition through the use of legal and democratic means, but only through constitutional revision. However, he does focus on international law to see if legal regulations of the UN and the EU insist that a 'minimum standard' of democratic legitimacy and protection is needed.[133] Likewise, Bertil Emrah Oder's discussion on Turkey presents how the European Court of Human Rights approached the question of banning political parties in Turkey.[134] These analyses will be influential on subsequent chapters where I discuss ECHR cases more specifically and argue for a transnational element to militant democracy.

Without going further into specific cases, it is sufficient for me to say that there is an exhaustive amount of literature pertaining to the empirics surrounding militant democracy in

[132] Neuberger, Benyamin. 2009. "Israel." In *The "Militant Democracy" Principle in Modern Democracies*, edited by Markus Thiel, 183-207. Farnham, England ; Burlington, VT: Ashgate.
[133] Auprich, *Austria*, 42.
[134] Oder, Bertil Emrah. 2009. "Turkey." In *The "Militant Democracy" Principle in Modern Democracies*, edited by Markus Thiel, 263-310. Farnham, England ; Burlington, VT: Ashgate.

different states. It is quite an interesting body of work that will contribute to many anecdotal references, as well as specific cases that I plan on investigating from a normative standpoint.

Conclusion

Normative approaches to militant democracy typically discuss certain important aspects of the problem of justification of this institution, but no theory is offered on how to best address the challenge of militant democracy on a comprehensive level. They take a normative stance on particular cases (Dyzenhaus, Mancini), or offer a different theoretical perspective on the concept (Pfersmann), but none offers a full liberal democratic account of the institution. Analytical-legal and empirical approaches tend to go deeply into particular questions or case studies, while often disregarding the depth of the paradox. Since Loewenstein's ground-breaking contribution, majority of the theorists dealing with the problem of militant democracy emphasize the goal of protecting the stability of the democratic order. The debate between stability and freedom still lurks in the background. Militant democracy is presented as an attempt to respond to this challenge. Since the problem cannot be solved within the standard constitutional democratic framework, we who support democracy introduce this institution to protect the order from those who hate democracy. But if this is true, then the paradox is only reinforced: democracy assumes readiness to violate its own principles in order to defend itself.

In the following chapters, I depart from these works, but I change the direction of the analysis and offer distinct positive arguments. I see the paradox as something vastly deeper, demanding to go beyond the problem of stability to illuminate exactly what is at stake here. I read the paradox as the core tension between the principled primacy of individual autonomy

and the imperative of political stability. For if we are autonomous, it follows that moral and political pluralism (including deep disagreement) are also legitimate. Constraining this pluralism requires looking into its own nature, rather than merely pointing to the imperative of stability. Thus, instead of concentrating on the question of stability, I propose to focus on the question of the meaning and reach of individual autonomy and moral equality in a liberal democracy confronted with threats.

A detailed analysis of the new approach is provided in the forthcoming chapters. Here I just want to list the noteworthy tensions between militant democracy and constitutional democracy that I am attempting to solve: first, a regime that institutionalizes militant democracy is not politically neutral – it does not treat all citizens in a legally (and morally) same way; secondly, militant democracy rests on a legally (constitutionally) defined distinction between those who act in accordance with law in a *legitimate* way, and those who act in accordance with law in an *illegitimate* way – thus, it discriminates and is able to identify lawful attitudes and actions that fail the legitimacy test. So, it seems that militant democracy deprives some actors (citizens, associations, parties) of at least two fundamental liberal values and constitutional rights: the right to decide on your own life (private autonomy) and the right to participate – on equal footing with others – in the processes of democratic self-government (public autonomy).

This alludes to the fact that legal and moral equality, understood as cornerstones of constitutional democracy, have a different definition and reading under this institution. The central problem is whether the constraints and exclusions that seem to be constitutive of militant democracy are liberally justified. I will try to provide this justification by placing an emphasis on the values underlying a liberal democracy and asking whether and how militant

democracy can help protect and advance these values. I do not seek to have stability as the paramount value, or freedom of individuals as the paramount value. Rather, I seek to understand whether the liberal-egalitarian core of a liberal democracy can still be in line with a militant democracy. I will argue, further down the line, that militant democracy does not have to be detrimental to a constitutional democracy. Rather, if properly implemented, it helps to conceptualize, and guard liberal values and the regime built around such values. I will be giving an argument based on substantive criteria of rightness of liberal democracy, something that has not previously been done.

CHAPTER TWO: AUTONOMY, PLURALISM, AND STABILITY – A PRECARIOUS BALANCE OF THIS TRIAD

Introduction

In Chapter Two of the dissertation, I return to the theoretical difficulties surrounding the principle of militant democracy and specify how my approach differs from the ones offered in Chapter One. I begin by outlining my approach to the paradox of militant democracy, namely, that to secure democracy, it necessitates limiting the fundamental democratic rights of some. Most theorists acknowledge the paradox, they see it as antidemocratic and illiberal, they accept that it cannot be solved but that the challenge has to be managed somehow and proceed to undertake a cost-benefit analysis of a sort between state action and non-action. However, in my view, this approach fails to ask a set of more fundamental questions. These are the questions that conceptually and normatively precede the problem of militant democracy and asking them changes the focus of the debate. A preliminary broad identification of these questions is as follows: how can unjust ideas and ideologies exist in a liberal democracy, and why are liberals ready to tolerate them? Does democratic legitimacy require allowing for the existence of such ideas and ideologies? Is there a substantive principle that underlines such an assumption?[135]

In a liberal democracy, the right to free speech is not tied to truth or justice, so the puzzle here is to better understand why unjust ideologies are permitted in the first instance, and what serves as an underlying principle to justify this. In a sense, it is about testing the limits of

[135] I am grateful to Mattias Kumm for pointing out the centrality of this question when debating the militant democracy.

toleration. To discuss the case of antidemocratic political behavior and state action, it is necessary to understand the normative commitments and assumptions that are built into the foundations of a tolerant, liberal-democratic state. Throughout the remainder of the chapter, I will underpin what these normative commitments are and what this means for the question of democracy more generally, and then apply it to militant democracy. The Chapter will be structured in the following way.

Section One begins with a preliminary identification of constitutional democracy. It explores the interplay between autonomy and pluralism and its institutional expression. It will also explore the challenges to autonomy when the condition of deep disagreement persists. The main discussion here will be on the issues of legitimacy and disagreement – how can it be legitimate to coerce all citizens to follow one law when they hold different worldviews?

In Section Two, I turn to the problem of stability. I ask: how can a democratic regime be stable given the fact (and value) of pluralism, and ensuing profound disagreement? I argue that legitimate stability requires a *reasonable* consensus. I define what it means to be a reasonable citizen living in a pluralistic society and the role of public reason as a criterion for justifying political decisions. I emphasize how reason places constraints on citizens, their justifications for coercion, and collective decision-making processes in a way that allows for consensus to be consistently achieved. This consensus creates "stability for the right reasons".[136]

In Section Three, I argue that reasonableness serves as a baseline to suggest that not all positions can be defensible in a liberal democracy. The positions that fail to reach the

[136] Rawls, John. 1996. *Political Liberalism*. New York: Columbia University Press. 134.

threshold of reasonableness should be contained. To determine that a position is unreasonable (and subject to constraint), two conditions must be identified: first, it rejects the *principle of equal respect*, denying moral equality of the members of the community; second, it rejects the essentials of a constitutional regime and seeks to achieve a goal that would threaten democratic institutions.[137] I determine the unreasonable by analyzing several factors, including actions, intentions, justifications, and ideologies. I will explicate the importance of each factor to conclude whether a position is unreasonable and subject to constraint. I also introduce the question of how the unreasonable can be contained, and I propose to distinguish among strong containment, weak containment, conversion, and rights infringement.

In the concluding section, I introduce militant democracy as one instrument to contain the unreasonable in a constitutional democracy. I identify how the institution can be legitimate. I then apply reasonableness as a criterion to show how it places legitimate restrictions on citizens and political authority. Finally, I discuss how my content-based restriction approach to the problem of disagreement and legitimacy applies to the case of militant democracy. This would hopefully create a vantage point for judging whether certain instances of militant action are legitimate. By using this premise as a framework, I define a principled, substantive criterion that can be used as a normative justification of the militant democracy principle.

Section One: Liberal Democracy: Value Pluralism and Institutional Set-up

[137] These conditions stem from arguments pertaining to why the unreasonable can be contained: the unreasonable disregard the moral status and dignity of others (moral argument) and threaten the stability of a liberal-democratic regime (political argument). These arguments do not imply that there is no room for the unreasonable because a liberal-democratic regime should be tolerant of both the reasonable and unreasonable. It does, however, limit the unreasonable to act on such intentions through democratic institutions.

1.1. Constitutional Democracy: A Preliminary Identification

Individual autonomy stands for self-rule, the ability of a person to lead her life following her own reasons, preferences, motives, or desires.[138] It requires that a person's life is free of external forces that would obstruct her own choices. As an institutional arrangement, democracy is valuable as a derivative of individual autonomy: it focuses on extending personal autonomy to the political realm, by acknowledging the equal status of citizens as members of the political community and by recognizing them as co-authors of their laws.[139] In other words, democracy translates the claim of personal autonomy into the claim of collective self-government (political autonomy). For a regime to be considered democratic, all its laws need to point somehow to their citizens as co-authors. Free and equal individuals exercise their political autonomy by acting together in the process of democratic decision-making. This is the basic meaning of the principle of popular sovereignty– the People hold ultimate authority on all matters of governance.[140] Democracy approximates the claim of self-government by providing citizens the institutional and procedural channels for deciding what laws are to be established as binding on them as members of a polity. Since popular sovereignty is operationalized through procedural mechanisms of political representation, participation, and majority rule, a democratic polity can claim that citizens' proximity to the law remains equal, thus affirming the principle of individual autonomy in the context of the life together.[141]

[138] See the following: Christman, John. 2015. "Autonomy in Moral and Political Philosophy." *The Stanford Encyclopedia of Philosophy* (blog). 2015. http://plato.stanford.edu/archives/spr2015/entries/autonomy-moral/.
[139] Kis, János. 2003. *Constitutional Democracy*. Budapest ; New York: Central European University Press. 68-73.
[140] Austin, John. 1995. *Austin: The Province of Jurisprudence Determined*. Edited by Wilfrid E. Rumble. Cambridge: Cambridge University Press. Ch. 5.
[141] Dimitrijevic, Nenad. 2015. "Always Above the Law? Justification of Constitutional Review Revisited." In *Constitutional Review and Democracy*, edited by Miodrag Jovanovic. The Hague: Eleven Internat. Publ.

Although this institutional arrangement's intrinsic value cannot be understated, there are many important questions that follow. To understand whether a democratic polity does provide the grounds for citizens to be treated equally, it is necessary to understand what it precisely entails to be treated as a democratic equal in that society. What *kind* of equality is at stake?[142] Equality is a complex and multifaceted concept - it is a long-debated issue, resulting in different definitions and interpretations.[143] We can depart from a *purely proceduralist* understanding of equality. Procedural equality before law points in different directions: equal protection of personal liberties, equality of votes, equal participation in democratic collective decision-making (where participation includes both involvement in the process of the formation of government, and participation in governmental law-making), majority rule, and so on. The latter is expressed through the principle of "one person, one vote": since every vote is of equal weight, no one counts as having more power than others.[144] Proceduralist focus on fairness and transparency of the political process further implies that legitimacy of laws and decisions cannot be judged by any independent substantive standard. If an outcome does follow these procedures, then equality is preserved, regardless of the content of that outcome. [145]

However, there are several issues with such a conception that I will briefly address here. First is the well-known problem of the "tyranny of the majority": a law that is procedurally-

[142] Sen, Amartya. 1992. *Inequality Reexamined*. New York; Oxford; New York: Russell Sage Foundation ; Clarendon Press ; Oxford Univ. Press. 13.
[143] I am aware that equality can appear in many ways, even though there is a principled agreement that it should be respected. Egalitarianism, for example, incorporates a complex group of principles to form a basic core, but offers contrary answers dependent on an adopted procedural principle. I will not dive into these debates on equality and justice but seek to understand what equality entails for the institutional set-up of democracy.
[144] Estlund, David. 1997. "Beyond Fairness and Deliberation." In *Deliberative Democracy*, edited by James Bohman and William Rehg. Boston: MIT Press.
[145] This is the route taken by Joseph Schumpeter, who argues that only a formal, procedural form of democracy where citizens equally vote for competing elites is more desirable than understanding democracy through a substantive conception of equality. See the following: Schumpeter, Joseph A. 2006. *Capitalism, Socialism and Democracy*. 1. Harper colophon ed. New York, NY: Harper Perennial.

democratically perfect can be substantively detrimental to the fabric of democracy if, for instance, it denies the basic rights of those left in a minority.[146] A democracy should not allow self-rule to run rampant at the expense of individual autonomy or equality in rights. Secondly, this reading of equality fails to address the question of the justification of coercion. Procedurally guaranteed equality in participation in law-making turns each individual citizen into a collaborator in coercion:

> The regime is a program for coercion. When we abide by a constitutional regime in place we collaborate in coercion of the ideally and presumptively free and equal individuals who live or come within its jurisdiction. For that collaboration, we liberally feel, some justification is owing.[147]

To overcome these and related problems, some conceptions of democracy combine a procedural understanding of equality with substantive values.[148] From a substantive view, equality implies that all have a duty to understand and recognize the capacity for all individuals to be self-governing. As Jeremy Waldron states, "[to identify] someone as a rights-bearer expresses a measure of confidence in that person's moral capacities – in particular his capacity to think responsibly about the moral relation between his interests and the interest of others".[149] This is a relationship that holds in both the private and political realm. Through this substantive-procedural nature of equality, a democracy establishes an equitable protection guaranteed to each citizen based on the "rock bottom principle of

[146] Hamilton, Alexander, James Madison, and John Jay. 2003. *The Federalist Papers*. Reissue. Bantam Classic. New York: Bantam Books.
[147] Michelman, Frank. 2001. "Constitutional Authorship." In *Constitutionalism: Philosophical Foundations*, edited by Larry Alexander, 1st pbk. ed. Cambridge Studies in Philosophy and Law. Cambridge [England] ; New York: Cambridge University Press. 82.
[148] I posit that a conceptually-sound view of equality will incorporate both procedural and substantive elements. My goal in this section was to show how a purely proceduralist fails to provide a reasonable concept of equality. For this reason, I will not discuss the purely procedural approach to legitimacy. In the next section, I will provide an overview of procedural and substantive approaches to the legitimacy concern that contain both elements.
[149] Waldron, Jeremy. 1999. *Law and Disagreement*. Oxford: Oxford University Press. 1.

political morality": respecting each citizen's capacity to reason that serves to ground a democratic political association.[150]

In this sense, "autonomy of equals transpires as a complex concept: it is an individual property, a communicative pattern, and the basis of a polity's democratic institutional setup".[151] In the first instance, democracy secures the private autonomy of individuals by legally defining the status of equal citizenship through basic rights that secure individual freedoms. These personal liberties must have a secure basis for any political association to be considered plausible – their protection should not be dependent on how people choose to exercise their collective power.[152] However, democracy also requires that these rights are the result of the co-authorship of self-governing individuals – laws that protect this private autonomy should stem from citizens' exercise of public autonomy as lawmakers.[153] The idea of public (political) autonomy is that citizens shape these freedoms by using the law as a medium to establish relationships with one another. In sum, democracy requires co-equality of private and public autonomies.[154] The issue, then, is how democratic decision-making can legitimately secure private autonomy in the political realm (public autonomy) given the fact of pluralism.

Pluralism has two distinct meanings here. The first refers to the *plurality of values* that exists in a democratic political association. As a moral person and a member of a political community, each citizen has her own distinct set of worldviews that define her individual identity. Citizens are responsible for their actions and choose their value convictions,

[150] Ibid., 1.
[151] Dimitrijevic, *Always Above the Law*, 40.
[152] Cohen, Joshua. 1999. "Reflections on Habermas on Democracy." *Ratio Juris* 12 (4): 385–416.
[153] Habermas, Jürgen. 2001. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Translated by William Rehg. 1 MIT Press Cambridge, Mass. 101.
[154] Ibid. 101.

interpret them, and act on them in a way that would make their lives worth living. Persons develop and hold conceptions of the good or what John Rawls refers to as *comprehensive doctrines* – views on morality, ethics, politics, and so forth – that are the result of their personal histories and deep reflection on the social world they live in.[155] A profound disagreement follows between citizens in that society:

> The values that we cherish embody irreducibly different ultimate concerns. The special obligations that we owe to our parents, children, siblings and other kindred have a difference source from the general duties towards everybody, or the commitments we make by giving a promise…[it] harbors unavailable conflicts…such conflicts of value are of an empirical character: they do not arise unless certain contingent facts are present. It follows that a harmonious, parallel pursuit of all the values we recognize as valid is impossible for us, finite human beings. Many of the values in conflict may be incommensurable with each other. It follows that not only are we constantly reduced to sacrificing one value for the sake of another but often we are not even capable of balancing the expected gains and losses against each other.[156]

Disagreement as a fundamental "circumstance in politics" makes it difficult for citizens, their associations, and involuntary groups to agree on a baseline understanding of constitutional essentials.[157] To insist that fundamental terms of political association should be defined and accepted by all to be considered legitimate, we seem to be confronted with an unsurmountable difficulty, for such a consensus apparently cannot be achieved. This is where the conflict between the claim of self-government and the stability of a regime arises as one of the core problems of democratic legitimacy. Moral pluralism and ensuing disagreement should be somehow prevented from questioning the basis of political commonality. When this interplay between ethics and morality translates into politics, a critical problem occurs. Here, the concern is about political morality - what duties citizens owe one another in the

[155] Rawls, *Political Liberalism*, 13.
[156] Kis, *Political Neutrality*, 16.
[157] Waldron, *Law and Disagreement*, 7.

collective enterprise of democratic society. How should the political community treat its citizens and what does this require from an institutional standpoint?

The moral problem in politics is about identifying the normative conditions that must be fulfilled so that citizens have a duty to obey. Once the question moves into the political domain, the focus is no longer solely on individual moral convictions and actions, but how this is to be translated into social practices on a horizontal and vertical level. Individuals who live together in society are in a horizontal relationship with one another and in a vertical relationship with the state. This vertical relationship deals specifically with how a coercive order can establish and maintain legitimacy. Since citizens can coerce one another through democratic outcomes, the horizontal relationship should be one that offers fair terms of cooperation. By offering fair terms of cooperation to one another, the hope is that citizens will find reasons to collectively agree on a certain broad reading of a basic set of values that would be acceptable to all. This is where John Rawls introduces the concepts of *reasonableness* and *reciprocity*: "They are prepared to offer one another fair terms of social cooperation…and they agree to act on those terms, even at the cost of their own interests in particular situations, provided that others also accept those terms".[158] In this respect, citizens can define their political principles through a shared commitment built on fair cooperation that respects individual autonomy and equality. Undoubtedly, there remains deep disagreement on how these principles are to be interpreted, but a baseline establishes and constrains political power in a legitimate way: "this is the same conviction as that on which the attribution of rights is based".[159] When basic rights are institutionalized and further defined, all citizens can be assured that it is done in a fair manner and that these rights will

[158] Rawls, *Political Liberalism*, xliv.
[159] Waldron, *Law and Disagreement*, 1.

not be infringed upon through arbitrary use of political power (i.e. majoritarian outcomes specifying one conception of the good over others). For these rights and liberties have an intersubjective character to them that is not fully individualistic but based on a reciprocal recognition of citizens as actors who cooperate with one another on fair and equal terms.[160]

> A right, after all, is neither a gun nor a one-man show. It is a relationship and a social practice, and in both those essential aspects it is seemingly an expression of connectedness. Rights are public propositions, involving obligations to others as well as entitlements against them. In appearance, at least, they are a form of social cooperation – not spontaneous but highly organized cooperation, no doubt, but still, in the final analysis, cooperation.[161]

Emphasizing these values explains the importance of those rights (freedom of association, the right to vote, freedom of expression) without which any meaningful democratic existence or action would be impossible to achieve. In that sense, there will be times when a democratic regime tames self-rule to uphold individual autonomy. Citizens and government alike will be legally limited in their powers, in order to protect the "rights of individuals from interested combinations of the majority".[162] This is the core concept and practice of constitutionalism, which insists that "no binding decision should violate individual autonomy, liberty, and equality among rights holders."[163] Thus, a constitutional democracy insists that individual liberty is protected from state intervention through a catalogue of constitutional rights. These rights originate from the general principle of moral equality and they outline how citizens should be respected and treated as free and equal.

[160] Habermas, *Between Facts and Norms*, 88.
[161] Michelman, Frank. 1986. "Justification (and Justifiability) of Law in a Contradictory World." In *Justification*, edited by John W. Chapman and J. Roland Pennock. Nomos 28. New York: New York University Press. 91.
[162] The Federalist, 263-264.
[163] Dimitrijevic, *Always Above the Law,* 44.

So, liberal-constitutionalist principles serve two purposes: they protect citizens from being treated as means to accomplish a majoritarian collective goal, and they prevent citizens and government from arbitrarily coercing individuals. If citizens are required to acknowledge others' moral equality, then their freedom to act on personal commitments cannot simply equate their prerogative to act in any way they choose. If an action seeks to exploit or infringe on the moral equality of others, it can be a legitimate target of some type of constraint through state action, since the state is required to protect the freedom and equality of all its citizens. A religious zealot may be bound to act by the commitments of a doctrine that requires a monthly human sacrifice for his God, but such a belief does not grant him the freedom to kill innocent people.[164] Protecting innocent people from being morally harmed far outweighs the zealot's freedom to act on his personal commitments.

This example raises the question of how exactly legitimate constraints can be forced on individuals through state action. One answer provides the *equality threshold* test: constraints can be placed on those that disregard the moral equality of others. Simply put, an interpretation of basic values that does not pass the test is considered illegitimate. However, not all cases of disagreement will be as clear-cut as the case of the religious zealot, but the state may still coerce individuals to follow some directive. There may be cases of disagreement where there is a legitimate pluralism of interpretations of basic values. Citizens may respect the moral equality of individuals and accept the essentials of a liberal-democratic regime, but there may be times when they are coerced to follow directives that they morally disagree with. In such cases, citizens are vulnerable to a special kind of harm, so the question of legitimacy is an important one:

[164] This example was used by Richard Arneson. See the following: Arneson, Richard. 2015. "Liberalism and Equality." In *The Cambridge Companion to Liberalism*, edited by Steven Wall. Cambridge: Cambridge University Press. 219.

> How can I, given my special responsibility for my own life, accept the dominion of others? How can I, given my respect for the objective importance of other people's lives, join in forcing them to do as I wish? Democratic politics raises the possibility that we all harm each other in that way every day.[165]

Now it becomes clearer what the core problem for legitimacy and disagreement is for our discussion: democratic politics allows for citizens to coerce one another to abide by directives they may find morally reprehensible. This requires further sharpening of the definition of political legitimacy, and its relationship to the concept of democracy. One could prioritize a substantive value, such as dignity. Or, one could emphasize the value of democratic procedures. In the next section, I will explore this legitimacy concern with a short overview of some theories. My aim is not to provide a comprehensive literature exploration and discuss all the internal debates with these approaches. I seek to describe how the approaches differ and where the core disagreement exists.[166]

1.2. Legitimacy and Disagreement: Overview and Approaches

Legitimacy relates primarily to political institutions and requires government to justify its use of political power to the public.[167] I am interested in understanding what legitimacy requires for democratic decisions in case of a profound disagreement. Two basic theoretical strategies are procedural and value-based approaches, each with its many variants. Here, I will give a brief overview of these two approaches.

[165] Dworkin, Ronald. 2011. *Justice for Hedgehogs*. Cambridge, Mass: Belknap Press of Harvard University Press. 320.
[166] The specific question I seek to answer is an understanding of what justifications legitimize democratic coercive power. Certain debates surrounding the legitimacy question cannot be given full attention, but I do acknowledge the importance of such debates. For example, I do not specifically address whether legitimate political authority entails political obligations.
[167] Habermas, Jürgen. 1994. "Three Normative Models of Democracy." *Constellations* 1 (1): 1–10. 8.

A proceduralist approach argues that democratic decisions are legitimate if they are the result of an appropriately constructed and constrained process of decision-making.[168] This approach argues that democracy is founded on the premise of political equality: individuals equally hold rights, including an equal right to participate in making majority decisions. Therefore, when cases of disagreement arise, treating citizens as political equals requires a majoritarian reading of democracy, as it establishes the fairest way of setting disputes through participation and voting. In addition, there is no limit as to what political questions – including individual rights and political processes themselves – could be decided upon through majoritarian procedures.[169]

A value-based approach, on the other hand, evaluates legitimacy of ends, processes, and outcomes through substantive standards. The legitimacy of an outcome is gauged through a value that exists independently of the democratic process – if laws and political decisions are not consistent with such a value, they fail the test of political legitimacy.[170] Political equality is a matter of political standing, requiring that government treats all citizens as equals in a substantive sense. This, however, creates the threat of an interpretive gap between the core principle and the more concrete rules and norms that structure decision-making institutional settings.[171] I will discuss these approaches more thoroughly in the remainder of this section.

1.2.1. Proceduralist Approaches

[168] Christiano, Thomas. 1996. *The Rule of the Many: Fundamental Issues in Democratic Theory*. Focus Series. Boulder, Colo: Westview Press.
[169] Waldron, *Law and Disagreement*, 232.
[170] Raz, Joseph. 1986. *The Morality of Freedom*. Oxford; New York: Clarendon Press ; Oxford Univ. Press.
[171] Dworkin, *Justice for Hedgehogs*, 242.

Procedural fairness is an essential feature for any legitimate constitutional system. "Democracy is a set of procedural requirements. It states the way the rules of the polity should be made, amended, and repealed so that no one could reasonably object to their enforcement. It says nothing about the content of the rules."[172]

Since there are many different variants for procedural-based approaches, I limit my analysis to Jeremy Waldron's majoritarian conception of democracy. Waldron believes that majoritarian procedures should decide contentious political questions because majority rule is based on the principle of political equality.[173] By submitting all political questions to a procedure where all citizens have an equal say, it respects the political and moral equality by regarding each citizen as morally competent and worthy of having the same political influence. Earlier, I presented the problem of the tyranny of the majority to show how a fair process may lead to procedurally-legitimate outcomes that call into question how democratic outcomes equate to legitimacy. Waldron takes this objection into account and concedes that some rights serve as necessary conditions of democratic legitimacy. He identifies rights that are constitutively required for democracy, such as voting (in the formation of law-making and decision-procedures). He also identifies rights needed for the legitimacy or moral rights that establish a deliberative context for decision-making, such as freedom of speech and association, and rights that establish moral membership in a community, since a member is only bound by majority decisions if she has a stake in that community.

Waldron submits that a democracy requires constraints on majority rule for the sake of the protection of these fundamental rights. Citizens should not be allowed to denigrate one

[172] Kis, *Constitutional Democracy*, 53-54.
[173] Waldron, *Law and Disagreement*, 232.

another's views and exclude them from politics because "we can hardly do this in the name of rights, if it is part of the idea of rights that a right-bearer is to be respected as a separate moral agent with his own sense of justice".[174] This concession leads one to question why majority rule should be regarded as special. To answer this, Waldron highlights how politics is characterized by pervasive disagreement and consensus is not likely to be achieved on many issues - the content and scope of rights, the standards to assess the legitimacy of conflicting claims, or how disagreements should be settled. He points out that all alternative methods of decision-making will run into the same issues as majority decision-making. In addition, they run the risk of privileging the "voices and votes of a few" over a greater number.[175] So, the most appropriate (and legitimate) mechanism at our disposal is majority rule, as it best respects each person's point of view on matters of common concern by granting each an equal say about what should be done.[176] In other words, collective decision-making embodies the spirit of self-government by which individuals can "discern the manifest footprints of our own original consent…settled by institutions which in their size and diversity pay tribute to the essential plurality of politics".[177]

The *demos*, as it were, should have the last word on important political decisions. The legitimacy of a law equates to its democratic nature: who made the law, what procedures were used to establish the law, and whether there were any limits placed on popular decision-making. The normative standard used is the value of collective self-government, which leads Waldron to argue that institutions should be as democratic as possible and closely tied to popular decision-making. In turn, Waldron criticizes constitutionalism's insistence that legal limits should be placed on popular decision-making through judicial review. He argues that

[174] Ibid., 303-304.
[175] Ibid., 299.
[176] Ibid., 299-305.
[177] Ibid., 309.

judicial review undermines political participation and infringes on equality by giving a small group of unelected judges the final say on matters that fundamentally concern citizens.[178] Furthermore, Waldron insists that even if a non-democratic institution imposed conditions that *improve* democracy, there is still a loss.

Even if we agree with Waldron that this is a loss to democracy, does it necessarily entail that the law is illegitimate? For Waldron, the short answer is yes – since these conditions were imposed through a non-democratic institution, it is, by default, illegitimate.[179] The appealing value for majority rule is that it tries to be fair to all citizens. However, this does not entail that each majoritarian outcome is consistent with the underlying principle of political equality. An important gap exists for Waldron's approach between the basic principle of political equality and his choice of institutional design (i.e. majority vote). Indeed, this is the general terrain that Charles Beitz explores, showing how fundamental principles alone cannot settle questions of democratic institutional design.[180] This is where I depart from Waldron and a procedural-based approach. It seems that Waldron has in mind only those cases of disagreement where questions concerning rights are objectively uncertain and indeterminate. This area of disagreement would be one in which citizens act with "democratic competence" and in good faith, so it produces a rational type of disagreement among "opinioned" citizens. He uses abortion policy as one such example, where there are legitimate interests from both dissenting parties, and no viable means of achieving a consensus. Those areas that are indeterminate speak directly to why majority rule is preferred and why we should not look independently outside of procedures to find an objectively right answer.

[178] Waldron, Jeremy. 2006. "The Core of the Case Against Judicial Review." *Yale Law Journal* 115 (6): 1246–1366.
[179] Michelman, Frank. 2007. "The Not So Puzzling Persistence of the Futile Search: Tribe on Proceduralism in Constitutional Theory." *Tulsa Law Review*, The Scholarship of Laurence Tribe, 42 (4): 891–910.
[180] Beitz, Charles R. 1989. *Political Equality: An Essay in Democratic Theory*. Princeton, N.J: Princeton University Press.

While this may be the case for deep, contentious moral disagreements, not all disagreements will be in "good faith". Although Waldron acknowledges that there is a need to protect fundamental rights against abuse, he does not link this specifically to those antidemocrats who openly reject basic democratic principles and want to dismantle democratic institutions and the fundamental rights of others. It seems paradoxical to state that majority rule is grounded by political equality if that same rule allows for antidemocrats to achieve goals that are incompatible with democracy. For me, the intrinsic value of a democracy cannot rest solely on procedures, but rather, on deeper values that respect the equality of citizens. I question whether a procedural-based approach can provide a sound defense of these basic rights when insisting on certain procedural conditions (i.e. majority rule). Additional criteria are needed here.

1.2.2. Value-Based Approaches

A value-based approach shares a similar concern for equality, namely that it is of the central importance for political legitimacy. The political equality associated with a value-based approach can be understood as a matter of political standing. At times, this may require assessing outcomes independently of procedures of decision-making. This does not imply a rejection of the procedural features of democracy. However, when democratic outcomes conflict with substantive justice, one could argue that justice-related reasons may outweigh democratically-derived reasons.[181]

[181] Christiano, Thomas. 2000. "Waldron on Law and Disagreement." *Law and Philosophy* 19 (4): 513.

A value-based approach puts its faith in the possibility of the normative convergence of pluralism of substantive worldviews. Legitimacy of a law would not depend on the shared agreement with its content, but rather, on the shared understanding that it affirms the core political values of the system holistically. To say that the regime should be legitimation-worthy implies that the ultimate burden of legitimation rests on the polity's constitution:

> To judge a constitution legitimation-worthy is to find that its prescriptions, taken all together to comprise a unified political system, have a special kind of virtue of merit: they are such as to cast a mantle of moral justification over enforcement against everyone of approximately all of the laws, rulings, decrees that issue in compliance with the system they comprise. The aim is thus a constitution whose terms are such as to allow you or me to say, with clear conscience, that any law whose process of enactment and whose content pass muster under its requirements can *ipso facto* be deemed a law with which all within range have good enough reasons to comply, and which we, therefore are justified in enforcing.[182]

By placing the burden of legitimation on the constitution itself, the focus no longer relies on asking if a law is substantively good or bad, but to ask whether the law is constitutional. Because people disagree on the moral merits of laws, a system grounds its legitimacy in the constitution's presumable agreeability to everyone. For this approach, legitimacy is a matter of degree, where certain unjust laws still can pass the legitimacy test (since there is no agreement over the substantive core of justice). Legitimacy is also a matter of interpretation, where different substantive principles may lead one to argue that certain policies are more unjust than others. Because there are many value-based approaches that have different underlying principles which serve as a standard for defining a legitimation-worthy constitutional system, I will limit my analysis to one theorist: Ronald Dworkin and his partnership conception of democracy.

[182] Michelman, *The Not So Puzzling*, 103.

For Dworkin, the problem of legitimacy lies in whether a constitutional system can justify, uphold, and defend *human dignity*.[183] Human dignity can be seen in two ways: from an ethical standpoint, it is comprised of two principles – self-respect and authenticity. The principle of self-respect states that each person should take her life seriously; the principle of authenticity states that each person should have ethical responsibility over their lives and identify what it means to live successfully. Because individuals recognize their ethical dignity, they have a duty to respect and recognize others in the same manner.[184] These two principles of dignity are then interpreted to ground universal moral claims to equal concern and equal respect in the political context. The *principle of equal respect* requires that persons' lives be considered equally valuable, so the state acts in such a manner that is reflective of these interests. The *principle of equal concern* entitles all to act in a way that they could take control of one's life and realize their fundamental purposes.

In turn, the state should aim to actively create the conditions necessary for individuals to be self-sufficient and achieve self-realization. The government cannot adopt policies and laws that are insensitive to citizens but should create a society where all share equal opportunity to live life in accord with their autonomous preferences. These two subset principles of dignity are then formalized in the catalogue of rights, which balances between the legitimacy of political directives and personal values. Therefore, Dworkin sees rights as "trumps" – they can never be subject to coercion and are used to question whether government is acting legitimately. No collective decisions can fall into those areas of life where they are to make their own decisions. Political rights are also granted to each individual and are required for

[183] Dworkin, *Justice for Hedgehogs*, 321-323.
[184] Ibid., 170.

collective acts of self-government. These rights presuppose any case where disagreement exists, and no disagreement can exist on the right to be treated as someone who has dignity.[185]

The requirement to be treated with equal concern calls for what Dworkin labels a partnership conception of democracy as opposed to a majoritarian conception. The partnership conception "holds that self-government means government not by the majority of people exercising authority over everyone but the people as a whole acting as partners".[186] Equal concern requires giving everyone the right to vote, to participate, and so forth, but Dworkin is willing to consider adjustments of representation and judicial review to implement the partnership conception. Contrary to procedural-based views, democracy is not simply about equalizing the political power or influence that individuals have (i.e. through institutions) but demands that people are treated as equals. Justifications should not coerce others to abandon their convictions but should rather appeal to principles that others would agree to. So, dignity is undermined when coercion is such that denies any reciprocal responsibility to treat others with equal concern and respect. In summary, legitimacy rests in a state recognizing that the fate of each citizen is of equal importance and each should be treated with equal care when implementing laws and policies.

In other words, a regime's democratic credentials should be tested primarily by its substance (the content of laws), and not solely on procedures (who and how the laws were created). Dworkin understands how the high level of abstraction in fundamental laws founded on political-moral principles would necessarily lead to profound disagreement. To leave the

[185] Ibid., 165.
[186] Ibid., 384.

determinacy of these fundamental matters up to majorities could threaten the political-moral principles underlying these abstract rights-declarations. For Dworkin, that is too high of a cost, and he argues that a constitutional system's primary object should be to resolve these controversial issues in a way that "best conforms to treating everyone with equal concern and respect".[187] The question, then, is how precisely this is to be done institutionally.

Dworkin insists that whichever institution best serves this aim should be given the authority to decide these controversial issues. If a counter-majoritarian institution, such as court, can best uphold human dignity, then there is no reason not to accept its legitimacy. Contrary to Waldron, Dworkin does not believe that a court is at odds with a democracy in principle. However, he does specify that its contribution is dependent on how it behaves: "Nothing guarantees in advance that judicial review either will or will not make a majoritarian community more legitimate and democratic".[188] This would require the court to combine historical insight ('political morality of the republic') and institutional analysis when assessing whether a particular law contributes to democracy. In this sense, Dworkin's understanding of democracy is substantive, where institutionally entrenched basic human-rights interpretations are guaranteed and protected "against procedural-democratic revision".[189]

This is an important point that guides my reading of democracy – the legitimacy of a constitutional system rests on its adherence to political-moral principles in all matters of governance. Ensuring the equality of free individuals requires institutionalization and effective protection of fundamental rights, however that is to be institutionally worked out.

[187] Michelman, *The Not So Puzzling*, 114.
[188] Dworkin, *Justice for Hedgehogs*, 250.
[189] Michelman, *The Not So Puzzling*, 114.

The state is granted authority to protect these rights through a system of constraints. When the state does enable some constraints, it is a special case where the justification lies on a principled level for the defense of fundamental rights. This I consider as a more plausible approach to take when discussing the case of antidemocrats. It offers a principled justification for a state to combat action that is detrimental to basic liberal values. Even though this may conflict with procedural-democratic values in certain instances, the primacy of liberal values must be upheld to guarantee everyone has a right to be treated with equal concern. This leads me to argue for a *substantive-procedural reading of democracy* that I would like to briefly define here.

1.3. Substantive-Procedural Reading of Democracy

From what has been argued above, it follows that there are times when democratic outcomes should be constrained to protect core liberal values. I believe it is misleading to claim that there is a fundamental difference between democratic and liberal values.[190] I do not believe these substantive values contradict democratic self-rule, but rather, are an integral part of what it means to be a citizen who should be treated with equal concern and respect in a democratic state. The full realization of democratic ideals (self-government, respect for reason, democratic equality) lies in the simultaneous realization of the ideas of constitutionalism in a circular fashion. Not only does constitutionalism limit the authority of government to sustain legitimacy, it is also the instantiation of the core democratic values through law.

[190] Kis, *Constitutional Democracy*, 59-60.

Consider the defense of democracy against threats. There are cases where democratic outcomes present a problem because they threaten core liberal values. Assume that an outcome is procedurally sound: citizens were given fair and equal opportunities to participate in the process and express their preferences; the legislature passes a law in a constitutionally prescribed way. However, the resulting law infringes upon the liberal values of equality, liberty, and dignity. A democratic defensive action is needed to prevent this violation of liberal fundamentals. In my *substantive-procedural reading of democracy,* these liberal fundamentals explain and justify the use of defensive democratic mechanisms. These mechanisms protect the core normative values from being exposed to majoritarian decision-making. I concur with Kis who claims that "liberal values express basic political values, while democratic values are derivative."[191]

Liberal values serve to guide our vertical and horizontal relationships so that we are treated with equal concern and respect. In other words, principles apply both horizontally and vertically: horizontally, in that all people are subject to the same principles, and that all people are equal under the law; vertically, it applies to the relationship between individuals and authoritative, hierarchical systems of institutions that have the final say on political matters. This primacy of the rule of law over the rule of the people is pivotal to my reading of democracy. Of course, these political values can only be fully realized through institutions. This is the task of the institutional order of constitutional democracy.

This step will allow me to assess, from a principled perspective, whether certain instances of rights restrictions can be liberally justified. Since my reading shows that line-drawing exercises are permitted, then the question becomes how precisely this is to be done. How are

[191] Ibid., 54.

we to recognize when instances of line-drawing are legitimate? What criteria can be used to guide this assessment? I will address these concerns in the next section. I will use the concept of reasonableness and reasonable disagreement to demarcate the domains of legitimate political action. The hope is that such a demarcation can be liberally justified and stabilize a liberal-democratic framework by protecting its core values in a procedurally transparent manner. In what follows, I will develop my substantive-procedural account in light of the problem of political stability, namely, that individuals may interpret the basics of a liberal-democratic framework in profoundly different ways and no clear consensus is readily available. My substantive-procedural account will help to specify what is the baseline needed for consensus to emerge in order for of liberal democracy to be stable.

Section Two: Stability and Reasonableness

2.1. The Stability Concern – An Overview

In section one, I argued that a liberal-democratic framework best enables free and equal individuals to live fulfilling lives and make effective uses of their freedoms because of the special priority attributed to equal rights. I showed how this framework is designed to deal with the fact and value of pluralism, as its goal is to accommodate the multitude of interests that exist, and still allow free and equal individuals to live together in a polity. However, one issue is that individuals may interpret the basics of a liberal-democratic framework in profoundly different ways. Pluralism can be a threat too. This leaves a liberal-democratic framework open to the problem of political stability: there is no clear consensus on how these rights should be defined, what the limits of their legitimate exercise are, how rights should be prioritized when conflicts arise, and what rights-claims merit protection by the state. If no

consensus is attainable on these fundamental questions, then a liberal democracy cannot fully operate and sustain political order, leaving the freedoms and liberties of individuals in a precarious state. I turn my attention to addressing the stability concern throughout the remainder of this section.

The way in which stability is conceptualized and achieved is important. A regime's stability, as such, cannot be the fundamental concern in a liberal democracy. To justify the infringement of individuals' freedoms and liberties as a means to sustain a stable regime would be illegitimate. In addition, the fact that a consensus cannot be reached on issues of deep doctrinal conflict does not justify a compromise that would disrespect the freedom and equality of individuals. If stability is to be reached, it can only be considered legitimate if it occurs between free and equal citizens who willingly consent to follow rules and directives that sustain order in the polity. From a liberal perspective, citizens should be motivated "to develop a desire to act in accordance with these principles and to do their part in institutions that exemplify them".[192] While such a consensus may be difficult to reach, I would like to present an approach that explicates how this is to occur and why individuals would prefer to live in a polity that fosters such an approach.

I follow Rawls' attempt to derive consensus from a *political conception of justice* that is not based solely on one comprehensive doctrine or viewpoint but is freestanding.[193] The content of a political conception of justice would exist independently of the truths or beliefs that citizens would affirm from their own comprehensive doctrines. It would be derived from ideas that are shared and accepted by the entire citizenry. A political conception would be a

[192] Rawls, *A Theory of Justice*, 154.
[193] Rawls, *Political Liberalism*, 13-14.

"module" that can fit into many different worldviews that exist, and citizens affirm this common "module" from within their own perspectives. A political conception of justice is generated from ideas that are present in the *public political culture* of that society.[194] Rawls states that the three most fundamental ideas in the public political culture of a democratic society are the following: citizens are free, citizens are equal, and society is based on a fair system of cooperation.[195] These ideas give shape to the basic features of a liberal-democratic framework.

Although individuals may interpret these ideas differently, they agree to accept them, and it guides the path of consensus-building for citizens thereafter. To support these basic ideas and agree to abide by a political conception of justice would result in political stability through an *overlapping consensus.* This consensus can accommodate many different philosophical, religious, and moral views, producing a just polity that is "stable for the right reasons".[196] It secures stability in a moral way by promising citizens that "regardless of any changes in their personal circumstances or in the distribution of political power, the level of support for the overlapping consensus, and thus the degree of political stability which it secures, will not diminish".[197] So, to endorse a political conception of justice and abide by liberal-democratic basic laws is not a citizen's second-best option, but rather, is the first-best option because it stems from their personal beliefs.

Still, this reading of stability "raises the question more sharply, since it means that the differences between citizens arising from their comprehensive doctrines, religious and non-

[194] Ibid., 13-14.
[195] Ibid., 13-14.
[196] Ibid., 134.
[197] Young, Shaun. 2000. "Political Stability and the Need for Moral Affirmation." *Internet Journal of Philosophy* 4.

religious, are irreconcilable and contain transcendent elements".[198] To achieve stability in this manner seems like a daunting challenge. What if a citizen is not sufficiently motivated to act in such a manner? Furthermore, why would a citizen choose to endorse a political conception of justice if it requires bracketing her comprehensive doctrine? These two challenges seem to threaten the voluntarist aspect of such an approach to consensus-building. A convincing argument must show why an individual is better off adhering with a political conception of justice even if it goes against her perception of her own interests and worldviews. I will do so in the following section.

2.2. Reasonableness and Reasonable Disagreement

Disagreement in politics is often related to normative questions. Citizens disagree about the moral acceptability of the different ways that political cooperation might be organized, for example, whether a tax policy is morally acceptable. It is difficult to decide which claim – if any – is legitimate because a public justification cannot be grounded in any one comprehensive doctrine. For stability based on an overlapping consensus to be achieved, it is necessary to explicate why citizens would choose to act in accordance with justice-related demands and affirm a political conception of justice. One could argue that citizens, by human nature, are self-centered, and would always seek to advance their interests in the political domain. In a sense, this serves as a better empirical picture of how disagreement exists in politics today. However, I do not base my approach in this way, but rather, seek to emphasize how citizens should act if they wish to belong to a society where political power is legitimately used.

[198] Rawls, *Political Liberalism*, xlv.

I believe there is an incentive for citizens to act in accordance with such demands and affirm a political conception of justice because it serves to maintain a well-ordered society, which secures the conditions for citizens to live free lives and realize their visions of the good life.[199] This will protect citizens' freedoms and liberties by giving special priority to individual rights. If citizens reject acting in such a manner, then there is no guarantee their rights will be protected, and they are left in a precarious state. Citizens cannot dismiss the fact that disagreement pertaining to questions of political morality is a permanent feature of modern democratic societies. When difficult political questions arise, citizens could find themselves on two ends of a political power spectrum – if they are fortunate to be part of a majority who holds political power, then their interests can be secured. However, if their interests place them into the minority, then the freedom and liberty is in a precarious situation and dependent upon how the majority will act and whether they subject the minority to follow rules that they morally disagree with. Citizens will not always know whether their interests are part of the majority view, and this is particularly alarming when they have a strong interest in pertinent political questions that must be decided upon.

In this condition, simply promoting first-order preferences is problematic for several reasons. It fosters an atmosphere of divisiveness in the public sphere where citizens view one another as adversaries, leading them to reject any conflicting interests as illegitimate or morally reprehensible. It sustains an environment where citizens are intolerant of conflicting religious, moral, and philosophical views. Political stability and social peace would be threatened. In addition, if citizens use their power to try and force others to obey their comprehensive doctrine, the justification for political power remains arbitrary. Would

[199] Ibid., 157.

citizens want to belong to a society where political power can be arbitrarily used, where political instability is the norm, and rights are under threat?

It could easily be observed that this summary of the threat of autonomy understood as a mere first-order preference brings us close to Hobbes.[200] Like Hobbes, I would assume that citizens would reject living under such a political regime. But Hobbes would say that the condition of an all-pervasive threat leads citizens to prefer security and peace over unrestricted enjoyment of their 'natural liberties'.[201] He paints a (quasi) empirical picture, and offers a (quasi) empirical alternative, in a form of an almighty government legitimized by its ability to do what matters most for each subject: obedience to the regime comes first because the regime only can guarantee peace, security, and overall stability.[202] But, starting with Locke, liberalism changes the starting assumption. While Hobbes severely curtails the assumption of original autonomy for the sake of survival in the collective context, Locke envisages a society where individual autonomy remains the core value, protected by the fundamental rights and the corresponding principles of the rule of law and limited government.[203]

[200] "And because the condition of Man…is a condition of Warre of every one against every one; in which case every one is governed by his own Reason; and there is nothing he can make use of, that may not be a help unto him, in preserving his life against his enemyes; It followeth, that in such a condition, every man has a Right to every thing; even to one anothers body. And therefore, as long as this natural Right of every man to every thing endureth, there can be no security to any man". See the following: Hobbes, Thomas. 1965. *Leviathan*. Oxford: Clarendon Press. 99-100, Ch. 14, Part 1.

[201] "To *law downe* a mans *Right* to any thing, is to *devest* himself to the *Liberty*, of hindering another of the benefit of his own Right to the same…Right is layd aside, either by simply Renouncing it; or by Transferring it to another…By TRANSFERRING; when he intendeth the benefit thereof to some certain person, or persons. And when a man hath in either manner abandoned, or granted away his Right; then he is said to be OBLIGED, or BOUND, not to hinder those, to whom such Right is granted, or abandoned, from the benefit of it". (Hobbes, *Leviathan*, 101).

[202] 'When men agree amongst themselves, to submit to some Man, or Assembly of men, voluntarily, on confidence to be protected by him against all others. This later, may be called a Political Common-wealth or Commonwealth by Institution...' (Hobbes, *Leviathan*, 132).

[203] Locke, John. 1988. *Two Treatises of Government*. Student ed. Cambridge Texts in the History of Political Thought. Cambridge [England] ; New York: Cambridge University Press. 353.

This sharpens the mentioned questions of motivation and balance of comprehensive doctrines. First, it is not immediately clear why would anyone prefer a constitutional democracy based on the primacy of autonomy over a regime that guarantees security and stability at the expense of liberty. Second, it is not immediately clear why would citizens be ready to give up on their comprehensive doctrines in the public realm. Answering these and related questions requires a normative approach that would go beyond the classical Hobbesian cost-benefit analysis. In the following, I will try to defend the following position. Liberal democracy requires *reasonableness* from its citizens.[204] The use of political power must fulfill a *criterion of reciprocity* – each citizen needs to be convinced that it is reasonable to believe that all citizens can reasonably accept the enforcement of a set of basic laws.[205] To be ready to do that, each of them should find for herself good reasons to obey that law, even if it goes against her own interest or her worldview. If coercion is to occur by law, then citizens should endorse society's fundamental political arrangements without domination or manipulation. In turn, this incentivizes citizens to propose and abide by mutually acceptable rules, if they are assured others will do the same. When conflicts arise, reasonable citizens would agree on mutually acceptable rules and confirm a political conception of justice, even if it means that their personal interests are sacrificed. This does not mean that citizens should believe the political conception of justice holds the ultimate truth, but simply that the conception of justice is *reasonable*, or can be accepted by other reasonable people. Since this conception of justice has a purely political character, it allows for individuals to disagree over these controversial moral questions and still maintain a "constant level of moral support for the overlapping consensus".[206]

[204] Rawls, *Political Liberalism*, xxxii.
[205] Ibid., xlvii-xlix.
[206] Young, *Political Stability*. para 4.

Here, I want to highlight how being reasonable in a cooperative context results in *reasonable disagreement*. Reasonable citizens can come to different conclusions as to what is the appropriate answer to a contentious political question for many reasons. Since reasonable citizens have a sense of justice and are willing to propose and abide by fair terms of social cooperation, both competing claims could be legitimate. Rawls argues that reasonable disagreement exists because of the *burdens of judgement*, or the "many hazards involved in the correct exercise of our powers of reason and judgment in the ordinary course of political life".[207] When reasoning occurs about deep philosophical or political issues, "the way we assess evidence and weigh moral and political values is shaped by our total experience, our whole course of life up to now, and our total experiences must always differ".[208] Even when citizens agree on relevant considerations, they may disagree on which values should be prioritized over others, or find different kinds of normative considerations on both sides of the issue that makes an overall assessment difficult. Finally, the moral and political concepts that are used are too vague and indeterminate for assessing hard cases.[209]

Given the uniqueness of each person, with their different historical backgrounds, reasonable citizens accept the burdens of judgement and believe that others are entitled to affirm their different views about complex issues. Reasonable citizens understand that there are deep issues that many people of good faith can disagree on and that this disagreement is likely to endure.[210] In turn, democratic society is filled with a diversity of worldviews resulting in

[207] Rawls, *Political Liberalism*, 49.
[208] Ibid., 56-57.
[209] Boettcher, James W. 2004. "What Is Reasonableness?" *Philosophy & Social Criticism* 30 (5-6): 597–621. 605.
[210] For example, a religious individual who holds Catholicism as their main creed and the only truth in religion, will disagree with many other religious people who hold that their creed is the "right" religious truth. Or, certain sects within Christianity will disagree on the role that Jesus plays in religious doctrine, whether he was the Son of God or just a deeply religious, historical figure who we should strive to act similarly to. Disagreements may not always be between religious and non-religious, but also within religions themselves, and this illustrates that a reasonable citizen, in Rawls' view, would be one that understands that permanent disagreement naturally follows from our diversity of worldviews.

reasonable pluralism underlined by tolerance and civility.[211] These deliberative capacities are the starting point "that are necessary in order to exercise a sense of justice and develop, affirm, and revise a conception of the good", resulting in rules and laws "based on political values".[212] As reasonable citizens develop a conception of the good, they accept those religious and moral doctrines that endorse these basic political values of toleration and civility. For instance, citizens who are religious would accept a reasonable interpretation of atheism or Christianity, in that such doctrines would not seek to use coercive political power on others to conform with such beliefs. Thus, citizens will endorse basic political values from within their religious and moral doctrines, resulting in stability from an overlapping consensus.[213] Here, an important virtue of reasonableness in a cooperative context is how citizens are expected to make concessions on their initial favored way of organizing political cooperation. Reasonable citizens would find it appropriate to make a concession from their moral concerns by accepting a diminished realization of this moral value that they are committed to so that others could reasonably accept their proposal.

Reasonableness plays a fundamental role when constituting a public basis of justification. As a first step, reasonableness is a virtue that guides our search for public justification: any public justification should be limited to the political domain and should respect reasonable disagreement. However, the burden of judgment shows that it is difficult to recognize when reasonable disagreement exists or whether reasonable disagreements are reasonable in the first place. This necessitates an explanation as to what the content of reasonableness is. What should be considered a reasonable claim, political principle, conception of justice, or

[211] Rawls, *Political Liberalism*, xxxii.
[212] Moles, Andres. 2014. "The Public Ecology of Freedom of Association." *Res Publica* 20 (1): 85–103. 3.
[213] Here, one could make the argument that this is a semi-quasi moral doctrine itself – it is not neutral and seemingly substantiates some truth claims about the elements of these religious and moral doctrines to assess whether they reach the standard of reasonableness based on substantive criteria. I believe this claim does not properly identify the goals associated with what the concept of reasonable pluralism is trying to accomplish.

comprehensive doctrine? There are two avenues employed in the literature. Following Charles Larmore, one could offer a thin concept of reasonableness, which simply equates to "the free and open exercise of the basic capacities of reason".[214] For the purposes of my argument, this thin conception fails to adequately address the concern of antidemocrats. It would allow certain groups, such as Nazis, religious fundamentalists, racists, and so on, to freely and openly exercise their reason and offer political justifications in a way that avoids any recourse to liberal principles. They would be permitted to speak, act, and submit concrete measures that are clearly unjust. I believe that such action should not be permitted, specifically when it relates to fundamental rights that are needed for a democracy to flourish and be sustainable. Employing a thin concept of reasonableness is not sufficient for combatting those attempts that aim to dismantle democratic institutions or the democratic state.

A second avenue offers a richer account of reasonableness that can readily address the concern of antidemocrats. Although Rawls does not openly submit a rich account of reasonableness, he does insist that a "reasonable comprehensive doctrine does not reject the essentials of a democratic regime".[215] To achieve an overlapping consensus among comprehensive doctrines, Rawls insists that they must find common ground within a liberal-democratic regime. These doctrines may diverge on what they believe to be the fundamental truth, but they can peacefully coexist in the political domain because they respect core liberal-democratic values (equality, freedom, toleration, etc.). If a comprehensive doctrine rejects these core liberal-democratic values, then it can be considered unreasonable. I also employ this rich conception of reasonableness. Still, this would indicate that any search for

[214] Larmore, Charles. 2008. *The Autonomy of Morality*. Cambridge ; New York: Cambridge University Press. 143.
[215] Rawls, *Political Liberalism*, xvi.

overlapping consensus would result in outcomes that uphold substantive liberal principles, thereby excluding those in society who disagree with such principles. However, it is important to understand that reasonableness is strictly political and deals with "the attitude to tolerate others' positions as they are acknowledged as legitimate albeit different from ones' own positions…it may be called the *common currency* of a society that vindicates its fairness".[216] Reasonableness supplements public justification so that the scope of principles and the effects of these prescribed principles are equally acceptable to all citizens. In turn, it protects the fundamental core of a liberal-democratic state.

Having seen how reasonableness plays a role when constituting a public basis of justification, I now turn to the challenge of identifying how citizens are to explain their political decisions to one another. In the next section, I proceed with Rawls, to discuss a liberal-democratic framework's commitment to public reason. I will identify the publicly available values and standards that citizens are to use when justifying their political decisions to one another and highlight how this fosters reasonable disagreement.

2.3. Public Reason

How are citizens able to overcome profound disagreement on contentious political questions and achieve an overlapping consensus? For Rawls, the way forward is to have a commitment to the moral ideal of public reason. Public reason "specifies at the deepest level the basic moral and political values that are to determine a constitutional democratic government's relation to its citizens and their relation to one another."[217] For instances where a person or

[216] Sala, Robert. 2014. "Reasonable Values and the Value of Reasonableness: Reflections on John Rawls' Political Liberalism." *Working Paper Series*. 195.
[217] Rawls, John. 1997. "The Idea of Public Reason Revisited." *The University of Chicago Law Review* 64 (3): 765.

group exercises coercive power over another person or group, public reason requires those individuals to justify their political decisions to one another using publicly available values and standards.[218] Rawls insists that public reason is restricted to the basic structure of society. The basic structure of a society refers to the fundamental political, social and economic institutions that form a unified system of social cooperation exists through time. It consists of constitutional essentials (rights and institutional arrangements), and the fundamental questions of justice.[219] Public reason is "governing only the reasoning by which citizens – as voters, legislators, officials, or judges – take part in political decisions (about fundamentals) having the force of law".[220]

Rawls specifies that public values must appeal to the values of a political conception, namely, to the freedom and equality of citizens, and to the fairness of terms of social cooperation.[221] Let me give a straightforward example to specify this ideal in practice, to highlight what could be considered publicly available standards: a state should decide whether there is a gender quota for all public offices. The proposal calls for a 25% gender-representative threshold, be it male or female. Advocates for the proposal justify the quota by arguing for political equality for women, as they have drastically low numbers in public offices. Opponents of the proposal, say a religious majority, argue on the following grounds: God teaches us that women are to be subject to the will of men. In this example, the religious majority violates public reason because they base their justification on the Bible which is not a common standard for evaluating public policy - justification is not based on public values and standards. In difference to them, advocates of the proposal argue from the freedom and

[218] Larmore, Charles. 1999. "The Moral Basis of Political Liberalism." *The Journal of Philosophy* 96 (12): 599.
[219] Rawls, *The Idea of Public Reason*.
[220] Larmore, Charles. 2003. "Public Reason." In *The Cambridge Companion to Rawls*, edited by Samuel Freeman. Cambridge: Cambridge University Press. 383.
[221] Rawls, *The Idea of Public Reason.*

equality of citizens, which is a standard that could be reasonably accepted by others. They are justifying their proposal by appealing to *public standards* of inquiry.

Here, I want to emphasize that public reason deals specifically with the *reasons* that citizens use to discuss laws that require coercive government action on fundamental political questions. In cases of reasonable disagreement, public reason has an important role in maintaining stability because it secures an allegiance to the values and ideals of that democratic society. Those reasonable doctrines "support a political conception of justice underwriting a constitutional democratic society whose principles, ideals, and standards satisfy the criterion of reciprocity".[222] A religiously plural society will, undoubtedly, have many faiths that disagree with one another over the ultimate truth. However, these deep doctrinal disagreements are rooted in the burdens of judgement, and not on a failure of being unreasonable. An atheist could not say that the only reason a religious person disagrees with her is because they are irrational or unreasonable as followers of a religious doctrine. An atheist should rather accept the burdens of judgement and refrain from disrespecting opponents, because this would violate the ideal of reciprocity in justification. The same would hold for religious people as well. Imagine a fundamental political issue should be addressed, such as which religions should be tolerated. It would be beneficial for all religious people to abide by public reason in such instances to ensure that their justifications can be acceptable to all religious people. A Catholic who believes their religion should be tolerated because she has a fundamental right to free practice of religion could not turn around and argue the opposite in regard to Islam. This necessary first step then forces individuals to appeal to public standards of inquiry.

[222] Ibid., 801.

The idea behind public reason suggests that there is a baseline on which no citizens could reasonably disagree. Public reason embodies the ideal of fairness and is applicable when questions arise within fair terms of social cooperation (matters of basic justice). However, when such questions arise, what is considered off-limits is a citizen's right to the essential conditions of a liberal conception – basic rights, liberties, and opportunities. The aim of a constitutional regime is to provide citizens with the means to make effective use of their freedoms.[223] Public reason should be able to accommodate different families of justice that agree with this baseline, even if they are to be fleshed out in various ways at the institutional level. If, on the other hand, a comprehensive doctrine denies these essential conditions, then it is considered unreasonable. This is precisely the case with antidemocrats – they openly oppose these essential conditions of a liberal conception and seek to undermine such ideals through democratic means. This is why they present a problem to the stability of a liberal regime.

Now, the problem becomes what to do with the unreasonable whose goals are to undermine liberal-democratic essentials. Public reason offers no indication as to what the next steps may be to secure a liberal-democratic order from such threats. Since this project deals specifically with those individuals, groups, and associations that seek to dismantle democratic institutions and affirm goals that are incompatible with liberal-democratic values, it is necessary to dive into the problem of the unreasonable. I will do so in the following section.

Section Three: Containing the Unreasonable

[223] Rawls, *Political Liberalism*, xlvii.

3.1. What is Unreasonableness?

As a baseline, I argue that citizens should act reasonably by willingly proposing and abiding by fair terms of social cooperation, by accepting the burdens of judgment, and by understanding the fact of reasonable pluralism. A rejection of this baseline would be considered unreasonable.[224] There may be cases where citizens accept this baseline but fail to prioritize these ideals when deliberating or reasoning – failure to do so would also indicate unreasonableness. So, what type of views would count as unreasonable? "This term refers to certain aspects of a person's beliefs or behavior, rather than referring to a clearly identifiable class of real people".[225] Citizens could act reasonably by recognizing and respecting the essentials of a liberal-democratic order, but still make unreasonable demands on one another regarding specific political questions they find morally important. In this sense, public reason does not exclude the unreasonable citizen per se, but rather, excludes those views or claims that are unreasonable. To give a straightforward example for simplicity sake, when a political argument is based on claims to ethnic, racial, or gender superiority – or appeals to some religious truth – then it is unreasonable.[226] Those who advance such claims would not stand the test of public reason and would be considered unreasonable because they are unwilling to translate their comprehensive claims into standards required by public reason.

This also reads as the question of motivation. Those who plan to engage public institutions for the "wrong reasons" are considered unreasonable.[227] One could support the general framework of a liberal democracy for purely prudential reasons – for example, they abide by rules and institutions simply for the fact that it creates order and stability. This is what I

[224] Quong, Jonathan. 2011. *Liberalism without Perfection*. Oxford ; New York: Oxford University Press. 291.
[225] Ibid., 291.
[226] Ibid., 292.
[227] Rawls, *Political Liberalism*, 55.

earlier referred to as a *modus vivendi* approach, and I argued that such an approach should not be taken. Those who are not motivated to support a liberal-democratic framework for moral reasons may use the democratic framework to achieve goals that are incompatible with liberal-democratic values, whether it be diminishing the rights to certain individuals and so on. For this reason, citizens who advance such claims would be excluded from the constituency of public reason: "the more unreasonable views they have, the more total their exclusion from this constituency will be".[228] As Rawls states, institutions have the "the practical task of containing them – like war and disease – so that they do not overturn political justice".[229]

Before I develop how the unreasonable should be identified and how they are to be excluded, I want to address a preliminary objection. If unreasonable citizens are excluded from public justification, then there are two unsettling implications: first, they are not entitled to the benefits of citizenship, and secondly, they are forced to abide by rules without their participation. Jonathan Quong pinpoints this worry when he asks: "how can you be entitled to the benefits of an agreement or social contract to which you were not a party, and whose basic premises you vehemently reject?"[230] One could argue that this exclusion from the process of public justification limits the fundamental rights that a liberal-democratic polity should guarantee to all its members. Although this is an important objection, it misconstrues the idea that public reason can only be extended to those who endorse its premises. The foundation of a liberal-democratic framework is built on the idea that the freedom and equality of citizens should be guaranteed. The unreasonable are still covered by a general principle of toleration.

[228] Quong, *Liberalism without Perfection*, 292.
[229] Rawls, *Political Liberalism*, 64.
[230] Quong, *Liberalism without Perfection*, 292.

To restrict the basic rights or liberties of the unreasonable, there must be additional reasons. Given that individuals are part of a joint-enterprise, the starting point cannot simply be the isolated individual as is, but rather a person who is a party to the fair system of social cooperation. Therefore, I model citizens as rational and reasonable, if they respect the rights of others, and act on this commitment by accepting the essentials of a liberal-democratic regime. To be sure, there is still a principle of toleration that generally holds, but there are certain cases where other considerations trump this principle and justify the intolerance of the unreasonable. As Karl Popper argued in his seminal work *The Open Society and Its Enemies*, intolerance should not be tolerated, particularly when citizens express an intention to denigrate subsets of a population, or the liberal-democratic way of life.[231] This holds in the realm of public justification, but still entitles the unreasonable to the benefits of citizenship. What considerations serve to trump the principle of tolerance? Most importantly, if restrictions are placed on the fundamental rights and liberties of the unreasonable, can a liberal-democratic regime justify intolerance as a legitimate political objective? In the next section, I will address these questions on justified intolerance by presenting two arguments: the containment of unreasonable doctrines and rights conflicts between reasonable and unreasonable citizens.

3.2. Containing Unreasonable Doctrines

In any pluralist society, it is "a permanent fact of life" that some comprehensive doctrines will reject some (or all) democratic freedoms, and Rawls argues that such doctrines should be

[231] Popper, Karl. 2008. *The Open Society and Its Enemies*. Repr. Vol. 1. The Spell of Plato. London: Routledge. 226.

contained.[232] However, it is not entirely clear what Rawls signifies by this concept, so it is necessary to fill in the ambiguities here. For me, the aim of containment is of a special nature, and is not simply about the protection of basic rights. Imagine a group of Nazi enthusiasts who try to attack a minority group. A liberal-democratic state would not allow for this to happen and would arrest the members of that group to prevent the incident from occurring. In this case, the aim of state action is to protect basic individual rights and freedoms of that minority group. Now, imagine that this Nazi group assemble to pronounce that the Aryan race should be prioritized over all others. Through some policy, the state denies this group the right to assemble and pronounce these views as unreasonable. The ground for containment is defined as follows: "any policy whose *primary intention* is to *undermine or restrict the spread of ideas* that reject the fundamental political values, that is, that political society should be a fair system of social cooperation for mutual benefit, that citizens are free equals, and the fact of reasonable pluralism".[233]

One could question whether constraining the marketplace of ideas is a legitimate political objective for a liberal-democratic regime. After all, freedom of expression is one of liberalism's fundamental commitments, and the scenario above does not indicate any serious harm as a direct result of the Nazi doctrinal pronouncement. To respond to such an objection, there are two interrelated concerns: whether containment is a legitimate political objective, and whether it justifies a liberal-democratic regime to act intolerantly against the unreasonable. First, containment is a legitimate political objective for a liberal-democratic state's *normative stability*. I argued that the proper approach to stability should be based on "the right reasons" which requires an overlapping consensus on core political values. The

[232] Rawls, *Political Liberalism*, 64.
[233] Quong, *Liberalism without Perfection*, 299.

possibility of a liberal-democratic regime remaining normatively stable would be compromised if citizens reject these political values.

For this reason, it is necessary to ensure that "doctrines which deny the freedom and equality of persons, or the idea of society as a fair system of cooperation, not become so prevalent that they threaten to undermine the fundamental ideals of a well-ordered legal regime".[234] Rawls attributes a moral value to containment to serve as an additional protection for a liberal-democratic regime. For Rawls, one of the fundamental moral powers that a citizen has is the capacity to exercise an effective sense of justice and act on its political public conception. A liberal society must sustain an atmosphere that fosters this development, and the worry is that unreasonable doctrines could have spill-over effects that lead to mental contamination of citizens, so they should be contained.[235]

Now, if containment or intervention may be a legitimate political objection, the question remains as to whether it merits a liberal state acting intolerantly against the unreasonable. Reasonable pluralism and the idea of public reason mandates that the state adhere to a principle of liberal toleration. If a liberal state were to depart from this principle, then it must be justified by public reasons. This is where it becomes more complicated, as cases vary in regard to political speech, participation, freedom of religion, and so forth. Each case is nuanced and presents inner dilemmas. Take, for instance, the case of free speech. For liberals who hold a robust model of freedom of speech, a liberal state should be limited in acting intolerantly against the unreasonable, to the extent that only an imminent violent revolt requires state intervention. Containing unreasonable doctrines by limiting such a fundamental

[234] Ibid., 300.
[235] Moles, *The Public Ecology*. 96-97.

right seemingly turns a liberal-democratic regime against its core values. It is paradoxical to consider that although the aim of containment may serve a legitimate political objective for a liberal-democratic regime, it is difficult to justify using such restrictive measures to accomplish that goal. However, I do believe there is a way forward, and I will argue why restrictions are necessary in some instances. I will develop this argument by analyzing conflicts that arise in regard to free speech cases in the next section.[236]

3.3. Conflict of Rights Between (Un)reasonable citizens

To begin with, I do not approach the question of freedom of expression by arriving at principles that prioritize all speech. The discussion on free speech should not be understood in isolation but in tandem with other values, such as the equal respect for all citizens. There may be some who place a higher value on speech then on other values, such as the prevention of harm or equality. I approach the question of free speech by considering the merits of the case at hand: the stakes, the potential risks and gains of different types of actions. The expression of hate speech that attacks a person or group based on their gender, religion, race, sexual orientation, and so on, has a primary aim of denying the freedom or equality of persons identified as members of such groups. So, a person who expresses hate speech is pursuing unreasonable goals and objectives from the outset. Their fundamental interests, by nature of being unreasonable, are different from reasonable citizens whose interests ground rights. One argument that serves to justify restricting the behavior of unreasonable citizens deals with this nature of rights and how rights conflicts should be resolved, and I will explore this argument while referencing free speech cases.

[236] For the purposes of this section, I do not wish to dive into all the debates on hate speech. I am simply using the hate speech to provide a range of cases where the containment argument is justified. Whether a liberal state does use hate speech legislation with this aim is entirely a political decision that they should determine. I argue that, in principle, liberal states can justify the containment of unreasonable doctrines with this aim.

First, I take it as given that rights claims are grounded on sufficiently strong interests that individuals have as citizens to form, revise, and rationally pursue their own conceptions of the good life.[237] This applies to all basic liberal rights, including the right to free speech. However, as I earlier argued in section one, rights do not cover the freedom for individuals to act in any way they choose.[238] There is a delineated domain given for individuals to act upon their rights, and each right is only protected within that domain. To understand whether certain actions are protected by a right, it should be "consistent with the overall moral ideal with the system of rights is meant to uphold…that moral ideal is society as a fair system of social cooperation for mutual benefit amongst free and equal citizens".[239] I define the unreasonable as those who reject precisely this moral ideal. It follows that actions that are deemed unreasonable cannot be protected by reference to individual rights and freedoms, since they are inconsistent with the grounds of such rights.

So, when citizens pursue reasonable objectives, they are protected by the rights and liberties of citizenship. If the opposite were to occur and a citizen pursues unreasonable objectives, then their actions are not protected by rights. Notice that the protection of rights hinges on whether a citizen has reasonable *objectives* – to act reasonably ensures that they are under the domain where rights are protected. This is an important point, and one that references my earlier remark that unreasonable citizens should not be excluded from citizenship and that they do retain fundamental rights. For it may be the case that a citizen has both reasonable and unreasonable objectives, and whether a rights restriction is placed on her actions depends

[237] Waldron, Jeremy. 1993. *Liberal Rights: Collected Papers, 1981-1991*. Cambridge Studies in Philosophy and Public Policy. Cambridge ; New York: Cambridge University Press. 63-87.
[238] I offered an earlier example of the religious zealot who has acts upon his commitment from God requiring a human sacrifice. The right to freedom of religion does not justify any such action.
[239] Quong, *Liberalism without Perfection*, 308.

upon their aim. For example, a religious fundamentalist adheres to a doctrine that treats women unequally by forcing them to be submissive to men. Just because he believes this to be the truth does not justify the liberal-democratic state from stripping him of citizenship or denying him fundamental rights. However, if he exercises his fundamental rights to deny equality of women, the state is justified in intervening and preventing such action, and his rights claim is not protected.

The discussion here provides a clearer answer as to how the state can decide difficult cases where rights claims conflict with one another. The state identifies whether both parties do, in fact, have a rights claim by assessing whether their objectives are reasonable. If a party does have unreasonable objectives, then the rights claim is not protected, and the conflict can be resolved. This better explains how citizens are permitted to hold unreasonable beliefs, and how the state is permitted to act in a way to prevent the proliferation of those beliefs. Waldron provides a good example to illustrate this point. He considers a conflict between the speech rights of a Nazi group and a Communist group. The Nazi group wants to make provoking speeches that will incite others to suppress the Communist group by infiltrating their meetings and gatherings so that they cannot speak freely. Waldron considers this case as a conflict between the Communists' right to free speech and the Nazis' right to free speech. Rather than look at this conflict in terms of a quantitative utilitarianism of rights, he proposes to approach the conflict in a more systemic way:

> In terms of each person's interest in participating on equal terms in a forum of public life in which all may speak their minds. On this account, the conflict between the Nazis and the Communists can be more easily resolved. To count as a genuine exercise of free speech, a person's contribution must be related to that of her opponent in a way that makes room for them both. But though they claim to be exercising that right, the Nazi's speeches do not have this character. The speeches they claim the right to make are calculated to bring an

> end to the form of life in relation to which the idea of free speech is conceived. We ban their speeches, therefore, not because we think we can necessarily safeguard more rights by doing so, but because in their content and tendency the Nazi's speeches are incompatible with the very idea of the right they are asserting.[240]

So, the premise remains the same here – the Nazi group seeks to exercise their rights to establish unreasonable objectives would equate to them not having a right to free speech since they are not exercising that liberal right whatsoever. The same argument can be offered for other cases, whether it be freedom of religion, the right to assemble, participation rights, and so forth.[241] Andres Moles applies a similar argument when analyzing freedom of association. Following Quong, he argues that liberal rights are grounded by reasonableness, and since there is no right to be unreasonable, "there is no right to form and join unreasonable associations".[242] Moles analyzes the goals of racist associations (or racist political parties) and shows how they fail to offer a justification to free and equal citizens. Moles concurs that even though citizens do not have a right to join unreasonable associations, "this does not mean that he has waived his political rights…it only means that he cannot form this particular party" because "the use of liberal rights is conditional on being reasonable".[243]

One problem remains that should be considered – the practical application of these arguments for a liberal-democratic state. Although I will not engage the question of how the unreasonable are to be specifically contained in this section, I want to provide some additional explication for the use of this argument in combatting antidemocrats that will unfold in the latter chapters of this thesis.

[240] Waldron, Jeremy. 1989. "Rights in Conflict." *Ethics* 99 (3): 503–19. 518.
[241] In a similar manner, Quong argues that the right for parents to make educational choices for their children can be infringed or withheld on containment grounds. His argument is structurally like the argument I present for hate speech.
[242] Moles, *The Public Ecology*, 96.
[243] Ibid., 97.

3.4. Non-Interference Principle

In the preceding section, I have specified what it means to be unreasonable and how it is attributed. I showed how this process is to occur methodologically through an assessment of claims by citizens and their doctrines to understand whether they directly contradict the fundamental political values of a liberal-democratic regime, and if so, I qualified them as unreasonable. I focused on such claims because citizens are liable to be both reasonable yet made unreasonable demands, and vice versa. I also showed why containment of the unreasonable is a legitimate political objection for a liberal-democratic regime and offered additional justification as to why such interventions should occur. The aim for this section was to provide an argument that containment can be justifiable at the level of principle. However, each case presents a different set of claims that should be assessed in to justify whether intervention against the unreasonable is necessary. In the remainder of this section, I will address more practical concerns of this argument and supplement it with a presumption of non-interference.

The main concern with such a principle is that the concept of reasonableness may be open to interpretation and is discretionary for targeting the views of citizens in an illegitimate way. While the overall goal of this principle is to create a stable liberal-democratic order, it should not steer away from the liberal commitment that any rights infringement should stand the test of public justification. This concern comes to the forefront when assessing how a liberal state should treat illiberal fringe groups. Take, for instance, political extremists in the U.S. who are both on the far-right and far-left of the political spectrum. These extremists have clear goals that are incompatible with liberal-democratic values. Although their views are clearly

unreasonable, one could not reasonably consider them to be tangible threats to the political stability of that regime. The normative stability argument, offered above, would not suffice to justify containing these extremists, because they are not growing in numbers or power.

Rather than see such fringe groups as detrimental to my argument, it shapes my understanding as to how containment or rights infringement should be approached in a more pragmatic way. Even though the argument may be justified from a principled perspective, the goal of intervention on the unreasonable should consider whether these groups do pose a significant threat to the liberal-democratic order. There is a difference to consider between those fringe groups in society that have limited interaction with others, such as the Amish, and those who participate politically in society at large. The former fringe groups do not pose any significant threat to the normative stability of the regime, as they do not aim at undermining liberal-democratic institutions. However, those unreasonable minorities who do participate in public life of society, may pose more of a serious threat to the stability of the liberal-democratic regime, so they warrant additional scrutiny. For the reason given above, such fringe groups may grow and contaminate certain subsets of society with more illiberal views, but that does not offer a clear liberal justification for intervention *prima facie*.

On a similar note, Robert Sala offers a critique of Rawls' concept of reasonableness as incomplete, arguing that persons may not be "reasonable", as they do not endorse liberal values, so they do not represent any danger to a just society.[244] In addition, "we cannot infer [that the unreasonable] will necessarily try to violate the terms around which cooperation is structured by imposing their values on others", so those citizens should be considered non-

[244] Sala, *Reasonable Values*, 190-199.

reasonable.[245] This is a valuable point, and certainly one that I take into consideration, as it may help to classify certain levels of unreasonableness. At the very least, those non-reasonable individuals do support the liberal-democratic order overall, as opposed to those who wish to undermine liberal-democratic institutions. Where Sala falls short is a discussion on the specific claims these non-reasonable citizens offer to the public. He insists that these reasons would "fall outside the domain of public reason" and would not be acceptable to reasonable people. However, he does not specify the content of reasons that non-reasonable citizens set forth, thereby limiting his assessment.

This brings me to an interesting point – there may be some who do not use public reasons to defend their positions, and that would mean their reasons are not sufficient for public justification – but that would not imply they are willing to impose their beliefs on others. Consider the Amish example given above: they wish to live their lives in a way that is governed by normal societal rules, however, they do not want to impose these beliefs on the society at large. From this, I understand that an assessment of threat should consider not only the size or power of a group, but also the goals they seek to establish. An assessment of threat is indeed an important factor that should be considered, and one that I will develop in Chapter Three. However, considering it as a relevant factor shows that I take seriously the burden of justification placed on the state when intervening against the unreasonable. I believe that the justification rests on those who advocate for containment, so there must be weighty reasons given so that the state does not suppress political rights arbitrarily. So far, my justification has offered a principled discussion on how this could be done, but I want to take it a step further and temper my account with a non-interference requirement.

[245] Ibid., 190.

While there are certain domains where intervention can be liberally justified, as the Nazi case highlighted, many counterexamples can be given that show how such discretionary power led to the suppression of political opponents through rights restriction. I see militant democracy as a special institution that can help in determining when the unreasonable can be contained, but in a principled manner that requires a strong justification – one which upholds liberal-democratic principles, values, and institutions.

CONCLUSION

In the beginning of this chapter, I started with a broad question: what type of justification could be given where individuals still accept the authority of a liberal-democratic state given the fact that our societies are deeply pluralistic? The justification given focused on how a liberal-democratic state best approximates the goal of securing the freedom and liberty of individuals over other alternatives. I then introduced a broader concern related to the stability of such a regime and how democracies do come under threat. Since a democracy has a right to self-determination, it must defend itself from all threats to its existence, and by doing so, must draw a line as to what it means to defend itself. I introduced threats stemming internally from those who use democratic institutions to achieve goals that are incompatible with democracy. Since a liberal justification of these threats is not straightforward, I focused on the problem that the institution of militant democracy poses for a liberal-democratic regime. The substantive targeting that this institution undergoes to defend democracy is somewhat paradoxical, given that it restricts the fundamental right of those they deem detrimental to democracy. So, the problem rose to the forefront – either a democracy does defend itself through targeted uses of restrictive measures and offers a justification, or its defeat is imminent. Thus, I chose to embark on providing a justification for militant democracy.

As we have seen, this is a difficult avenue to have chosen, since many argue that militant democracy directly contradicts democratic principles and cannot be justified. Theorists tend to favor additional procedural safeguards to supplement democracy, as opposed to the substantive core associated with militant democracy. Rather than see militant democracy as paradoxical to a liberal-democratic regime, I approach the question in a different way. I embarked on having an initial discussion that is independent of militant democracy and asked the following: how can unjust ideas and ideologies exist in a liberal democracy and why are liberals ready to tolerate them? With such an approach, I wanted to understand what underlying principles were at work. Section one began by explicating the interplay between substantive and procedural features of democracy. Through this discussion, I offered a substantive-procedural reading of democracy that points to both procedural features and a principled substantive core. This is what I believe should be the object of defense when understanding what militant democracy targets and how it operates.

In section two, I turned to the problem of stability. Much of the criticism against militant democracy has been leveled at the fact that it prioritizes stability of the regime over other values, be it democratic ones and so forth. I looked at the problem of persistent disagreement and tried to understand how a liberal-democratic regime copes with it. Since this is a contentious issue that cannot be readily resolved, I analyze how the concept of reasonableness plays an important role in a liberal-democratic regime. I define what it means to be a reasonable citizen in a pluralist society and the role of public reasons for justification. This allowed me to emphasize how reason, through its constraints on individuals and political power, is necessary to achieve consensus in a fair manner. My substantive-procedural reading justified my use of this concept.

In section three, I argued how reasonableness serves as a baseline to suggest that not all positions can be defensible in a liberal democracy. The positions that fail to reach that threshold of reasonableness should be contained and considered off-limits under a liberal-democratic regime. I defined what it means to be an unreasonable citizen living in a liberal democracy and how it is justified to place constraints on such claims during the process of public justification.

With this theoretical background, I can now offer an account of militant democracy as an instrument to contain the unreasonable in a liberal-democratic regime. Militant democracy should be understood as a special case for defending these freedoms in the first instance. My account of reasonableness focused on the political rights and liberties of individuals, and this links to my understanding of militant democracy more generally. The domain that militant democracy encompasses is the last stop of defense to ensure that a liberal-democratic regime does sustain its framework and that citizens live in a regime that respects the equality and freedom of all.

While the issue of line-drawing is contentious, the concept of reasonableness helped me to argue how it can be done in a liberally legitimate manner. The main conflict here was how to understand the limits of rights. I defined what those limits are and posited a baseline to suggest that not all viewpoints should be allowed in a liberal democracy. The unreasonable are those who seek to undermine democratic institutions and are unwilling to propose or abide by principles for specifying fair terms of social cooperation. With this theoretical background, I can now embark on assessing cases of militant democracy in a much more principled manner. I do not see, *prima facie*, any principled problem with restricting the rights of antidemocrats who have unreasonable objectives. I also supplement my account

with a non-interference principle to ensure that any rights restriction is justified with strong reasons that all reasonable citizens could accept.

CHAPTER THREE: DRAWING THE LINE – MILITANT DEMOCRACY IN ACTION

Introduction

In Chapter One, I provided a critical overview of the state of the art of the literature and explicated my methodological and analytical position. I clarified what the standard approach is to the question of militant democracy – discussing the institution's paradoxical nature – which shifts the debate to political-institutional concerns. As a result, I showed how the focus of such concerns emits a first-order, principled-level discussion. Since this principled discussion has been missing in the literature, it led to such an exploration in Chapter Two. My methodological approach took a step back from these internal debates which focus on the paradox to ask a set of more fundamental questions. These larger questions focused on stability, reasonable pluralism, legitimate disagreement, and tolerance. I identified and elaborated on the principles underlining a tolerant, liberal-democratic state and connected these larger questions to militant democracy. I defended militant democracy on this principled level through a substantive-procedural reading of democracy, and the concept of reasonableness was central in this discussion.

In this Chapter, I will focus on cases of militant democracy more specifically and revisit some earlier discussions I have undertaken in the two preceding chapters through such an analytical lens. The case of militant democracy is situated in a specific context, one that calls for an understanding that speaks directly to it. The German constitutional regime explicitly distinguishes between legitimate and illegitimate use of political rights. In this way, it goes beyond the classical liberal principle of the state neutrality that I specified in the preceding chapter. The state is apparently acting as if it is the embodiment of public reason and

reasonableness, two concepts that I fleshed out in Chapter Two. As such, the state is the guardian who has the right to step in, and this is precisely where militant democracy garners its legitimacy for German democracy. If this is public reason embodied, which seeks to protect underlying liberal-democratic values, then it is justified for the state to step in. The crucial question asks which conditions the state must meet when using militant democracy, so that its action can be justified in terms of public reason. By highlighting the German model of militant democracy, I will address the two core requirements: first, citizens are to act reasonably to receive all the benefits that come along with living in a liberal-democratic state; second, the state has to justify the use of militant measures in a liberally sound manner.

In section one, I begin with a short overview of the constitutional framework of the German model of militant democracy, followed by a detailed analysis of two classic militant democracy cases: the *Sozialistische Reichspartei* (*SRP*, or Socialist Reich Party) and the *Kommunistische Partei Deutschlands* (*KPD*, or Communist Party of Germany) bans decided by the German Constitutional Court. I specify the reflective reasoning of the German Constitutional court in these cases and show how militant democracy is one piece of a larger normative jurisprudential system whose legitimacy lies in the underlying values and principles of the Basic Law. In section two, I specify two levels of justification of militant democracy that are needed to provide a normative defense of this institution. I will analyze the party ban cases in reference to these two levels to specify the differing set of questions that each level attempts to answer.

Section One: Streitbare Demokratie: The German Model of Militant Democracy

1.1 The Militant Nature of German Democracy

All constitutional democracies have built-in institutional and procedural mechanisms to deal with different threats in a legitimate manner. The classical principles of the rule of law, separation of powers, and checks and balances are institutionalized to limit the power of government to act in an arbitrary manner. Yet there are border cases that appear to challenge the authority and capacity of the 'standard' institutional set-up. Consider controversies over the use and abuse of free speech. Imagine a Nazi group that proclaims their agenda on the streets – it is difficult to define where, when, how, and by whom to draw the line allowing the state to interfere with the participation rights guaranteed in a democratic society despite the egregious views of this group. It is relatively easy to draw the line when the group causes physical harm to others: criminal law demarcates when state intervention is legitimate. However, harm can be caused to others that is not just physical. We can imagine that an individual or a group is harmed from verbal attacks, threats, and so forth, where no physical act has occurred. It is also possible that such situations are not covered by criminal law. In these cases, we ask whether it is possible for the state to preemptively step in and restrict the rights of free speech, expression, or participation of those who express harmful views.

Now, imagine that a Nazi group does not seek to cause any physical harm, but simply proclaims that a certain type of government is preferred, one that would be run by the all-powerful Aryan race. One could argue that in a democratic society, the fundamental right to free speech gives them the right to proclaim such viewpoints. On the other hand, one could say that this undermines democratic values, and their right to free speech and participation should be restricted because of the content of their doctrine. This viewpoint would assume that the state can act in a preemptive manner. Since the threat this group poses to a democratic society and democratic institutions is severe, a special institution should be set in

place to combat such threats. It may require special action, bypassing a strict, procedural, ex post facto defense.

Proponents of militant democracy do not deny that there is a right that is being restricted. They argue that the nature of the threat is a sufficient justification for restricting that right. Since militant democracy challenges the conventional understanding of what it means to have political rights, the question remains as to when and how the state can legitimately use this institution - if at all. Militant democracy substantiates what these political rights entail and demarcate the boundaries of how they can be used. This is what makes this institution a special case: it challenges the neutrality of a liberal state by setting a substantive line that targets those who seek to abuse these rights and undermine democratic values. Still, many liberal democracies, especially those created after WWII, have institutionalized militant democracy.[246] How do these liberal democracies justify the institution and where do they draw the line? Let us turn to the paradigmatic German model of militant democracy as a first starting point.

The framers of the Basic Law understood the need to protect democracy against threats to its existence.[247] This was a direct result of their recent past, where Adolf Hitler and the Nazis came to power during the Weimar Republic, essentially becoming the largest party in Parliament via elections in early March 1933.[248] The framers understood that there were major deficiencies in the normative commitments and institutional features of the Weimar Constitution. One of the normative commitments underlining the Weimar Constitution was to create a genuine democratic state, one that would uphold a robust ideal of self-government.

[246] Many democratic states institutionalized militant democracy after World War II as a post-war response to the history of states that were taken over by extreme political movements: Italian constitution of 1948, the French Constitution of 1958, the Spanish Constitution of 1978, and the Basic Law of 1949, among others.
[247] Kommers, Donald P., and Russell A. Miller. 2012. *The Constitutional Jurisprudence of the Federal Republic of Germany*. 3rd ed., rev. and expanded. Durham, NC: Duke University Press. 285-301.
[248] Ibid., 290-293.

This was evidenced in the constitution's Bill of Rights, which guaranteed all Germans equality before the law and political and religious freedom, as well as giving all men and women the right to vote when they turned twenty-years old.[249] In addition, the Constitution offered an extensive list of socio-economic rights.

Although a normative commitment to creating a genuine democratic state is praiseworthy, it is still important to design institutions in a way that could uphold that ideal. The framers of the Basic Law understood how the institutionalization of this ideal led to two major flaws in Weimar Republic. First, to ensure a procedurally fair way for individuals to vote for their representatives, the Weimar Republic opted for proportional representation, meaning that Germans voted for a party and not a parliamentary member. Thus, a multitude of parties shared parliamentary seats, leading to parliamentary instability and making it extremely difficult to have laws passed in the Reichstag, since no majority could be formed across party lines. Eventually, this led the framers of the Basic Law to introduce a five percent election threshold for parties to enter into Parliament.[250] A second major flaw in the design of the Weimar Constitution was Article 48. It allowed the president to issue decrees in a state of emergency without the approval of the Reichstag. Because the constitution did not define what the legal grounds were for proclaiming a state of emergency, the president was given such discretionary power. This provided the legal means for the president to take over total control of the state, which eventually led to the suspension of basic rights and the dissolution of democratic institutions altogether.

The Basic Law opens with a strong normative statement on the primacy of human dignity[251], and proceeds with a catalogue of fundamental rights. These fundamental rights cover

[249] The Weimar Constitution (1919).
[250] Basic Law, Article 38.
[251] Basic Law, Article 1. "Human dignity shall be inviolable. To respect it shall be the duty of all state authority".

personal integrity and freedom[252], the right to free expression[253], freedom of assembly[254] and association[255], to name a few. These are some basic liberal protections that the state cannot interfere with. Furthermore, it is duty of the state to protect against the infringement of any of these rights. This does not seem so different than most other liberal democracies, but the German case is interesting because this commitment is coupled with measures that safeguard the democratic order against abuse by these rights. It appears that these fundamental rights require more than a classical liberal state neutrality - they require that the state actively protects them in light of the values underpinning the liberal-democratic order. This 'active protection' can include rights restrictions. As such, German militant democracy "exemplifies the restriction of rights for the purpose of adverting grave effects upon the community as a whole".[256] Article 18 of the Basic Law defines this in the following way:

> Whoever abuses the freedom of expression, in particular the freedom of the press (paragraph (1) of Article 5), the freedom of teaching (paragraph (3) of Article 5), the freedom of assembly (Article 8), the freedom of association (Article 9), the privacy of correspondence, posts and telecommunications (Article 10), the rights of property (Article 14), or the right of asylum (Article 16a) in order to combat the free and democratic basic order shall forfeit these basic rights. This forfeiture and its extent shall be declared by the Federal Constitutional Court.

Article 9.1 specifies limits of the right to form corporations and other associations. It states that "associations whose aims or activities contravene the criminal laws, or that are directed against the constitutional order or the concept of international understanding, shall be prohibited".[257] Likewise, Article 11 gives all Germans the right to freedom of movement, yet paragraph two states that "this right may be restricted… [if] such restriction is necessary to

[252] Basic Law, Article 2.
[253] Basic Law, Article 5.
[254] Basic Law, Article 8.
[255] Basic Law, Article 9.
[256] Hall, Jeffrey B. 2008. "Taking Rechts Seriously: Ronald Dworkin and the Federal Constitutional Court of Germany" *German Law Journal* 9 (6): 771-98. 791.
[257] Basic Law, Article 9, Paragraph 2.

avert an imminent danger to the existence or the free democratic basic order of the Federation".[258] Further, if a political party threatens the free, democratic basic order, Article 21.2 gives the state the authority to ban such a party.

While these provisions are seemingly in contradiction with one another, it is important to understand what is being balanced here. As the state invokes the primacy of democracy, rights are being threatened. At the very least, these rights are not liberal 'trumps', but appear to be in balance with the principle of democracy. In some cases, this gives the state the authority to limit such rights for the sake of protecting democracy, while in others, the cost associated with limiting rights is too heavy for the state to justify such action. However, it is important to observe that the primary object of defense is not simply democracy as a regime type, but a substantive core of values underlying the order. I will elaborate on this point below.

The Basic Law provides the Federal Constitutional Court with the special competence to interpret when such a forfeiture of rights is needed in the defense of the free democratic order.[259] For this reason, it is important to understand what the characteristics of FCC jurisprudence are and how this relates to militant democracy cases. One of the more important characteristics of the constitutional adjudication in Germany is the Court's reliance on an "objective order of values":

> [The Basic Law's] section on basic rights establishes an objective order of values, and this order strongly reinforces the effective power of basic rights. This value system which centers upon dignity of the human personality developing freely within the social community, must be looked upon as a fundamental constitutional decision affecting all spheres of law.[260]

[258] Basic Law, Article 11, Paragraph 2.
[259] I provide a more detailed conceptualization of the "free democratic order" in the next subsection.
[260] Decision of Jan. 15, 1958, 7B VerfG.

When adjudicating cases, the Court often refers to this value order as a ranking of substantive values. While it is possible to consider that human dignity is at the top of this hierarchy, it is not clear where other values rank on the hierarchical list. Besides, having a hierarchy of values does not mean that balancing between these values does not occur. Imagine a case where a highly ranked value is only incidentally affected, but serves as a trump against a lower value, which fundamentally affects that lower value. It is possible that the ranking of these values are subject to change when adjudicating cases and the Court is presented with a factual context.[261] The takeaway here is to understand that there is an established *prima facie* order of values that are prioritized during balancing exercises as a whole, but the precise order of these values will be determined when individuals put forth rights claims and the specific facts are presented during balancing exercises.

So, when the FCC asserts that there is a basic order of values, it states that it has a duty to support the moral principles of "one party's claims to a right over an adverse party's claim", and not simply to choose one adequate decision out of many in hard cases.[262] As I dive into specific militant democracy cases where the Court interprets whether a challenge to democracy warrants state action in the form of preemptive, militant measures, these orderings through rights balancing exercises will become clearer. Judicial interpretations of rights and principles will highlight what values are most important and necessitate defense through militant action.

To uncover these values, I analyze several party ban cases in Germany. I will address the following questions: first, what is the meaning of the term "free and democratic basic order"? Secondly, what constitutes a grave threat to the democratic order? Is it about the potentiality

[261] Alexy, Robert. 2002. *A Theory of Constitutional Rights*. Oxford ; New York: Oxford University Press. 98-104.
[262] Hall, *Taking Rechts Seriously*, 796.

of a threat or the imminence of a threat? Third, to determine whether such a threat exists, how is this procedurally done? Where are the limits here? And finally, how is it possible to characterize a party as anti-democratic and anti-constitutional? Does this require looking into the general nature and character of a party? Does this rely on a goal of institutional change or simply the infringement of human rights?

1.2 The Socialist Reich Party Case

We begin by analyzing the Nazi party ban case in German jurisprudence. The party ban prohibition is specified in Article 21.2 of the Basic Law: "Parties which, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order or endanger the existence of the Federal Republic of Germany, shall be unconstitutional. The Federal Constitutional Court shall decide on the question of constitutionality".[263]

Founded in 1949, the Socialist Reich Party (*SRP)* was a successor to the right-wing German Imperial Party.[264] Specific aspects of the party's Nazi leanings emerged a result of analyzing its campaign rhetoric, leadership communications, and publications. The *SRP* had around 10,000 members and won seats in the Lower Saxony state assembly (11%) and in the Bremen assembly (7.7%). Despite having these parliamentary seats, the SRP was seen as a fringe party, one that did not have broad, popular support, and thus, had no real potential to challenge German democracy. Still, in May 1951, the Bundestag concluded that the *SRP* "sought to impair the liberal democratic order"[265] and petitioned the Federal Constitutional

[263] Basic Law, Article 21, Paragraph 2.
[264] Kommers and Miller, *The Constitutional Jurisprudence*, 286.
[265] Decision of May 4, 1951, [1951] Gemeinsames Ministerialblatt [GMBI] III.

Court to declare the party unconstitutional. The Constitutional Court granted the application and proceeded to decide on constitutionality of the *SRP*.[266]

The Court received an abundance of evidence that showed how the *SRP* was a Nazi-front organization.[267] Rather than banning the party on the available evidence by deeming this party an imminent threat to the liberal-democratic order, the Court engaged in a deep, philosophical, principled discussion. The *SRP* raised an important defense, calling on the court to define what precisely the constitutional concept of "free and democratic basic order" denotes. Their argument was that the concept of "free and democratic basic order" was a matter of interpretation, and that its different readings are both possible and legitimate. Since the form of government they seek to establish should have the same merits as any other potential government in a democratic state, then there could be no constitutional basis for rejecting the *SRP*'s alternative order.[268] If, for instance, the *SRP* were able to garner enough popular support to establish their party as a viable alternative and realize their goals in a democratic manner, then it would be paradoxical for a democratic state to target their party in such a discriminatory manner. Note that the *SRP* did not deny its goals of seeking to dismantle liberal-democratic institutions but rested its defense on a certain procedural reading of democracy.

The Court's response is an important one – it stated that, under Article 21, the liberal democratic order in question was a "normative order".[269] It emphasized how such a

[266] It is worth noting the process by which such a question arises. A charge of unconstitutionality should be brought against a party by the federal government, the Bundestag, the Bundesrat, or by the government of that state. The procedure to be followed in a party-prohibition action under Article 21 must be initiated through political action of the legislature of the executive. This is an important qualification for when militant democracy may be called upon, particularly when it is the legislature, since that body is linked more directly to the people, and helps to distinguish what is a more legitimate process of questioning whether militant action is needed in the first place.
[267] Decision of Oct. 23,1952, 2 B VerfG 30.
[268] Ibid., 12.
[269] As the court stated, "*eine wertgebundene Ordnung"*, which roughly translated to a "value-bound order".

normative order is "fundamental" and therefore transcends the "constitutional order", or the political apparatus of the state.[270] The Court continued:

> The free democratic basic order can be defined as an order which excludes any form of tyranny or arbitrariness and represents a governmental system under a rule of law, based upon self-determination of the people expressed by the will of the existing majority and upon freedom and equality. The fundamental principles of this order include, at the very least, respect for the rights of man as set forth in the Basic Law, above all respect for the rights of one individual to life and free development, the sovereignty of the people, separation of powers, the accountability of the government, administration according to law, the independency of the judiciary, the multiparty principle, with equal opportunity for all political parties, including the right to constitutionally acceptable development, and opposition.[271]

What is clear is that the Court understands the "free democratic basic order" to be built on some substantive, foundational principles, ones that should always be respected: any party who "participate[s] in the formation of the popular political will" should accept and abide by these principles.[272] From the perspective of individuals, this means that everyone's autonomy should be respected and that all citizens ought to be treated as free and equal persons. From the perspective of governance, this means abiding by the rule of law, the separation of powers, and limited government. For a party to legitimately take part in the political domain, it should abide by these prerequisites. Therefore, the Court stated that "a party may be eliminated from the political process only if it rejects the supreme principles of a free democracy".[273]

When sifting through the evidence against the *SRP*, the Court attempted to determine how the organization of the *SRP* was governed and whether this conflicted with a democratic

[270] Ibid., 13. "Verfassungsmässige Ordnung"
[271] Decision of Oct. 23, 1952, 2 BVerfG 13.
[272] Ibid., 73.
[273] Kommers and Miller, *The Constitutional Jurisprudence*, 288.

approach to party politics. It examined the *SRP's* practices and bylaws and found that the organization was run in a dictatorial manner with a top-down approach to politics rather than a bottom-up one. Members were not included in the decision-making processes, and the authority of the party was derived from the directives of its leaders, not by other members of the party. The evidence raised against the *SRP* showed that the party not only failed to abide by these principles but was, in fact, actively hostile against them.[274] The Court declared the party unconstitutional under article 21.2 stating that their goals and values are incompatible with the values underlying the liberal democratic order.

What followed was the dissolution of the party, its assets, and its ability to re-create itself in any other organizational form.[275] However, the ruling did not provide an answer as to what this would mean for the two *SRP* delegates in the federal legislature at Bonn and other *SRP* members who held office in various state legislatures.[276] Given that the *SRP* delegates were democratically elected, the Court had to decide whether they could retain their seats. The Court ruled that the delegates' seats should be forfeited:

> [W]hen by a judgement of the Constitutional Court a political party's ideas are found to fall short of the prerequisites for participation in the formation of the popular political will, the mere dissolution of the party's organizational apparatus, which was meant to further these goals, cannot truly implement the court's judgment. Rather, it is the intent of the Court's sentence to exclude the ideas themselves from the process of the formation of the political will.[277]

The Court's resolution is important for several reasons. It shows how the Court interpreted Article 21.2 in a broad manner. Secondly, it established the role of the Court as an institution

[274] Decision of Oct. 23,1952, 2 BVerfG, 30.
[275] Ibid., 2, 71, 78-79.
[276] These two members of the *SRP* held office at the lower house of the federal legislature (Bundestag) along with over 400 other members. Office of the US High Commission for Germany, Elections and Political Parties in Germany 1945-52 37 (1952).
[277] Ibid., at 73.

that is paramount in assessing the proper place of competing values within this normative order. The Court stated that it has the power to legally deny the advancement of certain political doctrines put forward by "constitutional institutions", such as political parties. As important as Article 21 is for defending this normative order, it is simply one piece of a larger jurisprudential system whose legitimacy lies in the underlying values and principles of the Basic Law. In other words, militant democracy is a means for defending the principles and values underling the "free democratic order". With this case, the Court aimed at reducing the ambiguity of what the "free democratic order" means as a concept in two ways: "Negatively…the absence of violent or arbitrary government. Positively, [it] satisfies necessary conditions: respect for human rights" and other fundamental freedoms and liberties.[278] In this way, the Court defined the realm of legitimate action in the German public space. The Court is not banning political doctrines deemed unacceptable from the private realm. It is rather taking a stand as to what the political realm can justifiably encompass, and it importantly states that political legitimacy in a democracy cannot be a matter of popular support only.

The Court's decision in the *SRP* case formulated a principled framework that could be used when controversial cases were to be decided. I will now turn to the Court's second party-ban case to see whether this framework holds.

1.3 The Communist Party of Germany Case

The framework established in the *SRP* case was put to the test in the *Kommunistische Partei Deutschlands* (*KPD)* case. The Constitutional Court banned the party in 1956.[279] The Court

[278] Niesen, Peter. 2002. "Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties - Part I." *German Law Journal* 3 (7).
[279] Decision of Aug. 17, 1956. 5 B VerfG 85.

took four years to hand down its decision, partly due to *KPD*'s lengthy defense, which was based on the following arguments: first, the defense claimed that Article 21(2) was an "unconstitutional norm", as it violated rights of free speech and free association that the Basic Law recognizes;[280] secondly, the defense claimed that the ideology of the Party was a scientific worldview, and therefore, it could not be subject to review by the Court.[281]

The Court rejected the first claim – an unconstitutional provision is one that contradicts the "basic values" of the constitution, or is "contradictory to a fundamental constitutional principle by which the individual positive provisions of the constitution can and must be measured".[282] The Court stated that if a party no longer recognizes the "sphere of individual freedom vis-à-vis the state, then neutrality towards that party is no longer possible on the part of a liberal democracy which must protect the dignity of man".[283] Even if a viewpoint or ideology had universal popular support but infringes upon such a principle, it would be overridden:

> The Basic Law represents a conscious effort to achieve a synthesis between the principle of tolerance with respect to all political ideas and certain inalienable values of the political system. Article 21.2 does not contradict any basic principle of the constitution; it expresses the founders' conviction, based on their concrete historical experience, that the state could no longer afford to maintain an attitude of neutrality toward political parties. In this sense the Basic Law has created a "militant democracy", a constitutional value decision that is binding on the Constitutional Court…. certain fundamental principles grow out of the variety of goals and value systems that is embodied by political parties. These principles, once sanctioned in a democratic fashion, shall be recognized as absolute values, and therefore protected against every attack.[284]

[280] Decision of Aug. 17, 1956. 5 B VerfG 85, 137.
[281] Ibid., 105.
[282] Ibid., 137.
[283] Article 1.1 of the Basic Law states that dignity is inviolable.
[284] Ibid., 139.

The Court reconciled these two apparently competing aims in the Basic Law (tolerance and primacy of 'inalienable values') by stating that the Basic Law is an "organic structure of [inter]-related norms" which could be ranked according to their place within that structure. For this reason, the Court could reconcile its power under Article 21(2) with the fundamental right of "freedom of political opinion" guaranteed by Article 5(1) of the Basic Law.[285] Interestingly, the Court seemed to rank the protection of the liberal democratic order above the fundamental right to freedom of political opinions, but it limited this interpretation to political parties, as seen in their response to the *KPD'*s second line of defense. The Court cited the *SRP* decision relating to parties and specified what duties these institutions are obligated to follow:

> [A]t the very least, those who are called upon to participate in the formation of this [political] will must be unanimous in their affirmation of the basic values of this constitution. It is conceivable that a political party that renounced and opposed these basic values could exist and be active as a sociopolitical group, but it is unthinkable that its lawful, responsible participation in the formation of the political will could be constitutionally guaranteed.[286]

What is interesting in this case is a clarification of the threshold that warrants the Court's constitutional intervention. The Court sees political parties as constitutional entities that have a duty to support the normative basis of the liberal democratic order. Therefore, when a party has a "fixed purpose constantly and resolutely to combat the free democratic basic order and manifests this purpose in political action according to a fixed plan", then it can be deemed unconstitutional.[287] In essence, the Court legitimizes the ban of this party because it seeks to

[285] Article 5(1) states the following: "Each person has the right to express and publicize opinions in speech, writing, and images; Each person has the right to seek information without hindrance from every generally [publicly] available source. Freedom of the press and freedom of radio and film reporting are guaranteed. There shall be no censorship." GG art. 5(1).
[286] Ibid., 134.
[287] Kommers and Russell, *The Constitutional Jurisprudence*, 285-301.

protect and defend the Basic Law's normative order, understood as a substantive core set of liberal-democratic values.

From these two cases, one can assert that German democracy is militant against any form of totalitarianism, and targets "against the Communist threat from the East as against any revivals of the brown menace from the past".[288] In addition, these cases are important because they help with my classification of the two approaches to militant democracy: the principled approach and the political-institutional approach. I contend that these cases offer a principled level justification and will specify what this entails in the next section.

Section Two: Two-Levels of Justification of Militant Democracy

2.1 The Principled Level

From the cases above, I believe that the core normative argument for German militant democracy centers on the need to defend the values underlying a liberal-democratic state. Call it a principled perspective. Rather than assess whether the parties have actual political power or influence to achieve their goals, it looks to their beliefs, aims and intentions of the parties to establish whether they are in accordance with the established interpretation of the normative order.

Two opposing prudential arguments could be given here, based on the political situation at the time. One would urge to consider the threat of unintended consequences, arguing that repressive action against a fringe party may result in dangerous adverse effects in a country

[288] Müller, Jan-Werner. 2006. "On the Origins of Constitutional Patriotism." *Contemporary Political Theory* 5 (3): 278–96.

that has only recently gone through a politically and morally disastrous totalitarian period.[289] The other context-specific argument could defend the opposite stance: by pointing to the historical experience of German Nazism, it would claim that militant democracy is an appropriate way for post-war Germany to deal with its recent past.[290] Although there is extensive moral weight attributed to such arguments, they – in and of itself – fail to legitimize militant action. They fail to provide a normative standard of justification that can be applied in other contexts. This claim does not deny the relevance of the context, but it does argue that a controversial institution like militant democracy cannot be justified unless its defense is clearly connected to the normative basis of liberal constitutional democracy. I would like to defend the claim that the reasoning of the German Constitutional Court's is based on universalizable principles. Still, to reiterate, its reading of the normative order challenges the simple liberal assumption of the primacy of rights. In turn, this raises the stakes of the legitimacy question. For example, one could claim that party ban prohibitions infringe on democratic principles and argue that such measures illegitimately treat certain groups of people as unequal partners in the joint-enterprise of democracy simply because of their political beliefs. From this perspective, the fundamental commitment to democratic principles would override the potential threat stemming from these parties. This could serve as a counter-argument that is still located on the principled level. Some may believe that countering such extremist ideologies should take place in politics through rational discourse. In addition, democracy is supposed to guarantee fundamental rights of participation and speech. To employ anti-democratic measures, such as a party ban, against ideological enemies – as terribly as they may appear – would turn democracy into its own form of fundamentalism. This appears to bring us back to Loewenstein's classical argument. One

[289] For example, banning Nazi or Communist parties would make these political actors into martyrs for their respective causes, thereby gaining more support from the public for a multitude of reasons (i.e. free speech advocates, "soft" Nazis or Nazi apologetics converting to a more extreme version of Nazism, and so forth).
[290] Teitel, *Militating Democracy*.

could argue that the normative position of the Court is wrong because it seemingly abandons important requirements needed for legitimate authority over individuals in a constitutional democracy. In a sense, this is a concern that others have raised when referring to the "protection of democracy" as a legitimate goal of militant democracy. They would argue that the effect of militant democracy is to protect democracy against its supposed enemies yet point to its arbitrary nature to show that such measures restrict the democratic nature of the regime on a holistic level.[291]

Here, I want to address this line of argument, as it points to what others have labeled the "paradox of militant democracy". In democracies that are deeply pluralistic, there will be many disagreements. Sometimes such disagreements will be deep, and they will concern the very basis of liberal democracy. To maintain a vibrant democratic culture, there should be ample room for both anti-democrats and democrats to express their conflicting opinions. If a democratic state is committed to political equality, then political processes should reflect this commitment. So, those who are adversely affected by an authoritative decision should ideally be able to identify the arguments behind the decision as reasonable, and to accept its results. At the very least, they should be able to count themselves as "free and equal partners in a joint enterprise of law-giving".[292] Since the Court is banning these parties, their members, supporters and voters could argue that by targeting their viewpoints and disregarding their merits based on substantive grounds, they are not being treated fairly or equally - they are excluded from the democratic polity of equals. An outcome which treats certain groups of people as unequal partners (due to their political beliefs) would not be considered reasonable,

[291] See the following: Invernizzi and Zuckerman, *What's Wrong With Militant Democracy*,; Wise, Judith. 1998. "Dissent and the Militant Democracy: The German Constitution and the Banning of the Free German Workers Party", *The University of Chicago Law School Roundtable*, 5 (3): 301-343 (amongst others).
[292] Kumm, Mattias. 2007. "Institutionalizing Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority, and the Point of Judicial Review." *European Journal of Legal Studies* 1 (1). 153-183.

since it disregards basic constitutional commitments. Thus, from a principled perspective, one could argue that the party bans are not legitimate.

I believe that such an argument does not take into consideration that such viewpoints do not fall in the spectrum of reasonable disagreement. In Chapter Two, I argued that such unjust viewpoints should not be considered to have a legitimate basis in a liberal democracy. I showed how there are limits to what should be considered a legitimate viewpoint when a joint-enterprise of law-making is to occur. As a baseline, all should respect the fundamental rights of others and democratic institutions. By allowing these parties to participate and advocate goals or viewpoints that seek to dismantle democratic institutions and deny equal rights of all, they are actually undermining democratic processes. Legitimate viewpoints would not question the very framework that makes it possible for an argument to be raised, but this is exactly what these parties are doing – they use democratic institutions as a means to dismantle them. Political parties should be afforded the same equal opportunities as others, if they belong to a realm of reasonable disagreement.

This is precisely what the Court argued in both cases – to belong to the domain of reasonable disagreement, all political parties should abide by certain rules and normative requirements. The Court established clear boundaries as to what it means to be a reasonable political party by listing a set of prerequisites that sustains a free and inclusive political domain. These are necessary for a democracy to sustain itself and allow for reasonable disagreements to work themselves out through political processes. The *SRP* and the *KPD* failed on both procedural and normative accounts, thus demonstrating their anti-democratic nature. Following Mattias Kumm, I contend that Courts act legitimately in their decisions by telling rights-claiming litigants the following:

> What public authorities have done, using the legally prescribed democratic procedures, is to provide a good faith collective judgment of reason about what justice and good policy requires under the circumstances; given the fact of reasonable disagreement on the issue…it remains a possibility that public authorities were wrong and you are right and that public authorities should have acted otherwise; but our institutional role as a court is not to guarantee that public authorities have found the one right answer to the questions they have addressed; our task is to police the boundaries of the reasonable and to strike down as violations of right those acts of public authorities that, when scrutinised, cannot persuasively be justified in terms of public reason.[293]

So, rather than understand militant democracy as the protector of democracy as a regime, I contend that its goal is to protect fundamental principles underlining the liberal-democratic order. Democracy, understood strictly as an institutional arrangement, is not the sole target of protection for militant democracy. Militant democracy can be a legitimate institution if it protects the core normative commitments of liberal democracy. In the cases above, I believe the Court is expressing a basic constitutional commitment to individuals that legitimate authority will be limited by what can be justified in terms of public reason. The justification here is not dependent on what the outcomes generate (e.g. stability of the regime confronted with a threat) but on a commitment to fundamental liberal democratic principles, which require drawing a line between reasonable pluralism and unreasonable extremism:

> [Courts] are in the business of policing the line between disagreements that are reasonable and those that are not and ensure that the victorious party that gets to consecrate its views into legislation is not unreasonable…acts by public authorities that are unreasonable can make no plausible claim to legitimate authority in a liberal constitutional democracy.[294]

The measures are justified on a principled level because the Court publicly articulated in a universalistic manner what principles of liberal constitutionalism are being defended and to which threats they were exposed (disempowering a part of the demos through a political

[293] Ibid., 175-176.
[294] Ibid. 176.

agenda, rejection of political and party pluralism).[295] By universalistic, I mean to say that the Court provided a legitimate framework for the party bans in which all reasonable citizens could believe it to be sufficient to justify the negative costs involved.[296] If this holds, a party ban cannot be rejected as a mere authoritarian check on the content of disagreement.

The majority of theorists who deal with the topic tend to focus on a different set of questions when analyzing whether militant democracy can be considered a legitimate legal instrument in a liberal democracy. Their questions, I argue, are located on a second-level – the political-institutional level. In the next section, I will summarize this approach.

2.2. The Political-Institutional Level

I argued that the principled approach engages with the question of why parties can be justifiably banned in a liberal democracy. The political-institutionalist approach deals with a second-order set of questions that relate to which militant measures should be used, by whom they should be used, and specifically how they are to be used. It attempts to locate the institutional boundaries of militant democracy and ask how it should fit into the architecture of a constitutional democracy – if at all. For instance, this approach analyzes how militant measures have become introduced into a constitutional regime, tracing this process from history, to its constitutional enactment, to current contemporary issues related to its

[295] Müller, *Militant Democracy*, 1267-1268.
[296] Kumm, Mattias. 2004. "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice. A Review Essay on A Theory of Constitutional Rights." *International Journal of Constitutional Law* 2 (3): 574–96.

application and adjudication.[297] The political-institutional approach also focuses on questions related to which governing bodies (legislative, executive, or judicial) have the authority to utilize such measures from a legal standpoint. Finally, it asks why certain measures are used, the proper procedures of their actions, and the range of sanctions. These analyses are typically done from a cost-benefit standpoint.

To better understand the political-institutional approach, let us briefly revisit the German court's ban of the SRP and KPD. If we were to engage on questions related to this level, we would ask the following: what are the legal means available to ban these parties? Why does the Constitutional Court have the authority to ban political parties? Is the party ban the best measure for protecting democracy? What are the procedures of the use of these mechanisms, and when can it spring into action? The approach focuses on the means and dynamics of how the German state can legally-institutionally protect itself as opposed to answering the normative question of why we ban the party in the first instance. As such, it requires identification and elaboration of a legally-established baseline to avoid the use of militant measures in an arbitrary way.

With the cases above, the first methodological step of the political-institutional approach would be to answer the set of questions listed above which specify the legal boundaries of

[297] I contend that much of the literature tries to specify such questions. For instance, Martin Klamt focuses on how law tries to reconcile the need to protect democracy from those who seek to undermine it by comparing the constitutions of those states who rejected democracy before and during World War Two: Klamt, Martin. 2007. "Militant Democracy and the Democratic Dilemma: Different Ways of Protecting Democratic Institutions." In *Explorations in Legal Cultures*, edited by Fred Bruinsma and David Nelken, 133–59. The Hague: Elsevier. The edited volume on militant democracy from Markus Theil similarly approaches the question of this institution from a political-institutional approach throughout most of the contributions: Theil, Markus. 2009. *The "Militant Democracy" Principle in Modern Democracies*, Farnham, England ; Burlington, VT: Ashgate. Lastly, Svetlana Tyulkina's *Militant Democracy: Undemocratic Political Parties and Beyond* has an analysis that is fully placed on the political-institutional level, attempting to map out all of the instantiations of militant democracy in different states' legal systems. This is not an exhaustive list of the literature that focuses on questions related to the political-institutional level, however, these examples are heavily quoted throughout many works on militant democracy, and for that reason, I wanted to pinpoint where their approach lies.

militant democracy (e.g. how the measures have come about, which measures can be used, the proper procedures).[298] After these checks have been done, the second step would be to ascertain whether a credible threat exists so that militant democracy can spring into action. This entails looking at the established baseline of what is considered a threat, which is provided by constitutional definition of the threat, or by precedent cases. Most theorists who subscribe to this approach stay with the imminence argument. [299] This interpretation links the threshold for action with the actuality of the threat in order to avoid arbitrariness. If an imminent threat arises, only then can the institution be triggered and utilize the party ban. In the cases above, there is no imminent threat that arises from these fringe parties, and therefore, the political-institutional approach would refrain from calling on militant measures to be used because the threshold has not been met. This approach would avoid normative questions of why the party should be banned because it is trying to determine – from a legal-institutional standpoint – the procedural means necessary for militant action to spring forth. It necessarily depends on certain facts on the ground to establish whether the threshold has been crossed and whether legal action should be taken but does not engage on cases where there is a potential threat that looms.

This is where I believe the political-institutional approach is insufficient in answering how a democratic state can defend itself through militant measures. Dismissing those threats that can readily turn from potential to imminent, implies rejecting the claim that militant democracy can engage in preemptive action. If there is no evidence to prove that a threat is

[298] For example, Peter Niesen's work focuses on distinguishing between three paradigmatic understandings of bans on political parties. He looks at how these three paradigms of party bans differ in the identification of their opponents, their conceptions of democracy, and the justifications offered for limiting political liberty. His work helps us understand the rationales for banning a party and how it plays out in a legal-institutional way. See the following: Niesen, *Anti-extremism, Negative Republicanism*.

[299] Patrick Macklem, for instance, argues that governmental intervention can only occur if actual legislation is set forth by a party, thereby insisting that imminence should be the determining factor for when militant democracy can spring into action. See the following: Macklem, *Militant Democracy*.

imminent, then it follows that other procedures must run their course in order to deal with anti-democratic action. This suggests a certain belief that other democratic institutions and safeguards which are built into a democratic state suffice for protecting the regime and its core values. If we were to use such an approach, then the German Court's decisions to ban the SRP and KPD would be considered illegitimate – preemptive action is too drastic in these cases since the parties in question had no significant majorities or real power to overthrow democratic institutions. It seems to me that the core problem of this approach is that there remains an element of arbitrariness in deciding what constitutes a credible threat to democracy and who an "enemy of democracy" is.[300]

To repeat, I am not rejecting the political-institutionalist approach. The claim is that it alone does not suffice to justify militant democracy. The same objection holds for the normative approach. Too often, theorists focus on questions related to one of the levels while disregarding some important questions which exist on both levels that are necessary for a strong normative defense of this institution. Looking at the question from solely one level would not allow us to dive deeper into questions as to whether the institution can be justified in the first place and how this is to be worked out institutionally. Focusing on a specific case or a particular question of militant democracy (e.g. party ban versus speech restriction) will only provide insight into one of the many problems associated with this institution.[301] As an alternative, I offer a two-level approach, which I label a normative institutionalism. Normative institutionalism searches for a justification on the principled level, and then moves on to questions as to how line-drawing exercises would commence on the political-

[300] Invernizzi and Zuckerman, *What's Wrong with Militant Democracy*.
[301] See the following: Niesen, *Anti-extremism, Negative Republicanism*.

institutional level. My argument centers on the idea that having the freedom to use political rights also entails a certain baseline of what it means to use those rights in the proper way.[302]

For example, we could argue that an anti-democratic party should be banned because it is detrimental to a vibrant democratic culture. For this argument to work, it must first be placed in the principled level, and cannot be triggered solely from the political-institutional level. Of course, such an argument necessitates a two-level approach. It departs from a principled argument that focuses on the question of normative justifiability of militant democracy. In the next step, it proceeds to the institutional level, which addresses the questions of which measures should be used, which body has the authority to utilize such measures, what is the best procedure of doing so, and what is the range of sanctions. Therefore, it is necessary to engage with such justifications on a principled level as well, and this is an important gap that exists in the literature on militant democracy.

So, while I do believe the political-institutional level does matter, the ultimate justification for utilizing militant measures should always lie on the principled level. It is also why I disagree not only with the mainstream institutional approach of the theory, but also with the judicial reasoning in different cases of militant democracy. In the next section, I will briefly visit one such case to show how my argument plays out and how it is necessary to have an analysis which combines both levels of justification.

2.3. The National Democratic Party of Germany

In January 2017, the German Constitutional Court rejected an attempt to ban the National Democratic Party (*NPD*), one of Germany's oldest far-right political parties, finding that it

[302] I expand on this argument in Chapter Two.

did not pose any existential threat to democracy despite violating the principles of the constitution.[303] According to the court, the *NPD* did advocate abolishing the existing free democratic basic order and intended to "replace the existing constitutional system with an authoritarian national state that adheres to the idea of an ethnically defined 'people's community'".[304] In addition, the *NPD* disrespected human dignity and was entirely incompatible with the principles underlying the liberal-democratic order. Most alarming, the *NPD* openly acted "with sufficient intensity" in achieving their aims. In lieu of such evidence, the Court had to decide whether the party should be banned pursuant to Article 21.2 by deeming it unconstitutional due to its aims.

The Court had to measure the request to ban this party against several different standards. The first standard provides the core constitutional principle of human dignity, as the very basis of the free democratic basic order. Secondly, under the principle of democracy, there should the possibility of equal participation of all citizens in the process of developing the formation of political will. The final question is whether the party does, indeed, seek to undermine or abolish the free democratic basic order - this criterion is met if the party systematically advocates working towards such a goal. The Court found that the party failed to meet all of these standards of constitutionality. Still, the Court ruled that prohibiting the *NPD* was unfounded. How is it that the Court reached such a conclusion?

The Court focused on the question of whether the party is capable of meeting its aims. It concluded that "there are no specific and weighty indications that suggest that the *NPD* will succeed in achieving its anti-constitutional aims".[305] In essence, the court concluded that it was entirely impossible for the *NPD* to succeed in achieving its aims through democratic

[303] Decision of Jan. 17, 2017. 2 BVerfG 13.
[304] Ibid.
[305] Ibid.

means. It pointed to the party's low membership, its structural deficiencies, and its history of unsuccessfully implementing its agenda as weighty reasons not to ban the party.

The *NPD* case is an example of the limitations of an exclusively political-institutional approach to militant democracy: a party could only be banned if it has a sufficient amount of power to actually put its proposals into action, and to achieve the stated goals. One problem here is that the political-institutional approach might be too late. It would start the banning process when a party already has sufficient power and ground in society, as this could be detrimental to democratic institutions. Another major problem is ambiguity over the question of what the threshold is when drawing the line for defensive action. The Court identifies that threshold as the threat level of the party. But how to identify a level at which a threat posed by an extremist party becomes "clear and present"? What are the criteria of the imminent danger? Where is the threshold level that demarcates legitimate line-drawing exercises? Imagine that the Court makes the threshold very low, stating that a party can be banned if it acquires one percent of the popular vote. This seems intuitively unappealing, as the danger posed by one-percent party does not appear as imminent. Or imagine that the threshold level is higher, and a party should gain 51 percent of the popular vote. This is equally unappealing, because 51 percent threshold seems to be too high, meaning that the threat of such a party might be too big to be effectively contained – the party is most likely past the point where preemptive measures can be taken. Or, moving beyond numbers, we could try to argue that an extremist party should be banned only when it is in parliament and when it proposes legislation. What would happen then?

These imaginary scenarios show how problematic it is to orient the banning of parties along the lines of threat where it is understood as the capacity to carry out anti-democratic goals. So, what else would it be? As I earlier argued, the distinguishing function for banning parties

must be in the principled level. On this level, I believe a justification can be made for banning the *NPD*. In fact, this would follow the same argument that the court established with the *SRP* and *KPD*, meaning that the element of imminence is not central in defining what is considered a threat. The principled level justification for banning the *NPD* would be the defense of fundamental principles, or standards of constitutionality already identified by the Court. For me, the fact that the court banned the *SRP* and *KPD* parties should not be understood as simply an immediate reaction to the post-war years, or a decision that helped distance West Germany from its Nazi past.[306] It was – and should continue to be – about the defense of these fundamental principles. As the court established that the *NPD* is a racist, anti-Semitic, anti-democratic party whose ideology aligns with the tradition of Nazism, then it seems arbitrary to place the threshold for banning the party simply on whether it poses an existential threat to the liberal-democratic state.

What, if anything, changed from the justification of banning previous extremist parties and the conclusion that the *NPD* should not be banned? Toleration of extremist political parties has a baseline, as I earlier argued, and the *NPD* crossed that line with their racist and anti-democratic agenda. The approach of militant democracy is to act preemptively, and while this may raise the paradoxical concern that protecting democracy involves restricting political liberties, there are clear limits to what should be legitimately accepted in a liberal-democratic state. All three parties in question – *NPD, SRP,* and *KPD* – crossed that line, and the justification for banning the parties lies on this principled level, as there is a limit to democratic tolerance in these cases.

[306] Such an argument could be understood as a transitional justice approach to militant democracy which I specified in Chapter One through Ruti Teitel's work.

CONCLUSION

Unpacking these prototypical cases of militant democracy is certainly an important first step, as it led me to understand what role the Court plays and the difficulties surrounding the adjudication of such cases. In addition, it helps to serve as a litmus test when analyzing how others interpret such cases and what their normative justification is in favor or against militant democracy. As I pointed out in Chapter One, some of the normative justifications for militant democracy do not stand the test of time or are too context-dependent.[307] So, I search to find whether such a justification can exist, and I center my argument on the idea that having the freedom to use political rights also entails a certain baseline of what it means to use those rights in the proper way. In this respect, the Court's reasoning is important because the argument is centered on political parties not meeting the required prerequisite needed to participate as legitimate public institutions. However, it also calls into question why the court abandoned this justification when dealing with the *KPD* party ban.

Understanding the goal of why certain militant measures are used is a much more intricate and nuanced endeavor than simply equating it to the consequence of implementing that measure. So, to say that banning the Nazi and Communist parties would mean disenfranchising people from voting is too quick of a claim to make. Just because these parties are banned "does not amount to politically excluding its members and voters once and for all…in a democracy, successor parties may arise that take a somewhat more moderate stance".[308] The goal of these measures is not to disenfranchise individuals from voting – it is to uphold fundamental values underlying the liberal-democratic order.

[307] Here, I am referring to Ruti Teitel's normatively defensible account of militant democracy as a "transition paradigm". This could also be seen in my previous discussion between the three party ban cases of the German Constitutional Court.
[308] Müller, *Protecting Popular Self-Government,* 14.6.

In fact, recent history further solidifies this point. The *SRP* ban did not result in total exclusion of these individuals to be members of a similar organization. Similar parties still existed onto which individuals could be part of, and that to do this day. Looking at the most recent election results in Germany, far right-wing parties are still making gains, as the Alternative for Germany is the first one to win seats in Parliament since the 1950s. So, normative claims should be checked by the surrounding political context at that time, as well as the present. There must be a mixed approach that engages with both levels of justification to have a sufficient defense of militant democracy. With the *SRP* and *KPD* party ban cases, the court reasoned on a principled level, but some argue that this justification was still bound into their recent past. While the defense of the liberal-democratic values called for a line-drawing exercise to occur, the justification – for most theorists – was legitimate because it targeted ideologies that already dismantled democratic institutions (Nazism during the Weimar Republic). From today's standpoint, one could argue that the *KPD* case should also be understood in the context of populist movements have democratic successes at this time, and how they are continuously mounting across liberal-democratic states. However, even if this reflection did occur in the *KPD* case – and asked whether such a measure is a proper solution to the populist crisis of democracy – the justification would still have to be on the principled level. Although this populist crisis is a core issue that surrounded the historic hearing of this case, and is a core question of democratic life, any preemptive action should be based on principles, informed by the political context, to be sure, but not relying on such facts as the sole reason justifying preemptive action.

In the next chapter, I will provide a full-scale theoretical model of militant democracy to further flesh out my two-leveled, mixed approach. I will then dive into problematic cases of militant democracy to show how my model would be applicable. I look to these cases to

understand two main points: first, whether my justification for militant democracy can extend to other liberal-democratic states; secondly, I seek to understand whether some consensus can be reached when it comes to relevant measures and actors to implement militant democracy. I will also use these cases to show how arguments against militant democracy carry less weight when the threat becomes more imminent. In turn, this will further show how justifications based solely on the political-institutional level are insufficient. This leads me to question the strength of these normative claims and provide a more sufficient justification in favor of militant measures that encompasses both the principled and political-institutional levels.

CHAPTER FOUR: A TWO-LEVEL APPROACH TO MILITANT DEMOCRACY

Introduction

In Chapter Three, my core argument was to distinguish on which level a proper justification for militant democracy should lie. I argued that only a principled level could provide the space where such a normative argument is justified. I also drew on the measure of the party ban to explicate the criteria of distinction between the principled level and the political-institutional level. I further argued that any normative defense of militant democracy should answer questions related to both levels. In this chapter, I will provide this novel approach to militant democracy by specifying my theoretical approach and using other cases of militant democracy to further explicate how the justificatory process should play out.

I begin this chapter with a summary of my approach here. The first step places us on the principled level. The question that I am attempting to solve is the following: what is the underlying justification for militant democracy? The justification is the following: militant democracy is a necessary institution that protects fundamental principles and values (i.e. personal autonomy, dignity, moral equality) underlining the liberal-democratic order. When militant measures are used, public authorities are to justify their actions in terms of public reason and point to these underlying values of the order that should necessarily be protected. This would mean that any the principled level takes precedence in the justificatory process. The second step focuses on the political-institutional level. It asks the following questions: which measures could be used in in specific contexts in relation to the primary justification?

What criteria should be used when deciding whether these measures should be used? The final step asks, who authorizes and implements these measures?

My general answer is straightforward: any measure that meets the justification criteria established in the first step is legitimate. I will argue that, theoretically, all measures are fair game – party ban prohibitions, individual rights restrictions, and so forth – provided they aim at protecting, and they effectively protect, fundamental principles and values underlying the liberal-democratic order. Principles and values should come first: they should shape the institutional set-up and the legitimate reach of that special type of state coercion we call militant democracy. Only a proper establishment and interpretation of this framework can trigger a legitimate use of militant measures. So, my approach is mixed, and it rests on the hierarchy between the two elements. I believe that this hierarchical complexity distinguishes my approach from all other theorists who engage on the question of whether militant democracy can be liberally justified.[309]

In further fleshing out my mixed approach, I will choose from among two broad strategies. The first strategy would dive into cases of militant democracy and then derive theoretically important features of those cases. Based on this analysis, a full-picture theoretical model would be presented. The second strategy would turn around the sequencing of steps: it would depart from an abstract theoretical exposition of my model, which would then be illustrated by going through diverse cases and explicating how my model differs from others that have been provided. I opt for the second strategy. Besides justifying instances of militant measures at the

[309] I submit that Alexander Kirshner's analysis of militant democracy mirrors the approach I provide here. While Kirshner did not explicitly label his analysis to be one of a mixed approach between two levels of justification, I do believe his theoretical approach is similar to my own. Still, I disagree with his normative justification for militant democracy and the restrictions he places on militant democracy when he provides his self-limiting model.

domestic level, I will also address the question of international legality of specific forms of militant action.[310] The focus, here, will be on the ECHR's jurisprudence on the dissolution of political parties, which can now be seen as a specific feature of European law.[311] I will also specify what the constitutional limits of militant democracy are regarding international human rights law by indicating what measures this institution has been assigned to address through its constitutional practice throughout European States (e.g. cases related to fascist or communist ideologies).

After my theoretical model is presented, I will test it through cases to understand two main points. I first ask whether my justification for militant democracy holds universally or if it remains contingent on historical and political circumstances. It will also test whether the paradigmatic German model of militant democracy stays true to such a justification or whether it wavers from it. I will develop the argument offered in Chapter 3, section 2.3., to argue that it does the latter. Secondly, I seek to understand whether some principled consensus can be reached when it comes to relevant measures and actors who implement militant democracy. One point that I will highlight here is that arguments against militant democracy carry less weight when the threat becomes more imminent. I will challenge this approach and argue that my combination of the principled and political-institutional levels provides a more appropriate justification in favor of militant measures.

Section One: A Novel Approach to Militant Democracy

[310] Macklem, *Militant Democracy, Legal Pluralism*. 490-500.
[311] Tyulkina, Svetlana. 2015. *Militant Democracy: Undemocratic Political Parties and beyond*. London: Routledge, Taylor & Francis Group. 97.

1.1 Who is Affected?

I begin the explication of my theoretical model by asking the question of *who* could be affected by militant measures. I will look at four different types of affected agents: individuals, groups, political parties, and other institutionalized organizations. How one answers this difficult question relates to the identification and interpretation of the central background assumptions of liberal democracy. My reading identifies three such assumptions. First, in a liberal-democratic state, each person's interests should be treated with the same moral consideration. Secondly, citizens should be recognized as competent moral agents who search for the common good with other actors in the democratic arena. Lastly, the legitimacy of a political system depends upon whether the basic institutions and rules are justified in a reasonable way to all members of that community. These assumptions outline the scope of legitimate pluralism and the way of dealing with deep disagreement.

Only from this standpoint can we then ask the question of whether the political rights of anti-democrats (participation, speech, association) are used legitimately and whether militant measures can be used to restrict these rights. Kirshner, for example, would point to these background assumptions and answer that anti-democrats do have a legitimate claim to participation, relying on an "account of democracy that takes self-government as intrinsically valuable, as a necessary component of any persuasive account of justice", and concluding that "the wages of referring to a narrowly democratic principle is that I will systematically recommend overly restrained modes of militant democracy".[312] My methodological approach takes a step back and asks the following: what if anti-democrats have obviously unjust

[312] Kirshner, *A Theory of Militant Democracy*, 22-24.

viewpoints – can such views exist in a liberal democracy and should liberals tolerate them?[313] This question centers on the idea of what should be considered reasonable disagreement. For Kirshner, "reasonable disagreement does not extend to the relative superiority of democracy, as, ideally, a fair system of allocating opportunities to exercise political power".[314] In most cases where militant measures are discussed, the issue is precisely that reasonable disagreement "does not extend to the legitimacy of a broadly defined set of democratic procedures".[315] This is where Kirshner's analysis is insufficient - it does not take seriously the idea that those who do not harbor good-faith disagreements but advocate obviously unjust and unreasonable positions can be subject to militant measures. He finds it illegitimate to disenfranchise unreasonable citizens because it would mean excluding them from the political process.[316] I explicate my disagreement with this position by discussing the first agent who may be affected by militant measures – individuals.

1.1.1 Individuals

I argue that individuals, groups, or parties who use their rights in a wrong way – to restrict the rights of others – are acting in bad faith. They are not reasonable. Tolerating their speech and actions has a harmful effect on the rest of society, damaging democratic institutions and threatening fundamental rights of other citizens: "It will send a signal that organizing to destroy the existing form of fair social cooperation will be condoned by the legal system".[317] In Chapter Two, I argued that citizens define their political principles through a shared commitment built on fair cooperation that respects individual autonomy and equality. I showed how there is a

[313] This is the main question that I raised in Chapter Two when approaching the question of militant democracy from a different methodological and theoretical approach than others.
[314] Ibid., 34.
[315] Ibid., 35.
[316] Ibid., 46.
[317] Müller, *Protecting Popular Self-Government,* 14.8.

baseline established here that constrains political power in a legitimate way. With basic rights, citizens are assured that these rights will not be infringed upon through arbitrary use of political power (e.g. majoritarian outcomes specifying one conception of the good over others). Rights and liberties are not mere claims of isolated individuals: they have an intersubjective character to them that is based on a reciprocal recognition of citizens as actors who cooperate with one another on fair and equal terms.[318] Emphasizing these values explains the importance of these rights (freedom of association, the right to vote, freedom of expression) without which any meaningful democratic existence or exercise would be impossible to achieve. What does this entail in terms of rights restrictions?

According to Jonathan Quong, at stake is not primarily restricting their rights but excluding them from the constituency of public justification – if laws of a liberal-democratic state coerce unreasonable citizens, then reasons for such laws are not owed to unreasonable citizens because they "reject the basic project of public justification that lies at the heart of a liberal, deliberative democracy".[319] The differentiation here is that justice is still owed to unreasonable citizens, since they are entitled the same equal liberties as all other citizens, even if what they believe goes against the values underpinning a liberal-democratic state. Quong argues that rights restrictions are justified when unreasonable citizens reproduce their beliefs over time.[320] He adds that such defense requires a relative amount of "normative stability" of the liberal-democratic state. The issue here, raised by Jan-Werner Müller, is that the "notion of endangering stability clearly depends on some quasi-empirical judgment of how stable the underlying moral compact of a society is".[321] Having a quasi-empirical judgment would require having an agreement on the values that are already set in place, requiring us to define

[318] Habermas, *Between Facts and Norms*, 88.
[319] Quong, *Liberalism without Perfection*, 315.
[320] Ibid., 314.
[321] Müller, *Protecting Popular Self-Government*, 14.8.

specifically what those values are and how they are being threatened. However we are to draw the line, it certainly requires looking beyond whether unreasonable citizens have actual power to threaten the liberal-democratic order, but to the principles and values underlying the order.[322]

The problem is different when the disagreement meets the criteria of reasonableness and yet militant measures are called upon to be used. What if acts are done in good faith, meaning, that it is the attempt of individuals to point out some error or wrongfulness in a law, in action of government or judiciary? The use of militant democracy in such instances where there is reasonable disagreement would be illegitimate. If all members of the community are reasonable, then this would mean that there is a common belief in the natural equality of human beings (which in political community manifests itself in formal legal equality). In such instances, fundamental rights should not be infringed upon. There exists a certain minimum area of personal freedom that cannot be violated, for "if it is overstepped, the individual will find himself in an area too narrow for even that minimum development possible to pursue, and even to conceive, the various ends which men hold good or right or sacred".[323] Therefore, there is a space around individuals in which they are free from the interference of others and political authorities that allows them to pursue their own vision of the good, including the justified civil disobedience.

Freedom in a well-ordered liberal democratic society entails responsibility for one's own actions, and duty to respect the equal freedom of co-citizens. One can imagine a case where a citizen or group of citizens does not believe that a certain minority is equal to others. However, as all people are free and equal, it would be inappropriate to treat someone who disregards this

[322] I raised a similar objection with the political-institutional approach: the justification cannot be tied to the criteria of whether these individuals and groups have power to dismantle democratic institutions.
[323] Berlin, Isaiah. 1969. *Four Essays on Liberty*. Oxford Paperbacks, 116. London, New York: Oxford University Press. 118-172.

reading of core values as a person who should be denied basic rights. Therefore, to specify what the correct approach is to rights restriction based on the justification above, I will now discuss three approaches to rights restrictions offered by Jan-Werner Müller.

I classify these approaches on a spectrum, the first approach being the least drastic of the three. Müller refers to this approach as the American-style doctrine: "only imminent lawless action justifies rights restrictions, but it adds that the state can still forcefully counter the messages conveyed by antidemocratic actors".[324] At its core, there is a commitment to democratic principles, thereby no speech is disadvantaged. The state protects hateful viewpoints in the public arena because their holders should have the chance to voice their opinions openly through democratic processes. As Dworkin argues, "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".[325] In this approach, the hope is that the core values could still be upheld, but the capacity of the state to act is limited to "democratic persuasion" as a means of changing the stance of those unreasonable. When the outcome of a fair democratic procedure is accepted, it does not imply a value judgment on the speech in question. Here, the issue remains that the unreasonable retains its capacity to harm democratic processes, institutions, and infringe on the rights of others.

A second, more draconian, approach would disenfranchise the unreasonable citizens of political rights permanently. I agree with Müller that this approach is not a correct one to take, but interestingly, it remains a possibility for liberal-democratic constitutions that have

[324] Müller, *Protecting Popular Self-Government*, 14.8.
[325] Dworkin, Ronald. 2006. "The Right to Ridicule." *The New York Review of Books*, March 23, 2006. https://www.nybooks.com/articles/2006/03/23/the-right-to-ridicule/.

institutionalized militant democracy.[326] I disagree with such an approach for several reasons. First, if we are to justify the liberal project as a legitimate one, then we cannot exclude unreasonable citizens from the project wholeheartedly, by denying their political status and rights.[327] Taking away rights altogether is worrisome. Even if there are those antidemocrats whose goals are incompatible with a liberal-democratic state, militant democracy rarely – if ever – engages in cases where there straightforward illegal acts occur, so such a draconian approach is one that should not be taken.[328] When an unreasonable person act in a way that threatens the rights of other citizens, then the state may have a compelling moral reason to restrict such action, but not to disenfranchise him or her from the liberal project altogether. An alternative measure is a party ban. The difference, here, would simply be that such a measure applies collectively to a group, but does not strip the rights from individuals completely – it only reduces the options that individuals can choose from.

I support the third approach. Take the example of free speech again. This approach, according to Müller, allows for outlawing certain kinds of speech without depriving citizens of the right to free speech.[329] Such citizens are still able to pronounce their viewpoints: they are only in a particular situation prevented from threatening the rights of other citizens. I believe the target of such restriction would be those that advocate for destroying democracy and disregarding basic values of a liberal-democratic state through nonviolent means, for example, a neo-Nazi association that advocates for such viewpoints and attempts to garner more legitimacy in the general public through campaigns and meetings. Such citizens taint the political process and

[326] Many democratic states institutionalized militant democracy after World War II as a post-war response to the history of states that were taken over by extreme political movements: Italian constitution of 1948, the French Constitution of 1958, the Spanish Constitution of 1978, and the Basic Law of 1949, among others.
[327] Quong, *Liberalism Without Perfection*, 11.
[328] As Kirshner notes, political participation requires the protection of certain fundamental rights, and if these are taken away, then the possibility of such citizens being able to advance their interests would be drastically curtailed.
[329] Müller, *Protecting Popular Self-Government*, 14.8.

do so through democratic means. It is only their specific action that is not covered by a general principle of toleration.[330] The burden of justification rests on the side of the political authorities who impose rights restrictions. They should justify their actions by public reasons. This requirement for a principled justificatory argument in the form of the use of public reason tempers the use of militant measures.

1.1.2. Groups and Organizations

Individual rights restrictions are a more difficult case to justify than restrictions on groups or political parties. We could argue that restricting the actions of a collective affects primarily that group, as opposed to targeting just one individual and their actions. In this and next two sections, my approach to the question of what restrictions are justified for groups and political parties starts by locating where the restriction occurs and trying to understand how that effects the rights of individuals who are associated with that collective. I depart from the following question: is it possible to use normal institutional-legal mechanisms (i.e. criminal law) to deal with anti-democratic groups or political parties? I would argue that in certain cases, it is possible to use such mechanisms, and this would fall outside of the realm of militant democracy. Although this may fall outside militant democracy, it still informs whether a state is in a position to act more forcefully or not. For instance, the United States' robust protection of democratic rights (i.e. free speech protection, freedom of association, etc.) would lead us to conclude that nothing similar to militant measures could be implemented whatsoever in this state. Yet even such a robust protection of free speech is regulated by hate speech legislation, so there is still a certain level of militancy built into each democracy, as this example shows,

[330] In Chapter Two, I provide a more comprehensive analysis of this condition.

through normal institutional-legal mechanisms.[331] There are still safeguards against internal threats, but the idea here is that normal institutional-legal mechanisms can combat them.

Let us look at the first case here - groups and organizations that are not political parties who want to be part of government but are still political entities who participate in public realm. We could categorize these groups on a spectrum range from less extreme to most extreme. The core criterion for justifying whether militant measures can (or should) be used is the following: if the groups are actively seeking to denigrate a subset of the population by infringing or denying the rights of others and whether they belong to the realm of legitimate pluralism. Take for example hate groups. According to the Southern Poverty Law Center, a hate group is "an organization that – based on its official statements of principles, the statements of its leaders, or its activities – has beliefs or practices that attack or malign an entire class of people, typically for their immutable characteristics".[332] However, such hate groups that vilify others because of their race, religion, ethnicity, or gender, would not fall into the realm of militant democracy. Hate groups would typically be monitored by state officials and would be dealt with under the umbrella of criminal law through hate crimes, which are understood as "criminal offenses against a person or property motivated in whole or in part by an offender's bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity".[333] In other states, such as Hungary, authorities were successful at preventing the operation of extremist groups by prosecuting them for violent crimes or for illegal possession of firearms.[334] This is a clear indication that criminal law can serve to protect individuals from such groups, showing that

[331] In Chapter One, I explicate this particular line of thought when analyzing Otto Pfersmann's work on militant democracy. Pfersmann has an interesting conceptual point when discussing militant democracy, centering on the question that every democratic state is militant because of safeguards built into the architecture of that democracy. See Pfersmann, *Shaping Militant Democracy*.
[332] "What is a Hate Group?", Southern Poverty Law Center, https://www.splcenter.org/20171004/frequently-asked-questions-about-hate-groups#hate%20group. Last accessed: May 8, 2018.
[333] "Hate Crimes" Federal Bureau of Investigations, https://www.fbi.gov/investigate/civil-rights/hate-crimes, Last accessed: May 8, 2018.
[334] Uitz, *Hungary*, 179.

militant measures may not be necessary. In addition, these individuals who act as part of this collective are acting against the law, whereas militant democracy targets action that is not illegal.

Militant democracy deals strictly with the political-institutional realm. To be sure, these groups may advocate for goals which are political in nature - to engage in racial hate speech or action that aims at justifying the disenfranchisement of certain groups (e.g. African Americans) is a political concern. However, if these groups are not political entities who wish to take part in the formation of the popular will, meaning, they do not form political parties, then they remain outside of the scope of militant democracy. Criminal law should be the mechanism to deal with such threats. Militant democracy, on the other hand, is about protecting the underlying values of a liberal-democratic state and securing democratic institutions from the potentiality of abuse from such groups. If an extremist group does have the political agenda of undermining democratic institutions – they pay membership dues, they participate in activities such as meetings or rallies, they organize to try and reach more individuals to achieve their specific political goals – then this is the space where militant democracy must step in. When these groups challenge lawfully established institutions through hatred, disgust, or a general disloyalty through collective action, militant democracy will be needed to defend democratic institutions. Justifying militant democracy requires pointing to this political-institutional realm and understanding whether such groups accept or challenge these lawfully established institutions, rather than assessing whether their ideology is too "extreme". That baseline would be far too difficult to define since deep moral disagreement persists, whereas pointing to their acceptance of democratic institutions is more plausible. A justified use of militant democracy points to the protection of the public realm, rather than to the identification of an extreme

ideology. How precisely this is to be done – when such measures should be implemented and by whom – will be further elaborated upon in the following sections of this chapter.

1.1.3. Political Parties

The party ban is an area that can be used as an analytical tool to understand how different theorists consider the legitimate use of the militant democracy and what are the shapes of different models of militant democracy. In Chapter Three, I went through the paradigmatic model of German militant democracy and looked extensively at the party prohibitions of the 1950's to better understand what served as an underlying justification for the use of such measures. I also showed that the same logic exists in other states as well, including in the legal jurisprudence of the European Court of Human Rights. Recall also that banning political parties is a severe form of curtailment requiring a strong justification with a high threshold in the shape of compelling moral reasons. This threshold, some argue, is far too high and puts democracy on a "slippery slope", thus turning a democratic state to an intolerant one.[335]

My model would allow banning political parties that threaten the liberal-democratic state. Parties exist at the intersection of government and society: "they are institutions rooted in society, but extend into the sector of 'institutionalized statehood'".[336] Political parties have a vital function of serving as the space where individuals are able to instill their viewpoints into a unified, collective representative, and fulfill an act of self-government at this group level. As such, they are valuable institutions of the pluralist liberal-democratic regime. It follows that any curtailment of political parties demands that government provides a robust justification.

[335] Neuberger, *Israel*, 185.
[336] Theil, *Germany*, 123.

There is a double threat of abuse that must be prevented: first, political parties should be prevented from abusing their position in a pluralist democratic regime; second, this measure should not be used as a tool for governmental restriction of the legitimate expression of pluralism. To repeat, while pluralism and toleration are two values in a democratic system that we should strive to achieve, these values should not serve to justify violating other people's rights. Certain behavior and political positions should not be allowed for political parties in this sense, and this is precisely the baseline that needs to be explicated to offer a proper justification for party bans.

So, what is needed to understand whether a political party can be banned? I argue that it is not enough for a political party to be opposed to liberal-democratic principles – it is possible for them to have a different worldview without being openly combative against the order wholeheartedly. The defining feature of why a party should be banned (or why it can be banned) is if it acts in a combative manner time and time again, with an aggressive attitude against the existing order. When the party aims to methodically affect the functioning of the order – or if it seeks to abolish this order over time – then it violates the baseline for what it means to be a legitimate political party that can participate in the will-formation and law building practices. The denigration of politics – as well as democracy as a whole – should be prevented, not only because there are vulnerable groups in society, but because legitimacy of the democratic order and a liberal-democratic way of life are also at stake.

It is important to properly identify this combative attitude and define what exactly makes such parties qualitatively different from other parties. The first step would be to explicate the severity of the party goals – calling for the denigration of the rights of others, disrupting democratic institutions, or denying that the liberal-democratic order has any legitimacy, among

others. The second step would be to establish the temporality of these parties' anti-democratic goals – if they continuously push for dismantling democratic institutions through legal means. In this two-step process, we identify the combative attitude by looking at the following: party programs, pamphlets, announcements, meetings, speeches of party leaders, and so forth. We look at both the content and temporality of what these parties are seeking to establish. For instance, if party leaders call for the denigration of the rights of others through their speeches – and do so continuously – then this is one way to establish that the party has a combative attitude. This expression of political parties' goals may convey hateful or discriminatory views against specific individuals or groups, particularly those who have historically faced discrimination and are the most vulnerable in society. Such viewpoints would not be acceptable to a liberal-democratic state.

This is a type of situation in which the regime can legitimately defend itself and the underlying liberal-democratic values by banning the party. We may see this as governmental intervention for the sake of securing democracy, against efforts of anti-democrats who seek to undermine pluralism, equality, and other citizen groups' political rights. Such an approach would sustain a political space that denies anti-democratic parties the right of representation while not restricting other rights of their constituents, such as political participation, association, or expression.[337] By targeting political parties rather than individuals, we counter anti-democratic action without infringing on the democratic rights of individuals.

For example, let us assume that there is a political party who advocates for a Marxist-Leninist doctrine. They argue for upholding a totalitarian notion of society and demand that the political

[337] Issacharoff, Samuel. "Fragile Democracies." *Harvard Law Review*, Public Law Research Paper, 120 (No 06-34).

and legal order should adhere to a specific concept of this doctrine. We first ask whether it is justified for the state to interfere with a political party, and we do so by understanding what the aim of such government intervention would be. In this case, the question is if the purpose of infringing on the party is to safeguard democracy from the existential threat. We then ask whether such a measure would be proportional, or what Robert Alexy calls the 'Law of Balancing': "the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other".[338] In this case, two principles are in balance – restricting the democratic rights of citizens who associate with the Marxist-Leninist party and the defense of democracy. The question, then, is whether this restriction – the supposed democratic deficit here – is justified. First, we must look at what individual rights are being infringed upon when a party ban takes place. We do not strip these Marxist-Leninists from the right to participate on an individual level, we do not restrict their right to free speech, or the right to associate. The followers of this party are still free to organize themselves around another party that has similar ideas, but albeit, ones that are not detrimental to the liberal-democratic state. Banning the party shows that there is a certain principled baseline that each party must respect in order to legitimately take part in democratic political process. So, my model presumes that there is no prima facie restriction for a liberal-democratic state to use militant measures to target parties who seek to abolish or drastically undermine liberal-democratic institutions. The question remains as to when the state should step in and actually use such a ban. I will answer this in the next section.

1.2 When to Implement Militant Measures

[338] Alexy, *A Theory of Constitutional Rights*, 102.

We first decide whether militant measures should be used (i.e. party bans, limiting association, limiting freedom of speech, and so forth). My model would say that such measures could be utilized and that all are fair game.[339] To decipher when militant measures should be used, then, it is necessary to explicate what constitutes a threat that leads to militant action. I distinguish between attitude-based and action-based approaches.

1.2.1. The Action-Based Approach

The action-based approach holds that militant measures could be utilized *after* anti-democratic action that carries with it an immediate and existential threat is performed. This approach rejects preemptive militant measures: the identification of a possible threat posed by anti-democrats does not suffice. What is the benchmark of identification of such an action? One idea is to look at anti-democratic legislation, which could be invalidated through judicial review, as a complement to "democratically accountable decision-making".[340] While such an approach may seem intuitively appealing, it is insufficient for several reasons.

To begin with, it wrongfully conceptualizes what militant democracy is - the goal of having such a principle in the first place is to allow the state to legally step in and defend democracy *before* such an act would occur. It is not simply about looking at anti-democratic legislation, but moving away from this standard and "consider whether defensive policies are necessary *before* a suspect law has been passed…requir[ing] democrats to make difficult decisions about whether a range of antidemocratic activities warrants an intolerant response".[341] In fact, one

[339] In Chapter One of this dissertation, I give a broad overview of different perspectives on the militant democracy principle. I emphasize how some disagree with the idea that militant democracy can be part of a liberal-democratic state's legal apparatus.
[340] Kumm, *Institutionalizing Socratic Contestation*, 2.
[341] Kirshner, *A Theory of Militant Democracy,* 16.

could argue that if anti-democrats are already able to pass through such anti-democratic legislation, then this is beyond the scope of militant democracy at that stage – other institutions should be the ones who would deal with such legislation. The goal would be to make sure that such anti-democrats could not propose any such legislation in the first place. Is it possible to have an action-based approach that sets a benchmark for a preemptive defensive action?

Let me explicate what it means for a state to act preemptively in this case. One such measure could be a party ban, as I explicated in the previous section, or excluding parties in question from the democratic arena by defunding them or not allowing them airtime on national television (amongst many others). Another would be placing content restrictions on electoral speech.[342] Rather than waiting on a party to enter office and introduce (or pass) legislation, militant measures would be used proactively, to dismantle the threat before it becomes a part of the formal institutional setup. But how to identify the action that justifies the militant involvement? Under the action-based approach, we could assess the actions of certain groups in the *past* and then justify the restriction of anti-democratic rights based on this. For this argument to hold, it is necessary to identify whether the party in question has changed substantially. For instance, such an approach would focus on neo-Nazi or neo-Communist parties to establish whether their ideologies, attitudes, and goals have remained the same as in the past, or whether a substantial change has occurred. The aim of this backward-looking exercise would be to establish whether the past patterns actions of these groups are likely to be repeated in the present. This approach was used in Austria, where authorities outlawed any and all neo-Nazi organizations and any forms of neo-Nazism.[343] This type of backward-looking element can be seen in Peter Niesen's idea of "negative republicanism": if militant democracy

[342] Macklem, *Guarding the Perimeter*, 575.
[343] Aupich, *Austria*, 42-43.

is motivated to use rights restrictions in response to a politically "negative" past experience (Nazism, Fascism), then it could be seen as legitimate because we understand the disastrous outcomes that have already been seen in the past.[344]

Although this historical, backward-looking argument in favor of preemptive defensive action may seem intuitively appealing, I do not believe that it can stand the test of normative justification. The normative criterion should be one that is based in the present. It is not a sufficient argument to state that in the past neo-Nazis engaged in violent attempts at dismantling a liberal-democratic state, therefore all those who believe in some sort of neo-Nazi ideology in the present would act violently to achieve their goals. As Cas Mudde argues, extremists today are not all focused on toppling democracy. Many among such organizations are using democratic institutions to realize their substantive vision of political order.[345] These parties do not stake openly anti-democratic standpoints (e.g. racism or anti-Semitism), as Fascist parties in the past had done, but adjust carefully their expressive ideological stance and accept democracy as an institutional arrangement. On the other hand, the use of democratic procedures does not imply that they are used in a democratic fashion – institutions are used in a way that challenges democratic principles and fundamentals of a liberal democracy. This is a fundamental weakness of the action-based approach that makes it insufficient for stating when militant measures should be used. I would argue that if the goal is to act preemptively, then the justification should rely on identification of the goals and intentions of these groups and individuals, or what I call the attitude-based approach. I will specify this approach here and show how it fits into my model of militant democracy.

[344] Niesen, *Anti-Extremism, Negative Republicanism*, 575-78.
[345] Mudde, Cas. 2016. An expert on the European far right explains the growing influence of anti-immigrant politics. https://www.vox.com/2016/5/31/11722994/european-far-right-cas-mudde.

1.2.2. The Attitude-Based Approach

An attitude-based approach starts from a particular stance – that liberal-democratic states do have a right to defend themselves. They should actively engage in this defense, should be cautious of anti-democratic action whose goal is to dismantle democratic institutions, but should be aware of anti-democratic risks that such a defensive action involves. If properly exercised, preemptive, democratic self-defense is not "bound to lead to democratic self-destruction".[346] If it is properly established that groups or organizations aim dismantling democratic institutions and disenfranchising a significant number of people, then liberal-democratic state should not stand idly by and "permit the disempowerment of parts of the demos" or democracy altogether.[347] There are times when it is justified to act preemptively, requiring a liberal-democratic state to look beyond simply action of anti-democrats.

There are two important aspects to the attitude-based approach. First, how to decipher whether a threat exists which requires militant action? The benchmark may be different depending on the agents in question. Take, for instance, a party ban measure. We assess a party to understand whether it passes the threshold for being a legitimate organization that can participate in the formation of the popular political will. We look for two criteria: first, whether the goals of the parties' adherents – including the political elite and followers – seek to impair or abolish the liberal-democratic order. Secondly, we try to establish whether they are actively engaging in following through on such plans. We identify the goals of the party by looking at the programs and other literature, establishing how the party is structured (top-down vs. bottom-up), and analyzing its rhetoric and action. This criterion helps us to establish whether party goals have

[346] Müller, *Protecting Popular Self-Government*, 14.5.
[347] Ibid., 14.6.

the real capacity of violating equal rights and democracy. One problem is that, even if the criterion of internal democracy is met, the party in question may still threaten a democratic way of life. Take, for instance, a neo-Nazi party that is internally democratic, is organized from the bottom-up, and deliberates among themselves as to how to formulate the program and organizes internal elections. In their processes, they still are structured in line with democratic principles. However, looking at their rhetoric, their party goals, their campaigning, we can discern their attitude to liberal-democratic values. If the two criteria establish that they go against such democratic values, then they could be targeted in a preemptive manner.

What if a party does go against liberal-democratic values yet does not have any power or popular support to achieve their goals? One could counter my approach by arguing that a party ban may have unintended consequences – a weak party subjected to the militant measures could present itself as a martyr for the cause, whereas their adherents would have a rallying cry for future elections and could garner more popular support due to government intervention. This leads me to the second important aspect of the attitude-based approach: the question of whether power or influence should be applied as a criterion of the legitimacy of use of militant measures. There are some who believe that what really matters is whether anti-democrats have the realistic capacity of achieving their goals – if they increase in power and influence, then it may be legitimate to implement militant measures.[348] The issue with such a viewpoint is establishing that benchmark for deciding whether anti-democrats indeed dispose of such power. I contend that this is an incorrect way of understanding the problem.

To begin with, the benchmark is arbitrary – should the measure be implemented when the party gains a certain percentage of votes, when it comes to power, when it has local or national

[348] Niesen, *Anti-Extremism, Negative Republicanism*, 575.

representation, when it introduces or passes legislation? If these anti-democrats are intentionally using democratic means to achieve anti-democratic ends, then, by default, they reject the democratic project but are paradoxically still afforded the right to use democratic institutions. This has a two-fold effect: first, the legitimacy of democracy is deteriorated as it provides a platform for such unjustifiable viewpoints to permeate the democratic arena; secondly, the acceptance of such viewpoints in the democratic arena signals to these political parties that misusing democratic institutions is a viable political option, increasing the likelihood that they continue to act in this way, where they can then engage in rights violations on subsets of the citizenry. Even if that threshold is met, and rights restrictions can occur, the justification would still fail to establish whether their goals are compatible with a liberal-democratic project. Although the assessment of the actual power of anti-democrats at the political-institutional level may help us determine more specifically when militant measures are to be taken, it does not give us a proper principled justification for rights restrictions, which is necessary given the costs associated with such action should be liberally justified.

Both levels are needed here. This would mean that the justification for why we can ban such political parties would shift to the principled level, while the question of *when* would remain on the political-institutional level (as was the case with the *SRP* and *KPD* party bans). On the principled level, we can argue that there is a certain baseline needed for a party to be considered legitimate: agreeing not to denigrate particular citizens, to not organize to destroy a system that is based on fair social cooperation, or to not show disrespect for constitutional fundamentals. Rather than perceive threat as a question of power, it is about protecting a liberal-democratic state by not allowing anti-democratic attitudes free rein. Once this criterion is established, then militant measures can be implemented. In Section Two of this chapter, I will walk through particular cases to show how my model plays out. However, one important question that still

needs to be answered is who decides on whether militant measures should be utilized. I now turn to this question.

1.3 Who Decides?

This is the institutional question. As Jan-Werner Müller points out, "there is wide-spread agreement that, if militant democracy is legitimate at all, it ought to be applied by impartial institutions, which primarily is to say: courts".[349] I will address this argument here and affirm that an independent court should be the guardian of militant democracy for my model. But first, I will ask why it is problematic to have the executive or legislature as the guardian of militant democracy.

1.3.1. Legislatures and Executives

The main worry about having militant measures be decided upon by the executive or legislature is that this would make the institution more prone to abuse. For instance, these governmental bodies may utilize militant measures to outlaw their competitors in a legal manner. The concern on the abuse of party bans for partisan purposes is a serious one – whoever is the guardian of militant democracy should also be the one who decides upon the question of what should be perceived as a genuine threat to democracy. From an institutional standpoint, it would make sense to have such power consolidated in a branch of government that is least prone to partisan politics. When we look at the way a constitutional system is institutionalized, through a robust

[349] Müller, *Protecting Popular Self-Government,* 14.12.

principle of the separation of powers and checks and balances, we can point to the judiciary as the one institution that has the least amount of probability of misusing militant democracy.[350]

However, two points should be made here. First, I contend that militant democracy should be institutionalized into a constitution in rigid manner, so that political actors cannot rewrite it in a way to serve their own political goals. Secondly, the executive and legislative bodies should not have full authority on being the guardians of militant democracy, but they should have some sort of role. For example, the German model has an interesting way of incorporating other branches: the federal government should be the one to bring a charge of unconstitutionality against a party.[351] This is a good way to have a system where there is a sort of separation of powers lurking in the background to garner more legitimacy of such a decision like a party ban. I would incorporate these aspects of the German model into my own model of militant democracy, where a call for a ban should occur through some democratic process. However, I will now argue why the court should be the ultimate decider on questions related to militant democracy.

1.3.2. The Court as the Guardian of Militant Democracy

There are two arguments that I contend as to why courts should be the ones to decide on whether militant measures should be used in my model. First, of the three branches of government, it is the most impartial branch that is removed from partisan politics. Its function is to interpret and apply the law, and if militant democracy is institutionalized into a constitution rigidly, then it falls upon this branch to apply the law. Secondly, as I argued above,

[350] Here, one could argue that the limits of democracy should not be judged by a non-democratic body (see Waldron). In Chapter Two, I engage with such an argument and detail why it is insufficient when dealing with these internal threats to democracy. This is based on my substantive-procedural understanding of democracy.
[351] Basic Law, Article 21.

the court, as the institutional embodiment of public reason, is more likely to decide upon these questions in a principled manner.[352] The justification here is not dependent on the outcomes it would generate (stability) but on a commitment to fundamental principles. In a democracy, we expect courts to engage in what Kumm names 'general practical reasoning', understood as "reasoning about rights…about how a particular value relates to the exigencies of the circumstances…".[353] So, if anti-democratic individuals, groups, or political parties are targeted by political authorities, "they enlist courts to critically engage public authorities in order to assess whether their acts and the burdens they impose on the rights-claimants are susceptible to plausible justification".[354] In my model, the Court is required to articulate in a universalistic manner what principles of liberal constitutionalism are being challenged and by what types of attitudes and actions (disempowering a part of the demos through a political agenda, rejection of political and party pluralism). If we are to take seriously the problem of anti-democratic attempts at dismantling democratic institutions, and believe that militant democracy can help in this regard, then it is necessary for any model to have a robust belief in courts' ability to publicly reason and justify such preemptive measures.

To specify how my approach differs than the ones offered in favor or against militant democracy, I will now walk through some classical cases and show how my model would work applied to those. I will briefly revisit the German cases of militant democracy and then move on to discuss others, such as the *Refah Partisi* case in Turkey.

Section Two: Militant Democracy in Action

[352] For more on this argument, see Chapter Three, Section 1.4 entitled *The Principled Level*.
[353] Kumm, *Institutionalizing Socratic Contestation*, 156.
[354] Ibid., 155.

2.1. Justified Militant Measures: SRP/KPD

In Chapter Three, I introduced two classical cases of militant democracy to highlight the paradigmatic German model. The cases dealt with party bans of the Communist Party of Germany (*KPD*) and the Socialist Reich Party (*SRP*). The Court concluded that both parties were unconstitutional under article 21.2, stating that their goals and values were incompatible with the core principles underlying the liberal democratic order. I will now analyze whether my model of militant democracy is in congruence with these judgments and why.

The importance of these cases is paramount to my model of militant democracy. They established the role of the Court as an institution that is vital for the assessment of competing values and their proper place within the normative order. They also solidified the idea that there are principles which serve as prerequisites that define what is legitimate action in the German public space. The Court stated that it has the power to legally deny the spread of certain political doctrines advanced by "constitutional institutions", such as political parties. The Court is not stating that all political doctrines which are expressed in the private realm should be suppressed if they do not pass the test of democratic legitimacy. It is taking a stand as to what the shape of the political realm encompasses, and that it is legitimate to exclude certain doctrines that reject the basic principles and values underlying the Basic Law from the process of the formation of the political will, even if there is popular support for them. With these cases, the Court was able to formulate a principled framework that could be used when militant cases such as these were brought up again in the future.

Are these Court's decisions compatible with my model? Recall that my model proceeds in three steps. First, who is targeted by such a militant measure? The agents are anti-democratic political parties. If a party no longer recognizes or adheres to a certain democratic baseline, then a liberal-democratic state does not need to remain neutral to the party's goals and aims.

In this case, the aim of these parties was to destabilize democratic institutions and instill non-democratic forms of government. It follows that these parties also aimed at infringing on equal fundamental rights. On a principled level, it is justified to target these parties, and I agree with the Court's reasoning that the meaning of fundamental right to freedom of political opinions has to be interpreted against the background of the protection of the liberal-democratic order.

Secondly, I ask when to utilize militant measures. Both of these parties could be seen as fringe parties. They had no power or influence to achieve their goals and overturn the democratic state. So, the question remains as to whether we do see them as a threat and if militant measures can be used. I concur with the Court's decision – it is not simply about a question of power as capacity but the fact that these political parties, as constitutional entities, do not support the normative basis of democracy, since they have a "fixed purpose constantly and resolutely combat the free democratic basic order and manifest this purpose in political action according to a fixed plan".[355] Finally, the answer to the question on who decides points to the Court.

From this, we can understand where to establish a baseline – the Court looked at *what* these parties proposed, rather than at *whether* they were likely to succeed at fulfilling their goals. Other models of militant democracy may disagree with such a justification by pointing to whether the parties have the means to carry out their vision. In the next section I return to the analysis of cases, to explicate my claim that it is insufficient to argue for a defense of militant democracy simply from the political-institutional level.

2.2. Problematic Cases of Militant Democracy

[355] Kommers and Russell, *The Constitutional Jurisprudence*, 285-301.

2.2.1. The National Democratic Party of Germany Revisited

The *National Democratic Party of Germany* case (2017) helps to illuminate my distinction between the principled level and the political-institutional level.[356] In an interesting turn, the German Constitutional Court rejected an attempt to ban this far-right political party, finding that it did not pose any existential threat to democracy despite violating the principles of the constitution.[357] My model of militant democracy would reject this conclusion and insist that the *NPD* be banned. I will now walk through how my model reaches such a conclusion.

First, we again ask whether it is legitimate to target this political party. I have specified that there is no conceptual impossibility to target this political actor. Secondly, we ask when we can implement militant measures, and try to decipher how precisely we argue for such a defense. The *NPD* advocated for abolishing the existing free democratic basic order, they wanted to replace democracy with an authoritarian national state, they disrespected human dignity, and called for the denigration of any citizen who was not ethnically defined as a member of the 'people's community'.[358] Finally, they openly acted in such a way to achieve these aims by professing a commitment to target the free democratic basic order in a systematic way, continuously stating that parliamentary representation should be abolished and replaced with a national state that adheres to the concept of *Volksgemeinschaft*.[359] For my model of militant democracy, this evidence would be sufficient for instituting a party ban. The element of imminence should not be central in deciding what is considered a threat and whether the state should respond. The fact that the party has such goals, while participating in the

[356] In Chapter Three, section 2.3 entitled *The National Democratic Party of Germany*, I detail and analyze this case more specifically. I use the case here as an illustration for where my model differs from other models of militant democracy that currently exist.
[357] Decision of Jan. 17, 2017. 2 BVerfG 13.
[358] Ibid., 13, 3a, 3aa.
[359] Ibid., 13, at 3bb.

democratic arena, is enough to argue that the potentiality of the abuse of rights and denigration of others calls for militant action – in this case, the party should be banned.

This conclusion stands in stark contrast to how the Court reasoned. The main question the Court tried to answer was whether a party ban is necessary if they do not actually have the power to achieve their aims.[360] So, the justification for why the ban would be given relies on the question of empirically provable capacity of the party to adversely affect the political-institutional level. Some points are of interest here: first, there are interpretations of militant democracy that offer a justification precisely on this distinction: whether the parties in question have the means to achieve their goals. Patrick Macklem, for instance, would argue that "there is no legal conflict until the party comes to power and begins to introduce legislation or policies or otherwise engages in actions that represent the realization of such an agenda".[361] This approach rejects the legitimacy of banning parties preemptively. The fact that the Court took this path raises a second point of theoretical interest: whether the German model of militant democracy is, in fact, as militant as it is generally stated in the literature. This particular decision seems to challenge that conventional view. The Court's conclusion rejects the view that allowing the party to participate in the development of political opinions comes down to legitimizing such viewpoints by giving them a platform by which to garner support. My model differs in that it insists on a more militant approach, more akin to the 1950s' cases. The Court should act preemptively. The violation of the basic constitutional principles amounts to a direct harm that poses a threat to the democratic way of life: to the larger society as a whole and the legitimacy of democracy, to the particular subset of society who is targeted by these anti-

[360] Ibid., 13.
[361] Macklem, *Militant Democracy, Legal Pluralism*, 37-38.

democratic agendas, and to equal freedom of all members of the polity. Thus, it is necessary for the state to react.

Let us revisit one already mentioned important counter-argument. It claims that a party prohibition of such a marginal party would be counter-productive since it would make the party much more prominent and could "potentially give its members the status of martyrs".[362] The German Court adhered to this argument with the NPD case, essentially abandoning their 60-year-old standard for the unconstitutionality of political parties. While it could be argued that the Court should always be reflective of changed circumstances, in this instance, the protection of democratic institutions should be considered fundamental to a liberal-democratic state, and jurisprudence on this realm should be consistent and have continuity.[363] The Court abandoned jurisprudential continuity by introducing a novel category, linking the "anti-constitutional" character of a political party to the assessment of the imminent threat.[364] Since the party is not banned, it still has the same rights as any other party, which means that it can still engage in denigrating subsets of the population and undermine liberal-democratic values of dignity and equality. By so moving the baseline for militant action, the Court effectively encouraged extremist organizations to proceed test the limits of the baseline that is established in the Basic Law. It seems that the Court is beginning to change its own reading of what a democracy is by tightening the requirements for a party ban, attempting to shift the conflict to the arena of political contestation and discursive politics, where they hope the NPD's influence would fall flat. In my view, a preemptive approach is needed, one that has fundamental liberal-democratic

[362] Müller, *Protecting Popular Self-Government*, 14.13.
[363] Müller, Peter. n.d. "Jeder, Der Versuchen Würde, Das Bundesverfassungs¬gericht Auszuhebeln, Würde Sich Verheben." *Verfassungsblog* (blog). Accessed August 23, 2018. https://verfassungsblog.de/jeder-der-versuchen-wuerde-das-bundesverfassungsgericht-auszuhebeln-wuerde-sich-verheben/.
[364] Steinbeis, Maximilian. 2017. "Die Eventuell, Aber Nicht Potenziell Verfassungswidrige NPD." *Verfassungsblog* (blog). January 17, 2017. https://verfassungsblog.de/die-eventuell-aber-nicht-potenziell-verfassungswidrige-npd/.

values as the core, where militant democracy steps in to defend them. The aim of militant democracy is to defend these values, not to police whether certain parties garner influence and then be justified to step in and be proactive. The racist elements of the NPD and their strong commitment to eroding liberal-democratic norms, values, and institutions should be the baseline here.

2.2.2. Refah Partisi and Others v. Turkey

To further distinguish my model, I now turn to another problematic case of militant democracy: *Refah Partisi and Others v. Turkey*.[365] My core aim here is to demonstrate that my model does not exclude political-institutional considerations. It establishes a hierarchy of arguments, in which principled level justification comes first, serving as the benchmark for judging the context of the case and its political impact. I begin by summarizing the specific institutional model of militant democracy in Turkey and explicate the reasoning behind the constitutional existence of militant measures. Then I provide the narrative of the case and explain the political context that surrounded it.

The Turkish legal system "establish[es] a defensive network of norms both at constitutional and sub-constitutional level…an 'unalterable core' of the constitution aims to protect the democratic regime from its internal opponents".[366] In a similar manner as the German case, irrevocable constitutional principles: Article One defines the state of Turkey as a Republic[367]; Article Two characterizes the Republic of Turkey as "a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice,

[365] *Refah Partisi and Others v. Turkey*. European Court of Human rights. Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98.
[366] Oder, *Turkey*, 264.
[367] Turkish Constitution, Article 1.

respecting human rights, loyal to the nationalism of Ataturk, and based on the fundamental tenets set forth in the preamble"[368]; finally, Article Three states that "The State of Turkey is an indivisible entity".[369] These three articles are entrenched in Article Four: "The provision of Article 1 regarding the form of the State being a Republic, the characteristics of the Republic in Article 2, and the provisions of Article 3 shall not be amended, nor shall their amendment be proposed".[370] The irrevocability of such provisions is justified as a legal device that helps to protect a pluralist democratic order.[371] This constitutional reading of entrenched values or principles gives the state a legal basis for restricting free speech and expression to "safeguard the indivisible integrity of the state with its territory and nation". [372] Freedom of religion – an important factor at the center of the *Refah Partisi* case – is also given certain restrictions: "No one shall be allowed to exploit or abuse religion…for the purpose of personal or political influence, or for even partially basing the fundamental, social, economic, political, and legal order of the state on religious tenets".[373] While secularism may seem to be one of the main pillars here, it intersects with certain liberal democratic values that should be protected.[374] Understanding exactly what these liberal values are comes through the context of militant action, and the landmark *Refah Partisi* case shows how the state implements its defense of liberal values that are specified in the constitutional text:

> Fundamental rights and freedoms may be restricted only by law and conformity with the reasons mentioned in the relevant articles of the constitution without infringing upon their essence. These restrictions shall not be in conflict with the letter and spirit of the constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality.[375]

[368] Turkish Constitution, Article 2.
[369] Turkish Constitution, Article 3.
[370] Turkish Constitution, Article 4.
[371] Oder, *Turkey*, 268.
[372] Turkish Constitution, Article 28, Paragraph 4.
[373] Turkish Constitution, Article 24, Paragraph 5.
[374] Oder, *Turkey*, 263.
[375] Turkish Constitution, Article 13.

The narrative of the *Refah Partisi* case is as follows. In 1987, the Welfare Party participated in its first general election obtaining 7.1% of the vote. Given that Turkey had a 10% threshold at that time, the party did not have representation in the National Assembly. Eight years later, the party won 21.5% of the popular vote and became the largest in Parliament. By forming an alliance with the center-right True Path Party, Welfare's leader, Necmettin Erbakan, became the prime minister in 1996. Yet there were many that viewed this support and ascension into power with suspicion, most notably leading military officers and other portions of the Turkish population.[376] This is an important point, since the military has been traditionally perceived as the powerful guardian of the core constitutional values in Turkey. In large part, this suspicion was reasonable, as Erbakan and the Welfare Party threatened to disrupt the secular foundations of the Turkish state. Being an Islamist party, it insisted on introducing elements of Sharia Law.[377] A large majority in parliament provided them with institutional capacity to accomplish these goals while claiming electoral legitimacy. Still, the Constitutional Court banned the Welfare Party because its activities were held to be contrary to the principle of secularism. It argued that there is a democratic principle behind the principle of secularism, and it is this value that should be protected against any threat:

> Secularism, which has specificity for Turkey on the ground of historical differences, is a rule prescribed and protected by the constitution … With adherence to the principle of secularism, values based on reason and science replaced dogmatic values … Persons of different beliefs have desired to live together and have trusted in state by virtue of its egalitarian attitude towards them…Secularism cannot be limited to separation of state affairs and religion…Under a secular regime religion, which is a specific social institution can have no authority over the constitution and governance of the state … Conferring on the state the right to supervise and review religious matters cannot be regarded as interference violating the requirements of democratic society … Secularism, which is also the instrument of the transition to democracy, is Turkey's philosophy of life. In secular state, religious feelings cannot be associated with politics, public affairs and legal provisions.[378]

[376] Kirshner, *A Theory of Militant Democracy*, 107.
[377] Ibid., 108.
[378] *Refah Partisi*, e. 1997/1, K. 1998/1, K.t. 16 January 1998.

When banning the party, the Court argued that secularism was an indispensable condition of democracy, and that the Welfare Party, with its preference for sharia law and Islam over other religions, violated this principle. In addition to banning the party, six of its leaders were banned from participating in political party activities for five years. Those politicians who were affected - and the party itself - applied to the European Court of Human Rights, arguing that the right to freedom of association has been violated. Interestingly, the Court agreed with this claim, but observed that such an interference was "prescribed by law", pursued a legitimate aim, and was "necessary in a democratic society". The legitimate aims according to the ECHR are the protection of democracy and the rights and freedoms of others:

> When read together, the offending statements, which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts.[379]

Considering my model, the ECHR engaged in a two-leveled approach – it combined the principled and institutional level. As the above quote demonstrates, it found the political program of the party to be incompatible with the principles of democracy. It clearly states that the changes a party wants to make to the law or the constitution – even if they have popular support –must be compatible with democratic principles. The justification for the ban should have been precisely this line of argument (i.e. upholding liberal values such as secularism). However, the ECHR's proceeds to argue that "*Refah* had the real potential to seize political

[379] ECHR, *Refah Partisi v. Turkey*, paras. 72 and 123.

power…the real chances that *Refah* would implement its program after gaining power made that danger more tangible and immediate".[380] With this, the justification for the ban is moved to the political-institutional level, where it was established that the threat was imminent because of *Refah's* rise in influence and its considerable chances of coming to power.[381] This has been the Court's approach when looking at previous Turkish party cases - *Refah* differs because all other parties lacked the ability to carry out their goals before they were dissolved, so they should not have been banned.[382] I would argue that such a justification works only thanks to the preceding insistence on to the principled argument, which substantiated why precisely such a defense is needed in the first place and what precisely is coming under threat.

2.3. Line-Drawing Exercises

When theorists look to the *Refah* case, the question they focus on is the threat of the party, and not all agree that the evidence is enough to ban the party.[383] Identifying this line is integral for their normative justification for whether these measures are legitimate. Here, I want to emphasize this point, because it is critical in understanding why most analyses of militant democracy fail to understand the importance of the proper interplay between these two levels of justifications.

Regarding the evidence that the Welfare Party represents an imminent threat to Turkish democracy, Patrick Macklem argues that a "radical political agenda…represents freedom of

[380] ECHR, *Refah Partisi v. Turkey*, paras. 72 and 123.
[381] ECHR, *Refah Partisi v. Turkey*, paras. 107-110.
[382] For other cases where the threshold had not been met for the ECHR to ban a political party in Turkey, please see the following: *United Communist Party of Turkey and Others v. Turkey*, January 30, 1998; *Socialist Party and Others v. Turkey*, May 25, 1998; *Freedom and Democracy Party (ÖZDEP) v. Turkey*, December 8, 1999.
[383] See the following theorists: Mancini, Susanna. 2014. "The Tempting of Europe, the Political Seduction of the Cross." In *Constitutional Secularism in an Age of Religious Revival*, edited by Michel Rosenfeld, First edition. Oxford, United Kingdom ; New York, NY: Oxford University Press.

expression and association in action. The traditional democratic approach to such an agenda is to determine its constitutionality when it begins to conflict with the rights of others".[384] So, democracy has to learn to live with (non-democratic) radicalism, at least to a certain point. The timing of defense matters here, and only when there is an "immediate and total threat" should a democracy defend itself, thereby insisting that in the Welfare Party case, political participation should be given priority, since no rights-infringements have yet occurred. Macklem essentially argues that infringing on *actual* rights to safeguard against future *potential* threat to rights is illegitimate: "The task of democratic institutions is to restrain the government of the day from acting in an unconstitutional manner…militant democracy constitutes a stark departure from this traditional democratic stance. Political agendas should be scrutinized not ex ante but as close to the threshold between proposal and policy as possible".[385] The line that Macklem draws here is when the party acts in a specific, policy-oriented manner that is attempting to subvert certain democratic principles or institutions. When this action occurs, only then can militant democracy step in and try to determine whether it indeed poses such a threat, but this does not necessarily mean that repressive action can be made at that specific time.

Although Macklem's argument is persuasive, what is missing on his account is a general understanding of the specifics surrounding the political, legal, and cultural history of democracy in Turkey. Only when taking these into account, it becomes possible to correctly assess the actual severity of this potential threat. Treating this case in an isolated theoretic manner drastically misinterprets why Turkish democracy has implemented militant democracy in the first instance. Turkish democracy may not be able to cope with such threats and address

[384] Macklem, *Militant Democracy, Legal Pluralism*. 514.
[385] Ibid., 514.

them via standard constitutional procedures. A procedural defense would place too high of a threshold on what is a threat – for example, actual legislation or proposals – which may already be too late for it to safeguard itself, whereas militant democracy can step in preemptively and address this threat head-on. When considering the specific factors surrounding Turkish democracy in a similar manner to my approach, Alexander Kirshner argues that if the "Turkish Court waited until the threat from Refah was indisputable, the party's status and power might have allowed its leaders to ignore the Constitutional Court, alter the body's membership, or change the constitution itself".[386] Kirshner does not rely solely on whether a threat is imminent to call for militant action, but rather, attempts to uncover when participation rights could be potentially threatened in order to justify the use of militant measures. This is where Kirshner and Macklem disagree, as Macklem argues that governmental intervention can only occur if actual legislation is put forth by *Refah Partisi* that restricts the fundamental rights of citizens. As Kirshner states, "if [Macklem] is right, acting democratically may require us to wait until it is too late to defend democratic institutions. That may just be so much the worse for democracy".[387] I believe that the Court's decision to utilize militant measures is based on safeguarding a democratic way of life in Turkey. This is what can be seen in the argumentation given by both the Turkish Court and the ECHR. They showed that it was not completely out of the realm of possibilities that the party would have changed laws or possibly amended the constitution in a way that changes the democratic system.

Theorists often focus on the second-order consideration in defining the ground for the legitimate use of militant measures, namely, the imminence or potentiality of a threat. For instance, Macklem must establish that such a threat is clear and present, and he does this by

[386] Kirshner, *A Theory of Militant Democracy*, 119.
[387] Ibid., 111.

giving the proper timing of defense. Macklem would say the proper timing of defense comes when anti-democratic legislation is being proposed, but before it becomes policy: this is when the state should step in and defend itself.[388] For Kirshner, the answer is different: a threat must be *comprehensive*. This threat has two specific characteristics: capacity, or a dominant position within a country's main political institutions; and intent, or evidence that a party wants to undermine the regime.[389] Kirshner believes that if there is "real likelihood that such anti-democrats will attain such positions and ignore normal democratic and legal mechanisms", then there is room for intervening.[390] But what of the German party ban cases where there was no clear and present or comprehensive threat? Kirshner and Macklem – by focusing on the importance of participation – do not target political parties who do not have a sufficient amount of influence.[391]

Returning to the defense of my positive argument, let me reiterate that the ECHR pointed out two activities of the Welfare Party that would disrupt this democratic way of life: the intention to set up a plurality of legal systems, thereby discriminating on the basis of religious beliefs, and applying *Sharia* law.[392] The point is that there would be no way to defend against such changes in the constitution or democratic system at the time that it is being prescribed, so the timing of defense must come at an earlier point, before the threat reaches its maximum potential. The two courts engaged in an extensive balancing between the security of the democratic state and equal rights for all, on the one side, and the political rights of the party members and those who favored the Welfare Party, on the other side. The courts did not take

[388] Macklem, *Militant Democracy*, *Legal Pluralism*, 38-39.
[389] Kirshner, *A Theory of Militant Democracy*, 130-131.
[390] Ibid. 130.
[391] This much is clear in the analysis given above and provided elsewhere. For a more detailed analysis of Kirshner and Macklem's theory – among others - see Chapter One, which provides an overview of different perspectives on militant democracy.
[392] ECHR, *Refah v. Turkey*, Third Section (31 July 2001) Grand Chamber (12 February 2003), App. Nr.: 41340/98, 41342/98 and 41344/98, paras. 72 and 123.

this balancing lightly, and it was a specific threat that they were dealing with that they felt they needed to address because of the potential harm that it could cause. The courts established a limit to ideological pluralism, specified in the question of whether such parties will drastically alter the democratic way of life.

It is helpful to point to two additional Turkish cases of party bans that engaged the Turkish Constitutional Court and the ECHR. In the *United Communist Party of Turkey and Others v. Turkey* case, the ECHR found the ban unconstitutional due to the following:

> A measure as drastic as the immediate and permanent dissolution [of the parties], ordered before its activities had even started…is disproportionate to the aim pursued and consequently, unnecessary in a democratic society…the fact that such a political program is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy. It is of the essence of democracy to allow diverse political programs to be proposed and debated, even those that call into question the way a State is currently organized, provided that they do not harm democracy itself.[393]

The same line of reasoning is found in the *Socialist Party and Others v. Turkey* case, where the ECHR argued that "such drastic measures may be taken only in the most serious cases".[394] What this shows, coupled together with the arguments given in the Welfare Party case, is that a substantive line is drawn here as to what the limit can be in banning such parties.[395] In drawing this substantive line, the ECHR makes an important distinction between 'the current principles and structures of the state' and 'harm to democracy'. The latter takes advantage, and

[393] ECHR, *Socialist Party v. Turkey*, 20/1997/804/1007, 25 May 1998, para. 47; ECHR, *ÖZDEP v. Turkey*, App. Nr. 23885/94, 8 November 1999, para. 41.
[394] ECHR, *OZDEP v. Turkey*, App. Nr. 23885/94, 8 December 1999.
[395] Unfortunately, I did not go into detail regarding these two party ban cases. It would be useful for me to compare these cases and see exactly where the limit is for the Turkish case. For now, I am simply trying to show that there is an overall limit to how far one can go in banning political parties, and that any theory of militant democracy should put this into account when giving a justification for the institution.

therefore the core issue is that of properly identifying 'harm to democracy'. I tried to specify this normative requirement in Chapter Two: people who share different beliefs and conceptions of the good can live together as free and equals and must not be dominated by another's values. Democracy presupposes the institutional capability of the state to protect equal freedom of all. If this basic liberal egalitarian assumption is being threatened, then defense may be necessary. In the next step, when discussing whether the threat is significant enough to warrant militant action, institutional concerns come into light. Only at this stage we look at whether that threat is of an imminent nature – clear and present – or potentially threatening. Within this concern, other questions arise, such as the negative effects of banning a party, which measure should be used, or empirical facts on just how soon this threat can become imminent.

Therefore, one should still look at numbers, actions, intentions, and capacity for extremist anti-democratic action to assess whether a democratic regime should act preemptively in that moment, but the imminence of a threat should not be the threshold to base a normative justification on. I am not denying that Kirshner and Macklem possess credible arguments to the problem as to where to draw this substantive line. I am merely saying that these theories are too abstract in being focused on the abstract value of political participation. But each case of militant democracy requires a much more nuanced and comprehensive approach, one that considers not only political participation, for example, but the important principles that specific states are trying to defend. A German Court can have a different view on participation and see that not as the sole principle that should be upheld. It may be the case that there are moments when this right can be infringed upon in order to defend some principle, and it is the necessary defense of such a principle that requires militant action.

Before I conclude this chapter, there is still one counter-argument to my proposal that I believe requires a response: that the institution of militant democracy can be prone to abuse. This counter-argument carries considerable force, particularly when we are dealing with the potentiality of threats becoming imminent. Those who hold power, as the argument states, would be tempted "to abuse the provisions of militant democracy to harm legitimate opponents or even push them out of the political game altogether".[396] Theorists who defend this view do not tackle the question of institutional design of militant democracy, but rather, their focus is more on how to judge whether militant policies are properly deployed from a theoretical standpoint (e.g., the principle of participation versus rights restrictions).[397] Here, I would like to offer some institutional proposals that may help curb the abuse of this institution at the hands of political actors who would use it to target their political opponents.

Recall that in my model militant democracy deals specifically with the political: we should look at political actors who may have some influence on collective will formation and have some sort of institutional platform to preach their message. So, individual rights restrictions may occur if a leader of a political party continuously engages in rhetoric that denigrates subsets of the population and calls for the dissolution or disruption of democratic institutions. Therefore, the first safeguard is understanding the scope and space where militant democracy may enter. This requires that militant democracy be built into the constitution in a semi-entrenched manner – that is to say, has some sort of rigidity that cannot be amended through simple legislative activity. Without such entrenchment, the scope of militant democracy would not be defined, and therefore, may be subject to reinterpretation or change, moving the guardian

[396] Müller, *Protecting Popular Self-Government*, 14.6.
[397] For instance, Kirshner's work on militant democracy does not dive into "detailed questions of institutional design", since they "are beyond the scope" of the project at hand. See: Kirshner, *A Theory of Militant Democracy*, 83.

of militant democracy from the judicial branch to the legislative or executive branch, for example.

A second institutional safeguard follows from the first – by entrenching militant democracy in the constitution, we specify that the guardian of militant democracy is the judiciary. Courts are to decide upon questions related to the use of militant measures, as they serve as the best institution that embodies public reason.[398] When courts are to decide upon the question of a party ban, two safeguards should be put in place: first, to have a court hear this case, it should be brought about through legislative activity – a majority in the Parliament should call upon the banning of this party and offer the decision up to the Court. Secondly, when the court is to decide on whether a party is to be banned, it should require a supermajority. This is due to the fact that a total dissolution of a party is a permanent measure, one that cannot be reversed, and requires not only stringent public reason, but a decision that is close to anonymity. Finally, if the guardian of militant democracy is the court, then the party whose rights are restricted can still apply to a supra-national institution to hear its case, such as the European Court of Human Rights.

By offering these safeguards, my model is limited, in that it requires a normative justification that can be reasonably accepted by all. The idea is not to disenfranchise anti-democrats of their rights in a totalitarian, arbitrary manner, but rather, to think twice about the consequences that follow and whether the defense of principles necessitates such restrictions in each case. Thus, the use of militant measures would not be justified on the basis of political motives, but rather, on the basis that democratic institutions and their underlying principles should be protected against potential and imminent threats.

[398] I specify this argument earlier in this chapter and address the counter-majoritarian difficulty in Chapter Two.

Conclusion

In this chapter, I presented my model of militant democracy. I answered three major questions: who is targeted, when militant measures should be implemented, and who decides. From the outset, I argued that all measures are fair game – party ban prohibitions, individual rights restrictions, and so forth – provided they aim at protecting, and they effectively protect, fundamental principles and values underlying the liberal-democratic order. I offered a full-picture theoretical model that was then illustrated by going through diverse cases of militant democracy – those that I agreed with the justification, and those that I found problematic.

Principles and values should come first: they should shape the institutional set-up and the legitimate reach of that special type of state coercion we call militant democracy. The political-institutional level should also be given its proper space in deciding whether such measures would effectively protect these principles, but only the principled level gives us the justificatory weight. So, my approach is mixed, and it rests on the hierarchy between the two elements – the principled level, first, and then questions related to the political-institutional level second. I believe that this hierarchical complexity distinguishes my approach from all other theorists who engage on the question of whether militant democracy can be liberally justified.

Finally, in the last section of this chapter, I offered some institutional safeguards for militant democracy so that it is not prone to abuse by political actors. This is one of the first models that does so in the literature on militant democracy. While it is an exploratory practice here and does not encompass a full architectural picture, it does point us in the right direction by asking how militant democracy should be institutionally shaped.

Conclusion

Despite the different perspectives on the question of the militant democracy, nearly all theorists agree on the following claim: democratic regimes should defend themselves against threats to their existence. But what does it mean for a democratic state to defend itself? Can this institution be liberally democratically justified? What would this justification entail? Are we defending an institutional arrangement, as a whole, or are we defending a certain democratic way of life? And finally, how precisely is such a defense to play out? These are the guiding questions that drive this thesis. At the heart of the matter is the fact that democratic norms, procedures, and institutions can be used to affirm values and achieve goals that are incompatible with democracy. Anti-democrats often claim that they are simply exercising their rights to speech, expression, and association. We have shown that the mechanisms of militant democracy – preemptively constraining or forbidding extremist political action – are employed in the name of protecting civil and political freedoms. A paradox seems apparent: how can a mechanism that constrains constitutional rights be justifiably presented as a means of protecting those rights? The skeptics of militant democracy keep pointing to this tension. They insist on the anti-democratic and illiberal nature of rights restrictions. They argue that it is paradoxical for a state to claim protection of civil and political freedoms by taking away these freedoms from actors who are identified as enemies of democracy, even if those actors have not violated any constitutional rule. Shortly, militant democracy creates a serious democratic deficit, by distinguishing among those who deserve rights protection and those who do not.

In spite of this tension, many liberal democratic states have institutionalized mechanisms of militant democracy. The presence of this institution and the experience of its practice raise

the stakes for the theory. It may be plain that a liberal justification of combatting internal threats via rights restriction is not straightforward. But does it imply that militant democracy is an anomaly, which cannot be properly liberally justified? When I examined the dominant approaches to militant democracy in Chapter One, my core intuition was that something was lacking. The clear majority of theorists approach the institution through analytical-legal or empirical means. In focusing on the institution itself, they often dismiss the question of whether and how militant democracy fits into the overall normative picture of liberal democracy. I tried to go beyond such legal-institutional and empirical analyses. My "step back" consisted of re-creating an analytic and normative framework of constitutional democracy. Analytically, I ask what we have when we have democracy. One of my core claims is that an analytic defense of democracy requires resorting to its core values. Call this a combined analytic-normative approach. In the most general sense, the claim is that the analytic construct of democracy is justifiable if the legal-institutional architecture of the regime is effectively shielding and affirming the substantive principles of autonomy, liberty, equality, dignity, and justice. It is against the background of these and related principles and their institutional formalization that I explore and judge militant democracy. In short, my methodological approach takes a step back from internal debates surrounding the paradoxical nature of militant democracy to ask a set of more fundamental questions, which conceptually and normatively precede the problem of militant democracy.

To go beyond standard internal debates, I presented a normative argument in Chapter Two. I asked the following preceding questions: how can unjust ideas and ideologies exist in a liberal democracy, and why are liberals ready to tolerate them? As indicated above, this required asking the larger question of what democracy ought to be about, and not simply what it is as an institutional arrangement. For this purpose, I utilized normative constitutional

theory and political theory, to offer an understanding of the conceptual origin and logic of the legal and political setup of democracy. The core intention behind this endeavor may be simple: to identify anti-democratic goals, attitudes, and actions, it is first necessary to understand the normative commitments and assumptions that are built into the foundations of a tolerant, liberal-democratic state. Two related overarching norms that can be used to legitimate militant democracy, I argued, are those of reasonableness and toleration. Individuals, groups, associations, and political parties must accept the moral and political equality of all citizens. Taking toleration as the basic norm of democratic regimes allows the liberal democracies to pass laws restricting the political action of those who do not accept this demand. Such individuals, groups, and associations are unreasonable, because they refuse to acknowledge that each and every individual or group in a liberal democratic society is entitled to a same set of universalizable values and their legal formalization as rights. The paradox, then, only holds if we presuppose that tolerance means blind acceptance of all attitudes, goals, and actions. I argued that this would be the wrong way to understand what constitutional democracy is about. Hence, I argued that political neutrality of constitutional democracy is not opposed to militant democracy, where the latter is understood as the institution which defends liberal democratic principles, values, and norms.

After this larger theoretical debate, I moved on to highlight how dominant theoretical approaches insufficiently answered the normative question of militant democracy. I specified a new categorization that did not exist in the literature: a two-level justification for militant democracy. The two levels – the principled and the political-institutional level – were presented in Chapters Three and Four. In Chapter Three, I focused on specific cases of militant democracy. I offered a detailed analysis of these classic cases to reflect on the reasoning behind why militant measures can be seen as a legitimate legal instrument. The

central aim of this analysis was to distinguish on which level a proper justification of militant democracy should lie. The criteria of distinction between the principled level and the political-institutional level was given. Most theorists answer questions related to the latter level, and generally, do not engage in a principled discussion of why the institution is justified in the first place. I argued that only a principled level could provide the space where such a normative argument can be given. The justification is the following: militant democracy is a necessary institution that protects fundamental principles and values (i.e. personal autonomy, dignity, moral equality) underlining the liberal-democratic order. This would mean that the principled level takes precedence in the justificatory process. Following this two-level categorization of militant democracy, I provided a novel approach to militant democracy by specifying how my model plays out in regard to paradigmatic militant democracy cases. This helped to further explicate how the justificatory process should play out.

In the remaining space, I want to highlight some of the remaining challenges associated with this institution that this thesis could not readily address, since it has focused mainly on the state level of constitutional democracy. First, we must reflect on the contemporary political circumstances. As European countries move towards a more cautious and restrictive interpretation of militant democracy[399], right-wing political violence is on the rise, and far-right extremist parties have seen historic electoral success. The anti-immigration, anti-Muslim Alternative for Germany Party is now the third largest party in the Bundestag. France's Front National was in second place in the 2017 presidential elections, Jobbik is now the second largest party in Hungary, and Poland's Law and Justice Party retained the

[399] I contend that militant democracy has taken a chastened turn, with Germany being the primary example. The rejection of the 2017 ban against the neo-Nazi NPD party, on the grounds that it was too weak to pose a real threat to democracy, is the mark of such a jurisprudential turn.

majority (37.6 percent) of seats in the parliament since 2015. All these parties have seen increasing acceptability of their ideas. In addition, Italy installed one of the first populist governments in Western Europe after the electoral success of the anti-establishment Five Start Movement and the xenophobic Northern League parties. The historical example of Nazism does not seem to help with today's situation because the potentiality concern no longer applies—if we cannot define extremist action as imminently threatening democracy, militant measures cannot be used. As Cas Mudde has argued, extremists today are not focused on toppling democracy, but rather on using democratic institutions to realize their substantive vision of democracy. These parties do not preach anti-Semitism, as fascist parties had in the past. Their vision of democracy is based on a "Europeanness" which centers on a xenophobic ideology, and paints the problems currently faced by democracies (whether migration, terrorism, or economic stagnation) as issues of security. In sum, their ideologies today typically stop short of identifying explicitly targets of exclusion among nation-state citizenry, and they accept democracy as an institutional arrangement.

In the European context, where national provisions of militant democracy often fail, a new form of transnational militant democracy—such as that advocated by Jan-Werner Müller and Ulrich Wagrandl—may be required to defend core liberal values. Some European democracies, such as Hungary, have a stranglehold on democratic institutions, which ensures that power is solidified and centralized, diminishing the ability of legitimate opposition to carry any meaningful force for change. For instance, when Prime Minister Viktor Orbán expanded the Hungarian constitutional court in 2010 from eight to 15 members, he effectively squashed the core liberal institutional principle of the independence of the judiciary by appointing judges who would be loyal to him and by passing constitutional amendments that further shrunk the competencies of the Constitutional Court. The Orbán

government's redrawing of parliamentary districts in 2010 further institutionalized his party advantage, reshaping democratic institutions in an unfair manner, and undermining core democratic value of equality. In Poland, the situation is also quite dire, with the Law and Justice Party (*PiS*) essentially taking control of the entire judicial system by replacing judges seated by the previous parliament, who will then report directly to the justice minister.[400]

The question now reads: what if militant democracy can no longer be utilized at the nation-state level because certain states have a stranglehold on democratic institutions? An institutional route can still address this question. The EU has the power to enforce that its member states adhere to democratic standards and thus punish those states who do not meet this standard by suspending their voting rights when serious violations occur. According to Article 7 of the Lisbon Treaty, the EU can punish member states by suspending their voting rights when serious violations occur in regards to the commitment to uphold the fundamental values of the EU: respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights. This is the route by which the EU can act militantly. In April 2018, the European Parliament called for the use of Article 7 following Orbán's actions regarding the constitutional court, corruption charges, and the restrictions on media, non-government organizations, and research institutions. Likewise, in June 2018, Poland was put in the dock by its fellow EU member states in an unprecedented hearing over the country's alleged failure to respect democratic norms, initiating Article 7 proceedings. It seems, then, that militant democracy has become transnational: upholding democratic values at a supranational level when states fail to live up to those standards through militant measures.

[400] The *PiS* Party did this in a number of ways, most recently, by lowering the retirement age of judges, thereby forcing more than a third of Supreme Court judges to retire, and then be replaced by the ruling government.

Still, we can easily see that, save the judicial activism, militant measures can also be blocked at the EU level. For the EU to strip Hungary or Poland of its voting rights in the council, it requires that all other EU member states would vote in favor of such a measure. In the case of stripping Poland of its voting rights, Orbán reiterated that he would block any such sanctions, thereby closing the institutional path of implementing a transnational militant democracy. Thus, we are still left with a lingering question: when institutions fail, what is next? On both the domestic and international level, it seems that the use of militant measures may not be an effective instrument for defending core liberal-democratic values anymore. The present situation - the rise of populism and political extremism across EU member states – shows that the institution may have reached its plateau. How are we to then defend those core liberal-democratic values? It is an important question, for what we can see, currently, is that the techniques of militant democracy cannot be used effectively when these anti-democratic, anti-liberal parties have already ascended to power and have consolidated it to the point where no democratic opposition is possible. In fact, what can be seen is that these parties are now using militant techniques in an illiberal way – in Poland, *PiS* have started to crack down on anti-government demonstrations and have attempted to take over and replace board members of opposition movements.[401] Whether militant democracy in Poland (or elsewhere) will not become a weapon against democratic principles now depends on a decision from the high courts – but should the defense of democracy end here, left in the hands of self-proclaimed illiberal democracies, or does it require looking elsewhere?

These specific questions were not dealt with in an in-depth manner throughout this thesis. However, these examples did loom largely over the project at hand, as they guided the

[401] Maftean, Miles. 2018. "For a Chastened Militant Democracy", *Tocqueville 21*. https://tocqueville21.com/le-club/for-a-chastened-militant-democracy/.

normative assessment and my larger institution framework. In our contemporary times, we can see, more than ever, that a principled approach is necessary, particularly in the case of militant democracy, in order to uphold the normative values behind this institution and to guard against illiberal actors. We can see that institutions are only as strong as the actors who utilize them – if left entirely to the political-institutional level, then it leaves open the possibility that such actors use these institutions in an unprincipled, detrimental manner. This reinforces my two-level approach: we can see what happens with militant democracy (or any other liberal democratic institutions) when they are disassociated from the moral core that ultimately justifies their existence.

For all these current accompanying reasons, it is important for us to look at what the normative justification for militant democracy is – the protector of liberal-democratic values – to ensure that it could still be used, be it through a transnational model or domestically.

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