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Summer August 4, 2020

Parties versus democracy: Addressing today's political party threats to democratic rule

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Parties versus democracy: Addressing today's political-party threats to democratic rule

Forthcoming in the International Journal of Constitutional Law (ICON)

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The growing threat to liberal democracy worldwide is, in many ways, a political-party threat. Recent years have witnessed the rise of a range of authoritarian populist, illiberal, far-right, nativist, and extremist parties. Some have entered government in countries including Hungary, Poland, Austria and Italy. Germany's Alternativ für Deutschland (AfD) is now the main parliamentary opposition. Beyond Europe we see democratic structures threatened or incrementally dismantled through the subversion of an established democratic party by an outsider (e.g., Donald Trump in the U.S., or Rodrigo Duterte in the Philippines) or ascendance of the extremist wing of a right-wing party (e.g., India's Bharatiya Janata Party (BJP)). Parties and party leaders occupying an ill-defined space on the political spectrum – a form of "far-right lite" – today generally present a much greater threat to democratic governance than overtly anti-democratic fringe outfits, such as the National Democratic Party (NPD) of Germany. The ambiguity of such parties, their growing size, their entry into government, the subversion of "good" democratic parties by a "bad" leadership, and the rise of the 'shadow party' and intensifying external control mean that contemporary political-party threats seriously frustrate the possibility of remedial action afforded by existing public law and policy mechanisms. They also require us to reflect anew on crafting novel remedies and to revisit our deep assumptions about parties as creatures of central constitutional importance.

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.[1] As documented by a variety of party analysts, recent years have seen the rise of a range of populist, illiberal, nativist, xenophobic, far-right and neo-fascist parties, especially in Europe.[2] In Hungary, Poland, Austria and Italy questionable parties have entered government. Others remain outside government but are making gains, often by espousing a "far-right lite" platform

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[1] What we mean by the term 'liberal democracy' is set out in Part II.
[2] *See, e.g.*, Ron Inglehart and Pippa Norris, *Trump and the Populist Authoritarian Parties: The Silent Revolution in Reverse*, 15(2) PERSPECTIVES ON POLITICS 443 (2017); *Timbro Authoritarian Populism Index 2017*, TIMBRO, https://timbro.se/tag/populism/; and Matthijs Rooduijn, Stijn van Kessel, Caterina Froio, Andrea Pirro, Sarah de Lange, Daphne Halikiopoulou, Paul Lewis, Cas Mudde & Paul Taggart, *The PopuList: An Overview of Populist, Far Right, Far Left and Eurosceptic Parties in Europe*, http://www.popu-list.org (2019)..

to grow their electoral support. Most visibly, Germany's September 2017 elections brought a far-right-leaning party to parliament for the first time since the 1960s, with Alternativ für Deutschland (AfD) claiming 12.6 per cent of the total vote and becoming the main opposition in the Bundestag following formation of another CDU/CSU-SPD "grand coalition" between the mainstream Christian-democratic and social-democratic parties.[3] Perhaps the most striking story surrounding the election of Jair Bolsonaro as Brazil's new president in October 2018 is how his candidacy utterly transformed the political-party system, spurring the emergence of a large, ambiguously anti-democratic, right-wing party.[4]

We also see established democratic parties in government which have threatened or incrementally dismantled democratic structures through subversion by an outsider (e.g., Donald Trump in the U.S., or Rodrigo Duterte in the Philippines) or the ascendance of the extremist wing of a long-standing right-wing party (e.g., India's Bharatiya Janata Party (BJP)). From the Hungarian, Polish and Romanian governments' attacks on the media, courts and civil society,[5] to the Abe government's stifling of press freedoms in Japan,[6] to President Trump's apparent disregard for constitutional fundamentals including free speech and the separation of powers, this threat is now being studied under rubrics including "constitutional retrogression,"[7] "constitutional capture,"[8] and "democratic decay."[9] While this phenomenon is often framed as an executive-led problem, it also needs to be understood as a political-party problem.

In this overall scheme, parties and party leaders occupying an ill-defined space on the political spectrum between centre and extreme – the "far-right lite" – now present a much greater threat to democratic governance than overtly anti-democratic fringe outfits, such as Germany's 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. Key features of contemporary political-party threats that need to be considered include: their ambiguous nature; growing size; the subversion of democratic parties by errant leaders; and intensifying external influence on parties, including the rise of "shadow" parties–which, we argue, is of much greater concern than foreign influence.

This article 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 new public law and policy solutions to address these threats, and to reflect anew on our

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[3] *See e.g.*, Fredrik Erixon, *Merkel's left-right coalition has given the AfD exactly what it wanted*, THE SPECTATOR, March 4, 2018, https://blogs.spectator.co.uk/2018/03/angela-merkel-has-created-germanys-far-right/.

[4] *See, e.g.*, Tom Gerald Daly, *Populism, Public Law, and Democratic Decay in Brazil: Understanding the Rise of Jair Bolsonaro*, conference paper, 'Democratic Backsliding and Human Rights' conference, Tel Aviv, Israel, 2-3 January 2019.

[5] *See, e.g.*, CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA: THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA (Armin von Bogdandy & Pál Sonnevend eds., 2015); and Tomasz T. Koncewicz, *The "Emergency Constitutional Review" and Polish Constitutional Crisis: Of Constitutional Self-Defense and Judicial Empowerment*, 2 POLISH L. REV. 73 (2016).

[6] *See, e.g.*, PRESS FREEDOM IN CONTEMPORARY JAPAN (Jeff Kingston ed., 2016); and Tokujin Matsudaira, *Abe's Japan—Another Case of Abusive Constitutionalism*, INT'L J. CONST. L. BLOG (Sept. 23, 2017), http://www.iconnectblog.com/2017/09/abes-japan-another-case-of-abusive-constitutionalism/.

[7] Aziz Z. Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 85 (2018).

[8] *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 (Carlos Closa & Dimitry Kochenov eds., 2016).

[9] *See, e.g.*, Tom Gerald Daly, *Democratic Decay: Conceptualising an Emerging Research Field*, HAGUE J. R. L. (not yet assigned to an issue, published online 19 February 2019).

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, parties' core function is shifting (from a broadly rational vehicle for channelling citizen policy preferences to a more emotive representation of identity), and the very way we practice democracy is being questioned, this article aims to ignite discussion and debate rather than answer all the questions raised.

It is important to set out some boundaries regarding the scope of this enquiry. There is, of course, a voluminous existing literature on law and policy approaches to democracy-threatening parties (e.g. militant democracy mechanisms).[10] There is also a longstanding literature on the decline of party politics and democratic participation due to dwindling membership and organisation, and the death knell of party politics has been sounded (prematurely) for decades.[11] While the central focus of this piece is more squarely on the clearest and most immediate political-party threats to democratic rule worldwide, these threats in many ways intersect with the wider and more diffuse "decay" of party politics.

The article contains four parts. Part II provides an overview of the centrality of political parties to contemporary definitions of democracy and 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. Part III discusses the conventional approaches to political parties perceived as threats to democratic governance. Part IV highlights how the threats posed by contemporary political parties cannot be adequately addressed by existing approaches. Part V canvasses a number of potential innovations in responding to contemporary political-party threats, with the aim of spurring deliberation on this crucial issue.

2. Political parties: central to democracy but orphans of constitutional thought

Definitions of democracy have long presupposed the existence of political parties, even where they are not expressly acknowledged. For the purposes of this paper, at its most basic what counts as a democratic state can be taken to refer to states rated as "free" by Freedom House or as a "full" or "flawed" democracy by the Economist Intelligence Unit (EIU) Democracy Index.[12] In the academic sphere, a useful basic definition is provided by the term "constitutional liberal democracy" used by Huq and Ginsburg to denote a state with

> (1) a democratic electoral system, most importantly periodic free-and-fair elections, in which a losing side cedes power; (2) the liberal rights to speech and association that are closely linked to democracy in practice; and (3) the stability, predictability, and integrity of law and legal institutions—i.e., the rule of law—functionally necessary to allow democratic engagement without fear or coercion.[13]

Putting to one side the open-ended and contested nature of concepts such as the rule of law in this definition, it is notable for present purposes that component (1) of this definition assumes the existence of political parties, that power has not been permanently captured by one party,

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[10] See, e.g. THE MILITANT DEMOCRACY PRINCIPLE IN MODERN DEMOCRACIES (Marcus Thiel ed., 2009).

[11] See, e.g., Peter Mair, RULING THE VOID: THE HOLLOWING OF WESTERN DEMOCRACY (2013); Ian Marsh & Raymond Miller, DEMOCRATIC DECLINE AND DEMOCRATIC RENEWAL: POLITICAL CHANGE IN BRITAIN, AUSTRALIA AND NEW ZEALAND (2012); and Sheri Berman, *The Life of the Party*, 30(1) COMP. POL. 101 (1997).

[12] See https://freedomhouse.org/ and https://www.eiu.com/home.aspx. Some formerly free states, such as Hungary, are now considered 'partly free'.

[13] Huq & Ginsburg, *supra* note 7, at 87.

and that there is an adequately functioning political-party system where the opposition can present at least a credible potential alternative government. This definition also would seem to require a political-party system where the parties adhere to the "rules of the (democratic) game". This definition, of course reflects the dominant conception of democracy as *representative* democracy, which places emphasis on the need for institutions to channel the popular will, as opposed to mechanisms of direct democracy (e.g., referendums).[14]

Yet, despite being central to contemporary understandings and conceptualisations of functioning liberal democracy, political parties occupy an enduringly awkward position in democratic governance and constitutional law, representing both a threat to democracy and a virtually unavoidable medium between the State and the people in facilitating democratic governance in complex modern polities, which requires strong protection of their expressive and associative rights. This tension has deep historical roots. In crafting the U.S. 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."[15] While the U.S. Constitution itself says nothing of parties, its entry into force shortly pre-dated, even spurred, the coalescence of the U.S. political system into two clear groupings, centred on the issue of the extent of federal power, and prefiguring the enduring two-party system that is so central to U.S democracy today.[16]

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 1793–94, 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.[17] The terms "terrorism" and "terrorist" are said to have been invented retrospectively to describe the Jacobins and the methods they employed.[18] In France, then, the first (proto-)parties rapidly came to be viewed as antithetical to good governance (if not quite liberal democracy as we understand it today). 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 to 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."[19] 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 in the 1949 Basic Law of Germany and spreading in subsequent decades to states

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[14] See, e.g., Frances McCall Rosenbluth & Ian Shapiro, RESPONSIBLE PARTIES: SAVING DEMOCRACY FROM ITSELF (2018).

[15] *See* William Partlett and Zim Nwokora, *The Foundation of Democratic Dualism: Why Constitutional Politics and Ordinary Politics are Different* (forthcoming, CONSTELLATIONS) 7−10. *See also*, THE FEDERALIST No. 10 (James Madison).

[16] *Id*. At 9. *See further*, Russell Muirhead and Nancy L. Rosenblum, *The Uneasy Place of Parties in the Constitutional Order*, *in* THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION (Mark Tushnet, Mark A. Graber & Sanford Levinson eds., 2015).

[17] Marisa Linton, *Jacobinism*, *in* ENCYCLOPEDIA OF POLITICAL THEORY: A–E, vol. 1 (Mark Bevir ed., 2010).

[18] *Id*. at 726.

[19] Aradhya Sethia, *Where's the Party?: Towards a Constitutional Biography of Political Parties* (forthcoming, INDIAN LAW REVIEW) 2,3 of the draft text provided to the authors.

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, Poland).[20] In recent decades in continental Europe, thicker constitutional recognition has transformed political parties "from socio-political organizations into integral units of the democratic state," which has been viewed as an attempt to shore up their legitimacy as their claim to democratic representation has weakened.[21]

However, in constitutional law scholarship – and in particular, in the rarefied circles of constitutional theory, focused on the late-modern schemes of tripartite separation of powers – 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.[22] A rich literature analyses everything from inter-party relations to intra-party dynamics, to sweeping shifts in political-party systems.[23] However, advances in legal actors' understanding of political parties as constitutional actors have been made in the past two decades, with German and US legal scholars and courts, in particular, leading the way.

Donald Kommers has framed the Federal Constitutional Court of Germany's case-law on political parties as a "jurisprudence of democracy"[24] 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 per cent 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."[25]

In the U.S.A., scholars such as Richard Pildes 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 landmark 2005 article, Pildes and Daryl Levinson argued that the original Madisonian design of the Constitution, predicated on healthy inter-branch competition as a means of preventing excessive concentration of political power and the concomitant risk of tyrannical government, had been almost immediately superceded by the simultaneous emergence of the political party system.[26] For Levinson and Pildes, the continuing focus on this outmoded model of inter-branch competition elides the ways in which

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[20] See, e.g., Justin O. Frosini & Sara Pennicino, *Ban on Political Parties*, *in* THE MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW (Rainer Grote, Frauke Lachenmann & Rüdiger Wolfrum eds., 2017).

[21] Ingrid Van Biezen, Constitutionalizing Party Democracy: The Constitutive Codification of Political Parties in Post-War Europe, 42 BRIT. J. OF POL. SCI. 187, 187 (2012)

[22] *See, e.g.*, the five-volume collection POLITICAL PARTIES AND DEMOCRACY (Kay Lawson ed., 2010).

[23] See, e.g., Zim Nwokora and Riccardo Pelizzo, *Measuring Party System Change: A Systems Perspective*, 66(1) POL. STUD. 100 (2017).

[24] DP Kommers, 'The Federal Constitutional Court: Guardian of German Democracy' (2006) 603 *Annals of the American Academy of Political & Social Science* 111, 111.

[25] Collings, DEMOCRACY'S GUARDIANS: A HISTORY OF THE GERMAN FEDERAL CONSTITUTIONAL COURT, 1951-2001 (2015) xxxiii.

[26] Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2005-2006).

disciplined political parties can functionally fuse executive-legislative branch operation, which has been exacerbated by the sharpening of ideological inter-party 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."[27]

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.[28] 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[29]) they are generally viewed in constitutional terms as private entities, under-regulated, or at best cuckoos in the constitutional nest.[30]

The analysis above, of course, remains largely framed as analysing the shortcomings of "ordinary" politics in systems populated by parties broadly committed to democratic governance.[31] However, 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 have set about actively dismantling the democratic system by diminishing accountability and rights-protecting organs (independent courts, media, and civil society organisations), while maintaining a veneer of legality and democratic rule through sophisticated manipulation of law and continued elections.[32] This presents a challenge of a different order and magnitude compared to the imperfect systemic functioning analysed by Pildes and others. However, it raises the same central risk of tyrannical government through excessive concentration of power and subversion of the constitutional framework. For instance, there are clear resonances between the longstanding debate on party system dysfunction and the observation from scholars such as Kim Scheppele and Laurent Pech that the marked deterioration of democratic rule in states such as Hungary and Poland has often been preceded by, or even prompted by, a crisis in the political-party system, often due to crisis in a main party or one party's turn to the political extremes, accompanied by declining public faith in the existing political system and the growing electoral appeal of a party vowing to "fix the system."[33]

In many states worldwide, the political-party system is now not only unable to perform the essential mediating and representative role essential to adequately functioning representative democracy due to long-established trends such as declining membership, but also due to the intensification of extreme polarisation and "invidious partisanship,"[34] the prioritisation of partisan advantage over fidelity to constitutional and democratic governance,[35] the fuller "capture" of parties by elite or sectoral interests, and – in states such as Poland and Hungary,

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[27] *Id*., 2361

[28] *See, e.g*., D.A. Canteub, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49 (2017); and Ginesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445 (2016).

[29] Graeme Orr, Pri*vate association and public brand: the dualistic conception of political parties in the common law world*, 17(3) CRIT. REV. INT'L. SOC. & POL. PHIL., 332 (2014); and Catherine O'Regan, *Political Parties: The Missing Link in our Constitution?* 1 SOUTH AF. JUD. ED. J'L 61.

[30] *See, e.g.*, Muirhead & Rosenblum, *supra*, note 16.

[31] See, in particular, Richard Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L. J. 804 (2014).

[32] See, e.g., Laurent Pech & Kim Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19 CAMB. Y. EUR. LEG. STUD. 3; and Huq & Ginsburg, *supra*, note 7.

[33] Pech & Scheppele, *id.*, 11.

[34] Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59(5) WM. & MARY L. REV. 1993 (2018).

[35] See e.g. Yasmin Dawood, *Democracy and the Problem of the Partisan State* in Sanford Levinson, Joel Parker & Paul Woodruff (eds), Loyalty: NOMOS LIV (2013).

for example – party "capture" of the state itself through domination of all previously independent democratic institutions, facilitated by the fragmentation 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 anti-democratic. The party system, quite settled for decades, has become a churn of change. This bedevils analysis of political parties as systemic actors, and of political-party systems that are transforming before our eyes. First, it is useful to briefly map existing approaches to addressing anti-democratic parties.

3. Conventional approaches to anti-democratic parties

Historically, states have attempted to address parties perceived as threats to, or inimical to, the democratic system in three principal ways: legal approaches (e.g., registration conditions and parliamentary thresholds); constitutional approaches (e.g., electoral system tinkering and party dissolution); and policy approaches (e.g., erecting "cordons sanitaires" by refusing to engage with such parties). As this terrain is already covered by an expansive literature, the aim is to summarise the existing approaches and debates surrounding them, and to highlight their inadequacy in remedying the novel democratic threats posed by contemporary parties, discussed in Part IV.

3.1 Legal Approaches

Registration conditions

Political party 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. Whilst in some states—especially in long-established common law democracies—these may only consist of "bureaucratic niceties," such as form-filling and fees,[36] in other jurisdictions requirements are "complex and lengthy."[37] Registration may require a host of documents, such as party statutes and rulebooks, composition of the executive committee and party officers, evidence of foundation meeting minutes and membership, among others.[38] New contenders may be deterred at this stage. Indeed, "the more specific the requirements," the more likely these will "affect minor parties on the extremes of the political spectrum."[39] 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, however such refusals can usually be appealed.[40]

Although the literature surrounding registration consistently notes that the types and forms of documentation required for political parties are becoming lengthier and more complex, as discussed in Part IV, this has not kept ambiguously democracy-threatening parties off the

[36] Orr, *supra*, note 29, at 343.
[37] PIPPA NORRIS, RADICAL RIGHT: VOTERS AND PARTIES IN THE ELECTORAL MARKET (2006) 88.
[38] European Commission for Democracy Through Law (Venice Commission), *Comparative Report on Thresholds and Other Features of Electoral Systems which Bar Parties from Access to Parliament* (Study No. 485 / 2008), 3.
[39] Venice Commission, *id*.at 3.
[40] European Parliament, *Criteria, conditions and procedures for establishing a political party in the member states of the European Union* (2012), 20-23.

ballot. Savvy political parties are probably aware of these restrictions and are unlikely to divulge information that may lead to a registration refusal. Various parties have also transformed over time from more liberal and democratic platforms to less liberal democratic programs (e.g., PiS in Poland, Fidesz in Hungary).

Thresholds for entering parliament

Thresholds are "the legally prescribed minimum number of votes needed for a party to take part in distribution of parliamentary seats,"[41] which has also been referred to as the "threshold of exclusion."[42] Thresholds are designed to protect parliaments against extremist or fringe parties that may gain a small but not insignificant number of votes. Legal thresholds are usually set between 3-7 per cent, but can be higher or lower in some states.[43] Such thresholds can also be set in terms of regional versus national vote percentage, or even for coalitions of parties.[44] 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. For example, in the UK's majoritarian system the natural threshold to secure a seat is 35 per cent (preventing the UK Independence Party from gaining more than a single seat in the 2015 elections despite obtaining 12.6 per cent of the national vote).[45] Further implications regarding the choice of electoral system are explored below, but suffice it to say that natural thresholds in majoritarian systems are higher than those in proportional systems.[46]

As with registration requirements, electoral returns in recent years have demonstrated that in many states thresholds are not keeping threatening political parties out of power. For instance, Germany's 5 per cent threshold has not prevented the Alternative for Germany (AfD) from achieving a position of considerable strength, as section 4.1 analyses below.

Applications of new and existing law

In dealing with specific party threats, 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.

That said, it is common for states to punish extremist parties or party leaders through the application of terrorism, hate speech or incitement laws,[47] application of the criminal law,[48] tax fraud[49] and campaign funding regulations,[50] amongst others – a recent example being prosecution of Golden Dawn in Greece.[51] Sometimes, as a consequence, parties may break

[41] Venice Commission, *supra*, note 38.
[42] *Id.*, at 5.
[43] In the Netherlands it is 0.67 per cent. In Turkey it is 10 per cent (Venice Commission, *supra* note 38, at 6-8).
[44] For example, in Germany parties need either 3 district seats or 5 per cent of the national vote to enter the Bundestag.
[45] Electoral Commission, *2015 UK general election results*, https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/uk-general-elections/2015-uk-general-election-results.
[46] Venice Commission, *supra* note 38, at 9.
[47] See Vlaams Blok in Belgium in 2004 and Centrum Partij in the Netherlands in the 1990s: William M. Downs, POLITICAL EXTREMISM IN DEMOCRACIES: COMBATING INTOLERANCE (2012) 85.
[48] ("French Rightist Found Guilty of Assault in 1997 Campaign" N.Y. TIMES (April 3, 1998), https://nyti.ms/2GF0wkG).
[49] *See* Mogens Glistrup, founder of the Danish Progress Party (Downs, *supra* note 47, at 139).
[50] *See, e.g.*, the One Nation party in Australia (Norris, *supra* note 37 at 69).
[51] Dimitris Christopoulos, *The Golden Dawn trial: a major event for democracy in Greece and beyond,* OPEN DEMOCRACY, January 16, 2018 https://www.opendemocracy.net/en/he-golden-dawn-trial-major-event-for-democracy-in-greece-and-beyond/.

down or voluntarily dissolve. But a crackdown on party leaders may also bolster a fringe party's status, leading to increased electoral success. One of the more famous cases is Jean-Marie Le Pen's success after his conviction for assault during a 1988 election campaign.[52] Thus, legislating against a new political party threat or prosecuting high-profile leaders under existing law may not be the best strategy to defuse the long-term problem, as it could prove advantageous—rather than debilitating—for the targeted party.

For states ordinarily less willing to tackle parties through the law, one-off restrictions on particular parties are not unheard of. Perhaps the most notorious case is banning of the US Communist Party. The government's McCarthy-era tactic of weakening labour unions and those possessing communist sympathies was initially pursued through the Internal Security Act of 1950.[53] Later the Communist Control Act of 1954[54] explicitly outlawed the Communist Party of the United States, labelling the party an "authoritarian dictatorship" that is part of a "conspiracy to overthrow the Government of the United States," and which takes orders from "foreign leaders of the world Communist movement."[55] But for all its bombast, the statute has a relatively dull legal history. It was never widely enforced, has not been officially repealed, and was never struck down by the US Supreme Court. The US Communist Party has continued operating since its establishment in 1919. Such one-off attempts can also backfire. Australia's Communist Party Dissolution Act 1950 became the first piece of primary legislation ever struck down by the Australian High Court.[56]

Another one-off strategy has been for governments to cut off media access or government funding. In 2017, for instance, after the German Constitutional Court refused to dissolve the neo-Nazi National Democratic Party (NDP), the Bundestag promptly passed a constitutional amendment allowing anti-democratic parties to be starved of federal funds.[57] Although it is too early to predict how this amendment will play out, key issues arise with both of these one-off strategies. In an age of social media any type of traditional media censorship would not be not nearly as effective (if it ever was), and any type of funding withdrawal could incentivise foreign or illegal methods of generating funding, the rise of "shadow parties," or the party dissolving and re-registering under a new name (see sections 4.3 and 4.7 below).

3.2 Constitutional approaches

Electoral system tinkering

Can particular election systems facilitate or diminish political-party threats? The trend towards proportional systems is growing, for instance, on the basis that they are more democratic by according voters more electoral choice and that a more representative parliament is constructed after elections.[58] However, Rosenbluth and Shapiro argue that the wide adoption of proportional systems has contributed to the current state of ill-health that many democracies are experiencing, as these systems permit fringe and extremist political parties into the

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[52] As Norris notes, the media attention that Jean-Marie Le Pen received after his conviction and temporary banning by the European Parliament probably did not damage his popularity: Norris, *supra* note 37 at 91.
[53] Internal Security Act of 1950, 64 Stat. 987 (Public Law 81-831).
[54] Communist Control Act of 1954, 68 Stat. 775 (Public Law 83-637).
[55] *Id.*, s 2.
[56] *Australian Communist Party v The Commonwealth* [1951] HCA 5.
[57] *See* 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), http://www.constitutionnet.org/news/germanys-move-deprive-anti-democratic-parties-federal-funding-effective-response-populist-wave.
[58] Nils-Christian Bormann & Matt Golder, *Democratic Electoral Systems around the world, 1946–2011*, 32 ELECTORAL STUDIES 360, 363-65 (2013).

system.[59] They argue that having two strong parties in a majoritarian single member district (SMD) system produces the best democratic outcomes, whilst over time proportional systems struggle to balance the long-term national interest of citizens and fall victim to haphazard and weak coalition government.[60]

A number of issues arise regarding Rosenbluth and Shapiro's argument. First, in many jurisdictions any wholesale changes regarding election systems would be difficult and unlikely to be achieved any time soon – and fragmentation may be rooted in longstanding political traditions. Perhaps more importantly, major traditional political parties in majoritarian systems can still be captured by authoritarian-leaning populist candidates hostile to liberal democracy (see sections 4.5-4.6 below). This problem has been aggravated by changes to party leadership election methods. In many jurisdictions elections are being further "democratised" to have a larger proportion of party members vote, as opposed to the more traditional selection of leaders through party or parliamentary leadership, which removes barriers for questionable candidates.[61]

Thus, constitutional tinkering of the electoral system is at best a medium-term option, and even if successful, is no panacea.

Banning (or dissolving) parties[62]

The power to dissolve political parties based on the purportedly anti-democratic nature of their platform or operation is a feature of constitutions in many democratic states. It represents one of the most controversial weapons in the arsenal of a "militant democracy" capable of protecting itself from threat or collapse by employing illiberal means. Against a longstanding background of party banning by undemocratic regimes (e.g. in pre-war Japan and Turkey[63]), post-war constitutions have been more explicit about party banning as a democracy-protecting measure. The most influential model for dissolution has been the 1949 Basic Law of West Germany, which in Article 212(2) conferred on the Federal Constitutional Court the power to ban political parties which "seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany."

In many states the mechanism has been expanded to cover a range of additional circumstances. Although most frequently targeted at fringe parties, some sizeable parties have been dissolved (e.g., former ruling Communist parties in Latvia and Lithuania).[64] Frequency of use varies by country, with some using the mechanism frequently (e.g., Turkey, which has of course never been a fully developed liberal democracy),[65] whilst other states possess the mechanism but have never used it (e.g., Poland).[66] A recent study found that twenty of thirty-seven European states analysed had banned at least one party since 1945, totalling fifty-two bans in all, including both post-authoritarian states and states without experience of authoritarian rule.[67] Indeed, party bans often connect to very specific state problems, such as: communal conflict and terrorism rooted in historical antagonisms and separatism (e.g.,

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[59] McCall Rosenbluth & Shapiro, *supra* note 14.
[60] *Id.*, at 5.
[61] McCall Rosenbluth & Shaprio, *supra* note 14, at 81-89.
[62] We use "party ban" and "party dissolution" interchangeably.
[63] *See e.g.* THE ROUTLEDGE HANDBOOK OF MODERN TURKEY 185 (Metin Heper & Sabri Sayari eds., 2013).
[64] Frosini & Pennicino, *supra*, note 20, at ¶ 16.
[65] Ödül Celep, *The Political Causes of Party Closures in Turkey*, 67 PARL. AFF. 371, 372–373, 377 (2014).
[66] *See* Fernando Casal Bertóa & Marcin Walecki, *Party Regulation and its Effects on the Polish Party System (1991–2011)* (The Legal Regulation of Political Parties, Working Paper No. 22, May 2012).
[67] Angela K. Bourne & Fernando Casal Bértoa, *Mapping "Militant Democracy": Variation in Party Ban Practices in European Democracies (1945–2015)*, 13 EUCONST. L. REV. 221, 230, 246 (2017).

Northern Ireland, Spain, France), a belligerent neighbour (South Korea), or denial of the existence of the State or its Jewish and democratic character (Israel). Characterising such bans as aimed at saving liberal democracy can unhelpfully conflate the survival of the democratic system with other issues (e.g., state security and survival) and it remains important to acknowledge the hybrid democratic pedigree of states such as Israel.[68]

Party bans also contain an international dimension. The core expressive and associative political freedoms they affect are not just recognized in national constitutional provisions, but also in a host of instruments including the International Covenant on Civil and Political Rights (ICCPR) at the global level, and regional human rights conventions such as the European Convention on Human Rights (ECHR).[69] In 2000, the Council of Europe's Venice Commission set out seven guidelines for the dissolution of political parties,[70] drawing heavily from the case law of the European Court of Human Rights (ECtHR). However, these have not necessarily ensured clarity,[71] and some of the ECtHR's judgments have come under heavy criticism: for instance, its upholding of the dissolution of the Welfare Party by the Turkish Constitutional Court has been called "the largest single interference with freedom of association in European jurisprudence."[72]

Gur Bligh and Jan-Werner Müller, amongst others, have argued for a reconsideration and new understanding of party bans on the basis that novel challenges and different types of authoritarianism have arisen.[73] However, as Bligh points out, "the dominant approach continues to be preoccupied with the Weimar scenario"; namely, framing the problem in relation to the historical experience of democratic breakdown in Germany's Weimar Republic spurred by overtly anti-democratic actors.[74] In fact, existing public law and political science literature often emphasises the deficiencies of such bans.[75] At the normative level party bans are viewed as undemocratic and open to abuse, resting in intractable tension with adherence to democratic pluralism. At a practical level, many political science scholars argue that bans are "pointless" and "counterproductive,"[76] and can take attention from more effective methods, such as policy approaches.[77]

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[68] Gila Stopler calls Israel 'semi-liberal': see *Constitutional Capture in Israel*, INT'L J. CONST. L. BLOG (Aug. 21, 2017), http://www.iconnectblog.com/2017/08/constitutional-capture-israel.

[69] Eva Brems, *Freedom of Political Association and the Question of Party Closures*, *in* POLITICAL RIGHTS UNDER STRESS IN 21ST CENTURY EUROPE 120, 120−128 (Wojciech Sadurski ed., 2006).

[70] *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures*, CDL-INF (2000) 1 (Jan. 10, 2000).

[71] For example, clear tensions arise between Guideline 3, holding that parties may only be dissolved if they advocate or use violence, and Guideline 5, which states that governments should assess "whether the party really represents a danger to the free and democratic political order or to the rights of individuals," which suggests a much broader range of grounds for dissolution.

[72] See Paul Harvey, *Militant Democracy and the European Court of Human Rights*, 29 EUR. L. REV. 407, 417 (2004).

[73] Gur Bligh, *Defending Democracy: A New Understanding of the Party-Banning Phenomenon*, 46 VAND. J. TRANSNAT'L L. 1321 (2013); Jan-Werner Müller, *Protecting Popular Self-Government from the People? New Normative Perspectives on Militant Democracy*, 19 ANN. REV. POL. SCI. 249 (2016).

[74] Bligh, *Id.*, at 1325 (2013)

[75] See Downs, *supra* note 46, at 199.

[76] 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 195, 196 (Ingrid van Biezen and Hans-Martien ten Napel eds., 2014).

[77] Angela Bourne, *Democratic Dilemmas: Why Democracies Ban Political Parties* (ECPR General Conference, University of Montréal, Conference Paper, Aug. 26-29, 2015), at 3.

3.3 Policy approaches

Cordons sanitaires
A common method of dealing with extremist or threatening political parties that have entered parliament is creating "cordons sanitaires"; where parliamentary parties adopt a policy of refusal to engage with threatening parties. Yet 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. For instance, Norway's Fremskrittspartiet (FrP) party, although being under a cordon sanitaire, "have lent support to the center-right Høyre minority coalition consisting of the Christian People's Party and Liberals, and … may have sometimes exerted 'blackmail' influence over their immigration policies." [78] 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.[79] As Downs stresses, "[d]enial, rejection, and repression have largely failed to mitigate extremism in the cases where they have been adopted as dominant strategies."[80]

Downs argues that extremist parties can only be addressed through some form of regulated inclusion, arguing, for instance that, unlike the strong opposition to including extremist parties in Belgium and Austria (which achieved little), permitting the Swiss Peoples' Party into government deprived it of "victim" status, pointed up its inadequacies, and exacerbated its internal divisions.[81] Whilst intriguing, this strategy may be highly contingent and context-dependent, as it may not always produce internal party tensions or expose incompetent governance.

4. Democratic threats posed by contemporary parties

Conventional means for addressing democracy-threatening parties – whether non-registration, application of the criminal law, party bans, *cordons sanitaires* or structured engagement – are not only problematic but also appear unequal to addressing the contemporary threats to liberal democracy posed by political parties worldwide. It is important to emphasise that not all parties discussed here might, ultimately, present a fundamental threat to democratic rule–especially parties that have not had any opportunity to enter government. Distinguishing between potential threats and real threats, especially at a time of profound party-system transformation, is perhaps the defining difficulty that dogs the search for public law and policy solutions to contemporary threats.

4.1. The rise of the "far-right lite" party

Within the traditional "Weimar" paradigm, when we think of anti-democratic political party bans we tend to think of parties supporting violence, previous ruling parties, or small fringe parties with clear anti-democratic agendas, but very limited capacity to threaten the democratic system due to minimal electoral support.

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[78] Norris, *supra* note 37, at 67.
[79] Michael Minkenberg, *Repression and Reaction: Militant Democracy and the Radical Right in Germany and France*, 40 PATTERNS OF PREJUDICE 25, 43 (2006).
[80] *Id.*, at 200.
[81] *See* DOWNS, *supra* note 46, 81-109, 135.

However, 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, including France's Front National, Italy's Lega (formerly Northern League) or Germany's AfD, the Dutch Freedom Party (PVV) – and, outside Europe, possibly the Social Liberal Party (PSL), which has rapidly transformed from marginal party to a central electoral force in Brazil, hitched to Jair Bolsonaro's electoral success in the October 2018 presidential elections.[82] The nature of these larger parties is a key obstacle to addressing the threat they present. As Bale has observed, these parties are a form of "far-right-lite,"[83] 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 sophisticated manner that sets them apart from the likes of the neo-Nazi National Democratic Party of Germany (NPD) or Hungary's ultra-right *Jobbik*. It has been observed, for instance, that there is

> no absolute consensus about how to describe the AfD as a political phenomenon, other than as a party well to the right of the CDU and their Bavarian sister party, the CSU, after Merkel moved the conservatives significantly toward the center.[84]

Maximilian Steinbeis has referred to the AfD as the "Party of the Extreme Normal," noting how the party has achieved

> [w]hat the NPD and other marginal and/or short-lived phenomena of Germany's far right never even came close to achieve . . . : the outermost right-wing edge of the political spectrum has arrived in the "centre of democracy" [. . .] Before long, we will get used to it, though. It will be . . . kind of normal. In most of Europe, it already is.
>
> For the moment, it seems to be this perspective of normalization that is so particularly disturbing.[85]

It may be added that the AfD—like most parties—is not a monolithic bloc of one mind on all issues. As well as benefiting from anger at Chancellor Merkel's 2017 decision to take in 1.3 million refugees, the party's success appears partly based on its ability to offer the electorate two political "flavors": a relatively moderate face that frames anti-immigrant and other views as eminently sensible (embodied in the telegenic former party president Frauke Petry, until her departure after the 2017 elections[86]); and a much more strident and virulent face which speaks against "an invasion of foreigners" and is capable of shocking statements; for instance, that the Turkish-descended immigration minister should be disposed of in Anatolia (embodied in Alexander Gauland).[87] The AfD has made an art of walking back extreme statements with contrary statements from its more moderate wing, thereby having its political cake and eating it too (although it is becoming increasingly radicalised at grassroots level).

As a result, it would be hard to fit the party into the established framework for addressing anti-democratic parties, whether refusal to register, criminal law sanctions, or party banning under the German Constitutional Court's case law or accepted understandings of such bans

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[82] *See* Daly, *supra*, note 4.
[83] Bale, *supra* note 75, at 215.
[84] Jefferson Chase, *AfD: What You Need to Know about Germany's Far-Right Party*, DEUTSCHE WELLE, Sept. 24, 2017, http://www.dw.com/en/afd-what-you-need-to-know-about-germanys-far-right-party/a-37208199.
[85] Maximilian Steinbeis, *The Party of the Extreme Normal*, VERFASSUNGSBLOG: ON MATTERS CONSTITUTIONAL (Sept. 23, 2017), http://verfassungsblog.de/the-party-of-the-extreme-normal/.
[86] *See* Justin Huggler, *AfD Co-Leader Walks Out on Party on Day after German Election Success*, THE TELEGRAPH, Sept. 25, 2017, http://www.telegraph.co.uk/news/2017/09/25/afd-co-leader-walks-party-day-election-announces-fight-against/.
[87] *Id*.

reflected in the Venice Commission's guidelines. Identifying the party's *Sein* (ideological character) and *Handeln* (actions), as required by the Constitutional Court in banning applications, for instance, is no easy task.[88] Moreover, the AfD's effective position as the main opposition party means that a "cordon sanitaire" policy appears neither practically feasible nor democratically defensible.

Indeed, in the context of the Constitutional Court's refusal to ban the NPD in 2017 – strongly criticised by political actors, who promptly passed a constitutional amendment allowing anti-democratic parties to be starved of federal funds (which may operate as a *de facto* ban power, especially for smaller parties[89]) – one commentator, 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.[90]

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.[91] In Brazil, as mentioned above, the rise of the ambiguously far-right PSL under Bolsonaro leaves it as the new political force in a highly polarised system (with the established leftist Workers' Party (PT) on the other side of the aisle). These parties' growing size means that Thiel's point above gains added force: the larger an anti-democratic party, the more foolhardy (and less justifiable) it may be to attempt to suppress it by legal or means, or to attempt a policy of exclusion or containment.

Parliamentary dynamics clearly matter here. The Sweden Democrats (SD) party's share of 17.6 per cent of the vote in the September 2018 elections is just low enough to permit a policy of exclusion to work in practice. After months of uncertainty, in late January 2019 the incumbent coalition of the Social Democrat and Green parties came together in a weakened minority government dependant on parliamentary support from the center-right Centre and Liberal parties; seemingly based on a determination in all established parties to deny governing power to the SD.[92] By contrast, the entry of the two biggest parties into a coalition government in Germany means that the AfD simply cannot be ignored, as being the third-largest party it becomes the main opposition, despite winning a lower share of the vote than the SD in Sweden.

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[88] Bourne and Bértoa, *supra* note 66, at 225.

[89] Helmut Brandt, a CDU member of the (then) ruling CDU-CSU-SPD conservative-social democratic coalition insisted: "It's the task of politics to protect democracy from efforts to destroy it." *See* 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), http://www.constitutionnet.org/news/germanys-move-deprive-anti-democratic-parties-federal-funding-effective-response-populist-wave.

[90] 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 (Jan. 31, 2017), https://ukconstitutionallaw.org/2017/01/31/stefan-theil-a-vote-of-confidence-for-the-german-democratic-order/.

[91] *See Timbro Authoritarian Populism Index 2017*, *supra* note 2, 18.

[92] See Kartik Raj, *The Test for Sweden's New Government Rights-Based Policies Needed to Combat Drivers of Support for Populists*, HUMAN RIGHTS WATCH, January 25, 2019 https://www.hrw.org/news/2019/01/25/test-swedens-new-government.

The temptation may be 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. Indeed, in reference to party bans – arguing against a common consensus in scholarship, jurisprudence and policymaking that a party ban should be a measure of last resort – the Israeli scholar Cohen-Almagor has argued for a preventive approach:

> [W]hy should we wait for the stage of probable or reasonable possibility of danger to be reached, while the party in question goes from strength to strength and its ideas and acts undermine democracy and deliberately discriminate against others?[93]

However, this argument appears to assume that a party's platform and views would be explicitly anti-democratic, whereas contemporary parties present much more ambiguous fronts, and it may only be when a party is in power that its true threat to democratic rule becomes apparent (e.g., Poland, discussed below, or Hungary, where Fidesz began as a liberal party). In such circumstances, it is clear that the "Weimar" scenario of overt aversion to democratic rule does not apply, which precludes the application of any banning mechanism. Clearly, plausible claims of opportunism and partisan abuse of such bans could also be raised, especially as the targeted party amasses support. In line with Thiel's argument, such an approach would also still fail to address any of the structural issues underlying growing support for illiberal parties, particularly "cultural backlash" against rapid social change.[94]

4.3. The entry of anti-democratic parties into government

Apart from research on the banning of former ruling parties,[95] the majority of the literature on anti-democratic political parties focuses on contexts where the main political territory is occupied by "mainstream" parties within the acceptable ranges of the democratic political spectrum. While this is still true of many states (e.g., the Netherlands and Germany), it does not reflect the reality of states in which parties hostile to liberal democracy have entered government, sometimes with significant majorities (e.g., Law and Justice (PiS) in Poland, Fidesz in Hungary) or in coalition (e.g., the far-right Freedom Party (FPÖ) coalition with the centre-right Austrian People's Party (ÖVP) in Austria, the Lega-Five Star Movement coalition in Italy). 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.

In Poland, for instance, the PiS party in power since 2015 has taken measures that strongly echo the path of legislative and constitutional reform taken by the illiberal Fidesz party government in Hungary since 2010. However, PiS is not an explicitly far-right or extremist party. Alongside liberal democratic parties, it arose from the Solidarity movement that pushed the transition from Communism to democratic rule. Rather than expressly opposing democratic rule, its platform speaks to a "war of memory" contesting what type of state the movement from Communism represented: liberal democracy or a conservative nationalist democracy. Its

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[93] Raphael Cohen-Almagor, *Disqualification of Political Parties in Israel: 1988-1996*, 11 EMORY INT'L L. REV. 6, at 74 (1997).

[94] See Ronald F. Inglehart & Pippa Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash* (HKS Working Paper No. RWP16-026, Harvard Kennedy School, Aug. 2016), arguing that cultural backlash is a more convincing explanation for the rise of populism than economic factors.

[95] Pieter Niesen, *Banning the Former Ruling Party*, 19(4) CONSTELLATIONS 540 (2012).

platform emphasizes human dignity, personal and communal freedom, but also the nation, morality, and the "universal" Catholic Church, as well as an insistence that communist power persists in the state.[96] In a coalition government from 2005–2007, PiS's attacks on the judiciary, media, independent Central Bank, and rights of sexual minorities meant that by 2007 the scholar Ivan Krastev was calling Poland "the capital of Central European illiberalism today."[97]

The PiS party returned to government in October 2015, with the first outright majority since the fall of Communism, and quickly launched an assault on liberal democratic structures through a raft of legislation aimed at *de facto* constitutional change: rendering the Constitutional Tribunal "ineffective and toothless";[98] increasing government control of the State media; and permitting more extensive police surveillance. Having captured the Constitutional Court, the government continues to roll out legislation, including restricting NGOs and changing electoral laws to permit interference with results, while facing down concerns raised by external organizations including the European Commission and the Council of Europe's Venice Commission regarding the rule of law, rights, and democracy. The government has countered criticism by claiming to be *more* democratic by trammelling counter-majoritarian institutions frustrating the will of the majority, while scholars and other actors provide additional cover, characterising the attack on the democratic system as a shift to a more republican form of government, for example.[99]

Could PiS have been tackled by existing party-control mechanisms before it gained power? This is highly unlikely. Due to its ambiguous nature, no existing mechanism could have been easily applied. A policy of "cordon sanitaire" is hard to justify for a party which presents itself as pursuing an alternative form of democratic rule, rather than destroying democracy entirely, and would surely have been met with howls of protest claiming unjustifiable repression by the liberal Civic Platform government. It may be argued that, following its short term in government from 2005-7, an outright ban could have been justified; indeed, recent calls have been made to ban PiS even though it is the sole governing party.[100] However, although it is arguable that such a ban may be technically possible under Article 188 of the 1997 Constitution (read in light of Venice Commission guidelines[101]), this would again miss the wider point – returning to Thiel's argument, above – that banning the PiS party would have done nothing to address the discontent across significant swathes of the electorate, which has twice propelled the party to power. In addition, as a practical matter, in all likelihood, the party would have returned under a new name and with a more carefully expressed platform, as has happened in various states. For instance, the Belgian banned far-right Vlaams Blok relaunched itself as Vlaams Belang in 2004.

For far-right-leaning parties in coalition with more centrist parties, the expectation that the latter can act as a moderating influence is not always borne out. In Austria, prior experience of the centrist ÖVP wearing down the less experienced FPÖ party members in coalition

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[96] See Kate Korycki, 'Memory, Party Politics, and Post-Transition Space: The Case of Poland' 31(3) EAST EUR. POL. AND SOC.: AND CULT. 518 (2017).

[97] Ivan Krastev, *The Strange Death of the Liberal Consensus*, 18(4) J. OF DEMOCR. 56, 56 (2007).

[98] Tomasz Tadeusz Koncewicz, *Of Constitutional Defiance, Migration and Borrowing of Unconstitutional Tactics and European Resistance*, INT'L J. CONST. L. BLOG (Aug. 17, 2016), http://www.iconnectblog.com/2016/08/of-constitutional-defiance-migration-and-borrowing-of-unconstitutional-tactics-and-european-resistance/.

[99] *See* Lech Morawski, *The Polish Constitutional Crisis and Institutional Self-Defense: A Critical Response*, VERFASSUNGBLOG: ON MATTERS CONSTITUTIONAL (June 3, 2017), http://verfassungsblog.de/a-critical-response/. Justice Morawski was appointed under dubious circumstances by the PiS government.

[100] Piotr Misiło, *Poland's Law and Justice party should be banned*, EMERGING EUROPE, August 29, 2018 https://emerging-europe.com/voices/polands-law-and-justice-party-should-be-banned/.

[101] *Compilation of Venice Commission Opinions and Reports Concerning Political Parties*, CDL-PI(2016)003, 59 (Mar. 15, 2016), http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2016)003-e.

government in the mid-2000s has not been replicated under the current FPÖ-ÖVP coalition in government since December 2017, with the current crop of FPÖ ministers hardened or "ideologically resolute" members of the party.[102]

4.5. The "subversion" of a democratic party by an outsider/extreme wing

A different form of threat is posed by the subversion of a "good" party by a "bad" leadership, in the context of takeover of a long-established party by an outsider, or by an extremist wing of the party. As a recent policy paper suggests (using the term "populist capture"), this tends to be the only choice available to authoritarian-leaning political forces where the nature of the established party system precludes formation of a new party.[103] This section examines two examples: Rodrigo Duterte in the Philippines, and Donald Trump in the U.S.A.

In the Philippines, Rodrigo Duterte employed provocative law and order rhetoric in 2016 to boost himself to the presidency as the candidate for the PDP–Laban party,[104] as well as threats to restore authoritarian government.[105] World attention has been focused on Duterte's implementation of his central campaign promise to crack down on the Filipino drug trade by engaging in mass slaughter—without any semblance of due process rights—of thousands of individuals accused of involvement in the drug trade.[106] However, the threat his presidency poses to democratic governance is much more extensive. Mark Thompson argues that Duterte has substantially degraded, if not wholly subverted, the democratic order:

> [H]e changed the prevailing liberal reformist political order into an illiberal one through a new law and order governing script, new key strategic groups (the communist left and the police), and the quick removal of remaining liberal constraints (particularly in Congress and the Supreme Court). Duterte constructed a strongman political model at the local level before "nationalising" it after his election as president.[107]

Similarly, in the USA, there is little doubt that Donald J. Trump was an outsider in the 2016 campaign for the U.S. presidency; he had never previously served in political office and had been both a member of the Democratic and Republican parties during his lifetime. Through a combination of anti-immigrant and anti-Washington rhetoric he won the presidency. However, while enjoying the support of white supremacists[108] and other questionable organizations,[109] and issuing statements inimical to foundational constitutional values such as free speech, Trump never explicitly aligned himself or the Republican Party with them. In addition, many of his most extreme statements have been disavowed by key party members, and are not fully

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[102] Georg Plattner, *Back with a vengeance? One year with the radical right in government in Austria*, OPEN DEMOCRACY, January 17, 2019, https://www.opendemocracy.net/en/can-europe-make-it/back-with-vengeance-one-year-with-radical-right-in-government-in-a/.

[103] Lena Günther & Anna Lührmann, *Populism and Autocratization*. University of Gothenburg, Varieties of Democracy Institute: V-Dem Policy Brief, No. 19, December 2018 p.1.

[104] The *Partido Demokratiko Pilipino–Lakas ng Bayan* (translated literally: "Philippine Democratic Party–Power of the Nation").

[105] Mark R. Thompson, *Bloodied Democracy: Duterte and the Death of Liberal Reformism in the Philippines*, 35(3) J. OF CURR. S.E. ASIAN AFF. 39, 41 (2016).

[106] Michael Peel, *Philippine Police Relaunch Duterte's War on Drugs*, FINANCIAL TIMES, Mar. 6, 2017, https://www.ft.com/content/4b8600f8-0227-11e7-ace0-1ce02ef0def9.

[107] Thompson, *supra* note 104, at 42.

[108] Camila Domonoske, *Former KKK Leader David Duke Says "Of Course" Trump Voters are his Voters*, NPR, Aug. 5, 2016, https://www.npr.org/sections/thetwo-way/2016/08/05/488802494/former-kkk-leader-david-duke-says-of-course-trump-voters-are-his-voters.

[109] James Cook, *U.S. Election: Trump and the Rise of the Alt-Right*, BBC NEWS, Nov. 7, 2016, http://www.bbc.com/news/election-us-2016-37899026.

reflected in the Republican Party platform.[110] More importantly, and unlike the Philippines context, as regards implementing policies that threaten democratic institutions and values the Trump administration has, to date, been more effectively constrained by America's federalist system and intricate separation of powers.[111] Even with such pushback, however, the Trump administration's erosion of political norms and constitutional conventions could have significant long-term effects.[112]

In neither scenario could existing mechanisms tackle the erosion of the democratic order. In a two-party system such as the U.S., 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 emphasise the distinction between party leadership and the party itself. For instance, 2011 Venice Commission guidelines on banning political parties emphasise that the activities of party members (including leaders) as individuals cannot provide the basis for dissolution, especially if such action runs counter to the party constitution or party activities, unless it can be demonstrated that the activity was taken by the party's statutory body.[113]

That said, in some cases the outsider leader's effect on the party can be so transformative that the distinction between a "bad" leader and "good" party dissolves. In the Philippines, for example, Duterte's rise has not only affected the entire political system but has also been accompanied by the reorganization of the PDP-Laban party itself along more similar lines to the Communist Party in China, which also suggests a more fundamental transformation from a democratic to an anti-democratic party.[114]

Ultimately, to discuss mechanisms for addressing the threat posed by entire political parties in the context of "subversion" of a democratic party by an outsider is perhaps to look in the wrong places for possible solutions. Rather than the cosh of measures that target the entire party, it may be more effective to wield the scalpel of targeted measures to remove a corruptive leader. [115] Here we enter into territory covered by impeachment mechanisms (where the leader also holds impeachable public office), criminal law, and internal party procedures to remove party leaders. Yet, absent overt criminality (of the ordinary or "high crimes" nature), an independent figure or agency to pursue the party leader, or robust internal party procedures for sanctioning a leader, such measures are of limited use. Whether a subverted party can cleanse and rehabilitate itself after such leadership is also an open question.

4.6. The undemocratic dominance of a party by an insider

The above notwithstanding, the "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. In Poland, for instance, Jarosław Kaczyński is neither president nor prime minister, but rather, the leader of the ruling Law and Justice (PiS) party. However, due to the

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[110] *See Republican Party Platform 2016* (2016), available at https://www.gop.com/the-2016-republican-party-platform/.

[111] Jack Goldsmith, *Yes, Trump Is Being Held Accountable*, THE NEW YORK TIMES, Mar. 15, 2017, https://www.nytimes.com/2017/03/15/opinion/yes-trump-is-being-held-accountable.html.

[112] Neil Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L. J. (forthcoming, 2018), https://ssrn.com/abstract=3096033; *see also* Huq & Ginsburg, *supra* note 7.

[113] OSCE, ODIHR, & VENICE COMMISSION, GUIDELINES ON POLITICAL PARTY REGULATION 24 (2011), at 48 (¶ 94).

[114] Camille Elemia, *PDP-Laban "Very Open" to Learn Ideology, Policy from China's Communist Party*, RAPPLER, Jul. 19, 2017, https://www.rappler.com/nation/176073-pdp-laban-china-communist-party-ideology-policy.

[115] Bale, *supra* note 75, at 218.

lack of any internal democratic structures within PiS, his stranglehold on the party is pervasive and appears to be a key factor in its illiberal shift. President Duda's refusal in July 2017 to sign two problematic bills (aimed at further enhancing government control of the judiciary) has been seen by some as a sign of the more moderate wing in PiS chafing against Kaczyński's more extreme autocratic views and dominance of the party.[116]

This raises two difficult issues. First, to what extent can the activity of a dominant figure such as Kaczyński be separated from the party itself? Second, what democratic concerns are raised by the level of dominance exercised by one individual? 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 – and especially since the government has brought the Constitutional Court under its control[117] – 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 a manner in concordance with the text of the Constitution as well as acceptable constitutional practice in a democratic society, which is further exacerbated by excessive concentration of power within the party itself. Evidently, such concentration of power in one individual also renders the link between the electorate and party more tenuous. Yet, where the dominant figure is neither head of state nor executive, there are fewer mechanisms for removal, or at least, diminution of this figure's authority.

4.7. The rise of the "shadow party"

The discussion above raises the problem of identifying, and addressing, where political power truly lies, which – resonating with Levinson and Pildes' analysis discussed at the outset – may, to a significant extent, lie outside the formal institutions of government. This issue is raised in another guise in the case of organisations that act as "quasi-parties" but which are not presented as such to the electorate and which, crucially, avoid the formal channels for exercising political power, thereby avoiding accountability and vulnerability to electoral choice.

The central example here is the emergence in the USA of Americans for Prosperity (AFP) since 2004, as what Skocpol and Hertel-Fernandez call a "general-purpose advocacy and constituency mobilization federation." AFP, which is the latest iteration of a decades-long campaign by the billionaire Koch brothers[118] to build organisations capable of exerting significant influence on the Republican Party, goes far beyond any previous organisational link between a party and advocacy organisation (including Democratic Party-labour movement links and heavy lobbying across the spectrum): it has virtually unparalleled country-wide reach; has local chapters appointed and removed by the AFP high command rather than in-state activists; engages in continuous advocacy and lobbying between as well as during elections, including 'grassroots' protests and issuing annual congressional "scorecards" on voting records of sitting politicians (praised or denounced depending on their commitment to the AFP agenda); and has established a "revolving door" between AFP and Republican party insiders, to the extent that the boundaries between the two can be rather hard to chart. As Skocpol and Hertel-

[116] The authors are grateful to Wojciech Sadurski for these insights.

[117] *See, e.g.,* Wojciech Sadurski, *Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler*, HAGUE J. R. L. (not yet assigned to an issue; published online 13 June 2018).

[118] It is important to highlight here that this analysis completely disavows antisemitic opposition to the Koch brothers based on tropes of negative Jewish influence on politics.

Fernandez put it, AFP parallels and leverages the power of the Republican Party without being under its control:

> [AFP] pressures and pulls Republican candidates and officeholders to follow its preferred agenda. (…) It more closely resembles a European-style political party than any sort of specialized traditional U.S. advocacy group or election campaign organization. Yet AFP is not a separate political party.

This matters for two key reasons. First, it ruptures the link of representation between the people and government and pursues agendas that appear inimical to the endurance of genuinely democratic government. As Skocpol and Hertel-Fernandez show, it has led to Republican Party members in government adopting positions in direct opposition to polls showing clear public preferences for everything from healthcare reforms to carbon dioxide regulation.[119] The party, far from people-representative, becomes faction-representative. Second, it highlights that the political-party threat to democratic governance in the USA goes far beyond any one political leader or faction. Free and fair elections could continue, and the Trump administration could be replaced by an administration (of either party) more committed to liberal democratic norms, but this "shadow party" structure remains in place, continuing to distort the democratic system.

The unprecedented enmeshment of economic, party and (by extension) government power also resonates, to some extent, with concerns raised in other states, such as Hungary and South Africa, concerning the unhealthy degree of sway held by private persons and cronies over the functioning of government. Both states have been described as "Mafia states" where the dominant party in government acts as a channel for economic patronage and corruption on a scale utterly irreconcilable with representative democratic politics.[120] In South Africa analysts have started to use the term "shadow state" to refer to the unhealthy ties between the dominant ANC party and private actors including the Gupta family.[121]

It is striking that this issue has not received as much attention as concerns regarding foreign influence over political parties, which have been raised regarding, for instance, Austria's FPÖ, Italy's Lega and France's Front National (Russia);[122] and PDP-Laban in the Philippines (China).[123] There remains on-going investigation into President Trump's relationship with Moscow during the 2016 U.S. presidential election.[124] Yet, these links appear to be of a much different order to Cold War-era concerns regarding foreign control centred on the subordination of national Communist parties to the Soviet Union. Bar the significant evidence marshalled by the Mueller investigation into the Trump presidential campaign links with Russian State powers – which relates to the Trump team rather than the Republican Party itself – concerns in many states largely remain at the level of conjecture and should not be viewed as a central issue.

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[119] Theda Skocpol & Alexander Hertel-Fernandez, *The Koch Network and Republican Party Extremism* 14(3) PERSPECTIVES ON POLITICS 681, at 682, 692.

[120] *See, e.g.*, Bálint Magyar, POST-COMMUNIST MAFIA STATE. THE CASE OF HUNGARY (2016).

[121] *See* SHADOW STATE: THE POLITICS OF STATE CAPTURE (Ivor Chipkin, Mark Swilling, Haroon Bhorat, Mzukisi Qobo, Sikhulekile Duma & Lumkile Mondi eds., 2018).

[122] *See, e.g.*, Max Seddon and James Politi, *Putin's party signs deal with Italy's far-right Lega Nord*, FINANCIAL TIMES, March 6, 2017, https://www.ft.com/content/0d33d22c-0280-11e7-ace0-1ce02ef0def9. Henry Samuel, *Marine Le Pen's Links to Russia under U.S. Scrutiny*, THE TELEGRAPH, Dec. 21, 2016, http://www.telegraph.co.uk/news/2016/12/21/marine-le-pens-russian-links-us-scrutiny/.

[123] *Mayor Duterte and China: A Demand for Transparency*, THE SOCIETY OF HONOR: THE PHILIPPINES (Apr. 20, 2016, https://joeam.com/2016/04/20/mayor-duterte-and-china-a-demand-for-transparency/.

[124] Goldsmith, *supra* note 110.

5. Contemplating new public law and policy approaches

To effectively address the novel challenges to democratic governance posed by contemporary political parties requires innovative mechanisms to be crafted. Such mechanisms need to learn key lessons from the debate concerning existing and historical approaches to anti-democratic parties, including: falling into the trap of mechanisms that can be characterised as elite or partisan frustration of the will of the people by targeted parties; assuming that anti-democratic parties will be easy to identify; and distinguishing between party leaderships and the parties themselves.

This section contemplates a number of possible public law and policy options for addressing the difficult threats raised by contemporary political parties. The first three subsections discuss potential means of directly regulating parties. The final two subsections contemplate wider systemic measures that might be more effective in countering party threats to the democratic system. The discussion ends with a brief reflection on the broader emerging debates concerning party functioning and meaningful democratic rule.

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).[125] It may therefore be tempting, faced with the complexity of contemporary political-party threats to democracy, to suggest that courts could be accorded much broader regulatory powers. Courts could be empowered, for instance, to perform periodic party assessments for commitment to the Constitution and rule-of-law principles, and for adequate democratic procedures within parties themselves to prevent excessive dominance by one figure or faction. Grounds for regulation could be re-framed 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.[126] 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, Müller's concern that courts in fragile democracies are more likely to be packed has now spread to what were thought of as "consolidated" democracies.[127] A captured court such as the Constitutional Tribunal in Poland could wield broad regulatory powers aggressively should the PiS government's high poll numbers decline in advance of the 2019 elections. As Cavanaugh and Hughes' observe: "the use of [militant democracy] measures may well erode and devalue the very principles that they seek to protect." [128] Finally, even where independent courts remain in place, their characterisation by authoritarian-leaning populist forces as elite liberal institutions could mean that intervention may, perversely, strengthen support for such parties by allowing them to present themselves as victims of entrenched elites.

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[125] *See, e.g.*, Frosini & Pennicino, *supra* note 20; Venice Commission, *supra* note 70; Müller, *supra* note 73.
[126] *United Communist Party of Turkey and others v. Turkey*, 26 EHRR 121 (1998).
[127] *See* Müller, *supra* note 72, at 254.
[128] Kathleen Cavanaugh & Edel Hughes, *Rethinking What is Necessary in a Democratic Society: Militant Democracy and the Turkish State*, 38 HUM. RTS Q. 623, 625 (2016).

5.2. Non-judicial options

The party regulation model in states such as the UK may point to a different, less court-centred, approach. For instance, the UK's party proscription process under the 2000 Terrorism Act is wholly Executive-based via the Home Secretary, but this is tempered by the Act's framework for de-proscription. A proscribed party may apply to the Home Secretary for de-proscription, 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).[129] If that Commission decides to uphold the original decision of the Home Secretary, parties can then appeal to the Court of Appeal/Court of Session/Court of Appeal for Northern Ireland, followed by potential appeals to the Supreme Court.[130] Thus, rather than court-centred from the beginning, the process of de-proscription becomes increasingly court-focused only after decisions have been made again by the Secretary of State and then by an independent Commission. This insulates the courts from accusations of political decision-making, as they are not the initial adjudicators on party dissolution.

This is not to argue that the UK model is ideal, or to argue in favour of bans, but rather, to open our eyes to the possibility of a variety of "mid-level" and reversible regulatory sanctions (e.g. temporarily freezing funding, auditing accounts), and a broader-based institutional apparatus. 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. Indeed, the idea of a special commission could be pushed much further. For instance, independent party regulation commissions could be convened, perhaps comprising of lay citizens, academics, and former judges and elected officials, as a more broad-based and deliberative mechanism to address parties with a questionable commitment to liberal democracy. Issues such as selection of members would be contentious, but the fundamental point is that exploration beyond the *status quo* is sorely needed.

5.3. Emerging international mechanisms

In the European Union, approaches to contemporary illiberal parties, perhaps inescapably, have an international dimension. There is, of course, a longstanding campaign to have the Hungarian and Polish governments sanctioned under Article 7 of Treaty on European Union (TEU) for breach of fundamental values of the EU (e.g. democracy, rule of law, and human rights) contained in Article 2 TEU, which has had limited success to date.[131] In parallel, the European judiciary has stepped into the fray, with the Polish crisis coming before the Court of Justice of the European Union (CJEU) after an Irish High Court judge refusing to extradite a Polish national under the EU's European Arrest Warrant (EAW) due to rule-of-law concerns centred, in particular, on the Polish government's attacks on courts. In landmark rulings representing setbacks for the PiS government, the Court ruled in July 2018 that other national courts in Europe may consider the rule-of-law concerns raised regarding Poland when deciding on

[129] For example, a July 2007 case (*Lord Alton of Liverpool and Others v Secretary of the State for the Home Department*) included was one senior Judge, Sir Harry Ognall, and two QCs: http://bit.ly/2pxsjtJ.
[130] Terrorism Act 2000, ss 4-6.
[131] A limited step forward was a positive vote on 12 September 2018 in the European Parliamenrt to trigger Article 7 against Hungary.

extradition requests, and in December 2018 that highly dubious reforms concerning the Supreme Court must be halted. [132]

Recently, yet another gambit has emerged, focused on the parties themselves *qua* parties, rather than executive actors. Laurent Pech and Alberto Alemanno, two of an emerging breed of 'activist-professors' have called on the European Parliament to request the EU party regulation body[133] to verify whether the European's People Party (EPP) (which groups together a range of national parties, including the ruling party in Hungary; Fidesz) is in compliance with the EU's fundamental values as set out in Article 2 TEU.[134] As Pech and Alemanno explain, this legal mechanism (in a little-known EU Regulation[135]) has never been invoked, but could lead to Fidesz's de-registration as a European political party, thereby, at least by implication, diminishing its 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 "manifest and serious breach" of EU values. While this approach needs to be examined in light of the discussion above concerning the value and utility of repressive measures it is, of course, not a party ban – Fidesz would continue to operate – and appears as a measure of last resort from the EU law perspective, informed by a view that the governing party has captured the democratic system and the domestic political and democratic system is too weak to offer enough resistance.

That said, it appears important to consider two wider measures that may prove helpful to counter the key threats posed by political parties to liberal democracy worldwide: (i) opposition rights and incentivising opposition coherence; and (ii) stronger controls on manipulation of electoral law.

5.4. Opposition rights and incentivising opposition coherence

It is abundantly clear from the literature is that, in countering governmental degradation of the democratic system, opposition parties matter. Levinson and Pildes in 2009 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; "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."[136] More recently, this is a central plank of Huq and Ginsburg's argument for rendering the US political system more resilient against backsliding.[137] In the Indian context, Tarunabh Khaitan has similarly argued that strong constitutional recognition of opposition rights is crucial to pushing back against the illiberal agenda of the ruling BJP party under Modi, as well as multi-party appointments for, and greater independence of, fourth branch institutions.[138]

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[132] Case C-216/18 PPU, *Minister for Justice and Equality v LM* [2018] ECLI:EU:C:2018:586; and Case C-619/18 Commission v Poland ECLI:EU:C:2018:910.

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

[134] See Alberto Alemanno and Laurent Pech, *De-Registration of Europarties? Our Reasoned requwst to verify EPP's continuing compliance with EU values*, THE GOOD LOBBY, September 11, 2018 https://bit.ly/2SyUM1s.

[135] Regulation No 1141/2014 on the Statute and Funding of European Political Parties and European Political Foundations as amended by Regulation 2018/673.

[136] Levinson & Pildes, *supra* note 26 at 2348.

[137] See Aziz Huq and Tom Ginsburg, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2018) ch.6.

[138] Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: The Incremental Fusion of Party and State in India*, conference paper, 'Democratic Backsliding and Human Rights', Tel Aviv, 2-3 January 2019.

However, for some states a focus on opposition rights is of little benefit where there is a seriously diminished or fragmented opposition. This is certainly true of Hungary, for instance, where the most credible alternative to Fidesz is the ultra-right Jobbik party (although even that party may now disband after two abusive state audits[139]). In such instances, measures to incentivise opposition de-fragmentation (such as according "opposition rights" to formal opposition coalitions) appear necessary. 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 capture of independent accountability institutions and changes to electoral laws.

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. In the USA, this manifests in state laws establishing extreme gerrymandering and voter suppression.[140] In states such as Hungary and Poland (both unitary states) it appears in amendments to existing electoral laws, rendering it much easier for the governing party to secure larger majorities with fewer votes, thereby entrenching itself in power for the long run.[141] 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 organisations. 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.[142] In the electoral arena, new rules could introduce a requirement necessitating the achievement of two steps. First, electoral change (whether by ordinary law or constitutional amendment) could be prohibited as a government-party initiative until after that party has won two consecutive elections and, crucially, that the party's plans to change electoral laws (presented in sufficient detail) are an express and clear part of its policy platform *before* each election. This could be accompanied by an express constitutional prohibition on (or in the short term, promotion of an international norm against) bypassing these requirements through recourse to referenda – which has been a clear tactic used by Prime Minister Orbán in Hungary.[143]

5.6. The wider debate in which this discussion is couched

The above discussions are couched in a wider context of often intense change, regarding both fundamental change, within parties and across political-party systems, as well as shifts in the debates on the role of parties in democratic governance. In many states we are in the midst of

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[139] Marton Dunai, *Hungary's Jobbik party says might disband after second audit fine*, Reuters, February 2, 2019 https://www.reuters.com/article/us-hungary-opposition-fine-idUSKCN1PQ58Z.
[140] *See, e.g.*, Levitt, *supra*, note 34.
[141] *See, e.g.*, Pech & Scheppele, *supra*, note 32.
[142] See Rosalind Dixon and David Landau, *Tiered Constitutional Amendment*, 86(2) GEORGE WASH. L. REV. 438.
[143] *See* András Körösényi, *The theory and practice of plebiscitary leadership: Weber and the Orbán regime*, EAST EUROPEAN POLITICS AND SOCIETIES: AND CULTURES (First Online Articles: published 25 September 2018).

a wholesale realignment in political-party systems. In Europe one need only look at France, Sweden, Germany, or Italy. In the US, a forthcoming book by political veteran Frank J. DiStefano predicts the "crumbling" of the existing political-party system, and the emergence of entirely new parties.[144] Brazil's party system already experienced dramatic transformation in 2018.

An emerging debate concerns how best to fix the dysfunction in party systems. Some (especially in the U.S.A.) argue that the problem lies in how parties have themselves become disempowered, distorted, and less effective due to devolution of power to the grassroots (e.g., through mechanisms including primaries and local caucuses to select party candidates). Others insist that the centrality of parties must be broken by crafting new modes of participatory government. A recent book argues for a "directly representative democracy" as a new way of connecting citizens and elected officials to improve representative government, with congressional representatives meeting groups of their constituents "via online, deliberative town hall meetings to discuss some of the most important and controversial issues of the day."[145]

It appears that both arguments have limited application. In light of the discussion in this article, re-empowering parties may be a positive step in a state such as the U.S.A., but this does not address issues such as "shadow" parties or subversive leadership (at least, not immediately). In Europe, the issue is that democracy-threatening parties are already *too* powerful. Moreover, in a variety of states the political party has morphed from a vehicle for rational policy platforms and electoral contestation to a totem and vehicle of identity, narrative, and emotion: Korycki observes that PiS in Poland, for example, has a weak "programmatic identity" (in terms of clear policy platforms) but has achieved electoral success through a clear "political identity" with a central narrative of state capture by Communists and a return to traditional values.[146] As regards bypassing the centrality of parties entirely, scholars such as Seth Masket suggest that this has been attempted for at least a century now, with little success: the political party is an "inevitable" feature of democratic rule.[147]

Already, a burgeoning literature seeks to identify the fundamental drivers and broad structural factors fuelling the rise of "populist authoritarian" parties. Pippa Norris, Ron Inglehart and Yascha Mounk in the U.S.A., and European analysts such as Tomasz Koncewicz and Ivan Krastev, suggest the rise of illiberal parties and party politics in Europe as driven not just by economic issues but by a wider cultural backlash against rapid social change, and, in the European context, Western European hegemonic and universalising liberal democratic discourse, norms, and models, helped along by the impact of technology (e.g. social media) and a tendency toward demonising political opponents.[148] Addressing such deep-seated challenges is a generational project, far beyond any quick fix.

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[144] Frank J. DiStefano, THE NEXT REALIGNMENT: WHY AMERICA'S PARTIES ARE CRUMBLING AND WHAT HAPPENS NEXT (forthcoming, May 2019).

[145] See the abstract in Michael A. Neblo, Kevin M. Esterling & David M. J. Lazer, POLITICS WITH THE PEOPLE: BUILDING A DIRECTLY REPRESENTATIVE DEMOCRACY (2018).

[146] Korycki, *supra*, note 96.

[147] Seth Masket, THE INEVITABLE PARTY: WHY ATTEMPTS TO KILL THE PARTY SYSTEM FAIL AND HOW THEY WEAKEN DEMOCRACY (2016).

[148] See Inglehart & Norris, supra note 94; Ivan Krastev & Stephen Holmes, THE LIGHT THAT FAILED (forthcoming, 2019); and Yascha Mounk, THE PEOPLE VERSUS DEMOCRACY: THE RISE OF UNDEMOCRATIC LIBERALISM AND THE THREAT OF ILLIBERAL DEMOCRACY (2018).

6. Conclusion

This article had one central aim: 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, through a blend of theoretical and conceptual framing, global comparative analysis, and a fusion of law and policy considerations, the objective has been to emphasise just how much attention needs to be given to the often ambiguous and half-hidden 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. These negative dynamics will remain even if the current crop of democracy-threatening incumbents are ousted in forthcoming elections across the world. Identifying solutions is no easy task, especially given the extraordinary state of flux affecting political-party systems worldwide – and more widely, the fundamental shifts in how democratic governance itself is practiced and affected by everything from technology to inequality. There is no doubt that contemporary democracy requires wider re-thinking 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.