

## **Militant Democracy and the Study of Political Tolerance**

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## Introduction

The “democratic dilemma” of “how much freedom for the enemies of freedom” has traditionally been an important theme of debate for political and legal theorists (e.g. Müller 2012). By contrast, political scientists have paid much less attention to how different democratic regimes navigate this dilemma in practical terms –namely how and why democracies actually vary in their response to the actions of anti-democratic groups. The absence of a robust comparative empirical research agenda on “militant democracy” (Loewenstein 1937a, b), defined as the set of policies that a democratic state enacts and implements to limit the rights of expression and participation of (real or perceived) anti-democratic actors (Capoccia 2018c), constitutes a substantial lacuna in our knowledge and, at the same time, a puzzle. A lacuna because the boundaries that democratic decision-makers set to distinguish legitimate from illegitimate political dissent is a crucial aspect of democratic rule, as cases ranging from 1930s Germany to 1990s Algeria show. A puzzle because the issue of how to respond to the destabilizing action of anti-democratic political actors has been persistently salient in the politics of many democracies. In his seminal writings on militant democracy from the 1930s, Karl Loewenstein mapped the policy and institutional responses of many West European democracies to the rise of Fascism and Nazism. The problem of responding to extremism in democracies, however, did not disappear with the defeat of the Axis in the Second World War. Since then, democratic regimes have continued to face anti-democratic challenges, including, for example, Communist parties during the peak of the Cold War, extra-parliamentary extremism in the 1960s and 1970s, and the recent rise of Islamic fundamentalism. And yet, in post-war comparative politics, there were no successors to Loewenstein: political scientists have studied the rules and institutions of militant democracy mostly in descriptive studies, and this topic has been absent, broadly speaking, in mainstream political science (Capoccia 2013).

One important reason for this absence is that “mainstream” political science is largely defined by the rise (and decline) of rival approaches to the study of politics that provide scholars with theoretical

lenses, research programs, conceptual vocabularies and normative assumptions (e.g. Almond 1990).<sup>1</sup> And all such approaches, even those that potentially yield important insights, have blind spots. The issues raised by the restriction, by democratic governments, of the rights of political participation and expression of some subset of their citizens for political reasons have been of continuous interest to comparativists. Typically though, political science's dominant theoretical and normative lenses have led to the analysis of rights-restricting policies in democracies not *per se*, but in the context of research programs focused on related phenomena –such as, for example, state repression, human rights violations, or the policing of social movements (Capoccia 2018b). In particular, the long eclipse of institutional analysis between the 1940s and the 1990s (Hall and Taylor 1996) left little space for the systematic comparative analysis of the policies of militant democracy as an independent object of study. These circumstances have not just been detrimental to our knowledge of this aspect of democratic rule but, as I argue below, the lack of such knowledge has also had negative repercussions on the results of the above-mentioned research programs themselves. In this chapter, I illustrate these points by discussing the most important of the research programs in comparative politics that address problems that are relevant to militant democracy: the analysis of political tolerance.

The empirical study of political tolerance constitutes an established subfield of comparative politics. Started in the US during the 1950s, research on political tolerance has now gained a strong comparative dimension: questions on tolerance, for example, have become a stable part of important comparative surveys such as the World Values Surveys and the Eurobarometer (for reviews, see Gibson 2006, 2011). As an important example of the behaviorist approach to the study of politics, tolerance research focuses on individual attitudes, typically via the analysis of mass surveys. Demonstrating the continuing political salience of the policies and institutions that regulate dissent in democracies, this

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<sup>1</sup> I use the more generic term “approach” rather than the more contested term “paradigm” (e.g. Ball 1976; Eckberg and Hill 1979).

literature typically measures tolerance by asking survey respondents about their support for or opposition to policies that restrict the rights of expression and participation of “unpopular” groups. These are obviously the policies that, when targeted at political extremists, constitute the core of militant democracy. The continued relevance of rights-restricting policies for the study of tolerance, however, did not translate into laying the conceptual ground for their comparative analysis. Indeed the theoretical and conceptual setup that characterizes the research agenda on political tolerance has *reduced* the space for such an analysis. In particular, the identification of democracy with a model of an unrestricted “marketplace of ideas”, which has been dominant in the tolerance literature, has made it difficult to carve out a conceptual space for the comparative analysis of the key policies of “militant democracy” as *an independent phenomenon that happens in, and varies across, fully fledged democratic regimes*. The chapter illustrates this point, and further argues that the comparative knowledge provided by a robust research program on militant democracy could usefully inform comparative research on political tolerance itself, in particular outside the US and other Anglo-Saxon democracies such as the UK, Canada or New Zealand.

The chapter is organized as follows. The next section discusses the place and relevance of rights-restricting policies in the research program on political tolerance. The section that follows outlines how the normative identification of democracy with the model of an unrestricted marketplace of ideas has led to analytical moves that have significantly reduced the space for the analysis of those policies in democracies. The subsequent section discusses how a comparative body of knowledge on the rights-restricting policies enacted in democracies would improve the interpretation of empirical findings in comparative research on political tolerance. The conclusion summarizes the main points of the discussion and points to avenues of future theorization and research.

## Political tolerance, mass opinion and policy change

The study of political tolerance was initially motivated by what can be considered an extreme example of the law and politics of the principle of “no freedom for the enemies of freedom”: McCarthyism (Stouffer 1955). As is well known, the actions of the Wisconsin US Senator against real or presumed Communists polarized American society and engendered, in some circles, significant worries of an anti-democratic involution of the US polity (e.g. Rogin 1967).<sup>2</sup> At the time, many other Western democracies were dealing with the dilemmas posed by Communist parties with strong ties to the USSR. Indeed, in some European countries such as Italy or France, the Communist electoral base was much larger than in the US. In principle, this situation could have motivated a stream of research similar to Loewenstein’s from two decades earlier. That this did not come to pass in mainstream comparative politics is at least in part due to the fact that by the 1950s the “old institutionalist” style of analysis typical of Loewenstein’s work was declining in the consideration of political scientists. A new paradigm, behavioralism, had emerged as dominant across the social sciences. Behavioralist political scientists were the main critics of pre-war political analysis –what they called “traditional political theory”-- which they considered “subjective” and impressionistic (e.g. Ball 1976, 153). In political science, behavioralism promoted an analytical focus on observable political behavior in the context of the groups, processes and systems in which such behavior could be explained. It also relied on new research techniques and methods, first and foremost the analysis of mass survey data (Farr 1995, 202-203).

The rise of behavioralism in political science meant that the main analytical focus of research on rights-restricting policies in democracies shifted away from the policies themselves and to the popular

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<sup>2</sup> A discussion of whether the actions by McCarthy and the US Senate Permanent Subcommittee on Investigations (and the parallel ones by the House Un-American Activities Committee) should be considered normatively legitimate exceeds the scope of this chapter. Most supporters of militant democracy would *not* consider normatively legitimate restrictions of rights that are marred by procedural abuse, lack of effective judicial review, or disproportionality –which have been documented in the case of McCarthyism-- even if these actions were targeted at unquestionably anti-democratic actors. As discussed below, the conception of democracy at the basis of much empirical research on tolerance was such that would instead consider *the very possibility* of restricting rights of the enemies of democracy as democratically illegitimate.

attitudes towards them. The existence of intolerant attitudes towards specific groups was initially seen as an important condition for triggering public policies that restricted the rights of the groups in question. For example, the main finding of the seminal study in the literature on political tolerance, Samuel Stouffer's *Communism, Conformism and Civil Liberties* (Stouffer 1955), was that the US electorate was largely *intolerant* of Communists (and therefore broadly in alignment with McCarthy's initiatives of the time) and of other marginal groups in American society.<sup>3</sup> (At the same time, Stouffer found "elites" –in his definition, individuals with a stronger interest in politics and engaged more in political activities than the average citizen—to be significantly more tolerant than masses in general.) On these bases, Stouffer postulated a rather simple linkage between mass opinion and public policy: a diffuse public intolerance towards specific groups would lead to, and *de facto* legitimize, the imposition of policies restricting the democratic rights of such groups. The same view was held by Sullivan et al (1979; 1981) who argued that intolerance in the US did not decline after the 1950s as Stouffer had predicted on the basis of the expected rise of education levels, increased horizontal mobility, and diffusion of communication. Rather, intolerance simply became "pluralistic"—that is, spread among different targets rather than concentrated on Communists. According to Sullivan and his co-authors, the "pluralistic" distribution of mass intolerance explained the less repressive public policy of the 1970s vis-à-vis the 1950s: when there is sufficient agreement among the mass public to repress a certain group, that group will be repressed, as the Communists were in the 1950s. In the 1970s, no such agreement existed, so no repression occurred; elites were freer because of this divided public opinion and could act according to their more tolerant principles.

In later years, however, a number of studies have convincingly pointed out that the way in which rights-restricting policies come to be enacted does not respond to a simple demand-output

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<sup>3</sup> The definition of political tolerance evolved somewhat in this literature, and discussions on measurement have been robust, but never questioned the strategy of measuring political tolerance towards a certain group by asking individuals whether they supported or opposed policies aimed at restricting basic rights of members of that group.

model.<sup>4</sup> Gibson, for example, points out that the data available are insufficient for researchers to establish a clear causal nexus –let alone a linear, unidirectional one-- between mass opinion and public policies. In his analysis of anti-Communist repression in the US states, he argues that it is by no means evident that mass opinion drives public policy, and that the opposite causal arrow is at least as plausible—although the available evidence prevents any conclusive interpretation (Gibson 1988). In his analysis of the repression of campus protests against the Vietnam war, Gibson finds that mass opinion and repressive policies were *negatively* correlated across the US states: states where mass opinion was more tolerant had more repressive legislation (Gibson 1989). He speculates that the relationship between mass tolerance and repressive policies might take a quadratic functional form: more tolerance encourages more dissent, but when the disruption that comes with dissent surpasses a certain level, states are more likely to pass repressive legislation to quell it. Again, however, Gibson is careful to specify that existing data do not allow for testing this hypothesis. Other studies have maintained that courts and law enforcement institutions may have an independent effect on which policies are enacted and implemented (e.g. Gibson 1992a, 570; 1996; Barnum and Sullivan 1989). However, these insights into the causes of variation of rights-restricting policies towards specific groups have not been systematically developed.

## **The study of political tolerance and democracy as a “marketplace of ideas”**

The predominance of intolerant attitudes among the US mass public made scholars pessimistic about Tocqueville’s classic argument on the importance, in a democracy, of a civil society that supports civil rights and freedoms (e.g. Griffith et al. 1956; see discussion in Prothro and Griggs 1960, 281, 291-294). Indeed, Stouffer’s findings mentioned above spurred the debate on the so-called “elitist theory of

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<sup>4</sup> Gibson (1992b) raises doubts on whether mass (in-)tolerance has *any* influence on public policy, and argues that the most likely principal consequence of diffuse intolerant attitudes is to encourage a climate of social conformism and to stifle social criticism and opposition.

democracy”, and set the agenda of research on political tolerance for several decades (Gibson 2006). Various studies supported or criticized (e.g. Dahl 1961, 320; Key 1961, 197-199; McCloskey and Brill 1983; Nunn, Crockett and Williams 1978, 148; see Bachrach 1967 for a synthesis of the normative debate), the elitist theory of democracy essentially restricted the scope of Tocqueville’s original proposition by arguing that democratic masses were not necessary to a thriving democracy, but democratic elites were. Many later studies of political tolerance focused on proving (e.g. Prothro and Griggs 1960; McCloskey 1964; Sullivan et al 1979; 1981; Barnum and Sullivan 1989; 1990) or disproving (e.g. Gibson 1988; Duch and Gibson 1992; Gibson and Duch 1991) the elitist theory of democracy, at times highlighting its lack of specification (Gibson and Bingham 1984; Gibson 1992b, 338). Others pointed out that the difference between “elites” (often defined differently in different studies) and “masses” was either not significant or driven by third factors such as education (e.g. Jackman 1972).<sup>5</sup>

Even though it very soon became clear *empirically* that a democratic regime did not require a tolerant population (or even a tolerant majority), most scholars of tolerance continued to identify *conceptually* and *normatively* “tolerance” and “support for democratic norms” (e.g. Gibson 2011; see Gibson 2006, 23 for some nuancing of that view). Stouffer had pointed out that political tolerance embodied “two of the more delicate elements of the democratic creed”, namely “specific support for civil liberties” and the “principle of minority rights” (Stouffer 1955, 221). Such equation of political tolerance with “support for democratic norms” (e.g. Barnum 1982) is essentially based on the age-old conception of democracy as a political system based on a “marketplace of ideas”:<sup>6</sup> liberal democracy can

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<sup>5</sup> Furthermore, scholars disagreed on exactly *what aspect* of democratic rule would be negatively affected by the predominance of intolerant views among the population (see discussion in e.g. Barnum 1982, 485; Jackman 1972, 758)—whether democratic stability (Prothro and Griggs 1960), government effectiveness (Gibson and Bingham 1985, 9), or the application of tolerant norms to specific controversies regarding civil and political rights (e.g. Gibson 1987; Gibson and Bingham 1985; Barnum 1982).

<sup>6</sup> This is the core of the so-called “classical theory of democracy”, typically evoked in this literature in opposition to the above-mentioned “elitist theory of democracy”. According to this view (for which “classical” is somewhat of a misnomer: in the US it is mainly based on Oliver Wendell Holmes’s views on free speech; see Sullivan et al. 1979) democratic outcomes depend on whether citizens hold dear the respect for civil liberties.

only flourish if competition among ideas is unconstrained, because this is the only way in which “superior ideas are found to be superior...almost if as guided by an invisible hand” (Gibson 2011, 412). This notion has noble ancestors including, among others, John Stuart Mill and Oliver Wendell Holmes. Reference in the political tolerance literature is also made to Robert Dahl’s influential concept of “polyarchy” --i.e. real-existing rather than ideal democracy—which is based on the same view (e.g. Gibson 1988, 513; 1992b; 1996, 5-6; Gibson and Bingham 1985, 2-17; Gibson and Duch 1991; Peffley and Rohrschneider 2003, 248).<sup>7</sup> Analysts of tolerance have certainly not been exceptions in holding such views. Indeed, as some have argued, this conception of democracy was part and parcel of the behavioralist research program itself. The pluralistic system of individuals and groups that constituted the model of the political system for most behavioralist political scientists, rested on a general consensus on the values of liberalism, and it reflected, at least in the early phase of the program, an idealized image of American society (e.g. Farr 1995, 205).

Whatever its intellectual origins, the logical corollary of conceiving democracy as an unrestricted marketplace of ideas is that all policies that restrict the rights of (non-violent) groups are *anti-democratic*, including policies targeted at groups that advocate the demise of democracy (e.g. Stouffer 1955, 13; 221; Barnum 1982, 497-498; Gibson 2006, 23).<sup>8</sup> Hence, important studies of political tolerance frequently take the view that in a democracy speech in support of violence and suicide bombing should be tolerated (Gibson 2011, 411-412), not least because “the threat of violence, especially from outside agitators and other anti-system elements, is an intimate part of struggle over civil liberties” (Gibson and Bingham 1982, 618). This position is of course normatively legitimate, but fails to consider that the threat of violence has historically been functional to both pro- and anti-democratic agendas, and that in

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<sup>7</sup> Dahl considered that the definitional traits of polyarchies were the equality of opportunity for *all* political actors to formulate their preferences and signify them to the government and to their fellow citizens for individual and collective action; and to have the government weigh their preferences equally, that is, weigh them with no discrimination due to the content or the source of the preference (Dahl 1971, 1-2).

<sup>8</sup> This view considers as equally anti-democratic the beliefs, say, of a Nazi group, and of those in favor of curtailing the political rights of that Nazi group in order to protect democracy (e.g. Stouffer 1955, 221).

some cases anti-democratic forces have come to power (or threatened to do so) through constitutional channels. Different historical experiences may lead to the predominance of different views of democracy.

The *normative* definition of democracy as an unrestricted “marketplace of ideas” and the consequent consideration of all rights-restricting policies as inherently anti-democratic, even when targeted at actors who advocate openly anti-democratic ideologies, influenced the *conceptual* and *theoretical* apparatus of most scholars of tolerance. In particular, it was perfectly logical to consider all public support for rights-restricting policies (i.e. intolerant attitudes) as equally detrimental for democracy, irrespective of (1) whether such support is expressed in the context of a fully consolidated democratic regime or in transitional, illiberal, or otherwise precarious democracies (see e.g. Gibson 1996; 2002; Gibson and Gouws 2001; Marquart-Pyatt and Paxton 2007); and (2) whether in democratic regimes rights-restricting policies are targeted at anti- or pro-democratic groups.

The first of these two analytical moves *de facto* lumps “militant democracies” in the same category as hybrid regimes or illiberal democracies.<sup>9</sup> This move implicitly reduces the conceptual space for studying policies that restrict the rights of anti-democratic opponents as a separate phenomenon in full-fledged democracies –or, more precisely, across regimes that are normally considered as full democracies in other debates within comparative politics, as well as in common parlance. In other words, the conceptual categories of the tolerance literature lump together rights-restricting policies in, say, the Federal Republic of Germany and the Netherlands with those in, say, Putin’s Russia or other hybrid regimes. Yet, in the latter regimes, such policies may be used as one of many ways to frustrate

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<sup>9</sup> The analysis of mass tolerance in these contexts is often invoked to substantiate the ongoing importance of this literature. Gibson puts this point perhaps most explicitly of all: “...The topic is today no less important than it was in the days of Joseph McCarthy... since intolerance in one form or another fuels the conflict in Northern Ireland, the Middle East, Rwanda, and many other areas of the world. And even where intolerance does not directly produce political violence, the failure of democratizing regimes to embrace political freedoms for all, even those in the opposition, has become one of the most important impediments to the consolidation of democratic reform throughout the world (as in the so-called illiberal democracies)” (Gibson 2011, 410).

any opposition to the incumbents (e.g. Levitsky and Way 2010), while in the former (democratic) systems such policies have historically been targeted mostly at fringe and openly anti-democratic groups, while maintaining political pluralism and the rights of democratic oppositions.

The second analytical moves mentioned above treats groups such as atheists or homosexuals (two categories often studied in this literature as potential targets of intolerance—e.g. Stouffer 1955; Gibson 1987; Gibson and Duch 1993; Bahry et al. 1997) on the same footing as groups that advocate the demise of democracy. Support for limiting the freedoms of either type of groups is considered to be indicative of intolerance and weak democratic norms. As a result, it is not possible to conceptualize and study separately *militant* democracy. Militant democracy is comprised of policies that address the “democratic dilemma” mentioned at the beginning of this chapter. As such, it only consists of policies that are aimed at *anti-democratic* actors—that is, actors that pursue the goal of subverting democracy. The concept of militant democracy certainly does not extend to rights-restricting policies that are aimed at other types of political opposition and, even less so, at social minorities.

Even more importantly, this second analytical move neglects the possibility that, in some contexts, policies specifically directed at anti-democratic groups may be considered by elites and masses to be *supportive* of, rather than antithetical to, democracy, precisely because of the purpose of the policies in question of protecting democracy from internal attacks. In these contexts, democracy may not be conceived as an *unrestricted* marketplace of ideas. This possible variation in the commonplace conceptualization of democracy might, in turn, renders problematic the interpretation of some findings of tolerance research itself. I discuss this problem in the next section.

## Comparative analyses of political tolerance and militant democracy—a missing variable

Even though democracy as an unrestricted marketplace of ideas is a time-honored normative position, it is not the only plausible one, as the long-standing debate in legal and political philosophy about the “democratic dilemma” shows.<sup>10</sup> Therefore, an approach that assesses tolerance exclusively on the basis of the “unrestricted marketplace” concept risks understating the associated support for democracy, depending on the political context. In the US, which has been the main empirical terrain for agenda-setting tolerance studies (e.g. Stouffer 1955; Prothro and Griggs 1960; McCloskey 1964), the unrestricted marketplace definition of democracy reflects what most observers would perceive, temporary aberrations aside, as the “normality” of the constitutional and legal system: all (non-violent) dissent is allowed irrespective of its ideological content, and courts have set a rather high bar for government prohibitions on speech (e.g. Gibson 1988, 511; Barnum and Sullivan 1990, 719; on the historical roots of the legal treatment of free speech in the US, see e.g. Whitman 2000).<sup>11</sup> The same considerations broadly apply also to the UK, Canada, and New Zealand, empirical cases that also figure prominently in the tolerance literature (see e.g. Barnum and Sullivan 1989, 1990; Sniderman et al 1989a; Sullivan et al 1985).

In other contexts, however, the historical trajectory of democratization has sometimes given rise to rules restricting the political rights of anti-democratic actors not as temporary or exceptional measures but as rather stable elements of the constitutional order. Importantly, this may apply to regimes that, no less than the Anglo-Saxon countries just mentioned, are considered to be full democracies, and that are often taken as models of stability and effectiveness both by specialists and

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<sup>10</sup> This debate is too extensive to review here. For recent contributions, see e.g. Brettschneider (2012), Kirshner (2014), and Issacharoff (2015).

<sup>11</sup> Scholars of political tolerance are of course aware of the several circumstances in the history of the US in which the government has exerted harsh preventive repression on real or supposed enemies (e.g. Goldstein 1978). These, however, are typically considered as transient deviations from a default rule of generalized tolerance for non-violent extremism, as reflected in the vast legal literature on free speech in the US (e.g. Tribe 2000).

the general public. Indeed, democratic regimes do not emerge from a common blueprint, but historically, as collages of superimposed institutional arrangements that are often introduced to address the problems of specific political contingencies (Capoccia and Ziblatt 2010). In democracies that have emerged from the collapse of an authoritarian regime, for example, it is possible that the new democratic political elites, intent on preventing the resurgence of anti-democratic forces, include safeguards in the country's constitution and statute books that legally restrict the possibilities for political proselytization by anti-democratic organizations, first and foremost by the supporters of the previous authoritarian regime. The country's legal and political scholars, mainstream political organizations, and the courts may over time come to view these legal restrictions not as a breach of some abstract normative view of democracy, but as supportive of democracy given their declared aim of protecting democracy. The above is even more likely to occur in countries that have a history of democratic breakdown at the hands of authoritarian forces that grabbed power --or endangered democratic survival (Capoccia 2005)-- by exploiting *unrestricted* democratic rights of expression and participation. Goebbels' oft-cited dictum "It will always be one of the best jokes about democracy, that it provides its mortal enemies with the means to destroy it" (cited in Fox and Nolte, 1995, 1), and the "democratic dilemma" that it evokes, resonates much more forcefully in the politics of some democracies than others.

In these contexts, a view of democracy as a *restricted* marketplace of ideas --restricted not in general, but specifically with respect to the participation and expression rights of antidemocratic forces may constitute a more plausible term of reference to assess elites' and masses' support of democracy on the basis of their political tolerance.<sup>12</sup> If due to a country's historical trajectory, restrictions on certain

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<sup>12</sup> Some scholars of tolerance have expressed skepticism about the possibility of establishing objective bases for whether a group can be considered as anti-democratic before it achieves its political goals (e.g. Gibson 2013, 62; see also Gibson and Bingham 1985, 11-12; 25; 41; Gibson 1988, 516). The difficulties inherent in such *ex ante* classification are apparent, but the task is not impossible (see Capoccia 2002 for a broader discussion). On the

actors come to be widely seen as part and parcel of democracy, intolerance for such actors is more likely to indicate support for democracy (in the sense of protecting it from internal enemies) than opposition to it. Take the example of the Federal Republic of Germany, in which the possibility of restricting several fundamental political rights of anti-democratic individuals and groups was included in the Basic Law and several federal statutes (e.g. Kirchhof and Kommers 1993). As several scholars have pointed out, West German constitution-makers introduced these rules as a corrective to the excessive leeway for anti-democratic forces built into the Weimar constitutional and legal system, which was blamed for ultimately facilitating Hitler's rise to power (e.g. Schäfer 2002). Even though these protective rules have periodically come under criticism for various reasons in the German scholarly and public debate, a large majority of legal and constitutional scholars, as well as political analysts, continue to see these rules as an integral element of the Federal Republic's postwar *democratic* constitutional order; their democratic legitimacy has been affirmed by all mainstream democratic parties; and most of the relevant prohibitions have been endorsed by courts, with a remarkable degree of consistency over time. It is therefore plausible to consider these restrictions on political extremism as describing the "normality" of the German democratic system, no less than the model of an unrestricted marketplace of ideas describes the "normality" of democracy in the US.<sup>13</sup> Hence, when German elites and masses are

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other hand, maintaining that *any* classification of opposition groups *ex ante* as pro- or anti-democratic is necessarily arbitrary leads to paradoxical conclusions, such as the impossibility of classifying as anti-democratic, say, the German Nazi party in 1932, or the Czechoslovak Communist party in 1947—i.e. just in advance of the realization of their anti-democratic political objectives.

<sup>13</sup> Acknowledging that different historical conditions may legitimize a model of democracy in which the "marketplace of ideas" may be variously restricted vis-à-vis anti-democratic actors does *not* mean adopting a relativist position in which the majority's mere labelling as "anti-democratic" of any opposition would bestow democratic legitimacy by *fiat* onto any legal restriction of their political rights. Apart from any other consideration, such a position would incur in the same conceptual fallacy of lumping together "militant democracies" and illiberal or semi-authoritarian regimes, which was criticized earlier in the chapter. Rather, the position defended here is the empirical enactment of many scholars' (including among others Karl Popper and Carl Joachim Friedrich) normative view that democratic constitutions are not "suicide pacts". Hence, the restriction of anti-democratic dissent in a democratic regime for preventive and defensive reasons, —at a minimum to stave off a realistic prospect of democratic breakdown—should not by itself lead scholars to consider the regime in question as hybrid or authoritarian. Whether the extent of the restrictions and their proportionality to the threat, the presence of partisanship or procedural abuse, or even doubts concerning the anti-democratic nature of the target of

surveyed on whether they support the restrictions on rights of participation of anti-democratic groups, their affirmative answer is more likely to indicate abidance by democratic norms than opposition or indifference to such norms.

These contextual factors have been taken into account only partially, if at all, in the comparative literature on political tolerance. For example, Gibson and Duch study tolerance towards “fascists” in Western European countries by analyzing mass and elite support for policies that restricted their rights of political expression, free demonstration, and association (Gibson and Duch 1991; see also Duch and Gibson 1992). Taking their lead from the view of democracy as an unrestricted marketplace of ideas, the authors consider support for such policies (i.e. intolerance towards “fascists”) as revealing opposition to democratic norms. Yet the “unrestricted marketplace” normative yardstick might lead to misinterpretation of the survey results. Even though most of the results of Gibson and Duch’s analysis do not attain conventional levels of statistical significance, it is striking that in the case of Germany (probably the most developed, and certainly the best-studied, system of “militant democracy” in Europe) “opinion leaders” (i.e. “elites”) are found to be broadly *less* tolerant towards fascists than the mass public. I concur with the authors’ interpretation that, for historical reasons, German elites are likely to have internalized “systemic norms” that include intolerance towards neo-fascists. It is less clear, however, that the German case should be viewed as an exception to a rule that older democracies develop clearer and more pervasive “democratic norms”, as the authors also maintain (Gibson and Duch 1991, 199-202)<sup>14</sup>. In fact, with respect to whether “fascists” should be tolerated or not in a democracy, Germany is less likely to be an isolated exception than a case to be placed at the end of a continuum. In several Western European democracies –in particular those that were created or re-established after

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restrictions are such as to justify reclassifying the regime from democratic to non-democratic will be a matter of scholarly debate and of classificatory and empirical analysis.

<sup>14</sup> Gibson and Duch (1991, 209) accept that restricting the rights and liberties of certain groups may be considered “desirable in certain circumstances”, but supporting such restrictions remains intolerant and therefore undemocratic.

the demise of fascist regimes (either autochthonous or collaborationist regimes during wartime)-- legislation or even constitutional norms against the public expression of neo-fascist ideology have existed in various forms since at least the end of the second World War, with varying levels of support across the political spectrum and the judiciary (Capoccia 2018a). Depending on this variation, survey respondents may associate the legal exclusion of fascists with protecting democracy, not with the violation of democratic norms.<sup>15</sup>

In a broad comparative study, Peffley and Rohrschneider acknowledge the potential importance that the illegalization of certain groups and ideologies may have on the nexus between intolerance and support for democracy in some countries, but they are not fully consistent in drawing the logical consequences of this insight. Criticizing the presence of criminals among the potential targets of tolerance included in the World Values Survey (1995-1997) they rightly argue that:

*"...political intolerance represents a threat to democracy only if the targets of intolerance are entitled to the same political rights and privileges as everyone else in the polity. Unfortunately including criminals among unpopular groups and organizations makes little sense from the standpoint of democratic theory... In most countries, criminals do not enjoy the same citizenship rights as not criminals (e.g. they might lose the right to vote in elections). Thus, refusing to extend to criminals the rights to run to office may be more a reflection of our countries' legal framework than of political intolerance"* (Peffley and Rohrschneider 2003, 247, italics added).

In some of the Western and Eastern European countries included in this study, however, political groups such as the Nazis, Fascists, and Communists –all mentioned as potential targets of intolerance in the survey questions analyzed by the authors— are also treated differently from ordinary citizens for purposes of “political rights and privileges” (e.g. Niesen 2012). Therefore, support for policies

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<sup>15</sup> I refer here to the legal possibility of restricting the rights of anti-democratic actors *in principle* –that is, avoiding partisanship, abuse, disproportionality and other distortions *in the practice* of applying such restrictions, practices which are considered incompatible with democracy among those who see militant democracy as legitimate (see discussion e.g. in Kirshner 2014).

that restrict the right to run for office of members of one or more of these groups may also be interpreted as “the reflection of that country’s legal framework” rather than as a sign of lack of belief in democracy. Yet, the authors consider supporting policies that deny such groups the right to freely demonstrate and the right to hold public office to be “the hallmark of an intolerant citizen” and therefore to be opposed to democratic norms (Peffley and Rohrschneider 2003, 248)<sup>16</sup>.

Of course, the point here is less to show the limits of specific studies than to bring into relief how the lack of systematic knowledge of variation in rights-restricting policies across democratic regimes may have negative consequences for the correct interpretation of comparative findings on political tolerance. Adding this “missing variable” to comparative analyses of political tolerance would not only improve the validity of these interpretations but also theoretically ground the views of those who have argued that intolerance for anti-democratic dissenters in survey responses does not necessarily indicate opposition to democratic norms. This is the view, for example, of Sullivan et al., who argue that tolerance should not be identified with support for democratic norms but be seen in trade-off with other democratic values, which opens the possibility that in some cases being intolerant might actually support, rather than undermine, the cause of democracy (Sullivan et al 1982).<sup>17</sup> Similarly, Sniderman and co-authors maintain that “...it is by no means intolerant--indeed, it may reflect an effort to defend tolerance--to refuse to accept as legitimate a group because its conduct is ambivalent and illegal. To refuse to tolerate socialists is to be intolerant; but to refuse to tolerate terrorists is to be tolerant” (Sniderman et al 1989b, 42). Marquart-Pyatt and Paxton explicitly argue that models of tolerance that have been developed for the US may not apply to Western or Eastern European

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<sup>16</sup> The authors acknowledge that in post-authoritarian democracies such as Germany, some rights, such as the right to teach in a school, may be legally restricted for individuals who hold anti-democratic views. This is one reason why they drop that specific indicator of intolerance from their analysis (Peffley and Rohrschneider 2003, 248). However, they do not extend this view to the rights to free demonstration and to hold public office, which may be subject to similar restrictions in Germany as well as in other post-authoritarian democracies.

<sup>17</sup> It should be noted that Sullivan et al’s “content-controlled” measurement of tolerance—i.e. measuring tolerance of the “least-liked group” rather than named groups (Sullivan et al 1979)—is at odds with this insight, since in some democracies, the “least-liked” groups might actually be illegal (e.g. Marquart-Pyatt and Paxton 2007, 104).

democracies, in which people have dire memories of the harmful effect for democracy of “least-liked groups”, which in some cases may have led to their illegalization (Marquart-Pyatt and Paxton 2007, 104). Lacking a clear metric of the legal and judicial boundaries of legitimate dissent across different democracies, however, these authors are ultimately unable to clarify *where* certain types of intolerance (i.e. the support for rights-restricting policies of a given intensity and directed to given targets) are more likely to signify support for democratic norms rather than opposition to them. Finally, in their study of Denmark, Petersen et al (2011) find that, with some exceptions, tolerance is high towards groups that observe democratic rights, while groups that are associated with violence and disrespect for the rules of democracy are tolerated much less. The authors attribute this pattern to “norms of reciprocity”: democratic rights are accorded by respondents to groups that, even though disliked, themselves observe and acknowledge democratic rights, and vice versa. However, it is likely that the very meaning of “reciprocity” will be different depending on what is generally seen to constitute observance and acknowledgments of democratic rights in different countries. In countries in which, say, *any* neo-Nazi activities are strictly forbidden, non-violent expression by a small neo-Nazi group might be seen by many as disrespecting the rules of democracy. Countries with more permissive policy regimes may instead set a more capacious boundary for “respect for democratic rights”.

## **Conclusion**

This chapter makes a twofold point. First off, the absence of an empirical research program in post-war mainstream comparative politics on the variation in the rights-restricting policies associated with “militant democracy” is not due to the political unimportance of the issues underlying the policies in question but to the theoretical, conceptual and normative lenses characterizing the approaches that have successively dominated the sub-discipline. These approaches have led analysts to consider rights-restricting policies targeted at anti-democratic actors in the context of broader or narrower objects of study, typically reducing the conceptual and theoretical space available for the comparative analysis of

militant democracy *per se*. Second, the lack of systematic comparative knowledge from a robust research program on militant democracy has been not only detrimental to our understanding of democratic rule, but also to the research programs that have focused on phenomena related to rights-restricting policies in democracies.

The chapter illustrates these points through a discussion of the empirical research on political tolerance. The discussion focuses on how the identification of democracy with a model of an unrestricted marketplace of ideas, which underlies many analyses of tolerance, has led to conceptual and analytical moves that have restricted the theoretical and conceptual space for the study of “militant democracy” as an independent phenomenon that happens in, and varies across, full-fledged democratic regimes. The chapter furthermore shows how a more reliable empirical knowledge of variation in rights-restricting policies across different democracies would be likely to improve our interpretation of comparative findings on political tolerance. As explained, the historical trajectories and the political circumstances of different countries may entrench politically, judicially and culturally the democratic legitimacy of specific legal restrictions of the political rights of one or more anti-democratic groups, thus leading the normative concept of democracy to depart from the version based on the unrestricted marketplace of ideas. In these contexts, elite and mass support for such restrictions would be more likely to signify support for democratic norms rather than opposition to them.

What is needed, and what was missing for much of the post-war period in mainstream comparative politics, is an analytical focus on institutions *per se*, in particular their causal strength, their dynamics of development over time, and their social underpinnings. The resurgence of interest in institutional analysis since the late 1980s and early 1990s has brought important advances in the comparative politics field, and to useful theoretical and conceptual bridges with the literatures in public policy and history (e.g. Pierson 2006; Capoccia 2016). So far, longitudinal analysis of institutional

development has mainly –although not exclusively–concentrated on social and economic policies. We now have the instruments to extend the findings and concepts to other policy sectors, including, importantly rights-restricting policies –or, otherwise put, how “militant” democracies are, against whom, and why.

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