

Political Extremism and Liberal Democracy

Essay by **Benjamin A. Schupmann**, Duke Kunshan University

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Popular support for extremist parties is on the rise in liberal democracies today. In both new and well-established liberal democratic states, extremists are gaining government appointments and seats in legislative assemblies. As they gain power, they are better situated to enact their illiberal and antidemocratic goals into law and even alter their constitutions. The Fidesz Party of Hungary and the Law and Justice Party of Poland exemplify this trend. Both parties have used their democratic mandate to dismantle fundamental features of liberal constitutionalism and entrench their rule. Most recently, Fidesz stated it will use its supermajority in parliament to amend the constitution to read that “The protection of Hungary’s self-identity and its Christian culture is the duty of all state organizations”—threatening religious liberty and minorities’ rights.¹ The Law and Justice Party just passed a law that enabled it to purge judges who are critical of the party from the courts, including the Supreme Court—undermining the balance of powers.² Wherever extremists have gained control, they have adopted these sorts of tactics to realize their political goals. Broadly speaking, these tactics include weakening checks by the judiciary and administration on the legislative and executive branches by purging opposition judges and officials and replacing them with loyalists; consolidating power by altering election laws and amending the constitution to favor parliament and the executive; bullying and silencing the opposition within the legislature; weakening the rights that enable civil society to challenge and check the legislative and executive branches; and, finally, stoking racist, xenophobic, and anti-pluralist sentiments to mobilize their electoral base.

It is disturbing that these changes are happening at all. More alarming, however, is that these changes are being pursued and realized through legal constitutional means. This bears repeating. Extremist movements are

¹ Gábor Halmai, “Fidesz and Faith: Ethno-Nationalism in Hungary,” *Verfassungsblog*, 29 June 2018, <https://verfassungsblog.de/fidesz-and-faith-ethno-nationalism-in-hungary/>

² Marc Santora, “Poland Purges Supreme Court, and Protesters Take to Streets,” *The New York Times*, 3 July 2018 (accessed 15 July 2018), <https://nyti.ms/2KMNL44>

legally dismantling fundamental features of liberal constitutionalism and what we broadly understand as democracy. They are able to do so because they are popular and have a democratic electoral mandate large enough to wield both the normal legislative tools as well as the constitutional amendment procedure to pursue what illiberal political-legislative goals they will.

Recognizing this peculiar dynamic of democratic electoral support for illiberal movements and goals, Victor Orban, the Prime Minister of Hungary and the leader of Fidesz, characterized his government as an “illiberal democracy.”³ After elections earlier this year, Fidesz obtained 133 seats in parliament out of 199, giving it the two-thirds supermajority necessary to unilaterally make changes to the constitution. To be sure, Fidesz’s overwhelming control of parliament is in part due to its manipulation of the electoral process, such as through the two-ballot system it introduced in 2012 and its growing control over the media following the 2010 elections. But Fidesz is and has been a genuinely popular movement. Even its ability to manipulate the electoral process stems from its 2010 electoral victory. Illiberal extremism is genuinely popular in many liberal democracies today.

Popular support for extremist movements puts committed liberal democrats in an awkward position. Democracies seem to commit suicide *willingly* by voting away fundamental liberal and democratic commitments and institutions. Some thinkers including Jan-Werner Müller and David Runciman have responded by arguing that any political entity like Orban’s “illiberal democracy” is a contradiction in terms.⁴ What they mean is that, because of its illiberal changes, Orban’s Hungary is no democracy at all.

How can we account for these two opposed understandings of democracy? For decades, the West has used the language of democracy to define political legitimacy. Today, these two terms are used virtually interchangeably in everyday speech. To be sure, democracy is an important political value. But equating democracy and legitimacy displaces and obscures other values that determine political legitimacy, including values that may even be opposed to democracy in some ways. Ambiguity and confusion in the language we use to discuss legitimacy may corrupt how we think about it. It explains how Orban can argue that he leads an illiberal democratic state while simultaneously political thinkers can declare illiberal democracy to be a contradiction in terms.

By “democracy,” Orban seems to mean the use of content-neutral democratic procedures to make political and legal decisions. The outcome of this democratic procedure is politically legitimate because the people

³ “Prime Minister Viktor Orbán’s Speech at the 25th Bálványos Summer Free University and Student Camp,” *Official Website of the Hungarian Government*, 26 July 2014 (accessed 23 July 2018), <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp>, cf. Lydia Gall, “Dispatches: The End of Liberal Democracy in Hungary?” *Human Rights Watch*, 29 July 2014 (accessed 23 July 2018), <https://www.hrw.org/news/2014/07/29/dispatches-end-liberal-democracy-hungary>

⁴ Jan-Werner Müller, “‘Democracy’ Still Matters,” *The New York Times*, 6 April 2018 (accessed 23 July 2018), <https://www.nytimes.com/2018/04/05/opinion/hungary-viktor-orban-populism.html> Jan-Werner Müller, “The Problem with ‘Illiberal Democracy,’” *Project Syndicate*, 21 January 2016, <https://www.project-syndicate.org/commentary/the-problem-with-illiberal-democracy-by-jan-werner-mueller-2016-01>; cf. Jan-Werner Müller, *What is Populism?* (Philadelphia: University of Pennsylvania Press, 2016). David Runciman, *How Democracy Ends* (New York: Basic Books, 2018).

expressly willed it, adhering to the decision-making procedures in effect for doing so. Democratic legitimacy here means that a majority (or supermajority) of enfranchised people has the right to use the law to determine the type of public order most appropriate to itself. The legitimacy of what the people will cannot be prejudged; all that matters is whether they enact it into law by using the formal requirements for legislation. To dictate to the people in advance what the right or wrong candidate or political goal is would undermine the essence of democracy's equal chance to have any value or goal prevail in an open electoral competition.

For Müller and Runciman, on the other hand, “democracy” seems to mean something rather different. They argue that democracy without liberalism is a contradiction in terms. So “democracy” in this sense actually includes at least two distinct political forms: a democratic decision-making procedure and liberalism—basic rights of individuals and the separation and balance of powers. The consequence is that, for this view, a majority or even overwhelming supermajority of the people who adhere to the legal constraints and proper procedures for translating their will into law may nevertheless be acting undemocratically, if the political goals they will are illiberal.

Although this second definition of democracy is a way to argue for the illegitimacy of Fidesz' government on “democratic” terms, it severs the relationship between democratic legitimacy and the goals pursued by a majority legally. Looked at closely, however, this separation seems like conceptual sleight of hand: what a majority of voters might expressly want and legally pursue could nevertheless be “undemocratic”; what a minority wants, “democratic.” Although Fidesz' policies are indeed normatively objectionable, defining them as antidemocratic risks blurring the concept “democracy” into incoherence. Looking beyond the conceptual problems of this second definition, there is a practical problem: it seems unlikely that it would affect the very people it must appeal to—the citizens of an “illiberal democracy” who use their legal majority and the procedures for making constitutional change to remove liberalism from their constitution legally.

The fact that democratic legal procedures have produced and continue to produce illiberal outcomes reveals a latent but undeniable tension at the heart of liberal democratic states and constitutions. A democratically elected majority or supermajority in the legislature can use its legal-constitutional powers to amend liberal values out of the constitution *legally*, while remaining democratically popular. Both this opposition in practice as well as this latent conceptual tension suggests why it is irresponsible to equate democracy and legitimacy. Defining illiberal democracy away, as a contradiction in terms, does not do enough to confront this very real problem.

Committed liberal democrats are better off biting the bullet and recognizing this latent tension between democracy and liberalism. This recognition poses a dilemma to committed liberal democrats: which set of constitutional commitments takes priority, liberalism or democracy? Which constitutional commitments reflect the terms of legitimacy? Is the most basic source of legitimacy the guarantee of the right of the people to freely determine its interests—no matter what the content of those interests happens to be? Or is it checks on governmental power (even that of a majority), which take the form of guaranteed individual civil liberties and a system of checks and balances among institutions?

The first choice in this dilemma fails. Democracy in its strict sense cannot generate legitimacy. By maintaining the priority of democracy, even in merely rhetorical terms, lay people and political thinkers alike implicitly commit themselves to recognizing the right of the people to legally revolutionize their constitutions. From this perspective, a legitimate state and constitution reflects the laws the people chose. But by seizing this

option committed liberal democrats must, to paraphrase Hans Kelsen, be prepared to go down with the ship.⁵ Committing to the legitimacy of democracy above all else means committing to unpleasant or even legal but normatively indefensible legislative outcomes. In principle, democracy is the right of the people to create a Nazi state, a Christian fundamentalist theocracy, or something equally illiberal—as long as they adhere to the law as they recreate their constitution.

This political quietism is deeply unsatisfying. It is also unnecessary. Committed liberal democrats need not surrender their normative commitments to a value-neutral procedure. But maintaining them requires rethinking our terms of legitimacy. Democracy is a procedure for making political and legal decisions according to the will of the majority. Democracy was viewed with skepticism for most of human history because—like government by a single tyrant—the decision-making process need not go any further than the ruler’s immediate and potentially arbitrary will. In a democracy, that ruler happens to be a numerical majority. Its decisions may reflect the will of the greatest number. But it is still rule by will. Legitimacy must be more than will.

The other choice in the dilemma provides a solution. Conceiving of liberal constitutionalism as the source of political legitimacy provides constitutional tools to address the rise of extremism and legal revolution. Indeed, when the word “democracy” is used, I suspect that most people actually mean democratic procedures operating within the confines of liberalism—which includes rights and institutions like *habeas corpus*, equality before the law, freedom of expression, freedom of conscience, a system of checks and balances limiting government power, and so on. That is, by “democracy,” most committed liberal democrats actually mean a superstructure of democratic decision-making erected on a foundation of liberal constitutionalism. This seems to be, for example, what Müller and Runciman mean when they deny that illiberal democracy is democracy: the state and constitution become substantively illegitimate when they become illiberal, even if by democratic means.

Conceiving of legitimacy in terms of liberalism first and democracy second leads practically to the state and constitutional form of *constrained democracy*. Constrained democracy is the adoption of mechanisms in the constitution that absolutely limit democratic legal change, when those changes are directed against fundamentals of liberal constitutionalism. That is, a narrow range of amendments and changes are forbidden, regardless of how democratically popular they may be, because making those changes would be substantively *illegitimate* even if otherwise *legal* according to the democratic procedures for elections and legislation—changes that currently are legal and constitutional in many states today. Constrained democracy is a way to make those changes substantively illegitimate because illiberal changes are also illegal and unequivocally unconstitutional.

Two principal mechanisms of constrained democracy illustrate how it works as a state and constitutional form. One is the eternity clause, which locks in certain articles of the constitution by denying their legal emendation or abrogation—no matter how great a majority wants to make those changes. For constrained democracy, *valid legal and constitutional change supervenes on the public order of liberal constitutionalism*. As Hungary demonstrates, a supermajority may not always be enough to protect liberal fundamentals. To

⁵ Hans Kelsen, “Die Verteidigung der Demokratie.” Cited by Clemens Jabloner, “Introduction to Hans Kelsen,” in Arthur J. Jacobson and Bernhard Schlink, eds., *Weimar: A Jurisprudence of Crisis* (Berkeley: University of California Press, 2002) 74.

effectively entrench liberal constitutionalism, an eternity clause should lock in liberal civil liberties so that political rights cannot be turned against them. Exactly which civil liberties to lock in should be debated. A starting point is the list of human rights that John Rawls defended as necessary for a people to have decent domestic political and social institutions in his *The Law of Peoples: Articles 3-18 of the Universal Declaration of Human Rights*.⁶ Because we are talking about liberalism, other articles, such as Article 19, ought to be included as well. As a whole, this yields a list of individual civil rights that include *habeas corpus*, security of the person, equality before the law, and the rights to freedom of thought, conscience, speech, movement, and belief. The rights in this list are constitutive of the skeleton of liberalism—and it might be added of any genuine democratic practice. To be sure, other rights, practices, and values may be important for a fully fleshed out liberalism. But, for constrained democracy, this minimum should be locked in with an eternity clause.

A second principal mechanism of constrained democracy is the party ban. In a constrained democracy, any party openly adopting illiberal goals, such as by seeking to abrogate those fundamental rights protected by the eternity clause, can be a candidate for a ban. For constrained democracy, *political participatory rights supervene on the public order of liberal constitutionalism*. Parties and individuals that fail to respect the fundamental commitments of the state and constitution to liberal constitutionalism can have their participatory rights legitimately taken away. *Party bans must be used exceptionally*. But the infringement of these political participatory rights can be consistent with the state's overriding commitment to liberal civil liberties: parties and individuals who lose their participatory rights, and lose the ability to translate those illiberal beliefs into *public law*, nevertheless would retain their rights to fundamental liberal protections of the individual—including the right to maintain illiberal beliefs *privately*.

These mechanisms of constrained democracy may appear to be rather authoritarian. After all, it absolutely denies a set of legal-constitutional changes to what may be a legally expressed democratic will. But liberals need not be troubled by restricting democracy's ability to affect a narrow set of institutions. If the liberal rule of law should trump the rule of men, if reason should trump will, if protection of the individual is a precondition for *legitimate* democratic governance, then adopting the measures of constrained democracy to protect the rule of law, the rule of reason, and the liberal preconditions for democracy is normatively justifiable.

Nothing precludes combining the mechanisms of constrained democracy with other measures to combat extremism, such as robust judicial review as recommended by Kim Lane Scheppele,⁷ social democracy as recommended by Alessandro Ferrara,⁸ or civic education as recommended by Jan-Werner Müller.⁹ A multifaceted approach that adopts preventative and reactive measures in spheres of both government and civil

⁶ John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999), 80.

⁷ Kim Lane Scheppele, "Autocratic Legalism," *The University of Chicago Law Review* 85.2 (2018): 581-582.

⁸ Alessandro Ferrara, "Can Political Liberalism Help Us Rescue 'The People' from Populism?" *Philosophy & Social Criticism* 44:4 (2018): 10

⁹ Jan-Werner Müller, "Militant Democracy," in Rosenfeld and Sajó, eds., *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press 2012), 1266.

society will be a more effective way of defending liberal democracy against legal revolution and democratic suicide. Similarly, identifying and locking in liberalism as the state's fundamental commitment does not preclude identifying other values that are important and might be elevated to the status of rights. A different set of rights can be democratically added (or subtracted) from the constitution that may not enjoy the same level of protection offered by constrained democracy, yet have the status of rights nevertheless. Finally, nothing precludes combining a foundational commitment to liberalism with a democratic superstructure. Besides the narrow range of liberal commitments locked in with constrained democracy, the people retains wide latitude to pursue political goals and legislate freely.

The normative theory of constrained democracy emerges from a perhaps unexpected source. Although he would later join the Nazi party, during the Weimar Republic period Carl Schmitt developed his state and constitutional theory around the distinction between the First and Second Principal Parts of the Constitution. His state and constitutional theory—which I analyze in my book *Carl Schmitt's State and Constitutional Theory: A Critical Analysis*¹⁰—argues that democratic government, established in the First Principal Part, could not serve as the basic decision of the Weimar Republic. To commit to democracy above all else, Schmitt argued, undermined the purpose of a state and constitution, which is to provide the framework for a stable and enduring public order. He believed that the foundations of public order could not be capriciously revised from election to election without the state regressing into a Hobbesian state of nature.

Having ruled out democracy, Schmitt concluded that only the individual liberal civil liberties established in the Second Principal Part could coherently serve as Weimar's basic decision. Conceived as such, those individual civil liberties must be situated beyond the reach of what Schmitt considered to be the irrational and vacillating will of a momentary majority. To be sure, Schmitt was no friend of liberalism. And he did join the Nazi party. And he wrote despicable things. Whatever value his thought has, it must be considered in this context of his shortcomings and his contradictions. Regardless of Schmitt's actual motives, liberal democrats today can appropriate and learn from what is valuable in his thought without being bound to his personal failures and theoretical missteps. His Weimar-era development of constrained democracy provides a foundation for its contemporary normative theory today. Liberal democrats can use his theory to design their states and constitutions to deny extremists the ability to use the legislative process and constitutional amendment procedure to enact their illiberal and antidemocratic agendas without sacrificing their fundamental commitments.

Political events today seem to confirm that the democratically popular illiberal movements that swept across Europe in the early twentieth century were not an exceptional step backward in the progressive triumph of liberal democracy. Democratically popular illiberal extremist movements are a perennial problem against which liberal democracies must always be on guard. Constrained democracy is the best state and constitutional form with which to defend liberal democracy against their aims of legal revolution. But it requires renouncing both the belief that liberalism and democracy are the same thing and the belief that democracy defines legitimacy. Liberalism, not democracy, is the most fundamental commitment of liberal democracy today. To be sure, democracy is an important value. But the presence of basic liberal individual

¹⁰ Benjamin A. Schupmann, *Carl Schmitt's State and Constitutional Theory: A Critical Analysis*, (Oxford: Oxford University Press 2017); cf. Benjamin A. Schupmann, interview by Richard Marshall, *3:AM Magazine*, 16 June 2018, <http://www.3ammagazine.com/3am/carl-schmitt-and-democratic-cannibalism/>.

civil liberties is necessary to even speak of democratic legitimacy. As such, liberal constitutional commitments must be protected from legal revolution—democratic or otherwise.

Benjamin A. Schupmann is an Assistant Professor in the Division of Social Sciences at Duke Kunshan University. His research examines the relationship between the state, constitution, and liberal democracy. He is the author of *Carl Schmitt's State and Constitutional Theory: A Critical Analysis* (Oxford University Press, 2017).

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