

ARTICLE

Against Militant Democracy

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Abstract

Militant democracy is the prevailing model for defending democracies against anti-democratic political parties. This article evaluates the militant democracy model, classifying the prohibition of political parties as its “hard” version, and the regulation of political parties and their members as its “soft” version. It then compares this with an alternative model, termed strategic democracy. Unlike militant democracy, which controls the supply side by abolishing anti-democratic parties, strategic democracy focuses on the demand side.

From a rule of law perspective, it will be argued that strategic democracy does not infringe on political rights, provides greater legal certainty, and aligns with the concept of tolerant democracy. Practically speaking, the strategic democracy model is considered more efficient as it leverages electoral systems where political parties, such as the parties against democracy, which in principle have more enemies than supporters, are effectively ostracized.

Keywords: Militant democracy; strategic democracy; electoral systems; prohibition of political parties

A. Introduction

According to Greek mythology, Jason and the Argonauts embarked on a hazardous journey aboard their ship, the Argo. One of their greatest challenges was navigating the Symplegades, two colossal clashing rocks that would crush any vessel attempting to pass between them. Phineus, a wise member of the crew, devised a clever strategy: by sending a dove through the Symplegades first, the rocks would collide and momentarily remain open, allowing the Argo to swiftly sail through before they snapped shut again. In the modern era, this mythos offers a powerful metaphor for democracy. If democracy is our Argo, and the Symplegades symbolize the threat of anti-democratic forces, the story reminds us that overcoming such dangers requires ingenuity, foresight, and strategic mechanisms. Just as the Argonauts relied on a calculated plan to navigate the clashing rocks, democracies today must employ strategies to safeguard their values and institutions against those who seek to undermine them.

Preserving democracy is seen as a very sensitive task for every democratic government, and safeguards are outlined in every constitutional order. Within this context, militant democracy—or defensive democracy—refers to a public policy aimed at defending the democracy in a polity by actively and forcefully suppressing any activities that threaten the democratic framework.¹

¹See Karl Loewenstein, *Militant Democracy and Fundamental Rights*, I, 31 AM. POL. SCI. REV. 417, 423 (1937) (coining the term militant democracy just before World War II); see Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L. J. 1, 18–19 (1995) (arguing that the idea of militant democracy derives from Schmitt who claimed that Democracy is based on a value choice that neither requires nor allows a process of self-abolition); see generally BASTIAAN RIJPKEMA, *MILITANT DEMOCRACY: THE LIMITS OF DEMOCRATIC TOLERANCE* (2018) (asserting that particular attention should be given to the role of judges, the legal framework and efficacy of party bans, and the procedural safeguards at both national and supranational levels that can ensure the prudent application

Conceived as a model to defend democracy from anti-democratic movements, it often involves a variety of legal and constitutional mechanisms,² such as the abolition of political parties or their regulation with ordinary administrative law³ and controls over the conduct of their members via ordinary criminal law.⁴ Recently, it was even proposed that a militant approach should be implemented in the social media platforms to regulate disinformation and radical speech, and in particular with social media platforms' burden on self-regulation.⁵

This Article evaluates this model and classifies the prohibition of political parties as the hard version of militant democracy and the regulation of political parties and of its members as the soft version.⁶ Then it compares it with the alternative model, what we call the strategic democracy model.⁷ This model employs an electoral system in which political parties, like the anti-democratic ones, with more enemies than supporters are ostracized. Unlike militant democracy, which controls the supply side by abolishing anti-democratic parties, strategic democracy focuses on the demand side.⁸ Most importantly, while militant democracy policies are inherently content-based, as they distinguish between acceptable and unacceptable political speech and behavior, electoral systems, at glance, appear to be content-neutral.⁹

Within this context, the Article first analyzes the differences between the two models, then evaluates them from a rule of law perspective. Then, it argues that the strategic democracy model, based on electoral law, is the most efficient and appropriate mechanism to safeguard democracies from anti-democratic parties. The Article contends that strategic democracy facing extreme political

of militant democracy measures); see KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES: THE SPELL OF PLATO* 265 (4th ed., 1962) (illustrating that the idea of militant democracy is in accordance with the understanding of Popper of the open society, and claiming that the limit of tolerance is not to tolerate the intolerant); see Christoph Bezemek, *Abuse of Human Rights: On Militant Democracy, in ABUSE OF LAW* 329, 329 (Luboš Tichý ed., 2017) (analyzing the European Court of Human Rights jurisprudence and concluding that the balance between protecting democracy and violating the values of democracy is a very delicate).

²See generally Catarina Santos Botelho & Nuno Garoupa, *Regulating Parties by Constitutional Rules in Liberal Democracies*, 24 GERMAN L. J. 1648 (2023) (arguing that regulation of political parties is essential to maintaining a balance between protecting democracy and safeguarding civil liberties, and conducting empirical analysis to find that different legal frameworks—common law vs. civil law—influence the extent and methods of party regulation).

³See, e.g., Aziz Z. Huq, *Militant Democracy Comes to the Metaverse?*, 72 EMORY L. J. 1105, 1132 (2023) (referring to modern administrative measures to safeguard democracy from extreme political parties, such as the restriction on funding or limitations on their right to participate in elections).

⁴See generally Jan-Werner Müller, *Individual Militant Democracy*, in *MILITANT DEMOCRACY AND ITS CRITICS: POPULISM, PARTIES, EXTREMISM* 13, (Anthoula Malkopoulou & Alexander S. Kirshner eds., 2019) (regarding militant democracy measures targeting individuals).

⁵Huq, *supra* note 3, at 1137–40.

⁶See generally Joanna Rak, *Conceptualising the Theoretical Category of Neo-militant Democracy: The Case of Hungary*, 49 POLISH POL. SCI. Y.B. 61, 65 (2020) (discussing further classifications that have emerged concerning the tools of militant democracy. Notably, the term neo-militant democracy refers to the modern adaptation of militant democracy, diverging from the traditional measures employed before and after World War II. Similarly, the term quasi-militant democracy describes a softer approach, where militant democracy tools are applied less drastically); see Franca Maria Feisel, *Thinking EU Militant Democracy Beyond the Challenge of Backsliding Member States*, 18 EUR. CONST. L. REV. 385, 386 (2022) (arguing that militant democracy also has applications at the supranational level. In the context of the European Union, for instance, various provisions address the status and relationship of member states that shift towards authoritarianism. The hard version of supranational militant democracy could involve expelling a member state from the EU, while the soft version may include sanctions or economic restrictions); see Ming-Sung Kuo, *Militant Democracy Unmoored? The Limits of Constitutional Analogy in International Law*, 35 EUR. J. INT'L L. 441, 445 (2024) (demonstrating a viewpoint that is critical to the application of militant democracy tools in international law as the normative character of militant democracy contradicts the basic features of the international law system).

⁷See generally Antonios Kouroutakis, *Anti-democratic Political Parties as a Threat to Democracy: Models of Reaction and the Strategic Democracy*, 29 PUB. L. REV. 310 (2018).

⁸See generally Peter Stone, *Democratic Equality and Militant Democracy*, in *MILITANT DEMOCRACY AND ITS CRITICS: POPULISM, PARTIES, EXTREMISM* 38 (Anthoula Malkopoulou & Alexander S. Kirshner eds., 2019) (focusing on the voting procedure and arguing that poor choices in voting represent a failure to fulfill the public-service purpose of voting: to properly assess candidates and determine who is most fit for office).

⁹Tom van der Meer & Bastiaan Rijpkema, *Militant Democracy and the Minority to Majority Effect: on the Importance of Electoral System Design*, 18 EUR. CONST. L. REV. 511, 514 (2022).

parties via the electoral system is more efficient, as practical evidence will show its potential success. At the same time, such a system is more appropriate, as it aligns better with rule of law values.

B. Defending Democracy: Militant Democracy in Action

1. Militant Democracy: Legal and Constitutional Mechanisms

Just before World War II, Loewenstein remarked on the alarming growth of fascist political parties across Europe, which threatened the foundation of democracy. He argued that “[i]f democracy is convinced that it has not yet fulfilled its destination, it must fight on its own plane a technique which serves only the purpose of power. Democracy must become militant.”¹⁰ Loewenstein highlighted the paradox of fascist parties exploiting fundamental rights and the tolerance inherent in democratic systems to propagate their ideology, expand their influence, and ultimately seize power. He asserted that “[i]f democracy believes in the superiority of its absolute values over the opportunistic platitudes of fascism, it must live up to the demands of the hour, and every possible effort must be made to rescue it, even at the risk and cost of violating fundamental principles.”¹¹

To address the challenge posed by extreme political parties, various policies can be implemented.¹² One approach is the prohibition and dissolution of such parties, which is considered as the hard version of militant democracy. Another approach involves a softer version, regulating these parties through ordinary administrative law by imposing sanctions and limiting their privileges within the system, such as state funding and access to public media. Alternatively, efforts can focus on party members, imposing administrative penalties or criminal sanctions.¹³

The prohibition and dissolution of extremist parties, although seemingly in conflict with the principle of freedom of association, can be justified. This freedom is not absolute and may be limited, especially when it clashes with the democratic values that underpin the regime. The rationale behind the direct regulation to abolish such parties stems from the concept of “defensive democracy”¹⁴ or the “militant democracy.”¹⁵ Philosophically, this concept holds that democracies cannot tolerate intolerant political parties.¹⁶

Banning such parties serves as a preemptive defense to protect the political rights of future generations.¹⁷

In practice, different legal systems have implemented various regulations to address this issue.¹⁸ The dissolution of non-democratic parties can occur preventively or *ex ante*, especially when political parties are required to register. At this initial stage, authorities examine the party’s name, emblems.¹⁹ For example, in Austria, a party cannot use the swastika emblem, while in Switzerland and Liechtenstein, parties cannot pursue unlawful aims.

¹⁰Loewenstein, *supra* note 1, at 423.

¹¹*Id.*

¹²See Karl Loewenstein, *Militant Democracy and Fundamental Rights*, II, 31 AM. POL. SCI. REV. 638, 644 (1937) (examining a number of countries, namely France, Belgium, the Netherlands, England, the Irish Free State, Sweden, Norway, Denmark, Finland, Switzerland, and Czechoslovakia, and classifying the measures adopted to face the extreme political parties).

¹³See Kouroutakis, *supra* note 7, at 317–19. (giving more details on these measures).

¹⁴See Walter F. Murphy, *Excluding Political Parties: Problems For Democratic And Constitutional Theory*, in *GERMANY AND ITS BASIC LAW* 173, 180 (Paul Kirchhof & Donald Kommers eds., 1993).

¹⁵See Loewenstein, *supra* note 1, at 430 (suggesting that democracies need to take a militant stance against the threats posed by fascist groups and parties).

¹⁶See JOHN RAWLS, *A THEORY OF JUSTICE* 220 (1999) (“[A]n intolerant sect does not itself have title to complain of intolerance, its freedom should be restricted only when the tolerant sincerely and with reason believe that their own security and that of the institutions of liberty are in danger. The tolerant should curb the intolerant only in this case.”).

¹⁷See generally Fox & Nolte, *supra* note 1.

¹⁸See Angela K. Bourne, *Democratization and the Illegalization of Political Parties in Europe*, 19 DEMOCRATIZATION 1065, 1067 (2012) (discussing political parties that are dissolved).

¹⁹See, e.g., ABZEICHENGESETZ 1960 [ABZG] [VIOLATIONS OF THE BADGES ACT 1960] BUNDESGESETZBLATT [BGBl.] No. 84/1960 (Austria) (banning the revival of the national socialist party and its organization).

Alternatively, *ex post* dissolution of political parties occurs if there is evidence that the party's activities contradict the constitutional order. For instance, the Basic Law of the Federal Republic of Germany prescribes in article 21, which is entitled "Political Parties," that:

(1) Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds. (2) Parties that, by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality²⁰

Similar constitutional regulations are observed in numerous countries. For example, many European nations, including Croatia²¹, Poland,²² Turkey,²³ and Israel²⁴ have implemented such measures. Spain²⁵ and France²⁶ also follow this model, where their constitutions impose a general

²⁰Grundgesetz [GG] [Basic Law], translation at http://www.gesetze-im-internet.de/englisch_gg/index.html; see also DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 217–24 (1997). See generally Donald P. Kommers, *Politics and Jurisprudence in West Germany: State Financing of Political Parties*, 16 AM. J. JURIS. 215 (1971).

²¹See USTAV REPUBLIKE HRVATSKE [CONSTITUTION OF THE REPUBLIC OF CROATIA] Dec. 22, 1990, art. 6 para. 4 (Croat.) ("Political parties which by their programs or violent activities aim to demolish the free democratic order endanger the existence of the Republic of Croatia are unconstitutional. The decision on unconstitutionality shall be made by the Constitutional Court of the Republic of Croatia.").

²²See KONSTITUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION OF THE REPUBLIC OF POLAND] Apr. 2, 1997, art. 13 (Pol.) (Political parties and other organizations whose programmes are based upon totalitarian methods and the modes of activity of nazism, fascism and communism, as well as those whose programmes or activities sanction racial or national hatred, the application of violence for the purpose of obtaining power or to influence the State policy, or provide for the secrecy of their own structure or membership, shall be prohibited.).

²³TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION OF TURKEY] Nov. 7, 1982, art. 69 (Turk.).

(The activities, internal regulations and operation of political parties shall be in line with democratic principles. The application of these principles is regulated by law. . . .) The dissolution of political parties shall be decided finally by the Constitutional Court after the filing of a suit by the office of the Chief Public Prosecutor of the Republic. The permanent dissolution of a political party shall be decided when it is established that the statute and programme of the political party violate the provisions of the fourth paragraph of Article 68.).

²⁴Basic Law: the Knesset, SH 244 (1958) 69 (Isr.).

(A candidates' list shall not participate in elections to the Knesset if its objects or actions, expressly or by implication, include one of the following: (1) negation of the existence of the State of Israel as the state of the Jewish people; (2) negation of the democratic character of the State; (3) incitement to racism.);

see also Raphael Cohen-Almagor, *Disqualification of Lists in 1988 and 1992: A Comparative Analysis*, in LAW, JUSTICE AND THE STATE 84, 88–103 (Michel Troper & Mikael M. Karlsson eds., 1995); see generally Raphael Cohen-Almagor, *Disqualification of Political Parties in Israel: 1988–1996*, 11 EMORY INT'L L. REV. 67 (1997); Suzie Navot, *Fighting Terrorism in the Political Arena: The Banning of Political Parties*, 14 PARTY POL. 745, 747 (2008).

²⁵See CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 311, Dec. 29, 1978, art. 6 (Spain)

(Political parties are the expression of political pluralism, they contribute to the formation and expression of the will of the people and are an essential instrument for political participation. Their creation and the exercise of their activities are free in so far as they respect the Constitution and the law. Their internal structure and their functioning must be democratic.);

see generally Leslie Turano, *Spain: Banning Political Parties as a Response to Basque Terrorism*, 1 INT'L J. CONST. L. 730 (2003); Katherine A. Sawyer, *Rejection Of Weimarian Politics or Betrayal of Democracy?: Spain's Proscription of Batasuna Under The European Convention On Human Rights*, 52 AM. UNIV. L. REV. 1531 (2003).

²⁶See Loi 212-1 du 10 janvier 1936 sur les groupes de combat et milices privées [Law of January 10, 1936 on Combat Groups and Private Militias], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 11, 1936, 521; see generally Pascal Mbongo, *Actualité' Et Renouveau De La Loi Du 10 Janvier 1936 Sur Les Groupes De Combat Et Les Milices Privées* [Reality and Renewal of the Law of January 10th, 1936 on Combating Private Militias], REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET À L'ÉTRANGER 716, (1998); see generally Loewenstein, *supra* note 12 (regarding the application of this law).

obligation on political parties to adhere to democratic principles. Alongside these constitutional provisions, formal laws explicitly regulate the dissolution of political parties. Additionally, in the United Kingdom, political parties that employ paramilitary and armed tactics are banned.²⁷

Undoubtedly, the dissolution of political parties is the most drastic measure to safeguard the democratic regime from parties that pose a threat to democracy. In late 1999, the Venice report recommended that “[s]tate authorities should also evaluate the level of threat to the democratic order in the country and whether other measures, such as fines, other administrative measures or bringing individual members of the political party involved in such activities to justice, could remedy the situation.”²⁸ Interestingly, in 2001, Turkey supplemented its traditional model with a softer approach sanctioning political parties. Specifically, the law on political parties was amended to include Article 104, which allows for the partial or full cut of state assistance to political parties.²⁹

Although this mechanism was proposed as an alternative safeguard against lesser threats, in Greece it was employed to face the rise of a Nazi party, the Golden Dawn. Since the adoption of the Greek Constitution in 1975, the issue of anti-democratic parties was not a constitutional concern. However, this changed when Golden Dawn received 7 percent of the popular vote in the May 2012 elections, ranking fifth and gaining twenty-one seats in Parliament. This development brought the issue of addressing non-democratic political parties to the forefront, leading to an intensified discussion. In June 2012, following the failure of the leading parties to form a government, new elections were called, and Golden Dawn again received 6.9 percent of the popular vote, maintaining its fifth-place ranking. In the 2014 European elections, Golden Dawn increased its share to 9 percent, ranking third.³⁰ By the 2015 elections, it had solidified its position as the third-largest political force in Greece.

Surprisingly, several months after the latest general elections, polls indicated that while most parties saw a decline in their share, Golden Dawn managed to maintain its support.³¹ Given that the Greek Constitution does not explicitly permit the dissolution of political parties and there was the belief that dissolution of political parties was not permitted,³² the soft model of militant democracy was employed to address the Golden Dawn issue. In response to the dramatic increase in racist violence linked to the rise of Neo-Nazi Golden Dawn,³³ a number of measures were adopted.

²⁷Public Order Act 1936, 1 Edw. 8 & 1 Geo. 6 c. 6 (Eng.).

²⁸THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, VENICE COMMISSION OF THE COUNCIL OF EUROPE, GUIDELINES ON PROHIBITION AND DISSOLUTION OF POLITICAL PARTIES AND ANALOGOUS MEASURES, 41st plen. sess., (CDL-INF(2000)001) (Dec. 10-11, 1999), <https://www.coe.int/en/web/venice-commission/-/guidelines-on-prohibition-and-dissolution-of-political-parties-and-analogous-measures-adopted-by-the-venice-commission-at-its-41st-plenary-session-venice-10-11-december-1999-in-english-1> (adopting guidelines on prohibition and dissolution of political parties and analogous measures).

²⁹*Commission of the European Communities, 2003 Regular Report on Turkey's Progress Towards Accession*, at 33, COM (2003) 676 final (Nov. 5, 2003).

³⁰National Results: Greece | 2014–2019 Constitutive Session, European Parliament (last updated July 2019), <https://results.elections.europa.eu/en/national-results/greece/2014-2019/constitutive-session/> (last visited July 31, 2025).

³¹See *European Commission, European Economic Forecast: Spring 2016*, at 1, COM Institutional Paper 025 (May 3, 2016), https://ec.europa.eu/info/sites/info/files/file_import/ip025_en_2.pdf (providing context for Golden Dawn's rise in popularity. This phenomenon in Greece is inextricably related to the financial crisis and the austerity measures. However, the recent electoral results in central and north Europe came to refute the theory that correlates the rise of nationalism with the austerity measures and the far right parties as a “refuge of the poor”. France is not a country battered by the Eurozone crisis, and Austria and the Netherlands have the lowest unemployment rates in the EU.).

³²Antonios Kouroutakis, *Anti-democratic Political Parties as a Threat to Democracy: Models of Reaction and the Strategic Democracy*, 29 PUB. L. REV. 310, 317 (2018).

³³See EUR. COMM'N AGAINST RACISM & INTOLERANCE, *Report on Greece (Fifth Monitoring Cycle)* (Feb. 19, 2015), <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Greece/GRC-CbC-V-2015-001-ENG.pdf>; see also THE RACIST VIOLENCE RECORDING NETWORK 2014 ANNUAL REPORT, RACIST VIOLENCE RECORDING NETWORK (2015), <http://rvrn.org/2015/05/annual-report-2014/>.

In late 2012, the Ministry of Public Order and Citizens Protection introduced special police units to tackle racist violence. These units were granted the authority to conduct in-depth investigations into racist attacks, initiate investigations *sua sponte*, and receive anonymous complaints.³⁴ Additionally, in October 2013, a Prosecutor was appointed specifically to prosecute acts of racist violence.³⁵

The most significant development occurred in September 2013, when the Golden Dawn leadership was arrested and detained for criminal offenses.³⁶ In response, the Greek Parliament amended the rules for public funding of political parties. Under the new law, state funding and financial support were temporarily suspended if a party leader or one-fifth of the party's members were criminally prosecuted and imprisoned, as was the case with Golden Dawn.³⁷

Furthermore, in September 2014, the Greek Parliament amended the criminal code³⁸ by adopting the framework decision on combating certain forms and expressions of racism and xenophobia through criminal law,³⁹ which had been due since 2010.⁴⁰ Thus, a combination of criminal and administrative law was employed to address the Neo-Nazi party Golden Dawn.

Historical precedents of similar measures can be found. For instance, Capoccia notes that special anti-extremist legislation existed in the Weimar Republic. The Law for the Protection of the Republic, passed in 1923 and reiterated in a partially weakened form in 1930, imposed restrictions on certain types of extremist activities.⁴¹ Likewise, in 1940, the U.S. Federal Government adopted the Alien Registration Act, also known as the Smith Act, which set criminal penalties for advocating the overthrow of the U.S. government.⁴²

³⁴Proedriko Diatagma (2012:132) Systasi Tmimáton kai Grafeion Antimetopisis Ratsistikís Vías [Establishment of Departments and Offices for Combating Racist Violence], Government Gazette, Series A, Issue 239, dated Dec. 11, 2012 (Greece), which was later substituted by Proedriko Diatagma (2017:7) Anadiatixi - anadiorganosi, systasi kai leitourgia periferiakón ypíresión Ellinikís Astynomías (Reorganization and establishment of regional services of the Hellenic Police), Government Gazette, Series A, Issue 14, dated Feb. 9, 2017 (Greece).

³⁵PROSECUTOR'S OFFICE OF ATHENS, DECISION NO. 3/2013: APPROVAL OF ITS INTERNAL OPERATION REGULATION art. 18 (2013).

³⁶Renee Maltezos, *Greek Police Arrest Leader, Lawmakers of Far-Right Golden Dawn*, REUTERS WORLD NEWS, (Sept. 28, 2013 at 1:18 PM EDT), <https://www.reuters.com/article/greece-goldendawn/update-5-greek-police-arrest-leader-lawmakers-of-far-right-golden-dawn-idINL5N0HO02D20130928/>.

³⁷Nomos (2013:4203) Rythmíseis thematón Ananeosímon Pígon Energeías kai álles diatákseis [Provisions on Renewable Energy Sources and other regulations] EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D.] 2013, A:235 (Greece) (law challenged before the Council of State and the court dismissed all the claims of Golden Dawn); see Symboulíon Epikrateías [S.E.] [Supreme Administrative Court] 518/2015, p. 20-22 (Greece) (discussing the law's consideration that the possible involvement of Parliament members and members of the party is a serious reason, which makes the suspension of state financial support to this political party constitutionally tolerable, given that the suspension is of a temporary nature).

³⁸Nomos (2014:4285) Tropopóisi tou n. 927/1979 (A' 139) kai prosarmogi tou stin apófasi-plaísio 2008/913/DEY tis 28is Noemvriou 2008, gia tin katapolemísi orísmenon morfón kai ekdíloseon ratsismou kai xenofovías meso tou poinikou díkaiou (L 328) kai álles diatákseis. [Amendment of Law 927/1979 (Official Gazette A' 139) and its alignment with Framework Decision 2008/913/JHA of 28 November 2008, on combating certain forms and expressions of racism and xenophobia by means of criminal law (L 328), and other provisions] EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D.] 2014, A:191/10.9 (Greece).

³⁹Council Framework Decision 2008/913/JHA of Nov. 28, 2008, on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, 2008 O.J. (L 328) 55 (EU).

⁴⁰See *id.* (noting the framework decision's deadline for transposition in the Member States, which was four years earlier in November 11, 2010).

⁴¹Giovanni Capoccia, *Defending Democracy: Reactions to Political Extremism in Inter-War Europe*, 39 EUR. J. POL. RSCH. 431, 437 (2001).

⁴²Alien Registration Act of 1940, ch. 439, 54 Stat. 670 (codified as amended at 18 U.S.C. § 2385 (2024)).

II. Militant Democracy and its Critics

Loewenstein arguing in favour the party dissolution mechanism has remarked the following:

Democracies are legally bound to allow the emergence and rise of anti-parliamentarian and anti-democratic parties under the condition that they conform outwardly to the principles of legality and free play of public opinion. It is the exaggerated formalism of the rule of law which under the enchantment of formal equality does not see fit to exclude from the game parties that deny the very existence of its rules.⁴³

Sartori, focusing on two early cases that have set the legal framework of banning non-democratic political parties in Germany, the former in 1952 on the Socialist Reich Party⁴⁴ and the latter in 1956 on the Communist Party,⁴⁵ argues that these “judicial decisions have fundamentally altered the ‘natural development’ of the party system.”⁴⁶ Broadly speaking, such regulations are common to legal orders that suffer from extreme undemocratic waves or have faced non-democratic regimes in the past.⁴⁷

From a rule of law point of view, the direct model of party dissolution provides certainty and clarity, but it imposes a burden to the freedom of association and is incompatible with the concept of pluralism. Courts equally have the paramount role to defend the democracy from non-democratic parties and at the same time, they have to act as a safeguard against any unnecessary and disproportionate infringement of the right of association.⁴⁸ Thus, the role of the courts is critical as a safeguard for both the democracy and the rule of law.

While non-democratic parties exploit the guarantees and the rights of the democratic regime to challenge the democracy itself, it is questionable as to how far drastic policies, like the dissolution of political parties, is compatible with the quintessence of democracy that reserves the right to the people to “alter or abolish the established Constitution whenever they find it inconsistent with their happiness.”⁴⁹ In line with the above, Malkopoulou and Norman criticize the model of militant democracy because it fails to respect the principle that in a democracy there is no dominant force with the arbitrary power to approve or disapprove political forces.⁵⁰

That said, this model of reaction is a Trojan horse in the democratic regime as the dissolution of political parties infringes the right of participation in the political arena, and hampers the political

⁴³Loewenstein, *supra* note 1, at 424.

⁴⁴See Sozialistische Reichspartei, 2 BVerfGE 1, 39, 40 (BVerfG, Oct. 23, 1952) (Ger.) (declaring unconstitutional the Socialist Reich Party and consequently dissolving it: “The special importance of the parties in a democratic state justifies their exclusion from political life not just when they are fighting individual rules, and even entire institutions of the Constitution by legal means, but only if they want to shake supreme fundamental values of liberal democratic constitutional state,” and limiting the application of the article 21 as it ruled that the article 21 does not apply to the internal structure of the political parties).

⁴⁵Kommunistische Partei Deutschlands, 5 BVerfGE 85, 242, 247 (BVerfG, Aug. 17, 1956) (Ger.) (holding that Article 21, paragraph 2 of the Basic Law is not a basic principle in contradiction to the Constitution, but an expression of conscious constitutional political will to solve a marginal problem of the liberal democratic political system, which is the incapability of the principle of neutrality to defend itself from political parties who threaten the political system: “The latest development shows that even the liberal democracies cannot pass the practical political problem of the elimination of anti-constitutional parties from political life, once the state has reached a certain degree of danger.”).

⁴⁶GIOVANNI SARTORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING: AN INQUIRY INTO STRUCTURES, INCENTIVES AND OUTCOMES* 106 (1994).

⁴⁷Yigal Mersel, *The Dissolution of Political Parties: The Problem of Internal Democracy*, 4 INT’L J. CONST. L. 84, 93 (2006).

⁴⁸See THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, *supra* note 29, at 5 (“The prohibition or dissolution of a political party should be decided by the Constitutional court or other appropriate judicial body in a procedure offering all guarantees of due process, openness and a fair trial.”).

⁴⁹THE FEDERALIST NO. 78, at 468 (Alexander Hamilton).

⁵⁰Anthoula Malkopoulou & Ludvig Norman, *Three Models of Democratic Self-Defence: Militant Democracy and its Alternatives*, in MILITANT DEMOCRACY AND ITS CRITICS: POPULISM, PARTIES, EXTREMISM 92, 98 (Anthoula Malkopoulou & Alexander S. Kirshner eds., 2019).

competition.⁵¹ In a democratic society, political parties are a key component. They mediate and express the will of the people, not only instantly to highlight their representatives, but in general to legitimize the state power in all its basic forms.

Issacharoff accurately notes that “limiting the scope of democratic deliberation necessarily calls into question the legitimacy of the political process.”⁵² On top of that, it is always safe to keep in mind that it is equally and even more risky when a democratic government with a democratic agenda on paper acts in a totalitarian way. Suffice to mention here, the data analysis from Diamond who finds that since 2000, “25 breakdowns of democracy in the world [occurred]—not only through blatant military or executive coups, but also through subtle and incremental degradations of democratic rights and procedures that finally push a democratic system over the threshold into competitive authoritarianism.”⁵³

All told, the dissolution of political parties involves striking a balance between defensive democracy and intolerant democracy. This by default is a herculean task, which shall be used rarely and under caution. While this nuclear option is a *sine qua non*, once non-democratic parties gain widespread and solid support in a national level, it does not alternate the fact that the dissolution of political parties, as a policy, is a mark of “totalitarianism.”

Apart from the theoretical concerns, the application of this model in practice has its pros and cons as it worked in some countries but failed in others.⁵⁴ In particular, the dissolution of political parties is a short-term policy without any long term effect. It is a policy of exclusion; however, there is nothing that can prevent a dissolved party from rebranding itself and reappearing in the political arena. The voters of the abolished party might follow another newly founded party under a new label. To exemplify that, this was the case of Turkey with the series of Kurdish and Islamist parties that are banned and outlawed for more than 20 times.⁵⁵

In other words, the effort to silence anti-democratic parties does not have a permanent result. The ban causes the victimization of the political ideology, and when the conditions are met, such parties will reappear. Therefore, the dissolution of political parties should be regarded as exceptional measures, like the emergency provisions.

However, the softer version of militant democracy through administrative and criminal laws employed to regulate extreme political parties and their members apparently does not curtail the freedom of association, and it is a mild interference in the political completion among different parties in democracies. Nevertheless, such repressive legal tools can be subject to abuse. In theory, the government—executive and legislature—has a crucial role adopting laws and tailoring the restrictions against the anti-democratic parties, while the role of the courts is more like a safeguard.

The first concern is related to the lawmaking process, as it is clearly suspicious when lawmakers adopt *ad hominem* legislation against a specific party. In particular, the case of Greece has shown that the Greek Parliament, on the wake of the criminal charges against the Parliament members of the Neonazi Party Golden Dawn, has adopted tailored regulations. More precisely, the *ad hominem*

⁵¹See Angela K. Bourne, *Democratization and the Illegalization of Political Parties in Europe*, 19 DEMOCRATIZATION 1065, 1066 (2012).

⁵²Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1411 (2007).

⁵³Larry Diamond, *Facing Up to the Democratic Recession*, 26 J. DEMOCRACY 141, 144 (2015).

⁵⁴See Tim Bale, *Are Bans on Political Parties Bound to Turn Out Badly? A Comparative Investigation of Three 'Intolerant' Democracies: Turkey, Spain, and Belgium*, 5 COMPAR. EUR. POL. 141, 145–54 (2007) (arguing that the ban of political parties was successful in practice for the cases of Belgium, Spain and Turkey, despite contrary arguments that this model was successful in Germany and unsuccessful in Turkey given the numerous reappearances of the same parties).

⁵⁵Factbox: Turkey's History of Banning Parties, REUTERS (May 3, 2010), <https://www.reuters.com/article/world/factbox-turkeys-history-of-banning-parties-idUSTRE6423UA/>.

legislation that prescribed for the withdrawal of state subsidies “for parties that have its members prosecuted.”⁵⁶

Furthermore, concerns emerge in relation to the role of the courts acting as rule of law safeguards. It is argued that courts’ capacity to play a central role in shaping militant democracy measures depends on resources, independence, and the statutory environment.⁵⁷ Furthermore, in times of political gravity when political parties threaten the constitutional regime, courts would possibly defer the decision-making to the political branches of the government; therefore, it is questionable whether they can perform their role as a safeguard efficiently. Even the European Court of Human Rights, due to the vast history of antidemocratic political parties in Europe, shows deference to national governments when political parties are banned.⁵⁸

The McCarthy era epitomizes the failure of the Courts to act as a safeguard. When a series of prosecutions took place in the U.S. against the Leaders of the Communist Party based on the Smith Act, also known as the Smith Act trials of Communist Party leaders, the Supreme Court in the *Dennis* case⁵⁹ did not accept their defense based on the first amendment and free speech, and failed to apply properly the clear and present danger standard.⁶⁰ Stone accurately remarks that the defendants should have been convicted for their actions, and not for their advocacy in favour of a political ideology.⁶¹

Most importantly, the softer version of militant democracy is not sufficient to face the surge of extremist political parties. In theory, the softer version follows the strategy of inclusion, as it does not dissolve the political party, but it uses the ordinary mechanisms of criminal law and administrative law to progressively minimize its impact. Historically, the Weimar Republic employed this model, but obviously, the soft version of militant democracy failed to halt the rise of the Nazi Party.⁶² Also, it is a long-term policy whose outcome will be apparent in the long run.

Suffice to mention here, many years after the first successful electoral campaign of Golden Dawn in Greece in 2012, despite the administrative sanctions and the prosecution of its members, Golden Dawn was in the political arena while the role of the party is equally toxic inside and outside the parliament. Eventually in Greece with ordinary legislation it was enacted laws which allowed the dissolution of political parties.⁶³

What is particularly concerning, however, is when extreme political parties adopt strategies to normalize their public discourse and moderate their external actions while secretly maintaining

⁵⁶See Nomos (2013:4203), *supra* note 37; see also *Symboulion Epikrateias* [S.E.] [Supreme Administrative Court] 518/2015 (addressing Golden Dawn’s constitutional challenge to the law).

The possible involvement of members of the leadership of a political party . . . in criminal acts constitutes in view of the nature of the offenses and their link to the smooth functioning of the democratic system, a serious reason for the suspension of state financial support to that political party, which is constitutionally tolerable, in particular because the suspension is of a temporary nature.).

⁵⁷See generally Max Steuer, *The Role of Judicial Craft in Improving Democracy’s Resilience: The Case of Party Bans in Czechia, Hungary and Slovakia*, 18 EUR. CONST. L. REV. 440 (2022).

⁵⁸Paul Harvey, *Militant Democracy and the European Convention on Human Rights*, 29 EUR. L. REV. 407, 417–18 (2004).

⁵⁹*Dennis v. United States*, 341 U.S. 494, 503 (1951).

⁶⁰See GEOFFREY STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 409 (2004) (providing further details and criticism on *Dennis*).

⁶¹*Id.* at 410.

⁶²See Loewenstein, *supra* note 12.

⁶³See Nomos (2023:5019), *Ensomátosis tis odigías* (EE) 2020/1828 [Incorporation of Directive (EU) 2020/1828], EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D.] 2023, A:102 (as amended by Nomos (2023:5043) *Rythmiseis schetika me tous Organismous Topikis Autodioikisis A’ kai B’ bathmou – Diatakseis gia tin evzoia ton zoon syntrofias – Diatakseis gia to anthropino dynamiko tou dimosiou tomea – Loipes rythmiseis tou Ypourgeiou Esoterikon kai alles epeigouses diatakseis* [Provisions concerning first- and second-level Local Government Authorities – Provisions for the welfare of companion animals – Provisions regarding human resources in the public sector – Other regulations of the Ministry of the Interior and other urgent provisions], EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D.] 2023, A:102 (Greece).

radical elements behind the scenes. This tactic, known as “frontstage moderation,”⁶⁴ allows them to shield themselves from militant democracy measures by presenting a more acceptable public image. A notable example of this can be observed in Germany with the political party Alternative for Germany (AfD), a radical-right party. By employing front-stage moderation, the AfD has thus far managed to evade the application of militant democracy measures, despite its radical underpinnings.

All in all, the soft version of militant democracy appears more in restricting low-risk cases when the influence of non-democratic political parties is limited. However, Loewenstein himself questioned the efficiency of militant democracy’s tools, stating: “Can an Idea be Suppressed? At this juncture, a serious objection may be raised. No spiritual movement can, in the long run, be suppressed merely by legislative and administrative measures.”⁶⁵ Indeed, law is a crucial mechanism for maintaining justice, peace, and order within society. However, law as a tool has its limitations. It cannot address moral, ethical, and ideological considerations on its own. Laws are meant to be neutral regarding the political views of individuals. When laws are enacted to combat a specific ideology, they can be perceived as unjust and oppressive, occasionally reinforcing the beliefs of those who feel oppressed.

C. The Strategic Democracy Model

The role of citizen action in defending democracy against anti-democratic parties is the central focus of Olsen’s analysis.⁶⁶ He examines how citizens respond under different scenarios: first, when anti-democratic political parties gain representation, remain in opposition, and exert influence on politics, and second, when such parties come to power and either partially or fully dismantle democratic institutions.

Based on the role of citizens in these contexts, the article proposes an alternative approach to protecting liberal democracies from the internal threats posed by anti-democratic parties. This approach emphasizes the strategic use of electoral laws, which are the ultimate tool of political expression, rather than relying on legal rules that impose restrictions on political expression.⁶⁷ By focusing on electoral frameworks, the article offers a pathway that empowers citizens to act as defenders of democratic values while avoiding direct constraints on political freedoms. While the significance of electoral systems has often been underestimated, as Sartori noted,⁶⁸ it appears that electoral law can indeed offer policymakers and lawmakers a highly effective tool to address the rise of extreme political parties.

The following section will argue that electoral systems permitting strategic voting empower voters to penalize extreme political parties, thereby limiting the electoral success of these parties. This section will focus on four main electoral systems: the plurality election system with single-member districts, the second-round voting system, the alternative vote system, and the proportional representation system, and it will classify electoral systems into two broad categories: those electoral systems that facilitate strategic voting, and those who do not. It will analyze how these electoral systems enable voters to maximize the effectiveness of their votes by supporting candidates with a realistic chance of winning while simultaneously punishing candidates they strongly dislike.

⁶⁴See Franziska Brandmann, *Radical-Right Parties in Militant Democracies: How the Alternative for Germany’s Strategic Frontstage Moderation Undermines Militant Measures*, 18 EUR. CONST. L. REV. 412, 414 (2022) (providing more details about frontstage moderation).

⁶⁵See Loewenstein, *supra* note 1, at 431.

⁶⁶Tore Vincents Olsen, *Citizens’ Actions against Non-liberal-democratic Parties*, 18 EUR. CONST. L. REV. 466, 466 (2022).

⁶⁷See Gur Bligh, *Extremism in the Electoral Arena: Challenging the Myth of American Exceptionalism*, BYU L. REV. 1367, 1373–74 (2008) (arguing that indirectly electoral systems, such as the first past the post, de facto affect the political expression by promoting a more moderate political expression).

⁶⁸SARTORI, *supra* note 46, at 27.

1. Electoral Systems Facilitating Strategic Voting

In some democracies party dissolution mechanisms or specialized administrative and criminal laws to sanction the members of extreme political parties are not necessary. Countries with a plurality election system combined with single-member districts—commonly known as the first-past-the-post system—such as the U.S., Canada, and the UK, naturally limit the electoral strength of political parties that pose a threat to democracy.⁶⁹ This phenomenon is explained by Duverger's Law, which observes that plurality election systems with single-member districts tend to favor a two-party system.⁷⁰

While the relationship between electoral law and party systems is well established, there is also an indirect connection between electoral law and extreme political parties. The Independent Commission on the Voting System, also known as the Jenkins Commission, highlighted this connection.⁷¹ It stated that the "winner takes all" and "loser (particularly second or third losers) gets very little" effects of the plurality system encourage parties to broaden their appeal and thereby discourage extremism.⁷²

This perspective is supported by scholars such as Gidens⁷³ and Norris.⁷⁴ Mersel⁷⁵ also accurately remarks that the difficulty a single-member district poses in a plurality system concerns the formation of any third party, not just undemocratic ones, because rational voters typically vote for one of the two main alternatives with a real chance of winning. This phenomenon leads to a centralized ideological spectrum focused on the median voter, making it unlikely for extremist or non-democratic parties to gain significant support. In other words, when a non-democratic political party is popular in a specific constituency, voters in that constituency are likely to support the party with the best chance of winning, regardless of their political ideology, to prevent the non-democratic party from gaining the seat. This is the essence of strategic voting.⁷⁶ Consequently, political parties will adjust their rhetoric to counter the non-democratic party.

Due to strategic voting in plurality election systems with single-member districts, extreme political parties consistently fail to gain a majority in any single-member district, thus posing no threat to the constitutional order. However, there is a risk that extreme political voices may infiltrate mainstream parties, rendering the entire political system vulnerable. The Jenkins Commission noted that "in certain circumstances it encourages extremists to infiltrate moderate parties because the system gives them so little to gain on their own."⁷⁷

In like manner, the second-round voting system, essentially a simple majority system with a second ballot, requires a candidate to secure a majority of votes to win the seat—a first-past-the-post result is insufficient. Although this system encourages multipartyism,⁷⁸ the second round, where only two candidates compete during the second round, opens the door to strategic voting. Voters are pressured to choose their second or even third preferences. Sartori noted that "at this stage [second round] the voter does become pressured into 'strategic voting'"⁷⁹ for likely winners.

⁶⁹See also Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L. J. 1, 22–23 (1995) (discussing the UK's adopted legislation regarding the dissolution of military parties and the use of the soft version of militant democracy during the McCarthy era in the U.S.).

⁷⁰MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANISATION AND ACTIVITY IN THE MODERN STATE* 217 (1954).

⁷¹INDEPENDENT COMMISSION ON THE VOTING SYSTEM, 1998, Cm. 4090, at para. 19 (UK).

⁷²*Id.* at para 19 (recording the same effect at the second ballot system which is implemented, for instance in France, during the second round of the Presidential election).

⁷³See generally TERRI E. GIVENS, *VOTING RADICAL RIGHT IN WESTERN EUROPE* (2012).

⁷⁴See generally PIPPA NORRIS, *RADICAL RIGHT: VOTERS AND PARTIES IN THE ELECTORAL MARKET* (2005).

⁷⁵Mersel, *supra* note 47, at n. 44.

⁷⁶See GARY COX, *MAKING VOTES COUNT: STRATEGIC COORDINATION IN THE WORLD'S ELECTORAL SYSTEMS (POLITICAL ECONOMY OF INSTITUTIONS AND DECISIONS)* 232 (1997) (discussing strategic voting in relation to candidates of extreme political parties).

⁷⁷INDEPENDENT COMMISSION ON THE VOTING SYSTEM, 1998, Cm. 4090, at 19 (UK).

⁷⁸DUVERGER, *supra* note 70, at 239.

⁷⁹SARTORI, *supra* note 46, at 64.

Consequently, if one of the two remaining candidates poses a threat to the democratic regime, voters favoring democracy are likely to support the other candidate to block the non-democratic contender.

The second-round voting system thus serves as an effective mechanism for voters and political parties to block non-democratic parties. The case of France exemplifies this phenomenon, particularly with the extreme right-wing party “Front National” under Jean-Marie Le Pen. Shields observed that during the local elections in France in 1985, despite the Front National securing over 30 percent of votes in some constituencies and outpacing mainstream parties, it won only one seat out of 2,000 due to the two-round electoral system.⁸⁰ The French parliamentary elections of 1986 and 1988 highlight the significance of the second-round voting system in blocking non-democratic political parties. In 1986, parliamentary elections were held using the proportional representation system for the first time, allowing the Front National to gain its first legislative seats. The party received 2,703,442 votes, amounting to 9.65% of the total votes, and secured thirty-five seats.

However, in the 1988 elections, Prime Minister Chirac reintroduced the second-round voting system through a new electoral law.⁸¹ Despite the Front National obtaining a similar number of votes—2,359,528—and percentage—9.66%—it ended up with only one seat, losing thirty-four seats compared to the previous election. Shields noted that “to the FN group as a whole, it was clear that their days in the National Assembly would be numbered since one of the first steps taken by the Chirac government was to reinstate the two-round system of majority voting for the next legislative elections.”⁸²

An examination of parliamentary debates on the bill drafting reveals no evidence that the second-round voting system was deliberately chosen to counter the rise of an extreme political party. It is more likely that the Chirac government reinstated the second-round system as a strategic move to reclaim votes from the Front National in the second round, thereby gaining a partisan advantage. The unintended side effect was the limitation of an extreme political party’s power.

Finally, the alternative voting system, also known as Instant Runoff Voting or Ranked Choice Voting, which grants each elector within a single-member district multiple votes of unequal weight, allowing them to rank candidates in order of preference,⁸³ encourages citizens to engage with the political landscape more deeply, requiring them to consider the platforms and activities of multiple parties.⁸⁴ Equally significant is the shift in incentives for political parties, as they must now vie not only for the support of their base but also for broader appeal across the electorate.

Essentially, the alternative voting system operates as a preferential method wherein voters rank candidates according to their preferences. An intriguing example of the alternative voting system’s impact occurred in 1998 when the Jenkins Commission proposed its use, alongside a top-up system, while examining electoral systems abroad. In its report, the Commission noted Australia’s experience with the alternative vote system, highlighting that in the October 1998 election, Pauline Hanson’s One Nation Party, despite significant anticipation, failed to retain even the seat of its leader due to the Alternative Vote mechanism.⁸⁵

⁸⁰JAMES SHIELDS, *THE EXTREME RIGHT IN FRANCE* 209 (2014).

⁸¹See generally Loi 86-825 du 11 juillet 1986 relative à l’élection des députés et autorisant le gouvernement à délimiter par ordonnance les circonscriptions électorales [Law 86-825 of July 11, 1986 Relating to the Election of Deputies and Authorizing the Government to Delimit Electoral Constituencies by Order], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 12, 1986.

⁸²SHIELDS, *supra* note 80, at 217.

⁸³See SARTORI, *supra* note 46, at 6–7 (discussing the alternative vote system).

⁸⁴See Pippa Norris, *Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems*, 18 INT’L POL. SCI. REV. 297, 302 (1997) (making apparent that the Single Transferable Vote shares the same philosophy as the alternative vote system; however, it is distinct as the country is divided into multi member constituencies).

⁸⁵INDEPENDENT COMMISSION ON THE VOTING SYSTEM, *supra* note 71, at 75.

This observation underscores a key aspect of the alternative voting system: its capacity to promote strategic voting. By allowing voters to express multiple preferences through ranking candidates, it fosters centripetal forces among political parties.⁸⁶ Similar to the plurality system with single districts, this often results in the prevalence of centrist policies, while non-democratic political parties face diminished prospects of electoral success, as they typically rank lower in the preferences of the majority of voters.⁸⁷

Furthermore, the alternative vote system shares a common feature with the second-round system: both penalize parties with broad opposition. Extreme political parties, which often garner strong support from a dedicated base but face widespread opposition, exemplify the parties most heavily penalized by these voting systems.⁸⁸ This characteristic further reinforces the role of alternative voting in safeguarding democratic principles by discouraging the ascent of parties that pose threats to democratic norms.

II. The Proportional Representation Systems Making it Difficult to Vote Strategically

On the contrary, the orthodox view is that the proportional representation system⁸⁹ is often considered the most vulnerable to the influence of extreme political parties. Loewenstein himself recognized the vulnerability of representation systems, characterizing it as the “gravest mistake of the democratic ideology.”⁹⁰ This system appears to present a challenge by potentially allowing such parties to secure seats in the legislative body.⁹¹ Perspective is based on several factors: higher representation of minor parties, fragmentation of the political landscape, and lower electoral thresholds.

This system provides a platform for a wide range of political views, even to enabling them to exploit democratic guarantees and pose a direct challenge to the democratic regime. The conventional understanding is that the proportional representation system reflects the diverse political spectrum, accommodating parties of varying ideologies, including extreme and antidemocratic ones.⁹² In such systems, voters can easily express their preferences sincerely, leading to the representation of a wide array of political viewpoints.⁹³

This concern was articulated by a member of Parliament during debates on the electoral system, who argued against the adoption of proportional representation, stating that a country “cannot seek to give smaller parties more influence and then complain when small, extremist parties get elected and start wielding real political power.”⁹⁴

⁸⁶Gary W. Fox, *Electoral Equilibrium under Alternative Voting Institutions*, 31 AM. J. POL. SCI. 82, 92 (1987).

⁸⁷See generally DONALD L. HOROWITZ, A DEMOCRATIC SOUTH AFRICA? CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY 188 (1991) (discussing the use of this electoral system in South Africa, an ethnically divided country); Jon Fraenkel & Bernard Grofman, *A Neo-Downsian Model of the Alternative Vote as a Mechanism for Mitigating Ethnic Conflict in Plural Societies*, 121 PUB. CHOICE 487, 489 (2004); Donald L. Horowitz, *Where Have All the Parties Gone? Fraenkel and Grofman on the Alternative Vote – Yet Again*, 133 PUB. CHOICE 13, 14 (2007).

⁸⁸Richard Rose, *Elections and Electoral Systems: Choices and Alternatives*, in DEMOCRACY AND ELECTIONS: ELECTORAL SYSTEMS AND THEIR POLITICAL CONSEQUENCES 20, 32 (1983).

⁸⁹See *Electoral System Design Database*, INT’L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, <https://www.idea.int/data-tools/data/electoral-system-design> (last visited Jan. 9, 2017) (demonstrating that the proportional representation system is widely used around the world for the election of the members of the legislative body).

⁹⁰LOEWENSTEIN, *supra* note 1, at 424.

⁹¹See NORRIS, *supra* note 74, at 114 (“Despite having roughly the same share of the vote [under PR as under majoritarian elections, radical right wing parties] were more than twice as successful in gaining seats under PR as under majoritarian elections.”).

⁹²PIERO IGNAZI, *EXTREME RIGHT PARTIES IN WESTERN EUROPE* 205 (2003); RICHARD S. KATZ, *DEMOCRACY AND ELECTIONS* 154 (1997).

⁹³ROBIN FARQUHARSON, *THEORY OF VOTING* 25 (1969).

⁹⁴HC Deb (2 June 1998) (313) col. 179 (UK).

The vulnerability of the proportional representation system is underscored by the words of Mitterrand, who commented on its introduction, acknowledging that he believed “a victory for the RPR and its allies represented a greater risk to the country than the election of some Front National deputies.”⁹⁵

Weill’s research demonstrates that democracies operating under a system of proportional representation are more likely to incorporate at least one of the two key militant democracy mechanisms—either party bans or eternity clauses—within their constitutional or legal framework. According to his findings, an overwhelming 94.5 percent of proportional representation (PR) countries have implemented at least one of these measures to safeguard their democratic order. In contrast, only 55.5 percent of countries utilizing a majoritarian electoral system, such as the First-Past-the-Post (FPTP) system, have adopted similar protective measures.⁹⁶

However, certain configurations can mitigate this vulnerability by encouraging strategic voting. According to the Gibbard-Satterthwaite theorem, all electoral systems offer opportunities for strategic voting.⁹⁷ However, as noted in a report submitted to the Jenkins Commission, the ease of strategic voting varies depending on the system’s complexity and the information available to voters.⁹⁸

In proportional representation systems, strategic voting can be enhanced by two technical features: the electoral threshold and the district magnitude, also known as the natural threshold.⁹⁹ The adoption of an electoral threshold, or threshold of exclusion,¹⁰⁰ whether national or local, is often understood as a solution to prevent the surge of extreme political parties.¹⁰¹ This threshold sets quotas that political parties or candidates must reach to gain seats in the legislative body.

In theory, the implementation of electoral thresholds—whether at the national or local level—entails quotas that political parties or candidates must meet to qualify for seats in the legislative body. This mechanism aims to reduce the likelihood of extreme political parties with antidemocratic agendas gaining representation. Such concerns were recorded during debates in the House of Commons on electoral systems and in deliberations pertaining to the electoral law for the Greater London Authority Bill.¹⁰²

Upon further reflection, the electoral threshold may not be as effective in blocking the rise of antidemocratic parties as often believed.¹⁰³ Sartori argues that this mechanism is overestimated.¹⁰⁴

⁹⁵SHIELDS, *supra* note 80, at 209.

⁹⁶Rivka Weill, *On the Nexus of Eternity Clauses, Proportional Representation, and Banned Political Parties*, 16 ELECTION L. J. 237, 241 (2017).

⁹⁷See COX, *supra* note 76, at 93.

⁹⁸See INDEPENDENT COMMISSION ON THE VOTING SYSTEM, 1998, Cm. 4090 (Professor David Butler was the chairman of the report of a group of academics for the Independent Commission on the Voting System).

⁹⁹See, e.g., NORRIS, *supra* note 84, at 303 (demonstrating one formula that exists for the allocation of seats).

¹⁰⁰See THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, VENICE COMMISSION OF THE COUNCIL OF EUROPE, COMPARATIVE REPORT ON THRESHOLDS AND OTHER FEATURES OF ELECTORAL SYSTEMS WHICH BAR PARTIES FROM ACCESS TO PARLIAMENT, 82nd plen. sess., (CDL-AD(2008)037) (Oct. 18, 2008), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2008\)037-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2008)037-e) (demonstrating different types of electoral thresholds).

¹⁰¹See Yumak & Sadak v. Turkey, 2008 III Eur. Ct. H.R. 109 <https://hudoc.echr.coe.int/fre?i=001-87363> (showing that the main reason to include a threshold of exclusion is to prevent the fragmentation of the legislative body).

¹⁰²See HC Deb (14 Dec. 1998) (322) col. 626 (UK)

(The assembly will represent the views of all Londoners. However, we are aware that that very openness and accessibility carry risks. Therefore, we are including in the Bill a provision enabling an electoral threshold to be set, so as to avoid the assembly giving a platform to extremist parties. However, a balance needs to be struck, because of the need to ensure that legitimate parties are not unfairly excluded from the political process. For that reason, we have set a maximum threshold of 5 per cent, and any threshold can be set only after debate in both Houses of Parliament.); see Greater London Authority Bill 1998-99, HC Bill [7] cl. 2 (UK) (including a threshold of 5 percent).

¹⁰³See NORRIS, *supra* note 74, at 118 (pointing out that the threshold mechanism is in practice a weaker barrier compared to the safeguards of the alternative vote system and the second ballot system).

¹⁰⁴SARTORI, *supra* note 46, at 10.

To exemplify this, Greece has an electoral threshold of 3 percent,¹⁰⁵ which initially kept Golden Dawn at bay until 2012. However, since then, Golden Dawn has consistently surpassed this threshold, securing around 7 percent of the vote. Similarly, Turkey has the highest electoral threshold at 10 percent,¹⁰⁶ yet this measure has not been successful, as evidenced by the frequent banning of parties.¹⁰⁷

Conversely, district magnitude acts as a natural, non-legal threshold, theoretically offering greater efficacy in promoting strategic voting against antidemocratic political parties.¹⁰⁸ These inherent thresholds are embedded in the electoral system and are influenced by factors such as gerrymandering and the distribution of seats within multi-member districts. Unlike single-member districts, as seen in the Netherlands, multi-member districts can range from as few as two seats to encompassing the entirety of seats in the legislative body.

Therefore, in a three-member district, a party needs at least 25 percent plus one vote in order to gain a seat, while in a nine-member district, a party needs at least 10 percent plus one vote in order to gain a seat. As a result, in the three-member district, if a party has only 15 percent of the electorate support, it will not gain a seat and the votes in essence will be wasted. Similarly, in the nine-member district, if a party has only 5 percent of the electorate support, it will not gain a seat and the votes will be wasted. Accordingly, Cox and Shugart accurately remark that “strategic behavior in the electorate will efficiently avoid the casting of wasted votes.”¹⁰⁹

Despite this, we can establish two fundamental principles. First, smaller constituencies with fewer seats generally result in lower levels of representation, while larger constituencies tend to offer more extensive representation.¹¹⁰ Second, smaller constituencies also afford greater room for strategic voting, whereas larger constituencies may limit such manoeuvrability.¹¹¹ As a result, in districts composed of three to five members, voters and political parties are likely to adapt their preferences strategically, potentially preventing non-democratic parties from securing seats in the legislative body.

In conclusion, proportional representation systems can be categorized into two broad types: those with natural thresholds that prioritize limiting non-democratic party emergence at the expense of full representativeness, and those without such thresholds, which prioritize representativeness but may expose the system to the influence of non-democratic parties.

III. Strategic Democracy and its Limits

Strategic democracy, which employs carefully designed electoral rules to block extreme political parties from gaining representation, presents notable limitations and risks. At its foundation, strategic democracy assumes that voters make decisions strategically; however, voting behavior is influenced by various factors beyond strategic calculations. For instance, many voters prioritize identity-related attributes—such as ethnicity, social class, or religion—over adherence of candidates to constitutional principles or the rule of law. Moreover, entrenched party politics,

¹⁰⁵See Nomos (2004:3231) Eklogí vouleftón [Election of Members of Parliament], EPHEMERIS TES KYVERNESEOS TES HELLENIKES DEMOKRATIAS [E.K.E.D.] 2004, A. 5 (Greece).

¹⁰⁶THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, VENICE COMMISSION OF THE COUNCIL OF EUROPE, REPORT ON THRESHOLDS AND OTHER FEATURES OF ELECTORAL SYSTEMS WHICH BAR PARTIES FROM ACCESS TO PARLIAMENT (II), 82nd plen. sess., (CDL-AD(2010)007) (Mar. 11–13, 2010), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)007-e) (noting thresholds and other features of electoral systems which bar parties from access to Parliament).

¹⁰⁷Factbox, *supra* note 55.

¹⁰⁸See Gary W. Cox & Matthew Soberg Shugart, *Strategic Voting Under Proportional Representation*, 12 J. L., ECON., & ORG. 299, 317 (1996) (discussing strategic voting in proportional representation system and the importance of the district magnitude).

¹⁰⁹*Id.* at 307.

¹¹⁰SARTORI, *supra* note 46, at 8–9.

¹¹¹See COX, *supra* note 76 (arguing that strategic voting fades out in multi member districts with more than 5 seats).

clientelism, and societal polarization can erode public engagement or outrage, even when politicians openly espouse extreme views or violate democratic norms.

Additionally, certain electoral systems, such as first-past-the-post (FPTP), can under specific conditions facilitate the rise and dominance of extreme political parties. Van der Meer and Rijpkema observe that these systems often allow a minority of votes to control a majority of seats in legislative bodies, even securing the highest executive offices.¹¹² A striking example is the 2016 U.S. presidential election, where Donald Trump secured the presidency through a majority in the Electoral College despite receiving fewer popular votes than Hillary Clinton.

This dynamic is particularly concerning in two-party systems, where the simplicity of electoral competition paradoxically increases the system's vulnerability to extremism. Extreme political ideologies can infiltrate mainstream parties, reshaping their platforms and rendering the broader political landscape susceptible to radical ideologies. As Van der Meer and Rijpkema argue, this risk becomes pronounced when major scandals engulf mainstream candidates or parties, leading disillusioned voters to turn toward alternative, often extreme, platforms, thereby amplifying their influence.¹¹³

These challenges raise critical questions about the adequacy of strategic democracy as a standalone model. Given its inherent limitations, could societies benefit from a two-tiered protection system combining strategic democracy with militant democracy? Such an approach could merge the preventative safeguards of electoral mechanisms with militant measures designed to directly counter threats to democratic norms and institutions. Together, they might offer a more robust defense against the rise of authoritarianism and the erosion of democratic values.

Our response to this question is negative for two key reasons. First, the effectiveness of institutional design in preventing the rise of anti-democratic parties remains highly contested. Second, if the competition of ideas and open political dialogue are unable to counter and ultimately prevail over extreme anti-democratic voices, then it raises a fundamental question about the viability and resilience of democracy itself.

Pertaining to institutional design, the phenomenon of democratic backsliding in Eastern Europe—particularly in countries like Hungary, Poland, and Russia—has fueled significant criticism regarding the effectiveness of institutional design.¹¹⁴ These nations, whose governments were established based on newly crafted constitutional frameworks after the Cold War, were once heralded as promising examples of democratic transition. However, the erosion of democratic norms and institutions in these states underscores the limitations of constitutional design in safeguarding democracy.

Ginsburg, Huq, and Versteeg provide a sobering perspective on the role of constitutional design in preserving democracy. They argue that, at best, the structural features of a constitution function as “speed bumps,” temporarily slowing the accumulation and abuse of political power.¹¹⁵ While essential, these mechanisms are not infallible barriers against the erosion of democratic norms or the rise of authoritarian tendencies.

Ginsburg, Huq, and Versteeg emphasize that the ultimate safeguard lies not in constitutional texts but in the collective will and active participation of the people.¹¹⁶ Protests, civic engagement, and grassroots movements serve as the strongest bulwarks against tyranny. This perspective resonates with Aristotle's observation in *Politics*, where he cites the sophist Lycophron, stating, “[I]aw is only a convention, ‘a surety to one another of justice’, as the sophist Lycophron says, and has

¹¹²Van der Meer & Rijpkema, *supra* note 9, at 511.

¹¹³*Id.* at 522.

¹¹⁴See, e.g., Bojan Bugarič, *Central Europe's Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism*, 17 INT'L J. CONST. L. 597, 616 (2019); see generally Wojciech Sadurski, *On the Relative Irrelevance of Constitutional Design: Lessons from Poland* (Univ. Sydney L. Sch., Working Paper No. 19/34, 2019).

¹¹⁵Aziz Huq, Tom Ginsburg & Mila Versteeg, *The Coming Demise of Liberal Constitutionalism*, 85 UNIV. CHI. L. REV. 239, 253 (2018).

¹¹⁶*Id.* at 253.

no real power to make the citizens good and just.” Laws alone, therefore, cannot resolve all societal problems or ensure adherence to democratic principles.¹¹⁷

In addition, in their recent book, *How Democracies Die*, Levitsky and Ziblatt address this question by emphasizing the importance of unwritten norms and human behavior in sustaining democratic systems. They contend that two fundamental principles—mutual toleration and institutional forbearance—are essential elements of a functioning democracy and play a critical role in ensuring the effective application of checks and balances.¹¹⁸

As it was mentioned above,¹¹⁹ anti-democratic political parties often adapt to legal restrictions by rebranding, adopting new leadership, or revising their platforms to obscure their ideological agendas. They exploit ambiguities in legal frameworks or infiltrate mainstream parties, enabling them to persist and maintain influence. This adaptability underscores a key limitation of legal regulation: while laws govern external behaviors, they cannot penetrate the internal realm of thought, where ideological beliefs originate.¹²⁰ Legal frameworks address actions in the public sphere, but they cannot dictate the prudence or convictions of individuals.

The regulation of anti-democratic parties and extremist voices remains contentious. While prohibitions might seem like a safeguard against radical ideologies, they often raise concerns about freedom of speech and democratic resilience. Overly restrictive measures can suppress active citizenship, stifle free thought, and transform the effort to protect democracy into a tool of oppression.

Similarly, questions arise regarding the effectiveness of smart electoral systems instead of militant democracy measures in preventing the rise of anti-democratic political parties. To the extent that electoral systems can shape voting behavior, they offer a significant advantage. Specifically, strategic democracy and well-designed electoral frameworks may serve as more effective alternatives to outright bans on extremist parties. These approaches emphasize fostering a competitive marketplace of ideas and addressing the root causes of extremism preemptively. Three key principles underpin their effectiveness: first, only ideas combat ideas; second, strategic democracy and smart electoral systems work preventatively; and third, they avoid illegal practices of oppression.

First, the most effective antidote to extreme ideologies is competition, not prohibition. Smart electoral systems establish thresholds for representation, ensuring that fringe ideas lacking broad popular support are naturally eliminated from political discourse.

Second, strategic democracy acts preemptively to limit the regular representation of extreme ideologies in public office, reducing their opportunities to gain legitimacy or entrench themselves within societal frameworks.

Finally, prohibitions and legal restrictions risk breeding fear and fostering oppression. By focusing on open competition rather than suppression, democratic systems preserve freedoms while neutralizing extremist threats.

This is particularly evident in the context of Donald Trump’s re-election and his totalitarian-leaning political ideology. Trump’s rhetoric, which often undermined democratic norms, marginalized dissent, and promoted authoritarian tendencies, posed a significant challenge to the resilience of democratic institutions. Despite this, the U.S. Supreme Court ruled in *Trump v. Anderson*¹²¹ that states do not have the authority to disqualify federal candidates, including

¹¹⁷ARISTOTLE, POLITICS bk. III, ch. 9 (Benjamin Jowett trans. 1908) 118.

¹¹⁸STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 7 (2018) (“Two basic norms have preserved America’s checks and balances in ways we have come to take for granted: mutual toleration, or the understanding that competing parties accept one another as legitimate rivals, and forbearance, or the idea that politicians should exercise restraint in deploying their institutional prerogatives.”).

¹¹⁹See Bale, *supra* note 54 and accompanying text.

¹²⁰See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 42 (1991) (discussing the distinction between law and morality in regulating the external and internal dimensions of human behavior).

¹²¹*Trump v. Anderson*, 601 U.S. 100, 110–12 (2024).

presidential candidates, under Section 3 of the 14th Amendment. The Court emphasized that this power resides with Congress, not individual states, thereby reinforcing the principle that democratic systems must rely on open competition and legal frameworks rather than exclusionary measures. All in all, the essence of democracy lies in its ability to engage, persuade, and integrate diverse perspectives through debate and consensus-building. If democratic principles and values cannot stand up to radical opposition within the marketplace of ideas, then any attempts to preserve democracy through purely means of oppression and prohibition may be futile, and perhaps even contrary to democracy's foundational ethos.

By cultivating an environment where ideas are openly contested and only those with broad societal support thrive, democratic systems can maintain resilience against extremism without compromising the principles of freedom and open discourse. Strategic democracy, complemented by preventative mechanisms and an informed citizenry, provides a sustainable pathway to safeguarding democratic values in the face of rising challenges.

D. Conclusions

Militant democracy is the prevailing model for defending democracies against anti-democratic political parties. This article evaluates the militant democracy model, classifying the prohibition of political parties as its “hard” version, and the regulation of political parties and their members as its “soft” version. It then compares this with an alternative model, termed strategic democracy. Unlike militant democracy, which controls the supply side by abolishing anti-democratic parties, strategic democracy focuses on the demand side.

The model is labelled as “strategic democracy” as opposed to “militant democracy” because it is based on the concept of strategic voting. The IDEA report on electoral systems begins with a compelling statement: “[T]he choice of electoral system is one of the most important institutional decisions for any democracy.”¹²² This is true for an additional reason: the electoral system also serves as a safeguard for democracy against extreme political parties posing a threat to democracy. As demonstrated in previous sections, when the electoral system allows for strategic voting, such as in the plurality system with single-member districts or the alternative vote system, it acts as a shield, protecting democracy from the rise of extreme political parties that threaten the democratic regime.

Moreover, it is widely acknowledged that the proportional representation system is the most vulnerable to political parties which pose a threat to democracy. This vulnerability stems from two main factors: the high degree of representation and the limited scope for strategic voting. However, proportional representation systems with electoral districts limited to a maximum of five members may pose lower risks from non-democratic parties, as voters and political parties in such districts have sufficient information to act strategically.

When drafting a proportional representation system, lawmakers and policymakers face a dilemma of reconciling different values. They must balance the degree of representation with the level of tolerance for extreme political voices. If the policy aims for fair and near-total representation, mechanisms of intolerant democracy, such as the dissolution of political parties and related restrictions, become essential. Conversely, if the political system's representation is filtered through natural thresholds, the dissolution of political parties and similar measures become obsolete. Essentially, higher representation corresponds to lower tolerance, and vice versa.

Overall, using the electoral system as a safeguard against antidemocratic parties can provide more efficient and lasting solutions because: (1) it is preventive, blocking extreme political parties

¹²²ANDREW REYNOLDS, BEN REILLY & ANDREW ELLIS, *ELECTORAL SYSTEM DESIGN: THE NEW INTERNATIONAL IDEA HANDBOOK 1* (2008), <https://www.idea.int/sites/default/files/publications/electoral-system-design-the-new-international-idea-handbook.pdf>.

before they become a threat; (2) it activates both political parties and voters;¹²³ and (3) it avoids the victimization of dissolved political parties through ordinary electoral procedures.

Furthermore, in a model based on electoral law, the roles of voters and political parties are crucial. Voters adjust their preferences by considering the threats posed to the democratic regime by antidemocratic political parties, while other political parties adjust their agendas and rhetoric accordingly.¹²⁴ In this model, the responsibility to defend democracy from antidemocratic political parties is entrusted to both political parties and voters, making the voter the final arbiter. This approach aligns with the philosophy of democracy, maintaining its standards of tolerance and openness even in the face of threats from non-democratic parties.

Most importantly, the constitutional banning of antidemocratic political parties, known as the hard model of militant democracy, or the use of ordinary administrative and criminal law, the so-called soft version, which challenges aspects of the rule of law—such as freedom of speech and freedom of association—is not necessary.

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¹²³See SARTORI, *supra* note 46, at 32 (“Electoral systems have a two-fold effect: one on the voter, and one on the number of parties.”).

¹²⁴See TERRI E. GIVENS, VOTING RADICAL RIGHT IN WESTERN EUROPE 97 (2005) (discussing the strategic role of the political parties).