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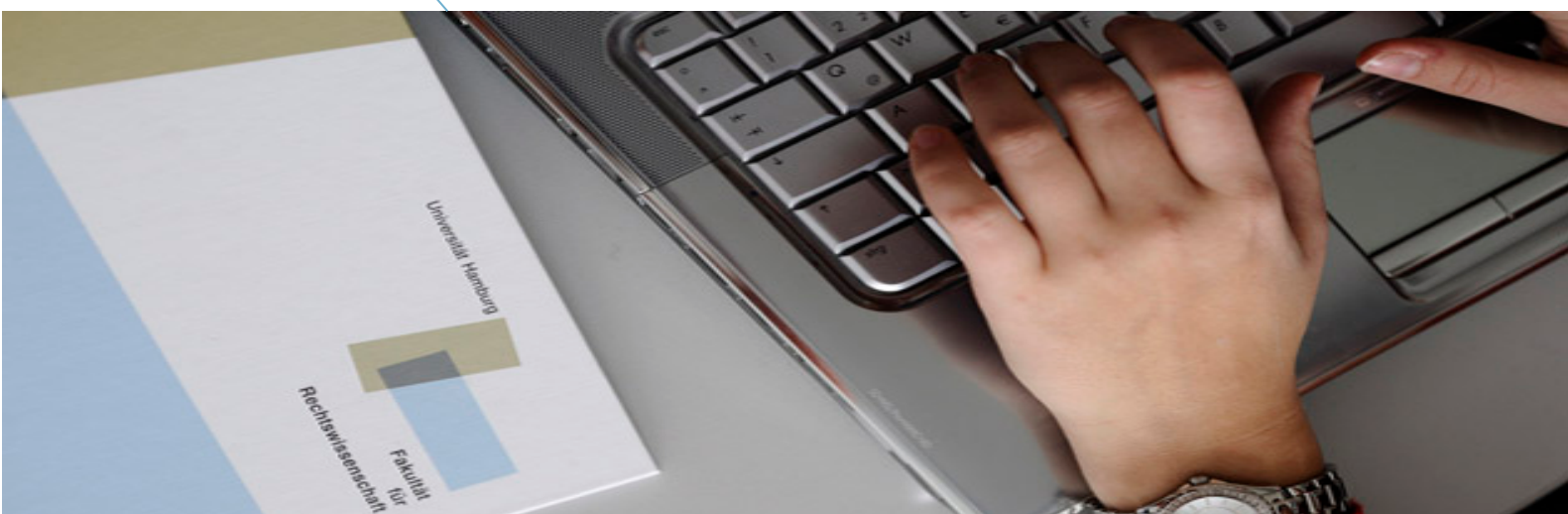
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Militant Constitutionalism – A Promising Concept to Make Constitutional Backsliding less likely?

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Abstract:

Constitutional democracy is in decline and many would-be autocrats try to elude constitutional constraints or even to exploit constitutions in their favor. We make a number of proposals for designing constitutions that are more resilient against such attempts. A first look at the empirical evidence, however, is sobering. There is little evidence that many appealing constitutional rules are able to increase constitutional resilience.

Keywords: constitutional compliance, militant democracy, militant constitutionalism, de jure de facto gap, democratic backsliding.

JEL Codes: H11; K38; P51.

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1. Motivation

“History will teach us (...) that of those men who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people, commencing demagogues and ending tyrants.”
Alexander Hamilton, Federalist Paper No. 1

Many observers have noted that constitutional democracies have come under stress. Examples for a declining respect of the executive for the constitution include Turkey, Hungary, Poland, the Philippines, and Venezuela. Frequently used indices of democracy as well as political and civil rights confirm that these observations are part of a larger trend. In 2017, Freedom House counted the 12th consecutive year in which countries suffering from democratic setbacks outnumbered those registering gains. According to the Economist Intelligence Unit, 89 countries regressed in 2017 whereas only 27 improved. The 2018 edition of the Bertelsmann Transformation Index finds that the quality of democracy in developing and transformation countries has fallen to its lowest level in 12 years.

After World War II, Germany has been following the slogan of “never again”. It pledged to prevent the abolition of democracy in favor of fascism or any other kind of non-democratic regime. In academic and political discourse, it was argued that implementing institutions of “militant democracy” would be instrumental for that purpose (the idea is often attributed to Loewenstein 1937a, 1937b). Today, would-be autocrats often use and shape the rules of the constitution to get rid of democracy. Examples abound: Recep Erdogan who introduced a presidential form of government with vast powers for the president (himself) under a state of emergency. Viktor Orban, who used a bare majority of the popular vote to pass an entirely new constitution fitted to his personal power aspirations in Hungary. Hugo Chavez, who introduced his “Bolivarian constitution” in Venezuela. Constitutional change has often been used by politicians to increase their power and prolong their stay at the helm of government.

Here, we ask how constitutions can be designed such that they lend themselves less to assaults on the rule of law by degrading checks and balances, lowering standards in law enforcement, or diminishing impartiality in law enforcement. Asking this question presupposes a constitution that is supposed to establish the rule of law in the first place. The rule of law and democracy do not require each other. A would-be autocrat could damage the rule of law while leaving formal democracy intact and vice versa. Although the two concepts can be distinguished from each other,

they often coincide in practice. This paper is not concerned with constraining or removing autocrats who already hold extensive power. Instead, it proposes to consider what constitutional design options are available for a society that strives for a sustainable implementation of a set of basic rights and the rule of law more generally, independent of who is elected into public office.

We will designate constitutional design that aims at safeguarding constitutionalism as “militant constitutionalism” to document its close relationship with the idea of a “militant democracy”.² The two concepts share the aim of preserving elements of the political order, namely democracy and the rule of law, respectively. However, they differ from each other in a number of important aspects, such as their timing (militant democracy tries to prevent non-democrats from acquiring power, whereas militant constitutionalism tries to contain the damage even if enemies of the rule of law have acquired power), the actors charged with their implementation (the government vs. actors well beyond the government), and the means employed to reach their goal (bans on extreme parties, accountability of the media, as well as the freedom of assembly vs. protecting the constitution from self-serving change).

This paper directly relates to the research program pursued by James M. Buchanan, who used an economic approach to analyze constitutional choice. Here, we are interested in determining if members of a society could agree on constitutional constraints that will bind politicians who are interested in exploiting public office for their own advantage.

Proposing ways in which constitutions can be designed such that they offer reliable protection from would-be autocrats might sound like a lofty idea. We make it concrete by not only proposing a number of design features that are likely to make a constitution more resilient to would-be autocrats, but also by subjecting the proposed measures to an empirical test to see whether their use has made constitutions more resilient in the past.

We find the sobering result that there is no empirical evidence for constitutional rules being systematically able to prevent politicians from undermining their country’s constitutional order. This finding seems to vindicate one of the basic

² We cannot take credit for inventing the term “militant constitutionalism” as such. It has been used in academic literature by a number of authors (most recently by Sajó 2019), but has not yet gained prominence in public discourse.

assumptions underlying Loewenstein's analysis of the rise of anti-constitutionalists in the 1930s, namely that the best antidote is a strong democratic tradition.

The remainder of the paper is structured as follows: In the next section, we briefly explicate the concept of militant democracy. Section 3 serves to present our version of the concept of militant constitutionalism. In Section 4, we try to evaluate some effects of militant constitutionalism empirically. Section 5 contains conclusions and open questions.

2. Militant Democracy

Today, Karl Loewenstein and militant democracy are often spoken of in the same breath. As the best-known proponent of a stream of thought that was very pertinent in the 1930s in Germany, Loewenstein sought to find a way to preserve parliamentary democracy.³ Since Loewenstein and militant democracy are so closely connected, we focus on his works to describe the main ideas of the concept. In two articles that appeared under the heading "Militant Democracy and Fundamental Rights" in the *American Political Science Review*, Loewenstein (1937a, 1937b) describes fascism as an international movement, gives an account of how some European democracies have turned militant, and finishes with offering a summary of anti-fascist legislation. Loewenstein did not introduce militant democracy as a new concept founded on firm theoretical reasoning, but rather as a summary of various measures governments in Europe had taken to prevent fascist movements from seizing power in their countries. Loewenstein does, however, systematically evaluate and endorses some of the measures he describes.

The two best-known measures described by Loewenstein are the possibilities to prohibit parties and to restrict the freedom of assembly. Others include bans on the formation of para-military units, precautions against the illicit use of firearms and

³ Hacke (2018, 246ff.) mentions others, such as Weltsch, Astrow, Bonn, Rosenberg, but also Thomas Mann. Some of the scholars who would later become the "Freiburg school" also participated actively in these discussions. In a paper that first appeared in 1933, Wilhelm Röpke coined the term "illiberal democracy" (reprinted in 1962, 124). In an address delivered in 1929, Alexander Rüstow first analyzes the main problem of Weimar, which he identifies as irresponsibility. He then proceeds to discuss four possible escape routes. Different from many observers at the time, he does not want to bestow more competences on the president, but, rather, on the chancellor. In the *Denkschrift "Politische Gemeinschaftsordnung"* of what is today known as the *Freiburger Bonhoeffer Kreis*, the authors seem to endorse a number of measures proposed by Loewenstein, such as limits on the freedom of speech, assembly, and the media.

other weapons, making editors of newspapers responsible for reports deemed to be “seditious propaganda”, measures against incitement to violence or hatred against parts of the population, the exclusion of people with extremist leanings from public administration, and the creation of a political police that is to control anti-democratic and anti-constitutional activities (Loewenstein 1937b, 645-655).

Whereas Loewenstein endorses inhibiting subversive movements altogether (“the most comprehensive and effective measure against fascism”, 645), he is a lot more hesitant with regard to other measures: “Perhaps the thorniest problem of democratic states still upholding fundamental rights is that of curbing the freedom of public opinion, speech, and press in order to check the unlawful use thereof by revolutionary and subversive propaganda” (ibid., 652).⁴

The notion of militant democracy is not only firmly rooted in the German constitution and its subsequent interpretation by the Federal Constitutional Court,⁵ it has also experienced a revival in recent years among political scientists and legal scholars on both sides of the Atlantic. Capoccia (2013) observes that the reflections about militant democracy in the U.S. deviate systematically from those in Europe, as the Americans are much more critical with regard to restrictions on the freedom of speech.

Yet today, some of Loewenstein’s proposals appear outdated and inadequate.⁶ Capoccia (2013, 208) counts three strategies underlying the various proposals: (a) concentrate power in the executive, (b) distinguish emergency powers from powers granted in normal times, and (c) pass *ad hoc* legislation to restrict rights of expression, participation, and assembly to prevent fascist movements from exploiting democratic freedoms to undermine democracy. All three strategies appear debatable. Relying on emergency powers and concentrating powers in the executive often amounts to the same thing, and both strategies have been misused

⁴ It seems important to add that Loewenstein believed “democratic tradition” to be an important factor in fighting fascism. In an earlier paper, he evaluates the prospects of virtually all European countries to withstand fascism and refers to democratic tradition as an important factor time and again. His comments about Great Britain are a good example (1935, 776): “In no country do better prerequisites for a successful stand against fascist doctrine and practice exist than in Great Britain. Two factors contribute to the expectation that England will be immune from fascism. One is the time-honored acceptance of democratic ideals and institutions in the country in which free government originated.”

⁵ Examples are Articles 79,3; 21,2; 9,2; 18; 20,4 of the *Grundgesetz*. Below, we argue that this list underestimates the relevance of the concept for the German constitution.

⁶ Kirshner (2014) is a recent exercise in “the ethics of combatting political extremism.”

frequently (states of emergency in both Turkey and Venezuela come to mind).⁷ Restricting some basic rights can also have high costs.

Most debates about militant democracy have focused on conceptual and, in particular, normative issues, such as whether it is paradoxical to be intolerant of the intolerant.⁸ Some have criticized the notion of militant democracy for its lack of a precise theoretical foundation, and then gone on to provide one (Müller 2012 is a concise history of the concept). Given the slightly outdated and almost naïve appearance of many of the measures that the notion of militant democracy is associated with, we propose to move forward and determine if a constitution can be written with specific traits that increase the likelihood that it can withstand would-be autocrats coming to power.

3. Militant Constitutionalism

Above, we observed that many would-be autocrats change the constitution to further their particularistic goals. In this section, we discuss how constitutions can be designed to withstand opportunistic reforms and infringements. We are interested in design features that protect the constitution against attempts to undermine the rule of law in the respective country. As already noted in the introduction, we propose calling this set of design features militant constitutionalism.

In this section, we focus on possible means to protect the constitution from would-be autocrats. We are not concerned with other questions that are relevant to constitutional design, such as the effects of constitutional rules on a society's growth prospects, distribution of wealth, access to public offices, etc. Coined differently, we are not considering potentially competing goals, freeing us from the necessity to enter into complicated trade-offs.

⁷ Bjørnskov and Voigt (2018) empirically analyze the reasons underlying declarations of states of emergency.

⁸ This paradox has been introduced by Popper (1944). In the notes to Chapter 7 of the first volume of "The Open Society and Its Enemies", he writes: "Less well known is the paradox of tolerance: Unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them." Both Müller (2016) and Wagrandl (2018) argue that with an adequate concept of tolerance, the seeming paradox disappears.

We begin by discussing the potential role of (1) constitutional amendment rules. This discussion is followed by some proposals regarding (2) the form of government as well as (3) the electoral system. The separation of powers (4) widely conceived follows suit. It includes discussions of the roles of the administration, the judiciary, and of other non-majoritarian institutions. Before finishing the section with (6) a wide-ranging procedural proposal, we discuss (5) ways in which non-state actors, such as NGOs and the media, could be protected by the constitution against would-be autocrats. For the purpose of our analysis we assume that a constitution can be distinguished from statutory law by the requirement of a supermajority to make formal changes.

(1) Constitutional amendment

The German constitution contains an article (79, 3) that prohibits amending Articles 1 and 20 of the constitution.⁹ Such eternity or unamendability clauses have been included in quite a number of constitutions (Albert and Oder 2018 collects various contributions on this topic). Trying to change either these articles or the articles they are protecting would be an obvious breach of the constitution and should provoke considerable opposition.

Creating barriers to changing the constitution might sound like a panacea to the challenges described above. However, trying to protect the entire constitution by making constitutional change very difficult could provoke one of two unintended consequences. The constitution might be replaced in its entirety, because such a change does not have to comply with formal amendment rules (Landau and Dixon 2015 analyze the substitutability of amendment and replacement), or the constitution might lose its legitimacy and then could simply not be complied with (this possibility is discussed in Gavison 2002, as well as Contiades and Fotiadou 2013). Accordingly, one should optimize – and not maximize – the difficulty of amending constitutions. This can mean a number of things: Unamendability clauses should be attached to only a small number of constitutional provisions deemed to be indispensable for maintaining the rule of law. Since the world is subject to constant change, making too many articles unamendable could provoke one of the two unintended consequences just sketched. We, therefore, propose to have at least

⁹ Article 1 introduces the basic rights chapter of the constitution and establishes that the dignity of man is inviolable. Article 20 establishes that the federal republic is a democratic and social federal state. The two articles are thus central to two fundamental chapters of the German constitution.

an emergency mechanism in unamendability clauses, e.g., making them amendable only by unanimous agreement in the legislature.

There might be many gradations between unamendability and the standard procedure for amending constitutions. If, say, in a bicameral system a two-thirds majority is needed in both houses, one could also make the amendment of specific clauses more difficult by requiring a three-quarters majority or more. These ideas are, of course, inspired by Buchanan and Tullock (1962).

Would-be autocrats often use times of crisis to seek support for sweeping constitutional change. Change is then agreed upon in the heat of the moment. Some constitutions prevent this from happening: constitutional amendments, for example, need to be agreed upon in two consecutive legislatures. In countries that have such amendment rules (these are mostly Scandinavian), parliamentary elections also function as a referendum on proposed constitutional changes. Such an amendment rule seems adequate to induce rational reflection on proposed constitutional changes. Now, there are situations in which constitutions need to be amended faster. We propose that cooling-off rules can be superseded by large super-majorities, such as 90 percent or similar of the respective houses.

Situations in which a general mood in favor of quickly changing the constitution emerges include natural disasters and domestic political conflicts. These are often dealt with by declaring a state of emergency. After experiencing disasters, many citizens are willing to allocate additional power to the (head of the) executive and quite frequently, would-be autocrats have taken advantage of that willingness by changing the constitution.¹⁰ One way of reducing the likelihood of such abuses is to prohibit constitutional change during a state of emergency.

(2) Form of government

Compared to prime ministers, who can be voted out of office in a parliamentary vote of no confidence at any time, presidents are more insulated, as their survival in office does not depend on parliamentary support. Would-be autocrats should, hence, prefer a presidential democracy over a parliamentary one. Anecdotal evidence supports this conjecture. Just witness the changes to the Turkish constitution by Recep Erdogan's AKP. There is some evidence showing that

¹⁰ As could be witnessed recently in Turkey, where the form of government was changed while a state of emergency was in place.

presidential systems are more susceptible to constitutional non-compliance than parliamentary ones (Svolik 2015).¹¹

A straightforward solution based on these observations would be to install parliamentary, rather than presidential democratic systems and maybe even to make the respective part of the constitution unamendable. If we assume, however, that a society prefers to have a presidential system, we must discuss a number of constitutional rules that could affect the likelihood of constitutional compliance under this form of government.

Term limits

Heads of government who can legally stay in power forever might have more incentives to renege upon constitutional constraints than those whose terms are constitutionally limited. Many would-be autocrats start out complying with the constitution, only to ignore or change it in during subsequent terms in office. Obvious examples are the first terms of Recep Erdogan or Vladimir Putin. Term limits might, thus, serve an important function in sustaining the constitution.

Experience shows that not all term limits will be effective (Ginsburg et al. 2011). First, presidents wishing another term might try to change the constitution. To prevent this from happening, an unamendability clause might appear apt. In addition, the precise wording of the clause is key: Are two terms only two consecutive terms, or is it two terms full stop? After having been president for two consecutive terms, Vladimir Putin switched to the office of prime minister, only to return to the office of president in the next election.¹²

Executive decrees

While in office, presidents frequently circumvent established law-making procedures (i.e., laws passed by parliament) by resorting to alternative means, such as executive decrees. Some justify executive decree power as being a means to overcome gridlock. This justification, however, is not entirely convincing: the

11 Identifying presidential systems as causing non-compliance is, however, challenging as the form of government is endogenously chosen and not randomly spread across the globe (Cheibub 2007).

12 Empirically, we only find term limits for presidents. It might be worthwhile thinking about term limits for heads of parliamentary governments, too. On the one hand, they can be kicked out of office by a parliamentary majority at any time. On the other hand, over time they might also develop a taste for power and a deeply rooted network of political supporters, making them more likely to misuse their office.

insulation of the president from parliament undermines the incentives for the president and parliament to compromise.

There are many cases in which executive decree power has been used to expand the powers of the president (Carey and Shugart 1998 contains case studies from eight countries).¹³ It seems that decree powers that do not require parliamentary support are most dangerous, as they effectively make the president a temporary dictator. It would seem to be advisable to reduce the power of the president by giving the legislature the right to annul any decree and make all decrees subject to sunset clauses implying that they automatically cease to have force after some time.

Right to pardon

The right to pardon appears to be a remnant from absolutism. In many countries, it is the prerogative of the head of state. If it is (mis-)used to pardon government members or relatives, this undermines the rule of law. There might be good reasons to uphold the institution of pardon in general, but it would seem to make sense to introduce at least something akin to what is called bias or prejudice in judicial procedure. If there are close family ties or professional relationships between the president and a convict, the right to pardon is suspended.

Separation of powers in presidential systems

It is frequently argued that the presidential form of government secures a clearer separation of powers, because presidents are more insulated from parliament than prime ministers (e.g. Persson et al. 1997). Whereas a prime minister needs to be continuously supported by a majority in parliament to survive in office, the president is elected for a fixed term and is independent of parliamentary majorities.

This view, however, appears to be heavily influenced by the U.S. experience. In other countries, presidents have been able to make parliaments their faithful servants, i.e., they have dismantled the separation of powers. Prempeh (2008) offers numerous examples of how African presidents manage to secure legislative approval of their policies.¹⁴ One way to ensure some more separation between the

¹³ Rubio and Goretti (1998, 33) describe that between 1853 and 1989 approximately 25 “necessity and urgency decrees” had been issued by Argentine presidents. In the five years between July 1989 and August 1994 alone, President Menem issued 336 such decrees.

¹⁴ One way is to offer lucrative jobs or buy the support of legislators. Prempeh (2008, 116) gives an example from Zambia where President Chiluba appointed nearly half of all legislators to ministerial positions. Furthermore, presidents’ parties sometimes have the power to expel legislators from

executive and legislature would be to ban members of parliament from holding the office of a minister.

(3) Electoral system

In some countries, constitutional amendments are politically “cheap” because of the electoral system. In Hungary, the party Fidesz won slightly more than 50 percent of the popular vote in 2011, which was enough to secure a two-thirds majority in parliament and to pass a new constitution. Clearly, the difficulty of amending the constitution is also determined by the electoral system. In theory, some 25 percent of the popular vote is sufficient to secure a parliamentary majority in first-past-the-post systems (Buchanan and Tullock 1962) and a two-thirds majority in parliament is attainable with a share of the popular vote far below 50 percent. Under proportional representation, a two-thirds majority in parliament presupposes a two-thirds majority of the population.

These considerations speak in favor of proportional representation. However, suppose that a society prefers to have single member districts in which parliamentarians are elected based on first-past-the-post. The vote share a party receives from the electorate might deviate substantially from the share of parliamentary seats it receives. At least two ideas come to mind how this imbalance could be reduced. First, electoral systems that allocate bonus seats to particular parties should get rid of these rules (Italy is an example). Second, so-called “overhang mandates” (used especially in Germany) could be introduced that would limit the imbalance to some pre-determined maximum amount.

parliament, if they oppose the president. This occurred in Zambia in 2001, when the ruling party expelled 22 legislators for their opposition to President Chiluba’s attempt to secure a third term in office. Sometimes, the constitution even explicitly allows for the expulsion of parliamentarians who have voted as they saw fit. Article 77(l) of Sierra Leone’s constitution, for example, states that a legislator must vacate his seat “if by his conduct in Parliament by sitting and voting with members of a different party, the Speaker is satisfied after consultation with the Leader of that Member’s party that the Member is no longer a member of the political party under whose symbol he was elected to Parliament”. Van Cranenburgh (2009, 5) reports that in many African countries, the president may nominate a number of members of parliament and this number might be quite substantial, as in Kenya and Zimbabwe. In Namibia in the first decade of the new millennium, the percentage of parliament members who held cabinet positions went as high as 60 percent. The prospect of securing a government job in the future will not only make current cabinet members less critical of government but also parliamentarians who only hope to secure such positions in the future.

Redistricting

The electoral system not only comprises the electoral rule, but also the size of the voting districts and their exact delineation. Would-be autocrats have often redrawn district lines to increase their share of parliamentary seats. Levitsky and Ziblatt (2018) offer Malaysia as an example where only half of the population consists of Malaysians but the districts were structured such that in 70 percent of the districts, Malaysians had a clear majority. Since it is necessary to redraw district lines because of demographic change, there must be some mechanism to do so. To avoid gerrymandering, it seems most reasonable to install a constitutionally protected independent electoral commission that has the competence to redraw voting districts after every census.¹⁵

(4)The separation of powers

It is frequently asserted that the first steps of democratically elected would-be autocrats on their way to free themselves from constitutional constraints are to reduce the amount of judicial independence, to restrict media freedom, and to constrain the operation of civil society.¹⁶

Judicial independence

Poland recently reduced the retirement age of judges. The government also applied the new legislation to sitting judges, pensioning many of them off. This gave the government the opportunity to staff the court with new, friendly judges.¹⁷ Similar measures have been taken by various would-be autocrats. It would seem that protecting the independence of judges via constitutional rules that are difficult to amend is a straightforward measure to ensure compliance with the constitution.

However, two caveats have to be considered. The first is about the assumption that a high level of *de jure* judicial independence will translate into a high level of *de facto* judicial independence. This assumption has been challenged with regard to

¹⁵ Quarrels about redistricting are hardly relevant in proportional rule electoral systems, as the number of seats of a party should always be proportional to the vote share it secured in the general elections.

¹⁶ Empirical evidence suggests that both reductions in freedom of the media and civil society organizations are, indeed, precursors of reductions in the degree of electoral democracy, as well as the compliance of the executive with the constitution (Gutmann and Voigt 2019c).

¹⁷ On October 19, 2018, the European Court of Justice decided that the underlying legislation was incompatible with EU-law and had to be suspended. Retired judges must be allowed to resume their office (C-619/18 R).

both the Americas and Europe (Gutmann and Voigt 2019b). The second concerns an insight of Ginsburg and Huq (2018, 174) who note that the “central role played by the courts can perversely raise the stakes in political battles over who controls the courts.” These objections notwithstanding, it seems to be advisable to fix the appointment procedure and tenure of judges in the constitution, and to make changing these procedures difficult.¹⁸

Other non-majoritarian institutions

In most countries, the judiciary is a non-majoritarian institution in the sense that its members are not elected by popular vote but appointed by some non-majoritarian procedure. In the last couple of decades, such non-majoritarian institutions have not only played an important role in academic discourse about possibilities to improve overall governance, they have also made a career in the real world. Just witness the growth of central bank independence in many parts of the world. The concept of non-majoritarian institutions covers very diverse organizations beyond the judiciary, ranging from independent regulatory bodies (telecommunications, energy, banking, competition, and so on) to central banks, supreme audit institutions, statistical offices, ombudspersons, and independent election commissions. They all constrain the discretionary leeway of the government, which implies that a high number of such institutions reduces the damage that would-be autocrats can do in the short run. However, there is a downside: governments frequently have the competence to appoint the heads of these agencies. Levitsky and Ziblatt (2018) point out that democratically elected would-be autocrats will try to control as many of these institutions as possible. As an example, they point to Hungary’s Victor Orban who did this for prosecutors, the supreme audit institution, the ombudsperson, the statistical agency, and the constitutional court.

Here are some suggestions for how the danger of dismantling non-majoritarian institutions can be limited. Most of these are already applied with regard to judges in some countries. (1) Make appointment of the heads of the institutions dependent on a parliamentary supermajority. One can also think of more fine-grained schemes allocating the right to nominate to different factions.¹⁹ (2) Guarantee the heads of these agencies a secure tenure in office. (3) At least some of these agencies should have heads who cannot be reappointed. The possibility of being re-appointed after

¹⁸ *Pari passu*, this also holds for the independence of prosecutors.

¹⁹ Federal judges in Germany are appointed by a *Richternwahlausschuß* that works along these lines. In most of the German states, similar committees exist for the appointment of judges on the state level.

the end of one's term is likely to reduce the independence of agency heads because they are likely to cater to the preferences of those who have the competence to re-appoint them. (4) In the U.S., Supreme Court justices are appointed for life. A would-be autocrat, who gets to appoint some, can, by picking young judges, impact the court for decades. Fixed terms seem, thus, to be preferable over life terms. If one assumes that most people will need some time to learn how to best perform a new task, the terms should, however, not be too short either.

Administration

On the one hand, the administration is supposed to be the agent of the government. On the other hand, the administration is said to follow its own rationale. Weber (1922) even explicitly distinguishes between rational bureaucracy based on competence and expertise and other ways of legitimizing power, such as charisma or tradition. Ensuring the constitutionality of the administration, as well as general rules defining the activities of the bureaucracy and its relationship with government, appears to be key. These should also limit the direct influence of government on the bureaucracy.

Bureaucrats can also be thought of as monitors who can limit the leeway of governments. In Germany, all civil servants are made monitors of the constitution by what is called "the duty to remonstrate" (*Remonstrationspflicht*). If a civil servant receives an order from his superior that he believes to be in conflict with the law, he has the duty to let his superior know. Should the superior insist, he has the duty to turn to the superior of the superior. Only if that person also insists that the order does not violate the law does the civil servant have to implement it. At least in principle, this seems a sensible way to slow down would-be autocrats.

The protection of whistle blowers has a similar function, but is less far-reaching, as it aims to protect those who have revealed sensible information without making the revelation of such information a duty. A *Remonstrationspflicht* should be linked with the protection of whistle blowers.

(5) Power to the people

At the end of the day, government compliance with the constitution might well depend on its active advocacy by the population at large. Such action seems to be beyond the confines of the constitution. Yet, a right to resist the government in case it violates the constitution might well be constitutionalized. Ginsburg et al. (2012) do not only include a comprehensive overview of constitutionalized resistance

clauses, but also an analysis of the determinants of their inclusion into a constitution. They show that many constitutions even include a duty – and not only a right – to resist, which they trace back intellectually to Locke and Jefferson. Yet, it is unclear what effects such constitutional provisions have, if any.²⁰

(6) Automatic triggers?

In case a would-be autocrat tries to impair the independence of any of the actors mentioned so far, it is important to know who has the right – and possibly also the duty – to take steps against such action. The constitution of Honduras contains an interesting article aimed at reducing the risk that the presidential term limit also contained in the constitution will ever be amended. The clause stipulates that any president who proposes to extend the term limit will immediately lose his office (and president Zelaya did lose his office in 2009). It is tempting to think of a version of this clause based on which anybody proposing a reduction in media freedom or judicial independence or the freedoms of civil society organizations and so on would automatically lose office. Yet, many details need to be addressed with precision: What office is to decide that the office holder did not only discuss the pros and cons of a particular institution but made a proposal to change it? How can misuse of such a powerful clause be prevented? On what grounds can the prohibition of deliberation ever be justified?

Summing up

In the figure below, we try to point out the similarities and differences between militant constitutionalism and militant democracy. The most relevant commonality lies in the attempt of both concepts to preserve something (democracy in the case of militant democracy, the constitution in case of militant constitutionalism). To the degree that the constitution contains democracy, one could argue that militant constitutionalism is a more encompassing concept. But if we look at the cells dealing with the timing of the two concepts, it becomes clear that they have a different focus. Whereas militant democracy aims at preventing anti-democratic forces from rising to power, militant constitutionalism tries to design the constitutional order such that it can withstand being challenged by office holders.

²⁰ Gutmann and Voigt (2019a) ask whether different societies have developed different cultures of civil disobedience and answer the question in the affirmative relying on an epidemiological approach.

| | Militant Democracy | Militant Constitutionalism |
|------------------------------------|---|---|
| Goal | Preserve democracy | Preserve constitution |
| Timing | Prevent anti-democratic forces from rising before they become too strong | Prevent government from reneging the constitution |
| Actors ...Protection against | Enemies of democracy | Governments that aim to violate the constitution or to use it for their particularistic goals |
| ...Implemented by | The government | Various actors, including the judiciary, civil society, the press |
| Means | <ul style="list-style-type: none"> - Ban on parties (and possibly other associations) - Limit freedom of speech - Limit right of association | <ul style="list-style-type: none"> - Make constitutional amendments more difficult - Strengthen veto players - Create additional watchdogs |

At the end of Section 2, the possible misuse of militant democracy was discussed. To evaluate militant constitutionalism as proposed here, the possibility of its misuse should also be briefly discussed. It is important to explicitly spell out an assumption that has been underlying all considerations, namely that the constitution to be maintained does not only serve to protect the interests of some powerful minority group, has been brought about by fair and transparent procedures and is commonly perceived as legitimate. If this is not the case and our proposals for constitutional design are implemented, they might serve to maintain illegitimate constitutions.

Constitutions have been described as rules for making rules. This view implies that many substantive constraints do not belong in the constitution but, rather, in statutory law. One can think of many statutory law provisions designed to increase constitutional resilience. In the past couple of decades, many parliaments have, for example, passed transparency rules obliging parliamentarians to reveal their incomes (Aaken and Voigt 2011). One idea could be to extend these provisions to members of the executive.

4. Gauging Effects of Militant Constitutionalism Empirically

In Section 3, we proposed several design features that can make constitutions more resilient. We cite empirical evidence where it exists. Some of the proposals,

however, have never been implemented, and yet others have not been evaluated with respect to our research question. In this section, we try to put our notion of militant constitutionalism to an empirical test.

Our goal is to understand whether those design features that have been implemented in the constitutions of sufficiently many countries can be shown to stabilize political leaders' compliance with the constitution. The Varieties of Democracy (or V-DEM) dataset contains a variable for whether members of the executive respect the constitution ("v2exrescon"). This continuous latent variable measures whether leading members of the executive never violate the constitution or whether they do so frequently and without legal consequences (see Pemstein et al. 2019 for the construction of this indicator). We assume that the head of government is the most important actor responsible for (non-)compliance with the constitution. Accordingly, our unit of analysis is a "leadership spell", defined as the period during which a head of government stays in office without interruption. A prime minister, for example, who stays in office for 12 years before losing an election, constitutes one observation in our dataset. If he held office two times, interrupted by the tenure of an opposition leader, this political leader would be represented by two observations (or two leadership spells) in our dataset. Our dependent variable measures whether and to what extent respect for the constitution deteriorates over the course of a leader's time in office. Therefore, we calculate the difference in the level of constitutional compliance between the year before the leader takes office and the year before the leader loses the political office. In other words, the benchmark for a leader's compliance is the compliance level "inherited" from his predecessor and the leader's compliance is measured before the end of the leadership spell in order not to consider the events that caused and followed the leader's removal, such as a military coup. Since we are not interested in improvements in constitutional compliance, we code any positive change as a zero (i.e., equivalent to no change in constitutional compliance during a leader's term). By construction, we disregard leadership spells that start and end in the same year, as our data does not allow us to measure changes in constitutional compliance within a year.

As we have already indicated, not all of the constitutional rules that we proposed have been used in real world constitutions, and others are so rare that there is no systematic data on their use. Here we focus on a list of variables to be evaluated as potential safeguards that is based on the *de jure* data collected by Elkins et al. (2009) in their Comparative Constitutions Project:

- *Unamendability* [*unamend*]; this dummy variable simply reflects if any parts of the constitution are unamendable. It is, hence, only a crude proxy for the very detailed proposals spelled out in Section 3.
- *Term limits for the head of state* [*hosterm*]; this dummy variable captures whether the total number of terms in office for the head of state is limited to two or less.
- *Decree power* [*hosdec*]; this dummy variable captures whether the head of state has decree power.
- *Pardon* [*hospard*]; this dummy variable captures whether the head of state has the power to pardon.
- *Judicial Independence* [*judind*]; this dummy variable captures if the constitution contains an explicit declaration regarding the independence of the judiciary.
- *Right to political parties* [*partright*]; this dummy variable depicts whether the constitution provides for the right to form political parties.
- *Right to trade union* [*jointrde*]; this dummy variable indicates whether the constitution provides for the right to form or join trade unions.
- *Freedom of association* [*assoc*]; this dummy variable depicts whether the constitution provides for freedom of association.
- *Freedom of the press* [*press*]; this dummy variable depicts whether the constitution provides for the freedom of the press.
- *Meritocratic civil service* [*civil*]; this dummy variable indicates whether the constitution provides for the meritocratic recruitment of civil servants.
- *Right to overthrow government* [*overthrw*]; this dummy variable depicts whether the constitution gives citizens the right to overthrow their government under certain conditions.

Some of the design features proposed earlier cannot be included, such as the constitutional protection of the independence of a number of non-majoritarian agencies. Others can only be included based on a rather crude approximation of what we have in mind (e.g., unamendability clauses, which are only included as a dummy variable that captures if any parts of the constitution are exempt from being amended). The indicators from the comparative constitutions project are recorded annually at the country level. In a first step, we replace each indicator by its 1-year lag to measure the constitutional rules at the beginning, rather than at the end, of the year. Next, we transform them to the leadership spell level by taking the mean value of all country-year observations in that time period. This way we account for

the average level of constitutional constraints over the course of the leadership spell. Alternatively, we control for the constitutional constraints in place before the political leader takes office. Two more indicators of interest come from Bjørnskov and Rode's (2019) regime dataset. The first is a *de facto* indicator of presidentialism. However, we do not expect a significant gap between *de jure* and *de facto* with regard to this constitutional trait, as it seems unlikely that a country's constitution prescribes a presidential form of government, but a parliamentary system is implemented. The second indicator is a dummy variable for democracy from the same source, which helps us to compare presidential democracies with other democracies. As with the constitutional indicators, we take the mean value over the leadership spell to aggregate country-year information to the leadership spell level.

We control for the degree to which the government respects the constitution at the beginning of each leadership spell. This allows us to take into account a possible convergence in constitutional compliance across political leaders. We do this based on the conjecture that deteriorations in compliance may be more likely, if the level of constitutional compliance is high at the beginning of a leader's term. We further control for the way in which the respective leader assumed office, distinguishing between regular entry, irregular entry (for example, via a coup d'état), and foreign imposition. This information and all other leader characteristics come from the Archigos dataset 4.1 (Goemans et al. 2009). Finally, we control for the second order polynomial of the length of the leadership spell in years and for the number of previous (uninterrupted) leadership spells of the current political leader..

Our data covers 1,262 leadership spells in 157 countries over the period from 1950 to 2015. We would have data on some leadership spells starting before 1950, but due to concerns about comparability and data quality, we discard leaders who took office before 1950. On average, our leaders stayed in office for 6.1 consecutive years with a minimum of two years and a maximum of 48 years (years in which the leader took and left office are counted as full years). The longest running political leader in our dataset is King Hussein of Jordan who reigned the kingdom from 1952 until his death in 1999. Only 125 leaders entered office irregularly and another nine were imposed by a foreign country. Interestingly, under none of the nine foreign imposed leaders did constitutional compliance deteriorate.

The largest deterioration in one leadership spell in our sample occurred under the rule of Juan Velasco Alvarado in Peru between 1968 and 1975. General Velasco was the commander of Peru's armed forces when he seized power in a nonviolent

military coup. Subsequently, he was named president and started to nationalize entire industries, while ruling in an authoritarian fashion. Political opponents were persecuted and media were censored. In 1974, all newspapers were expropriated and their publishers exiled. Velasco was removed by a military coup in 1975 due to rapid inflation, unemployment, and food shortages. The second largest deterioration of constitutional compliance in a single leadership spell was experienced in Uruguay during the presidency of Juan María Bordaberry. Bordaberry became President in 1972. One year later, he dissolved the general assembly and started to rule by decree. He was eventually ousted by the military in 1976, after having proposed radical constitutional reforms to solidify his power.

<< Table 1 about here >>

Table 1 shows the results of estimating our main model. These and the following results are based on ordinary least squares estimation and country-clustered standard errors, unless specified otherwise. In Column 1, the constitutional constraints are averaged over the leadership spell, as explained above. In Column 2, we replace these mean values with measures for the constitutional rules in place before the respective leader took office. Column 3 combines the first two approaches. Here, we control for the averaged indicators, but we instrument them with the constitutional rules in place before the leadership spell. Evidently, all three operationalizations produce almost identical results.

Let us first take a look at the control variables. Leaders in democracies are less likely to undermine respect for the constitution. Leaders who acquire power irregularly are significantly more likely to reduce compliance with the constitution during their time in office. In addition, we observe convergence in constitutional compliance across political leaders, as reductions in compliance levels become more likely or sizeable when initial constitutional compliance (i.e., at the beginning of a leadership spell) was higher.

When it comes to our independent variables of interest, the results seem to indicate that constitutional constraints are not an effective instrument to prevent constitutional backsliding. Most indicators for constitutional rules we account for are not significantly related to the propensity of constitutional backsliding. One exception is our measure for presidentialism. Presidents are more likely than other democratic leaders to reduce compliance with the constitution over the course of their term in office. In fact, presidential democracies do not perform differently than nondemocratic countries. This observation is very much in line with extant

empirical evidence that presidential democracies perform poorly regarding the rule of law (Gutmann and Voigt 2018).

Our second finding concerns the right to form political parties. Against our expectation, the constitutional protection of this right is associated with a higher risk that the executive reduces its compliance with the constitution. While this observation is not in line with our idea of militant constitutionalism, it might actually be considered supportive of the concept of militant democracy. As explained above, a core aspect of militant democracy is to ban extremist speech, just like extremist parties and political movements. One interpretation of our result is that a constitutional protection of the right to form parties might be abused by the opponents of liberal democracy, who form political parties that aim at abolishing these very political freedoms.

<< Table 2 about here >>

Table 2 shows the results of estimating the model in Column 1 of Table 1, but for specific subsamples. On the one hand, we distinguish between low- and high-income countries. On the other hand, we distinguish political leaders who entered office irregularly, e.g., via a coup d'état, from those that entered regularly or were imposed from the outside. Our expectation is that militant constitutionalism might be more effective in countries with higher incomes and for political leaders that did not enter office irregularly.

We find that unamendability of parts of the constitution in high-income countries, indeed, is associated with a lower risk of constitutional backsliding. The negative effect of the right to form parties is also only significant in high-income countries. Finally, we find yet another result for high-income countries that is more in line with the arguments of militant democracy, than with those of militant constitutionalism. Protecting the freedom of the press in the constitution is associated with a higher risk of deteriorating constitutional compliance during a leadership spell. Again, this might suggest that these freedoms could be abused by political agitators and moderate regulation of extremist media content might be inhibited by an explicit constitutional protection clause.

The explicit distinction between political leaders who entered political office in an irregular mode and other political leaders brings to light interesting insights, too. First, after irregular entry democracy plays a dramatically larger role in preventing deterioration in constitutional compliance. This is the only model in which

presidential democracy does not perform significantly worse than parliamentary and mixed democracy. Second, and more important for our research question, constitutionally guaranteed executive decree power is associated with a higher risk of constitutional backsliding if the political leader came into office irregularly. This is very much in line with the concept of militant constitutionalism.

<< Table 3 about here >>

In Table 3, we show empirical estimates based on two more sample splits. On the one hand, we distinguish countries that have been democratic for at least ten years at the beginning of a leader's term from those that were not. On the other hand, we distinguish countries with high and low levels of judicial independence. Our expectation is that constitutional rules will be more effective in constraining the executive in established democracies and countries with a powerful and independent judiciary.

One interesting observation is that democracy is not needed to prevent deterioration of constitutional compliance as long as the country's judiciary is independent. Again, we find that constitutionally entrenched executive decree power is associated with a higher risk of constitutional backsliding, but only in countries that lack an independent judiciary and that have not been democratic for at least a decade according to the very minimalistic notion of democracy employed by Bjørnskov and Rode.

As a final extension, we split our sample into different continents. The results are shown in Table A1 in the Appendix. We find two interesting results. The negative effect of the constitutional right to form parties is driven by countries in Asia. Moreover, Asian countries are the only ones where we find that a right to resist, i.e., a constitutional right to overthrow the government, is associated with a lower likelihood to see constitutional compliance deteriorate.

Taken together, our empirical evidence lends some support to both the ideas of militant democracy and militant constitutionalism. Extensive protections of political parties and media freedom might be abused by political agitators who aim to undermine a liberal constitutional order. At the same time, we find some evidence that making parts of the constitution unamendable and giving citizens the right to overthrow the government may increase constitutional compliance, at least in some settings. Most importantly, we find quite consistent empirical evidence that where political leaders come to power in an irregular fashion and where political and legal

institutions do not guarantee their accountability, executive decree power can be a dangerous political instrument.

5. Conclusions and Outlook

We have proposed that militant constitutionalism is a design concept for constitutions that can limit the harm inflicted on the rule of law by would-be autocrats. Militant constitutionalism is different from militant democracy, which attempts to keep enemies of democracy out of any of the branches of government.

We have tried to ascertain the effectiveness of militant constitutionalism by asking whether governments operating under constitutions with some of the proposed traits are more likely to maintain respect for the constitution than governments that are free from these constraints. To estimate these effects empirically, we rely on the period during which single leaders remain at the helm of government without interruption as our unit of analysis. As it turns out, we are unable to demonstrate that our proposed measures have a systematic effect on countries' propensity to experience constitutional backsliding.

While it is unfortunate that we cannot offer any panacea for designing better constitutions, our null findings may also teach us some important lessons. (1) Details matter, many of the indicators we used are crude approximations of the concepts we have in mind. Just making any part of the constitution unamendable is clearly different from protecting specific, strategically relevant elements of the constitutional order. (2) Context matters. Our simple empirical model might not be able to capture the complexity of real world constitutional constraints. Their effectiveness may depend on finer nuances, such as their wording, the history of the country, the presence of other constitutional rules, etc. (3) *De jure* rules are not automatically enforced. It might be too optimistic to expect that legal text alone can safeguard the rule of law. While we have tried to capture different levels of enforcement by studying the effectiveness of militant constitutionalism in various groups of countries, it might actually be necessary to measure *de facto* institutions to find any effects (see also Gutmann and Voigt 2019b; Voigt et al. 2015).

In his work on militant democracy, Loewenstein conjectures that a long democratic tradition might be the best disinfectant against the rise of anti-democratic politicians. He thus assumed that long practice makes democratic survival more

likely. Our finding that countries that have been democratic for at least ten years without interruption are unlikely to suffer from a deterioration in constitutional compliance accord well with his conjecture. However, the possibilities to constrain would-be autocrats by relying on constitutional design seem limited. Future research, therefore, should also study whether extra- or pre-constitutional practice is crucial in sustaining the rule of law: If there is high trust between the government and the governed, detailed and lengthy constitutional rules might be superfluous. It seems quite possible that specific constitutional constraints only become effective, if they are implemented in a favorable (cultural/informal institutional) environment.

At the end of the day, rules will only be complied with if a sizeable portion of the population cares about them being complied with. If the rule of law is only met with lukewarm approval or complete disregard by the population, the government might get away with ignoring constitutional constraints. This implies that democratic governments would do well to promote an enlightened constitutional culture, such that citizens understand and appreciate the value of their constitution. The goal would not be to encourage blind or even fanatical trust in a written document that might be centuries old, but to teach the concrete functions of different constitutional clauses from an early age and to discuss their advantages and disadvantages openly in political debate.

References

- Aaken, A. van, & Voigt, S. (2011). Do individual disclosure rules for parliamentarians improve government effectiveness? *Economics of Governance*, 12(4), 301.
- Albert, R., & Oder, B. E. (2018) *An unamendable constitution?* Heidelberg et al.: Springer
- Bale, T. (2007). Are bans on political parties bound to turn out badly? A comparative investigation of three 'intolerant' democracies: Turkey, Spain, and Belgium. *Comparative European Politics*, 5(2), 141-157.
- Bjørnskov, C., & Rode, M. (2019). Regime types and regime change: A new dataset on democracy, coups, and political institutions. *The Review of International Organizations*, DOI: 10.1007/s11558-019-09345-1.
- Bjørnskov, C., & Voigt, S. (2018). "Why do governments call a state of emergency? On the determinants of using emergency constitutions." *European Journal of Political Economy*. 54:110-123.
- Bourne, A. K., & Bértoa, F. C. (2017). Mapping 'militant democracy': Variation in party ban practices in European democracies (1945-2015). *European Constitutional Law Review*, 13(2), 221-247.
- Breuer, A. (2007). Institutions of direct democracy and accountability in Latin America's presidential democracies. *Democratization*, 14(4), 554-579.
- Buchanan, J. and Tullock, G. (1962). *The calculus of consent*: Logical foundations of constitutional democracy. Ann Arbor: University of Michigan Press.
- Capoccia, G. (2013). Militant democracy: the institutional bases of democratic self-preservation. *Annual Review of Law and Social Science*, 9, 207-226.
- Carey, J. M., & Shugart, M. S. (Eds.). (1998). *Executive decree authority*. Cambridge University Press.
- Cheibub, J. A. (2007). *Presidentialism, parliamentarism, and democracy*. Cambridge University Press.
- Contiades, X., & Fotiadou, A. (2013). Models of constitutional change. *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA*, 417.
- Cranenburgh, O. van (2009). Restraining executive power in Africa: horizontal accountability in Africa's hybrid regimes. *South African Journal of International Affairs*, 16(1), 49-68.
- Elkins, Z., Ginsburg, T. & Melton, J. (2009). *The endurance of national constitutions*. New York: Cambridge University Press.
- Gavison, R. (2002). What belongs in a constitution? *Constitutional Political Economy*, 13(1), 89-105.
- Ginsburg, T., & Huq, A. Z. (2018). *How to save a constitutional democracy*. University of Chicago Press.
- Ginsburg, T., Lansberg-Rodriguez, D., & Versteeg, M. (2012). When to overthrow your government: The right to resist in the world's constitutions. *UCLA L. Rev.*, 60, 1184.
- Goemans, H. E., Gleditsch, K. S., & Chiozza, G. (2009). Introducing Archigos: A dataset of political leaders. *Journal of Peace Research* 46(2), 269-283.
- Gutmann, J. and S. Voigt (2018). The rule of law: Measurement and deep roots. *European Journal of Political Economy* 54:68-82.

- Gutmann, J. and S. Voigt (2019a). Opposing one's government: Are there cultures of civil disobedience? Mimeo; Institute of Law & Economics, University of Hamburg, Germany.
- Gutmann, J. and S. Voigt (2019b). On the relationship between *de jure* and *de facto* judicial independence: A global puzzle? Mimeo; Institute of Law & Economics, University of Hamburg, Germany.
- Gutmann, J. and S. Voigt (2019c). Predicting democratic backsliding. Mimeo; Institute of Law & Economics, University of Hamburg, Germany.
- Hacke, J. (2018). *Existenzkrise der Demokratie: zur politischen Theorie des Liberalismus in der Zwischenkriegszeit*. Suhrkamp Verlag.
- Hamilton, A., Madison, J. and Jay, J. (1788/1961); *The Federalist Papers*, with an introduction by C. Rossiter, New York: Mentor.
- Hayo, B., & Voigt, S. (2010). Determinants of constitutional change: Why do countries change their form of government? *Journal of Comparative Economics*, 38(3), 283-305.
- Kirshner, A. S. (2014). *A theory of militant democracy: The ethics of combatting political extremism*. Yale University Press.
- Landau, D., & Dixon, R. (2015). Constraining constitutional change. *Wake Forest L. Rev.*, 50, 859.
- Levitsky, S., & Ziblatt, D. (2018). *How democracies die*. Crown.
- Loewenstein, K. (1935). Autocracy versus democracy in contemporary Europe, II. *American Political Science Review*, 29(5), 755-784.
- Loewenstein, K. (1937a). Militant democracy and fundamental rights, I. *American Political Science Review*, 31(3), 417-432.
- Loewenstein, K. (1937b). Militant democracy and fundamental rights, II. *American Political Science Review*, 31(4), 638-658.
- Karl, M. (1943). Diagnosis of our time. *Kegan Paul, Trench, Trubner & Co., London*.
- Müller, J. W. (2012). Militant democracy. In: *The Oxford Handbook of Comparative Constitutional Law*.
- Müller, J. W. (2016). Protecting popular self-government from the people? New normative perspectives on militant democracy. *Annual Review of Political Science*, 19, 249-265.
- Pemstein, D., K. L. Marquardt, E. Tzelgov, Y. Wang, J. Medzihorsky, J. Krusell, F. Miri, and J. von Römer (2019). *The V-Dem measurement model: Latent variable analysis for cross-national and cross-temporal expert-coded data*. V-DEM Working Paper 21.
- Persson, T., & Tabellini, G. E. (2005). *The economic effects of constitutions*. MIT press.
- Popper, K. R. (1944). *The open society and its enemies*. London: Routledge and Kegan Paul.
- Prempeh, H. K. (2008). Presidents untamed. *Journal of Democracy*, 19(2), 109-123.
- Rensmann, T. (2003). Procedural fairness in a militant democracy: The uprising of the decent fails before the federal constitutional court. *German LJ*, 4, 1117.
- Röpke, W. (1962). Epochenwende. In: *Wilhelm Röpke, Wirrnis und Wahrheit. Ausgewählte Aufsätze*. Stuttgart: E. Rentsch, 105-124.

Rubio, D. F., & Goretti, M. (1998). When the president governs alone. In: Carey, J. M., & Shugart, M. S. (Eds.). *Executive decree authority*. Cambridge University Press, 33-61.

Rüstow, A. (1929/1959). Diktatur in den Grenzen der Demokratie, Vortrag vor der Deutschen Hochschule für Politik am 5. 6. 1929. *Vierteljahreshefte für Zeitgeschichte*, 87-102.

Sajó, A. (2019). Militant constitutionalism. In: A. Malkopoulou and A. Kirshner (eds.): *Militant Democracy and Its Critics. Populism, Parties, Extremism*. Edinburgh University Press.

Svolik, M. W. (2015). Which democracies will last? Coups, incumbent takeovers, and the dynamic of democratic consolidation. *British Journal of Political Science*, 45(4), 715-738.

Teitel, R. (2007). Militating democracy: Comparative constitutional perspectives. *Mich. J. Int'l L.*, 29, 49.

Voigt, S., Gutmann, J. & Feld, L. P. (2015). Economic growth and judicial independence, a dozen years on: Cross-country evidence using an updated Set of indicators. *European Journal of Political Economy*, 197-211

Wagrandl, U. (2018). Transnational militant democracy. *Global Constitutionalism*, 7(2), 143-172.

Table 1: Main model

| | (1) Mean | (2) Lag | (3) IV |
|--------------------------|----------------------|----------------------|----------------------|
| Initial Compliance | -0.075*** (0.013) | -0.074*** (0.012) | -0.076*** (0.013) |
| Previous Terms in Office | 0.004 (0.013) | 0.007 (0.013) | 0.006 (0.013) |
| Irregular Entry | -0.388*** (0.075) | -0.408*** (0.077) | -0.412*** (0.077) |
| Regular Entry | -0.063 (0.056) | -0.079 (0.059) | -0.079 (0.060) |
| Presidential | -0.103*** (0.021) | -0.101*** (0.020) | -0.101*** (0.021) |
| Democracy | 0.139*** (0.033) | 0.134*** (0.033) | 0.138*** (0.034) |
| Right to Resist | -0.023 (0.054) | -0.064 (0.057) | -0.071 (0.062) |
| Unamendability | 0.032 (0.023) | 0.028 (0.023) | 0.030 (0.024) |
| Term Limits | 0.015 (0.023) | 0.029 (0.026) | 0.033 (0.029) |
| Decree Power | -0.040 (0.026) | -0.019 (0.028) | -0.021 (0.030) |
| Right to Pardon | 0.022 (0.024) | 0.023 (0.029) | 0.025 (0.032) |
| Judicial Independence | 0.013 (0.026) | 0.026 (0.031) | 0.028 (0.033) |
| Right to Parties | -0.053* (0.024) | -0.087** (0.026) | -0.095** (0.029) |
| Right to NGOs | 0.002 (0.025) | 0.006 (0.026) | 0.009 (0.028) |
| Right to Unions | -0.017 (0.025) | -0.004 (0.029) | -0.005 (0.033) |
| Press Freedom | -0.031 (0.021) | -0.040 (0.023) | -0.044 (0.026) |
| Right of Association | 0.026 (0.034) | -0.002 (0.039) | 0.000 (0.045) |
| Observations | 1,262 | 1,262 | 1,262 |
| Countries | 157 | 157 | 157 |

Note: (1/2): OLS regression coefficients with country-clustered standard errors in parentheses, (3): 2SLS-instrumental variable regression coefficients with country-clustered standard errors in parentheses, observations are leadership spells, *: 0.05 , **: 0.01 , ***: 0.001.

Table 2: Sample split by income/leader entry

| | (1) HighInc | (2) LowInc | (3) Irregular | (4) Regular/Imp |
|--------------------------|----------------------|----------------------|----------------------|----------------------|
| Initial Compliance | -0.076*** (0.022) | -0.093*** (0.016) | -0.329*** (0.048) | -0.025** (0.008) |
| Previous Terms in Office | -0.007 (0.021) | 0.012 (0.018) | 0.136 (0.104) | -0.003 (0.010) |
| Irregular Entry | -0.610* (0.235) | -0.311*** (0.081) | | |
| Regular Entry | 0.064 (0.125) | -0.089 (0.070) | | -0.102*** (0.030) |
| Presidential | -0.121*** (0.035) | -0.094** (0.028) | -0.092 (0.152) | -0.069*** (0.018) |
| Democracy | 0.166* (0.076) | 0.133*** (0.035) | 0.483* (0.185) | 0.068* (0.028) |
| Right to Resist | -0.163 (0.129) | 0.047 (0.035) | 0.169 (0.351) | -0.015 (0.052) |
| Unamendability | 0.065* (0.027) | 0.011 (0.028) | 0.159 (0.114) | 0.015 (0.016) |
| Term Limits | 0.052 (0.032) | -0.013 (0.030) | 0.087 (0.138) | 0.009 (0.017) |
| Decree Power | -0.018 (0.035) | -0.049 (0.030) | -0.371** (0.129) | -0.003 (0.022) |
| Right to Pardon | 0.000 (0.029) | 0.023 (0.035) | 0.215 (0.132) | 0.050 (0.026) |
| Judicial Independence | 0.035 (0.033) | -0.030 (0.030) | 0.355 (0.233) | -0.007 (0.014) |
| Right to Parties | -0.073* (0.029) | -0.044 (0.033) | -0.199 (0.144) | -0.033* (0.016) |
| Right to NGOs | 0.043 (0.027) | -0.043 (0.031) | -0.037 (0.153) | -0.006 (0.020) |
| Right to Unions | -0.030 (0.043) | -0.019 (0.035) | -0.228 (0.166) | -0.000 (0.020) |
| Press Freedom | -0.093** (0.029) | 0.014 (0.027) | -0.166 (0.129) | -0.009 (0.017) |
| Right of Association | 0.074 (0.045) | 0.055 (0.053) | 0.216 (0.200) | -0.004 (0.026) |
| Observations | 633 | 629 | 142 | 1,120 |
| Countries | 85 | 129 | 65 | 154 |

Note: OLS regression coefficients with country-clustered standard errors in parentheses, indicators for constitutional rules are mean values for the leadership spell as in Column 1 of Table 1, observations are leadership spells, *: 0.05 , **: 0.01 , ***: 0.001

Table 3: Sample split by age of democracy/judicial independence

| | (1) DAge 10+ | (2) DAge 9- | (3) HighJI | (4) LowJI |
|--------------------------|---------------------|----------------------|--------------------|----------------------|
| Initial Compliance | -0.004 (0.014) | -0.108*** (0.017) | -0.031* (0.014) | -0.132*** (0.021) |
| Previous Terms in Office | -0.017 (0.016) | 0.016 (0.018) | 0.004 (0.013) | 0.024 (0.029) |
| Irregular Entry | | -0.349*** (0.082) | | -0.348*** (0.087) |
| Regular Entry | -0.110 (0.202) | -0.012 (0.064) | 0.257 (0.146) | -0.021 (0.069) |
| Presidential | -0.063** (0.021) | -0.121*** (0.034) | -0.030 (0.016) | -0.193*** (0.048) |
| Democracy | 2.437* (0.959) | 0.142*** (0.035) | 0.099 (0.052) | 0.117** (0.044) |
| Right to Resist | -0.039 (0.083) | -0.027 (0.065) | -0.042 (0.042) | 0.025 (0.087) |
| Unamendability | -0.020 (0.024) | 0.034 (0.035) | 0.001 (0.020) | 0.064 (0.038) |
| Term Limits | -0.023 (0.025) | 0.046 (0.037) | -0.026 (0.021) | 0.068 (0.042) |
| Decree Power | 0.026 (0.032) | -0.086* (0.033) | 0.015 (0.021) | -0.083* (0.039) |
| Right to Pardon | 0.042 (0.027) | 0.019 (0.038) | 0.012 (0.022) | 0.057 (0.057) |
| Judicial Independence | 0.029 (0.019) | 0.015 (0.042) | 0.007 (0.016) | 0.037 (0.055) |
| Right to Parties | -0.029 (0.024) | -0.070 (0.036) | -0.025 (0.021) | -0.079 (0.043) |
| Right to NGOs | 0.011 (0.021) | -0.006 (0.035) | 0.013 (0.024) | -0.040 (0.043) |
| Right to Unions | 0.038 (0.028) | -0.051 (0.035) | 0.023 (0.022) | -0.039 (0.048) |
| Press Freedom | -0.022 (0.018) | -0.026 (0.031) | -0.022 (0.015) | -0.036 (0.042) |
| Right of Association | -0.063 (0.041) | 0.094 (0.050) | -0.031 (0.029) | 0.112 (0.062) |
| Observations | 561 | 701 | 626 | 636 |
| Countries | 89 | 149 | 87 | 117 |

Note: OLS regression coefficients with country-clustered standard errors in parentheses, indicators for constitutional rules are mean values for the leadership spell as in Column 1 of Table 1, observations are leadership spells, *: 0.05 , **: 0.01 , ***: 0.001.

Appendix

Table A1: Sample split by continents

| | (1) Africa | (2) Americas | (3) Asia | (4) Europe |
|--------------------------|----------------------|---------------------|----------------------|----------------------|
| Initial Compliance | -0.167*** (0.038) | -0.121** (0.033) | -0.107*** (0.028) | 0.001 (0.014) |
| Previous Terms in Office | 0.009 (0.087) | 0.004 (0.031) | 0.037 (0.027) | -0.016 (0.017) |
| Irregular Entry | -0.142 (0.121) | -0.265* (0.117) | -0.350*** (0.070) | -0.396*** (0.037) |
| Regular Entry | 0.106 (0.075) | 0.164 (0.131) | -0.014 (0.084) | -0.012 (0.035) |
| Presidential | -0.069 (0.100) | -0.275** (0.094) | -0.101* (0.040) | -0.034 (0.037) |
| Democracy | 0.160* (0.077) | 0.258* (0.121) | 0.170** (0.056) | -0.020 (0.037) |
| Right to Resist | 0.020 (0.080) | -0.160 (0.089) | 2.201*** (0.614) | 0.036 (0.031) |
| Unamendability | 0.000 (0.072) | -0.043 (0.057) | 0.062 (0.040) | -0.014 (0.027) |
| Term Limits | -0.037 (0.077) | 0.070 (0.080) | -0.056 (0.048) | 0.037 (0.037) |
| Decree Power | -0.076 (0.079) | -0.019 (0.114) | -0.065 (0.050) | 0.020 (0.020) |
| Right to Pardon | 0.192 (0.112) | 0.003 (0.049) | 0.035 (0.059) | -0.024 (0.026) |
| Judicial Independence | -0.001 (0.062) | 0.055 (0.096) | 0.049 (0.041) | -0.017 (0.021) |
| Right to Parties | -0.001 (0.075) | -0.029 (0.056) | -0.163*** (0.042) | -0.033 (0.031) |
| Right to NGOs | -0.160 (0.127) | 0.018 (0.066) | 0.018 (0.054) | 0.037 (0.031) |
| Right to Unions | -0.131 (0.108) | 0.042 (0.118) | -0.001 (0.036) | -0.000 (0.028) |
| Press Freedom | -0.038 (0.076) | 0.025 (0.059) | -0.017 (0.047) | -0.009 (0.024) |
| Right of Association | 0.073 (0.144) | -0.064 (0.179) | 0.075 (0.068) | -0.029 (0.027) |
| Observations | 190 | 334 | 304 | 381 |
| Countries | 48 | 27 | 41 | 36 |

Note: OLS regression coefficients with country-clustered standard errors in parentheses, indicators for constitutional rules are mean values for the leadership spell as in Column 1 of Table 1, observations are leadership spells, *: 0.05 , **: 0.01 , ***: 0.001