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## Defending Democracy: A New Understanding of the Party-Banning Phenomenon

Gur Bligh

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# Defending Democracy: A New Understanding of the Party-Banning Phenomenon

Gur Bligh\*

## ABSTRACT

*Recent years have witnessed a growing tendency among established democracies to battle political extremism by banning extremist parties. This Article explores this phenomenon in its wide-ranging international manifestations. The Article aims to challenge the prevalent paradigm underlying the discussion of party banning and to introduce a new paradigm for conceptualizing the party-banning phenomenon in its current reincarnation. Traditionally, the discussion concerning party banning has been strongly shaped by the traumatic experience of Hitler's rise to power and the collapse of the Weimar Republic. Hence, it has focused upon parties that are overtly opposed to democracy, like communist or fascist parties. Yet, the threats to democracies have changed considerably in recent years, and it appears that the "Weimar scenario" is becoming far less relevant. Instead, contemporary party banning mainly involves parties that incite to hate and discrimination, parties that support violence and terrorism, and parties that challenge the identity of the state. These new banning categories are difficult to understand and justify within the traditional paradigm and require an alternative framework. The new paradigm must focus upon the electoral arena as a source of legitimacy and status rather than merely an instrument for coming to power. This Article links this new legitimacy paradigm to the change in the nature of political parties and to their transformation from primarily representative organizations into "public utilities," or "public*

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*service agencies.” Once the contours of the legitimacy paradigm are established, this Article proceeds to examine which parties can justifiably be banned within this paradigm and to address its practical implications.*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1322
II.	THE WEIMAR PARADIGM.....	1326
	A. <i>Theoretical Basis</i> .....	1326
	B. <i>Practical Manifestations</i> .....	1333
III.	NEW CATEGORIES OF BANNING .....	1337
	A. <i>Incitement to Hate or Discrimination</i> .....	1338
	B. <i>Support of Violence</i> .....	1340
	C. <i>Challenge to the Identity of the State</i> .....	1342
IV.	ACCOMMODATING THE NEW CATEGORIES WITHIN THE WEIMAR PARADIGM .....	1345
	A. <i>Questioning the Legitimacy of the New Banning Categories</i> .....	1346
	B. <i>Expanding the Weimar Paradigm</i> .....	1349
V.	THE LEGITIMACY PARADIGM .....	1358
	A. <i>The Purpose of the Banning</i> .....	1358
	1. <i>Legitimacy and the Change in the Role         of Parties</i> .....	1359
	2. <i>Framing Effects and the Nature of         the “Political Field”</i> .....	1363
	3. <i>Conclusion</i> .....	1365
	B. <i>Which Banning Categories Are Justified?</i> .....	1367
VI.	APPLYING THE LEGITIMACY PARADIGM.....	1371
	A. <i>The Irrelevance of the Probability Standard</i> .....	1372
	B. <i>The Evidentiary Question</i> .....	1373
	C. <i>The Actual Effects of a Party Ban</i> .....	1375
	D. <i>Potential Dangers</i> .....	1377
VII.	CONCLUSION.....	1379

## I. INTRODUCTION

In May 2010, the Czech Constitutional Court affirmed the decision to ban the Far-Right Workers’ Party, the first ideological

party ban in the Czech Republic since the fall of Communism.<sup>1</sup> In June 2009, the European Court of Human Rights (ECHR) affirmed the 2003 ban of *Batasuna* (and two of its predecessors, *Herri Batasuna* and *Euskal Herritarrok*) by the Spanish Supreme Court. *Batasuna* was widely recognized as the political wing of *Euskadi Ta Askatasuna* (ETA), the Basque terrorist organization.<sup>2</sup> In July 2008, the Turkish Constitutional Court narrowly decided to refrain from banning Turkey's governing party, Justice and Development (AKP), and instead cut its public funding in half and issued a "serious warning" to the party for threatening the country's secular principles.<sup>3</sup> In 2003, the German federal government (together with the *Bundestag* and *Bundesrat*) attempted to ban the National Democratic Party (NPD), the oldest neo-Nazi party in Germany. Following a preliminary examination, the Federal Constitutional Court authorized the banning proceedings but later denied the banning petition when it discovered that several of NPD's leaders were in fact undercover agents or informers of the German secret service.<sup>4</sup>

These cases are only a few recent examples of an intriguing trend: the banning of extremist political parties. This Article examines this phenomenon in its wide-ranging international manifestations. This Article aims to challenge the prevalent paradigm underlying the discussion of party banning, which is strongly grounded in the tragic experience of the Weimar Republic, and to introduce a new paradigm for explaining the party-banning phenomenon in its current incarnation. On the basis of this new paradigm, this Article will also demarcate the justifiable applications and limits of this controversial practice.

The question of extremist participation in the electoral arena received significant worldwide attention in the 1930s, after the collapse of the Weimar Republic, and in the 1940s and 1950s, in the context of the postwar fear of the return of Fascism and the growing

1. Miroslav Mares, *Czech Militant Democracy in Action: Dissolution of the Workers' Party and the Wider Context of This Act*, 26 E. EUR. POL. & SOCIETIES 33, 33 (2012).

2. *Herri Batasuna v. Spain*, App. Nos. 25803/04 & 25817/04, Eur. Ct. H.R. 20 (2009). Since the initial ban of *Batasuna* in 2003, several other parties that were considered successors to *Batasuna* have been banned, most recently in 2011. See Angela K. Bourne, *The Proscription of Parties and the Problem with 'Militant Democracy'* (Ctr. for the Study of European Political Parties Online Working Paper Series, Paper No. 3, 2011), available at [http://rudar.ruc.dk/bitstream/1800/7346/1/2011\\_3\\_1\\_.pdf](http://rudar.ruc.dk/bitstream/1800/7346/1/2011_3_1_.pdf).

3. Sabrina Tavernise & Sebnem Arsu, *Turkish Court Calls Ruling Party Constitutional*, N.Y. TIMES (July 31, 2008), <http://www.nytimes.com/2008/07/31/world/europe/31turkey.html>.

4. See *infra* text accompanying note 107–08.

fear of Communism.<sup>5</sup> As fear of Fascism and Communism waned, efforts were made to minimize restrictions upon political speech in most democratic countries.<sup>6</sup> Lately, however, in the context of a resurgence of Far-Right movements in Western Europe and the emergence of ethnic and religious fundamentalist political parties in the Middle East and Europe, party banning has been receiving renewed attention.<sup>7</sup> In recent years, parties claiming to be racist and xenophobic in the Czech Republic, the Netherlands, Germany, Belgium, and Israel were the focus of banning efforts, most of which were successful.<sup>8</sup> Similarly, parties allegedly supporting violence and terrorism have also been the target of banning attempts in Spain, Israel, and Turkey.<sup>9</sup> In 2003, the ECHR upheld the Turkish ban of *Refah Partisi* (The Welfare Party) (Refah) holding that its Islamic agenda is incompatible with fundamental democratic principles.<sup>10</sup> A later attempt to ban the ruling Islamic party in Turkey was thwarted by the Turkish Constitutional Court.<sup>11</sup>

Although the issue of party banning has typically not been a significant concern in the United States since the 1940s and 1950s,<sup>12</sup> in recent years the issue of party banning has begun to receive growing scholarly attention in the English-speaking world as well.<sup>13</sup> The various discussions concerning party banning have been strongly shaped by the traumatic experience of Hitler's rise to power and the

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5. See Shlomo Avineri, *Introduction to MILITANT DEMOCRACY* 1, 2 (András Sajó ed., 2004) (discussing the Communist expansion fears that led "many Western democracies to apply both legal and political means (some of them obviously extra-legal) to curb the functioning of the communist parties" and noting that these means were "applied in some cases also to neo-Nazi and neo-fascist groupings").

6. *Id.*

7. See Patrick Macklem, *Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination*, 4 INT'L J. CONST. L. 488, 491 (2006) ("Despite its historical pedigree, questions relating to the nature and scope of militant democracy have acquired greater political and legal salience in recent years. No doubt, the rejuvenation of militant democracy is partly a response to the profoundly destabilizing potential of new forms of terrorism and religious fundamentalism.").

8. See *infra* Part III.A.

9. See *infra* Part III.B.

10. *Refah Partisi (Welfare Party) v. Turkey*, 2003-II Eur. Ct. H.R. 267, 271.

11. *Tavernise & Arsu*, *supra* note 3 (covering the Turkish Court's ruling that found the AKP constitutional).

12. See Gur Bligh, *Extremism in the Electoral Arena: Challenging the Myth of American Exceptionalism*, 2008 BYU L. REV. 1367, 1374-75 (2008) (noting the restrictive measures adopted in the United States during the 1940s and 1950s against the Communist Party).

13. See, e.g., Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 389 (Gregory H. Fox & Brad R. Roth eds., 2000) (addressing how a democracy should react to antidemocratic actors); NANCY L. ROSENBLUM, *ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP* ch. 9 (2008); Avineri, *supra* note 5, at 2; Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405 (2007); Nancy L. Rosenblum, *Banning Parties: Religious and Ethnic Partisanship in Multicultural Democracies*, 1 L. & ETHICS HUM. RTS. 17 (2007).

collapse of the Weimar Republic.<sup>14</sup> The memory of this tragic event was crucial in the adoption of party-banning regimes in Germany and other democracies.<sup>15</sup> However, the threats facing democracies today have considerably changed, and it appears that the Weimar scenario is becoming far less relevant. Today, overtly antidemocratic ideologies, such as Fascism or Communism, are largely out of political fashion and do not seem to draw significant support.<sup>16</sup> On the other hand, new challenges have appeared in the form of parties inciting hate or discrimination, parties supporting violence and terrorism, and parties identifying with religious fundamentalist movements.<sup>17</sup> However, despite the change in the nature of the threats facing democracies and a growing recognition of the need to develop an updated understanding of this issue,<sup>18</sup> an alternative framework underlying party-banning analysis is still lacking, and the dominant approach continues to be preoccupied with the Weimar scenario.<sup>19</sup>

In discussing the banning of extremist parties, one should clearly distinguish between two related but distinct questions. The first, which has been the main focus of scholarly discussion, is who should be banned—that is, What type of parties can be legitimately banned? A second related but distinct question, which has received far less attention, is what is the purpose of the ban—that is, What threats is the ban trying to address? When dealing with a Weimar scenario,

14. See, e.g., Fox & Nolte, *supra* note 13, at 392–93 (examining the rise of the German Nazi Party).

15. Rosenblum, *supra* note 13, at 23.

16. See *infra* Part II.B.

17. Rosenblum, *supra* note 13, at 25, 43.

18. See *id.* at 23 (explaining that she “hope[s] to show that the reasons for banning parties have become more complex than these familiar formulations of the ‘paradox of democracy’”); Paul Harvey, *Militant Democracy and the European Convention on Human Rights*, 29 EUR. L. REV. 407, 412 (2004) (explaining that while earlier banning cases fell within the paradigm of “Cold War politics” and democratization in the aftermath of the Cold War, most recent cases do not fit within that paradigm); Matthias Basedau et al., *Ethnic Party Bans in Africa: A Research Agenda*, 8 GER. L.J. 617, 623–28 (2007) (provisionally suggesting five categories of justification for party banning that may be applied in their research on ethnic party bans in Africa: militant democracy, regionalist–separatist challenge, civil society, obligations of international law and memory, and political identity); Bourne, *supra* note 2, at 4 (noting that the terminology of “militant democracy” related to the banning of extremist parties “has tended to expand from a narrow focus on fascist and communist parties . . . into shorthand for a much wider range of measures employed against all kinds of extremist threats”).

19. See, e.g., Ian Cram, *Constitutional Responses to Extremist Political Associations – ETA, Batasuna and Democratic Norms*, 28 LEGAL STUD. 68, 93 (2008) (arguing that the main purpose of a party ban is to prevent an “institutional crisis . . . in the sense of forcing the postponement of elections or preventing opposing parties from standing for election”); Issacharoff, *supra* note 13, at 1442 (arguing that the main threat party bans are supposed to address is that of parties “seizing power from within the national electorate”); Fox & Nolte, *supra* note 13, at 395–96 (focusing on the threat that the antidemocratic party will come into power and put an end to free elections).

there is an understandable tendency to conflate these two questions because the answer to the first question naturally dictates the answer to the second. In the Weimar context, democratic regimes ban antidemocratic parties, parties that seek to abolish democracy wholesale. The aim of the banning is to prevent the antidemocratic parties from coming to power and implementing their antidemocratic agenda. This traditional understanding of party banning will be referred to as the *Weimar paradigm*.

Today's threats to democracy represent different challenges. Many Far-Right parties in Western Europe or parties that express support for terrorist organizations do not promote overtly antidemocratic ideologies nor do they stand a real chance of winning an election.<sup>20</sup> In these circumstances, the Weimar paradigm does not offer a sufficient explanation for their banning. Indeed, almost all of the recent cases of party banning can be better understood as attempts to deny certain parties the legitimacy and other benefits that are afforded to political parties in modern democracies rather than as attempts to prevent the total collapse of a democratic regime. In light of this understanding, this Article suggests that the new banning cases are better understood within a new paradigm, which will be referred to as the *legitimacy paradigm*. This paradigm focuses upon the electoral arena as a source of legitimacy and status rather than merely as an instrument for coming to power. Once the contours of the legitimacy paradigm are established, this Article will examine which parties can justifiably be banned within this paradigm and will address the practical implications of this analysis.

This Article proceeds in five parts. Part II focuses on the controlling Weimar paradigm and its traditional justifications and manifestations. Part III surveys three new banning categories that have gained in prominence in recent years—parties involved in incitement to hate and discrimination, parties that support violence, and parties that challenge the state's identity. Part IV discusses the attempts to accommodate these new banning categories within the traditional Weimar paradigm. Part V presents and explains the legitimacy paradigm. Part VI discusses issues concerning the implementation of the legitimacy paradigm.

## II. THE WEIMAR PARADIGM

### A. *Theoretical Basis*

Political philosophers have devoted relatively little attention to the question of the circumstances, if any, in which a democracy is

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20. See *infra* text accompanying notes 80–94 and 197–207.

entitled to prevent an antidemocratic party from participating in democratic elections.<sup>21</sup> But it is still possible to identify two main approaches to this question. The first approach, which appears more natural to an American reader, has been referred to as the *procedural view*.<sup>22</sup> According to this approach, the government must act with neutrality toward the various factions operating in the political arena, including antidemocratic parties.<sup>23</sup> It may not label any party as illegal or unconstitutional and must be open to all views, moderate or extremist.<sup>24</sup> This procedural model has often been associated with the United States and hence has also been referred to as the “American model.”<sup>25</sup> Indeed, among liberal democracies, it appears that the American system is the most prominent example of the procedural model.<sup>26</sup> Although, as explained elsewhere, the reality of the American electoral system is quite restrictive for extremist parties,<sup>27</sup> the general free speech context and the formal structure of the American system generally correspond to this approach.<sup>28</sup>

21. See Rosenblum, *supra* note 13, at 18 n.2 (“Political commentary flourishes, but the academic literature on the subject is slight.”); Cram, *supra* note 19, at 73 (“Neither of these accounts, nor their twentieth century counterparts, devote explicit attention to the question of the circumstances, if any, in which a democracy is entitled to curtail freedom of association in order to prevent a grouping contesting elections and participating more generally in political debate as a coherent entity.”).

22. See Fox & Nolte, *supra* note 13, at 400–01 (analyzing theories of democratic tolerance); Cram, *supra* note 19, at 74.

23. Fox & Nolte, *supra* note 13, at 400–01. A notable example of this approach can be found in JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 242, 271–72 (2d ed. 1947) (explaining that democracy is merely “a political *method*, that is to say, a certain type of institutional arrangement for arriving at political—legislative and administrative—decisions and hence incapable of being an end in itself, irrespective of what decisions it will produce under given historical conditions”). For a more recent example, see BRIAN BARRY, DEMOCRACY, POWER AND JUSTICE: ESSAYS IN POLITICAL THEORY 25 (1989) (rejecting “the notion that one should build into democracy any constraints on the content of the outcomes produced, such as substantive equality, respect for human rights, concern for general welfare, personal liberty or the rule of law”).

24. As Oliver Wendell Holmes famously noted, “If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.” See *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

25. Cas Mudde, *Conclusion: Defending Democracy and the Extreme Right, in WESTERN DEMOCRACIES AND THE NEW EXTREME RIGHT CHALLENGE* 193, 196 (Roger Eatwell & Cas Mudde eds., 2004) (explaining that “[i]n the American model . . . the state provides for as much freedom as possible. This means that all *ideas* are accepted in the democratic ‘marketplace of ideas’, whether they are democratic or not”).

26. *Id.*; Fox & Nolte, *supra* note 13, at 400–01.

27. Bligh, *supra* note 12. It is also worth noting that during the 1940s and 1950s various restrictions were placed upon the Communist Party that were gradually lifted in later decades. For a detailed account, see HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 119–236 (Jamie Kalven ed., 1988).

28. Issacharoff, *supra* note 13, at 1415–21 (noting the extraordinary protection granted to extremist, antidemocratic speech within the American system and attempting to explain this phenomenon.). In fact, this unique approach even led the



Conversely, the Weimar paradigm is based upon what is often referred to as the *substantive approach*.<sup>29</sup> According to this view, democracy is not an end in itself but a means of creating a society in which the citizenry enjoy self-rule and permanently enjoy a core of political rights that ensure effective participation.<sup>30</sup> To preserve these rights, a democratic regime is entitled to act with intolerance toward intolerant entities that seek to destroy democracy.<sup>31</sup> Often, this substantive approach has been linked to the writings of John Stuart Mill.<sup>32</sup> Although, generally, Mill was strongly opposed to regulation of speech and was adamant in his objection to regulating actions that do not constitute harm to others (the “harm principle”), Mill did believe that an individual may be denied the right to sell himself or herself to slavery. Mill explained that

[t]he reason for not interfering, unless for the sake of others, with a person's voluntary acts, is consideration for his liberty . . . . But by selling himself for a slave, he abdicates his liberty; he foregoes any future use of it beyond that single act. *He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose himself . . . . The principle of freedom cannot require that he should be free not to be free.*<sup>33</sup>

Commentators have applied this example to the broader context of antidemocratic parties.<sup>34</sup> The argument is that, like the individual, society at large is not entitled to the “freedom not to be free.”<sup>35</sup> Thus, just as the state may interfere when an individual willingly sells himself or herself to slavery, it may act to prevent the state from “selling itself” to a dictatorship.<sup>36</sup> The idea is that the state is justified in limiting the freedom of the antidemocratic party in order to protect the “future use” of the freedom to compete in elections for other political parties.<sup>37</sup>

U.S. Senate to add several eviscerating reservations when it ratified the United Nations Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 343 (1995).

29. See Fox & Nolte, *supra* note 13, at 401–05 (describing the substantive concept of democracy).

30. *Id.* at 401.

31. See *id.* at 402 (discussing Rawls' critique on the tolerance of intolerant entities); see also Cram, *supra* note 19, at 77.

32. Carl A. Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173, 188 (1956); Nolte & Fox, *supra* note 13, at 402.

33. JOHN STUART MILL, ON LIBERTY 173 (Pelican Classics 1978) (1859) (emphasis added).

34. See *supra* note 32.

35. Auerbach, *supra* note 32, at 188; see also Fox & Nolte, *supra* note 13, at 402 (discussing the ramifications of tolerating groups that would jeopardize the institution of tolerance itself).

36. Auerbach, *supra* note 32, at 188.

37. *Id.*

Beyond this analogy from Mill, the problem of an antidemocratic movement operating within democracy has been directly addressed by Karl Popper in his writings on the “paradox of tolerance.”<sup>38</sup> Popper explained that a theory that equates democracy with majority rule is self-contradictory.<sup>39</sup> On the one hand, it requires the people to accept the decision of the majority even if the majority supports the establishment of a tyranny.<sup>40</sup> On the other hand, once the tyranny is in power, the same principle of majority rule requires the majority to oppose tyranny by way of force or revolution.<sup>41</sup> Thus, it appears inconsistent to maintain that the constitution protects a totalitarian movement in its attempt to come to power, but once the movement is in power, it becomes the moral right and duty of the people to overthrow such a government. In Popper’s view, the solution to this paradox is basing democracy upon the rejection of tyranny rather than upon the absolute righteousness of majority rule.<sup>42</sup> Thus, according to Popper, majority rule may be relaxed in order to prevent tyranny and maintain the ability of the ruled to change government without force or revolution.<sup>43</sup> As a result, one type of constitutional change is excluded in a democracy, “a change which would endanger its democratic character.”<sup>44</sup>

This approach can also find some degree of support in the writings of John Rawls.<sup>45</sup> Rawls explained first that the intolerant has no right to complain when he is not tolerated because “[a] person’s right to complain is limited to violations of principles he acknowledges himself.”<sup>46</sup> Despite this limited “right to complain” that is granted to the intolerants themselves, Rawls insisted that the tolerant group normally has to tolerate the intolerant elements operating within its midst.<sup>47</sup> However, for present purposes, it is

38. See KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 265 n.4 (5th ed. 1966) (“Unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them.”); see also *id.* at 124–25 (“[T]he *paradox of democracy* or more precisely, of majority rule; i.e., the possibility that the majority may decide that a tyrant should rule.”).

39. *Id.*

40. *Id.*

41. *Id.* at 123–25 (explaining that the paradox was first presented by Plato in the *Republic*); Auerbach, *supra* note 32, at 192–93.

42. POPPER, *supra* note 38, at 123–125.

43. POPPER, *supra* note 38, at 124–25; *id.* at 265 n.4 (“We should therefore claim, in the name of tolerance, the right not to tolerate the intolerant. We should claim that any movement preaching intolerance places itself outside the law, and we should consider incitement to intolerance and persecution as criminal, in the same way as we should consider incitement to murder, or to kidnapping, or the to the revival of the slave trade, as criminal.”).

44. *Id.* at 161.

45. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

46. *Id.* at 217.

47. *Id.* at 218.

crucial that Rawls did limit this general duty to tolerate and acknowledged that “[j]ustice does not require that men must stand idly by while others destroy the basis of their existence.”<sup>48</sup> Despite his general acceptance of the possibility of the suppression of the intolerant, Rawls believed that the tolerant should normally have faith in the inherent stability of their just institutions.<sup>49</sup> Hence, according to Rawls, suppression of the intolerant is justified only when “the tolerant sincerely and with reason believe that their own security and that of the institutions of liberty are in danger.”<sup>50</sup>

These theoretical justifications can be interpreted and applied in very different manners. However, at their core, these justifications focus primarily on preventing a scenario similar to that which occurred in the Weimar Republic and ultimately led to the collapse of the republic and to a Nazi dictatorship. Historically, the Nazi Party did not enjoy a majority in the *Reichstag*.<sup>51</sup> However, it was the strongest party following the elections of January 1933, and its relative strength led President Hindenburg to appoint Hitler as chancellor.<sup>52</sup> Once in power, Hitler used threats and intimidation to force the Reichstag to vote for a law suspending constitutional rule and allowing his government to rule by legislative decrees and thus, in effect, established a dictatorship.<sup>53</sup> Indeed, the rise to power of the Nazi Party is considered perhaps the paradigmatic case justifying the banning of antidemocratic parties.<sup>54</sup> As a result, the discussion concerning the banning of parties has focused upon parties resembling the Nazi Party—that is, explicitly antidemocratic parties that seek to completely dismantle the democratic regime.

When commentators try to flesh out what this means in practice, they mainly concentrate upon parties that reject democracy in its narrowest, procedural sense—that is, parties that object to free and competitive elections.<sup>55</sup> Thus, in Georg Nolte and Gregory Fox’s seminal article, concerning the restrictions imposed upon

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48. *Id.*

49. *Id.* at 219–20.

50. *Id.* at 220; Raphael Cohen-Almagor, *Disqualification of Lists in Israel (1948–1984): Retrospect and Appraisal*, 13 *LAW & PHIL.* 43, 47–49 (1994).

51. For a concise description of the course of events leading to the collapse of the Weimar Republic, see DAVID DYZENHAUS, *LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMAN HELLER IN WEIMAR 17–28* (1997).

52. *Id.*

53. *Id.*

54. Another notable example is the case of Czechoslovakia in which the Communist Party came into power through democratic means and once in power abolished democracy. See generally KAREL KAPLAN, *THE SHORT MARCH: COMMUNIST TAKEOVER IN CZECHOSLOVAKIA, 1945–1948* (1987). Another more recent example is the case of the Islamic Salvation Front Party in Algeria. Fox & Nolte, *supra* note 13, at 391–94.

55. For examples of an emphasis upon the “narrow” definition of democracy, see SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY 6–7* (1993); SCHUMPETER, *supra* note 23, at 269.

antidemocratic actors in democratic regimes, they emphasize that “the core concern has been preserving a system of electoral choice.”<sup>56</sup> They explain that “[o]nly elections both embody the idea of popular sovereignty and create the potential for its negation. Opposition to elections is thus the paradigmatic form of ‘antidemocratic’ action.”<sup>57</sup> Similarly, Samuel Issacharoff explains that the central concept is the idea of “renewability of consent.”<sup>58</sup> Thus, “[t]he real definition of democracy must turn on the ability of majorities to be formed and reformed over time and to remove from office those exercising governmental power.”<sup>59</sup>

It appears that the main concern underlying this emphasis upon elections is the question of *reversibility*. The main premise of the democratic method of government is that regardless of the specific policy that is adopted or ends that are pursued the people “keep . . . open the avenue of change so that wrongs may be righted peacefully.”<sup>60</sup> Accordingly, states are banning certain parties because the people fear that once these parties come to power and implement their agenda “future voters, [will] . . . be denied [the] . . . opportunity to change their government save through extra-constitutional means.”<sup>61</sup> This is precisely the Weimar scenario: a party that came to power through free elections, abolished elections, and forced its opposition to turn to “extra-constitutional” means to remove it from power.<sup>62</sup> In light of this purpose, the focus of the Weimar paradigm upon parties is obvious. Parties are “first of all an organized attempt to get power.”<sup>63</sup> Since the main concern is that antidemocratic forces will use the democratic institutions to abolish democracy, states block the means through which they may control these institutions—political parties.

56. Fox & Nolte, *supra* note 13, at 396.

57. *Id.* They further explain that the centrality of elections is due to three main reasons: a normative reason—the existence of periodic and fair elections is the minimal content of democracy; terminological—the definition of *democracy* in human rights law refers (since the Cold War) only to majoritarian elections; and reasons of political dynamics—an election is a defining moment in a country’s political life. During a campaign, all the various conflicts within a society come to a head. *Id.* at 396–98. See also Gregory H. Fox & Georg Nolte, *A Defense of the ‘Intolerant Democracies’ Thesis*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 445, 448 (Gregory H. Fox & Brad R. Roth eds., 2000) (explaining that the minimal condition for justifying a banning is “making a demonstrable case that the excluded actor presents a *danger to the continuance of regular elections*”).

58. Issacharoff, *supra* note 13, at 1464–66.

59. *Id.* at 1464.

60. Auerbach, *supra* note 32, at 191.

61. Fox & Nolte, *supra* note 13, at 446.

62. This turn of events led Joseph Goebbels to state, “This will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed.” Fox & Nolte, *supra* note 13, at 389, 392–93 (quoting Karl Dietrich Bracher et al., *Introduction to NATIONALSOZIALISTISCHE DIKTATUR 1933–1945*, at 16 (Karl Dietrich Bracher et al. eds., 1983)).

63. E.E. SCHATTSCHNEIDER, *PARTY GOVERNMENT* 35 (1942).

Moreover, in light of this concern, it appears quite reasonable that the party's "likelihood of success" would be a relevant consideration in the banning decision.<sup>64</sup> If the purpose of the ban is to prevent an antidemocratic party from coming to power and abolishing democracy, it is necessary to examine whether there is a real threat that the party will achieve this goal. If the party is insignificant and does not have a real chance of abolishing democracy, it seems that it should not be banned. Indeed, some have suggested subjecting banning decisions to a "clear and present danger" test.<sup>65</sup> Others, like the ECHR, have applied more lenient tests, such as the "sufficiently imminent" test.<sup>66</sup> Though the application of such a test may appear quite problematic,<sup>67</sup> and there are those who argue that in certain

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64. See Peter Niesen, *Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties – Part 1*, 3 GERMAN L.J., ¶¶ 12–13 (2002) (discussing the court's analysis of the probability "that there be the chance of [the party] realizing its unconstitutional goals" in the case of the Communist Party of Germany (KPD) decision); Eva Brems, *Freedom of Political Association and the Question of Party Closures*, in POLITICAL RIGHTS UNDER STRESS IN 21ST CENTURY EUROPE 120, 177–78 (Wojciech Sadurski ed., 2006).

65. See Thilo Rensmann, *Procedural Fairness in a Militant Democracy: The "Uprising of the Decent" Fails Before the Federal Constitutional Court*, 4 GERMAN L.J. No. 11 (2003) (providing an overview of the clear and present danger test); see also Macklem, *supra* note 7, at 515 (discussing other possible alternatives).

66. See *Refah Partisi (Welfare Party) v. Turkey*, 2003-II Eur. Ct. H.R. 306, ¶ 104 (stating that the test to determine whether the dissolution of a political party met a "pressing social need" was whether the risk to democracy was "sufficiently imminent").

67. There are various problems with applying a probability test even within the Weimar paradigm. First, there is an inherent paradox with the question of "probability" in a banning decision, which seems very hard to circumvent. When the party is very small, it does not stand a real chance of coming into power, thus there is no clear and present danger. However, when the party is strong and *does* seem to pose a clear and present danger, it may be too late to ban it without strong, perhaps violent, opposition. Also, when the party is strong, the antimajoritarian nature of the ban is much more apparent. See Günter Frankenberg, *The Learning Sovereign*, in MILITANT DEMOCRACY 113, 125 (András Sajó ed., 2004); Yigal Mersel, *The Dissolution of Political Parties: The Problem of Internal Democracy*, 4 INT'L J. CONST. L. 84, 92 (2006). A possible solution to this paradox is to use a more flexible probability test, such as the one offered by Barak Medina. See Barak Medina, *Arbaim Shana Lhilchat Irador: Shilton ha-Chok, Mishpat ha-Teva wgvulut ha-siah ha-legitimi bemedina yehudit vedemokratit* [Forty Years to the Yirador Decision: The Rule of Law, Natural Law and the Limits of Legitimate Speech in a Jewish and Democratic State], 22 MEHKARI MISHPAT 327, 379–80 (2006) (Isr.). Even a more sensitive test, however, would be difficult to apply because of the possibility of a snowball effect that would be very difficult to predict beforehand. One event increases the likelihood of a different second one that disproportionately increases the likelihood of another event. At a certain point in time, a critical mass is achieved and suddenly the party's success is imminent. It is very difficult to predict beforehand when this crucial moment will arrive. Moreover, a probability test is based on an assumption that the speech occurrence (or event) can be isolated and examined distinctly. Because of the distinct nature of such a speech occurrence, the imminence of the harmful activity can (arguably) be measured. However, the operation and effect of a political association, and even more so the operation of a political party, is much more multifaceted and long term in its effects and thus much more difficult to measure. A political party, by its very nature, does not

cases the likelihood of success is irrelevant,<sup>68</sup> it seems that some form of a probability test should be required under the Weimar paradigm. As will be explained, the picture is more complex when one deals with cases that do not fall neatly within this limited paradigm.

### B. *Practical Manifestations*

The Weimar paradigm was the central premise of banning regimes adopted in the 1940s and 1950s. These regimes were mainly concerned with the threat of overtly antidemocratic ideologies like National Socialism, Fascism, and Communism—ideologies that advocated the wholesale rejection of democracy as a form of government and its replacement with a dictatorship of the proletariat or a “dictatorship of the party.”<sup>69</sup> Accordingly, the early banning regimes typically outlawed parties that sought to abolish the democratic regime as a whole.<sup>70</sup>

The paradigmatic example of this banning ground can be found in the German Constitution, which outlaws parties “[that] seek to impair or abolish *the free democratic . . . order . . .*”<sup>71</sup> Similarly, the French Constitution states that political parties are obliged to

create a clear and present danger in the sense of a mob gathered in front of a corn dealer’s house, as Mill has famously suggested, or a heated demonstration. A party fulfills its goals through a gradual and long-term process: it has to present its agenda to the public, get elected, negotiate with its coalition partners, and so forth. It seems almost impossible for the party to pose a clear and present danger at the point in which its banning is decided, typically in the early stages of the electoral campaign when it is hard to know what kind of campaign it will run, whether it will get elected, and what level of support it will enjoy. See András Sajó, *Militant Democracy and Transition Towards Democracy*, in *MILITANT DEMOCRACY* 209, 216 (András Sajó ed., 2004) (explaining that “when it comes to events relevant for democracy the probability calculation and the related-consequences calculation become particularly difficult . . . because events are not insular”); see also Brems, *supra* note 64, at 178–79.

68. See Cohen-Almagor, *supra* note 50, at 49–50 (criticizing Rawls’ analysis that focuses upon the magnitude of the threat posed by the forces of intolerance and arguing that “this is a matter of moral principle, rather than one which is contingent on the level of danger. The fundamental question is not practical, but ethical”).

69. See Rosenblum, *supra* note 13, at 23 (examining antidemocratic parties and the reasons for banning them).

70. *Id.*

71. Grundgesetz [GG] [Basic Law], art. 21(2), translated in DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 218 (2d ed. 1997) (emphasis added). This open-ended language was clarified by the German Constitutional Court in its decision concerning the banning of the *Sozialistische Reichspartei* (SRP), a neo-Nazi organization formed a few years after World War II. Socialist Reich Party Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 23, 1952, 2 *ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS* [BVerwGE] 1, 12–13 (Ger.), translated in part in DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 216 (1994). The court held that the essential principles of a “free democratic . . . order” include at least: respect for human rights, popular sovereignty, separation of powers, responsibility of government, lawfulness of administration, independence of the judiciary, and a multiparty system based upon equality of opportunities for all political parties. *Id.*

“respect the principles of national sovereignty and *democracy*.”<sup>72</sup> Because of the centrality of this banning category, it continues to appear in recent banning regimes, though, as detailed below, it is accompanied by additional categories. For example, the Israeli Basic Law authorizes the banning of parties that negate “the existence of the State of Israel as a Jewish and *democratic* state.”<sup>73</sup> The Croatian Constitution states that “[p]olitical parties which by their programs or violent activities aim to demolish the *free democratic order* . . . are unconstitutional.”<sup>74</sup> Similar provisions appear in many other constitutions.<sup>75</sup>

One of the common variations upon this general prohibition of antidemocratic parties can be found in constitutions that outlaw specific antidemocratic parties or ideologies.<sup>76</sup> This specificity is often found in constitutions that were adopted following the overthrow of a totalitarian or authoritarian regime and, thus, are typically based

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72. 1958 CONST. art. 4 (Fr.), translated in *France Constitution*, INTERNATIONAL CONSTITUTIONAL LAW (emphasis added), available at [http://www.servat.unibe.ch/icl/fr00000\\_.html](http://www.servat.unibe.ch/icl/fr00000_.html) (last visited Oct. 22, 2013).

73. Basic Law: The Knesset, 5718-1958, SH No. 244, § 7A (Isr.), translated in ISRAEL'S WRITTEN CONSTITUTION (5th ed. 2006).

74. See CROAT. CONST. art. 6(3) (Croatia), translated in *Croatia Constitution*, INTERNATIONAL CONSTITUTIONAL LAW (emphasis added), available at [http://www.servat.unibe.ch/icl/hr00000\\_.html](http://www.servat.unibe.ch/icl/hr00000_.html) (last visited Oct. 22, 2013).

75. For example, in Spain, the new Parties Law provides that a party may be declared illegal “when its activity violates democratic principles, in particular when through its activity it seeks to deteriorate or destroy the system of liberties, or make impossible the democratic system, or eliminate it.” See *Ley Orgánica de Partidos Políticos* (“L.O.P.P.”) art. 9(2), (B.O.E., 2002, 154) (Spain), translated in Víctor Ferreres Comella, *The New Regulation of Political Parties in Spain, and the Decision to Outlaw Batasuna*, in *MILITANT DEMOCRACY* 133, 142 (Andrés Sajó ed., 2004). Similar provisions appear, *inter alia*, in Albania, the Czech Republic, and Slovakia. See European Commission for Democracy Through Law (Venice Commission), *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures*, Appendix I, § I(B)(b)(3), CDL-INF2000/1 (Jan. 10, 2000) [hereinafter *Democracy Through Law Guidelines*], available at <http://www.venice.coe.int/webforms/documents/CDL-INF%282000%29001-e.aspx>.

76. The outlawing of a *particular* ideology and total lack of objective standards may appear as the worst case of viewpoint discrimination. However, the main justification for this kind of restriction lies precisely in its exceptional nature. It is said to represent “case-specific historical justification.” This is an exception justified by the severity of the evil associated with the former regime rather than a general principle regarding the limits of democracy. In that respect, it has been linked to the concept of a “learning sovereign.” It is based upon the understanding that the democratic process is, in part, a process of experimentalism and collective learning. Accordingly, after the horrific experiences with a totalitarian regime, the sovereign can rightfully close some areas of democratic experimentalism from further exploration and the normal procedures of trial and error. The particular path of totalitarianism, whether Nazism, Fascism, or Communism, is assumed to have received numerous opportunities to present its agenda and implement it, and society had the opportunity to discuss and reject it. Niesen, *supra* note 64, ¶¶ 18–40.

upon the traumatic historical memory of the country at issue.<sup>77</sup> Thus, it can usually be found in new democratic constitutions adopted following World War II, outlawing Nazi or Fascist parties,<sup>78</sup> and in many of “the third wave” democracies that were established following decades of authoritarian regimes, including former Eastern bloc countries, typically outlawing Communist and Fascist parties.<sup>79</sup>

This paradigmatic ground for banning parties—wholesale rejection of democracy, whether framed generally or in regard to specific ideological movements—appears to be losing its relevance in recent decades.<sup>80</sup> Indeed, with the exception of certain religious fundamentalist parties, which will be discussed later on, explicit antidemocratic ideologies are out of fashion. As Samuel Huntington explains in his book concerning the third wave of democratization in the 1970s and 1980s, even among relatively new democracies in Southern and Eastern Europe or South America, there are no substantial antidemocratic ideologies or movements.<sup>81</sup> In fact, even

77. See Rosenblum, *supra* note 13, at 40 (“No matter how general their form, the significance and application of grounds for excluding parties is individual. They aim at ‘our extremists.’”).

78. For example, the Austrian Constitution, adopted immediately after Austria regained its independence from Germany, prohibited the establishment of the National Socialist Party and its sister organizations. The Italian Constitution of 1948 states that, “The reorganization in any form whatever of the now dissolved Fascist party is prohibited.” See John E. Finn, *Electoral Regimes and the Proscription of Anti-democratic Parties*, in *THE DEMOCRATIC EXPERIENCE AND POLITICAL VIOLENCE* 51, 70–72 (David C. Rapoport & Leonard Weinberg eds., 2001).

79. For example, the Polish Constitution, adopted in 1997, prohibits the constitution of parties whose programs are based “upon totalitarian methods and the modes of activity of nazism, facism and communism.” See *Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.* [Constitution of the Republic of Poland of 2 April 1997] art. 13 (Poland), translated in *Poland—Constitution*, INTERNATIONAL CONSTITUTIONAL LAW, available at [http://www.servat.unibe.ch/icl/pl00000\\_.html](http://www.servat.unibe.ch/icl/pl00000_.html) (last visited Oct. 22, 2013). The Portuguese Constitution of 1976, which was adopted following the demise of the right-wing dictatorship, states that “organizations which adopt fascist ideology are not permitted.” See *PORT. CONST.* art. 46(4), translated in *Portugal—Constitution*, INTERNATIONAL CONSTITUTIONAL LAW, available at [http://www.servat.unibe.ch/icl/po00000\\_.html](http://www.servat.unibe.ch/icl/po00000_.html) (last visited Oct. 22, 2013).

80. See Phillippe C. Schmitter, *Dangers and Dilemmas of Democracy*, in *THE GLOBAL RESURGENCE OF DEMOCRACY* 76, 77 (Larry Diamond & Marc F. Plattner eds., 2d ed. 1996) (“[F]ew contemporary parties or movements openly advocate a nondemocratic mode of rule. . . . [U]sually [they] claim that their (authoritarian) tutelage will eventually lead to some culturally appropriate kind of democracy.”); Meindert Fennema, *Legal Repression of Extreme-Right Parties and Racial Discrimination*, in *CHALLENGING IMMIGRATION AND ETHNIC RELATIONS POLITICS* 119, 139 (Ruud Koopmans & Paul Statham eds., 2000) (explaining that the legal repression of the radical Right has shifted its focus from anti-fascism to antiracism); see also CASS MUDDE, *THE IDEOLOGY OF THE EXTREME RIGHT* 177–78 (2002); Giovanni Capoccia, *Defence of Democracy Against the Extreme Right in Inter-war Europe*, in *WESTERN DEMOCRACIES AND THE NEW EXTREME RIGHT CHALLENGE* 83, 104 (Roger Eatwell & Cass Mudde eds., 2004).

81. See HUNTINGTON, *supra* note 55, at 46–47, 263 (“People in most countries came to accept – if not to implement – the rhetoric and ideas of democracy.”).



the most extremist right-wing parties, such as the Belgian *Vlaams Blok* and the Dutch Centre Party '86 (CP'86),<sup>82</sup> do not reject parliamentary democracy per se but rather oppose certain liberal aspects of the current regime, such as principles of equality and openness toward foreigners and immigrants.<sup>83</sup> That is not to mean that there are no current struggles for democracy or cases in which a young democracy is gradually slipping back into authoritarianism.<sup>84</sup> But it does appear that the main threat to democracy in these cases is in the form of leaders and authoritarian bodies seeking to consolidate their power, not political parties espousing explicit antidemocratic agendas.<sup>85</sup>

The major exception to the demise of antidemocratic ideologies may be found in fundamentalist religious parties, most prominently Islamist parties, which seem to currently represent the only overt ideological challenge to democracy.<sup>86</sup> However, even these parties have undergone some changes, and recent examples in Tunisia and Egypt may signify new and intriguing developments on this front.<sup>87</sup>

In any event, leaving aside the transitional democracies in the Middle East, stable democracies are currently not challenged by parties that offer a serious alternative to the democratic ideology.<sup>88</sup> This appears to be an encouraging development, which, it could be argued, eliminates the need for banning parties altogether. However, surprisingly, despite this development, recent years have witnessed a reawakening of the party-banning phenomenon.<sup>89</sup> This development is reflected both in the emergence of new cases involving party banning and in new constitutional banning regimes in various democracies. In the last two decades, attempts to ban extremist parties have arisen in a long list of democracies, including the Czech

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82. Both parties have been banned. See *infra* text accompanying notes 105–06, 109–12.

83. See sources cited *supra* note 80.

84. See Larry Diamond, *Thinking About Hybrid Regimes*, 13 J. DEMOCRACY 21 (2002) (describing how Russia provides such an example).

85. *Id.* (discussing the nature of these new “hybrid democracies” or “semi-authoritarian regimes”—which combine a rhetorical acceptance of liberal democracy, the existence of some formal democratic institutions, and respect for a limited sphere of civil and political liberties with essentially illiberal or even authoritarian traits).

86. See Rosenblum, *supra* note 13, at 22–23 (comparing fundamentalist Islam to Marxism).

87. See Jocelyne Cesari, *Are Muslim Democracies a New Kind of Political System?*, WASH. POST (Jan. 27, 2013, 9:37 PM), available at [http://www.washingtonpost.com/blogs/guest-voices/post/are-muslim-democracies-a-new-kind-of-political-system/2013/01/27/a84d5404-68f1-11e2-af53-7b2b2a7510a8\\_blog.html](http://www.washingtonpost.com/blogs/guest-voices/post/are-muslim-democracies-a-new-kind-of-political-system/2013/01/27/a84d5404-68f1-11e2-af53-7b2b2a7510a8_blog.html) (discussing the influence Islam may play with regard to democratic transitions).

88. See Capoccia, *supra* note 80, at 104 (explaining how totalitarian ideologies have waned “and the organizations abiding by them [have] ceased to be dangerous for the survival of democracy”).

89. *Id.* at 83 (“[M]any new democracies of Eastern Europe have included in their democratic constitutions rules limiting political pluralism . . .”).

Republic, Germany, Spain, Belgium, the Netherlands, Israel, Bulgaria, and Turkey.<sup>90</sup> As one commentator recently noted, “The paradox is that . . . this [growing ‘militancy’ of European democracies] is happening in a situation in which the ‘old’ totalitarian ideologies have waned, and the organizations abiding by them ceased to be dangerous for the survival of democracy.”<sup>91</sup>

Indeed, the majority of the parties targeted in these recent cases were not opposed to democracy in its narrowest sense. Admittedly, some of these parties reflected antidemocratic tendencies in the narrow sense, such as *Kach* in Israel, the extreme right-wing NPD in Germany, and, allegedly, Refah in Turkey.<sup>92</sup> However, it seems that all three were targeted primarily because of other reasons: *Kach* and NPD because of their racist tendencies and Refah because of its objection to the Turkish state’s foundational principle of secularism. The other parties that were the target of banning attempts, some of which were successful, were clearly not antidemocratic in the narrow sense; that is, they did not seek to put an end to free and democratic elections and did not favor instating an authoritarian regime.<sup>93</sup> Moreover, the constitutional provisions that have appeared in various democracies authorize the banning of a much wider range of parties than merely parties that seek to dismantle the democratic system as a whole.<sup>94</sup>

### III. NEW CATEGORIES OF BANNING

In general, recent banning cases and constitutional banning regimes appear to be directed against three types of parties: parties inciting hate and discrimination, parties that support violence, and parties that pose a challenge to the state’s identity.<sup>95</sup> This Article will proceed to examine these three banning categories and explain why they do not fit the existing Weimar paradigm. Although to a certain

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90. See *infra* Part III.

91. Capoccia, *supra* note 80, at 104.

92. See Cas Mudde, *Right-Wing Extremism Analyzed: A Comparative Analysis of Three Alleged Right-Wing Extremist Parties (NPD, NDP, CP’86)*, 27 EUR. J. POL. RES. 203, 214–16 (1995) (noting that the NPD had exhibited antidemocratic tendencies in the past, however, these have subsided); Cohen-Almagor, *supra* note 50, at 46 (referring to *Kach* as a party that propounds the destruction of democracy); see also Refah Partisi (Welfare Party) v. Turkey, 2003-II Eur. Ct. H.R. 123–125 (explaining that Refah’s agenda of imposing *Sharia* “is incompatible with the fundamental principles of democracy”).

93. See *infra* Part III (categorizing recent constitutional banning regimes).

94. *Id.*

95. This terminology is borrowed from Nancy Rosenblum’s analysis (with slight variations), though she notes an additional category—“outside support and control”—which seems rather peripheral to this analysis and thus will not be addressed here. See Rosenblum, *supra* note 13, at 68–71.

degree these categories have already appeared in the past, because their dominance and prevalence are more recent, all three categories will be referred to as “new” categories.

### A. *Incitement to Hate or Discrimination*

The first new category of banning that has become more prevalent in recent years concerns parties inciting hate or discrimination, particularly on the basis of racial or ethnic-national differences. This banning ground, which typically did not appear in post-World War II constitutions, becomes more common the more recent the banning regime is.<sup>96</sup> In Spain, parties may be banned for “repeatedly exhibit[ing] . . . behavior . . . violating fundamental rights by promoting, [or] justifying . . . the exclusion or persecution of an individual based on his ideology, religion, beliefs, nationality, race, sex, or sexual orientation.”<sup>97</sup> In Israel, a party may be banned if “its objectives or acts . . . explicitly or by implication” include “incitement to racism.”<sup>98</sup> In Ukraine, a party may be banned if its program, goals, or actions are aimed at the incitement “of inter-ethnic, racial, or religious enmity.”<sup>99</sup> Similar provisions exist in other countries, especially among the new democracies of Eastern Europe.<sup>100</sup>

In fact, it appears that in the last decades, this category has become the most common ground for banning parties. The first case in this series arose in 1984 in Israel with the failed attempt to ban Kach, a racist Jewish party inciting hate and discrimination against Arabs within and without the state of Israel.<sup>101</sup> The attempted ban failed due to a lack of constitutional basis for such an action.<sup>102</sup> Following this failure, the Basic Law regulating elections was amended, and a specific provision authorizing the banning of parties

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96. See Rosenblum, *supra* note 13, at 24 (“[T]he more recent the constitution, the more likely [it is] to incorporate religious, ethnic, racial, and linguistic constraints on party organizing.”).

97. Ley Orgánica de Partidos Políticos (“L.O.P.P.”) art. 9(2), (B.O.E., 2002, 154) (Spain), translated in Leslie Turano, *Spain: Banning Political Parties as a Response to Basque Terrorism*, 1 INT’L J. CONST. L. 730, 733 (2003).

98. Basic Law: The Knesset, 5718-1958, SH No. 244. § 7A (Isr.), translated in ISRAEL’S WRITTEN CONSTITUTION (5th ed. 2006).

99. UKR. CONST. art. 37 (Ukraine), translated in *Ukraine—Constitution*, INTERNATIONAL CONSTITUTIONAL LAW, available at [http://www.servat.unibe.ch/icl/up00000\\_00000.html](http://www.servat.unibe.ch/icl/up00000_00000.html) (last visited Oct. 22, 2013).

100. For instance, under Bulgarian law, parties may be banned for fomenting racial, national, religious, or ethnic unrest. See BULG. CONST. art. 44 § 2, translated in United Macedonian Organisation Ilinden – PIRIN v. Bulgaria, App. No. 59489/00, Eur. Ct. H.R. 29–33 (2005). In France, “parties may be banned for fostering discrimination [or] hatred toward a person or groups of persons because of their origins or the fact that they do not belong to a particular ethnic group, nation, race or religion.” See *Democracy Through Law Guidelines*, *supra* note 75, Appendix I, § I(B)(b)(5).

101. For a discussion of this case, see Cohen-Almagor, *supra* note 50, at 63–85.

102. *Id.*

was added.<sup>103</sup> And indeed, in 1988, and then again in 1992, Kach and its offshoots were banned from participating in the general elections.<sup>104</sup> Similarly, in the Netherlands, despite the lack of an explicit banning provision in the constitution, the Far-Right party CP'86 has been banned. CP'86 was first declared a criminal organization by the Dutch Supreme Court in 1997 based on the finding that it illegally promoted discrimination against foreigners in its programs and propaganda and endangered the public order.<sup>105</sup> On the basis of this decision, a lower court in Amsterdam banned and dissolved the party in 1998.<sup>106</sup>

In 2003, the German federal government, together with the Bundestag and Bundesrat, attempted to ban the NPD, the oldest neo-Nazi party in Germany.<sup>107</sup> The Federal Constitutional Court initially allowed for the initiation of the proceeding but ultimately rejected the banning petition when it discovered that several of NPD's leaders were undercover agents or informers of the German secret service.<sup>108</sup> Another example falling under the same category is the case of Vlaams Blok in Belgium. Vlaams Blok was a nationalistic and secessionist party, which presented an extreme anti-immigration agenda. In 2004, following a long procedural battle, the Court of Appeals at Ghent held that the propaganda distributed by the three organizations affiliated with Vlaams Blok<sup>109</sup> advocated systematic discrimination based on race and thus violated the law against racism and xenophobia.<sup>110</sup> This decision was upheld by the Belgian Court of Cassation.<sup>111</sup> Since that decision could have potentially led to the prosecution of individual Vlaams Blok members of Parliament and to the denial of any governmental subsidy to the party, the party

103. *Id.*

104. EA 1/88 Neiman v. Chairman of the Central Election Committee for the Twelfth Knesset [1988] IsrSC 42(4) 177; EA 2858/92 Movsovitch v. Chairman of the Central Election Committee for the Thirteenth Knesset [1992] IsrSC 46(3) 541.

105. See Paul Lucardie, *Right-Wing Extremism in the Netherlands: Why it is Still a Marginal Phenomenon*, presented at Symposium, Right-Wing Extremism in Europe (2002), available at <http://dnpp.eldoc.ub.rug.nl/FILES/root/publicatieLucardie/right-wing/rightextrem00.pdf> (discussing the dissolution of CP'86).

106. *Id.*

107. See generally Rensmann, *supra* note 65.

108. In fact, the majority of the judges supported the continuation of the proceeding, but because a two-thirds majority was required, the proceedings were discontinued. *Id.*

109. The three associations are: the association that formally receives the party's government funding, the party's education and research office, and the Nationalistic Broadcasting Foundation. See Hilde Coffé, *The Adaptation of the Extreme Right's Discourse: The Case of the Vlaams Blok*, 12 ETHICAL PERSP. 205, 215 (2005).

110. See *id.*; Jan Erk, *From Vlaams Blok to Vlaams Belang: The Belgian Far-Right Renames Itself*, 28 W. EUR. POL. 493, 494 (2005) ("[T]he Appeal Court of Ghent . . . ruled that three associations affiliated with Vlaams Blok had violated the law of 30 July 1981 against racism and xenophobia.").

111. *Id.*

decided to disband itself and establish a new, supposedly more moderate party, named *Vlaams Belang*.<sup>112</sup>

### B. Support of Violence

Another new category of banning concerns parties that support violence. This category also appears to have gained prominence in recent years, particularly in regard to parties that have links to terrorist groups. The most notable example in this respect is the 2002 Spanish amendment to the Parties Law, which includes a specific reference to the banning of parties that repeatedly exhibit behavior that encourages, legitimizes, or excuses violence.<sup>113</sup> This new law was aimed at providing a legal basis for the banning of Batasuna, the alleged political wing of ETA, the Basque separatist terrorist organization.<sup>114</sup> As expected, weeks after the amended law became effective, a petition for the banning of Batasuna and two of its predecessors was filed with the Spanish Supreme Court, and after the validity of the new statute was upheld by the Spanish Constitutional Court, Batasuna was banned.<sup>115</sup> The decision was challenged before the ECHR, and in June 2009, the ECHR affirmed the ban of Batasuna on the merits, substantially for the reasons stated by the Spanish Supreme Court.<sup>116</sup> Since this initial ban, several attempts by ETA and Batasuna to run again under different guises were thwarted by the Spanish authorities, most recently in 2011.<sup>117</sup>

A similar development arose in Israel. In 2002, in the context of the Second *Intifada*, growing hostility between Jews and Arabs, and extreme statements made by several Arab-Israeli Knesset members, the Knesset amended the banning provision of the Basic Law and added an additional ground for banning parties expressing “support

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112. See Coffé, *supra* note 109, at 216 (“One week after the ruling by the Court of Cassation, the Vlaams Blok rechristened itself as the Vlaams Belang.”).

113. See Ley Orgánica de Partidos Políticos (“L.O.P.P.”) art. 9(2), (B.O.E., 2002, 154) (Spain), translated in Turano, *supra* note 97, at 733 (“(a) violating fundamental rights by promoting, justifying, or excusing attacks on the life or dignity of the person . . . (b) encouraging or enabling violence . . . as a means to achieve political ends or as a means to undermine the conditions that make political pluralism possible; and (c) assisting and giving political support to terrorist organizations with the aim of subverting the constitutional order.”).

114. Comella, *supra* note 75, at 134; Regina M. Buono, *Delimiting Culture: Implications for Individual Rights in the Basque Country Today*, 39 TEX. INT’L L.J. 143, 150 (2003) (providing a background on Batasuna and the campaigns that led to its illegalization).

115. For a description of these events, see Comella, *supra* note 75, at 135–36; Cram, *supra* note 19, at 86 (providing background on the dissolution of Batasuna).

116. See *Herri Batasuna v. Spain*, App. Nos. 25803/04 & 25817/04, Eur. Ct. H.R. 94 (2009) (finding that there were convincing and compelling reasons for the dissolution of Batasuna).

117. See Bourne, *supra* note 2, at 15 (listing the various parties banned in Spain due to their association with Batasuna).

for armed struggle . . . against the State of Israel.”<sup>118</sup> Later that year, several banning petitions concerning *Balad*, an Arab-Israeli party; its leader, Azmi Bishara; and another Knesset member, Ahmad Tibi, were filed with the Central Election Committee.<sup>119</sup> These petitions were based, *inter alia*, on Bishara and Tibi’s alleged support for Hizballah and the Palestinian Intifada. All of the petitions, however, were rejected by the Israeli Supreme Court, and Bishara, Tibi, and Balad were allowed to participate in the elections.<sup>120</sup> Later attempts to ban Balad and its members and to ban the United Arab List-Arab Movement for Renewal were similarly rejected by the court.<sup>121</sup>

In Turkey, “support of violence” was provided as the basis for several banning cases concerning pro-Kurdish parties and was also advanced as one of the grounds for banning Refah in 1998. In the case of the Kurdish parties, the Turkish government typically argued that the targeted parties supported the Kurdistan Workers’ Party (PKK), a Kurdish terrorist organization.<sup>122</sup> In the case of Refah, the claim was that various party members, including senior officials, had called for the use of violence as a means to gain power and retain it.<sup>123</sup> When these cases were brought before the ECHR, it affirmed that incitement to violence is a legitimate ground for banning because it represents a rejection of the democratic method.<sup>124</sup> However, in all cases involving pro-Kurdish parties, the court found the evidence concerning support of violence lacking and overturned the banning decisions.<sup>125</sup> In contrast, in 2003, the ECHR affirmed the ban of the Islamic Refah Party, specifically focusing upon Refah’s “ambiguous”

118. Basic Law: The Knesset, 5718-1958, SH No. 244, § 7A (Isr.), *translated in ISRAEL’S WRITTEN CONSTITUTION* (5th ed. 2006).

119. EA 11280/02 The Central Election Committee for the Sixteenth Knesset v. Tibi [2003] IsrSC 57(4) 1 (Isr.).

120. *Id.*

121. EA 561/09 Balad - The National Democratic Party v. The Central Election Committee for the Eighteenth Knesset [2011] (Isr.); AB 9255/12 The Central Election Committee for the Nineteenth Knesset v. Zuabi [2013] (Isr.).

122. *See, e.g.*, Freedom and Democracy Party (ÖZDEP) v. Turkey, 1999-VIII Eur. Ct. H.R. 293, ¶ 14 (noting that the Turkish government claimed that ÖZDEP’s stance was similar to that of terrorist organizations); Socialist Party v. Turkey, 27 Eur. Ct. H.R. Rep. 51, ¶ 26–27 (1998) (noting that the Turkish government claimed that the party sought to justify violence and promote hatred); *see also* Dicle Kogacioglu, *Progress, Unity, and Democracy: Dissolving Political Parties in Turkey*, 38 LAW & SOC’y REV. 434 (2004) (discussing the evolution of party banning in Turkey).

123. *See* Refah Partisi (Welfare Party) v. Turkey, 2003-II Eur. Ct. H.R. 299–300, ¶¶ 84–85 (“[T]he Government cited the statements of Refah members who advocated the use of violence in order to resist certain government policies or to gain power and retain it.”).

124. *E.g., id.* at 304–05, ¶ 98 (declaring that policies opposed to democracy cannot claim protection).

125. *See* Brems, *supra* note 64, at 166–67 (describing the court’s approach to the ban of pro-Kurdish parties).

stance toward violence and its failure to distance itself from statements of support for violence made by various party officials.<sup>126</sup>

Similar constitutional limitations pertaining to parties advocating or supporting violence appear in many other democratic countries, including Denmark, Portugal, and the Czech Republic.<sup>127</sup>

### C. Challenge to the Identity of the State

A third new category of banning, which is less prevalent than the previous ones, concerns parties that challenge the identity of the state. This category has a wide range of manifestations. The narrowest version applies to parties that seek the actual destruction of the country in which they operate. For example, the German Constitution holds that parties that “seek . . . to endanger the existence of the Federal Republic of Germany” are unconstitutional.<sup>128</sup> Similarly, the French Constitution of 1958 also requires parties “to respect . . . national sovereignty.”<sup>129</sup> This research has not encountered any cases that arose under these provisions in recent years.

A second, more expansive form of this banning category concerns limitations imposed upon parties that do not threaten the existence of the state per se but merely its national or territorial integrity. For example, the Ukrainian Constitution of 1996 prohibits the establishment of parties “if their programme goals or actions are aimed at the . . . violation of sovereignty and territorial indivisibility

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126. See Refah Partisi, 2003-II Eur. Ct. H.R. 314, ¶¶ 129–31 (highlighting Refah’s speeches that mentioned the possibility of resorting to force); see also Brems, *supra* note 64, at 165 (“Refah Party . . . promot[ed] . . . violence through ambiguous references to jihad.”); Cram, *supra* note 19, at 92 (discussing three grounds for upholding the dissolution of Refah).

127. DEN. CONST. § 78(2) (Denmark), translated in *Denmark—Constitution*, INTERNATIONAL CONSTITUTIONAL LAW, available at [http://www.servat.unibe.ch/icl/da00000\\_.html](http://www.servat.unibe.ch/icl/da00000_.html) (last visited Oct. 22, 2013) (“Associations employing violence, or aiming at attaining their object by violence, by instigation to violence, or by similar punishable influence on people of other views, shall be dissolved by judgment.”); PORT. CONST. art. 46 § 1 (Portugal), translated in *Portugal—Constitution*, INTERNATIONAL CONSTITUTIONAL LAW, available at [http://www.servat.unibe.ch/icl/po00000\\_.html](http://www.servat.unibe.ch/icl/po00000_.html) (last visited Oct. 22, 2013) (“Citizens have the right to form associations freely and without requiring any authorization provided such associations are not intended to promote violence . . . .”); ÚSTAVA ČR. art. 5 (Czech Rep.), translated in *Czech Republic—Constitution*, INTERNATIONAL CONSTITUTIONAL LAW, available at [http://www.servat.unibe.ch/icl/ez00000\\_.html](http://www.servat.unibe.ch/icl/ez00000_.html) (last visited Oct. 22, 2013) (stating that parties may participate in the democratic system as long as they “reject[] force as a means for asserting their interests”).

128. Grundgesetz [GG] [Basic Law], art. 21(2) (Ger.), translated in KOMMERS, *supra* note 71, at 218.

129. 1958 CONST. art. 4 (Fr.), translated in *France—Constitution*, INTERNATIONAL CONSTITUTIONAL LAW, available at [http://www.servat.unibe.ch/icl/fr00000\\_.html](http://www.servat.unibe.ch/icl/fr00000_.html) (last visited Oct. 22, 2013).

of the State.”<sup>130</sup> A similar provision appears in the Turkish Constitution, which authorizes the banning of parties which threaten the “integrity of State territory.”<sup>131</sup> This banning provision has been employed in a series of cases involving Kurdish parties in Turkey, which were attacked on the ground of advocating separatist Kurdish agendas and hence threatening Turkey’s territorial integrity.<sup>132</sup> Similarly, the Bulgarian Constitution of 1991 states that “[o]rgani[z]ations whose activities are directed against the country’s sovereignty or territorial integrity or against the nation’s unity . . . shall be prohibited.”<sup>133</sup> This provision was the basis of the attempted ban of the United Macedonian Organization *Ilinden-Pirin*, an ethnic Macedonian party that claimed that Bulgaria’s Pirin region should belong to Macedonia.<sup>134</sup> In 2000, the party was banned by the Bulgarian Constitutional Court because of its separatist claims;<sup>135</sup> however, the ECHR overturned the ban, as well as similar bans in Turkey, ruling that a secessionist agenda is not a legitimate basis for banning a party in the absence of association with violence or antidemocratic objectives.<sup>136</sup>

A final type of limitation within this category refers to parties that seek to abolish a central defining characteristic of the state. Two important examples in this respect can be found in Israel and Turkey. The Israeli banning regime authorizes the banning of a party that negates “the existence of the State of Israel as a Jewish and democratic state.”<sup>137</sup> This clause was understood as authorizing the

130. UKR. CONST. art. 37 (Ukraine), *translated in Ukraine—Constitution, INTERNATIONAL CONSTITUTIONAL LAW, available at [http://www.servat.unibe.ch/icl/up00000\\_.html](http://www.servat.unibe.ch/icl/up00000_.html)* (last visited Oct. 22, 2013).

131. TURK. CONST. art. 68 § 4 (Turkey), *translated in Refah Partisi (Welfare Party) v. Turkey*, 2003-II Eur. Ct. H.R. 267 ¶ 45.

132. See cases cited *supra* note 122.

133. See BULG. CONST. art. 44 § 2 (Bulgaria), *translated in United Macedonian Organisation Ilinden – PIRIN v. Bulgaria*, App. No. 59489/00, Eur. Ct. H.R. 29–33 (2005).

134. See *United Macedonian Organisation Ilinden – PIRIN v. Bulgaria*, App. No. 59489/00, Eur. Ct. H.R. ¶ 15 (2005) (“[T]he Bulgarian parliament requested the Constitutional Court to declare the applicant party unconstitutional . . . contrary to Articles 11 § 4 and 44 § 2 of the Constitution . . .”).

135. See *id.* ¶ 27 (“A political party which declares part of Bulgaria’s territory as foreign and engages in actions for its secession is an unconstitutional party.”).

136. See *id.* ¶ 61 (“The mere fact that a political party calls for autonomy or even requests secession of part of the country’s territory is not a sufficient basis to justify its dissolution on national security grounds.”); see also *Freedom and Democracy Party (ÖZDEP) v. Turkey*, 1999-VIII Eur. Ct. H.R. 293, 317, ¶ 48 (overturning the ban of the Kurdish Freedom and Democracy party in Turkey); *Yazar v. Turkey*, 2002-II Eur. Ct. H.R. 395, ¶¶ 57–58 (overturning the ban of the Kurdish People’s Labor Party (HEP) in Turkey).

137. Basic Law: The Knesset, 5718-1958, SH No. 244, § 7A (Isr.), *translated in ISRAEL’S WRITTEN CONSTITUTION* (5th ed. 2006).



banning of parties that object to the Jewish character of Israel.<sup>138</sup> Based on this clause, there have been several attempts to ban Arab-Israeli parties in Israel. However, all such attempts have been rejected by the Israeli Supreme Court.<sup>139</sup> Similarly, the Turkish Constitution defines several elements of the state as essential and inviolable and prohibits the establishment of parties that seek to change these elements.<sup>140</sup> Perhaps the most important of these principles is the secular nature of the state.<sup>141</sup> Because the modern Turkish state was established by Ataturk as a secular republic, this principle serves as a bedrock of the Turkish state and was used to ban several Islamic parties in Turkey throughout the years, including the Refah Party mentioned above.<sup>142</sup> When the ECHR upheld this ban in 2003, it emphasized the importance of secularism and separation between religion and the state for the future of democracy in Turkey.<sup>143</sup> Yet, it explicitly rejected the approach that a mere

138. See Rosenblum, *supra* note 13, at 65–67 (discussing the suggested justifications for the ban of parties that challenge the state of Israel's Jewish character).

139. Among the cases involving such a claim, one can find the attempted ban of the Progressive List for Peace (PLP) in 1988 (EA 2/88 Ben Shalom v. Central Elections Committee for the Twelfth Knesset 43(4) IsrSC 221 [1988]); the attempted refusal to register the Arab Movement for Change in 1996 (PCA 2316/96 Aizekson v. The Parties' Registrar 50(2) IsrSC 529 [1996]); the attempted ban of Balad in 1999 (EA 2600/99 Erlich v. Chairperson of the Central Election Committee 53(3) IsrSC 38 [1999]); the attempt to ban Balad and its leader, Azmi Beshara in 2002 (AB 11280/02 The Central Election Committee for the Sixteenth Knesset v. Tibi 57(4) IsrSC 1 [2003]); the attempted ban of Balad and the United Arab List-Arab Movement for Renewal in 2009 (EA 561/09 Balad – The National Democratic Party v. The Central Election Committee for the Eighteenth Knesset [2011]); and the attempted ban of Knesset Member Hanin Zuabi of Balad in 2012 (AB 9255/12 The Central Election Committee for the Nineteenth Knesset v. Zuabi [2013]).

140. See Rosenblum, *supra* note 13, at 62–65 (describing several instances in which Turkey has attempted to ban parties that threaten its secularism principle).

141. Article 68 § 4 of the Turkish Constitution states:

The statutes and programmes, as well as the activities of political parties shall not be in conflict with the independence of the state, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, the principles of the democratic and secular republic; they shall not aim to protect or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime.

See TURK. CONST. art. 68 § 4, (Turkey), translated in *Turkey Constitution*, INTERNATIONAL CONSTITUTIONAL LAW, available at [http://www.servat.unibe.ch/icl/tu00000\\_.html](http://www.servat.unibe.ch/icl/tu00000_.html) (last visited Oct. 22, 2013).

142. For an interesting treatment of this matter, see Dicle Kogacioglu, *Dissolution of Political Parties by the Constitutional Court in Turkey: Judicial Delimitation of the Political Domain*, 18 INT'L SOC'Y 258 (2003); David Schilling, *European Islamophobia and Turkey - Refah Partisi (The Welfare Party) v. Turkey*, 26 LOY. L.A. INT'L & COMP. L. REV. 501, 504–06 (2004) (explaining the establishment of secularism in Turkey under Ataturk and its significance in the constitution).

143. See *Refah Partisi (Welfare Party) v. Turkey*, 2003-II Eur. Ct. H.R. 312, ¶¶ 123–25 (“Mindful of the importance for survival of the democratic regime of ensuring respect for the principle of secularism in Turkey, the Court considers that the

threat to the state's identity is sufficient to justify a ban if the threatened element is not crucial for preserving democracy.<sup>144</sup>

#### IV. ACCOMMODATING THE NEW CATEGORIES WITHIN THE WEIMAR PARADIGM

The three new grounds for banning outlined above do not fit neatly within the Weimar paradigm. They do not involve parties that explicitly reject democracy wholesale or parties that offer a new system of government. Instead, they target parties that threaten certain *elements* within the liberal constitutional order, such as the commitment to equality and nondiscrimination, the absolute commitment to a nonviolent resolution of disputes, or secularism. This discrepancy between the basic assumptions of the Weimar paradigm and the new banning categories creates considerable tensions, which have largely been unacknowledged and undertheorized.<sup>145</sup>

Generally speaking, it seems that there are three ways to approach this conundrum. The first: arguing that if overtly antidemocratic parties have largely disappeared from the political arena in established democracies, then perhaps party banning has outlived its use and should be effectively abandoned. Accordingly, judicial decisions or constitutional provisions authorizing the ban of parties that do not threaten democracy in the narrowest sense would be simply illegitimate. A possible variation on this approach would limit the new banning categories to cases where the party is directly linked to violent groups. A second possible approach: attempting to explain some or all of these new categories by expanding the Weimar paradigm. Often this is done by adopting a "thicker" view of democracy that emphasizes the importance of protecting fundamental rights within a democracy beyond the principle of majority rule. The third approach: proposing a substantially different paradigm that is distinct from the traditional Weimar paradigm. This Article will

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Constitutional Court was justified in holding that Refah's policy of establishing sharia was incompatible with democracy.").

144. See *id.* at 304–05, ¶ 98 (providing two conditions upon which a political party may legitimately promote changes in the law or constitutional structure of Turkey, one of which requires the proposed change to be compatible with democratic principles).

145. But see Rosenblum, *supra* note 13, at 22–24 (explaining that the threat of Fascist and Communist parties has been replaced by the challenge of ethnic and religious parties, which may exhibit illiberal tendencies); Harvey, *supra* note 18, at 412 (explaining that while earlier banning cases fell within the paradigm of Cold War politics and democratization in the aftermath of the Cold War, most recent cases do not fit within that paradigm); Basedau et al., *supra* note 18, at 624 (acknowledging the inadequacy of the traditional militant democracy approach to the new democratic challenges).

proceed to examine the first two approaches in more detail. The alternative, third paradigm will be discussed in the next Part.

### A. Questioning the Legitimacy of the New Banning Categories

The first possible approach to deal with the expansion of the party-banning phenomenon is to simply reject it: to hold that the banning of parties that do not endanger democracy in its narrowest sense is simply illegitimate. According to this approach, the new grounds should be considered an unwarranted expansion of the Weimar paradigm and, therefore, should be abolished. Although they do not explicitly acknowledge this, a hint of this approach may be reasonably derived from the analysis suggested by Nolte and Fox. In their seminal article on the topic, they suggested that the relevant criteria for banning should be “whether a particular political group, by its words or deeds, is sufficiently dangerous *as to pose a threat to the continued existence of the state’s democratic system.*”<sup>146</sup> When their position was criticized by other commentators,<sup>147</sup> Nolte and Fox explicitly stated that they were limiting their argument to the core case of the Weimar paradigm: the preservation of a system of “genuine periodic elections.”<sup>148</sup> Thus, a ban was allowed only if there was a “demonstrable case that the excluded actor presents a danger to the continuance of regular elections.”<sup>149</sup> This reluctance to justify the broader banning grounds is even more apparent in Issacharoff’s analysis. Issacharoff explained that “[t]he real definition of democracy must turn on the ability of majorities to be formed and reformed over time and *to remove from office those exercising governmental power.*”<sup>150</sup> Hence, the focus of a banning regime should be on parties that seek to abolish the concept of elections and the “renewability of consent.”<sup>151</sup>

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146. Fox & Nolte, *supra* note 13, at 421 (emphasis added).

147. See Martti Koskeniemi, *Whose Intolerance, Which Democracy?*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 436 (Gregory H. Fox & Brad R. Roth eds., 2000) (rejecting the notion that the terms *democracy* or *antidemocratic* have but one meaning and expressing concern that Fox and Nolte’s approach is not sensitive enough to the varying circumstances and idiosyncrasies of different cultures); Brad R. Roth, *Democratic Intolerance: Observations on Fox and Nolte*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 441 (Gregory H. Fox & Brad R. Roth eds., 2000) (expressing concerns that banning antidemocratic parties in democracies may legitimize limitations upon electoral participation in the name of other values, including by undemocratic regimes).

148. See Fox & Nolte, *supra* note 13, at 445 (“Our analysis centers on regimes that profess adherence to a system of ‘genuine periodic’ elections.”).

149. *Id.* at 448.

150. Issacharoff, *supra* note 13, at 1464 (emphasis added).

151. See *id.* at 1464–66 (“The definition of groups that are tolerable within a democratic order must turn . . . on such groups’ willingness to be voted out of office . . .”).

This approach could be criticized both on a normative level and on a practical one. Normatively, the narrow focus of this approach on the mere existence of elections is questionable. It is doubtful whether a regime that oppresses minorities or uses violence against its internal enemies can be considered democratic, even if it holds periodic elections. Indeed, many current definitions of democracy are much broader than the mere holding of elections, and fundamental principles like equal treatment and protection of minorities are often considered intrinsic to the definition of democracy.<sup>152</sup> Notably, when the German Federal Constitutional Court defined a “free democratic basic order” in the context of a party-banning decision, it held that such a basic order consists of a series of principles, including respect for human rights, popular sovereignty, separation of powers, responsibility of government, lawfulness of administration, independence of the judiciary, and a multiparty system based upon equality of opportunities for all political parties.<sup>153</sup> On the other hand, the categorical approach endorsed by Nolte and Fox and Issacharoff also has obvious benefits. Most importantly, considering the exceptional nature of party banning, and the obvious need to limit its use, this approach has the advantage of clarity and simplicity. It draws a well-defined principle that demarcates the rare instances in which a party may be banned, leaving all other cases outside of its scope.

In any event, regardless of its normative validity, it appears that the main problem with this approach is practical—namely, it is significantly at odds with the common practice of a wide range of respectable democracies and highly regarded institutions like the ECHR. To varying degrees, all the above-mentioned entities authorize the banning of parties beyond the narrow interpretation of the Weimar paradigm. While these various entities could of course be criticized for their approach, it seems more productive to examine whether their approach could be explained and conceptualized. Assuming that these more expansive banning categories are here to stay, it appears that such an attempt—to offer an updated understanding of these new banning categories—could actually assist in the application of banning provisions and in determining their proper limits.

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152. See, e.g., Frankenberg, *supra* note 67, at 130–32 (emphasizing equality and tolerance as values that are intrinsic to democracy); Fox & Nolte, *supra* note 13, at 396 (“Most definitions of democracy are substantially broader than the mere holding of elections, as are the claims of many States describing themselves as democratic.”).

153. See Socialist Reich Party Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 23, 1952, 2 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerwGE] 1, 12–13 (Ger.), *translated in part in* DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 216 (1994) (emphasizing that these principles are the most fundamental of a free democratic constitutional state).

Some effort to offer such a practical solution, without expanding the narrow interpretation of the Weimar paradigm, has been made by Issacharoff.<sup>154</sup> In this respect, Issacharoff noted two types of parties: “insurrectionary parties”<sup>155</sup> and “separatist parties.”<sup>156</sup> Within the present analysis, both types of parties fall within the ambit of the support of violence category. According to Issacharoff, since these categories go beyond the justifiable limits of the Weimar paradigm, they should be subjected to the clear and present danger standard. Specifically, the banning should depend upon the extralegal actions of the party (and its members) rather than the party’s agenda.<sup>157</sup> In other words, according to Issacharoff, the purpose of their banning is to prevent unlawful violent activity by organizations linked to the party.<sup>158</sup> Therefore, the crucial banning criteria are “the directness of the organizational link to unlawful activity and the immediacy of the likely harm.”<sup>159</sup>

Though this approach appears to offer a workable solution within the Weimar paradigm, it does not sufficiently address the problem. As a descriptive matter, even if the ultimate purpose of these bans is indeed to prevent violence and unlawful actions, it does not seem that the existence of a formal link between the party’s organization and such violent activities reflects the main concern of such bans. In fact, frequently the bans seem to address a more generalized threat—namely, the danger that a party advocating racism or violence will contribute to the creation of a climate of violence or a climate of hate.<sup>160</sup> This is particularly true concerning parties that are banned for inciting hate or discrimination. In cases involving such parties, though the danger of violence is usually looming in the background, the party is not typically a front or political wing of an illegal organization.<sup>161</sup> For example, in the case of the neo-Nazi NPD in Germany, the relationship between the party and violent activity has been described as “primarily a ‘symbolic’ one,” and it has been noted that no organizational link exists.<sup>162</sup> Even

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154. Issacharoff, *supra* note 13, at 1433–42.

155. Issacharoff defines these parties as parties that “use the electoral arena as an organizing forum for insurrectionary attacks on the state or as an outlet for defending illegal activities.” *Id.* at 1433.

156. Issacharoff defines these parties as parties that are related to armed groups fighting against the state. *Id.* at 1437.

157. *Id.* at 1442 .

158. *Id.*

159. *Id.* at 1452; *see also* Bourne, *supra* note 2, at 21–22 (distinguishing between antisystem ideologies and antisystem behavior).

160. *See infra* text accompanying notes 177–78.

161. *See* Mudde, *supra* note 25, at 206 (discussing cases where extreme Right parties, such as the NPD and CP’86, were banned).

162. *See* Michael Minkenberg, *Repression and Reaction: Militant Democracy and the Radical Right in Germany and France*, 40 PATTERNS OF PREJUDICE 25, 40 (2006) (noting that “[b]ecause the relationship between the NPD and these more militant and

though certain members of the party may have been involved in violent actions, this does not necessarily mean that the party as such was involved in the violence.<sup>163</sup> Instead, the claim is that the party enables or creates a situation in which these violent actions are more likely. Issacharoff's approach does not appear to adequately address such circumstances.

Moreover, it is not clear that one should wish to limit these bans to cases involving a direct organizational link between the party and immediate unlawful activity. When the party is directly linked to immediate unlawful activity, there is no need for the specific party-banning authorization that exists in various constitutions. Instead, those linked to unlawful activity can be prosecuted and have their case decided according to the standard principles of conspiracy law. As will be further explained,<sup>164</sup> it seems that the authorization to ban certain parties actually offers a democratic regime an instrument to battle antiliberal actors that is less repressive than the criminal system. It creates a "middle ground," which some have referred to as "constitutional illegality,"<sup>165</sup> that does not require a criminal procedure, with its far-reaching implications and accompanying procedural safeguards.<sup>166</sup> This middle ground would be lost if one were to focus exclusively upon the direct connection between the party and its immediate illegal activity.<sup>167</sup>

### B. *Expanding the Weimar Paradigm*

Perhaps the most common approach for explaining the new banning categories is based on an expansion of the definition of *democracy* in a more substantive direction, which includes within the

violence-prone milieu is primarily a 'symbolic' one, the attempted ban resulted in stimulation rather than stigmatization").

163. See Mudde, *supra* note 25, at 206 (explaining that in banning cases that involved extreme Right parties, "direct involvement of party members in violence was always looming in the background," but that this was hardly used as an argument in the court. More importantly, there was no proof in any of these cases "that the parties as such were involved in the violence." Indeed, in none of the cases was there proof that the party leadership knew about violent activities, none of the perpetrators were "prominent party members," and typically "the party in question distanced itself from the violence and the perpetrators, who were generally expelled from the party").

164. See *infra* text accompanying notes 281–85.

165. See Comella, *supra* note 75, at 138–39 (explaining that the new Spanish banning statute attempts to create an intermediate concept of "constitutional illegality," which "occupies a space somewhere between criminal illegality, on the one hand, and pure legality, on the other").

166. *Id.*

167. Notably, when Issacharoff discusses parties that are opposed to democracy in the narrow sense, he emphasizes that "what was undertaken in Turkey was *not a criminal prosecution* of Refah members or leaders, *but a disqualification from organizing an electorally based political party to pursue what the courts perceived to be intolerant aims.*" Issacharoff, *supra* note 13, at 1445 (emphasis added). Thus, in principle, Issacharoff acknowledges this distinction.

term "certain fundamental values beyond free elections." Naturally, an expansion of the scope of *democracy* also expands the scope of parties that could legitimately be banned as "antidemocratic." This approach seems to reflect the view of the ECHR and several commentators dealing with this matter.<sup>168</sup> The starting point for such an approach can be found in the generic form of restriction clauses in many international covenants, such as Article 22(2) of the International Covenant on Civil and Political Rights (ICCPR)<sup>169</sup> or Article 11(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).<sup>170</sup> Typically these conventions allow for the restriction of various rights and freedoms, including the freedom of association, for the protection of the rights and freedoms of others or for the protection of a general interest.<sup>171</sup> Notably, these clauses do not limit these restrictions to circumstances that involve a wholesale threat to democracy, although they do require that any such restriction be subjected to a proportionality test deeming them "necessary in a democratic society."<sup>172</sup>

The ECHR applied these principles in its decision concerning the Turkish Refah Party, in which it stated that a party "may promote a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles."<sup>173</sup> The court made it clear that a ban is legitimate if a party "is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy."<sup>174</sup> Thus, for example, in its specific discussion of the Refah Party, the court explained that Refah's proposal for a plurality of legal systems "would undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms, which is one of the fundamental principles of democracy."<sup>175</sup>

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168. See *infra* text accompanying notes 173–86.

169. See International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 ("No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society . . .").

170. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (providing a similar restriction clause to the rights of freedom of assembly and association).

171. Such as national security, public safety, the protection of public health or morals, public order (only the ICCPR), and the prevention of disorder or crime (only the European Convention). See Brems, *supra* note 64, at 128–29.

172. See *id.* (according to both conventions, such restrictions must also be "prescribed by law").

173. Refah Partisi (Welfare Party) v. Turkey, 2003-II Eur. Ct. H.R. 303–04, ¶ 98.

174. *Id.*

175. *Id.* at 310, ¶ 119 (quoting from the decision of the First Chamber).

This approach allows a broader scope of banning that goes beyond the narrow formulation of the Weimar paradigm and legitimizes the banning of a party that merely opposes “fundamental principles of democracy” even if it does not oppose democracy *per se*. Courts and commentators have followed the same route and have attempted to link each of the three new banning categories to this broader understanding of democracy to explain why parties falling under these categories could be considered incompatible “with fundamental principles of democracy.”

In justifying the banning of parties inciting hate or discrimination, commentators have focused upon the strong commitment of democracy to values of equality, pluralism, and protection of minorities, who are typically the target of hate messages.<sup>176</sup> It has also been argued that the objective of such a ban is to prevent a “climate of fear” and intimidation that could potentially intimidate groups and individuals and drive them out of certain areas of the public and political spheres.<sup>177</sup> In that sense, the banning of parties inciting hate could even be considered as necessary for the expansion of free speech rather than a limitation upon such speech. Its goal is to prevent the depression of political participation and representation of victim groups, typically minority groups, which may result from the propaganda of parties inciting hate.<sup>178</sup>

Similarly, the ban of parties that support violence has been justified through the inherent commitment of democracy to the use of peaceful and nonviolent means.<sup>179</sup> Indeed, the objective of parties is to win with “ballots not bullets.”<sup>180</sup> Even the narrowest definitions of democracy<sup>181</sup> acknowledge that a democracy is based upon free competition between political parties that does not involve violence

176. ROSENBLUM, *supra* note 13, at 434–36; Frankenberg, *supra* note 67, at 130–32.

177. Frankenberg, *supra* note 67, at 130–32. See Niesen, *supra* note 64, ¶¶ 35–36 (“[F]ree public political activity . . . is most endangered in those areas where NS-affine parties tend to exert a hegemonic influence . . .”).

178. Rosenblum, *supra* note 13, at 54–55; Niesen, *supra* note 64, ¶¶ 35–36 (emphasizing the “politically chilling” silencing effect that these parties can have on the political process). There is also a practical explanation for such restrictions—the threat that hate-mongering parties would provoke civil disorder and acts of violence between different segments of society. In this respect, the party ban (like other limitations upon electoral speech) is aimed at toning down rhetoric, especially in the context of electoral campaigns, which by nature give rise to passions and high tension. Rosenblum, *supra* note 13, at 53–54.

179. ROSENBLUM, *supra* note 13, at 423.

180. See generally Noah Feldman, *Ballots and Bullets*, N.Y. TIMES (July 30, 2006), [http://www.nytimes.com/2006/07/21/magazine/30wwln\\_lede.html?pagewanted=print&r=0](http://www.nytimes.com/2006/07/21/magazine/30wwln_lede.html?pagewanted=print&r=0) (discussing situations in the Middle East where parties use force in conjunction with elections in an effort to exert influence upon the political arena).

181. See HUNTINGTON, *supra* note 55, at 6–10, 28–29 (discussing different definitions and dimensions of democracy).



but rather persuasion and peaceful debate.<sup>182</sup> Thus, parties supporting violence can be characterized as antidemocratic even if they do not nominally oppose democracy as a form of government.<sup>183</sup>

It appears that limitations aimed at parties that challenge elements of the state's identity are the most difficult to justify from a democratic perspective. They appear to be the farthest away from the narrow definition of democracy, and, thus, they are the most restrictive and far-reaching in their impact. However, they too have been justified on the basis of their link to fundamental democratic values.<sup>184</sup> For instance, in its decision upholding the ban of the Refah Party, the ECHR held that the principle of secularism in Turkey is a necessary component of its democratic nature.<sup>185</sup> Similarly, the Israeli provision allowing for the ban of parties negating the Jewish nature of the state has been tentatively linked to the protection of the collective right of the Jews for self-determination, although only in situations in which the party in question categorically denies the right of the Jewish people to self-determination.<sup>186</sup>

This expansion of the Weimar paradigm is problematic on several levels, some of which will be discussed later on. Here, the focus will be on its main difficulty—its failure to supply a sufficient and coherent account as to the purpose of the banning and the dangers that the banning is supposed to address. In this respect, it is worth reiterating that the banning of a political party is an exception to the foundational democratic principles of state-neutrality, freedom of association, and equal participation.<sup>187</sup> In order to justify a ban, it is reasonable to require proof that such an action is narrowly tailored to achieving a necessary democratic purpose. When a democracy is dealing with parties that are overtly antidemocratic, the Weimar paradigm makes a lot of sense. The fear is that these parties will come to power and put an end to free elections. However, when dealing with parties that do not seek to put an end to free elections but merely reject a central aspect of democracy, such as pluralism, this underlying purpose does not appear relevant. So what is the purpose of the banning in these circumstances? What threat is it supposed to address?

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182. *Id.*

183. ROSENBLUM, *supra* note 13, at 423. The more problematic issue is determining what level of support is sufficient to justify such a banning. *Id.* at 424–28.

184. *See infra* notes 185–86.

185. *See* Refah Partisi (Welfare Party) v. Turkey, 2003-II Eur. Ct. H.R. 312, ¶¶ 123–25 (recognizing that Refah's policy of establishing Sharia was inconsistent with secularism as a fundamental principle of democracy).

186. Medina, *supra* note 67, at 358–59. Although Medina explains the coherence of such an approach, he ultimately does not endorse it.

187. *See, e.g., Democracy Through Law Guidelines, supra* note 75, art. III(V)(14) (“The prohibition or dissolution of a political party is an exceptional measure in a democratic society.”).

The importance of resolving this question can be demonstrated through the debate concerning the justifiability of the banning of Batasuna (and two of its predecessor parties) in Spain. Most commentators had rightfully predicted that the ECHR would uphold the banning of Batasuna, basing this conclusion on the court's position in the *Refah* case in which the court stated that a party "whose leaders incite to violence"<sup>188</sup> could legitimately be banned.<sup>189</sup> Others, like Ian Cram, have claimed that this ban will not, and should not, be upheld because of the "negligible prospect of Batasuna holding political power in the Basque country"<sup>190</sup> and because Batasuna does not "put in jeopardy the stability of democratic institutions in the Basque country or elsewhere in Spain."<sup>191</sup>

This difference of opinion does not merely represent a difference in the "militancy" of the various commentators. In fact, it also reflects the ambiguity and murkiness that arise when the Weimar paradigm is applied to the new categories of banning, such as support for violence. While the supporters of the ban seemed correct in their assessment that the ECHR regards incitement to violence as a legitimate banning ground, their opponents appeared correct in arguing that under the Weimar paradigm the probability that a party will come to power and destabilize the regime is a highly relevant factor.<sup>192</sup>

In its opinion affirming the banning of Batasuna, the ECHR did not resolve this tension.<sup>193</sup> While the court cited the *Refah* case for the proposition that a banning is justified only when the danger that the party will implement its antidemocratic agenda is "sufficiently established and imminent,"<sup>194</sup> it did not actually apply this requirement to Batasuna. Instead,

188. *Refah Partisi (Welfare Party) v. Turkey*, 2003-II Eur. Ct. H.R. 303-04, ¶ 98.

189. See, e.g., Thomas Ayres, *Batasuna Banned: The Dissolution of Political Parties Under the European Convention of Human Rights*, 27 B.C. INT'L & COMP. L. REV. 99, 108-12 (2004) ("The ECHR will also probably consider Batasuna officials' public statements and concurrent membership with ETA as 'relevant and sufficient' evidence of the party's active support of violence to achieve political ends, thereby justifying Spain's interference."); Katherine A. Sawyer, *Rejection of Weimarian Politics or Betrayal of Democracy?: Spain's Proscription of Batasuna Under the European Convention on Human Rights*, 52 AM. U. L. REV. 1531, 1566-72 (2003) (predicting that the ECHR would uphold the ban on Batasuna as serving a legitimate aim, notably national security).

190. See Cram, *supra* note 19, at 93 (justifying this conclusion by contrasting Batasuna, which did not occupy a dominant position in the legislature, with *Refah*, who did occupy such a position at the time of its proscription); see also Harvey, *supra* note 18, at 409 (implicitly criticizing the German and Spanish militant democracies who sought to ban parties largely because of the expected symbolic value).

191. See Cram, *supra* note 19, at 93 ("[T]he violent actions of ETA could not be said to have caused an institutional crisis for Spanish democracy . . .").

192. See *supra* text accompanying notes 64-68.

193. *Herri Batasuna v. Spain*, App. No 25803/04 Eur. Ct. H.R. ¶¶ 81-93 (2009).

194. See *id.* ¶¶ 81-83 ("[A] state cannot be required to wait, before intervening . . . even though the danger of that policy for democracy is sufficiently established and imminent.").

it simply focused on the expressions of support for violence made by party officials and the links between Batasuna and ETA, concluding that these factors, on their own, justified the ban.<sup>195</sup> Thus, the question remains whether this factor—the probability that the party will win an election—is relevant when one is dealing with a party that is banned for support of terrorism rather than for its overt antidemocratic ideology. Also, if it is not relevant, What is the purpose of the ban?

One possible answer could be that although the banning is not aimed at preventing a party from coming to power and abolishing democracy as a whole, it is aimed at preventing the party from coming to power and implementing its antiliberal agenda.<sup>196</sup> However, this explanation seems insufficient on several levels.

As a descriptive matter, most of the parties that have recently been subjected to these new categories of banning do not stand a realistic chance of winning an election. Therefore, there is no imminent threat that they will come into power and implement their agenda. For example, before Batasuna was banned in Spain, it enjoyed a steady support of merely 10–20 percent of Basque voters.<sup>197</sup> In fact, in the 2001 elections preceding the banning decision, Batasuna suffered a significant blow, winning only seven of seventy-five seats in the regional Parliament, compared to fourteen in the previous elections.<sup>198</sup> Similarly, Kach in Israel, had won only one of 120 seats in the Knesset in the 1984 elections.<sup>199</sup> Although polls prior to its banning in 1988 indicated that it would have won five to six Knesset seats,<sup>200</sup> it is clear that Kach was still very far from achieving a prominent position in the Knesset. A similar case could be made for the German NPD Party that was the target of a banning attempt in 2002. The party won only 0.4 percent of the vote in the 2002 federal elections, and though its support grew following the failure of the banning attempt (its best score was 9.4 percent of the vote in the regional Parliament of Saxony-Anhalt),<sup>201</sup> it is clear that

195. See *id.* ¶¶ 85–93 (finding that the views and actions imputable to the Batasuna Party were incompatible with the concept of a democratic society).

196. For example, in its *Refah* opinion, the ECHR explained that “the change proposed [by a political party] must itself be compatible with fundamental democratic principles.” *Refah Partisi (Welfare Party) v. Turkey*, 2003-II Eur. Ct. H.R. 267, 303–04 (emphasis added).

197. Turano, *supra* note 97, at 735.

198. See Buono, *supra* note 114, at 150 (explaining that “Basque voters made their displeasure with the resumed violence evident and revealed a preference for moderate nationalism”).

199. Ruth Gavison, *Esrin Shana Ihlilchat Irador – ha-Zechut Lehibacher velikhei ha-Historia [Twenty Years to the Yirador Decision – The Right to be Elected and Historical Lessons]*, in *ESSAYS IN HONOUR OF SHIMON AGRANAT* 145, 189 (Aharon Barak et al. eds., 1986).

200. *Id.*

201. Tim Bale, *‘Intolerant’ or ‘Militant’ Democracies? The Banning of Political Parties in Europe: A Consequentialist Consideration*, presented at Workshop I: Democracy and Political Parties, ECPR Joint Sessions (Granada, Apr. 14–19, 2005).

the NPD was still far from coming into power, even on the regional level.<sup>202</sup> The two outliers in this respect are the Turkish Refah Party and the Belgian Vlaams Blok Party. Both enjoyed considerable support at the time of their ban—Refah was the largest party in Parliament and Vlaams Blok was the largest party in Flanders.<sup>203</sup> However, these two examples do not seem to affect the conclusion stated above. As to Refah, it was mainly banned because it was considered antidemocratic in the narrow sense.<sup>204</sup> Thus, its banning does not really affect the discussion of the three new categories.<sup>205</sup> As to Vlaams Blok, it was subject to a *cordon sanitaire*, a pact between all other parties that agreed never to include it in a coalition government because of its extreme right-wing views.<sup>206</sup> Thus, regardless of the ban, it would have been effectively blocked from attaining executive power.<sup>207</sup>

In fact, two high courts that have dealt with banning decisions, the German Constitutional Court and the Israeli Supreme Court, have acknowledged that banning may be justified even when the party does not pose a real threat of coming to power. This was first recognized by the German Constitutional Court in its 1958 decision concerning the Communist Party of Germany when it recognized that the existence of a “logical danger” is sufficient even if “it has no chance of realizing its unconstitutional plans at any foreseeable time in the future.”<sup>208</sup> This approach was reiterated in its more recent decision concerning the neo-Nazi NPD when the court specifically noted that a party may be banned even before it poses a concrete, or actual, danger.<sup>209</sup> Similarly, the Israeli Supreme Court has concluded that the absence of a probability test in the Basic Law’s provision authorizing party banning reflects the legislators’ intention that such

202. *Id.*

203. See Macklem, *supra* note 7, at 507 (explaining that at the time of Refah’s dissolution, it held the most seats in the Turkish Parliament); see Coffé, *supra* note 109, at 212 (“Vlams Blak became the largest faction in the Flemish Parliament in the elections of June 13, 2004 . . .”).

204. *Id.*

205. See *Refah Partisi (Welfare Party) v. Turkey*, 2003-II Eur. Ct. H.R. 267, 303–04 (“[A] political party whose leaders incite or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognized in a democracy cannot lay claim to the Convention’s protection against penalties on those grounds.”).

206. Mudde, *supra* note 25, at 195.

207. *Id.*

208. Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Aug. 17, 1956, 5 BVerfGE 85, 143, 146 (Ger.), *translated in* CURRIE, *supra* note 71, at 218; see also Frankenberg, *supra* note 67, at 126.

209. See Rensmann, *supra* note 65, ¶ 39, (“The abolishment of a party before it poses any *konkrete Gefahr* (actual or clear and present danger) to the basic values enshrined in the Constitution is intended to avoid the rise of any anti-democratic movement that might then no longer be containable by constitutional means.”).

a decision will not be based upon the likelihood that the party will implement its agenda.<sup>210</sup>

Furthermore, it appears that the reasons for banning when dealing with parties supporting violence or inciting hate or discrimination have often more to do with what the parties say rather than what the parties plan to do when they come into power. For example, the banning of the Basque Batasuna Party was largely based upon a long series of public acts by Batasuna officials that demonstrated its alleged endorsement, tacit and explicit, of violence as a means for achieving political ends.<sup>211</sup> Among the expressions the Spanish Supreme Court took into account were expressions of glorification and identification with ETA terrorists, including declarations that several ETA terrorists were “honorary citizens” in municipalities controlled by Batasuna;<sup>212</sup> expressions of explicit support for ETA violence, including threats concerning the use of violence;<sup>213</sup> the refusal of elected party officials to condemn fatal bombings;<sup>214</sup> and other public acts of support for ETA terrorism. In addition, the court took into account the fact that various convicted members of ETA occupied the highest ranks of Batasuna leadership.<sup>215</sup> Notably, Batasuna’s political program and legislative agenda were not at issue.

Similarly, in its decision concerning the neo-Nazi NPD, the German Constitutional Court specifically noted that party banning is not only designed to prevent dangers to the existence of the “free democratic order” as such but also “to foreclose attacks on human dignity by means of the specific organizational structure of a political party.”<sup>216</sup> According to this decision, a party may be banned if it uses the party platform to verbally “attack” the human dignity of

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210. Medina, *supra* note 67, at 374–75. Though, there is a consistent minority opinion led by former Chief Justice Aharon Barak suggesting otherwise. *Id.*

211. See Tribunal Supremo, Sentencia, Ilegalización de los Partidos Políticos Herri Batasuna, Euskal Herritarrok y Batasuna [Supreme Court, Judgment, Illegalization of the Political Parties Herri Batasuna, Euskal Herritarrok and Batasuna], Autos acumulados no. 6/2002 y 7/2002 (Mar. 26, 2003) (Spain) [hereinafter *Batasuna Decision*]; see also Ayres, *supra* note 189, at 102 (describing the opinion).

212. Herri Batasuna v. Spain, App. No 25803/04 Eur. Ct. H.R. ¶ 34 (2009).

213. See *id.* (highlighting multiple statements made by party leaders encouraging the use of violence).

214. See *id.* ¶ 67 (citing the party’s failure to condemn the terrorist attacks at Santa Pola).

215. See *id.* ¶ 22 (“The fact that convicted terrorists are regularly appointed to positions of leadership or entered on lists of candidates for election may appear to constitute an expression of support for terrorist methods . . .”); see also Ayres, *supra* note 189, at 109 (“ETA militants with criminal records have formed part of Batasuna’s directive organs, electoral lists, and municipal and parliamentary groups.”).

216. Rensmann, *supra* note 65, at 1131; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 18, 2003, 2 BVB 1/01, 2/01, 3/01, ¶ 141 (Ger.).

others.<sup>217</sup> Again, the emphasis is upon the threat to the dignity of individuals, or minority groups, by the mere existence of the party and its participation in the electoral arena rather than upon the threat that it will actually succeed in the polls.

Finally, from a normative perspective, even if the extremist party is strong enough, or may become strong enough, to affect policy decisions,<sup>218</sup> it appears that the Popperian or Millian exception justifying the banning of overtly antidemocratic parties cannot be easily applied to these three new categories. Thus, even if the parties at issue espouse a problematic agenda, incite racial hate, support terror, or threaten the state's basic values, as long as they do not intend to abolish elections altogether, there is always the possibility that they will be voted out of power. Hence, these parties do not threaten to close avenues for future change and cannot be compared to a person "selling herself to slavery."<sup>219</sup> In other words, if the crucial premise of the Weimar paradigm is the concept of reversibility, it does not appear to apply to these new categories of banning, as these categories do not include parties that seek to use their associational freedom to block other voters from presenting their preferences in the future.<sup>220</sup> Therefore, they do not seem to easily fit within the Weimar paradigm's justification.

To summarize, it appears that the current theoretical accounts of party banning lack a coherent approach as to the purpose of the banning of parties within the new banning categories. They do not offer a defined threat that is addressed by the banning of parties within these categories. Both the suggestion that the purpose of the ban is to prevent the party from coming into power and Issacharoff's focus upon the party's links to illegal actions seem to be lacking descriptively and normatively. In fact, they both reveal the inability of the current Weimar paradigm to cope with these new banning categories. Therefore, the more fruitful approach would be to seek an alternative understanding that will provide a new basis for the analysis of party banning in modern democracies. This new

217. Rensmann, *supra* note 65, at 1131 (explaining that the protective dimension of human dignity imposes an additional legal obligation on the Federal Constitutional Court to provide protection against such threats).

218. See Angela K. Bourne, *Why Ban Batasuna?*, presented at University of Exeter Elections, Public Opinion and Parties Annual Conference: Political Parties and Terrorism: (Sept. 9–11, 2010), available at [http://www.exeter.ac.uk/media/universityofexeter/research/microsites/epop/pdfs/Bourne\\_-\\_Political\\_Parties\\_and\\_Terrorism.pdf](http://www.exeter.ac.uk/media/universityofexeter/research/microsites/epop/pdfs/Bourne_-_Political_Parties_and_Terrorism.pdf) (noting that, despite its small share of the vote, Batasuna had opportunities to influence public policy through parliamentary politics).

219. See *supra* text accompanying notes 33–37.

220. One caveat that is worth mentioning in this context concerns extremist parties that advocate the expulsion of minority citizens or denying minorities the right to vote. Parties of this nature give rise to concerns of reversibility, because if the extremist party succeeds in implementing its agenda these minority citizens may not be able to state their electoral preferences in the future.

understanding will be referred to as the *legitimacy paradigm* because it focuses on the legitimizing effects of participation in the electoral arena and deems the denial of such legitimacy as the central purpose of the banning phenomenon.

## V. THE LEGITIMACY PARADIGM

### A. *The Purpose of the Banning*

The Weimar paradigm focuses upon the instrumental goal of a political party, mainly, passing legislation and coming to power. Indeed, “parties are the only bodies which can come to power, [and] also have the capacity to influence the whole of the regime in their countries.”<sup>221</sup> However, participation in the electoral arena also has a considerable legitimizing effect upon a political party and the ideas it represents.<sup>222</sup> A party may enjoy this legitimacy effect even if it is relatively small and cannot directly effect legislation or come to power. This is particularly true for extremist parties, which typically present an agenda that is rejected by the other mainstream parties.<sup>223</sup>

Though the legitimizing functions of the electoral arena have been acknowledged in the past, the centrality of these functions, and their special significance in the context of the three new banning categories highlighted earlier, have not been sufficiently discussed and explained. Indeed, this Article argues that focusing on the legitimizing nature of political parties is crucial to understanding the current party-banning phenomenon. The question of legitimacy and the delegitimization of certain parties is not merely a secondary aspect of party banning. In fact, it is the main concern of this phenomenon in its current incarnation. As will be argued, this new legitimacy-oriented understanding of party banning can be linked primarily to the change in the perception of parties from voluntary organizations to public utilities and quasi-public entities. It can also be linked to the unique effects the electoral arena has upon voters’ “frame of thought.”<sup>224</sup>

After outlining the basis for this new understanding of the banning phenomenon, this Article will proceed to reexamine the

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221. Refah Partisi (Welfare Party) v. Turkey, 2003-II Eur. Ct. H.R. 267, 300.

222. Gavison, *supra* note 199, at 146, 169–70; Medina, *supra* note 67, at 380.

223. The concept of “legitimacy” is an essentially contested concept, which in itself could justify a lengthy discussion. This Article will not engage in such an attempt. The concept of “legitimacy” is treated here as an umbrella concept referring to a degree of acceptability and inclusion that is contrasted with its colloquial, political opposite “illegitimate.” That is, the delegitimizing of certain parties means labeling them as “beyond the pale” or beyond the realm of accepted disagreement.

224. See *infra* subpart A.1 and A.2.

justifications for the new banning categories described earlier. Although the argument advanced here is that the legitimacy paradigm is a superior understanding of party banning “as it is,” this Article will also advance a normative argument concerning the manner in which the banning instrument should be applied. As will be explained, the realization that the main focus of the current banning phenomenon is upon denying legitimacy from certain parties should lead to narrower and more carefully defined banning categories than those supported by the “expanded” version of the Weimar paradigm. This new paradigm should also lead to a reevaluation of many other aspects of the banning decision, including the need for a probability test, the evidentiary requirements for banning, and the actual consequences of a banning.

### 1. Legitimacy and the Change in the Role of Parties

In recent years, there has been a growing understanding in political science literature that the nature of political parties is changing.<sup>225</sup> The major theme underlining these changes is the transformation of political parties from representative organizations, or intermediaries between civil society and the state, into quasi-public entities.<sup>226</sup> This phenomenon has two sides to it. The first is the growing distance between the parties and civil society. Falling rates of electoral participation, declining levels of party membership, and lower levels of organizational activities all reveal that parties are losing relevance as avenues of representation and mobilization.<sup>227</sup> Yet, at the same time, as the parties move away from civil society, they become much closer to the state. This interpenetration of party and state is manifested, on the one hand, in the growing dependence of the parties upon public funding and state-regulated media access and, on the other hand, in an increasing regulation of their internal

225. See sources cited *infra* note 226.

226. See generally Ingrid van Biezen, *Political Parties as Public Utilities*, 10 PARTY POL. 701, 701–06 (2004) (arguing that parties have gradually come to be seen as necessary and desirable institutions and have been transformed from voluntary private associations into “public utilities”); Ingrid van Biezen, *Constitutionalizing Party Democracy: The Constitutive Codification of Political Parties in Post-war Europe*, 42 BRITISH J. POL. SCI. 187, 208 (2011) (explaining that the constitutional codification of political parties in many European constitutions “gives them an official status as part of the state”); Richard S. Katz & Peter Mair, *Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party*, 1 PARTY POL. 5, 15–16 (1995) (arguing that parties have become agents of the state and employ the resources of the state); Ingrid van Biezen & Peter Mair, *Political Parties*, in DEVELOPMENTS IN EUROPEAN POLITICS 98, 102–03 (Paul M. Heywood et al. eds., 2006) (arguing that parties have been absorbed by the states and now act as semistate agencies).

227. See van Biezen & Mair, *supra* note 226, at 98 (discussing the trend of citizens turning away from parties).



affairs by the state.<sup>228</sup> This evolution in the nature of political parties, which has mainly been discussed in relation to the European political arena, has been noted earlier in the American context.<sup>229</sup>

Currently, almost all European countries provide subsidies to their political parties.<sup>230</sup> In fact, in many of these democracies, the state is often the single most important financial contributor to party activity.<sup>231</sup> This is particularly true in newer post-Communist democracies as well as in their Southern European counterparts. For example, in Portugal and Spain the government typically provides 75–85 percent of a major party's total income.<sup>232</sup> Similar degrees of financing appear in most Eastern European countries.<sup>233</sup> In addition, many European democracies also provide free media access to political parties in periods preceding general elections.<sup>234</sup>

Furthermore, alongside this greater dependence of parties upon the state, there is a growing tendency of states to regulate parties.<sup>235</sup> These regulations are mostly focused on the financial aspects of the party's activities.<sup>236</sup> Thus, almost all European democracies have adopted some type of regulatory scheme that monitors and controls the income and expenditures of political parties and candidates.<sup>237</sup> These regulations typically impose a duty to disclose their financial

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228. See *id.* at 102–03 (examining the “cartel party” phenomenon); van Biezen, *Political Parties as Public Utilities*, *supra* note 226, at 702 (discussing how parties now act as public utilities).

229. See LEON D. EPSTEIN, *POLITICAL PARTIES IN THE AMERICAN MOLD* 155–58 (1986) (arguing that “[t]he distinctive restraints imposed on American parties are elements of their treatment as quasi-governmental agencies, or, in my terminology, public utilities”).

230. All the democracies in Europe, except Latvia, offer public funding to political parties. See Ingrid van Biezen & Petr Kopecky, *The State and the Parties: Public Funding, Public Regulation and Rent Seeking in Contemporary Democracies*, 13 *PARTY POL.* 235, 242–43 (2007). This new phenomenon has many explanations: the growing costs of modern political campaigns, the decrease in party revenue resulting from the decline in dues-paying members, the concern for equal opportunity and fairness in elections, and the desire to restrict the influence of private money with its potential for corrupting effects. See van Biezen, *Political Parties as Public Utilities*, *supra* note 226, at 706–07 (arguing that the state provides financial support because it sees parties as “the key political institutions for modern democracy”).

231. See van Biezen, *Political Parties as Public Utilities*, *supra* note 226, at 710 (“[T]he state appears to be the predominant player in party financing in many of the post-communist countries in Europe as well as in their Southern European counterparts.”).

232. *Id.*

233. See *id.* (“In most of the post-communist democracies in Eastern Europe the role of the state in party financing tends to be of equal significance.”).

234. *Id.* at 708.

235. *Id.* at 712–14.

236. See *id.* (“The notion that parties are a distinct type of public utility has encouraged a practice of party financing which is subject to strict legal regulations, such as on the amount and type of permissible contributions or on the amounts of the party or campaign expenditures.”).

237. *Id.* at 712.

affairs, but many states also impose limits on donations (private, corporate, or both), expenditures, foreign donations, and so forth.<sup>238</sup> In Europe, these limitations have not included direct regulation of parties' nominating processes, as is the situation in the American electoral system, but this may be on the horizon.<sup>239</sup>

As a result of these developments, political parties are increasingly viewed as public rather than private institutions.<sup>240</sup> They are no longer considered merely a voluntary, representational agent of civil society, but rather as part of the public domain, a public utility that should be supported and regulated to ensure their proper operation for the benefit of the state.<sup>241</sup> As Leon Epstein explained in the American context, parties may be viewed as "an agency performing a service in which the public has a special interest sufficient to justify governmental regulatory control, along with the extension of legal privileges, but not governmental ownership or management of all the agency's activities."<sup>242</sup>

This emerging public status of parties is related to a crucial normative assumption concerning the role of political parties in modern democracy—they are increasingly considered a "public good" that is crucial for the healthy functioning of democracy.<sup>243</sup> This is a major change in the status of parties. When parties first appeared on the political scene, they were regarded with hostility, as a threat to the advancement of the general interest and the public good.<sup>244</sup> Only gradually, as mass democracy had developed, have parties

238. See *id.* at 714 tbl.2 (displaying the degree of public control of parties' finances by country).

239. See *id.* at 716 (arguing that "intensive state regulation" may limit the organizational autonomy of parties in a way similar to the American political process where parties are seen as integral to the machinery of elections rather than separate entities that contest elections).

240. See Katz & Mair, *supra* note 226, at 16 (discussing the emergence of the "cartel party"); van Biezen, *Political Parties as Public Utilities*, *supra* note 226, at 705 (explaining that because of the increasing involvement of the state, "political parties have been progressively incorporated into the public domain"); van Biezen, *Constitutionalizing Party Democracy*, *supra* note 226, at 208 (arguing that a third mode of constitutionalism allows for political parties to be primarily understood as public utilities).

241. *Id.*

242. EPSTEIN, *supra* note 229, at 157.

243. See Richard S. Katz, *Party Organizations and Finance*, in *COMPARING DEMOCRACIES* 107, 122 (Lawrence LeDuc et al. eds., 1996) (comparing political parties to hospitals and schools); van Biezen, *Political Parties as Public Utilities*, *supra* note 226, at 705 (reasoning that political parties are "valued as desirable political institutions in representative democracy").

244. See van Biezen, *Political Parties as Public Utilities*, *supra* note 226, at 704 (arguing that when parties originated, they were seen as a threat to the general interest of society and the individual's interest due to their incompatibility with traditions inspired by Jean-Jacques Rousseau and John Locke). A famous example is the writings of James Madison concerning the dangers posed by "factions." See *THE FEDERALIST* No. 10 (James Madison) ("[T]he public good is disregarded in the conflicts of rival parties . . .").

increasingly been regarded as a necessary condition for the proper operation of modern democracy—in effect, “the core foundation of a democratic political system.”<sup>245</sup>

The privileged status granted to parties is further demonstrated by the growing tendency to constitutionalize the status of parties and to explicitly refer to them as essential components of the constitutional framework.<sup>246</sup> For example, Article 6 of the Spanish Constitution states that “[p]olitical parties express democratic pluralism, assist in the formulation and manifestation of the popular will, and are a basic instrument for political participation.”<sup>247</sup> Article 5 of the Czech Constitution states that “[t]he political system is based on the free and voluntary foundation and free competition of political parties respecting fundamental democratic principles and rejecting force as a means for asserting their interests.”<sup>248</sup> Similar provisions also appear in practically all European democracies with an authoritarian or totalitarian past, especially in Eastern and Southern Europe, which generally consider parties as an essential condition for a democratic system.<sup>249</sup> The same sentiment was also expressed by the ECHR in its *Refah* decision, in which it emphasized that political parties have an “essential role in ensuring pluralism and the proper functioning of democracy.”<sup>250</sup>

This transformation in the role of political parties in democracies has significant implications for questions of legitimacy. First, the special status attributed to political parties as an inevitable organ of democracy grants them an *a priori* degree of legitimacy that is not necessarily ascribed to other voluntary associations operating within the state. Since they are a public good, or a type of public utility,<sup>251</sup> which is funded and supported by the government, by definition they are an entity that the public has an interest in encouraging and promoting. They are not merely a form of representation and expression but rather enjoy a preferred status, central to the

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245. Petr Kopecky, *Developing Party Organizations in East-Central Europe: What Type of Party is Likely to Emerge?*, 1 PARTY POL. 515, 516 (1995). See also SCHATTSCHNEIDER, *supra* note 63, at 1 (“[T]he political parties created democracy and modern democracy is unthinkable save in terms of political parties.”).

246. See generally van Biezen, *Constitutionalizing Party Democracy*, *supra* note 226 (describing the process of party constitutionalization in post war Europe).

247. CONSTITUCIÓN ESAPÑOLA (C.E.) art. 6 (Spain), *translated in Sawyer, supra* note 189, at 1542–43 n.59.

248. ÚSTAVA ČR. art. 5 (Czech Rep.), *translated in Czech Republic—Constitution*, INTERNATIONAL CONSTITUTIONAL LAW, available at [http://www.servat.unibe.ch/icl/ez00000\\_.html](http://www.servat.unibe.ch/icl/ez00000_.html) (last visited Oct. 22, 2013).

249. See van Biezen, *Constitutionalizing Party Democracy*, *supra* note 226, at 201–03 (representing in Table 2 that more recently established democracies tend to regulate parties more as they identify political parties “in terms of essential democratic principles”); see YIGAL MERSEL, HA-MAAMAD HA-HUKATI SHEL MIFLAGOT POLITIYOT [THE CONSTITUTIONAL STATUS OF POLITICAL PARTIES] 355–56 (2004) (Isr.).

250. *Refah Partisi (Welfare Party) v. Turkey*, 2003-II Eur. Ct. H.R. 267, ¶ 88.

251. van Biezen, *Political Parties as Public Utilities*, *supra* note 226, at 701–06.

democratic framework.<sup>252</sup> This bestows them with an aura of respectability and significance. Moreover, the political message conveyed by the party also gains institutional prominence—it is funded by the state, broadcasted on state-owned media, and presented by an entity that is subject to state regulation.<sup>253</sup> Thereby, it is privileged with a unique position on the “central stage” of democracy, with a salience and prominence that is not enjoyed by other political ideas or messages within the “marketplace of ideas.”<sup>254</sup>

It should be noted that the claim is not that these various characteristics of political parties convey a message of endorsement by the state. The electorate is obviously well aware that various parties have different views and that the financial and other support they receive from the state does not signify that the state supports their message. However, it is hard to deny that the entanglement of the state with the parties, and the support it grants them, conveys a message concerning the legitimate contours of the political debate. A party that is funded by the state and broadcasts freely on public television cannot be “that bad”; it is not beyond the pale. This point becomes clearer if one examines state relationships with parties from the perspective of a victim of a party inciting hate against minorities, for example. It is reasonable to assume that a member of a minority community will feel less offended, and less threatened, by a racist politician speaking to followers in a demonstration, or on a website, as compared to hearing the same message on the public airwaves, funded by her tax money. The difference seems to be in the degree of respectability or legitimacy that is granted to the latter that is not enjoyed by the former.

## 2. Framing Effects and the Nature of the “Political Field”

Another aspect of this legitimization phenomenon—highlighted by Jens Rydgren, a Swedish sociologist—concerns the effect an extremist party has upon voters’ frame of thought.<sup>255</sup> In his article—which focused on radical right-wing parties in Europe, particularly in France and Sweden—he claimed that the presence of such parties in

252. See Gregory Tardi, *Political Parties’ Right to Engage in Politics: Variations on a Theme of Democracy*, in *MILITANT DEMOCRACY* 81, 101–02 (András Sajó ed., 2004) (explaining that “[i]n both Spain and Turkey, the role of political parties is more clearly integrated into the apparatus of the state and more integral to the functioning of the state itself”).

253. Medina, *supra* note 67, at 380; van Biezen *Constitutionalizing Party Democracy*, *supra* note 226, at 208 (noting how political parties are primarily understood as public utilities and seen as “quasi-official agencies of the state”).

254. *Id.*

255. See Jens Rydgren, *Meso Level Reasons for Racism and Xenophobia: Some Converging and Diverging Effects of Radical Right Populism in France and Sweden*, 6 *EUR. J. SOC. THEORY* 45 (2003) (discussing the effect extremist parties have upon the level of xenophobia and racism in society).

the electoral arena is not only a result of growing racist and xenophobic sentiments but also a cause of such attitudes.<sup>256</sup> The participation and success of radical right-wing parties tend to legitimize, and reinforce, feelings of xenophobia and racism in a society because it affects the electorate's frame of thought. It does so mainly by taking people's existing unarticulated xenophobic beliefs and organizing them in a more comprehensive way, offering them an alternative, xenophobic frame of thought.<sup>257</sup> As a result, the latent, popular xenophobia is lifted to a manifest level, and on that level, the xenophobia is more likely to diffuse.<sup>258</sup> Again, this influence is not dependent upon the party coming to power or implementing policies of discrimination through legislation.<sup>259</sup> The legitimacy and attention that a party achieves as an actor within the electoral arena is sufficient to influence voters' frame of thought.

Furthermore, as Pierre Bourdieu has explained in his writing on the political field, the political arena is characterized by the symbolic struggle over the legitimate principles of division and ultimately over the power of categorization of the political reality.<sup>260</sup> Hence, the emergence of an extremist party in the electoral arena may affect the dynamics of the political field even if it is not successful enough to directly influence government policy.<sup>261</sup> For example, the emergence of the Front National on the French electoral arena increased the salience of the sociocultural cleavage dimension rather than the economic cleavage dimension.<sup>262</sup> Moreover, by being considered a legitimate political actor, the extremist parties take part in the framing struggle over how to define social and political issues. Thus, the extreme Right parties have been successful in several European countries in advancing their general diagnostic frame that

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256. See *id.* at 46 ("Many have argued that the presence of a widespread popular xenophobia is an important, though not the only, reason for the emergence of RRP [Radical Right Populist] parties . . . Few, however, have paid much attention to the dual character of this relationship, i.e., that the emergence of a RRP [Radical Right Populist] party may also be a reason for the reinforcement of xenophobia and racism in a society.").

257. *Id.* at 52–53 (arguing that with the emergence of the RRP parties, a "new alternative frame of thought is offered" which may help people articulate their previously "unarticulated stock of beliefs and attitudes").

258. See *id.* at 61 ("[T]he emergence of a RRP party may lift the latent popular xenophobia to a manifest level.").

259. See *id.* at 46 n.5 (emphasizing that the author is not discussing the possibility that the RRP might take over and directly implement policies of discrimination).

260. Pierre Bourdieu, *Conference: Le champ politique* [Conference: *The Political Field*], in PROPOS SUR LE CHAMP POLITIQUE [ON THE POLITICAL FIELD] (Pierre Bourdieu ed., 2000) (Fr.); see also Rydgren, *supra* note 255, at 55–60 ("I will, in accordance with Bourdieu . . . argue that the supply side of the political space . . . is characterized by the symbolic struggle over the legitimate principles of division, and ultimately over the power of categorization.").

261. Bourdieu, *supra* note 260, at 62–63.

262. *Id.* at 61–62.

immigration and immigrants are a problem and hence that the discussion should focus on the “prognostic” frame—how the problem should be solved.<sup>263</sup>

Finally, the relative success of an extremist party may provide an incentive for other parties to adjust their position in order to draw some of the extremist party’s electorate. Typically, this would be done through incorporation of some of the extremist party’s themes or policy proposals that would appeal to the extremist party’s voters.<sup>264</sup> This could further legitimize the extremist agenda presented by the party, turn it into a relevant actor, and lead to even greater electoral success for the extremist party.<sup>265</sup>

### 3. Conclusion

The evolution in the status of political parties and the significant legitimization benefits they gain from participation in the electoral arena provide the basis for understanding the recent manifestations of party banning and for the growing urge in several democracies to battle extremism by banning parties. The reasons for the banning can be directly derived from the account provided above concerning the legitimizing effects of electoral participation. The main aim appears to be to deny extremist parties the forum of institutional expression, the legitimacy, and the aura of respectability that is naturally granted to political parties in modern democracies. The banning also denies these parties the monetary benefits that are currently available to parties. The banning may also be concerned with preventing the establishment of an antiliberal frame of thought within the voters and aimed at leaving certain extremist parties out of the symbolic political field. Thus, for such a party, a banning decision constitutes a message from the banning organ—typically the court—that the party is beyond the pale, has no place in the electoral arena, and is an illegitimate participant in the decision-making process of the nation.<sup>266</sup> In this sense, the banning may contribute to

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263. Rydgren, *supra* note 255, at 57.

264. See Marcel Lubbers et al., *Extreme Right-Wing Voting in Western Europe*, 41 EUR. J. POL. RES. 345, 350, 365 (2002) (addressing the connection between political space on issues and the larger support for extreme right-wing parties); Tim Bale, *Cinderella and Her Ugly Sisters: The Mainstream and Extreme Right in Europe’s Bipolarizing Party Systems*, 26 W. EUR. POL. 67, 74–76 (2003) (explaining that, recently, Center-Right politicians have “begun to inhabit the same discursive universe as their far right counterparts” making Far-Right views more respectable and more salient for voters).

265. *Id.*

266. See Gavison, *supra* note 199, at 146; Medina, *supra* note 67, at 380; RAPHAEL COHEN-ALMAGOR, SPEECH, MEDIA AND ETHICS: THE LIMITS OF FREE EXPRESSION 48–49 (2001) (suggesting that court decisions denying eligibility to compete in elections may indicate that even the courts think that the ineligible groups have no place in society).

the stability of democracy "by throwing the moral and political weight of the regime behind democratic principles."<sup>267</sup>

This delegitimizing purpose of the banning regime can be understood as a principled one, based on an assumption that parties advocating certain ideas should be rejected as a matter of principle and banned from the electoral arena. According to this line of thinking, the purpose of the ban is to deny these parties and their ideas the legitimacy that they will gain as a result of mere participation in the electoral arena. Therefore, the ban may be justified even if there is no apparent long-term danger of the extremist party actually coming into power.<sup>268</sup> In addition, this purpose can also be understood as driven by a practical perspective. The underlying assumption is that because of the legitimacy that electoral participation, and electoral success, bestows upon a political party and its messages, the dangers stemming from an extremist party in the long run are substantially larger than the dangers posed by other voluntary associations. As Ruth Gavison explained in her analysis of party banning, the initial goal of an extremist party is to achieve legitimacy rather than to affect government or legislation. The party seeks to be included as a legitimate participant in the debate, on equal footing with other parties and other ideas. By allowing it to participate in the election and get elected, the state is granting it legitimacy and thereby allowing it to grow and get stronger. Thus, in the long run, participation may significantly assist the party in coming into power.<sup>269</sup>

The paradigm outlined in this section is a suggested frame of thinking about the nature of party banning in recent years. It provides a better account of the underlying purpose of recent banning cases and new constitutional provisions authorizing the banning of extremist parties. It explains the tendency, noted earlier, to ban parties that are too small to actually threaten the stability of the constitutional regime as a whole. It also explains why there is a strong emphasis upon the speech of the extremist party rather than the specific details of its policy suggestions. The next subpart will preliminarily suggest which categories of banning can be justified under this paradigm.

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267. Finn, *supra* note 78, at 65 (referring to this interest as "presentational" rather than practical and explaining that it may reduce "the sense of 'affront to the public'").

268. See COHEN-ALMAGOR, *supra* note 266, at 45, 50 ("[T]he issue of defending democracy is a matter of moral principle, rather than one that is contingent on the level or the proximity of the danger.").

269. See Gavison, *supra* note 199, at 165-70 (explaining that the growth of an extremist party can be very rapid and dependent on factors that the system cannot control, and because of the legitimizing effect of getting elected, courts should not wait for an imminent threat but rather address the problem relatively early).

### B. Which Banning Categories Are Justified?

The preceding discussion concerning the purpose of the banning can also assist in developing a framework for determining the proper limits of the banning instrument. Since there has been considerable discussion within the Weimar paradigm concerning parties that oppose democracy wholesale,<sup>270</sup> this subpart will focus on the three new categories mentioned earlier: parties inciting hate or discrimination, parties that support violence, and parties that challenge the identity of the state.

The expanded, substantive version of the Weimar paradigm, which was presented most prominently by the ECHR, allowed for the banning of parties that offer an agenda that is not “compatible with fundamental democratic principles.”<sup>271</sup> That is, a ban is legitimate if a party “is aimed at the destruction of democracy and the infringement of the rights and freedoms afforded under a democracy” and there is a “pressing social need” to do so.<sup>272</sup> As Judge Georg Ress noted in his concurring opinion in *Refah*, this formula is quite ambiguous and requires additional clarification.<sup>273</sup> Indeed, human rights by their nature are dynamic and open to diverse interpretations. It is possible to think of a wide range of legitimate changes proposed by a political party that, to a certain extent, involve a “violation” of fundamental rights. For example, a party that advocates a reform in the tax system may be said to advocate a “violation” of property rights, while a party supporting a radical reform in libel laws could be said to support a “violation” of the right to free speech. Hence, it seems that one should be more cautious and precise in defining the limits of party banning. In fact, the legitimacy paradigm lends particular urgency to this endeavor. Indeed, once one acknowledges that current banning decisions are not aimed at preventing the total collapse of democracy but merely at denying legitimacy to certain ideas and parties, it seems that the need to determine the justifiable limits of this instrument becomes even more acute.

The legitimacy paradigm is focused upon the unique nature of the electoral arena and political parties in modern day democracies. As explained above, modern political parties enjoy a unique status as quasi-public entities.<sup>274</sup> They are considered a public good and

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270. See *supra* Part II.A.

271. *Refah Partisi*, 2003-II Eur. Ct. H.R. 267, 303.

272. *Id.* at 303–04, 306.

273. See *id.* at 319, ¶ 98 (Ress, J., concurring) (“In my view it cannot be interpreted to the effect that any campaign to change rights and freedoms recognized in a democracy amount to a situation where a political party would lose protection. In this respect also all depends on the specific rights and freedoms which a political party aims to change and furthermore what kind of change or modification is envisaged.”).

274. See *supra* subpart A.1.



contributor to the state because they promote its fundamental democratic characteristics and goals. They do not merely represent ideas and voters but also serve an "essential role in ensuring pluralism and the proper functioning of democracy"<sup>275</sup> and providing for a system of "electoral choice."<sup>276</sup> This status bestows upon political parties a considerable degree of legitimacy and practical benefits, like government funding.<sup>277</sup> However, this function assigned to political parties may also guide us in determining which parties may be banned. Under this paradigm, the banning should be aimed at parties that seek to undermine the functional role assigned to them by operating against pluralism or rejecting the concept of peaceful electoral competition. This may point us to two of the new categories demarcated above: namely, parties inciting hate or discrimination and parties that support violence. Parties that fall within these two categories create a climate of violence, fear, and intimidation, which is diametrically opposed to the role of parties in contributing to pluralism (by spreading hate against other groups in society) and in promoting a system of regulated rivalry (by endorsing and supporting the use of violent measures for achieving political ends).

From a broader perspective, it appears that this kind of view is linked to a more positive version of democracy, emphasizing the affirmative obligation of a democracy to encourage equality, protection of human dignity, and cultivation of democratic dispositions. As Nancy Rosenblum has explained concerning the banning of parties inciting hate, "The ground for exclusion has to do with . . . undermining conditions for the reproduction of democracy. . . . Preserving and promoting a political culture of civic and political equality is seen as the positive obligation of democratic government, and as justification for imposing certain constraints on parties."<sup>278</sup> A similar view was presented by Peter Niesen in his discussion concerning what he referred to as the "civic society" approach.<sup>279</sup> This approach explains the banning of parties inciting

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275. *Refah Partisi (Welfare Party) v. Turkey*, 2003-II Eur. Ct. H.R. 267, 300–01; see also, for example, *CONSTITUCION ESAPNOLA, C.E., B.O.E. n. 311, Dec. 29, 1978, s. 6* (Spain), which states: "Political parties are the expression of political pluralism, they contribute to the formation and expression of the will of the people [,] and [they] are an essential instrument for political participation," as translated in Sawyer, *supra* note 189, at 1542–43, n.59.

276. See Katz, *supra* note 243, at 122 ("Democracy comes to be defined not by the capacity of citizens to direct government but merely by the fact of electoral choice. Choice requires parties, and so the state guarantees the provision of parties . . .").

277. See *supra* subpart A.1.

278. ROSENBLUM, *supra* note 13, at 435–36; *But cf. id.* at 436 ("[P]ositive affirmation of democratic values . . . is not required for parties to compete in elections . . . . Rather, certain forms and expressions are categorically disallowed.").

279. See Niesen, *supra* note 64, ¶ 43 ("Looking at democracy not as itself protected (against extremists or historical foes) but as protective of minorities and later generations, is inspired by theories of civil society.").

hate on the basis of the moral culture of democracy and the dependence of democracy upon “the recognition of the other as equal, on reciprocity, and the capacity for discursivity.”<sup>280</sup>

However, while Rosenblum and Niesen speak of the obligations of a democratic regime as a whole to cultivate certain democratic dispositions, the legitimacy paradigm suggested here focuses upon the obligations specifically imposed upon political parties that are directly derived from their unique status in current democracies. Thus, these obligations create a distinction between the regulation of extremist speech in the marketplace of ideas and regulation of extremist parties. They impose certain institutional expectations upon parties that are not necessarily imposed upon other voluntary associations.<sup>281</sup> Indeed, as the ECHR noted, the “primordial role” of political parties in a democracy is not only a reason to protect their free operation but also a basis for requiring a greater degree of loyalty from them.<sup>282</sup> Accordingly, restrictions that may apply to parties inciting hate and discrimination or supportive of violence do not, and should not, necessarily apply to individuals or associations that express similar views.<sup>283</sup> The emphasis is upon the duty of loyalty of political parties rather than upon the duty of the individual or private associations operating within civil society.<sup>284</sup> This approach leaves the door open for a political group to choose: if it wishes to enjoy the various privileges granted to it as a party, it is required to conform to certain regulations that are imposed by the state, including

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280. *Id.*

281. See Rosenblum, *supra* note 13, at 37 (“The public role of parties and government involvement in licensing parties, setting ballot requirements, and funding campaigns combine to make them more reasonably susceptible to regulation than other political associations.”); Comella, *supra* note 75, at 136–38, n.10 (arguing, with regard to Spain, that “it is constitutionally valid to impose more restrictions on political parties, given the reference in Art. 6 of the [Spanish] Constitution to the ‘the Constitution and the law’ as limits that parties must respect”).

282. See *Refah Partisi (Welfare Party) v. Turkey*, 2003-II Eur. Ct. H.R. 267, 300 (highlighting the parties’ primordial rule and their capacity to influence regimes); Harvey, *supra* note 18, at 415; van Biezen, *Political Parties as Public Utilities*, *supra* note 226, at 704–05.

283. In that sense, the approach that is advocated here differs from the approach adopted in the German Basic Law. The German Basic Law is more *protective* of political parties than associations in general. While an application for limiting a political party has to be submitted and approved by the Federal Constitutional Court, the restriction of an association is an administrative decision that does not require an application to the Federal Constitutional Court. See KOMMERS, *supra* note 71, at 236. Indeed, throughout the years, dozens of associations were banned by the Minister of Interior, while the Constitutional Court has dealt with only three party-banning cases. See Mudde, *supra* note 25, at 201–02. For criticism of this approach, see Judith Wise, *Dissent and the Militant Democracy: The German Constitution and the Banning of the Free German Workers Party*, 5 U. CHI. L. SCH. ROUNDTABLE 301, 317–18 (1998). Conversely, the approach suggested here is similar to the constitutional approach adopted by Spain and Israel. See Comella, *supra* note 75, at 136–40 (analyzing the Spanish Constitution and its effect on the statute on political parties).

284. Gavison, *supra* note 199, at 170.

restrictions upon certain antiliberal agendas. Alternatively, it may be released from the burden of these regulations if it seeks to operate as any other voluntary association that does not enjoy the special benefits granted to political parties.<sup>285</sup>

In addition, the restrictions under this approach may be more limited than the expansive version of the Weimar paradigm, which allows for the banning of parties that seek to “destroy the rights or freedoms set forth in the Convention.”<sup>286</sup> According to the approach presented here, one should not allow for the banning of parties that merely oppose certain “rights” or “freedoms” as these may be an object of legitimate contention and debate within a democracy. The concern is limited to parties that seek to undermine two of the core aspects of a democratic regime: the commitment to pluralism and the rejection of violence as a means to achieve political ends.

Finally, it also follows from this discussion that the third new banning category, which concerns parties that challenge the identity of the state, is more problematic and harder to justify.<sup>287</sup> Thus, limitations upon parties that present a challenge to the state’s identity give rise to the concern that the restrictions are aimed at protecting a certain status quo while taking off the table precisely the kind of substantive topics that are the focus of the democratic debate. For instance, prohibitions upon parties endangering the territorial integrity of the state may lead to the outlawing of a party that seeks to settle a border dispute by ceding a certain territory to a neighboring state. Indeed, as stated earlier, the ECHR held that a secessionist agenda—a threat to the state’s territorial integrity—is not a legitimate basis for banning a party in the absence of support of violence or antidemocratic objectives.<sup>288</sup> Similarly, a ban upon parties seeking the change of the secular nature of the state (as in Turkey) or its Jewish nature (as in Israel) may prevent a public discussion on issues that are central to the future of the state in question.<sup>289</sup> Thus, as long as the party in question does not challenge democracy in the narrow sense by, for example, aiming to impose Sharia law and

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285. See Bale, *supra* note 201, at 152–54. Although, it has also been argued that a political party should enjoy more rather than less protection because “it is situated at the core of the political debate, and because of its multiplier effect: one party may express the opinion of thousands or even millions of citizens.” Brems, *supra* note 64, at 148–49.

286. Refah Partisi, 2003-II Eur. Ct. H.R. at 300–01.

287. For a similar view, see Rosenblum, *supra* note 13, at 67–68.

288. See United Macedonian Organisation Ilinden – PIRIN v. Bulgaria, App. No. 59489/00, Eur. Ct. H.R. 61, ¶ 18 (2005) (“The mere fact that a political party calls for autonomy or even requests secession of part of the country’s territory is not a sufficient basis to justify its dissolution on national security grounds.”).

289. See Rosenblum, *supra* note 13, at 68 (“The coexistence of parties proposing and defending against altering the dominant understanding of political identity is unstable and fearful, but it is ineradicable in pluralist democracies . . .”).

prevent any further elections, and does not fall within the two categories highlighted above, it seems harder to justify its banning.

Clearly much more can be said concerning the precise contours of the banning categories that have been outlined above. However, only two points will be briefly mentioned here. First, when one is dealing with the banning of parties supporting violence, the level of support that is sufficient to justify a ban may be unclear. If the party itself is a revolutionary military organization or a terrorist organization, its active members may be prosecuted criminally. However, the issue will typically arise when the party is involved in other, more indirect, forms of support for violent activities. These can range from more concrete actions, like providing financial or logistical support, to more abstract forms of support, such as praising violent actions after they have occurred.<sup>290</sup> Thus, making a banning determination based upon a party's support for violence requires a detailed and nuanced analysis that goes beyond the scope of this Article.

The banning of parties inciting hate or discrimination may also give rise to problems of interpretation. For instance, dilemmas may arise with extreme right-wing parties that do not explicitly incite hate or discrimination but rather claim to address certain problems related to immigration, like unemployment or crime. These positions could be presented as substantive disputes concerning state policy rather than hate speech.<sup>291</sup> Thus, in determining whether a party falls under this category, courts will have to make difficult classifications on a case-by-case basis, taking into account the content of the party's agenda, the actual acts and statements by party leaders, and perhaps even the broader social context and the status of minorities in the country at issue.

## VI. APPLYING THE LEGITIMACY PARADIGM

This principled discussion concerning party banning leaves several practical issues open. This section considers some of these issues and suggests how they should be addressed and resolved within the legitimacy paradigm.

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290. See *id.* at 49–50 (discussing the bans of parties charged with “association” with violent groups, “support” for violence, and “incitement” of violence).

291. ROSENBLUM, *supra* note 13, at 435–36 (“[W]hen proscription extends to any electoral appeal for or against parties on the basis of ascriptive characteristics, militant democracy fails to capture the stakes or the justification for banning.”).

### A. *The Irrelevance of the Probability Standard*

As explained earlier, within the Weimar paradigm, it appears natural to subject any banning decision to a probability test.<sup>292</sup> Indeed, despite the practical difficulties of this test,<sup>293</sup> if the purpose of the ban is to prevent an antidemocratic party from coming into power and abolishing democracy, it seems necessary to examine whether there is indeed a real threat that the party will succeed in achieving that goal.

Under the legitimacy paradigm, when one is dealing with the two banning categories that are the focus of this discussion, incitement of hate and discrimination and support of violence, the application of a probability test is even more problematic. Indeed, as explained earlier, within these two categories, the ban is aimed at preventing the extremist party from using its unique legitimacy and status to create a climate of fear or violence. In these circumstances, the application of a probability test appears futile. The harm sought to be avoided is by nature even more diffuse and hard to define. Furthermore, the contribution of the party to such a negative climate is cumulative by nature and cannot be linked to a specific action or result.<sup>294</sup> To a great extent, almost any party whose agenda includes hateful statements or identifies with violence could be said to create a clear and present danger when the danger at issue is not a particular act but rather is the promotion of a climate of hate or violence. Thus, within the legitimacy paradigm, the probability test loses most of its value as a limiting factor.

It seems that under this paradigm, a probability test could only be useful when the parties at issue are so ineffective and insignificant that they could not pose any actual danger. In other words, the banning could be avoided only in regard to parties whose contribution to a climate of hate or violence would be practically nonexistent. Thus, such a test may assist in a few easy cases but will probably not do a great deal of work in more difficult cases. Therefore, it is necessary to adopt additional limiting criteria that would be helpful and relevant in a broader scope of cases. One such criterion will be suggested in the next subpart.

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292. See *supra* text accompanying notes 64–68.

293. See *supra* note 67.

294. See Miriam Gur-Arye, *Can Freedom of Expression Survive Social Trauma: The Israeli Experience*, 13 DUKE J. COMP. & INT'L L. 155, 175 (2003) (“The probability test—even to a degree of near certainty—loses its value as a limiting factor when it is applied to the relationship between a publication and its contribution to a climate of violence and to fanning hatred. No single publication creates the violent climate. Its contribution is in its cumulative influence upon the creation of a social atmosphere that may fan hatred.”).

### B. *The Evidentiary Question*

One of the crucial aspects in a decision to ban a party is determining precisely what the party's agenda is.<sup>295</sup> The challenge is twofold. First, parties are usually not homogenous. Different leaders of the party may hold different views. The party may consist of different factions, each advancing its own agenda.<sup>296</sup> Moreover, the party may also consciously say different things to different electorates in order to win more votes. There may be a difference between the party's formal program and what it says in public rallies or closed forums. This may be particularly true for an extremist party that fears banning and thus "cleans" its formal program from problematic proposals while continuing to spread its extremist message orally or in informal publications.<sup>297</sup>

In the *Refah* case, the ECHR adopted a rather lenient standard, basing its decision upon speeches by various leaders and members of the party even if the speeches did not reflect the party's formal program.<sup>298</sup> The court had no trouble imputing statements made by the chairman and the vice-chairman of the party to the party as a whole.<sup>299</sup> It also considered statements made by lower ranking representatives as imputable to the party because the party did not distance itself from these statements.<sup>300</sup> By doing so, the court, in effect, imposed an affirmative duty upon the party to distance itself from problematic statements made by its members. The court also considered older material, including speeches made several years before the banning decision.<sup>301</sup>

It seems that under the legitimacy paradigm the standard of proof must be much more demanding. Indeed, this paradigm assumes that the main purpose of the ban is to prevent certain views from being granted the benefit of institutional expression, and denying them the opportunity to shape the frame of thought of voters and the frame of the political arena in general. In light of this objective, it is

295. See, e.g., Brems, *supra* note 64, at 181–85 (discussing the difficulties involved in uncovering the hidden agendas of political parties).

296. *Id.* at 181.

297. See *id.* at 182 (discussing the threat of persecution and prohibition that leads to careful formulation of proposals).

298. See *Refah Partisi (Welfare Party) v. Turkey*, 2003-II Eur. Ct. H.R. 267, 305 (“[A] party’s political programme may conceal objectives and intentions different from the ones it proclaims . . . the content of the programme must be compared with the actions of the party’s leaders and the positions they defend.”). For a criticism of this lenient approach, see Kevin Boyle, *Human Rights, Religion and Democracy: The Refah Party Case*, 1 ESSEX HUM. RTS. REV. 1, 6 (2004).

299. *Refah Partisi*, 2003-II Eur. Ct. H.R. at 308–09.

300. *Id.*

301. See *id.* at 307, 309–10 (upholding the Turkish courts’ consideration of the speeches made several years in the past in light of the progression of risk to democracy); Brems, *supra* note 64, at 183–84.

obvious that only clear and undisputable expressions of the proscribed nature could justify a ban. If the ban is based on the privileged status of a party in a democracy, then the banning decision should focus on the institutional expressions made by the party as such. Ambiguous statements made in informal circumstances or a collection of sporadic statements made by party members throughout a long period of time would not suffice.

In this respect, a good baseline could be the one suggested by the dissenting judges in the first instance of the *Refah* case.<sup>302</sup> They explained that when the ban is not based upon the program or activities of the party itself but rather upon the actions or statements of individual leaders or members, “particularly convincing and compelling reasons must be shown to justify a decision to dissolve the entire party.”<sup>303</sup> This approach is also consistent with the Venice Guidelines set out by the European Commission, which made it clear that “[a] political party as a whole cannot be held responsible for the individual behavior of its members not authorized by the party within the framework of political/public and party activities.”<sup>304</sup> A similar approach was put forward by the Israeli Supreme Court in its banning decisions. The court made it clear that a ban may be justified only if the prohibited aims of the party are dominant and central in its agenda and are substantial and serious in their magnitude; the evidence must also be “convincing, clear and unequivocal.”<sup>305</sup> As the Israeli banning cases reveal, this heavier evidentiary burden serves as a significant limiting standard and considerably offsets the lack of a probability test.<sup>306</sup>

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302. *Refah Partisi (Welfare Party) v. Turkey*, 35 Eur. H.R. Rep. 56 (2002) (Third Chamber) (Fuhrmann, Loucaides, and Bratza, J., dissenting) (“[W]here as here the grounds relied on by the Constitutional Court relate not to the programme and activities of the political party itself but rather to actions or statements of individual leaders or members of the party, we consider that particularly convincing and compelling reasons must be shown to justify a decision to dissolve the entire party. This is all the more so where . . . the acts or statements complained of were not linked in terms of time or place but were isolated . . .”).

303. *Id.*

304. *Democracy Through Law Guidelines*, *supra* note 75, art. III(IV) ¶ 13. A similar approach was also suggested by the Parliamentary Assembly of the Council of Europe. See EUR. PARL. ASS., *Restrictions on Political Parties in the Council of Europe Member States*, Res. 1308 § 11(iv) (2002), available at <http://www.venice.coe.int/webforms/documents/CDL-INF%282000%29001-e.aspx> (“[A] party cannot be held responsible for the action taken by its members if such action is contrary to its statute or activities.”).

305. See, e.g., AB 11280/02 *The Central Election Committee for the Sixteenth Knesset v. Tibi* 57(4) IsrSC 1, ¶ 6 [2003] (Isr.).

306. In fact, since the ban of the extreme right wing Kach Party and its offshoots, no other party has been banned in a parliamentary election in Israel.

### C. *The Actual Effects of a Party Ban*

Throughout the discussion so far, the term *party ban* has been used rather broadly in referring to a series of restrictive measures applied by democracies against political parties.<sup>307</sup> It appears necessary to further specify what a *party ban* actually means and to explain how the proper limits of such a measure can be derived from the framework provided by the legitimacy paradigm.

Perhaps the most comprehensive form of party banning can be found in Germany. When a political party is declared unconstitutional by the Federal Constitutional Court, it ceases to exist as a legal entity, its property is confiscated, it loses its seats in federal and state parliaments, and even its surrogate organizations maybe dissolved.<sup>308</sup> In fact, such a decision has criminal implications as well. For example, Section 86 of the German Criminal Code prohibits the dissemination of propaganda that supports ideas of unconstitutional political parties or prohibited associations, and Section 86(a) prohibits the use of insignias, flags, badges, uniforms, passwords, and salutes of these same organizations.<sup>309</sup> In other countries, like Spain, when a party is banned—declared illegal—it is dissolved as a legal entity, its assets are given to the state, and it is prevented from competing in elections.<sup>310</sup> However, the banning in itself does not have consequences in the broader free speech domain beyond the party and its successors.<sup>311</sup>

A less restrictive approach can be found in Israel where most of the party banning cases arose in the context of Article 7A of the Israeli Basic Law: The Knesset, which authorizes the disqualification of an “electoral list” presented by a political party from competing in a certain electoral campaign. According to the Israeli banning provision, when an electoral list is disqualified—as was the case with Kach, for example<sup>312</sup>—this does not, in itself, mean that the party loses its status as a legal entity.<sup>313</sup> It does not lose its property, and it is not prohibited from organizing various activities such as

307. For a general discussion of the various measures that are employed, see Brems, *supra* note 64, at 141–48.

308. See KOMMERS, *supra* note 71, at 223 (discussing the impact of a ruling of unconstitutionality on a political party in Germany).

309. See David A. Jacobs, *The Ban of Neo-Nazi Music: Germany Takes On the Neo-Nazis*, 34 HARV. INT'L L.J. 563, 570 (1993) (examining criminal laws that limit freedom of expression).

310. See Comella, *supra* note 75, at 133–36 (detailing the process of dissolving the Batasuna Party).

311. *Id.*

312. See *supra* text accompanying notes 101–04.

313. See Brems, *supra* note 64, at 144 (explaining that a party whose electoral list is disqualified from competing in the election can still function normally in the nonelectoral public sphere).



demonstrations and assemblies.<sup>314</sup> It is simply prevented from participating in a specific election.<sup>315</sup>

An alternative measure that is applied toward extremist parties is the denial of state subsidies. Although this measure is less restrictive in principle, it may prove to be quite damaging in systems where party funding is strictly regulated and state subsidies are relatively generous. For example, Belgium does not have a party-banning regime but does allow for the temporary denial of state subsidies to political parties that "show clearly and repeatedly their hostility toward the rights and freedoms protected in the European Convention on Human Rights and its additional protocols."<sup>316</sup> Indeed, the fear of denial of state funding following its conviction for violating the law against racism and xenophobia was one of the main concerns that led the Belgian extreme-Right party Vlaams Blok to dissolve itself and to form a new party, Vlaams Belang.<sup>317</sup>

If one examines these different possibilities through the lens of the legitimacy paradigm, it appears that the preferred approach should be closer to the Israeli, or perhaps the Belgian, banning regime rather than to the more comprehensive German approach. Indeed, the German approach is more appropriate under the Weimar paradigm when the assumption is that the banning is aimed at preventing an antidemocratic party from seizing power. Accordingly, it makes more sense to impose severe restrictions upon the antidemocratic party, to decapitate it financially, organizationally, and electorally. Conversely, under the legitimacy paradigm, the focus of the banning is upon the unique and practical legitimacy benefits that stem from participation in the electoral arena itself. The fear is that associations and individuals are granted a special "institutional" status when they compete in elections as political parties and enjoy benefits that are specifically conferred upon electoral parties.

The logical implication of such an emphasis is that the ban should be aimed precisely at the stage of electoral participation. Thus, banned parties should be allowed to continue to operate as associations; they should not lose their separate legal identity, their assets, or their ability to organize assemblies and demonstrations. Instead, the focus should be upon denying them the special benefits afforded to political parties per se, especially the right to compete for votes within the electoral arena and the various benefits offered to parties, like government funding or free public broadcasting opportunities. This approach leaves the door open for a political group

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314. *Id.*

315. *Id.*

316. *Id.* at 145.

317. *Coffé, supra* note 109, at 216 ("[T]he judgement could have served as a crowbar to pry away any form of governmental subsidy to the party. The Vlaams Blok as a result felt obliged to change its name.").

to choose. If it wishes to enjoy the various privileges granted to it as a party, it is subjected to restrictions concerning the advocacy of certain antiliberal agendas. However, outside of the electoral arena, it is released from these limitations and may advance its agenda freely, subject to the criminal restrictions on inciting speech.

#### D. Potential Dangers

The application of a repressive measure such as the banning of a political party entails significant dangers and concerns. A complete survey of these concerns goes beyond the scope of this Article. However, two main concerns will be highlighted: the use of party banning as an entrenchment device against political opposition and the effect this device may have upon ethnic or regional minorities.

The first concern, regarding partisan self-entrenchment, is a typical risk of any regulation of the electoral arena. As various commentators have noted, laws and actions regarding parties are not merely constructions adopted by a neutral state but rather are the result of actions by partisan political actors.<sup>318</sup> While this observation does not necessarily delegitimize all such regulations, it highlights the need to ensure that they have been adopted to protect democracy and not to protect incumbents and limit legitimate political opposition.<sup>319</sup> This concern is particularly acute in transitional democracies, in which the threat of extremism may be used as a pretext for a return to an authoritarian regime.<sup>320</sup> Similarly, wartime conditions may also be conducive of such repressive overreaction. Based upon excessive fear or deliberate misrepresentation of a threat, a government may be tempted to use an instrument such as party banning against opposition parties that are deemed dangerous and subversive. A notable example in this regard is the treatment of the Communist Party in the United States during the Red Scare of the 1940s and 1950s.<sup>321</sup> In fact, the legitimacy paradigm seems to

318. See, e.g., Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 653 (1998) (“We emphasize that ‘the State’ must not be viewed as an abstract, detached, or nonpartisan entity in most cases of political regulation . . . ‘The State’ is always a constellation of currently existing political and partisan forces.”); Richard Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 130–53 (2004) (discussing how parties may use political power to insulate themselves from competition).

319. See Finn, *supra* note 78, at 66 (commenting on the potential for abuse inherent in this kind of regulation).

320. See Issacharoff, *supra* note 13, at 1454 (“[Too many putative democracies . . . have succumbed to one party rule under the claimed necessity of domestic emergencies . . . to ignore this threat.”); Peter Niesen, *Political Party Bans in Rwanda 1994-2003: Three Narratives of Justification*, 17 DEMOCRATIZATION 709, 723 (2010) (noting that party bans are used by the ruling party in Rwanda as a means to “divest[ ] itself of its challengers and competitors”).

321. ROSENBLUM, *supra* note 13, at 429–30.

exacerbate these concerns. Indeed, once one acknowledges that current banning decisions are not aimed at preventing the total collapse of democracy but at a more open-ended purpose—denying legitimacy from certain ideas and parties—the risk of misuse is even greater, and the need for vigilance is even more pronounced.

The second concern, which is probably more acute in the present context, is the effect of party banning upon ethnic or regional minorities. This concern arises particularly in the context of parties that are banned for their support of violence and stems from the strong association between the potential targets of this banning category and minority segments of the population.<sup>322</sup> This is obviously not a necessary characteristic of this type of restriction, but in recent years it is in fact a very common one. Typically, this association arises when an ethnic or regional minority employs terror for the purpose of achieving greater political rights or independence, and the political party at issue is also supported by the same minority. Thus, the political party has, or is accused of having, some level of affinity with the terrorist organization.<sup>323</sup> The danger here is twofold. First, the tendency to employ repressive means may be greater when the target of such a measure is a minority party that is not part of the mainstream and whose members are often the target of discrimination in other areas of civic life.<sup>324</sup> In addition, from a practical perspective, banning parties that are considered supportive of violence may effectively lead to the closing off of a central legitimate avenue of expression for the minority.<sup>325</sup> It may lead to alienation of the minority and to its further radicalization.<sup>326</sup>

In light of these concerns, there is a clear need to ensure that all banning decisions are subjected to review by an independent entity that is distinct from the self-interested political actors—typically, the judicial branch.<sup>327</sup> A source of review that is independent of the executive is critical in providing a check and making sure that this dangerous power is not misused by the government against political

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322. See Issacharoff, *supra* note 13, at 1438 (discussing the problems posed by separatist parties).

323. All three of the examples mentioned earlier in this regard, Batasuna in Spain, the Kurdish parties in Turkey, and the Arab parties in Israel, correspond to a certain degree to this description. See *supra* Part III.B.

324. See Issacharoff, *supra* note 13, at 1438 (“There is an extraordinary risk of defining politics as closing out the political expression of grievances of the minority.”).

325. See Rosenblum, *supra* note 13, at 44 (“Outlawed parties typically speak for oppressed minorities or in some cases for excluded majorities; if these parties are banned than the concept of political parties of a pluralistic nature would suffer.”).

326. Medina, *supra* note 67, at 370–71.

327. See *Democracy Through Law Guidelines*, *supra* note 75, art. III(VI) ¶ 18 (“The role of the judiciary is essential in the prohibition or dissolution of political parties. . . . There can be different judicial bodies competent in this field. In some states it lies within the sole competence of Constitutional courts whereas in others it is within the sphere of ordinary courts.”).

enemies.<sup>328</sup> As detailed above, the Israeli case demonstrates that an independent judiciary may also serve a crucial role in protecting the rights of parties that are associated with ethnic minorities and preventing the widespread use of party banning against such parties.<sup>329</sup> The review of the banning decision by an international court, like the ECHR, is particularly effective because such tribunals will usually be detached from the domestic political pressures and partisan interests.<sup>330</sup>

## VII. CONCLUSION

The banning of political parties is an exceptional measure and a radical departure from accepted democratic principles. It seems particularly alien to American constitutional thinking. Yet, the recent prevalence of this measure, even in stable democracies, shows that despite its severity, it is considered part of the democratic arsenal in dealing with extremism. In these circumstances, it is important to thoroughly examine its characteristics and justifications. This Article seeks to do so by revealing the inadequacy of the current theoretical frameworks for dealing with this phenomenon and by offering an alternative framework.

There is a lot more to say about the dangers that arise in the context of a banning decision, about the type of oversight that is required in a banning process, and about the various pragmatic considerations against banning.<sup>331</sup> However, these matters will not be pursued here. It will suffice to say that a decision to ban a party should always take into account the repressive nature of such a measure and cautiously assess whether it is indeed justified despite the infringement of fundamental democratic rights that is inherent in any such action. However, in the appropriate cases, democracies should not shy away from challenging those who wish to use the electoral system to destroy democracy's most basic values.

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328. See Issacharoff, *supra* note 13, at 1453–58 (“Requiring that there be an independent source of legislative authority for the prohibition of a political party and that there be a source of review independent of the executive provides a check on the misuse of this dangerous power.”).

329. See *supra* text accompanying notes 120–21.

330. See Issacharoff, *supra* note 13, at 1454 (“Such crossnational bodies are removed from any immediate accountability to domestic political processes and are unlikely to respond narrowly to partisan or sectional interests.”).

331. See Tim Bale, *Are Bans on Political Parties Bound to Turn Out Badly? A Comparative Investigation of Three “Intolerant” Democracies: Turkey, Spain and Belgium*, 5 COMP. EUR. POL. 141 (2007) (conducting a comparative empirical investigation of the consequences of recent bans in Turkey, Belgium, and Spain and showing that these recent cases have achieved some positive results—that is, at the very least, the conventional wisdom that party banning will prove pointless, counterproductive, or endanger democratic achievements is not necessarily true).

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