

Militant Democracy: The Institutional Bases of Democratic Self-Preservation

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Annu. Rev. Law Soc. Sci. 2013. 9:207–26

First published online as a Review in Advance on
August 19, 2013

The *Annual Review of Law and Social Science* is
online at <http://lawsocsci.annualreviews.org>

This article's doi:
10.1146/annurev-lawsocsci-102612-134020

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Keywords

freedom of expression, freedom of association, participation,
democracy, democratization

Abstract

Over the past two decades, the concept of militant democracy—the use of legal restrictions on political expression and participation to curb extremist actors in democratic regimes—has again captured the attention of comparative constitutional lawyers and political scientists. In comparative constitutional law, the old neutral model of liberal democracy, according to which all political views are entitled to the same rights of expression and association, has given way to a general consensus that restrictions on basic rights designed to preserve democracy are legitimate. At the same time, legal scholars attribute the considerable cross-national variation in the formal design and use of such restrictions to the particular historical background of each country. In political science, a large body of work now examines specific militant restrictions on extremist actors. Although this scholarship consists mainly of descriptive analyses, it has begun to advance causal hypotheses explaining variation in important militant democracy policies. Taken together, these developments point to the fact that militant restrictions constitute an important facet of modern democracy and that at the same time, notwithstanding recent advances, our understanding of the phenomenon is still marked by significant gaps, making the legal and empirical analysis of militant democracy an important emerging research program both in comparative constitutional law and political science. This article reconstructs the debate on the concept since its origins in the 1930s and suggests directions for further research in both fields.

INTRODUCTION

The concept of militant democracy was introduced into comparative constitutional law and political science by Karl Loewenstein, a German émigré to the United States (Van Ooyen 2004, Lang 2007). In a series of articles written in the 1930s and 1940s (Loewenstein 1935a,b; 1937a,b; 1938a,b; 1943; 1944), Loewenstein reflected on the difficult task of tackling the rising wave of international fascism, which had started in Italy and Germany and had quickly spread to the rest of the Continent and other parts of the world. In Loewenstein's view, the only way in which democratic states could withstand fascism's skillful exploitation of democratic rights to subvert democracy from within was to abandon what he took to be an outdated view of liberal democracy, under which all voices should be accorded free expression and participation, and to fight fire with fire: to adopt special measures to prevent fascist leaders from exploiting what Joseph Goebbels famously defined as the "best joke of democracy," namely that "democrats provide their enemies with the means to get rid of democracy"¹ (quoted in Bracher et al. 1983, p. 16).

Even though Loewenstein's position evolved somewhat throughout his writings, he built his concept of militant democracy on the view that fascism was not an ideological movement but a "sophisticated technique for the attainment of power" within contemporary democracies, founded on an appeal to the psychology of the masses. The success of fascism was based on its "perfect adjustment to democracy" (Loewenstein 1937a, p. 423). By exploiting the freedoms guaranteed by democratic regimes, fascists were able to render democratic procedures unworkable and systematically discredit those regimes. At the same time, they mobilized in semimilitary corps that served to impress and intimidate the masses. With this strategy, fascist movements sought to acquire power "on the basis of studious legality" (p. 424). In order to

respond blow by blow to this fascist technique, Loewenstein argued that democracies had to foster awareness of the emergency situation and set aside internal divisions to fight the common enemy, thus building the political will necessary to address the threat. This political will would then be converted into specific legal-constitutional measures that would enable democracies to weather the storm.

Thus, in Loewenstein's analysis, democracies should turn militant in order to prevent fascist leaders and movements from subverting democracy—and so they generally did—by adopting three main strategies: (a) concentrate power in the executive, (b) use emergency powers, and (c) pass ad hoc legislation to restrict rights of expression, participation, and assembly to prevent fascist movements from exploiting democratic freedoms to undermine democracy.

The last of these three dimensions, which is the most characteristic of the concept of militant democracy, is the one that has captured the attention of later scholars. In both constitutional law and political science, the concentration of powers in the executive and the use of emergency powers in times of crisis are well studied but generally with little or no explicit reference to the concept of militant democracy (e.g., Ferejohn & Pasquino 2004). By contrast, scholars of militant democracy have concentrated on the enactment and use of rights-restrictive legislation, which, partially contradicting Loewenstein's own predictions, can prove to be permanent rather than a temporary expedient designed to confront the extremism of the moment.²

²The theme of militant democracy was widely debated in the late 1930s and early 1940s. Important contributions such as Lerner (1938) and Mannheim (1943) portrayed economic planning—to prevent business from supporting fascism in order to preserve economic power—as a core element of a militant democracy. In this context, Mannheim underscored the importance of promoting social change as a means of addressing the conditions that induced voters to turn to extremist parties; in his view, it was necessary to educate the masses to build the unity of purpose underlying a planned society. Political science and constitutional theory have continued to focus on the importance of alleviating the social hardship that can be exploited by antidemocratic forces (e.g.,

¹All translations by the author.

Postwar scholarship has departed in one significant respect from the earlier work of Loewenstein and his contemporaries. Whereas this first generation of scholarship generally focused on the *common* effort of democracies to turn militant in order to confront the rising and omnipresent fascist challenge, later scholarship has sought to understand the *differences* between democratic systems in addressing threats to the democratic order. For instance, one of the most restrictive and visible of militant laws, the forced disbandment of a political party, has been enacted in several—but by no means all—European democracies, and in those countries with such laws, different types of parties have been targeted with legal action. For example, in interwar Finland, the Communist Party was repeatedly disbanded in the course of the 1920s, and in interwar Czechoslovakia, several parties representing right-wing tendencies in the Sudeten German minority were banned (Capoccia 2005). In the immediate post-WWII years, in West Germany, party bans involved both the extreme Right and the extreme Left (discussed below), whereas other postfascist European democracies targeted only neofascist successor parties. In more recent years, several extreme right-wing parties have been targeted with bans in different European democracies, and ethnoregionalist parties have been illegalized at various points in the United Kingdom, France, and Spain (Capoccia 2007). The enactment and implementation of more general militant restrictions on political participation and political expression have been subject to similar variation among democracies. To capture this variation, comparative constitutional lawyers have compiled a series of typologies and have analyzed and evaluated the normative justifications put forward in different

countries in support of restrictions on “freedom for the enemies of freedom.”³ Political scientists have concentrated on the actual operation of legal restrictions and the political conditions that render their adoption and implementation viable. Notwithstanding this growing appreciation of the differences that separate democracies, however, our knowledge remains quite fragmented. In this article, I discuss this literature and propose avenues of further research.

Taking its lead from both Loewenstein and this later scholarship, this article therefore focuses on the adoption and implementation of legal instruments that curtail rights of expression and participation based on political viewpoint. Importantly, these legal restrictions apply, on their face, to nonviolent extremism (even though in some cases, the boundaries between nonviolent organizations and violent fringes may be blurred; see, e.g., Weinberg et al. 2009). Thus defined, the scope of analysis excludes a few lines of inquiry sometimes associated with militant democracy. First, political violence, in contrast with nonviolent extremism, is repressed in all states, including democracies; this includes terrorism, which has been the object of an extensive comparative and normative literature, especially after the 2001 attacks in New York and Washington, in which the overall focus is substantially different from that in militant democracy (e.g., Müller 2012, p. 1256). Second, the discussion excludes philosophical analyses of political tolerance, which have often concentrated on the treatment of minorities (Walzer 1997; see also Scanlon 2003). Third, this article brackets earlier examples of legal restrictions on pluralism. In the late nineteenth century, a number of protodemocracies enacted measures curtailing the freedoms of socialists and anarchists, and even earlier, of secret societies (Lippincott 1965, Goldstein 1983). Unlike these earlier episodes, however,

Wright 1992; Müller 2012, p. 1266); likewise, engaging civil society in defending democracy from extremists has been underscored by several authors (e.g., Pedahzur 2002, Rummens & Abts 2010). Arguably though, the core topic in the debate on militant democracy remains the normative legitimacy and the political viability of legal restrictions on extremist dissent. For other early analyses of related themes, see Friedrich (1957) and the essays in Scheuerman (1996).

³This is of course an important theme in political philosophy (classically, see Mill 1859, Popper 1945). Here I concentrate on the debates in comparative constitutional law and political science.

militant democracy entails legal restrictions in the context of full-fledged mass democracies—often through the retrenchment of more liberal rules from an earlier period.

The article is organized as follows: The next section discusses the literature on militant democracy in comparative constitutional law. The following section discusses the debate on militant institutions and policies in political science. The conclusion takes stock of the findings in both fields and suggests possible avenues for future research.

MILITANT DEMOCRACY IN COMPARATIVE CONSTITUTIONAL LAW

Subsequent to Loewenstein's writings and those of other institutionalist scholars of his generation, interest in militant democracy subsided, especially in English-language scholarship. One possible reason is that both the concept and the practice of militant democracy have been rather foreign to the experience of English-speaking democracies. To be sure, there is an extensive legal literature on some high-profile cases of militant restrictions in Anglo-Saxon democracies, such as the special legislation adopted in the United Kingdom to address the Northern Irish problem (e.g., Boyle et al. 1980) and the famous Keegstra case in Canada, in which the Supreme Court upheld a restriction on hate speech as a proportionate restriction on freedom of expression (Mahoney 1992). In general, however, none of these countries has ever adopted a wide-ranging practice—even less a coherent constitutional doctrine—of militant democracy. This is true in particular for the United States, despite well-known episodes such as McCarthyism⁴ and the more recent war on terror (Stone 2004). Indeed, most of the militant-democracy measures adopted in other systems would be very unlikely

to withstand legal scrutiny in US courts (e.g., Issacharoff 2007, p. 1415).⁵

A further reason for scholarly neglect of militant democracy may lie in the circumstances of the Cold War. At that time, the very concept of democracy became even more contested than usual, as Communist “people’s democracies” claimed that their democratic legitimacy surpassed that of the capitalist democracies of the Western world (Fox & Nolte 1995, p. 25). The global nature of the clash between the two models of “democracy” left little room for nuancing the liberal model of democracy with systematic attention to the ways in which the practice could deviate from the ideal model—lest Western democracies be accused of repressing dissent and therefore ultimately not being fundamentally different from their Communist foil. With the disintegration of international communism in 1989–1991 and the consequent demise of the claim to democratic-ness of Communist states, renewed interest in militant democracy became possible. Comparative constitutional law scholarship turned to the question of how national legal systems did or did not contain antiextremist rules and how the relevant policies were justified in the legal doctrine of different countries (e.g., Tomuschat 1992). The resurgence and political activism of Islamic fundamentalist movements, in particular after the events of 9/11, have also bolstered interest in the topic.⁶

In this recent literature, consensus has emerged on the fundamental principle underlying the theory and practice of militant democracy: Democracies have a right (some say a duty;

⁵In the United States, restrictions on rights for political reasons are grounded in the judicial doctrine of clear and present danger elaborated by the Supreme Court between 1917 and the present day. The Court, despite some oscillations over the decades, has settled on a position according to which free speech can be curtailed only if a clear association with the perpetration of violent acts can be proven (e.g., Tribe 1978, Farber 2003).

⁶Several democratic states have introduced, in addition to measures targeted at terrorists, militant restrictions on expression and participation by Islamic groups (e.g., Sajó 2006, Capoccia 2010a; see also Crenshaw 2010).

⁴Anti-Communist measures, generally justified with a fifth-column argument, were adopted in many Western democracies including Anglo-Saxon ones (e.g., Auerbach 1956; Lippincott 1965; Dyzenhaus 2004, pp. 19–21).

see Fox and Nolte 1995, Issacharoff 2007) to limit fundamental rights of free expression and participation—albeit with various qualifications and caveats—for reasons of self-preservation. Gustav Radbruch’s and Hans Kelsen’s value-neutral model of pluralist democracy (Müller 2012, p. 1257), according to which all political positions should be given equal rights of expression and participation—and that according to many (including Loewenstein) doomed the Weimar Republic—has virtually no supporters today. At the same time, faced with broad variation in the design of militant provisions, scholars have sought to evaluate how the principle has been put into practice, addressing the issues of who are the legitimate targets of restrictions on rights and freedoms, when it is legitimate to intervene, and what procedures should be adopted to safeguard against the abuse of legal provisions for partisan reasons. Below I review the main contributions to this debate. Before doing so, however, I discuss briefly what is unanimously considered in the specialized literature the prototypical case of postwar militant democracy and which constitutes the background case for most legal theories in the field, namely, the Federal Republic of Germany (FRG).

The characteristics of the FRG’s system of *streitbare Demokratie* are well known, and the German specialized literature is too vast to be discussed in detail here.⁷ The Federal Republic’s *Grundgesetz* (Basic Law) includes several articles that entrench a system of protection of the so-called *freiheitliche demokratische Grundordnung* (liberal-democratic constitutional order). The so-called eternity clause of Article 79.3 prohibits amendments to the basic principles included in Articles 1 (dignity of man) and 20 (democratic, federal, and social state based on the rule of law); Article 21.2 provides

for the possibility of disbanding antidemocratic parties; Article 9.2 allows the dissolution of antidemocratic associations; Article 18 provides that individuals who abuse rights in order to subvert the liberal democratic order may lose their individual freedoms; and Article 20.4 gives every citizen the right to resist attempts, including those of the public authorities, to abolish the constitutional order.⁸

Not all of these constitutional provisions have been consistently implemented. The rules on forfeiture of individual rights and the right of resistance have virtually remained unapplied (e.g., Klamt 2007, p. 139). The same is not so for the provisions on the dissolution of antidemocratic associations and parties: Many antidemocratic (nonparty) political organizations have been dissolved since 1949, and there has been periodic recourse to the provision on party bans, beginning with the ban of the neo-Nazi SRP in 1952 and the Communist Party of Germany (*Kommunistische Partei Deutschlands*)

⁸The expression *freiheitliche demokratische Grundordnung* is contained in several articles of the *Grundgesetz*. In its 1952 ruling against the SRP, the Federal Constitutional Court defined the concept as follows:

an order that establishes public powers that are bound by the rule of law and that exclude any violence or arbitrariness, and that are based on the self-determination of the people according to the will of the majority as well as freedom and equality. The foundational principles of this order include at least the following: the respect for the human rights established in the Basic Law, above all the right to life and free development of personality, popular sovereignty, the division of powers, government accountability, the subjection of administrative powers to the law, the independence of judges, the principle of party pluralism and the equality of chances for all parties and their right, within the limits of the constitution, to the formation and exercise of an opposition. [*Bundesverfassungsgerichtsentscheidungen* (BVerfGE—Decisions of the Federal Constitutional Court) 2, 1 (12 ff.)]

⁷The expression *streitbare Demokratie*, first used by the Federal Constitutional Court of Germany in its pronouncement on the ban of the *Sozialistische Reichspartei* (SRP) in 1952, derives from the German translation of militant democracy in Mannheim’s (1943) book mentioned above, which was published in German in 1951 (Müller 2012).

(Note that the rulings of the German Federal Constitutional Court are referenced by indicating the number of the volume in the official collection, followed by the number of the first page of the ruling in the volume indicated, and by the number of the page or pages cited, reported in parentheses; if the reference refers to the whole ruling, the first and last page are reported.)

in 1956.⁹ These two significant party-ban judgments of the Federal Constitutional Court of Germany were one of the main seams of an extensive scholarly debate on militant democracy that continued in German academia (e.g., Abendroth 1956; Heinemann 1967; Schuster 1968a,b; Bulla 1973; Leibholz 1973; Lameyer 1978; Jesse 1980, 1984; Jaschke 1991; Leggewie & Meier 2002). Outside of Germany, however, interest in militant democracy generally subsided after the 1950s, to be renewed only in the 1970s with the issue of the so-called *Berufsverbot* (translatable as professional disqualification, referring to civil servants). In response to the declared strategy of the extreme Left [in particular the reformed German Communist Party (*Deutsche Kommunistische Partei*)] to effectuate their aims through a long march through the institutions, in 1972 the Presidents of the German *Länder* and the Federal Chancellor announced that those individuals whose activities were deemed hostile to the Constitution (*verfassungsfeindlich*)—or who were members of parties or associations that were deemed hostile to the Constitution—would be excluded from the German civil service. This initiative, which was based on a new interpretation of an existing law, was upheld as constitutional in a much-debated ruling of the Federal Constitutional Court in 1975.¹⁰ The implementation of this policy entailed, for a long period, routine background checks of civil service applicants by the Office for the Protection of the Constitution (Brinkmann 1983, p. 594) and was extremely controversial both in Germany and abroad (e.g., Int. Russell Trib. 1979).

⁹In the FRG, parties are considered the main instrument of the expression of popular will, and as such they are regulated differently than associations. This difference in legal treatment is reflected in the so-called doctrine of party privilege (*Parteienprivileg*): Although political associations can be dissolved by government decree, the final decision on the dissolution of a party is reserved to the Federal Constitutional Court (e.g., Denninger 1983).

¹⁰See *Bundesverfassungsgerichtsentscheidungen* (BVerfGE—Decisions of the Federal Constitutional Court) 39, (334–91).

In the 1990s, the party-ban procedures in force in Germany again attracted the attention of scholars worldwide. In the mid-1990s, the Federal Constitutional Court rejected two applications to ban two extreme right-wing parties on the grounds that they were too marginal to enjoy the *Parteienprivileg*.¹¹ In 2001, the federal government and both houses of parliament asked the Court to ban the extreme right-wing *Nationaldemokratische Partei Deutschlands* (NPD, National-Democratic Party of Germany), a party that, although marginal, had national visibility and had been somewhat successful in local elections (Lovens 2001). The request was again rejected by the Court on the grounds that the case was based on evidence from numerous government spies that had infiltrated the party cadres, including several witnesses summoned by the Court. The case was extremely high profile in Germany (e.g., Fischer 2001, Van Ooyen & Möllers 2002), and although many have seen it as a setback for the constitutional practice of party bans, it is by no means impossible that future attempts to ban an extremist party will be successful.¹²

Until recently, the case of the FRG was considered exceptional owing to the peculiar history of the country. The German Basic Law has been defined as an “anticonstitution,” designed in response to both the failure of the Weimar Republic and the abuses of rights on the part of the Nazi regime, which grounded a full-fledged doctrine of safeguarding democracy (e.g., Karpen 1988). The renewed recent

¹¹These were the *Nationale Liste*, competing in the *Land* of Hamburg, and the *Freiheitliche Arbeiterpartei* (FAP). After the court’s pronouncement, these were dissolved by decrees of the Hamburg government and the federal government, respectively (Wise 1998).

¹²Indeed, at the time of this writing, a renewed request to ban the NPD is being debated. The 2001 initiative to ban the NPD, albeit controversial as is the case with all such initiatives, enjoyed broad support among all the mainstream parties. Furthermore, a majority of judges of the court were in favor of proceeding with the trial against the NPD, but they fell short of the supermajority necessary in such cases (Flemming 2003, Jesse 2003, Becker 2005, Pisch 2009, Weckebrödt 2009, Niehaus 2010, Preißler 2010).

attention to militant democracy in comparative constitutional law has shown that, even though perhaps no other democracy is based on as coherent a doctrine of militant democracy as the FRG, many others do incorporate formal rules that either protect certain constitutional principles from amendment or restrict rights of participation or expression for political reasons (e.g., Fox & Nolte 1995, Sajó 2004, Issacharoff 2007, Thiel 2009).

Recent comparative scholarship has generated several typologies, focused mainly on restrictions on extremist parties, which as mentioned above are generally considered the core legal norms of militant democracy because outlawing a political party both excludes a set of political ideas from the deliberative policy-making process and, at the same time, reduces the range of choices available to voters (e.g., Fox & Nolte 1995, p. 6; Preuß 2002, pp. 106–14; Sajó 2004, p. 410; Niesen 2007, p. 1; Thiel 2009, p. 403; see also Gordon 1987, Brems 2006). Nancy Rosenblum (2007; 2008, pp. 412–455) notes that a few rationales, common to a variety of democratic systems, are used to justify and legitimize the dissolution of parties: the use of violence, the incitement of hate, the fact that the party is controlled by a foreign power, and existential threats to national identity. Samuel Issacharoff (2007, pp. 1421–51) identifies several categories of restrictions on extremist parties, including prohibitions on participation in the electoral arena that stop short of forced disbandment, as in Israel; prohibitions on the formation of antidemocratic parties, as in Germany; specific content restrictions on the views that parties may espouse, as for example in Turkey (on the principle of secular democracy, see, e.g., Yuksel 1999) and Israel (on the Jewish character of the state, see, e.g., Cohen-Almagor 1997, 2000); and prohibitions on parties that are considered front organizations for violent or terrorist groups, as in Spain after 2002 (e.g., Ferreres Comella 2004). In line with other scholars, Issacharoff (2007, pp. 1453–59) argues that the principle of proportionality should determine which sanctions should be

applied and that in order to ensure proportionality and to prevent these legal provisions from being abused for partisan purposes, independent overview of these decisions, in particular by the judiciary, is necessary.¹³ Peter Niesen (2002) traces the evolution of party-ban paradigms in the jurisprudence of the German Federal Constitutional Court, identifying three paradigmatic justifications: “antiextremist,” applied equally to totalitarian ideologies on the Right and the Left (such as in the seminal 1950s cases discussed above); “negative republican,” concentrating on restricting political actors that hark back to the authoritarian past; and “civil society,” designed to protect vulnerable social groups from harmful speech, such as in the case of hate speech and limitations on racist expression¹⁴ (Frankenberg 2004; see also Scheppele 2003; on hate speech, see Jenness & Grattet 2004; on racist expression, see, e.g., Fennema 2000).¹⁵ Of particular comparative interest is the distinction between antiextremism, which in principle applies to any offender of core constitutional values, and negative republicanism, which is confined to the political successors of certain authoritarian political organizations and ideologies. The adoption of one paradigm or the other has significant formal and substantive consequences for a country’s legal system, grounding an important distinction in rule design between what can be called “neutral” and “targeted” rules (Capoccia 2007). Antiextremist rules are generally designed to be neutral, that is, to protect specific constitutional values or institutions (Capoccia

¹³This is typical of most democracies that include party-ban rules in their legal systems. In some of them, the government can only request a party ban through the judiciary, and the implementation of the ban follows only a court ruling; in other countries, parties can be banned with immediate effect by government decree, and the courts can then exert judicial review if accessed by the affected party.

¹⁴To be sure, racist expression can also be seen as a violation of democratic values, thus in principle pertaining to the antiextremist paradigm (e.g., Müller 2012).

¹⁵Some of these ideas were expressed in the 2000 *Bundestag*’s application to the Federal Constitutional Court for the NPD ban, of which Frankenberg was one of the authors.

2005, p. 56). Examples range from the general defense of the liberal democratic constitutional order in the FRG mentioned above to more specific objects such as, for example, the federal or the republican form of the state (entrenched, respectively, in the postwar constitutions of West Germany and Italy). The negative republicanism paradigm is instead based on the essential affinity between the current political actor and the predecessor political organization, associated with the country's authoritarian past or with other discredited episodes in the country's history.¹⁶ The formal rules, in such a model, are often targeted, that is, they mention explicitly the ideology (e.g., fascism) that gives rise to legal restrictions on expression and participation. Substantively, targeted militant rules, which are common in contemporary democratic constitutions, represent an important shift from the prewar constitutional theory of militant democracy, which considered them incompatible with democracy (Capoccia 2007). Loewenstein, for example, despite his focus on fascism, considered explicit ideological targeting in the design of formal legal rules to be a violation of the rule of law (Loewenstein 1937b, p. 646).

A final point to be made is that even though comparative legal analysis has endeavored to classify militant measures and to find general legitimizing principles that transcend the specific situations of single countries, underlying most such analyses is the view that such variation can be explained only by the political and historical context of each country. Jan Werner Müller (2012, pp. 1267–68), for example, considers a number of criteria that potentially legitimize militant limitations on freedoms of expression and association: a political program

of permanently disempowering a part of the demos, adherence to ideologies associated with genocide or ethnic cleansing, and rejection of political and party pluralism. Although, in theory, these criteria apply in a variety of political settings, he argues that they must be situated in their national and historical context. To give just one example, offending the dignity of certain groups in society is likely to be less tolerable in countries with a history of genocide against those groups than in countries with no such history and in which a robust tradition of free speech exists. Similarly, talking about “our extremists,” Rosenblum (2008) underscores that what counts as an extremist party is generally defined according to parameters that are deeply rooted in a country's political history and legal culture. Thus, although typological analyses offer useful roadmaps of different national experiences, scholars acknowledge that national context plays an important role not only in the adoption and design of these measures, but also in their judicial interpretation and public legitimation.

To recap, the recent comparative constitutional law literature on militant democracy has converged on the principle that democracies have a right to defend themselves against their enemies, even in the absence of violence designed to undermine the democratic state. To accomplish this purpose, democratic states can enact and apply formal rules restricting expression and participation, subject to impartial oversight of their application. Beyond these basic principles, however, little convergence emerges in the practice of contemporary democracies: how to identify the enemies of democracy; whether simple—extremist—expression is sufficient to warrant repressive measures or whether some form of extremist action (still short of violence) is necessary; what type of legal measures are legitimate and how to assess their proportionality; and so on. In seeking to understand and address all of these issues, distinctive historical experiences and particular national contexts are the key in the thinking of most constitutional theorists.

¹⁶ Sajó (2004, p. 215) ties the adoption of militant rules to past authoritarian experiences, too, but maintains that, owing to what he calls “the phenomenon of constitutional risk aversion,” political elites in new democracies are likely to adopt rules limiting the freedom of all potential enemies of the new regime (see also Niesen 2007, Bleich & Lambert 2011).

MILITANT DEMOCRACY IN POLITICAL SCIENCE

As discussed above, Loewenstein's original concept of militant democracy straddles comparative constitutional law and political science. And as in comparative constitutional law—perhaps even more so—for several decades after the war, the rules, policies, and institutions of militant democracy were largely neglected in comparative political science. This certainly was not because the policy imperatives of militant democracy had disappeared: Although the core fascist regimes of Germany and Italy had been dismantled, totalitarian parties of the Left and, albeit weakened, of the Right were active in most democratic regimes. Nor, of course, was the specter of international authoritarianism out of the way: For several decades after the war, the predominant form of government around the world was rule by left- and right-wing authoritarian regimes.

Besides the general reasons for the concept's eclipse discussed in the previous section, there are a number of causes specific to the disciplinary trajectory of political science. In political science, old institutionalist research—the school to which Loewenstein's work can be ascribed—was superseded by paradigms that stressed macrolevel processes, such as systems theory and behavioralism. In line with this trend, scholars of democracy and democratization abandoned their focus on the institutions and rules of democracy. Modernization theory emphasized the social bases of democracies (Lipset 1959), whereas the historical macrosociology of regime development (Moore 1967) stressed the importance of class alliances at historical critical junctures and the political trajectories triggered by such alliances (see also Luebbert 1991, Rueschemeyer et al. 1992). Importantly, both strands of scholarship took the nature of the regime as a whole as their explanandum, generally classified dichotomously as democracy versus nondemocracy (sometimes with intermediate categories), and typically neglected the internal institutional variety of regimes. Moreover, they focused on

structural, impersonal causes (the level of socioeconomic development, the nature of social cleavages) as their main explanatory factors, thus typically neglecting agency. Yet both of these theoretical elements—institutional variety within democracies and agency—are crucial to a research agenda seeking to uncover the determinants of militant democracy. To be sure, over the past two decades, both institutional variety across democratic polities and agency have been front and center of “new institutionalism” research, at least its “historical” variant (e.g., Thelen & Steinmo 1992; Thelen 1999; Pierson 2000, 2004). However, the empirical focus of these works has been mainly on political economy and social policy (e.g., Hacker 2004, Streeck & Thelen 2005), paying generally less attention to the constitutional institutions of democracy (but see Mahoney & Thelen 2010).

Today, understanding what makes militant policies and institutions politically viable—for example, why societies deal with the memory and legacies of an authoritarian past in different ways (e.g., Müller 2002), whether prohibitions could be viable in fractured societies riddled by ethnic or religious divisions (Issacharoff 2007, Capoccia et al. 2012), or whether the emerging challenge of religious fundamentalism could be tackled effectively with militant restrictions (e.g., Macklem 2006)—has certainly not lost importance. Given that most democratic regimes adopt at least some of the legal restrictions of militant democracy, what explains variation of these institutions across time and space? Under what conditions are militant rules likely to be politically viable—that is, formally enacted and then applied against extremists? How do we explain why some democracies are more militant than others? As a field, comparative political science is not close to providing satisfactory answers to these questions. Yet, in recent years, not unlike the recent resurgence of interest in militant democracy among comparative constitutional lawyers and theorists, the attention of political scientists has been drawn to the topic, and a comparative research agenda is beginning to emerge. Indeed, given the recent

return to institutionalism in the study of democratic development (e.g., Orren & Skowronek 2004, Capoccia & Ziblatt 2010), the conditions are present for political science to address these questions. A number of recent works, reviewed below, have addressed aspects of militant democracy, thus providing important insights to build systematic causal analyses of variation in militant institutions and policies.

A significant portion of the recent work on the institutions and policies of militant democracy is of a descriptive nature. Descriptive case studies of the entire range of militant democracy measures exist with respect to Israel (e.g., Pedahzur 2002) and Turkey (e.g., Kogacioglu 2003, Oder 2009), as well as, of course, Germany (e.g., Murphy 1993; see also More 1994). In a recent monograph, George Michael (2003) provides a detailed analysis of the measures adopted against the extreme Right and terrorism in the United States. There are also a number of studies of high-profile recent cases of party bans (e.g., Mares 2012). Jan Erk (2005), for example, reconstructs both the legal and the political dynamics of the dissolution of the three core associations of the Belgian extreme right-wing party *Vlaams Blok* in 2004 (see also Brems 2006). The dissolution of the Basque separatist party *Batasuna*, based on its close connections with terrorist groups, has also attracted the attention of country specialists (e.g., Turano 2003, Ayres 2004). Similarly, the failed ban of the German NPD mentioned above has been analyzed in specialist international journals (Minkenberg 2006). Historical cases have received some attention, too (e.g., Capoccia 2002, 2005).

In addition to these single-case studies, there are also a number of descriptive comparative analyses: Notable examples (in German) are Boverter (1985), comparing France and the United States against the background of West Germany, and Canu (1996), comparing policies for the protection of the constitution in Germany and France (see also Brunner 1965). In English, the contributions in the recent volume by Markus Thiel (2009) discuss militant rules and policies in sixteen countries,

and Erik Bleich (2011) offers an excellent descriptive account of the differences between the regulation of racist expression and racist organizations in the United States and several European countries (see also Fennema 2000). These works cover the legal rules and the normative reasons that legitimize the law and also—although at times unsystematically—provide information on the politics and history of important episodes in which militant rules were adopted and enforced, information that can serve as a basis for further analysis.¹⁷

Over recent decades, the empirical study of the causes of political repression (e.g., Davenport 2007) has been associated principally with quantitative analyses of state coercion of individuals or groups or of the violation of human rights, either using data on repressive events (Francisco 1996) or deriving levels of repression from standard-based measures of respect for human rights (e.g., Gibney & Dalton 1996) or levels of democracy (e.g., Gastil 2004). Although focused on political repression, these studies are of little help for the comparative analysis of militant-democracy policies and institutions: They cover not only democracies, but the whole gamut of political regimes, and therefore their data are not sensitive enough to capture differences between democratic regimes. Democracies are generally lumped together on the more tolerant end of the spectrum, despite important differences in their militant institutions and policies. The quality of the data used in these analyses has also been criticized (e.g., Bollen 1986; Carleton et al. 1986, pp. 594–95; Goldstein 1986; Munck & Verkuilen 2002).

To find causal research that is targeted at the right level of abstraction, that is, aimed at capturing the differences in institutional arrangements and policy making that separate democratic regimes, it is necessary to look elsewhere. In a recent comparative study of interwar

¹⁷Other useful comparative analyses are Jesse (1980), Finn (1991, 2001), and Levitt (1993). Relevant comparative work exists on bans of ethnic parties (Basenau et al. 2010; see also Rosenblum 2007).

Europe, Capoccia (2001, 2005) proposes a three-step model for understanding how democracies respond to extremism, including legal restrictions: Consensus emerges among the members of a political coalition on the characterization of a particular actor as extremist, each member resists the temptation to defect from the coalition for short-term political gain that may derive to them from defecting from the coalition, and the coalition agrees on the measures needed to contain the extremist threat. Capoccia applies this model to regime crises in interwar Europe, when fragile multiparty government coalitions were subject to challenges from totalitarian antisystem parties. He finds that the internal dynamics of what he calls border parties, that is, the parties that were electorally most at risk of losing votes to antisystem forces, and their ultimate choice in favor of alliance or defection at critical moments were a key element in determining whether these democracies could implement their militant apparatuses, and more generally, whether governments could react effectively to the takeover attempts of extremists (Capoccia 2005, pp. 5–26 and 179ff.).

Capoccia's model complements traditional structuralist views of democratic survival and breakdown, which emphasize impersonal and distal causes of regime outcome such as socioeconomic and cultural conditions. Such causes generally offer robust correlations and as such account for regime outcomes in many instances, but they have difficulties in explaining democratic survival or breakdown in countries in which the structural conditions do not unequivocally point in one direction or the other. In such cases, understanding inter- and intraparty dynamics, as well as the decisions of key leaders at critical moments, can help explain the outcome of political crises.¹⁸ At the same time,

the scope of Capoccia's argument is explicitly limited to cases in which democratic systems respond to the challenge of a totalitarian party that threatens to disrupt the fragile coalition at the helm of the regime, thus paralyzing the coalition's ability to react. The argument is not easily extended to cases in which legal restrictions are imposed on nonparty actors or on parties that are too small to pose an electoral threat that is serious enough to destabilize the regime. It is under these conditions, however, that with only few exceptions, militant rules and policies have been adopted in the postwar decades.

Of the different arguments advanced in the literature for cross-national variation in militant institutions, the most prominent one to emerge to date is culture. The argument has an important lineage: In his classic work *Political Justice*, Otto Kirchheimer (1961) maintained that the existence of rules restricting pluralism turned on whether the public values of a country favored tolerance or authoritarianism. Political systems such as Sweden or Great Britain, where tolerant values prevailed, had no need for such restrictive rules, in contrast to countries such as Germany or Italy, which required special rules to counteract the proauthoritarian trends in their public opinion (pp. 159–70). Cultural variables play an important role in a more recent comparative study by Martin Klamt (2007, p. 154), who states that the variation between countries is “closely related to the development of national legal cultures.” Klamt analyzes six contemporary European democracies that have had “similar historical experiences” of dictatorship: Germany, Austria, Italy, Greece, Spain, and Portugal (p. 135). He maintains that their common historical experience explains why all of these systems contain some legal limits on extremist political actors and that legal culture

¹⁸ A further distinction introduced in Capoccia (2005, pp. 47–69) is between antiextremist measures expected to have effects in the short term and those, such as civic education and policy concessions, designed to have an effect in the longer term. The former are introduced to respond to rising extremist challenges that threaten to lead to democratic breakdown

or at least to paralyze a government's ability to respond to extremism, whereas the latter address the social roots of political extremism. Although this distinction builds on a longstanding debate in the literature on militant democracy (see n.2 above), the different temporal horizons of antiextremist measures are at times confused in the literature (e.g., Wright 1992).

accounts for differences in the wording and application of their legal measures (p. 154).

Culturalist explanations make the important point that the political viability of militant rules is linked to their broader normative legitimacy in the public sphere. However, they fall short on two counts: First, they fail to provide a full causal account of cross-country variation in militant rules and institutions. They generally refer to ideational and normative positions without offering compelling evidence on whose values prevailed in the decision-making process and why these values prevailed over competing ones (Skocpol 1992, p. 22). In failing to do so, they at times mix cause and effect. Klamt (2007, p. 143), for example, states that “compared to Germany, Italy’s constitution expresses an integration of a wider range of political pluralism. . . . That might indicate the lack of any historical experience concerning a failed ‘open’ constitutional democracy as strong as the example of the Weimar Republic.” However, especially from a legal culture perspective, there is no reason to consider prefascist Italy any less of an open constitutional democracy than the Weimar Republic; Italy was heavily influenced by German constitutional doctrine, and, if anything, Weimar had many more restrictive antiextremist rules in force than Italy did (Capoccia 2005, pp. 203–10; see also Gusy 1991, Stein 1999). Nor is there any reason to believe that the failure of the prefascist democratic systems was any less traumatic for the Italian population and democratic elites than the collapse of the Weimar Republic was for their German counterparts, at least to the extent that such failure could be expected to induce political actors to approve antiextremist legal norms.¹⁹ Without further evidence and independent measures of these cultural variables, it is impossible to exclude that other factors are responsible for variation in militant institutions in these and other cases.

Second, culturalist explanations are unsatisfactory because they are inherently static. They

cannot explain either the timing of when militant measures are enacted and applied or what might be called their targeting, namely, why they are applied against only certain extremist actors and not others, when, in principle, all fall foul of the law. For example, why was the German NPD—a party that has existed since 1964 without major changes in its ideology—targeted only in 2001? And why was the equally extremist *Deutsche Volksunion* (DVU) not targeted with similar measures? Why did the Spanish parliament enact a new law and then apply it to ban the *Batasuna* only in 2002, when Basque terrorism had been a constant feature of Spanish political life for many years and when the ambivalent, almost tolerant, attitude of the various previous incarnations of the autonomist Basque political party had not substantially changed? Reference to national political and legal cultures cannot account for such within-country dynamics.

Jaap van Donselaar, in important comparative work (Van Donselaar 2003, summarizing the insights of a larger earlier work published in Dutch; see Van Donselaar 1995), focuses exactly on these dynamics. Van Donselaar advances two hypotheses regarding bans of extreme right-wing parties that address the issues of timing and targeting discussed above. His first hypothesis is that bans are triggered by events that are particularly shocking to the public. Episodes such as the desecration of the Jewish cemetery of Carpentras in France in 1990 or the violent attacks against immigrants in Mölln and Solingen in Germany in 1992 and 1993, respectively, put the dissolution of extreme right-wing parties on the political agenda, even though it was never fully established that these parties were connected with those responsible for the violence. His second argument concerns the size of the extreme right-wing party in question: When it is so small that it cannot influence the political equilibrium, it is unlikely to be targeted by bans (Van Donselaar 2003, pp. 281–82).

Van Donselaar’s argument offers interesting insights into the within-country dynamics of militant democracy, but as it stands, it does not

¹⁹Indeed, in postwar Italy, antifascist legislation was enacted, even though it came too late to be effective against the reemerging neofascist party (Capoccia 2010b).

seem to stand up to comparative testing. Trigger events, even in Van Donselaar's examples, do not always lead to bans, even though they might make bans more likely. And to avoid tautology, trigger events should be defined independently of their effects, and a much more extensive set of observations are required to understand their impact on the rules and institutions of militant democracy. His point concerning size also does not seem to account for much of the variation evident across contemporary democracies: In several cases, bans have been implemented against fringe parties that did not, and realistically could not, influence national political equilibria.²⁰ More generally, this approach to understanding militant democracy fails to link within-country dynamics to cross-country variation in what are considered legitimate political and legal responses to extremist dissent and to the reasons for that variation. Not all countries respond with bans or even milder measures if extremist parties grow in size or if episodes of political violence occur. Some do adopt restrictive measures, others debate such restrictions but fail to implement them, and yet others never even consider limiting the rights of extremist groups. Any compelling empirical causal theory of militant democracy will have to integrate systematically these background conditions that do or do not favor the adoption of militant measures with an analysis of the within-country processes that account for timing and targeting. In the conclusion, I take stock of the previous discussion of the literature in comparative constitutional law and political science and offer some reflections on directions of further research in both fields.

CONCLUSION—ADVANCING RESEARCH ON MILITANT DEMOCRACY

In Loewenstein's original conceptualization, the phenomenon of militant democracy was

relevant for comparative constitutional law and political science alike. The discussion above has taken stock of the state of research on militant democracy in the two fields, which have witnessed a recent resurgence of interest in the concept after decades of relative neglect. In comparative constitutional law, scholars largely agree that limitations on basic rights of expression and participation, enacted to safeguard democracy, are compatible with the principle of liberal constitutional democracy, and they attribute the wide comparative variation in militant rules and institutions to different historical trajectories and their impact on national legal culture. In political science, the renewed interest in militant democracy has given rise to a number of descriptive studies as well as some causal work on the politics of militant democracy—that is, why and how certain restrictions are politically viable. Analysis in both fields shows unquestionably that militant restrictions on rights and freedoms are widespread in modern democracies and constitute an important element of both their legal systems and their domestic politics. Both the legal debate and the empirical research, however, have yet to do full justice to the phenomenon, and in this conclusion, I briefly discuss potentially fruitful directions for future research in the two fields: the emergence and legitimacy of militant democracy rules and practices at the supranational level, in comparative constitutional law, and the empirical analysis of militant institutions and policies in the context of democratization processes, in political science.

Given the widespread acceptance of militant democracy as normatively legitimate but the extremely varied set of rules and institutions through which the principle is put into practice in national legal systems, what are the prospects for militant democracy at the international or supranational level? Constitutional theorists that advocate such a development exist: Gregory Fox & Georg Nolte (1995), in an influential article, argue that international treaties that include a right to democracy should be taken to mean that states have a

²⁰Two examples are the ban of the FAP in Germany in 1995 mentioned above and that of the *Centrumpartij* '86 in the Netherlands in 1998.

duty to pass and implement formal rules aimed at protecting the democratic process from being undermined and ultimately eliminated by antidemocratic forces. However, they acknowledge that the international community is limited in the extent to which it can intervene in the internal affairs of states (p. 70; see also Fox & Roth 2000).²¹

Perhaps militant democracy stands a better chance at the supranational level, in particular in the European Union. The famous Haider case of 2000, in which the Austrian government was subject to sanctions by the other EU member states (Merlingen et al. 2001), led to the formalization of a procedure designed to sanction the abuse of rights at the national level and its inclusion in the Treaty of Nice. A special committee of “three wise men” was appointed to address the problem, and it inspected the record of the Austrian government in the areas of rights of minorities, immigrants, and refugees (Ahtisaari et al. 2000). Even though the special committee exonerated the Austrian government, the case has served as a precedent for direct EU intervention in national politics in the name of safeguarding democracy, for instance in the recent cases of Hungary and Romania (Bánkuti et al. 2012).

These EU initiatives invoke various principles associated with the modern conception

of democracy. Whether these principles will be consistently upheld—in other words, whether they can constitute the core of a community of values that defines the European Union—remains to be seen (for conflicting positions on the issue, see Van De Steeg 2006 and Leconte 2005). Complications abound of course, not least because of the interaction of national interests, partisan loyalties, and cultural differences, as well as the limited powers of EU institutions (e.g., Müller 2012, p. 1255). However, if we bear in mind two points from the earlier discussion—namely, the widespread acceptance of the principle that democracies can legitimately limit rights and freedoms to preserve their foundations, and the importance of historical trajectories in shaping the interpretation and application of this principle in national democracies—then it is plausible to think that, if European integration deepens and a political community gradually develops, some militant rules and institutions are likely to emerge, their shape and content likely to be influenced by the struggles and debates internal to the Union itself. Understanding the conditions and the modes by which militant institutions might develop at the EU level constitutes an important domain for future research on militant democracy beyond the state.

Militant democracy offers opportunities for research in comparative politics as well, complementing the vibrant scholarly conversations on responses to terrorism and on political repression in the field. One strategy for acquiring systematic empirical knowledge of the determinants of variation in the rules and institutions of militant democracy is situating their study in the context of the analysis of democratization. Such an approach would have limits, as it would not cover all militant policies and institutions but rather would focus on restriction placed on the political successors to the political actors that were hegemonic in defunct authoritarian regimes. At the same time, this strategy would have a number of advantages. As many scholars argue (e.g., Müller 2012, p. 1254), a substantial portion of the cross-national variation in the rules and institutions of militant

²¹ A literature exists, too, on the adoption of militant democracy principles by the Council of Europe (e.g., Revenga Sanchez 2003) and in particular the European Court of Human Rights. Individuals have challenged militant restrictions imposed by their governments before the European Court of Human Rights. In some cases, the Court has allowed such restrictions to stand, based on the Convention’s provisions allowing the interference with rights in the event of “necessity in a democratic society,” but in other cases, the Court has found that the condition was not satisfied. Restrictions on extreme right actors have generally been upheld, but the attitude of the Court toward restrictions on Communist actors has been more mixed. Probably the Court’s best known judgments in this area are the seven cases involving a party ban in Turkey: The Court found that bans on the parties advocating Kurdish autonomy (six of the seven cases) did constitute a violation of the Convention, whereas the 2003 decision to ban the *Refah Partisi* was upheld by the Court on the grounds that the fundamentalist principles advocated by the party were incompatible with democracy (e.g., Harvey 2004).

democracy can be attributed to the different lessons learned from national histories of authoritarianism. Therefore, a research program that situates the comparative analysis of militant democracy in the context of processes of regime change from authoritarianism to democracy would be well placed to address the question of why different lessons and policies prevailed in different postauthoritarian democracies. Furthermore, analyzing militant rules targeted at successor dissent provides a solid basis for cross-national comparison and for transcending context in empirical analysis.

This agenda would also draw on theories of institutional and policy development (Pierson 2004, Mahoney & Thelen 2010) to account for the variation of militant institutions and policies. These theories raise a set of questions and offer a set of tools that can be profitably applied to militant institutions and policies.

The insights of democratization theory on how new democracies deal with authoritarian legacies, when combined with the most recent advances in the theorization of institutional development, might provide the theoretical bases to link microprocesses of institutional persistence and change in the rules and policies of militant democracy to macrovariation at the country level (Ahmed 2013, Ahmed & Capoccia 2013). Why are certain militant institutions and policies selected? How do they change or persist, and why? What is their impact on the nature of the regime as a whole? Answering these questions not only would contribute to our knowledge of that elusive object of study that militant democracy has been so far but, given the ubiquitousness of militant rules in today's democracies, would also—and more importantly—shed light on a crucial and understudied dimension of contemporary democracy.

DISCLOSURE STATEMENT

The author is not aware of any affiliations, memberships, funding, or financial holdings that might be perceived as affecting the objectivity of this review.

ACKNOWLEDGMENTS

I thank Jan Werner Müller and Kim Lane Scheppele for comments on previous drafts. The usual disclaimer applies.

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Contents

Growing Up in Law and Society: The Pulls of Policy and Methods <i>Richard Lempert</i>	1
Integrating Law and Health Policy <i>Sandra R. Levitsky</i>	33
The Legal and Political Legacy of Jeremy Bentham <i>Philip Schofield</i>	51
The Political Psychology of Counterterrorism <i>Aziz Z. Huq</i>	71
Legal Regulation of Health-Related Behavior: A Half Century of Public Health Law Research <i>Scott Burris and Evan Anderson</i>	95
The Adoption of Transparency Policies in Global Governance Institutions: Justifications, Effects, and Implications <i>Megan Donaldson and Benedict Kingsbury</i>	119
Law, Race, and Biotechnology: Toward a Biopolitical and Transdisciplinary Paradigm <i>Dorothy E. Roberts</i>	149
Niklas Luhmann's Theory of Autopoietic Legal Systems <i>Hugh Baxter</i>	167
Special Interests After <i>Citizens United</i> : Access, Replacement, and Interest Group Response to Legal Change <i>Samuel Issacharoff and Jeremy Peterman</i>	185
Militant Democracy: The Institutional Bases of Democratic Self-Preservation <i>Giovanni Capoccia</i>	207
The Regulation of Environmental Space <i>Steve Herbert, Brandon Derman, and Tiffany Grobelski</i>	227
Sex Laws and Sexuality Rights in Comparative and Global Perspectives <i>David John Frank and Nolan Edward Phillips</i>	249

The Justice Cascade: the Origins and Effectiveness of Prosecutions of Human Rights Violations <i>Kathryn Sikkink and Hun Joon Kim</i>	269
Is There a Canon of Law and Society? <i>Carroll Seron, Susan Bibler Coutin, and Pauline White Meeusen</i>	287
Motivated Cognition in Legal Judgments—An Analytic Review <i>Avani Mehta Sood</i>	307
Reproductive Justice <i>Zakiya Luna and Kristin Luker</i>	327
Sentenced to Life: Penal Reform and the Most Severe Sanctions <i>Marie Gottschalk</i>	353
Contextualizing Mass Atrocity Crimes: Moving Toward a Relational Approach <i>Susanne Karstedt</i>	383
Middle Eastern Law <i>Chibli Mallat and Mara Revkin</i>	405

Indexes

Cumulative Index of Contributing Authors, Volumes 1–9	435
Cumulative Index of Article Titles, Volumes 1–9	438

Errata

An online log of corrections to *Annual Review of Law and Social Science* articles may be found at <http://lawsocsci.annualreviews.org>