7

Parties versus Democracy

Addressing Today's Political Party Threats to Democratic Rule

Tom Gerald Daly and Brian Christopher Jones

7.1 INTRODUCTION: THE POLITICAL PARTY THREAT TO LIBERAL DEMOCRACY WORLDWIDE

The growing threat to liberal democracy worldwide is, in many ways, a political party threat. Recent years have seen the rise of a range of populist, illiberal, nativist, xenophobic, far-right, and neofascist parties.[1] In many places, parties with a questionable commitment to liberal democracy have entered government, while others remain outside government but are making gains.[2] We also see established democratic parties in government that have threatened or incrementally dismantled democratic structures through subversion by an outsider or the ascendance of an extremist wing. These threats are studied under rubrics including "constitutional retrogression,"[3] "constitutional capture,"[4] and "democratic

[1] See, e.g., Ron Inglehart and Pippa Norris, "Trump and the Populist Authoritarian Parties: The Silent Revolution in Reverse," *Perspectives on Politics* 15(2): 443–454 (2017); Andreas Johansson Heinö, "Timbro Authoritarian Populism Index 2017," *Timbro* (January 4, 2018), https://timbro.se/allmant/timbro-authoritarian-populism-index2017/; and Matthijs Rooduijn et al., "The PopuList: An Overview of Populist, Far Right, Far Left and Eurosceptic Parties in Europe," PopuList (2019), www.popu-list.org.

[2] A watershed moment, for both European and global democracy, was Germany's September 2017 elections, which brought a far-right-leaning party to parliament for the first time since the 1960s, with Alternativ für Deutschland (AfD) claiming 12.6 percent of the total vote and becoming the main opposition in the Bundestag following the formation of another CDU/CSU-SPD "grand coalition" between the mainstream Christian-democratic and social-democratic parties: Fredrik Erixon, "Merkel's Left-Right Coalition Has Given the AfD Exactly What It Wanted," *Spectator* (March 4, 2018), www.spectator.co.uk/article/merkel-s-left-right-coalition-has-given-the-afd-exactly-what-it-wanted.

[3] Aziz Z. Huq and Tom Ginsburg, *How to Save a Constitutional Democracy*. University of Chicago Press, 2019.

[4] See, e.g., Jan-Werner Müller, "Protecting the Rule of Law (and Democracy!) in the EU: The Idea of a Copenhagen Commission," in *Reinforcing Rule of Law Oversight in the European Union* ed. Carlos Closa and Dimitry Kochenov. Cambridge University Press, 2016, 206–224.

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decay."[5] While this phenomenon is often framed as an executive-led problem, it also needs to be understood as a political party problem.

Parties and party leaders occupying an ill-defined space on the political spectrum between the center and extreme – the "far-right lite" – now present a much greater threat to democratic governance than overtly antidemocratic fringe outfits, such as Germany's neo-Nazi National Democratic Party (NPD). Such parties also frustrate, in new ways, the application of existing public law and policy mechanisms to address democracy-threatening parties, including refusal of registration, thresholds for entering parliament, application of the criminal law, outright banning, the erection of "cordons sanitaires" to freeze them out of governance, or a practice of considered engagement. Crucial features of contemporary political party threats include their ambiguous nature, their growing size, and the subversion of democratic parties by errant leaders or extremist factions.

This chapter makes the following central claims: that contemporary political party threats require us to more systematically map the key threats posed, to pay greater attention to crafting novel public law and policy solutions to address these threats, and to reflect anew on our fundamental assumptions about the relationship between political parties and the functioning of liberal constitutional democracy itself. At a time when political party systems are transforming worldwide, and certain parties' core function is shifting from a broadly rational vehicle for channeling citizen policy preferences to a more emotive representation of identity, this chapter aims to ignite discussion and debate on these developments.

The chapter contains four sections. Section 7.2 addresses the enduringly awkward relationship between democratic governance and political parties, as both essential mediators between the public and State and forces that can frustrate the design and functioning of the democratic system. Section 7.3 discusses conventional approaches to political parties perceived as threats to democratic governance. Section 7.4 highlights the inadequacies of existing approaches to address the threats posed by contemporary political parties. Section 7.5 canvasses a number of potential innovations in responding to such threats, with the aim of spurring deliberation on this crucial issue.

7.2 POLITICAL PARTIES: CENTRAL TO DEMOCRACY BUT ORPHANS OF CONSTITUTIONAL THOUGHT

Despite being central to contemporary understandings and conceptualizations of functioning liberal democracy, political parties occupy an enduringly awkward position in democratic governance and constitutional law, representing both a potential threat to democracy and a virtually unavoidable medium between the

[5] See, e.g., Tom Gerald Daly, "Democratic Decay: Conceptualising an Emerging Research Field," *Hague Journal on the Rule of Law* 11: 9–36 (2019).

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state and the people in facilitating democratic governance in complex modern polities. This tension has deep historical roots. In crafting the US Constitution, James Madison warned of the "factional threat" represented by a group "who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[6] While the US Constitution itself says nothing of parties, its entry into force shortly predated, even spurred, the coalescence of the US political system into two clear groupings, centered on the issue of the extent of federal power, and prefiguring the enduring two-party system central to contemporary US democracy.[7]

Some 4,000 miles distant, political clubs in revolutionary France arose in the heady years of newly won political freedom following 1789, which saw a flowering of open political activity and exchange of ideas. However, Jacobin clubs, in particular, having played a key role in the height of The Terror from 1793–1794, during which the revolutionary government pursued its aim of countering its internal and external enemies through extreme violence, were closed down after the end of The Terror in 1794.[8] The terms "terrorism" and "terrorist" are said to have been invented retrospectively to describe the Jacobins and the methods they employed.[9] In France, then, the first (proto-)parties rapidly came to be viewed as antithetical to good governance. Yet, despite their increasing systemic importance, successive constitutions remained silent on the role of parties as the French Republic repeatedly foundered and renewed itself.

Despite the concurrent rise of constitutional government and political parties across the long nineteenth century (i.e., 1789–1914), constitutions worldwide largely overlooked parties as an essential element of the modern democratic state. As Aradhya Sethiya offers: "If political theory saw parties as anti-democratic, the eighteenth- century constitutions considered them constitutional externalities" or even "orphans of constitutional law."[10] In the post-1945 era, the most common early references to political parties in constitutional texts concern their registration and the constitutional power to ban parties opposed to democratic rule: originally found

[6] See William Partlett and Zim Nwokora, "The Foundation of Democratic Dualism: Why Constitutional Politics and Ordinary Politics Are Different." *Constellations* 26(2): 177, 177–178 (2019); and James Madison, "Federalist No. 10" (1787), Bill of Rights Institute, https://billofrightsinstitute.org/founding-documents/primary-source-documents/the-federalist-papers/federalist-papers-no-10/.

[7] Partlett and Nwokora, "The Foundation of Democratic Dualism," 182. See Russell Muirhead and Nancy L. Rosenblum, "The Uneasy Place of Parties in the Constitutional Order," in *The Oxford Handbook of the U.S. Constitution* ed. Mark Tushnet et al. Oxford University Press, 2015, 217–240.

[8] Marisa Linton, "Jacobinism," in 1 *Encyclopedia of Political Theory: A–E* ed. Mark Bevir. Sage, 2010, 725–726.

[9] Ibid. at 726.

[10] Aradhya Sethia, "Where's the Party? Towards a Constitutional Biography of Political Parties," *Indian Law Review* 3(1): 1 (2019).

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in the 1949 Basic Law of West Germany and spreading in subsequent decades to states worldwide, including Spain, South Korea, Israel, and various states in Central and Eastern Europe after post-1989 transitions to democratic rule (e.g., Czech Republic and Poland).[11] In recent decades in continental Europe, thicker constitutional recognition has transformed political parties "from socio-political organizations into integral units of the democratic state," viewed as an attempt to shore up their legitimacy as their claim to democratic representation has weakened, not least due to declining membership.[12]

However, in constitutional law scholarship, parties have all too often been ignored or treated as an unwelcome guest, running amok around the three pristine pillars of ordered government sketched in the constitutional text. Not so in political science, where scholars, more interested in whomever exercises power and less hidebound by the niceties of constitutional texts and ideals, have expended much more energy on understanding precisely how political parties operate within the democratic system.[13] A rich literature analyzes everything from interparty relations to intraparty dynamics, to sweeping shifts in political party systems.[14] However, advances in legal actors' understanding of political parties as constitutional actors have been made in the past two decades.

Kommers has framed the Federal Constitutional Court of Germany's case law on political parties as a "jurisprudence of democracy,"[15] shaping the electoral system with the aim of ensuring a genuinely representative political system and bringing their roles within the constitutional realm. As well as insistently affirming the core democratic role of political opposition in its early decades and beyond, the court in key decisions granted political parties the power to defend their institutional rights before the court in a similar manner to other state organs, struck down restrictive candidacy laws, and upheld a law setting a 5 percent threshold of votes cast for parties to enter parliament, to ensure "orderly" governance in an electoral system characterized by diffuse voting patterns. The latter outcome reflected memories of the instability inflicted on Weimar's parliamentary system by a "chaotic carousel of shifting coalitions and collapsing governments, of immobile parliaments repeatedly dissolved."[16]

[11] Justin O. Frosini and Sara Pennicino, "Ban on Political Parties," in *The Max Planck Encyclopedia of Comparative Constitutional Law* ed. Rainer Grote et al. Oxford University Press, 2017, https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e598.

[12] Ingrid Van Biezen, "Constitutionalizing Party Democracy: The Constitutive Codification of Political Parties in Post-War Europe," *British Journal of Political Science* 42: 187 (2012).

[13] Kay Lawson, ed., *Political Parties and Democracy*. Bloomsbury, 2010.

[14] Zim Nwokora and Riccardo Pelizzo, "Measuring Party System Change: A Systems Perspective," *Political Studies* 66: 100 (2017).

[15] D. P. Kommers, "The Federal Constitutional Court: Guardian of German Democracy," *The Annals of the American Academy of Political and Social Science* 603: 111 (2006).

[16] Justin Collings, *Democracy's Guardians: A History of the German Federal Constitutional Court, 1951–2001*. Oxford University Press, 2015.

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US scholars have crafted a "law of democracy" literature focused on an institutionalist analysis of the true workings of the democratic system, which underscores the serious tensions between real-world practice and the scheme set out in the venerable constitutional text. In a 2005 article, Pildes and Levinson argued that the original Madisonian design of the US Constitution, predicated on healthy interbranch competition as a means of preventing excessive concentration of political power and the concomitant risk of a tyrannical government, had been almost immediately superseded by the simultaneous emergence of the political party system.[17] For Levinson and Pildes, the continuing focus on this outmoded model of interbranch competition elides the ways in which disciplined political parties can functionally fuse executive-legislative branch operation, which has been exacerbated by the sharpening of ideological interparty divisions through factors including the rise of gerrymandering by both parties and the strengthening of internal party discipline, which renders branch interests "contingent upon shifting patterns of party control."[18]

This analysis is couched in a broader strain of recent US scholarship highlighting the way in which other long-term phenomena, including the growth of the administrative state and of (private) economic power, frustrate the ideals, understandings, and deep assumptions underlying the constitutional scheme and constitutional thought.[19] Yet, despite attempts to understand and reconceive political parties in constitutional terms due to their unavoidable centrality to the exercise of public state power, in the US system (and other states such as Australia and South Africa)[20] they are generally viewed in constitutional terms as private entities, under-regulated, or at best cuckoos in the constitutional nest.[21]

While the analysis above remains largely framed as analyzing the shortcomings of "ordinary" politics in systems populated by parties broadly committed to democratic governance,[22] public law scholars' focus on the centrality of parties to functional democratic governance has started to intensify as parties hostile to liberal democracy have gained ground and various governing parties worldwide

[17] Daryl J. Levinson and Richard H. Pildes, "Protecting Popular Self-Government from the People?," *Harvard Law Review* 119: 2312 (2005–2006).

[18] Ibid. at 2361.

[19] See D. A. Canteub, "Tyranny and Administrative Law," *Arizona Law Review* 59: 49 (2017); and Ginesh Sitaraman, "The Puzzling Absence of Economic Power in Constitutional Theory," *Cornell Law Review* 101: 1445 (2016).

[20] Graeme Orr, "Private Association and Public Brand: The Dualistic Conception of Political Parties in the Common Law World," *Critical Review of International Social and Political Philosophy* 17: 332 (2014); and Catherine O'Regan, "Political Parties: The Missing Link in our Constitution?," *South African Judicial Education Journal* 1: 61 (2018).

[21] Muirhead and Rosenblum, "The Uneasy Place of Parties in the Constitutional Order."

[22] Richard Pildes, "Romanticizing Democracy, Political Fragmentation, and the Decline of American Government," *Yale Law Journal* 124: 804 (2014).

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have actively diminished accountability and rights-protecting organs (independent courts, media, and civil society organizations), while maintaining a veneer of legality and democratic rule through sophisticated manipulation of law and continued elections.[23] This presents a challenge of a different order and magnitude compared to the imperfect systemic functioning analyzed by Pildes and others, raising more intensely the risk of tyrannical government through excessive concentration of power and subversion of the constitutional framework.

In many states worldwide, the political party system is now unable to perform the essential mediating and representative role essential to adequately functioning representative democracy. This is due not only to long-established trends such as declining membership but also to the intensification of extreme polarization and "invidious partisanship,"[24] the prioritization of partisan advantage over fidelity to constitutional and democratic governance,[25] the fuller "capture" of parties by elite or sectoral interests, and party "capture" of the state itself through domination of all previously independent democratic institutions, often facilitated by the fragmentation or weakness of the opposition.

Further complicating the picture, perhaps the defining feature of the political party landscape in many states suffering democratic decay today is flux: marginal parties are growing, new parties are forming, long-dominant centrist parties are losing support, more extremist wings of large parties are in the ascendant, and – the greatest challenge of all – recent years have witnessed the rise of parties that are ambiguous in terms of their commitment to liberal democratic rule, rather than avowedly antidemocratic. The party system, quite settled for decades in many states, has become a churn of change. Given this churn, it is useful to briefly map existing approaches to problematic parties.

7.3 CONVENTIONAL APPROACHES TO ANTIDEMOCRATIC PARTIES

This section summarizes the three principal ways – legal, constitutional, and policy approaches – states have attempted to address parties perceived as threats to, or inimical to, the democratic system, and highlights their inadequacy in remedying the novel democratic threats posed by contemporary parties.

[23] Laurent Pech and Kim Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU," *Cambridge Yearbook of European Legal Studies* 19: 3 (2017); and Huq and Ginsburg, *How to Save a Constitutional Democracy*.

[24] Justin Levitt, "Intent Is Enough: Invidious Partisanship in Redistricting," *William & Mary Law Review* 59: 1993 (2018).

[25] See, e.g., Yasmin Dawood, "Democracy and the Problem of the Partisan State," in *Loyalty: NOMOS LIV* ed. Sanford Levinson et al. Oxford University Press, 2013, 257–292.

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7.3.1 *Legal Approaches*

7.3.1.1 Registration Conditions

Registration requirements (and refusal to register) have been used to curtail threats by making it more difficult for fringe and extremist parties to gain ballot access. While in some states – especially in long-established common law democracies – these may only consist of "bureaucratic niceties," such as form- filling and fees,[26] in other jurisdictions requirements are "complex and lengthy."[27] Even if parties meet all the formal bureaucratic requirements, state authorities are often empowered to refuse registration based on the wider aims of the party or because of incongruity with party laws or constitutional standards – although such refusals can usually be appealed.[28] While research suggests that the types and forms of documentation required for political parties are becoming lengthier and more complex, this has not kept democracy-threatening parties off the ballot. Savvy parties are aware of these restrictions and are unlikely to divulge information that may lead to registration refusal.

7.3.1.2 Thresholds for Entering Parliament

Thresholds, defined as "the legally prescribed minimum number of votes needed for a party to take part in distribution of parliamentary seats,"[29] are designed to protect parliaments against extremist or fringe parties that may gain a small but not insignificant number of votes. Usually set between 3–7 percent, they can be higher or lower,[30] and can also relate to regional versus national vote percentage, or even for party coalitions.[31] Beyond the legal threshold, there is also a natural threshold that parties must surpass in order to gain seats, namely, the percentage needed to obtain one seat at the district level, which tend to be very significantly higher.[32] For example, in the United Kingdom's (UK) majoritarian system the natural threshold to secure a seat is 35 percent (preventing the UK Independence Party from gaining more than a single seat in the 2015 elections despite obtaining 12.6 percent of the

[26] Orr, "Private Association and Public Brand," 343.
[27] Pippa Norris, *Radical Right: Voters and Parties in the Electoral Market*. Cambridge University Press, 2006, 88.
[28] Criteria, Conditions and Procedures for Establishing a Political Party in the Member States of the European Union, European Parliament Document PE 462.512 (2012) at 20–23.
[29] Ibid.
[30] In the Netherlands, it is 0.67 percent. In Turkey, it is 10 percent. See Venice Commission, at 6–8.
[31] For example, in Germany parties need either three district seats or five percent of the national vote to enter the Bundestag.
[32] Venice Commission, at 9.

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national vote).[33] As with registration requirements, elections in recent years have demonstrated that many state thresholds are not keeping threatening political parties out of power.

7.3.1.3 Applications of New and Existing Law

Jurisdictions are often hesitant to restrict specific parties because of the implications this could have for rights and liberties, such as freedom of association and expression, and foundational values such as democratic pluralism. Yet, states commonly punish extremist parties or party leaders through terrorism, hate speech or incitement laws,[34] criminal law,[35] tax fraud laws,[36] and campaign funding regulations,[37] which can lead to parties breaking down or voluntarily dissolving. However, this may not be the best strategy to defuse the long-term problem and may even prove advantageous – rather than debilitating – for the targeted party, by bolstering its status and electoral success, such as Jean-Marie Le Pen's success after his conviction for assault during a 1988 election campaign.[38] For states ordinarily less willing to tackle parties through the law, one-off restrictions include attempts in the 1950s to suppress or ban the main communist party in both the United States and Australia, which failed due to weak enforcement of a suppressive law (US)[39] or its being struck down by the apex court (Australia).[40] Alternative strategies, such as cutting off media access or government funding – which Germany's Bundestag opted for in 2017 after the Constitutional Court refused to dissolve the neo-Nazi National Democratic Party (NDP)[41] – have limited effect in the social media age and could even incentivize foreign or illegal funding strategies or the party dissolving and reregistering under a new name.

[33] Electoral Commission: 2015 UK General Election Results, www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/uk-general-elections/2015-uk-general-election-results.

[34] Vlaams Blok in Belgium in 2004 and Centrum Partij in the Netherlands in the 1990s. See William M. Downs, *Political Extremism in Democracies: Combating Intolerance*. Springer, 2012, 85.

[35] Reuters, "French Rightist Found Guilty of Assault in 1997 Campaign." *New York Times* (April 3, 1998), https://nyti.ms/2GFowkG.

[36] Mogens Glistrup, founder of the Danish Progress Party. See Downs, *Political Extremism in Democracies*, 139.

[37] E.g., the One Nation Party in Australia. See Norris, *Radical Right*, 69.

[38] See Norris, *Radical Right*, 91.

[39] Internal Security Act of 1950, Pub. L. No. 81-831, 64 Stat. 987.

[40] *Australian Communist Party v. The Commonwealth* [1951] HCA 5 (Australia).

[41] Tom Gerald Daly, "Germany's Move to Deprive Anti-Democratic Parties of Federal Funding: An Effective Response to the Populist Wave?" ConstitutionNet (July 26, 2017), www.constitutionnet.org/news/germanys-move-deprive-anti-democratic-parties-federal-funding-effective-response-populist-wave.

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7.3.2 *Constitutional Approaches*

7.3.2.1 Election System Tinkering

Can particular election systems facilitate or diminish political party threats? While proportional systems have proliferated on the basis that they are more democratic by according voters a broader electoral choice and by constructing a more representative parliament after elections,[42] Rosenbluth and Shapiro argue that this can not only lead to haphazard, weak, or deceptively representative coalition governments but also permits fringe and extremist political parties into the system.[43] They argue that having two strong parties in a majoritarian single-member district (SMD) system produces the best democratic outcomes.[44] Counter-arguments here include: in many jurisdictions any wholesale electoral system change would be difficult and unlikely to be achieved within a short time-frame, fragmentation may be rooted in longstanding political traditions, major traditional political parties in majoritarian systems can still be captured by authoritarian-leaning populist candidates hostile to liberal democracy,; and the latter problem has been aggravated by changes to "democratize" party leadership election methods, which, compared to more traditional selection of leaders through party or parliamentary leadership, removes barriers for questionable candidates.[45] Thus, constitutional tinkering of the electoral system is at best a medium-term option and, even if successful, is no panacea.

7.3.2.2 Banning or Dissolving Political Parties

The power to dissolve political parties based on their purportedly antidemocratic platform or operation is a feature of many democratic constitutions globally, representing one of the most controversial weapons in the arsenal of a post–World War II "militant democracy" capable of protecting itself from threat or collapse by employing illiberal means. The most influential model has been the 1949 Basic Law of West Germany: Article 212(2) empowers the Federal Constitutional Court to ban political parties that "seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany." While frequency of use varies considerably (from highly frequent in Turkey to not a single instance in Poland) and some sizeable parties have been dissolved (e.g., former ruling Communist parties in Latvia and Lithuania), they largely target fringe parties or specific state issues (e.g., secessionist parties).[46] One study indicates that twenty of

[42] Nils-Christian Bormann and Matt Golder, "Democratic Electoral Systems around the World, 1946–2011," *Electoral Studies* 32(2): 360, 363–365 (2013).
[43] Frances McCall Rosenbluth and Ian Shapiro, *Responsible Parties: Saving Democracy from Itself*. Yale University Press, 2018.
[44] Ibid. at 5.
[45] Ibid. at 81–89.
[46] Frosini and Pennicino, "Ban on Political Parties," at paragraph 16.

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thirty-seven European states analyzed had banned at least one party since 1945, totaling fifty-two bans in all, including both post-authoritarian states and states without experience of authoritarian rule.[47] The core expressive and associative political freedoms such bans affect are not only recognized in national constitutions but also in international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR) and regional conventions such as the European Convention on Human Rights (ECHR).[48] In 2000, the Council of Europe's Venice Commission set out seven guidelines for political party dissolution,[49] drawing heavily from the case law of the European Court of Human Rights (ECtHR). However, these have not necessarily ensured clarity[50] and some of the ECtHR's judgments have come under heavy criticism.[51]

Bligh and Müller have argued for a reconsideration and new understanding of party bans on the basis that novel challenges and different types of authoritarianism have arisen.[52] As Bligh observes, "the dominant approach continues to be preoccupied with the Weimar scenario" of democratic breakdown in 1920s Germany, spurred by overtly antidemocratic actors.[53] Both public law and political science literature emphasizes the deficiencies of bans:[54] normatively, as being undemocratic and open to abuse, resting in intractable tension with adherence to democratic pluralism; and practically, as being "pointless", "counterproductive,"[55] and diverting attention from more effective methods, such as policy approaches.[56]

[47] Angela K. Bourne and Fernando Casal Bértoa, "Mapping 'Militant Democracy': Variation in Party Ban Practices in European Democracies (1945–2015)," *European Constitutional Law Review* 13: 221, 230, 246 (2017).

[48] Eva Brems, "Freedom of Political Association and the Question of Party Closures," in *Political Rights Under Stress in 21st century Europe* ed. Wojciech Sadurski. Oxford University Press, 2006, 120–128.

[49] European Commission for Democracy Through Law (Venice Commission), "Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures," *CDL-INF* (2000), 1.

[50] For example, Guideline 3 limits party bans to those advocating or using violence while Guideline 5 refers to the much broader criteria of "danger to the free and democratic political order or to the rights of individuals."

[51] For instance, its upholding of the Welfare Party's dissolution by the Turkish Constitutional Court has been called "the largest single interference with freedom of association in European jurisprudence." (Paul Harvey, "Militant Democracy and the European Court of Human Rights," *European Law Review* 29: 407, 417 [2004]).

[52] Gur Bligh, "Defending Democracy: A New Understanding of the Party-Banning Phenomenon," *Vanderbilt Journal of Transnational Law* 46: 1321 (2013); and Jan-Werner Müller, "Protecting Popular Self-Government from the People? New Normative Perspectives on Militant Democracy," *Annual Review of Political Science* 19: 249 (2016).

[53] Bligh, "Defending Democracy," 1325.

[54] See Downs, *Political Extremism in Democracies*, 199.

[55] Tim Bale, "Will It All End in Tears? What Really Happens when Democracies Use Law to Ban Political Parties," in *Regulating Political Parties: European Democracies in Comparative Perspectives* ed. Ingrid van Biezen and Hans-Martien ten Napel. Leiden University Press, 2014, 195–196.

[56] Angela Bourne, "Democratic Dilemmas: Why Democracies Ban Political Parties 3," Conference Paper, University of Montréal, European Consortium for Political Research General Conference (August 26–29, 2015).

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7.3.3 *Policy Approaches*

7.3.3.1 Cordons sanitaires

"Cordons sanitaires" entail parliamentary parties adopting a policy of refusal to engage with extremist or threatening political parties that have entered parliament. There is little consensus that this is effective: some question the efficacy of "quarantining" in that targeted parties may not always become pariah parties and could exert influence through other means. Although repressive measures can have the effect of pushing out a "small minority" of members from extremist parties, such actions may also attract potential newcomers because of the party's "persecuted" status and can also lead to the establishment of clandestine networks and a hardening of extremist positions.[57] As Downs stresses, "denial, rejection, and repression have largely failed to mitigate extremism in the cases where they have been adopted as dominant strategies."[58]

7.4 DEMOCRATIC THREATS POSED BY CONTEMPORARY PARTIES

7.4.1 *The Rise of the "Far-right Lite" Party*

In recent years, the clearest global trend in political party systems is the rise of parties with a more ambiguous relationship to liberal democracy and more significant electoral support (e.g., France's Front National, Poland's Law and Justice Party (PiS), Brazil's Social Liberal Party (PSL), or India's Bharatiya Janata Party (BJP).[59] The nature of these larger parties is a key obstacle to addressing the threat they present. They often present a form of "far-right lite,"[60] with partially detoxified platforms that steer away from any overt challenge to democratic governance and tend to frame their racist, xenophobic, and illiberal views in a more sophisticated manner than previous problematic parties (although the Brazilian context has featured more overt authoritarianism at times).

Moreover, a party like the Alternativ für Deutschland (AfD) – like most parties – is not a monolithic bloc of one mind on all issues. Its success appears partly based on its ability to offer the electorate two political "flavors": a relatively moderate face, which frames anti-immigrant and other views as eminently sensible, and a much more strident and virulent face, which speaks against "an

[57] Michael Minkenberg, "Repression and Reaction: Militant Democracy and the Radical Right in Germany and France," *Patterns Prejudice* 40: 25, 43 (2006).
[58] Downs, *Political Extremism in Democracies*, 200.
[59] Daly, "Democratic Decay."
[60] Bale, "Will It All End in Tears?," 215.

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invasion of foreigners" and is capable of shocking statements.[61] The AfD has made an art of walking back extreme statements with contrary statements from its more moderate wing. Thus, it is hard to fit the party into the established framework for addressing antidemocratic parties under the German Constitutional Court's case law or accepted understandings of such bans reflected in the Venice Commission's guidelines. Moreover, especially when the AfD has been the official opposition, a "cordon sanitaire" policy has been neither practically feasible nor democratically defensible.

Indeed, in the context of the Constitutional Court's refusal to ban the NPD in 2017 – strongly criticized by political actors, as discussed above – Stefan Thiel approved of the Constitutional Court's judgment as reflecting the view that German society "must adapt to fight extremist ideologies chiefly in the political, rather than the legal arena. First and foremost, this requires engaging with at times uncomfortable viewpoints, an active engagement of civil society in political debate and tolerance of dissent."[62]

7.4.2 *The Size of "Far-right Lite" Parties*

Second, and further undermining the potential application of existing mechanisms, is the size of contemporary democracy-threatening parties. While such "hybrid" parties long occupied the fringes of democratic political party systems, especially in Europe, it has been argued that they have now displaced liberal parties as the "third ideological authority" beyond Conservative and Christian Democrat parties, and Social Democrat Parties.[63] This means that Thiel's point above gains added force: the larger a potential antidemocratic party, the more foolhardy (and less justifiable) it may be to attempt to suppress it by legal means, or to attempt a policy of exclusion or containment. It is tempting to argue that such parties should be targeted before they have the chance to grow, through refusal to register, application of the criminal law, or outright bans. However, this would assume that a party's platform and views are explicitly antidemocratic, whereas contemporary parties present much more ambiguous fronts. It may only be when a party is in power that its true threat to democratic rule becomes apparent. Here, the "Weimar" scenario of overt aversion to democratic rule does not apply, which precludes the application of any banning mechanism.

[61] Justin Huggler, "AfD Co-Leader Walks Out on Party on Day after German Election Success," *Telegraph* (September 25, 2017), www.telegraph.co.uk/news/2017/09/25/afd-co-leader-walks-party-day-electionannounces-fight-against/.

[62] Stefan Theil, "A Vote of Confidence for the German Democratic Order: The German Federal Constitutional Court Ruling on the Application to Ban the National Democratic Party," UK Constitutional Law Association (January 31, 2017), https://ukconstitutionallaw.org/2017/01/31/stefan-theil-a-vote-of-confidence-for-the-germandemocratic-order/.

[63] Timbro Authoritarian Populism Index 2017, 18.

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7.4.3 *The Entry of Antidemocratic Parties into Government*

Apart from research on the banning of former ruling parties,[64] the majority of the literature on antidemocratic political parties focuses on contexts where the main political territory is occupied by "mainstream" parties within the acceptable ranges of the democratic political spectrum. However, in multiple states, parties hostile to liberal democracy have entered government, sometimes with significant majorities or in coalition. Some, like Hungary's Fidesz Party, Poland's Law and Justice Party or India's BJP have secured multiple terms in government while others have been ousted after one term (e.g., Bolsonaro's PSL in Brazil). The problems canvassed above regarding the futility of applying existing remedial measures to parties like the Front National and AfD are exacerbated in the case of a variety of parties that have, once in government, tended to incrementally hollow out democratic structures, crafting a hybrid governance system with few constraints on executive power but retaining elections. The examples of the Law and Justice (PiS) party in Poland and Fidesz party in Hungary demonstrate how difficult it is to deal with this issue before parties come to power. Indeed, both parties started as what seemed to be liberal-democratic parties; Fidesz (whose name comes from Fiatal Demokraták Szövetsége; Alliance of Young Democrats) emerged from a liberal student activist movement; PiS emerged from the Solidarity movement that spurred the Polish democratic transition ending Communist rule.

7.4.4 *The "Subversion" of a Democratic Party by an Outsider/Extreme Wing*

A different form of threat is posed by the takeover (or "populist capture")[65] of a long-established "good" party by a "bad" leadership, whether by an individual outsider or an extremist wing. This tends to be the only choice available to authoritarian-leaning political forces where the nature of the established party system precludes the formation of a new party.[66] Examples include Rodrigo Duterte in the Philippines and Donald Trump in the United States.

In neither scenario could existing mechanisms tackle the problematic rise of these individuals. In a two-party system such as the US, using criminal law, "cordon sanitaire" techniques, or other existing mechanisms against the subverted party simply could not work without distorting the entire political party system, and would inescapably be viewed as partisan in nature. It is important to emphasize the distinction between party leadership and the party itself. For instance, the 2011 Venice Commission guidelines on banning political parties emphasizes that

[64] Pieter Niesen, "Banning the Former Ruling Party," *Constellations* 19: 540 (2012).
[65] Lena Günther and Anna Lührmann, "Populism and Autocratization 1," V-Dem Policy Brief No. 19. University of Gothenburg, Varieties of Democracy Institute (December 2018).
[66] Ibid. at 1.

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the activities of party members as individuals (including leaders) cannot provide the basis for dissolution, especially if such action runs counter to the political party's constitution or activities, unless it can be demonstrated that the activity was taken by the party's statutory body.[67]

In cases of "subversion" of a democratic party by an outsider, rather than the cost of measures that target the entire party, it may be more effective to wield the scalpel of targeted measures to remove a corruptive leader, such as impeachment.[68]

7.4.5 *The Dominance of a Party by Unaccountable or Shadow Insiders*

A "subverter" is not always an outsider, nor in a formal position of apex power in the State. In this connection, internal party dynamics appear increasingly important as a factor. This raises two difficult issues. First, to what extent can the activity of a dominant figure such as Poland's Jarosław Kaczyński be separated from the party itself? After all Kaczyński is leader of the PiS party but only joined cabinet in 2020 until PiS was ousted in 2023. Second, what democratic concerns are raised by the level of dominance exercised by an unaccountable individual or group of unaccountable individuals? Where government policy and activity is excessively influenced by one figure, this appears to cut against the most foundational safeguards of a democratic system, such as the separation of state powers – acutely heightening the concerns highlighted by Levinson and Pildes in the US context regarding the impact of party dynamics on excessive concentration of power. Effectively, the separate branches of government become simply different arms of the party, rather than separate "sovereign" entities that check and balance one another's power in concordance with the Constitution as well as acceptable constitutional practice in a democratic society. Such concentration of power in one individual also renders the link between the electorate and party more tenuous. It is an issue that requires much more attention in the literature.

7.5 CONTEMPLATING NEW PUBLIC LAW AND POLICY APPROACHES

Effectively addressing the novel challenges to democratic governance posed by contemporary political parties requires new mechanisms, based on key lessons from the debate concerning existing and historical approaches to antidemocratic parties, including: falling into the trap of mechanisms that can be characterized as elite or partisan frustration of the will of the people, assuming that antidemocratic parties will be easy to identify, and distinguishing between party leaderships and the parties

[67] OSCE, ODIHR, & Venice Commission, Guidelines on Political Party Regulation 24: 48 (paragraph 94) (2011), www.osce.org/odihr/77812?download=true.
[68] Bale, "Will It All End in Tears?," 218.

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themselves. This section contemplates an indicative list of possible public law and policy options for addressing the difficult threats raised by contemporary political parties.

7.5.1 *Can We Just Trust Courts to Make the Right Call?*

A clear point of consensus across jurisprudence, scholarship, and practice is that the most serious forms of controlling political parties, such as bans, should be the responsibility of the constitutional court (or equivalent).[69] It therefore may be tempting to suggest that courts could be accorded much broader regulatory powers; for instance, to perform periodic party assessments for commitment to the constitution and rule-of-law principles or to assess parties' internal democratic procedures to prevent excessive dominance by one figure or faction. Grounds for regulation could be reframed in wider terms, allowing more discretion to constitutional courts to take a tailored approach to each party, with more flexible standards of scrutiny.

However, such an argument dissolves in the face of four issues. First, existing jurisprudence on party bans and regulation at both the national and international levels has attracted significant criticism, not least the inconsistencies in the ECtHR's case law, discussed above.[70] Second, courts may, for good reason, be unwilling to employ such an expanded regulatory power on the basis that it would mire them in partisan politics – especially regarding regulation of parties with more than marginal support. Third, packed courts in backsliding or fragile democracies might wield broad regulatory powers aggressively. As Cavanaugh and Hughes observe: "The use of [militant democracy] measures may well erode and devalue the very principles that they seek to protect."[71] Finally, even where independent courts remain in place, their characterization by authoritarian-leaning populist forces as elite liberal institutions could mean that intervention may strengthen support for such parties by allowing them to present themselves as victims of entrenched elites.

7.5.2 *Nonjudicial Options*

The party regulation model in states such as the United Kingdom may point to a less court-centered, approach. For instance, the UK's party proscription process under the Terrorism Act 2000 is wholly executive-based via the Home Secretary, but this is tempered by the Act's framework for deproscription. A proscribed party may apply to

[69] See Frosini and Pennicino, "Ban on Political Parties"; Venice Commission, "Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures"; and Müller, "Protecting Popular Self-Government from the People?"

[70] *United Communist Party of Turkey v. Turkey*, 1998 (26) European Human Rights Report 121.

[71] Kathleen Cavanaugh and Edel Hughes, "Rethinking What Is Necessary in a Democratic Society: Militant Democracy and the Turkish State," *Human Rights Quarterly* 38: 623, 625 (2016).

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the Home Secretary for deproscription and, if declined, may appeal to a Proscribed Organisations Appeal Commission (POAC) consisting of one senior judge and two other members of the Commission (usually accomplished lawyers),[72] with a right of further appeal to higher UK courts.[73] Thus, rather than court-centered from the beginning, the process of deproscription becomes increasingly court-focused only after decisions have been made again by the Secretary of State and then by an independent Commission. This may insulate the courts from accusations of political decision-making, as they are not the initial adjudicators on party dissolution.

Ideally, party regulation should involve multiple branches of government, incorporate quasi-judicial entities (e.g., independent commissions), and not place dissolution into the hands of one group or institution.

7.5.3 *Emerging International Mechanisms*

In the European Union (EU), approaches to contemporary illiberal parties, perhaps inescapably, have an international dimension. Alongside a long-standing but unsuccessful campaign to have the Hungarian and Polish governments sanctioned under Article 7 of the Treaty on European Union (TEU) for breach of fundamental values of the EU (e.g., democracy, rule of law) contained in Article 2 TEU,[74] and the pushback by both the Court of Justice of the European Union (CJEU) and national courts,[75] yet another gambit has emerged, focused on the parties themselves qua parties, rather than executive actors.

Pech and Alemanno in 2018 called on the European Parliament to request the EU party regulation body[76] to verify whether the European's People Party (EPP) (which groups together a range of national parties, including Fidesz, the ruling party in Hungary) is in compliance with the EU's fundamental values as set out in Article 2 TEU.[77] This legal mechanism (in a little-known EU Regulation)[78] had never been invoked and was perceived as potentially providing an avenue for Fidesz's deregistration as a European political party, thereby, at least by implication, diminishing its

[72] For example, a July 2007 case (*Lord Alton of Liverpool v. Secretary of the State for the Home Department* [2008] EWCA Civ 443) included was one senior Judge, Sir Harry Ognall, and two QCs, http://bit.ly/2pxsjtJ.

[73] Terrorism Act 2000, c. 11, §§ 4–6 (Eng.).

[74] A limited step forward was a positive vote on September 12, 2018 in the European Parliament to trigger article 7 against Hungary.

[75] Case C-216/18 PPU, Minister for Justice and Equality ECLI:EU:C:2018:586 (July 25, 2018); and Case C-619/18 *European Commission v. Republic of Poland* ECLI:EU:C:2019:531 (June 24, 2019).

[76] Authority for European Political Parties and European Political Foundations (APPF).

[77] Alberto Alemanno and Laurent Pech, "De-Registration of Europarties? Our Reasoned Request to Verify EPP's Continuing Compliance with EU Values," *The Good Lobby* (September 11, 2018), https://bit.ly/2SyUM1s.

[78] Regulation 1141/2014, 2014 O.J. (L 317) 1 (as amended by Regulation 2018/673, 2018 O.J. (L114) 1 (Euratom).

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power and damaging its domestic standing. Interestingly, the request for review of a party by the EU regulator can be made not only by other EU organs (the Council and Commission) but also by "a group of citizens," although the latter is possible solely in the event of a "manifest and serious breach" of EU values. This option needs to be examined in light of the discussion above concerning the value and utility of repressive measures. Although it is not a party ban, with the relevant Regulation placing emphasis on political pluralism, it has not been pursued and appears as a measure of last resort from the EU law perspective.[79]

7.5.4 *Incentivizing Opposition Rights*

It is abundantly clear from the literature that, in countering governmental degradation of the democratic system, opposition parties matter. Levinson and Pildes have suggested that a key measure to address the democratic deficiencies of the US political party system would be to adopt the European notion of opposition rights, that is, "measures to empower the minority party to oversee government action, such as the power to initiate investigations, to obtain information through the subpoena power or other means, or to control audit or similar oversight committees."[80] More recently, this is a central plank of Huq and Ginsburg's argument for rendering the US political system more resilient against backsliding[81] and Khaitan's argument for pushing back against the illiberal agenda of the ruling BJP party under Prime Minister Modi in India (as well as multiparty appointments for, and greater independence of, fourth branch institutions).[82]

However, for some states, a focus on opposition rights is of little benefit where there is a seriously diminished or fragmented opposition. In the long term, these could be written into law, but for the short term – and again, as a measure of last resort due to democratic legitimacy concerns – the most effective approach may be to offer enhanced international funding for opposition coalitions that form a unified front against a ruling party that has demonstrably sought to entrench itself in power through the capture of independent accountability institutions and changes to electoral laws, although in many states this may be frustrated by laws against foreign funding.

[79] See Wouter Wolfs, *European Political Parties and Party Finance Reform Funding Democracy?* Springer International, 2022, 211, citing John Morijn, "Responding to 'Populist' Politics at EU Level: Regulation 1141/2014 and Beyond," *International Journal of Constitutional Law* 17(2): 617, 638 (2019).

[80] Levinson and Pildes, "Protecting Popular Self-Government from the People?," 2348.

[81] Aziz Huq and Tom Ginsburg, "Making Democratic Constitutions That Endure," in *How to Save a Constitutional Democracy*. University of Chicago Press, 2018, 164–204.

[82] Tarunabh Khaitan, "Killing a Constitution with a Thousand Cuts: The Incremental Fusion of Party and State in India," *Law and Ethics of Human Rights*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3367266.

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7.5.5 *Stronger Controls on Electoral Manipulation*

One of the greatest threats to the very core of democratic functioning is the use of law to degrade the fairness and transparency of the electoral process, such as state laws establishing extreme gerrymandering and voter suppression in the United States.[83] These measures, again, break the link of true representation that renders the party a legitimate channel of the electoral majority.

How can this be addressed? In the immediate term, the clearest backstop is international condemnation. However, this requires an in-depth understanding of often sophisticated manipulation of electoral laws, which can be a hard sell to foreign political leaders and organizations. In the longer term, new constitutional design options might be considered, drawing on Dixon and Landau's notion of "tiered constitutional amendment" – namely, creating different constitutional amendment requirements for different parts of the constitution,[84] which in the electoral arena, could require special and more onerous procedures or supermajorities to amend electoral law and transform electoral agencies.

7.6 CONCLUSION

This chapter sought to highlight key threats posed by political parties to the endurance of representative liberal democratic governance worldwide, to generate debate by putting a range of potential remedial options on the table, and to spur reflection on the need for a fundamental reorientation of deep constitutional assumptions concerning the role and democratic purpose of parties today. While it is impossible to be comprehensive or definitive regarding solutions, we have aimed to emphasize the urgent need for greater attention to the often ambiguous ways in which parties now threaten democratic governance. Despite prevalent analysis of the global authoritarian populist turn as based on a revolt of the electorate wrenching democracy from entrenched and out-of-touch elites – and there is considerable truth to that perspective – it is also a story of new elites delivering us charlatans, fake democrats, and fake democracy. Perhaps the most immediate lesson from this discussion is that to frame the challenges facing democratic rule worldwide as an executive, or even leadership, problem, is to miss the deep structural role that parties play in processes of democratic deterioration and decay. Worldwide, political parties are also learning from one another, as seen at the time of writing in how rapidly Slovakia's new government – a coalition of Direction – Social Democracy (Smer-SSD), Voice – Social Democracy (Hlas-SD), and the nationalist Slovak National Party (SNS) – is implementing the "authoritarian playbook" developed in large part by far-right lite

[83] Levitt, "Intent Is Enough."

[84] Rosalind Dixon and David Landau, "Tiered Constitutional Amendment," *George Washington Law Review* 86: 438 (2018).

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party governments in Hungary and Poland.[85] These negative dynamics may remain even when specific democracy-threatening incumbents are ousted in elections across the world, as we have seen in states such as the USA, Brazil and, more recently, Poland. There is no doubt that contemporary democracy requires wider rethinking and renewal, and solutions must go far beyond trying to turn the clock back to the status quo ante. But we must start somewhere: democracy-threatening parties are going nowhere.

[85] See, e.g., Peter Čuroš, "Hundred Days of Fico IV Administration," Verfassungsblog, March 5, 2024.

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