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Towards a theory of militant constitutionalism

Manenschijn, J.I.

Citation

Manenschijn, J. I. (2026, February 13). *Towards a theory of militant constitutionalism*. Retrieved from <https://hdl.handle.net/1887/4289921>

Version: Publisher's Version

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Note: To cite this publication please use the final published version (if applicable).

IO ACKNOWLEDGEMENT OF PREVIOUS PUBLICATIONS

Some of the research presented in this thesis builds on previously published work. Throughout the chapters, references to these earlier publications are provided where relevant. Special mention should be made of chapter 7, which presents a structured literature review of constitutional safeguards. This chapter is based on research initially conducted under the commission of the Dutch Ministry of Internal Affairs and Kingdom Relations. Due to this assignment, Professor Rijpkema and I were able to hire a student assistant to assist in conducting a structured literature review on the effectiveness of constitutional safeguards. This resulted in an online published research report. Drawing from that report, the two co-authors and I wrote a book on militant constitutionalism (*weerbare rechtsstaat*). Chapter 7 is an adapted version of a chapter from that book. I was the lead author of the research report and the book, and I have contributed significantly to the research output. I am deeply grateful to my co-authors, Bastiaan Rijpkema & Steven Bruintjes, for their collaboration on this project and for their support in including this work in my PhD thesis. I also wish to thank the Dutch Ministry of Internal Affairs and Kingdom Relations for the research assignment and for granting permission to publish the results in both book form and this thesis.

II APPENDIX A: PROTOCOL FOR THE STRUCTURED LITERATURE REVIEW

Methodology and results of the structured literature review

The studies in the dataset were gathered through a predetermined list of search words (keywords) entered into three different scientific search engines.⁹¹² We used a combination of narrow and broad keywords, such as ‘militant democracy’, ‘constitutions’ and ‘constitutional compliance’ in relation to keywords like ‘empirical’, ‘effectiveness’, and ‘democratic backsliding’ (see table below). We used the search engines Google Scholar, Web of Science and the Search Engine of the library of Leiden University. We only included studies that were published and accessible at the start of this research project, in October 2023.

The entered keywords resulted in approximately 900 individual studies. After reading the title and abstract of these individual studies, we determined whether the study had the potential to fulfil the predetermined ‘inclusion and exclusion criteria.’⁹¹³ After this initial selection, approximately 300 studies remained. All these studies have been carefully read to determine if they fulfil the three inclusion and exclusion criteria:

1. Criterion 1: Is the study about a safeguard that is enshrined in the constitution?
2. Criterion 2: Is the safeguard empirically tested?
3. Criterion 3: Are the effects of the safeguards tested in relation to democratic erosion?

After this second selection, approximately 100 studies remained. To limit the number of studies, we formulated two additional criteria:

4. Criterion 4: Is the study peer-reviewed?
5. Criterion 5: Are the safeguards tested using quantitative methods?⁹¹⁴

After this third selection, approximately 30 studies remained. Using the ‘snowball method’, all biographies of these studies were reviewed to determine if any studies had been missed that could have fulfilled all five criteria. Due to time constraints, we could only apply the

912 The protocol of the structured literature review is based upon the methods of Petticrew and Roberts and Gough, Olivier and Thomas. See: Petticrew and Roberts, *Systematic Reviews*; David Gough, Sandy Oliver and James Thomas, *An Introduction to Systematic Reviews* (Sage, 2017).

913 Every study is reviewed by one researcher. Random checks were done to ensure that the criteria were applied as consistently as possible. If the researcher reviewing a study was unsure about the application of one of the criteria, the study was reviewed by a second researcher.

914 For the classification ‘peer-reviewed’ of articles, we followed the classification as shown in the search engine of the library of Leiden University. In case of doubt, we hand-checked the publisher’s website to confirm whether the article was peer-reviewed. For books and book chapters, we assumed that those printed by an academic press were peer reviewed.

snowball method within reasonable boundaries. Furthermore, we manually added some studies to the dataset that were known to one of the three authors of the project to create as much comprehensiveness as possible.⁹¹⁵

Pre-determined list of keywords for literature search

Specific keywords (three databases)*	Broad keywords (two databases)**	Title search only (Google Scholar)***
'effectiveness of constitutions' AND 'empirical'	'effects of constitutions' AND 'empirical'	'effectiveness of constitutions'
'effectiveness of militant democracy'	'constitution' AND 'democratic backsliding' AND 'empirical'	'effects of constitutions'
'effectiveness of militant constitutionalism'	'constitution' AND 'democratic erosion' AND 'empirical'	'constitution' AND 'democratic backsliding'
'effects of militant democracy'	'constitution' AND 'militant democracy' AND 'empirical'	'constitution' AND 'democratic erosion'
'effects of militant constitutionalism'	'constitutional safeguards' AND 'empirical'	'constitution' AND 'militant democracy'
'constitutional endurance' AND 'empirical'	'constitutional compliance' AND 'empirical'	'constitutional safeguards'
'constitutional survival' AND 'empirical'	'constitutional design' AND 'empirical'	'constitutional compliance'
'constitutional resilience' AND 'empirical'		
'constitutional self-defence' AND 'empirical'		
'constitutional self-defense' AND 'empirical'		
'democratic self-defence' AND 'constitution' AND 'empirical'		
'democratic self-defense' AND 'constitution' AND 'empirical'		

* entered in the search engine of Universitaire Bibliotheken Leiden, Google Scholar and Web of Science

** entered in the search engine of Universitaire Bibliotheken Leiden, Leiden and Web of Science

*** only entered in Google Scholar with function Title Search.

⁹¹⁵ Petticrew and Roberts, *Systematic Reviews*, 79-124.

12 APPENDIX B: ORIGINAL DATASET

Andrews & Montinola 2004

J.T. Andrews & G.R. Montinola, 'Veto Players and the Rule of Law in Emerging Democracies', *Comparative Political Studies* (37) 2004, afl. 1, p. 55-87.

Ball, Dave & Dodds 2023

S. Ball, C. Dave & S. Dodds, 'Enumerating rights: more is not always better', *Public choice* (196) 2023, afl. 3/4, p. 403-425.

Castro Montero 2017

J.L. Castro Montero, 'Constitutional replacement in five countries of South America. An Empirical Comparative Analysis', *Estudios de Derecho* 2017, afl. 164, p. 69-88.

Chilton & Versteeg 2016

A.S. Chilton & M. Versteeg, 'Do Constitutional Rights Make a Difference?', *American Journal of Political Science* (60) 2016, afl. 3, p. 575-589.

Chilton & Versteeg 2020

A.S. Chilton & M. Versteeg, *How Constitutional Rights Matter*, New York: Oxford University Press 2020.

Closa 2012

C. Closa, 'Constitutional Rigidity and Procedures for Ratifying Constitutional Reforms in EU Member States', in: A. Benz & F. Knüpling (red.), *Changing Federal Constitutions: Lessons from international comparison*, Leverkusen: Verlag Barbara Budrich 2012, p. 281-310.

Crabtree & Nelson 2017

C. Crabtree & M.J. Nelson, 'New evidence for a Positive Relationship between De Facto Judicial Independence and State Respect for Empowerment Rights', *International studies quarterly* (61) 2017, afl. 1, p. 210-224.

Cross 1999

F.B. Cross, 'The relevance of law in human rights protection', *International Review of Law and Economics* (19) 1999, afl. 1, p. 87-98.

Dastgeer & Stewart 2021

S. Dastgeer & D. Stewart, 'Freedom of Speech and Press in Muslim-Majority Countries', *International Journal of Communication* (15) 2021, p. 5004-5028.

Davenport 1996

C.A. Davenport, "Constitutional Promises" and Repressive Reality: A Cross-National Time-Series Investigation of Why Political and Civil Liberties are Suppressed', *The Journal of Politics* (58) 1996, afl. 3, p. 627-654.

Dixon & Ginsburg 2011

R. Dixon & T. Ginsburg, 'Deciding not to decide: Deferral in constitutional design', *International Journal of Constitutional Law* (9) 2011, afl. 3/4, p. 636-672.

Elkins 2021

Z. Elkins, 'Term-limit evasions and the non-compliance cycle', *Constitutional Political Economy* (32) 2021, afl. 3, p. 326-345.

Elkins 2022

Z. Elkins, 'Militant democracy and the pre-emptive constitution: from party bans to hardened term limits', *Democratization* (29) 2022, afl. 1, p. 174-198.

Elkins, Ginsburg & Melton 2009

Z. Elkins, T. Ginsburg & J. Melton, *The Endurance of National Constitutions*, New York: Cambridge University Press 2009.

Ferejohn 1997

J. Ferejohn, 'The Politics of Imperfection: The Amendment of Constitutions', *Law & Social Inquiry* (22) 1997, afl. 2, p. 501-530.

Fiddler 2014

L. Fiddler, 'The Preamble in Constitutional Endurance. Preambular Content and Its Effect on the Lifespan of National Constitutions', *Indonesian Journal of International & Comparative Law* (1) 2014, afl. 2, p. 366-422.

Fruhstorfer 2019

A. Fruhstorfer, 'Consistency in constitutional design and its effect on democracy', *Democratization* (26) 2019, afl. 6, p. 1028-1046.

Ginsburg & Melton 2015

T. Ginsburg & J. Melton, 'Does the constitutional amendment rule matter at all? Amendment cultures and the challenges of measuring amendment difficulty', *International Journal of Constitutional Law* (13) 2015, afl. 3, p. 686-713.

Ginsburg & Versteeg 2017

T. Ginsburg & M. Versteeg, 'Constitutional Correlates of the Rule of Law', in: M. Adams, A. Meuwese & E.M.H. Hirsch Ballin (red.), *Constitutionalism and the Rule of Law. Bridging Idealism and Realism*, Cambridge: Cambridge University Press 2017, p. 506-525.

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J. Goldstone e.a., 'A Global Model for Forecasting Political Instability', *American Journal of Political Science* (54) 2010, afl. 1, p. 190-208.

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J.A. Goldstone & J. Ulfelder, 'How to construct stable democracies', *The Washington Quarterly* (28) 2004-2005, afl. 1, p. 9-20.

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J. Gutmann, K. Metelska-Szaniawska & S. Voigt, 'The comparative constitutional compliance database', *The Review of International Organizations* (19) 2024, afl. 1, p. 95-115 (al online gepubliceerd in mei 2023).

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J. Gutmann & S. Voigt, 'Militant constitutionalism: a promising concept to make constitutional backsliding less likely?', *Public Choice* (195) 2023, afl. 3/4, p. 377-404 (al online gepubliceerd in februari 2021).

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C. Van Ham & H.A. Garnett, 'Building impartial electoral management? Institutional design, independence and electoral integrity', *International Political Science Review* (40) 2019, afl. 3, p. 313-334.

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B. Hayo & S. Voigt, 'Explaining *de facto* judicial independence', *International Review of Law and Economics* (27) 2007, afl. 3, p. 269-290.

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A. Pérez-Liñán & A. Castagnola, 'Judicial Instability and Endogenous Constitutional Change: Lessons from Latin America', *British Journal of Political Science* (46) 2016, afl. 2, p. 395-416.

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