Militant Democracy and Political Liberalism

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Abstract

There will always be a need to defend democracy against its enemies. Some democratic constitutions provide for "militant democracy," i.e. measures of constitutional entrenchment, such as party bans, that aim to pre-emptively deny antidemocrats the legal and democratic means to revolutionize democracy. At first glance, however, militant democracy's measures of constitutional entrenchment can appear fundamentally undemocratic. A normative theory of militant democracy must explain the democratic legitimacy of measures of constitutional entrenchment. This article analyses how elements of Rawls' political thought provide the foundations for an alternative "liberal" normative theory of militant democracy. In particular, it analyses both how Rawls' thought determines basic liberal rights to be authoritative constitutional norms and how it defends the legitimacy of deploying "militant" measures, namely unamendability and political rights restrictions, to entrench those norms. Turning to Rawls helps resolve shortcomings that normative theories of militant democracy have encountered so far, such as the paradox of democracy's self-defence, the detection of illiberal democrats as a threat to democracy, and the incongruence between the theory and practice of militant democracy today.

Introduction

Contemporary challenges to democracy, such as populism, illiberal democracy, and democratic backsliding, demonstrate the perennial need to defend democracy against its enemies. To do so, some democratic constitutions do provide for "militant democracy," i.e. measures of constitutional entrenchment that aim to pre-emptively deny antidemocrats the legal and democratic means to revolutionize democracy (Müller 2018, 415). These measures entrench the democratic identity of the constitution and defend against its legal revolution. Although today militant democracy is considered synonymous with party bans (Malkopoulou 2019, 2), earlier approaches included other mechanisms, such as constitutional unamendability.

At first glance, however, militant democracy's measures of constitutional entrenchment can appear fundamentally undemocratic. This is especially the case when states seek to deploy militant measures against actors who have not broken any laws and who are supported by a majority of voters in their pursuit of their political goals.

A normative theory of militant democracy explains the legitimacy of measures of constitutional entrenchment. This article analyses how Rawls's political liberalism provides the foundations for an alternative "liberal" normative theory of militant democracy. It aims to unpack what Rawls adds to the debate about militant democracy, rather than to develop an original contribution to Rawls-scholarship per se.

A normative theory of militant democracy grounded in Rawls's thought has several advantages. In particular, it may better address the paradox of democracy's self-defence," which Kirshner (2014) defines as the paradox that measures taken to defend democracy against its enemies appear themselves to be undemocratic and a threat to democracy. It better recognizes "illiberal democrats" as (potential) threats to democracy. Finally, it is more congruent with the form that militant democratic constitutions take today, such as the German *Basic Law*.

Threats to Democracy

The reasons for enacting "militant" measures for democracy's self-defence are as valid today as when militant democracy was first theorized in the 1920s and 1930s. Democracy has always had enemies. Those enemies adopt both legal and illegal tactics in pursuit of antidemocratic goals. A democracy defending itself against illegal and even violent revolutionary tactics is uncontroversial. However, democracies face a serious quandary when their enemies adopt legal revolutionary tactics. What recourse does a democracy have if an openly antidemocratic party pursues political power while remaining within the bounds of legality and with the support of a majority of voters?

The case of Hungary helps illustrate this problem. Since taking power through free and fair elections in 2010, the Fidesz party under the leadership of Victor Orbán has successfully used legal revolutionary tactics, including constitutional amendment, to transform Hungary into what Orbán calls an "illiberal democracy." Among other things, Fidesz has limited speech rights, constitutionally privileged Christianity, constrained civil society (such as press and academic freedoms), gerrymandered electoral districts, and undermined an independent judiciary (Bánkuti, Halmai, and Scheppele 2012; Pech and Scheppele 2017; Bárd and Pech 2019). The result, Halmai (2018, 246) writes, is that "Hungary (not even a Republic in its name anymore) cannot be considered a liberal constitutional democracy."

Although Hungary now fails to meet most normative definitions of democracy, the formal legality of Fidesz's changes and the ongoing popularity of its illiberal agenda with the electorate complicate the picture. Orbán depicts himself as a representative of the Hungarian people and a champion of Hungarian popular sovereignty. There is unfortunately something to that portrayal. Urbinati (2019, 20) argues that populist parties tend to make obtaining electoral legitimation a "defining dimension" of their regimes. Scheppele (2018, 547-548) credits populist successes in backsliding democracy to their decision to shelter antidemocratic ambitions behind electoral backing and procedural legality. While their values and methods are troubling enough by themselves, the

popularity and success of parties like Fidesz suggests that many voters, in some democracies a majority even, openly reject fundamentals of democracy.

Militant Democracy

Hungary's *Fundamental Law* was ill equipped to prevent its legal revolution. It presented few obstacles to Fidesz pursuit of power and abrogation of democratic essentials. But other models of democratic constitutional design do offer recourse against antidemocrats pursuing their antidemocratic goals through legal revolutionary methods.

Drawing on the experience of totalitarianism's emergence out of democracy in the 1930s, jurists designed post War democratic constitutions to be "militant" and entrench their democratic identity, in order to foreclose the potential for the legal revolution of democratic constitutional essentials. Many post War constitutions codify militant democracy in varying degrees, such as Italy, Israel, Turkey, India, Thailand, and South Korea.

The German *Basic Law* arguably most closely realizes the ideal-type of militant democracy. This is due to three interrelated features: constitutional unamendability, political rights restrictions, and judicial "guardianship" (Heun 2011; Kommers and Miller 2012).

Article 79.3 of the *Basic Law* protects the substance of German democracy against legal change through explicit unamendability. It legally invalidates amendments to the principles codified in Articles 1 and 20 (as well as to Germany's federal structure). Explicit unamendability signals the fundamental identity of the constitution through positive law. It subordinates the state and all within it to the principle of human dignity codified in Article 1, a more detailed meaning of which is enumerated legally in the next 18 articles. Article 79.3 also subordinates the state and all within it to the five substantive principles codified in Article 20: namely, the commitments to a democratic state, a social state, a *Rechtsstaat*, a federal state, and a republic. The principles of those articles are considered valid and binding not simply because they have been positively enacted into law. They merely codify a freestanding "objective order of values." Because they are objectively binding, those

values cannot be abrogated validly, no matter how popular doing so might be (Heun 2011, 37; Kommers and Miller 2012, 45, 57-58).

Article 92 of the *Basic Law* authorizes the Federal Constitutional Court (FCC) to act as the guardian of the constitution. Its duty is to defend Germany's democratic public order against both governmental and majoritarian excesses (Issacharoff 2015, 138, 145). Its decisions bind other constituted powers, including the legislative. As the final interpreter and arbiter on questions of constitutionality, the FCC sits as the "epicentre" of German democracy (Kommers and Miller 2012, 38).

Article 21 of the *Basic Law* both establishes the importance of political parties to German democracy and regulates them by allowing for the restriction of their rights. Paragraph 1 requires that parties have an internal structure that conforms to democratic principles. Paragraph 2 stipulates that parties are unconstitutional if they "seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany." That determination hinges in particular on whether parties threaten Articles 1 or 20. Finally, Paragraph 4 authorizes the FCC, as guardian, to decide on parties' constitutionality.

Weill (2017) argues, because unamendability and political rights restrictions perform the same underlying function of constitutional entrenchment, they are mutually presupposing. If one article is codified in the constitution, the other is at least implied.

Although it is easy to focus on how measures such as a party ban infringe on members' political rights – which they do –, their positive purpose is to entrench constitutional essentials against legal change. A party ban does so *indirectly*, by denying the legal possession of state power to antidemocratic actors. Constitutional unamendability accomplishes entrenchment *directly*, by denying the constitutionality of otherwise legal changes to the constitution. These measures are complementary because they focus on different threats to entrenched norms. While unamendability focuses on undemocratic legislative *actions*, containment focuses instead on antidemocratic *actors*. Weill (2017, 242; 2018, 961, 963) provides an additional perspective on their relationship, conceiving

of their respective contributions to entrenchment in temporal terms. Political rights restrictions entrench a constitution *proactively*, by denying the legal possession of state power to organizations that threaten the substance of the constitution. Unamendability entrenches a constitution *retroactively*, by invalidating unconstitutional amendments.

Besides performing the same underlying function, these two mechanisms also reinforce one another. Restrictions on the rights of political organizations reinforce unamendability by denying antidemocrats the opportunity to pursue unconstitutional legislation in the first place. A public official cannot attempt to pass unconstitutional legislation if he cannot hold public office.

Unamendability similarly reinforces political rights restrictions. The basis for party bans is weakened when there are no limits on constitutional amendment, such as when the amendment clause is the supreme clause of the constitution. It is difficult to make a case for restricting a party's political rights because it sought to use the amendment clause legally. Unamendability sets the substantive identity of the constitution above its amendment procedures.

Arato (2017, 368) argues that constitutional entrenchment is not self-enforcing. For entrenchment to work, some branch of government must be authorized to decide when unconstitutional constitutional amendments and derogations or "breaches" of the constitution through ordinary law occur. Modern constitutions tend to authorize the judiciary to decide.

The Paradox of Democracy's Self-Defence

Although there is a perennial need to defend democracy against legal revolutionary threats and although many post-war constitutions provide mechanisms that entrench democracy, the deployment of those militant measures can appear fundamentally undemocratic.

That opposition results in the paradox of democracy's self-defence: measures to defend democracy against its enemies may themselves be undemocratic and destroy democracy (Kirshner 2014, 2). That paradox begs the reasonable question of whether militancy is democratically

legitimate at all. Only in the last decade have theorists really begun to assess the legitimacy of militant democracy head on.

Advocates of militant democracy today focus on theorizing the legitimacy of party bans as mechanism to defend political participatory rights, such as the right to vote and the right to hold public office (Rummens and Abts 2010; Niesen 2012; Kirshner 2014; Jovanović 2016; Rijpkema 2018; Vinx 2020; Müller 2021). They argue that equal political rights are the *sine qua non* of democratic legitimacy. Political rights legally guarantee that each member's interests will receive formally equal consideration in democratic majoritarian procedures. Party bans, advocates argue, may be necessary to ensure that all members continue to be heard as equals in those procedures. Should a party credibly threaten to infringe on other members' political rights, by extension threatening the continuity of the democratic public order, militant democrats argue that the state may validly restrict that party's own political rights. Advocates recognize that, although infringing on political rights might be illegitimate in a vacuum, the exceptional infringement of political rights can be justified when in defence of the underlying commitment to democratic public order and universal equal political rights.

Critics respond that militant democracy fails to resolve the paradox of democracy's self-defence (Invernizzi-Accetti and Zuckerman 2017; Malkopoulou and Norman 2018; Kaltwasser 2019). They agree with advocates that political rights are the *sine qua non* of democratic legitimacy. For that reason, they argue, legally authorizing the state to infringe on political rights *in any way* degrades democracy by definition. A state ceases to be a democracy when it can disregard the legally expressed will of its members or impede their ability to formulate their political will. Even when deployed with the best of intentions, critics argue, militant measures depoliticize a democracy because they exclude members' interests from consideration *a priori*. There is something to this: neither forcing members to choose among undesired political options nor compelling them to abide by laws they would otherwise change seems very democratic. In addition, critics worry, militant

democracy produces unreasonable discretionary authority to decide who is an enemy of democracy. The mere presence of militant measures can lead members to self-censor their political interests.

However, critics do not offer any alternative way of responding to antidemocrats threatening to revolutionize democracy legally. To be sure, some advocate other measures to improve the quality of democracy. Malkopoulou and Norman (2018) recommend more robust social welfare programs, to help "immunize" members against antidemocratic influences. Badano and Nuti (2018) outline a moral duty to pressure antidemocrats to revise their beliefs through discourse and rhetoric. Stahl and Popp-Madsen (2022) argue democracies should find ways to broaden popular participation in government. While these approaches would no doubt better democracy, they do not address the distinctive and pressing problem of the legal revolution of constitutional essentials by popularly elected parties – a blind spot acknowledged by Stahl and Popp-Madsen (2022, 323). Critics' silence when it comes to legal revolution implicitly accepts that democracies have no legitimate recourse against openly antidemocratic parties pursuing state power legally to revolutionize democratic essentials. This silence is problematic because inaction in the face of an existential threat degrades democracy no less than the militant measures that they criticize.

The current debate over the legitimacy of militant democracy thus seems to lead to an impasse. Rummens (2019, 112-114) has argued that it runs aground on a performative contradiction. Kirshner (2019, 57-58) summarizes that contradiction neatly, writing that ultimately "both inaction in the face of a threat to democratic rights and action taken in defence of those rights could leave a polity less democratic."

Democracy, Entrenchment, and Modern Constitutionalism

The normative problems facing militant democracy can be sharpened even further by approaching it through the lens of modern constitutionalism.

Constitutionalism asks "what makes the law different from a highway robber demanding one's wallet at gunpoint?" That is, what makes the law legitimate, something that we have reason to

obey, rather merely an exercise of coercive power? Modern constitutionalism holds that law is legitimate because it is democratic, i.e. because it reflects the identity and the will of "the people." (Chambers 2004, 154ff; Kalyvas 2005, 238; Preuss 2007, 211; Loughlin 2014, 219)

The history behind the turn to democratic legitimation is complicated, but can be summarized as a consequence of modern epistemology and the fact of pluralism.

Modernity is defined by the break with traditional forms of authority. Modern scepticism began a process of the disenchantment of *transcendent* sources of authority. Transcendent authority rooted in normative facts, such as the Catholic Church's interpretation of divine law, was no longer accepted as self-evident. Individuals developed radically different perceptions about truth and right and the fact of reasonable pluralism now characterizes modern society (Rawls 1996, 63). Pluralism seeded deep disagreements about what norms must be upheld publicly, with the force of law. At times, those disagreements became violent and erupted into civil war. Because of the fact of pluralism, modern societies needed an alternative source for legitimate law.

Democracy provided that alternative. It generates legitimate authority *immanently*, through a closed system in which action begins and ends with the agent. In the case of constitutionalism, immanence means that the subject of the law is also its author. The law is legitimate not because it codifies a transcendent normative fact. It is legitimate because its subjects, "the people," authored it. Through a combination of democratic procedures and legal positivism, public law develops dynamically with "the people."

Militant democracy's entrenchment of constitutional essentials seems incompatible with modern constitutionalism in two ways.

First, the norms entrenched as constitutional essentials do not seem to issue from "the people." Those norms are valid and binding, regardless of what a majority or even supermajority believes. A normative theory of militant democracy should be able to explain how those norms are still consistent with modern constitutionalism. For example, where does the "objective order of

values" of the German *Basic Law* come from and why would it still be objectively binding even if Germans themselves no longer saw that order as their own?

Second, even if particular norms can be shown to be objective, adopting militant measures to uphold them seems to raise normative problems of its own. Unamendability and political rights restrictions may in principle be used to impose constitutional norms against a majority or supermajority that would otherwise legally oppose them. A normative theory of militant democracy must account for how measures of absolute entrenchment are compatible with modern constitutionalism.

In sum, a normative theory of militant democracy must explain both why a particular set of constitutional norms is authoritative and second why militant measures may be deployed to entrench them. In both cases, theoretically against the legally expressed will of the electorate. A normative theory of militant democracy should also explain who has the authority to decide on the entrenchment of those norms.

The above-described paradox of democracy's self-defence results in part from the logical opposition between the norms being defended (political rights) and the means to do so (repressing political rights). Although advocates offer theoretical resolutions to the paradox, it still clouds the reception and legitimacy of militant democracy.

Current normative theories of militant democracy face two other shortcomings. First, antidemocrats today, such as Fidesz, tend to dismantle liberal rights but retain at least the veneer of political rights. Focusing exclusively on threats to political rights creates what Rijpkema (2019) calls a "detection problem" for current normative theories of militant democracy. Current normative theories of militant democracy cannot detect illiberalism as a threat. They would leave democracies defenceless against what is arguably the most pressing internal threat to democracy today.

Second, current normative theories of militant democracy seem incongruent with the design of actual militant democracies, exemplified by the *Basic Law*. On the one hand, the *Basic Law* defends basic liberal rights as the most fundamental commitment of German democracy, both by

codifying the value of human dignity as the foundation of German democracy and by absolutely entrenching that value. On the other hand, the party ban is not the only measure of entrenchment in need of legitimation. A normative theory of militant democracy should account for the richer set of measures of entrenchment in practice in militant democracies today.

In sum, the current focus on political rights by theorists of militant democracy raises several problems for a normative theory of militant democracy: the paradox of democracy's self-defence, the detection problem, and the incongruence between militant democracy's theory and practice. Rather than continuing to focus only on the defence and restriction of political rights, an alternative path is to investigate whether militant democracy can be theorized in different terms that could overcome those problems

The Authority of Constitutional Norms

John Rawls provides the foundations for an alternative "liberal" normative theory of militant democracy. Rawls's thought identifies basic liberal rights as authoritative and binding constitutional norms and defends their entrenchment through constitutional unamendability and political rights restrictions. Because entrenchment rests on liberal theory, a normative theory of militant democracy grounded on Rawls's liberal theory would circumvent the paradox of democracy's self-defence: political rights restrictions are justified as guarantees of basic liberal rights. Its liberal orientation makes it better suited to detect the threat posed by illiberal actors and makes it more congruent with actual militant democratic constitutions, such as the German *Basic Law*.

The remainder of this section unpacks how Rawls's thought develops the authority of liberal constitutional norms. The next unpacks what measures entrench those norms.

Unreasonability and the Deterioration of an Overlapping Consensus

In *Political Liberalism*, Rawls argued that a democratic public order should be the product of an overlapping consensus among its members. He focused on how an overlapping consensus might

emerge out of a *modus vivendi*. An overlapping consensus occurs as a plural society transitions from a condition of *de facto* stability, in which there is only a (temporary) balance of power among groups, each unable to definitively seize state power, to *de jure* stability or "stability for the right reasons", in which members accept the public order as legitimate even if their group does not possess state power (Rawls 1996, 145; Medina 2010, 560; Wenar 2021).

The reverse situation is also possible, however. A democratic society with *de jure* stability can deteriorate, when members holding "unreasonable" beliefs reject its constitutional consensus and work to replace it. The deterioration of a legitimate public order does not just risk transforming an overlapping consensus into a *modus vivendi* (Quong 2004, 320; Medina 2010, 561-562). A *modus vivendi* is inherently unstable because members are more likely to see the law as mere coercion used to advance the interests of power holders.

When domestic affairs are characterized as a *modus vivendi*, the public order fails to answer the question of constitutionalism. And when social relations are characterized by a mere balance of power among competing factions, a perceived change in that balance of power may precipitate a competition among them to seize power and impose their idiosyncratic worldview. "Unreasonable" members thus threaten not just legitimate democratic order but more simply stable public order.

Building on Rawls's account, Quong (2011, 299) defines unreasonability as the rejection of the fundamental tenets of liberal democracy. Two principal features define "unreasonable" members: they reject fair terms of cooperation, denying that others members deserve freedom and equality, and they reject the burdens of judgment, dismissing the fact of pluralism and the possibility of reasonable disagreement about normative truth (Rawls 1996, 49-50;Cf. Sala 2013, 255-256; Reid 2022, 303). Given the opportunity, unreasonable members will violate fair terms of cooperation (Rawls 1996, 60-61, 138; Giovanola and Sala 2022, 1236). They insist on the truth of their particular comprehensive doctrine and believe in imposing their idiosyncratic values on society. Medina (2010, 558-559) argues that, because of their righteous insistence on their own worldview, unreasonable

members may even see other members as "enemies," in a Schmittian state of nature-like relationship.

No democracy can prevent unreasonable beliefs from arising. They are a natural consequence of democratic toleration and the fact of pluralism. As long as unreasonable members remain a minority and within the private sphere, they do not threaten a legitimate constitutional consensus (Quong 2011, 297). They will tend to abide by the rules of a liberal public order, even if only out of self-interest. They become a problem when their numbers reach a critical mass and they attempt to infiltrate the public sphere and use the law to impose their worldview, upsetting the democratic constitutional consensus (Rawls 1996, 126).

One way to infiltrate the public sphere is to seize it violently. However, as discussed above, legal revolutionary methods can have the same deleterious effect on a democracy. By possessing state power legally, unreasonable members can legally impose their comprehensive doctrine and deny fair terms of cooperation to other members. And because legal revolution plays by the rules of the democratic game, it may be more likely to succeed in democracies ill-equipped to defend themselves against the weaponization of legal procedures and political rights against democratic constitutional essentials.

Populist "illiberal democrats" such as Fidesz, seem to fall under Rawls's category of "unreasonable." On the one hand, as Ferrara (2018, 467-471) argues, populist parties tend to conceive of the people as a homogenous entity and seek to dismantle institutions that legally guarantee pluralism. As a result, they transform the public from a sphere of communicative interaction and reason-giving into a space of factionalism and even enmity. On the other hand, as Badano and Nuti (2018, 150-151) argue, they insist that only those members who belong to the "authentic" people deserve equal membership. They may believe that minorities and other "outsiders" do not deserve the same set of membership rights. This bears out in practice, as populists in power have worked to enact antipluralist policies and disenfranchise minorities.

Hypothetical Proceduralism

Ideally, democratic constitutional essentials are legitimate because they rest on an overlapping consensus among the electorate. However, populism, illiberal democracy, and democratic backsliding all demonstrate how fragile and reversible an overlapping consensus can be. A just public order is not a once and for all achievement. It needs continual upkeep and defence. So how does Rawls respond to the degradation of a prior overlapping consensus by unreasonable members?

Rawls argues that the legitimacy of democratic constitutional essentials also rests on a second pillar besides an overlapping consensus: political constructivism. In their overview of the debate in metaethics, Darwall, Gibbard, and Railton (1992, 140) recognize that although constructivism is a kind of proceduralism, it determines authoritative norms without appealing to transcendent normative facts. Even if the overlapping consensus erodes under the pressure of unreasonable member, those norms remain authoritative and limit valid constitutional change (Freeman 1994, 643).

Because it is a kind of proceduralism, political constructivism shares several structural features with other kinds of proceduralism (Rawls 1996, 93ff; 1999d, 310ff; 2003, 88). Those similarities help show how constructivism remains within the normative framework set by modern constitutionalism. First, constructivism generates legitimate law *immanently*. It recognizes no independent, transcendent criteria for determining legitimacy. The only criterion for legitimacy is the outcome of the procedure. Second, participants within the procedure all possess formally equal participatory rights, which guarantee them equal consideration as they participate in its decision-making procedures. Third, participants are free to exercise their political rights in whatever way they believe will best realize their goals. Finally, the output of the procedure is majoritarian: the procedure aggregates the interest expressed by individual participants.

However, constructivism departs from other proceduralist accounts in two significant ways, which explain how it generates authoritative norms.

Constructivism's first significant departure is who participates in the procedure. Unlike in other proceduralist theories, in which members of society participate directly, constructivism's procedure is hypothetical (Street 2010, 366). It is a thought experiment. Members of society do not represent themselves or participate directly in the procedure. Members are instead represented in a fiduciary relationship by artificial, rational agents (Rawls 1996, 104; 1999d, 311, 316). "Rational" means instrumentally rational: agents will select the most efficient means to realize their given goals (Rawls 2003, 87). In the procedure, the goal of each rational agent is to secure the interests of discrete individual members of society.

Constructivism's second significant point of departure is a constraint built into the structure of the procedure. In the constructivist procedure, each rational representative is placed under a "veil of ignorance," which blinds it to the concrete identity of whoever it represents (Rawls 1999d, 310ff.; 1999c, 400). It cannot be certain of the idiosyncratic interests of who it represents. The veil of ignorance structurally embeds in constructivist proceduralism the limitations of modern epistemology, which gave rise to reasonable pluralism and which motivated constitutionalism's turn to democratic legitimation in the first place. The uncertainty produced by the veil of ignorance eliminates any possible bargaining advantages that would come from knowledge about the world, for example knowledge of the proportion of members in society who hold a particular interest. At best, a rational agent knows the complete range of possible interests that a represented member might hold.

Building *epistemic uncertainty* directly into the procedure derails the ability of rational agents to realize their representative goals through the exercise of their political participatory rights. Not knowing anything concrete about who exactly it represents, no agent would use the procedure to secure the beliefs, values, and interests of whoever it represents *directly*. Any rational agent would recognize that codifying laws that advance an arbitrary set of interests would be extremely unlikely to benefit whoever it actually represents (Rawls 1996, 311). Arbitrary legislation would more likely be antithetical to their interests. Constructivism's two significant departures work together to

put rational agents in a performative bind. A rational agent will be averse to using its political rights to enact any substantive goals directly.

However, rational agents would recognize that there is a way to secure the interests of whoever they represent *indirectly* (Rawls 1996, 307). They could realize their aims indirectly by enacting formal rights that legally guarantee to each member the opportunity to pursue their idiosyncratic interests by themselves, within the widest range compatible with other reasonable interests (Rawls 1996, 181, 187; 1999d, 313-315; 2003, 58-59).

The legislative output of constructivist proceduralism is distinctive because it is *second-order* and *negative*. It is second-order because it does not produce any first-order laws that would regulate society directly. It only determines "the rules of rule-making." It is negative because the laws it produces only circumscribe what the actual legislative branch can achieve through positive legislation.

Constructivism's still modern answer to the question of constitutionalism, then, is that law is legitimate when situated within a public order that first guarantees to every member the primary goods to pursue their idiosyncratic interests, their conception of the good, by themselves. Constructivism argues that every member has reason to accept the legitimacy of a democratic public order, even when they are out of power, because every member will still have those rights guarantees.

As a thought experiment, constructivism does not represent an actual event or offer a blueprint for how an actual democratic legislature should behave (Rawls 1999c, 394, 400, 410; Street 2010, 366). It is as an independent heuristic device for assessing the legitimacy of a democratic constitution (Gutmann 2003, 188-189). As long as a democracy's actual legislative procedures operate within that framework, then constructivism holds that it meets the requirements of modern constitutionalism.

Although constructivism still offers a modern answer to the question of constitutionalism, its method distinguishes it from other modern answers. Constructivism concludes that a legitimate

public order should not grant its members full control over the agenda. Legitimate public order must first guarantee background conditions, which enable the exercise their political rights. While it only takes a narrow set of options off the agenda, it requires that those conditions be guaranteed.

Constructivism's Formal Output: Authoritative Norms

The output of the constructivist procedure has both formal and substantive components. Formally, constructivism argues that its procedure generates binding and authoritative norms, which apply to any democratic society.

Those norms are authoritative because the constructivist procedure isolates and abstracts the process of practical reasoning itself, as practical reason navigates the limits imposed by modern epistemology (Rawls 1996, 90, 273-277; Baynes 1992, 19; Bagnoli 2021). The two structural constraints, the artificial rationality of participants and the veil of ignorance, distil how practical reason operates when it is unable to rely on transcendent truth-claims.

As described above, the epistemic constraints of constructivism would lead a rational agent to conclude that the best it can do is obtain the legal means necessary for whoever it represents to realize their interests by their self and for their self. Moreover, because the agent in the constructivist procedure would also reason that it could be the representative of *any* member of society, it would choose the primary goods that could in principle serve *every* member of society in pursuit of their interests. Between the formal equality of every rational agent and the structurally-determined need to represent every member of society, rational agents should decide on those institutional guarantees unanimously (Rawls 1996, 383-384; 1999d, 339). That unanimous decision represents the distillation of practical reason (Rawls 1996, 93, 274; 1999c, 401; Bagnoli 2021; Street 2010, 368, 373).

Rawls presupposes that practical reasoning is a universal human capability (Rawls 1996, 19, 81; See Baynes 1992, 20). Because of that universality, and because democratic societies all rest on the same condition of epistemic uncertainty and reasonable pluralism, Rawls held that rational

agents' decisions can validly be imputed to and are universally binding on actual democratic

societies. In principle, any member of a democratic society can follow that process of practical

reasoning. That universality generates the normative authority of the output of constructivist

proceduralism.

Although constructivism generates authoritative norms, those norms are qualitatively

different from normative truths derived from transcendent normative facts, such as divine law or

natural right. That distinction matters. Claude Lefort (1988, 17-19) argued that modern democratic

society was characterized by the fact that power, knowledge, and law have been "disentangled" and

that transcendent reason and justice no longer inform secular affairs. Constructivism argues that –

pace Lefort – *markers of normative certainty can still be found* in modernity. It determines them

without entangling law in claims of absolute knowledge or the whims of arbitrary power. Through

practical reasoning, the value pluralism that defines modern democratic society itself becomes a

source of normative authority.

Constructivism's Substantive Output: Basic Liberal Rights

So what exactly are those markers of normative certainty? Constructivism's substantive outputs are

the liberal principles of legitimacy, which take the constitutional form of classic basic liberal rights.

At its most abstract, Rawls (1996, 309; 1999e, 52) argued that the output of the

constructivist procedure are the iconic two principles of justice. The two principles of justice serve as

normative guidelines on what primary goods are necessary to guarantee that members of society

can autonomously realize their beliefs, values, and interests for themselves.

Although constructivism generates two principles of justice, Rawls (2003, 46-48) argued that

only the first principle can be enacted constitutionally. The second principle measures the legitimacy

of "the background institutions of society." But because it requires balancing property rights with

social rights and because it imposes positive duties on members, actual members should decide on

its concrete form. Although both principles specify what goods a democratic order should deliver, Rawls argued that only the first principle could be constitutionalized.

The first principle takes the constitutional form of basic liberal rights. Rawls unfortunately did not list the basic liberal rights that the first principle generates. Rawls (1996, 291) writes that among them are "freedom of thought and liberty of conscience; the political liberties and freedom of association, as well as the freedoms specified by the liberty and integrity of the person; and finally, the rights and liberties covered by the rule of law." While Rawls does not say much more to unpack the exact content of basic liberal rights, they do seem to mirror the fundamental requirements of the rule of law: formal rights should guarantee a sphere of individual liberty, the law should bind state authority, and it should ensure that all are formal equal before it.

In contrast to other theories of democracy, Rawls's argument defines basic liberal rights as the *sine qua non* of democratic legitimacy. They constitute the background conditions that make democracy possible (Freeman 1990, 338). They hold a prior normative status and may validly trump the exercise of political rights.

Defending the authoritative and binding nature of basic liberal rights does not preclude enacting (or abrogating) *other* rights constitutionally. Constructivism sets a constitutional minimum. It does not determine the constitution in its entirety. There is no reason why members cannot change other aspects of the basic structure of democracy through amendment. Although those articles would not have the same normative and constitutional status as basic liberal rights, they would still enjoy the projection of supermajoritarian thresholds. In this way, actual members retain enormous latitude to determine the laws they are subject to – aside from basic liberal rights.

"The People" versus the Electorate

Modern constitutionalism argues that, to be legitimate, the law must reflect the identity and will of "the people." Yet "the people" as a unified, agent has never existed (Chambers 2004, 154). It must be represented. Just who possesses the authority to represent "the people" is not self-evident.

Although in many cases the electorate may legitimately represent "the people's" will through majoritarian procedures, Rawls does not think that "the people" is reducible to the electorate. To the contrary, the unchecked will of the electorate can produce democratically unjust outcomes, outcomes that "the people" would never accept. Ferrara (2023, 66-90) elaborates on this point, arguing that equating the electorate with "the people" gives antidemocratic power holders the opportunity to portray their actions as if they were "the people's" constitutive power, something populists do today. To disqualify such abuses, constructivism establishes a normative gap between "the people," as a constituent power, and the electorate, as a constituted power (Rawls 1999e, 313ff; 1996, 233).

Commentators have elaborated on how Rawls's conceived of "the people." Freeman (1994, 664) argues that, when it comes to democratic constitutional essentials, "the people" is "an ideal of democratic politics". It cannot be located in any concrete body in society. Michelman and Ferrara (2021) make a similar argument when they argue that "the people" is "always under law." Ferrara (2023) argues that "the people" should be conceived intergenerationally, as a body that extends from the founders into future generations. Besides rejecting the unqualified identity of the electorate and "the people," their arguments imply or explicitly argue that "the people" is best conceived normatively, rather than as a material will.

Distinguishing "the people" from the electorate has several normative consequences.

First, although "the people" has no material existence, the normative output of its constitutive decision does. Its most authoritative representation is the material output of its decision to self-constitute in the first place: its constitution. Constitutional essentials are the most authoritative expression of the constituent power and the identity of "the people."

Second, because basic liberal rights can be determined to be constitutional essentials, "the people" would not authorize their abrogation. To do so would be to destroy "the people's" political identity and existence (Rawls 1996, 337, 365-366; 1999b, 439; Freeman 1994, 663).

Third, the electorate is a derivative and constituted power. The constitution delegates legal powers to the electorate – along with every other constituted power. As a constituted power, the electorate may not validly assume "the people's" constitutive power. Because the electorate may not legitimately assume the constitutive power of "the people," attempts to do so are implicitly unconstitutional. This holds even if the positive legal pathways to assume constitutive power exist – such as when the amendment clause is the supreme clause of the constitution and all other articles of the constitution sit under the reservation of its exercise.

Fourth, the identity and will of "the people," expressed through constitutional essentials, may conflict with the legally expressed will of the electorate (Freeman 1994, 659). When they do conflict, constitutional essentials validly trump the will of the electorate.

By distinguishing "the people" from the electorate normatively, political constructivism defends depoliticizing constitutional essentials, to prevent their abrogation by an electorate that illegitimately assumes "the people's" constitutive power. To guard against that, Rawls (1996, 161) argues, constitutional essentials should be taken "off the political agenda" entirely.[1]

Entrenching Constitutional Norms

Insofar as basic liberal rights are authoritative norms that define legitimate order, it makes sense to entrench them against positive legal change. So what measures does Rawls think a democracy may deploy to entrench basic liberal rights without jeopardizing its claim to be a legitimate democracy?

Rawls did not directly take up this question. However, he did discuss the legitimacy of the two principal measures of militant democracy: unamendability and political rights restrictions.

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[1] Rawls suggests, if not openly advocates, taking liberal principles "off the political agenda" in many places (Rawls 1996, 151-152 (note 16); 1999a, 494, 496; 1999b, 435-436, 439, 442; 2003, 116, 145-146, 194)

Implied Unamendability: Fixing Basic Liberal Rights "Once and for All"

Because of their authority, Rawls argues that basic liberal rights are implicitly unamendable (Roznai 2017, 145-146). Besides arguing that basic liberal rights should be taken off the political agenda, Rawls (1996, 161) expressed this most clearly by arguing that basic liberal rights must be "fixed, once and for all, and assigned special priority" because "leaving the status and content of those rights and liberties still unsettled [would] subject them to the shifting circumstances of time and place [and greatly raise] the stakes of political controversy, dangerously [increasing] the insecurity and hostility of public life."

Two arguments can be drawn out of that passage. First, Rawls argued that basic liberal rights should be assigned a special constitutional status. In doing so, he implies that constitutional amendments should follow two distinct procedures or "tracks". Basic liberal rights should have their own distinctive track when it comes to constitutional amendment. That argument anticipates Arato's theory of "multitrack constitutionalism" (Arato 2011, 324-325; 2017, 388ff).

Multitrack constitutionalism can be best understood in contrast with dual-track constitutionalism. Dual-track constitutionalism, which characterizes both the Hungarian *Fundamental Law* and *The US Constitution*, recognizes only two legislative tracks: law passed by a simple majority ("ordinary" law) and law that must meet a higher threshold (constitutional law). Because of that simplicity, dual-track constitutionalism can run into problems with amendment. Either the legal revolution of constitutional essentials is too easy, because the thresholds for amendment are too low. For example, requiring only a two-thirds supermajority in a single chambered legislature. Or the amendment of non-essentials is too difficult, because the thresholds for all amendments are too high or too convoluted. For example, by requiring a two-thirds supermajority in two legislative chambers, followed by ratification by three-quarters of state legislatures.

In contrast, multitrack constitutionalism has at minimum two tracks for constitutional amendment, which distinguish essential and inessential articles. Amendments to essentials are

either legally impossible or they must meet extremely high thresholds. Amendments to inessential articles must still meet higher thresholds than ordinary legislation, but they are lower than what is required for changes to constitutional essentials. The separate track for essentials both signals their status legally and better entrenches them, while leaving the rest of the constitution more responsive to the electorate. When Rawls argues for the special status of basic liberal rights, he argues for multitrack constitutionalism.

Second, by arguing that basic liberal rights should be "fixed," Rawls implied that they should be legally unamendable. He clearly believed that their abrogation would jeopardize not only the legitimacy of public order but also its stability, as their abrogation increased the possibility of backsliding into a *modus vivendi*.

Rawls (1996, 339) argued that, at every stage of legislation, "the reasonable frames and subordinates the rational." He meant that reasonability structurally limits what self-interested actions can accomplish through positive legislation. This begins with constructivism's hypothetical procedure. At that highest level of legislation, namely "the people's" exercise of its constituent power, the reasonable subordinates the rational because the identity of the democratic "people" is represented through constructivism's hypothetical procedure, rational agents under the veil of ignorance. The output of that procedure helps determine the constitutional essentials of democracy. Constitutional essentials in turn limit and frame what constituted powers, the government and the electorate, can accomplish. It leaves them with, Rawls wrote, "far less leeway" in terms of how they may exercise state powers and what goals they may pursue with political rights.

The argument for unamendability builds on the distinction between "the people" as a constituting power and the electorate as a constituted power. "The people" would not authorize a constituted power to amend basic liberal rights because that would amount to authorizing its political disintegration. Ferrara (2023, 273ff.) suggests that Rawls's criterion of reciprocity implicitly structures constitutional amendment *vertically*: constitutional amendments are valid only if they

maintain a standard of reasonability across generations. Unamendability is implied when basic liberal rights are determined to be authoritative constitutional norms.

If the legal procedures to abrogate democratic constitutional essentials exist positively, the electorate may believe that it has the right to abrogate those essentials, that its power of amendment is a constitutive power. Unreasonable members, such as illiberal democrats, could in turn exploit that belief. Depoliticizing constitutional essentials by "fixing them" through constitutional unamendability helps to reinforce both the limits of the electorate's power of amendment and the special role that those essentials play in enabling democratic public order. Depoliticizing them helps to prevent a democracy's backsliding into a *modus vivendi*.

Of the three roles that Rawls assigned to the constitutional court, the first is to guard the constitution by invalidating attempts to abrogate constitutional essentials through its power of judicial review (Rawls 1996, 233ff.). Rawls acknowledged that, at first glance, judicial review might appear antimajoritarian and therefore antidemocratic. It allows an elite minority to oppose the legally expressed will of a present majority of the electorate. But stopping there and characterizing the court's guardianship as "antidemocratic" would fail to take into account the fact that there are background conditions that enable democracy to exist at all. The legislative branch threatens those conditions when it can illegitimately exercise the constituent power of "the people." Through judicial review, Rawls argued that the constitutional court plays an invaluable supporting role in upholding unamendability and guarding those authoritative constitutional norms.

Building on Rawls's argument, Freeman (1990, 354) argues that, although they are the primary means for promoting democratic ideals, majoritarian legislative procedures are imperfect. Without checks, they too can be antidemocratic. This is particularly so if majoritarian institutions become incapable of self-correction (Freeman 1990, 361). For example, when captured by unreasonable members and used to legally revolutionize constitutional essentials. Insofar as judicial review acts as a corrective and helps guarantee all can live freely and equally and can pursue their idiosyncratic conceptions of the good, judicial review is both democratically legitimate and necessary

to offset the pathologies of the legislative branch. By representing members of "the people" left out of majoritarian institutions, judicial review is actually democracy enhancing. And it enforces the entrenchment of the constitution through unamendability.

Political Rights Restrictions: "Containing" Unreasonable Actors

By itself, unamendability may not be sufficient to entrench constitution essentials. Even if antidemocrats cannot amend the constitution, the right to hold public office affords them other avenues for legal revolution indirectly, without amending the constitution itself. By obtaining public power through democratic elections, they can produce unreasonable outcomes by combining ordinary and reasonable state powers – a tactic Scheppele (2013) describes as stitching together a "Frankenstate." For example, by combining ordinary legislation and the power of judicial appointment, antidemocratic representatives can derogate or "breach" the constitution. With loyalists installed in the constitutional court, antidemocrats can be confident that that the court will either not hear challenges to their unconstitutional laws or the court will not invalidate them. The ability to participate in democratic institutions in bad faith alone can pose an existential threat to democracy. To succeed, entrenchment must include mechanisms that can deny the legal possession of state power to antidemocrats, in addition to those that invalidate antidemocratic legislation (Kirshner 2014, 4).

Rawls's thought provides the normative framework for entrenchment through political rights restrictions, albeit obliquely. He argues that, although no democratic state can prevent unreasonable beliefs and actors from emerging, it can seek "to contain them so that they do not undermine the unity and justice of society" (Rawls 1996, xviii-xix). He did not elaborate on what he meant by "containment," except to suggest that the law may be used to "force the intolerant to respect the liberty of others, since a person can be required to respect the rights established by principles that he would acknowledge in the original position" (Rawls 1999e, 192). Gutmann (2003,

183) elaborates that Rawls thought limits on political rights would be justifiable and reflective of public reason, were they done to protect more important freedoms.

Quong fleshes out a convincing reading of Rawls's argument for containment. Quong (2011, 299) argues that, if "containment" is to be conceptually meaningful, it cannot be defined as enforcing the law. It cannot mean, for example, upholding the legal prohibition of violence by preventing members of the Ku Klux Klan from murdering African Americans. Instead, Quong (2011, 300) argues, containment is conceptually meaningful when it applies to circumstances in which "no law is being broken and no harm will directly follow." Containment defines how a democracy should respond to unreasonable members who threaten legitimate and stable public order within the bounds of legality.

Quong discusses several cases in which containment is legitimate. Of those, he argues that the strongest case for containment are Nazis who choose to use their speech rights to incite others to suppress the rights of minorities or otherwise harm them (Quong 2011, 305, 308-311). He argues that containment in this instance is legitimate neither because reasonable members find the Nazis' views to be odious nor because the Nazis' speech indirectly harm others. Their containment is legitimate because their use of speech rights contravenes the fundamental commitment to society as a fair system of social cooperation among free and equal citizens.

Basic rights protect members' fundamental interests in being free from interference by the state and other members. They do so by imposing a legally enforceable duty on the state and other members to not interfere in a member's pursuit of those fundamental interests. However, Quong argues, if the interest pursued is fundamentally unreasonable, especially if it undermines others' pursuits of their own fundamental interests, then the appeal to rights fails and the state may legitimately contain their exercise.

Insofar as it is legitimate to infringe on the speech rights of Nazis threatening to degrade the fundamentals of democratic order, the case for containment should be even stronger when unreasonable members threaten to turn political rights against democracy itself. If any

circumstances justify containment, it must be the legal revolution of democratic constitutional essentials. In the case of legal revolution, antidemocrats do not merely argue that their basic rights trump others' claims to basic rights. They argue that their political rights allow them to annihilate certain basic liberal rights altogether or to deny certain members equal membership. Legal revolution attempts to constitutionalize unreasonability.

In the context of the entrenchment of constitutional essentials, "containment" means restricting the political rights of organizations that seek state power in order to indirectly revolutionize constitutional essentials. It entrenches those constitutional essentials by barring political organizations that participate in democratic elections in bad faith.

Two considerations about containment may assuage concerns about their own antidemocratic potential. First, as a mechanism of entrenching basic liberal rights, containment only justifies restricting organizations' political rights because it is only concerned with the legal revolution of constitutional essentials. Constructivism's answer to the question of constitutionalism requires that basic liberal rights be guaranteed institutionally. Containment must leave members, including unreasonable members, with the tools necessary to pursue their idiosyncratic conception of the good and their fundamental interests privately.

Second, containment is not an automated, irreversible process (Quong 2011, 311). Even though they leave intact basic liberal rights, political rights restrictions still harm members' fundamental interests in democratic participation by removing options from the ballot. For that reason, a militant democracy must present good reasons for seeking to restrict an organization's political rights. Containment should be a public process, governed by the rule of law, subject to oversight and a system of checks and balances, and those affected should have legal recourse to appeal political rights restrictions.

As fleshed out by Quong, Rawls's containment offers a normative argument for the legitimacy of deploying political rights restrictions to entrench constitutional essentials. Containment

complements unamendability – and is an important guarantee of the essential background conditions of democracy.

Conclusion

This article has analysed how elements of Rawls's thought provide the foundations for an alternative, "liberal" normative theory of militant democracy. Militant democracy matters for circumstances when unreasonable, antidemocratic members use legal revolutionary tactics to backslide an existing democratic constitutional consensus. That liberal normative theory succeeds as a theory of militant democracy because it determines both which constitution norms are authoritative and what measures may be deployed to entrench those norms.

Through its hypothetical procedure, constructivism determines the freestanding authority of basic liberal rights. Basic liberal rights hold for a democratic people even if a present majority opposes them and would otherwise abrogate them legally. Constructivism argues that they are authoritative not only as prerequisites for a legitimate public order, they are necessary for its very stability. They also represent part of the political identity of "the people."

Because they are essential, a democracy may legitimately entrench basic liberal rights. And Rawls discusses the legitimacy of mechanisms of entrenchment. He defended "fixing" basic liberal rights against legal change through constitutional unamendability, and authorized the constitutional court to guard them. He also defended "containing" unreasonable members who threaten democratic fundamentals. Although Rawls did not specify what containment meant exactly, containment can be interpreted as a theory of political rights restrictions.

Grounding a normative theory of militant democracy in Rawls's thought addresses problems that affect its existing normative theories. A liberal normative theory circumvents the paradox of democracy's self-defence. Normative theories have so far conceived of militant democracy as party bans deployed to defend members' political rights. The paradox emerges from the logical tension between infringing on some members' political rights to uphold political rights. To be sure,

advocates explore ways to resolve that paradox. A liberal theory of militant democracy has the advantage of not encountering the paradox in the first place. It argues political rights restrictions are legitimate when in defence of basic liberal rights, which have a more fundamental normative status.

A liberal normative theory of militant democracy has other advantages. Illiberal democrats trash basic liberal rights but leave political rights mostly intact. Because of their focus on defending political rights, existing theories of militant democracy can allow illiberal democrats to fly under the radar. Liberal theory is better equipped to detect the threat that they pose. A liberal normative theory of militant democracy is also more congruent with the constitutional form and practice militant democracy takes. As I have unpacked it, Rawls's thought legitimates the militant aspects of the German *Basic Law*, namely its assertion that basic liberal rights are objectively binding and that they should be defended through explicit unamendability and with political rights restrictions, as interpreted by the constitutional court.

It should be emphasized, however, that when it came to the deployment of mechanisms of militant democracy, Rawls backed away from measures of entrenchment. He argued that the problem of democracy's self-defence was a "practical dilemma which philosophy alone cannot resolve" (Rawls 1999e, 193). Part of the reason may have been because Rawls believed that institutional design was beyond the scope of political philosophy. The implications of deploying them may have also given him pause. Although Rawls was relatively unambiguous that liberal basic rights were authoritative constitutional norms, he seemed at best uncomfortable when it came their entrenchment.

While democrats must bear in mind their potential for abuse, they can be more confident about deploying measures of entrenchment. Rawls helps show how militant democracy can be consistent with modern democratic constitutionalism. And states like Germany model the potential of militant democracy to entrench democracy without degrading it. For those reasons, committed democrats should take militant democracy seriously as a means of democracy's self-defence. Democracy needs defence because it will always have enemies. In recent years, those enemies have

succeed in backsliding both new and consolidated democracies using the legal revolutionary

methods that militant democracy aims to curb. When the dust settles and committed democrats

have the opportunity to rebuild, a liberal normative theory of militant democracy may provide a

roadmap for better guaranteeing the future of democratic constitutionalism.

Bibliography

Arato, Andrew. 2011. "Multi-Track Constitutionalism beyond Carl Schmitt." *Constellations* 18 (3): 324-351.

---. 2017. *The Adventures of the Constituent Power: Beyond Revolutions?* Cambridge: Cambridge University
    Press.

Badano, Gabriele, and Alasia Nuti. 2018. "Under Pressure: Political Liberalism, the Rise of Unreasonableness,
    and the Complexity of Containment." *The Journal of Political Philosophy* 26 (2): 145–168.

Bagnoli, Carla. 2021. "Constructivism in Metaethics." *The Stanford Encyclopedia of Philosophy*. Last Modified
    18 March 2021. Accessed 31 January 2023.

Bánkuti, Miklós, Gábor Halmai, and Kim Lane Scheppele. 2012. "Hungary's Illiberal Turn: Disabling the
    Constitution." *Journal of Democracy* 23 (3): 138-146.

Bárd, Petra, and Laurent Pech. 2019. "How to Build and Consolidate a Partly Free Pseudo Democracy by
    Constitutional Means in Three Steps: The 'Hungarian Model'" RECONNECT.

Baynes, Kenneth. 1992. "Constructivism and Practical Reason in Rawls." *Analyse & Kritik* 14: 18-32.

Chambers, Simone. 2004. "Democracy, Popular Sovereignty, and Constitutional Legitimacy." *Constellations* 11
    (2): 153-173.

Darwall, Stephen, Allan Gibbard, and Peter Railton. 1992. "Toward Fin de siècle Ethics: Some Trends." *The
    Philosophical Review* 101 (1): 115-189.

Ferrara, Alessandro. 2018. "Can Political Liberalism Help Us Rescue "The People" from Populism?" *Philosophy
    & Social Criticism* 44 (4): 463–477.

---. 2023. *Sovereignty Across Generations: Constituent Power and Political Liberalism*. Oxford: Oxford University
    Press.

Ferrara, Alessandro, and Frank I. Michelman. 2021. *Legitimation by Constitution: A Dialgoue on Political
    Liberalism*. Oxford: Oxford University Press.

Freeman, Samuel. 1990. "Constitutional Democracy and the Legitimacy of Judicial Review." *Law and
    Philosophy* 9: 327-370.

---. 1994. "Political Liberalism and the Possibilty of a Just Democratic Constitution." *Chicago-Kent Law Review*
    69 (3): 619-668.

Giovanola, Benedetta, and Roberta Sala. 2022. "The Reasons of The Unreasonable: Is Political Liberalism Still

      An Option?" *Philosophy and Social Criticism* 48 (9): 1226–1246.

Gutmann, Amy. 2003. "Rawls on the Relationship between Liberalism and Democracy." In *The Cambridge*

      Companion to Rawls, edited by Samuel Freeman. Cambridge: Cambridge University Press.

Halmai, Gábor. 2018. "A Coup against Constitutional Democracy? The Case of Hungary." In *Constitutional*

      Democracy in Crisis?, edited by Mark A. Graber, Sanford Levinson and Mark Tushnet. New York:

      Oxford University Press.

Heun, Werner. 2011. *The Constitution of Germany: A Contextual Analysis*. Oxford: Hart Publishing.

Invernizzi-Accetti, Carlo, and Ian Zuckerman. 2017. "What's Wrong with Militant Democracy?" *Political Studies*

      65 (1S): 182–199.

Issacharoff, Samuel. 2015. *Fragile Democracies: Contested Power in the Era of Constitutional Courts*.

      Cambridge: Cambridge University Press.

Jovanović, Miodrag. 2016. "How to Justify 'Militant Democracy': Meta-Ethics and the Game-Like Character of

      Democracy." *Philosophy and Social Criticism* 42 (8): 745–762.

Kaltwasser, Cristóbal Rovira. 2019. "Militant Democracy versus Populism." In *Militant Democracy and Its*

      Critics: Populism, Parties, Extremism, edited by Anthoula Malkopoulou and Alexander S. Kirshner.

      Edinburgh: Edinburgh University Press.

Kalyvas, Andreas. 2005. "Popular Sovereignty, Democracy, and the Constituent Power." *Constellations* 12 (2):

      223-244.

Kelsen, Hans. 1970. *The Pure Theory of Law*. Translated by Max Knight. Berkeley: University of California Press.

Kirshner, Alexander S. 2014. *A Theory of Militant Democracy: The Ethics of Combatting Political Extremism*.

      New Haven: Yale University Press.

---. 2019. "Militant Democracy Defended." In *Militant Democracy and Its Critics: Populism, Parties, Extremism*,

      edited by Anthoula Malkopoulou and Alexander S. Kirshner. Edinburgh: Edinburgh University Press.

Kommers, Donald P., and Russell A. Miller. 2012. *The Constitutional Jurisprudence of the Federal Republic of*

      Germany. Durham: Duke University Press.

Lefort, Claude. 1988. "The Question of Democracy." In *Democracy and Political Theory*. Oxford: Polity Press.

Loughlin, Martin. 2014. "The Concept of Constituent Power." *European Journal of Political Theory* 13 (2): 218–

      237.

Malkopoulou, Anthoula. 2019. "Militant Democracy and Its Critics." In *Militant Democracy and Its Critics: Populism, Parties, Extremism*, edited by Anthoula Malkopoulou and Alexander S. Kirshner. Edinburgh: Edinburgh University Press.

Malkopoulou, Anthoula, and Ludvig Norman. 2018. "Three Models of Democratic Self-Defence: Militant Democracy and Its Alternatives." *Political Studies* 66 (2): 442-458.

Medina, Vicente. 2010. "Militant Intolerant People: A Challenge to John Rawls's Political Liberalism." *Political Studies* 58 (3): 556–571.

Müller, Jan-Werner. 2018. "Militant Democracy and Constitutional Identity." In *Comparative Constitutional Theory*, edited by Gary Jacobsohn and Miguel Schor. Cheltenham: Edward Elgar.

---. 2021. *Democracy Rules*. New York: Farrar, Straus & Giroux.

Niesen, Peter. 2012. "Banning the Former Ruling Party." *Constellations* 19 (4).

Pech, Laurent, and Kim Lane Scheppele. 2017. "Illiberalism Within: Rule of Law Backsliding in the EU." *Cambridge Yearbook of European Legal Studies* 19: 3-47.

Preuss, Ulrich K. 2007. "The Exercise of Constituent Power in Central and Eastern Europe." In *The Paradox of Constitutionalism*, edited by Martin Loughlin and Neil Walker. Oxford: Oxford University Press.

Quong, Jonathan. 2011. Liberalism without Perfection. Oxford: Oxford University Press.

Rawls, John. 1996. *Political Liberalism*. New York: Columbia University Press.

---. 1999a. "The Domain of the Political and Overlapping Consensus." In *Collected Papers*, edited by Samuel Freeman. Cambridge: Harvard University Press.

---. 1999b. "The Idea of an Overlapping Consensus." In *Collected Papers*, edited by Samuel Freeman. Cambridge: Harvard University Press.

---. 1999c. "Justice as Fairness: Political not Metaphysical." In *Collected Papers*, edited by Samuel Freeman. Cambridge: Harvard University Press.

---. 1999d. "Kantian Constructivism in Moral Theory." In *Collected Papers*, edited by Samuel Freeman. Cambridge: Harvard University Press.

---. 1999e. *A Theory of Justice*. Cambridge: Belknap Press.

---. 2003. *Justice as Fairness: a Restatement*. Cambridge: The Belknap Press.

Reid, Andrew. 2022. "How Can Political Liberalism Respond to Contemporary Populism?" *European Journal of Political Theory* 21 (2): 299–320.

Rijpkema, Bastiaan. 2018. *Militant Democracy: The Limits of Democratic Tolerance*. New York: Routledge.

---. 2019. "Militant Democracy and the Detection Problem." In *Militant Democracy and Its Critics: Populism, Parties, Extremism*, edited by Anthoula Malkopoulou and Alexander S. Kirshner. Edinburgh: Edinburgh University Press.

Roznai, Yaniv. 2017. *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*. Oxford: Oxford University Press.

Rummens, Stefan. 2019. "Resolving the Paradox of Tolerance." In *Militant Democracy and Its Critics: Populism, Parties, Extremism*, edited by Anthoula Malkopoulou and Alexander S. Kirshner. Edinburgh: Edinburgh University Press.

Rummens, Stefan, and Koen Abts. 2010. "Defending Democracy: The Concentric Containment of Political Extremism." *Political Studies* 58: 649.

Sala, Roberta. 2013. "The Place of Unreasonable People beyond Rawls." *European Journal of Political Theory* 12 (3): 253–270.

Scheppele, Kim Lane. 2013. "The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work." *Governance: An International Journal of Policy, Administration, and Institutions* 26 (4): 559–562.

---. 2018. "Autocratic Legalism." *The University of Chicago Law Review* 85 (2).

Street, Sharon. 2010. "What is Constructivism in Ethics and Metaethics?" *Philosophy Compass* 5 (5): 363–384.

Urbinati, Nadia. 2019. *Me the People: How Populism Transforms Democracy*. Cambridge: Harvard University Press.

Vinx, Lars. 2020. "Democratic Equality and Militant Democracy." *Constellations* 27 (4): 685-701.

Weill, Rivka. 2017. "On the Nexus of Eternity Clauses, Proportional Representation, and Banned Political Parties." *Election Law Journal* 16 (2): 237-246.

---. 2018. "Secession and the Prevalence of Both Militant Democracy and Eternity Clauses Worldwide." *Cardozo Law Review* 40 (2): 905-990.

Wenar, Leif. 2021. "John Rawls." *The Stanford Encyclopedia of Philosophy*. Last Modified 4 May 2021. Accessed 31 January 2023.