



Militant Democracy and COVID-19: Protecting the Regime, Protecting Rights?

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Dr. Max Steuer

Assistant Professor, O.P. Jindal Global University, Jindal Global Law School
Research Fellow, Comenius University in Bratislava, Department of Political Science

Abstract

This paper introduces some of the peculiarities embedded in contemporary research on the concept of militant democracy in relation to the concept of constitutionalism. As it is well known, there is an inherent tension in militant democracy, whereby militant measures, restricting rights in the name of upholding free and open political competition, can damage democracy. Thereby, militancy might remain fundamentally at odds with modern understandings of constitutionalism. As a result, besides efforts to limit the scope of militant democracy to a few narrowly defined restrictions, attempts have surfaced to distinguish between ‘militant democracy’ and ‘militant constitutionalism’, or to classify non-legal measures against extreme political actors as a version of militant democracy. The paper highlights the contributions of these approaches in its second section; nevertheless, the assessment of the broadening of the original concepts reveals the costs of such extensions. In the third section, the paper encourages thinking about the relationship between militant democracy and the pandemic that broke out in 2020. While it seems that particularly the challenges posed by a public health threat to democracy are unrelated to militant democracy, notably because there is no ‘actor’, whose rights can be restricted in the name of democracy protection, a connection with militant democracy arises through the question of restricting the spread of disinformation. As disinformation are often produced by actors opposed to democracy, a ‘dual justification’ for restricting them could be envisioned: protecting public health as well as protecting democracy. The paper concludes with identifying some difficulties with this approach, particularly in terms of determining who the ‘arbiters of truth’ shall be.

Introduction: An array of ‘big concepts’¹

‘[...] no political concepts can be completely neutral and, the more important they are, the more likely their deployment will be perceived as having a differential impact upon the “real-existing” political process.’²

In 2020, even some of the most advanced democracies³ adopted extensive emergency measures to restrict the spread of the COVID-19 pandemic. The implications of these measures for sustaining and improving the quality of democracy remain questionable.⁴ The question of flourishing and perhaps even persistence of this political regime type is more urgent than ever at least since the height of the Cold War that raised uncertainty about the continuation of democracy in its struggle with communism. Eminent scholars framed it as a rupture that can fundamentally alter popular support for political elites, and perhaps even existing models of political organization as such.⁵ Therefore, students of democracy protection naturally look for existing knowledge that may help rethink the capacities of democracy to develop and build resilience amidst the looming uncertainty.

‘Militant democracy’ is one of the concepts that deserve such attention. Even though the recent debates surrounding it are extensive and remain in need of mapping to improve accessibility to a broader audience, this paper, rather than offering a systematic literature review, aims to focus on selected contemporary controversies in the relationship between militancy, democracy and constitutionalism. This approach is fruitful because it allows the disentanglement of two key elements intermingled in the very concept of militant democracy, and show how their association is built on assumptions of upholding and protecting a constitutional order that aspires to fulfil the ambition to pay ‘equal concern and respect’⁶ to every individual. The controversies covered concern the recent alternative concept of militant constitutionalism and its relation to militant democracy, as well as the further possible extensions of the concept to encapsulate new restrictions on rights by reference to democracy protection. Thereby, the paper’s contribution is twofold: firstly, it highlights the benefits and drawbacks of extending the concept. Secondly, having in mind this assessment, it explores the relevance of militant democracy for the political context that has emerged as a result of the pandemic in 2020. Here, it finds that there is a connection, through the calls for legal restrictions on the spread of disinformation that are primarily being justified for the protection of public health but may be placed under the umbrella of militant democracy as well. That move raises the question of identifying disinformation. A modest solution is to outlaw only blatantly false statements with life-threatening impacts that are deliberately presented by political actors in order to retain or enhance voter support. The aim is to keep the baby of democracy in the bath, while throwing out the bathwater of disinformation results in militant democracy, in its narrow conceptualization, remaining insufficient to capture more sophisticated conduct where consensus over the falsehood of the information coupled with life-threatening impacts is missing.

1 This paper develops some ideas in a more extensive ongoing research, supported by the Slovak Research and Development Agency under the contract No. APVV-16-0389.

2 Philippe C. Schmitter, “The Confessions of a Repeat Offending and Unrepentant Conceptualist” (IPSA World Congress, 2009), 15, <https://www.eui.eu/Documents/DepartmentsCentres/SPS/Profiles/Schmitter/IPSATalk2009.pdf>.

3 The measurements available nowadays are extensive. For one sophisticated conceptual scheme aimed at measuring the level of democracy through its “varieties”, see Michael Coppedge et al., *Varieties of Democracy: Measuring Two Centuries of Political Change* (Cambridge University Press, 2020), 27–42.

4 For rich empirical data, see, e.g., the symposium on COVID 19 and States of Emergency at <https://verfassungsblog.de/category/debates/covid-19-and-states-of-emergency-debates/> (2020).

5 See David Runciman, “Too Early or Too Late?,” *London Review of Books*, March 21, 2020, <https://www.lrb.co.uk/the-paper/v42/n07/david-runciman/too-early-or-too-late> and the references therein.

6 Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass: Belknap Press of Harvard University Press, 2011) Chapter 19.

1. The inherent tension in militant democracy

Developed as an effort to respond (or at least to highlight the historical failure to respond) to the Nazi threat,⁷ the concept of militant democracy gained new prominence around the turn of the millennia.⁸ With the concept's increased prominence, precisely as Philippe Schmitter foresaw,⁹ comes increased scrutiny, and so the concept is currently a source of intensive debates, even though the positions supportive of it in some form seem generally to prevail.¹⁰

Terminologically, 'militant', if defined as 'active, determined, and often willing to use force'¹¹ is not necessarily a controversial term to use in relation to democracy. That democratic polities are ready to defend their values¹² when under attack can hardly be a reason for accusing them of betraying those very same values. This broader terminology accords with the German expression for militant democracy as the system around which its conceptualization developed is *streitbare* or *wehrhafte Demokratie*, implying democracies that are able and ready to *fight* (or *argue*, as a similar but not synonymous term).¹³ Nothing in the term requires that fighting occur through pre-emptive criminal law restrictions, but that is precisely how militant democracy is used in a narrow sense—it highlights the use of *legal restrictions* on rights of actors seen as a potential threat to democracy.¹⁴

Even with this narrower (and hence more controversial) approach, there are few full-blown critiques,¹⁵ though a range of 'moderate' supporters of militant democracy who argue for restricting the scope of legitimate militant measures has surfaced in the literature.¹⁶ The more legal restrictions are used and the more severe penalties are imposed, the greater the danger that very legal regulation will undermine the democratic aspirations of the regime.¹⁷

7 Karl Loewenstein, "Militant Democracy and Fundamental Rights I," *American Political Science Review* 31, no. 03 (1937): 417–432, <https://doi.org/10.2307/1948164>. Today, it is virtually impossible to escape a reference to Loewenstein in works on militant democracy. There are many detailed summaries of his approach available, hence it is not the aim of this paper to engage with his work in depth. For a concise but effective overview, see; Bastiaan Rijpkema, *Militant Democracy: The Limits of Democratic Tolerance* (London: Routledge, 2018), 25–31.

8 It is likely that this renewed prominence is explained by the extension of the concept discussed in 3.1 to anti-terrorist and pro-secularist measures as well as by relevant court decisions on the subject particularly by the European Court of Human Rights. A defining early volume is András Sajó and Lorri Rutt Bentch, eds., *Militant Democracy* (Utrecht: Eleven International Publishing, 2004).

9 See text to footnote 2 above.

10 Hence, most contributors in a recent collection endorse a version of militant democracy. Anthoula Malkopoulou and Alexander S. Kirshner, eds., *Militant Democracy and Its Critics: Populism, Parties, Extremism* (Edinburgh: Edinburgh University Press, 2019).

11 <https://dictionary.cambridge.org/dictionary/english/militant> (2020).

12 As Martinico points out, militant democracy requires thinking of the constitutional order as containing 'a hierarchy of principles' that, if under threat, 'justify and trigger the counter-reaction'. Giuseppe Martinico, "Memory of Horror and Post-World War II Constitutionalism," *Hong Kong Journal of Law and Public Affairs*, 2 (2020): 40.

13 Martin Klamt, "Militant Democracy and the Democratic Dilemma: Different Ways of Protecting Democratic Constitutions," in *Explorations in Legal Cultures*, ed. Fred Bruinsma and David Nelken (The Hague: Elsevier, 2007), 133 fn 2.

14 See Max Steuer, "Militant Democracy," in *The Palgrave Encyclopedia of Global Security Studies*, ed. Scott Romaniuk, Manish Thapa, and Péter Marton (Cham: Springer International Publishing, 2019), 1–6, https://doi.org/10.1007/978-3-319-74336-3_605-1 and the references therein.

15 Carlo Invernizzi Accetti and Ian Zuckerman, "Militant Democracy as Decisionist Liberalism: Reason and Power in the Work of Karl Lowenstein," in *The Decisionist Imagination: Sovereignty, Social Science and Democracy in the 20th Century*, ed. Daniel Bessner and Nicolas Guilhot (New York: Berghahn Books, 2018), 64–84. As one example, also not clear at which point there is a genuine attack, considering that democracy in itself embodies a plurality of opinions and in principle cannot be equated with the criminal prosecution of opinions proposing an alternative regime.

16 E.g. Lars Vinx, "Democratic Equality and Militant Democracy," *Constellations*, 2020, 1–17, <https://doi.org/10.1111/1467-8675.12467>; Rijpkema, *Militant Democracy*.

17 The risk is most tangible from a normative legitimacy perspective (Loewenstein's 'authoritarian democracy' and similar models remain internally contradictory). From a sociological legitimacy perspective (public or popular support for the measures) the suggested relationship might not hold and would require empirical testing (such as through measuring public perceptions of democratic quality in relation to its perceptions of concrete cases where militant measures were (attempted to be) invoked).

2. Broadening the notion of militancy

In recent years a number of different moves towards broadening the original concept of militant democracy has been identified. These efforts bear relevance on the discussion on the consequences of such an extended application of the concept for analyzing the democratic implications of the new phenomena it refers to.

A. Militant constitutionalism

It is not settled whether the concept of ‘militant constitutionalism’ is a *component* of, or an *alternative to*, militant democracy. The concept has sporadically appeared in the literature to denote different phenomena (or, in Schmitter’s terms above, it has not had its conceptual ‘breakthrough’ as a major concept yet). For instance, in 2004, one scholar used it as ‘paraphrasing Donald Kommers’ concept of “militant democracy”¹⁸ to denote the ‘permanent commitment [to the goals set out in the constitution] from the political forces that brought them about.’¹⁹ This ‘behavioral’ definition of the concept differs from the more ‘institutional’ approach adopted in later works. For András Sajó, militant constitutionalism as ‘measures that would limit the possibilities of abuse of government power’ emerges from the ‘logic of militant democracy’ as one of the ‘two kinds of defensive mechanisms’, the other one being rights restrictions more traditionally associated with the concept.²⁰ Yet another approach is discernible in the work of Gutmann and Voigt who, acknowledging that they ‘cannot take credit for inventing the term’, contrast militant constitutionalism with militant democracy. Limiting government power through constitutional means can work regardless of the kind and intensity of presence of antidemocratic actors in the system, and it ‘tries to contain the damage even if enemies of the rule of law have acquired power.’²¹ The discussion of the relationship between the concepts is important as it gives rise to the distinction between a broad and a narrow understanding of militant democracy both of which have advantages and drawbacks (see subsection C below).

The reason for the need to add the adjective (‘militant’) to measures such as presidential term limits or supermajority requirements remains unclear, however. After all, constitutionalism *as a whole* is usually seen as tied to ‘limiting government’, as the very title of Sajó’s earlier book on the subject suggests.²² From this perspective, there is no need to invent a new concept to study various mechanisms through which institutions can defend themselves, and other actors (including the public at large) can defend institutions.²³

If one holds up to the distinction, some instruments that are discussed under the general term of ‘militant democracy’ seem, in fact, closer to militant constitutionalism (and by extension, to general questions of limiting governmental power). A peculiar example is the US Voting Rights Act.²⁴ Kirshner, one of the representatives of the ‘neo-militant’ scholars who try to find a narrower reading for the legitimate invocation of militant democracy,²⁵ recognizes this Act as a core legislative instrument to prevent democratic deterioration by prohibiting exclusionary voting practices. While the Act does

18 As we saw above, the origin of the concept is clearly a more deeply rooted one.

19 Mauricio Garcia-Villegas, “Law as Hope: Constitutions, Courts, and Social Change in Latin America,” *Florida Journal of International Law* 16, no. 1 (2004): 139.

20 András Sajó, “Militant Constitutionalism,” in *Militant Democracy and Its Critics: Populism, Parties, Extremism*, ed. Anthonla Malkopoulou and Alexander S. Kirshner (Edinburgh: Edinburgh University Press, 2019), 193.

21 Jerg Gutmann and Stefan Voigt, “Militant Constitutionalism – A Promising Concept to Make Constitutional Backsliding Less Likely?” (Rochester, NY: Social Science Research Network, June 11, 2019), 3, <https://papers.ssrn.com/abstract=3402705>.

22 András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Budapest: CEU Press, 1999).

23 See Nicholas W. Barber, “Self-Defence for Institutions,” *The Cambridge Law Journal* 72, no. 3 (2013): 558–77, <https://doi.org/10.1017/S0008197313000706>.

24 79 Stat. 437 (1965).

25 Anthonla Malkopoulou and Ludvig Norman, “Three Models of Democratic Self-Defence: Militant Democracy and Its Alternatives,” *Political Studies* 66, no. 2 (2018): 445–48, <https://doi.org/10.1177/0032321717723504>.

not introduce sanctions for antidemocratic actors, it functions *preemptively* by limiting (although not eliminating) the discretion of the legislator to adopt restrictive voting rules, with the Supreme Court having a central role in preserving the ‘bite’ of the legislation amidst challenges to it. The Act formally ended the processes of exclusion of (especially racial) minorities from voting in many US states.²⁶ The US Supreme Court, in *Shelby County v. Holder*²⁷, significantly limited the ‘teeth’ of this Act, however, by declaring unconstitutional the federal review of amendments to voting rights of selected states.²⁸ While the Court departed from a concern for an outdated formula in determining the list of jurisdictions which were subject to such federal review (‘preclearance’ requirement), as Chemerinsky highlights²⁹, there was no clear constitutional provision that this formula was seen to have violated, and the Court did not explicitly identify one either.

The content of militant constitutionalism will, of course, be shaped by the meaning of constitutionalism itself. Although unpacking this concept in detail is not possible in this paper, it shall be highlighted that the above understandings of militant constitutionalism presuppose a notion of constitutionalism compatible with the premises of democracy, at least since their authors explicitly refer to it as a mechanism to bloc antidemocratic actors’ ascent to power. There are, however, challenges to constitutionalism being limited to those instances. Recent studies have advocated the turn to ‘varieties of constitutionalism’ that tries to capture its myriad invocations in scholarly and public discourse.³⁰ The fundamental question, not unlike with the ‘varieties of democracy’ with adjectives is whether some of the adjectives do not defy the noun, creating oxymoronic concepts. The most prominent example here is ‘authoritarian constitutionalism’.³¹ To the extent constitutionalism is inherently at odds with unlimited power (even unlimited power of the people conceptualized through majority rule), ‘authoritarian constitutionalism’ would seem internally contradictory. If the ‘baseline’ of constitutionalism is determined as encompassing more limited criteria, such as the prevention of arbitrary decision making through ‘publicity, prospectivity, and generality’,³² then a range of non-democratic alternatives may be compatible with it. In a non-democratic regime, traditional instruments of restricting rights in the name of democracy protection do not work; rather, they further empower the autocratic government that can invoke restrictions as a legal implication of its language constructing the opposition as the ‘enemies’ of the regime. ‘Militant constitutionalism’ in such context could then help non-democratic actors keep their power, for instance, by making it even more difficult for the opposition to challenge their dominance.

Even if we reject the concept of ‘authoritarian constitutionalism’, however, there are other variants of constitutionalism that may alter the conventional, liberal meaning of militant constitutionalism. The core point of the present discussion focusing on that conventional meaning is this: militant constitutionalism cannot replace militant democracy when questions of preventing the rise of antidemocratic actors to power are discussed. In turn, those questions can be addressed by appealing to the existing conceptual toolkit.

B. *Cordon sanitaire*

With the rise of extreme political parties in several European countries, the discussion about appro-

26 See, generally, Gary May, *Bending Toward Justice: The Voting Rights Act and the Transformation of American Democracy* (New York: Basic Books, 2013).2013

27 570 U.S. 529 (2013).

28 Erwin Chemerinsky, *We the People: A Progressive Reading of the Constitution for the Twenty-First Century* (New York: Picador, 2018), 102–5.

29 Chemerinsky, 104.

30 Mark Tushnet, “Varieties of Constitutionalism: Editorial,” *International Journal of Constitutional Law* 14, no. 1 (2016): 1–5 referring to the work of Diana Kapiszewski on “Latin American constitutionalism” and extending it to encompass a broader set of adjectives that may be found paired with the noun.

31 An extensive treatment is available in Helena Alviar García and Günter Frankenberg, *Authoritarian Constitutionalism* (Cheltenham: Edward Elgar Publishing, 2019).

32 Mark Tushnet, “Authoritarian Constitutionalism,” *Cornell Law Review* 100, no. 2 (2014): 416.

appropriate responses to them by pro-democratic political leaders gained in prominence. *Cordon sanitaire* is, broadly speaking, the technique of excluding extreme parties from governing. It is precisely this element of exclusion that prompted some to consider it as an instrument of militant democracy.³³ Thus, Esmark differentiates ‘soft’ and ‘hard’ militant responses, whereby the former are represented by the *cordon sanitaire*.³⁴ *Cordon sanitaire* is not a legal measure, however; rather, it rests on informal agreement (otherwise it could hardly be compatible with free and fair political competition). Therefore, it is unclear why it should be considered as an element of militant democracy.³⁵ While there is undoubtedly politics behind introducing and extending rights restrictions (such as freedom of speech),³⁶ the essential element is the encoding of the measure into law rather than political agreements.

C. Assessing the benefits and drawbacks of broadening the concept

What are the benefits and drawbacks of broadening the notion of militant democracy against the backdrop of its original conceptualization as preemptive legal restrictions of rights in the name of democracy protection? Clearly, such a choice would result in a broader applicability of the concept, and its capacity to elucidate the relationships between measures that could otherwise remain ignored, including the potential downsides of adopting these measures. Indeed, scholars of militant democracy might be able to analyze more closely questions of constitutional design (in case militant constitutionalism is seen as a variant of militant democracy), responses to new challenges to democracy posed by populism³⁷ as well forms of societal exclusion of antidemocrats that do not need to be based on legal restrictions (for instance, through studying the usefulness and effects of the *cordon sanitaire*, but also governmental counter speech³⁸).

Empirical research could explore the relationship between these measures: is there any relationship between the three broad ‘categories of militancy’? Does the presence of any one of them undermine or enhance the effectiveness of the others? Doctrinal legal scholarship could address the role of law across all these areas: while it may seem that *cordon sanitaire* has nothing to do with legal regulation, it cannot be detached from such important pieces of legislation as regulation of the electoral system, the internal operation of legislatures, or the quality of the media landscape that allows diverse political movements to present themselves during electoral campaigns. Last but not least, the controversies surrounding the ‘traditional’ conceptualization of militant democracy could ensure that these new measures are not greeted with an uncritical welcome and instead subjected to rigorous scrutiny in terms of both legitimacy and effectiveness.

33 As Wagrandl points out, ‘militant democracy [...] means exclusion [...]. Ulrich Wagrandl, “Militant Democracy in Austria,” *University of Vienna Law Review* 2, no. 1 (2018): 99. However, his interpretation of the need to politicize liberal democracy that, in turn, necessitates militant instruments obscures the fact that democracy in itself is hardly value-neutral and there is no feasible non-liberal notion of democracy (when liberalism is understood as commitment to fundamental rights, themselves representing certain values). Alternatives or refinements of militant democracy are still intertwined with politics as they are with values.

34 Anders Esmark, *The New Technocracy* (Bristol: Policy Press, 2020), 232–34.

35 An example establishing this association is Matthijs Bogaards, “Militant Consociational Democracy: The Political Exclusion of the Extreme Right in Belgium,” in *Compromises in Democracy*, ed. Sandrine Baume and Stéphanie Novak, Palgrave Studies in Compromise after Conflict (Cham: Springer International Publishing, 2020), 178–83, https://doi.org/10.1007/978-3-030-40802-2_8.

36 For the extensions of restrictions on denial of the Holocaust and other crimes of non-democratic regimes, see Max Steuer, “The (Non)Political Taboo: Why Democracies Ban Holocaust Denial,” *Sociológia - Slovak Sociological Review* 49, no. 6 (2017): 673–93.

37 This inquiry has already begun, see Cristóbal Rovira Kaltwasser, “Militant Democracy Versus Populism,” in *Militant Democracy and Its Critics: Populism, Parties, Extremism*, ed. Anthoula Malkopoulou and Alexander S. Kirshner (Edinburgh: Edinburgh University Press, 2019), 72–91.

38 The state is an important speaker in its own right, see Corey Brettschneider, “When the State Speaks, What Should It Say? The Dilemmas of Freedom of Expression and Democratic Persuasion,” *Perspectives on Politics* 8, no. 04 (December 2010): 1005–1019, <https://doi.org/10.1017/S1537592710003154>. The decisiveness of the messages communicated by the state through official channels has come to the fore during the COVID-19 pandemic, particularly in cases when messages calling for individual responsibility were communicated to the public.

At the same time, the broadening of the concept could also enhance conceptual confusion, by blurring the differences between various measures employed to protect democracy, including some that are potentially inherently antidemocratic. For example, there is little evidence that rights restrictions on the basis of violations to secularism³⁹ help preserve democracy, while some of the non-legal (or at least non-restrictive) measures might bring more plausible results. While the similarities between the phenomena are highlighted through using militant democracy as an ‘umbrella term’, the differences between the same would be neglected. For example, institutions play different roles in the framework of *cordon sanitaire* (where informal agreements between political leaders is decisive) and in the traditional processes of criminalizing certain antidemocratic actions or ideas (where courts ultimately shape the law and its implications).⁴⁰

Hence, the focus on lawmaking and on the discourses of political elites in relation to broader democracy-protective measures is undoubtedly important but its study should not come at the expense of scrutinizing militant adjudication, particularly in cases where, by design, courts decide on curtailments of fundamental rights. More seriously, to the extent scholarly debates ‘leak’ in broad terms into the broader public discourse, the extension of militant democracy could inject the new measures with an ‘appeal of legitimacy’ in countries where there is a general consensus that in some cases, it is legitimate to restrict antidemocrats’ rights. While the same extension of the concept could increase suspicions towards the legitimacy of the new measures in countries where restrictions on political rights are generally not favorably looked at (such as the United States)⁴¹, a generally supportive attitude towards restrictions runs through most of Europe⁴² (exemplified by the case law of the European Court of Human Rights (ECtHR)).⁴³

All in all, the relevance of studying militant measures in the narrow sense is unlikely to disappear, and remains, of course, tied to broader questions of constitutionalism in terms of operation of rights and their limitations, the content of the principle of democracy, and the role of institutions in preventing democratic decay.

3. Militant democracy and the COVID-19 pandemic

The efforts to associate militant democracy with a wider range of political contexts signify the continuing attractiveness of the term. The COVID-19 pandemic and the widespread emergency measures declared in its wake brought up the question of a *militant duty*: is there a constitutional obligation

39 Whether secularism is ‘neutral’ or represents a form of religion is itself subject to debate. For one prominent contribution, see Ronald Dworkin, *Religion Without God* (Cambridge: Harvard University Press, 2013).

40 Philosophical literature on militant democracy rarely brings up the specific involvement of courts, and the implications of this involvement. See, e.g. Alexander S. Kirshner, *A Theory of Militant Democracy: The Ethics of Combatting Political Extremism* (New Haven: Yale University Press, 2014).. Courts do not receive significant attention even in the magisterial historical study by Capoccia: Giovanni Capoccia, *Defending Democracy: Reactions to Extremism in Interwar Europe* (Johns Hopkins University Press, 2007). Admittedly, the phenomena of judicialization of politics and rise of judicial review have increased the relevance of courts, so the neglect is more justified in historical than in conceptual studies. On judicialization, see, for instance, Ran Hirschl, “The Judicialization of Mega-Politics and the Rise of Political Courts,” *Annual Review of Political Science* 11, no. 1 (2008): 93–118, <https://doi.org/10.1146/annurev.polisci.11.053006.183906>.

41 The United States have generally developed a more individualist approach to democracy, that may offer a particularly fertile ground for the opposition towards extensive government power. To the extent actors not supportive of democracy form such opposition, the ‘backlash’ against the ‘underreaction thesis’ could fuel political support for these actors. See, e.g. Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (Chicago: University of Chicago Press, 2018), 205–35 for a more in-depth treatment of the status quo of US democracy.

42 For historical justifications, see, for example, Peter Niesen, “Anti-Extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties,” in *Annual of German and European Law*, ed. Russell A. Miller and Peer Zumbansen (New York: Berghahn Books, 2003), 81–112.

43 On the ECtHR’s approach towards party bans, see Svetlana Tyulkina, *Militant Democracy: Undemocratic Political Parties and Beyond* (London: Routledge, 2015), 95–104. On extreme speech, see Max Steuer, “Militant Democracy on the Rise: Consequences of Legal Restrictions on Extreme Speech in the Czech Republic, Slovakia and Hungary,” *Review of Central and East European Law* 44, no. 2 (2019): 178–82, <https://doi.org/10.1163/15730352-04402003>.

for the political elites to act through declaring a state of emergency which, if breached, would imply a violation? Positive answers to this question tend to be narrowly focused on the present situation, highlighting the losses of lives as a result of pretending to continue ‘business as usual’⁴⁴. The *militant duty* is broadly in line with calls for a notion of constitutionalism that centers on the effectiveness and capacity of the state to deliver its core services (which, while subject to interpretation in their specifics⁴⁵, can hardly exclude the protection of lives amid a pandemic). The problem is that such arguments cannot be easily reconciled with the constitutionalists’ traditional call for narrow and very specific emergency measures.⁴⁶ One can recognize the dangers entailed in emergency measures without claiming they are necessary at the same time. Concurrently, antidemocrats might abuse the argument of ‘underreaction’, which claims that the government has a duty to act to protect lives. In this context, the focus on preserving life knocks the wind out of sails of (some) opponents of antidemocratic emergencies: if life in the form of survival⁴⁷ is the priority, and if the emergency measures are more likely to protect survival, then why be concerned with sacrificing rights along the way?

A virus cannot be antidemocratic on its own; hence, the extension of militant democracy to measures adopted to reduce its damaging effects rest on fragile conceptual grounds. The measures adopted to prevent individuals from undermining the state’s responses to the virus, however, could be subsumed under the concept in its broad reading. Notably, the restrictions on spreading disinformation related to the virus might belong to this category. At the same time, the vagueness of these restrictions promises similar if not greater challenges to the measures’ legitimacy and effectiveness. An extreme case can be found in Hungary which, even before the outbreak of the virus, could hardly have been considered a democracy.⁴⁸ The Hungarian government introduced, among others, criminal sanctions against those who ‘at the site of a public emergency, before the grand public, claim or spread a falsehood or claim or spread a distorted truth in relation to the emergency in a way that is suitable for alarming or agitating a large group of people at the site of the emergency.’⁴⁹ Even if one assumed that there were no deficits in judicial independence or rights protection in Hungary before the introduction of these measures, the competence for the state to ‘police truth’ inevitably fuels suspicions of a potential abuse against the opposition or critical media. Ultimately, where the government in question exhibited democratic deficits *before* the pandemic, there are sound reasons to believe that the restrictive measures may be excessive and/or abused for further consolidation of power. This includes possible references to militant democracy, such as banning some opposition movements through an argument that they undermine the effectiveness of the response to the pandemic and hence threaten citizens’ lives.⁵⁰

As Ivan Krastev has argued,⁵¹ the COVID-19 pandemic resulted in the construction of a new Other—the individual beyond state borders. The difference compared to the pre-pandemic setting has been that *territorial exclusions* applied regardless of citizenship. Consequently, everyone who was be-

44 Kim Lane Scheppelle, “Underreaction in a Time of Emergency: America as a Nearly Failed State,” *Verfassungsblog* (blog), 2020, <https://verfassungsblog.de/underreaction-in-a-time-of-emergency-america-as-a-nearly-failed-state/>.

45 See Nicholas W. Barber, *The Principles of Constitutionalism* (Oxford: Oxford University Press, 2018).

46 See John Ferejohn and Pasquale Pasquino, “The Law of the Exception: A Typology of Emergency Powers,” *International Journal of Constitutional Law* 2, no. 2 (January 4, 2004): 210–39, <https://doi.org/10.1093/icon/2.2.210>.

47 See Agamben’s work building on Aristotle’s distinction between forms of existence that distinguish among bare survival and political life. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, Meridian: Crossing Aesthetics (Stanford: Stanford University Press, 1998).

48 Bálint Magyar, *Post-Communist Mafia State: The Case of Hungary* (Budapest; New York: CEU Press, 2016).

49 Criminal Code, Section 337(1), see also Eva S. Balogh, “Translation of Draft Law ‘On Protecting Against the Coronavirus,’” *Hungarian Spectrum* (blog), March 22, 2020, <https://hungarianspectrum.org/2020/03/21/translation-of-draft-law-on-protecting-against-the-coronavirus/>.

50 Incitement to violence remains a legitimate ground of prohibition of a movement according to international human rights standards. However, incitement to violence cannot be presumed from criticizing governmental public health policies as it cannot be associated with, for instance, claims advocating for a regime change. On the latter argument in the context of the ban of the Hong Kong National Party, see Carole J. Petersen, “Prohibiting the Hong Kong National Party: Has Hong Kong Violated the International Covenant on Civil and Political Rights?,” *Hong Kong Law Journal* 48, no. 3 (2018): 789–806.

51 Berliner Korrespondenzen #4 digital: One crisis, many faces, 4 May 2020. <https://www.youtube.com/watch?v=ojbGOP8LoRc>.

yond state borders at the time of border closure was began to be seen as a potential carrier of the virus, and hence a threat to those within the borders whom it vowed to protect.⁵² This does not necessarily mean that *within state territory*, there were no exclusions based on old dividing lines;⁵³ for instance, the members of the Roma minority received disproportionately little or otherwise discriminatory treatment in several European countries,⁵⁴ and the ‘mass exodus of migrant workers’ in India⁵⁵ showed that ‘traditional’ exclusions remain still at work. They, however, do not seem to have a lot in common with rights restrictions in the name of democracy protection but *a conflict of rights*, such as between freedom of movement and the right to health and security.

While the distinction between conflicts of rights that are not directly related to the protection of democracy from antidemocratic actors and rights restrictions for the purpose of such protection seems plausible at a face level, it is premature to ignore the (less direct) link between them. Extreme political actors may frame whatever restrictions of rights to property or movement as undemocratic strategies by the regime, and position themselves as the ‘heroes of liberty’. In turn, they may gain political support and become a greater threat to democracy in the future. To anticipate and preempt this threat, militant democracy may justify the restrictions of rights of extreme political actors to disseminate disinformation about the impacts of the virus and the effectiveness (or lack thereof) of governmental measures. An interrelated ‘network of restrictions’ emerges with rights restrictions (including of individuals committed to democracy, such as pro-democratic citizens abroad or business owners) in the name of protection of the health, some of which can also be argued for in the name of protection of democracy. In turn, such arguments necessitate, in a democratic context, the need to justify the restrictions, for ensuring which the proportionality doctrine is the most widespread approach;⁵⁶ this justification is missing, for example, in the Hungarian case. But the fact that a certain desirable aim cannot be achieved without a rights restriction does not imply that that restriction is legitimate.⁵⁷ The disappearance of a ‘culture of justification’⁵⁸ during the times of heightened pressure on state action risks fueling critiques of the regime from extreme political actors who, building on justified deficiencies of the measures, pursue their own goals.

Despite discouraging examples such as the Hungarian case, it is not unimaginable that *some* legal restrictions on the spread of disinformation in the name of democracy protection can be justified.⁵⁹ They point to the intrinsic connection between the idea of militant democracy and the *value*

52 This perceptive dimension is significant for the ‘core’ militant measures as well, since their effectiveness is tied to societal acceptance and endorsement. Beyond the question of effectiveness, perception formation through narratives identifying sources of threat also plays a role in designing militant measures. As an example, Bourne invokes the concept of securitization of a Spanish terrorist movement that facilitated its legal ban: Angela K. Bourne, “Militant Democracy and the Banning of Political Parties in Democratic States: Why Some Do and Why Some Don’t,” in *Militant Democracy – Political Science, Law and Philosophy*, ed. Afshin Ellian and Bastiaan Rijpkema, Philosophy and Politics - Critical Explorations (Cham: Springer, 2018), 38–39, https://doi.org/10.1007/978-3-319-97004-2_2.

53 Cf. Ivan Krastev and Mark Leonard, “Europe’s Pandemic Politics: How the Virus Has Changed the Public’s Worldview” (Brussels: European Council on Foreign Relations, June 24, 2020), 11, https://www.ecfr.eu/publications/summary/europes_pandemic_politics_how_the_virus_has_changed_the_publics_worldview who claim that “[d]uring the most virulent days of the pandemic, governments treated migrants in the same way as residents.”

54 Neda Korunovska and Zeljko Jovanovic, “Roma in the COVID-19 Crisis: An Early Warning from Six EU Member States” (Berlin: Open Society Foundations, April 2020), <https://www.opensocietyfoundations.org/publications/roma-in-the-covid-19-crisis>; see also Ed Holt, “COVID-19 Lockdown of Roma Settlements in Slovakia,” *The Lancet Infectious Diseases* 20, no. 6 (June 1, 2020): 659, [https://doi.org/10.1016/S1473-3099\(20\)30381-9](https://doi.org/10.1016/S1473-3099(20)30381-9).

55 The Lancet, “India under COVID-19 Lockdown,” *Lancet (London, England)* 395, no. 10233 (2020): 1315, [https://doi.org/10.1016/S0140-6736\(20\)30938-7](https://doi.org/10.1016/S0140-6736(20)30938-7).

56 See, generally, Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach* (Oxford: Oxford University Press, 2019). In the ECtHR context, see also Jernej Letnar Černej, “Militant Constitutionalism: Safeguarding constitutional democracy in the case-law of the European Court of Human Rights,” *Hong Kong Journal of Law and Public Affairs*, VOL 2 (2020): 105.

57 E.g. T. R. S. Allan, “Democracy, Legality, and Proportionality,” in *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, ed. Grant Huscroft, Bradley W. Miller, and Gregoire Webber (Cambridge: Cambridge University Press, 2014), 218.

58 Kai Möller, “Justifying the Culture of Justification,” *International Journal of Constitutional Law* 17, no. 4 (December 31, 2019): 1078–97, <https://doi.org/10.1093/icon/mozo86>.

59 One condition for such restrictions to be legitimate could be the implementation of state-led counter-speech or

of democracy as a regime that, at the bare minimum, allows for correcting its own failures.⁶⁰ But who will decide what is disinformation? Who should be the ‘arbiter of truth,’⁶¹ without resorting to ‘a specially selected and trained political police for the discovery, repression, supervision, and control of anti-democratic and anti-constitutional activities and movements’?⁶² In judicial contexts, experts invited to testify should provide the scientific point of view.⁶³ While disagreements often exist among experts as well and too much of anything (including of expert influence) may have unintended side effects for democratic governance, there exist outright hoaxes and demagogueries that no expert would subscribe to, including some spread by key political elites. An international expert consensus over the dangerousness of specific pieces of disinformation could be the blueprint for establishing whether regulation is conducive to democracy protection or may backfire. This could reduce the contentiousness of cases on the one hand, but leave the model unable to deal with ‘hard cases’ of sophisticated disinformation on the other hand. Moreover, the ‘vicious circle’ would remain given the lack (at present, at least) of institutional designs that could secure the legitimate functioning of such ‘expert councils’. The existing practice of expert witnesses at courts deciding on legal restrictions may help avoid excessive restrictions but is unlikely to alone lead to a societal consensus over the feasibility of regulation in complicated cases.⁶⁴

Concluding remarks: A concept here to stay

This paper sketched some of the links between militant democracy and constitutionalism, paying particular attention to the extensions of the initial concept to contemporary (or returning) phenomena, including emergency measures taken in response to the COVID-19 pandemic. As it aimed to make obvious throughout the elaboration, there is a substantial room for further conceptual and empirical research *regardless* of which notion of militancy is used. Indeed, students of militant democracy may have good reasons to resist the extensions of the concept that are currently ongoing in the literature, but even then, they should not ignore the phenomena that are better addressed through other concepts. Rather than studying militant democracy (or militant constitutionalism) in an isolated manner, what seems necessary moving forward are broader studies of democracy protection, of which militant democracy is but one component.

One avenue of further inquiry could go in the direction of examining those varieties of constitutionalism (see section 2A above) that are compatible with democracy in relation to invocation of militant instruments. In particular, is ‘social constitutionalism’ more resilient against antidemocratic actors than ‘liberal constitutionalism’⁶⁵, either due to its institutional setup or indirectly due to providing individuals with more guarantees for basic welfare that encourage them to participate and reduces their tendency to support antidemocratic actors?⁶⁶ How can the existing model of constitutionalism

other non-restrictive solutions, including the dissociation of established political movements from the extreme political actors’ claims.

60 Rijkema, *Militant Democracy*.

61 Interestingly, the ‘right to truth’ (as opposed to merely information) is not a subject of particular interest in an impressive collection on ‘new human rights’. Andreas von Arnould, Kerstin von der Decken, and Mart Susi, eds., *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (Cambridge: Cambridge University Press, 2020), <https://doi.org/10.1017/9781108676106>.

62 Karl Loewenstein, “Militant Democracy and Fundamental Rights II,” *American Political Science Review* 31, no. 04 (1937): 655, <https://doi.org/10.2307/1948103>.

63 See, for examples in the context of free speech adjudication, Uladzislau Belavusau, “Experts in Hate Speech Cases: Towards a Higher Standard of Proof in Strasbourg?,” in *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, ed. Lukasz Gruszczynski and Wouter Werner (Oxford: OUP, 2014), 254–71; Richard J. Evans, “History, Memory, and the Law: The Historian as Expert Witness,” *History and Theory* 41, no. 3 (2002): 326–45, <https://doi.org/10.1111/1468-2303.00209>.

64 Slovakia is an illustrative case of utilizing such expertise in “hate speech” cases, that, for the present purposes, do not substantially differ from “disinformation proceedings”. The results, at the time of writing, were mixed in terms of the reduction of societal support for extreme political views. See Max Steuer, “Democratic (Dis)Armament,” *Verfassungsblog* (blog), December 17, 2019, <https://verfassungsblog.de/democratic-disarmament/>.

65 David S. Law, “Alternatives to Liberal Constitutional Democracy,” *Maryland Law Review* 77, no. 1 (2017): 223–43.

66 See the ‘social democratic’ model of ‘self-defence’ of democracy as elaborated, with reference to scholars such as Heller and Ross, by Malkopoulou and Norman. Malkopoulou and Norman, “Three Models of Democratic Self-

be refined to reduce the risk of its emptying out by authoritarian actors?

Another avenue could build on the observations of the indirect link between regulation of disinformation, the protection of public health and the protection of democracy. Here, besides narrower questions (such as designing proportionality analyses of restrictions of disinformation), broader questions arise. For example, are we entering the ‘age of experts’, whether or not they are understood as technocratic, neutral players⁶⁷ or as actors who legitimately can (or even shall) be part of democratic decision making? Shall we continue to associate militant democracy with the state (as the majority of scholarship currently does) or would it be desirable to explore its applicability in non-state contexts, such as on social media platforms? In these and more ways, the concept of militant democracy is but a window to core questions about the preservation and development of constitutionalism as a requirement for a democratic regime.

Defence,” 450–55.

67 Anthoula Malkopoulou, “What Militant Democrats and Technocrats Share,” *Critical Review of International Social and Political Philosophy* (June 16, 2020): 1–24, <https://doi.org/10.1080/13698230.2020.1782047>.

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