Otto Kirchheimer & Militant Democracy

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**Abstract**

This paper argues that Otto Kirchheimer’s analysis of political rights restrictions, a basic mechanism of militant democracy, may resolve a practical paradox faced by contemporary normative theories. Militant democracy can be defined as the use of mechanisms of constitutional entrenchment to pre-emptively deny antidemocrats the legal democratic means to revolutionize a democracy. A central challenge to political rights restrictions, such as party bans, is a practical paradox: by the time they may be deployed legitimately, antidemocratic movements may have grown too strong to be stopped by legal means.

Kirchheimer offers a way out of that paradox. Drawing on rulings by the German Federal Constitutional Court, he argued for a redefining the criteria used to determine an organization's unconstitutionality. His redefined criteria shift the focus from the illegality or imminence of a threat to the relationship between an organization’s political goals and its members’ actions. This approach justifies using political rights restrictions pre-emptively, as soon as a threat can be identified legally, thereby circumventing the paradox by justifying a significantly earlier intervention.

This paper reconstructs Kirchheimer’s analysis by discussing both his Weimar-era observations and his post war views on the Federal Constitutional Court's role in detecting threats to democracy. It also discusses the normative and tactical grounds that he offered for employing political rights restrictions earlier. It concludes with an overview of Kirchheimer's reservations about these measures due to the complexity of employing political rights restrictions without undermining democratic constitutional essentials.

Otto Kirchheimer on Militant Democracy

Democracy will always have enemies who aim to subvert it. Their efforts almost always take one of two forms: *coup d’état* and legal revolution. A *coup d’état* occurs illegally, usually through the military’s intervention. Legal revolution occurs legally, as democratically elected politicians wield formally valid laws to erode the democratic identity of the constitution.

Militant democracy responds to that latter problem of legal revolution. It can be defined as the use of mechanisms of constitutional entrenchment to pre-emptively deny antidemocrats the legal democratic means to revolutionize a democracy.[[1]](#footnote-1)

The challenge of militant democracy lies in an apparent dilemma: the measures it uses to defend democracy also seem to undermine democratic principles. Kirshner calls this “the paradox of militant democracy.”[[2]](#footnote-2) That paradox can be illustrated with reference to the party ban, which Malkopoulou argues has become synonymous with the term “militant democracy” today[[3]](#footnote-3): Although a party ban may prevent antidemocrats from pursuing their political goals using the powers of public office, it hardly seems democratic to deny voters the right to choose a party that they believe best represents their political interests. At the same time, it seems as undemocratic to stand idly by while antidemocrats dismantle democracy. Part of the paradox seems to be that democracy will be degraded no matter what democrats do.[[4]](#footnote-4) It is up to a normative theory of militant democracy to resolve that paradox and show how its measures can be reconciled with the basic values of democracy.[[5]](#footnote-5)

Because of that paradox, many scholars and policymakers today have doubts about the legitimacy of militant democracy. Even advocates of militant democracy seem to lack confidence in it, reserving its measures for a last resort against an imminent existential threat.[[6]](#footnote-6) Normative reservations can have practical consequences, however. They may allow antidemocrats the opportunity to better organize and continue to broaden and mobilize their base. By the time a party ban may be deployed legitimately, according to today’s normative theories, antidemocratic movements may be too strong to be stopped bylegal sanctions. Müller summarizes this practical paradox as “countries that can have militant democracy probably do not need it; whereas those that need it, cannot have it.”[[7]](#footnote-7) He concretizes that problem by criticizing the “useful fiction” that trying to ban the NSDAP in 1932, when the Nazis had a 37% plurality of the vote, could have saved the Weimar Republic.[[8]](#footnote-8)

Although the Frankfurt School jurist Otto Kirchheimer (1905-1965) did not take up the concept “militant democracy” directly, he did discuss the constitutionality of some of its principal mechanisms, namely unamendability and political rights restrictions. Buchstein has argued that Kirchheimer should be considered an early advocate of militant democracy.[[9]](#footnote-9) He recognized that militant democracy could advance the political goals of the left, despite its institutional conservatism.[[10]](#footnote-10) That stance would carry over into his post war legal thought. Besides being of historical interest, Kirchheimer’s analysis may help to resolve some of militant democracy’s ongoing paradoxes.

This paper focuses on how Kirchheimer’s discussion of political rights restrictions in the early and mid-twentieth century may help resolve that practical paradox of militant democracy.[[11]](#footnote-11) It unpacks two of his arguments in particular. First, how Kirchheimer defended resetting the criterion for detecting an unconstitutional organization, from the illegality or imminence of a threat posed by an organization to the relationship between an organization’s political goals and its members’ concrete actions. Second, on that basis, Kirchheimer defended the legitimacy of deploying political rights restrictions early, as soon as a threat could be legally identified. If political rights restrictions can be deployed early, they may circumvent that practical paradox.

This paper unpacks Kirchheimer’s discussion in six sections. The first summarizes some of Kirchheimer’s Weimar-era observations about the difficulties that Weimar democracy had in defending itself. The second analyses Kirchheimer’s discussion of the Federal Constitutional Court’s criterion for detecting threats to democracy that merit the restriction of their political rights. The third analyses how that new criterion normatively grounds deploying political rights restrictions sooner. The fourth discusses other practical or “tactical” reasons Kirchheimer offered for deploying political rights restrictions sooner. The fifth discusses how Kirchheimer’s approach helps to resolve the practical paradox of militant democracy. The sixth and final section summarizes how, although Kirchheimer had reservations about the use of political rights restrictions, he nevertheless recognized the importance of equipping democracy to defend itself with them.

**Limits to Weimar’s Self-Defence**

Kirchheimer's early juridical career was characterized by his advocacy for a form of far-left socialism, sometimes described as a blend of Marx and Schmitt. However, Kirchheimer’s political stance underwent a significant shift as Weimar democracy faced increasing threats from far right extremists bent on its destruction.[[12]](#footnote-12) Starting in 1930, Kirchheimer grew more institutionally conservative, recognizing that democracy and the rule of law were the most effective political form for advancing the left’s goals.[[13]](#footnote-13)

Indeed, as the Weimar crisis approached its climax in 1932, Kirchheimer examined factors contributing to its constitutional problems in dialogue with his *Doktorvater* Carl Schmitt. While Scheuerman has thoroughly examined Kirchheimer’s principal concern at that time – namely how antidemocratic elites were undermining democracy, liberalism, and the formal rule of law from within government by exploiting ambiguities in the law and the discretionary powers of their offices – Kirchheimer also analysed the dangers posed by right-wing extremist parties outside government.[[14]](#footnote-14) Those parties, especially the NSDAP, participated in Weimar politics with the aim of seizing control of parliament and legal revolutionizing its democratic constitution. In his later writings in the Weimar period, Kirchheimer pinpointed two serious weaknesses in Weimar’s ability to respond to such threats, both linked to the value-neutral design of its democratic system.

The first weakness was the inability of the 1922 *Gesetz zum Schutze der Republik* (RSG) to effectively contain antidemocratic elements acting against the Weimar Constitution from within. The RSG authorized the Weimar state to take action against organizations that opposed “the constitutionally established republican form of the state [*verfassungsmäßig republikanische Staatsform des Reichs*]” – and included the power to ban them and seize their assets.[[15]](#footnote-15) However, the RSG’s scope was limited to sanctioning overt criminal activities, such as political assassinations and attempted *coup d’états*. It did not extend to legally permissible activities, regardless of how substantively unconstitutional they may have been. Kirchheimer observed that right-wing antidemocrats quickly adapted and remained within the bounds of the law.[[16]](#footnote-16) They had realized that the Weimar Constitution could be a suicide pact: they could exploit its value-neutral democratic legal procedures for their antidemocratic political goals. This inability of the RSG to prevent the manipulation of democratic legal procedures for undemocratic ends was starkly illustrated by Hitler’s claim that “the constitution dictates the method, not the goal.”

Beyond its ineffectiveness against antidemocrats operating legally, Kirchheimer also harboured concerns about potential abuses of the RSG. Initially used against right-wing antidemocratic organizations, the RSG transformed into a tool to be used against left-wing organizations, especially the Communist Party (KPD) and its affiliates, as Weimar stabilized after 1924. This shift, influenced by the conservative disposition of both Weimar’s administration and its judiciary – a legacy of the Empire – saw public prosecutors, the police, and other administrative bodies disproportionately wielding the RSG against the left, often with inadequate supervision from federal courts. At the same time, the administration and judiciary tended to turn a blind eye toward the activities of the far-right, particularly as they shifted to legal revolutionary methods.[[17]](#footnote-17) This bias explains the absurdly disparate treatment of figures like Hitler and Ludendorff after their Beer Hall Putsch compared to the harsh sentence of “high treason” that a communist received merely for reciting revolutionary poems.[[18]](#footnote-18) Kirchheimer believed the unequal use of the RSG was symptomatic of the broader problem of the deformalization of the formal rule of law within Weimar.[[19]](#footnote-19) The perception that the government was unfairly targeting the left alienated them, eroding their willingness to continue to support for democracy in general.[[20]](#footnote-20)

Kirchheimer diagnosed the second weakness in Weimar’s ability to respond to internal antidemocratic threats in the nature of the Constitution. Building on Schmitt’s distinction between the constitution and constitutional law, Kirchheimer had repeatedly argued that the Weimar Constitution seemed to lack a political decision.[[21]](#footnote-21) According to the interpretation prevailing among Weimar’s republican jurists, every article of the constitution sat under the reservation of its amendment clause. This meant that the Weimar Constitution seemed to tolerate any political goal and – based on the supremacy of Article 76, its amendment clause – it could in principle be amended out of existence legally.[[22]](#footnote-22)

That interpretation further undermined attempts to defend Weimar against antidemocrats who adopted legal revolutionary tactics. Kirchheimer wrote that banning a revolutionary party presupposed a category similar to the French Institutionalist Hauriou’s concept of *superlégalité constitutionnelle*.[[23]](#footnote-23) Because it did not seem to decide for any particular super-legal constitutional order – liberal democratic, socialist, whatever – the Weimar Constitution could only judge the constitutionality of a party by its legality or illegality.[[24]](#footnote-24) In the absence of any constitutionally-established value system, sanctioning a particular belief or goal for its unconstitutionality at best rested on a shaky constitutional footing.[[25]](#footnote-25) As a result, Kirchheimer concluded, it seemed unconstitutional to ban a party solely because of its political goals. He argued that only a constitution that adopted norms that were “basically unalterable” could properly defend itself using measures such as political rights restrictions.[[26]](#footnote-26)

**A Focus on Substance**

After Hitler seized power, Kirchheimer was briefly imprisoned as an opponent of the regime. Following his release, he soon fled Germany, ultimately arriving in the United States in 1937. In the occupation and reconstruction after the Second World War, Kirchheimer participated in discussions with fellow jurists about the new German constitution’s design, notably with its principal architect Carlo Schmid, with whom he was close.[[27]](#footnote-27) While the extent of his influence on what would become the German Basic Law is unclear, at minimum Kirchheimer possessed a deep understanding of its principal features and the rationale underpinning them.

The Basic Law was designed to address the limits of Weimar democracyto defend itself. Among other things, it contained an explicit political decision for a liberal democratic basic order [*freiheitlich-demokratische Grundordnung*], grounded in the absolute right to human dignity.[[28]](#footnote-28) Article 79.3, the “eternity clause,” constitutionally entrenches that political decision and renders it explicitly unamendable. In addition, Article 21 of the Basic Law was designed to overcome the limits of the RSG.[[29]](#footnote-29) Unlike the Weimar Constitution, the Basic Law explicitly recognizes and privileges political parties. It affirms that parties are essential for modern democracy. At the same time, the Basic Law grants the Federal Constitutional Court (FCC) the final authority to regulate, and if need be restrict, the political rights of parties that hold unconstitutional goals or maintain an undemocratic internal structure.[[30]](#footnote-30) It may also revoke the representative mandate of parliamentarians elected on the ticket of restricted parties.

Kirchheimer believed that the innovations in the Basic Law laid the groundwork for a different and more robust constitutional approach to countering organizations substantively opposed democratic values using legal revolutionary methods.[[31]](#footnote-31) He saw in it the embodiment of many of the institutions and mechanisms suggested over the decades that could help avoid a repeat of Weimar.[[32]](#footnote-32) In particular, it established mechanisms to immunize basic liberal rights against such threats, a development Kirchheimer regarded as consistent with the ideals of democracy.[[33]](#footnote-33)

In his late writings, particularly *Political Justice*, Kirchheimer analysed how some of the innovations of the Basic Law allowed democracies to reconsider the criteria for using political rights restrictions. Its design enabled the FCC to adopt a different criterion to detect whether an organization opposes the constitution and thus might be a candidate for repression. Because the Basic Law had a clear political decision, the FCC could define unconstitutional activities in substantive terms: “unconstitutional” goals were defined by their substantive opposition to the value of a liberal democratic basic order, irrespective of whether their holders might use legal or illegal means to realize those goals.

By focusing on substantively unconstitutional goals, the FCC could justify shifting its criterion for detecting antidemocratic threats from illegality to concrete evidence of a relationship between an organization’s unconstitutional political goals and strategic doctrines, on the one hand, and concrete actions taken by members to realize those goals, on the other – again, regardless of whether those actions were legal or illegal.[[34]](#footnote-34) Kirchheimer suggested that the FCC should centre its analysis on whether an antidemocratic organization’s strategic doctrines, aimed at achieving its political goals, demonstrably influenced members to act against the democratic constitutional order. In essence, at issue was whether the organization’s strategies or goals incited individuals to engage in behaviour fundamentally at odds with the political identity of the constitution.

On that basis, the FCC could identify organizations as “unconstitutional” by finding evidence that its antidemocratic goals motivated its members to act to undermine democratic constitutional essentials, no matter how abstractly formulated those goals may be or how nascent its strategies for realizing them were. Kirchheimer emphasized that the level of detail in an organization’s revolutionary strategy – whether it merely discussed that strategy in vague terms or had outlined a detailed sequence of steps to realize its political goals – had “no meaning” for assessing its constitutionality.[[35]](#footnote-35) Debating the details of the strategy might have academic value, he wrote, but it was not relevant juridically. What matters juridically, he argued, was whether members acted to bring about its alternative ideal of public order. The FCC thus modelled a different approach for determining the unconstitutionality of an organization: was there evidence of a relationship between an organization’s antidemocratic political goals, defined by their opposition to positively unamendable constitutional essentials, and members’ concrete acts to realize them?

Kirchheimer thought that focusing on that relationship mattered because, as a would-be revolutionary organization becomes larger and more prominent, it becomes more and more difficult for it to disown or mask its revolutionary, unconstitutional aims.[[36]](#footnote-36) To successfully compete for power in modern democratic politics, legally or illegally, an organization must amass a sizable base and some degree of administrative efficiency. Organizations cannot avoid some degree of transparency about their objectives, particularly in order to recruit, indoctrinate, and mobilize members as it vies for influence. In addition, an organization will struggle to conceal its true intentions from the public eye as it pursues them.

Contemporary antidemocratic organizations seem to confirm Kirchheimer’s argument. While the specifics of their strategies may be unclear, its usually not hard to unearth their overarching political goals. Although their political goals typically differ from those of past antidemocrats, today’s antidemocrats employ legal revolutionary methods that are structurally similar to those used by antidemocrats in the past. And, like their predecessors, contemporary antidemocrats often openly express their goals despite the potential political repercussions of doing so.

*Alternative für Deutschland* (AfD) provides an instructive example. Brandmann points out that the AfD, wary of potential repercussions from both democratically-oriented voters as well as Germany’s institutions of militant democracy, tried to conceal its extremist goals.[[37]](#footnote-37) The party adopted a strategy of presenting a more moderate face to the public (its “frontstage” presentation) while burying its more extreme elements in the background (its “backstage” presentation). However, those efforts backfired: by downplaying the more extremist goals and members in public, the AfD leadership inadvertently shifted internal power dynamics, ultimately strengthening the extremists and allowing them to exercise greater influence over the AfD’s agenda.[[38]](#footnote-38)

The case of the AfD suggests that calculated efforts to conceal an antidemocratic agenda are a short-term strategy for antidemocrats. “Backstage” messaging and hidden agendas are bound to surface and, ironically, attempts to obscure extremist elements within a party may only serve to strengthen them. Kirchheimer argues that, as an antidemocratic organization expands, its moderate façade will inevitably collapse, revealing its true character. For that reason, it is imperative that democrats take antidemocrats at their word. The substantive goals they advocate, including those they try to downplay or hide “backstage,” are likely to guide their actions if they successfully obtain power. Democracies must be ready to confront them with every militant mechanism at their disposal.

Expanding on those arguments about organizational dynamics, Kirchheimer also discussed the responsibility borne by individual members for their organization’s political goals, a discussion that resembles Arendt’s more well-known work on bureaucracy and personal responsibility.[[39]](#footnote-39) He argued that simply joining and participating in an organization renders individuals complicit in its overarching political goals.[[40]](#footnote-40) Even if an individual’s actions do not directly advance their organization’s unconstitutional or revolutionary goals, those goals may nevertheless be ascribed to them by virtue of their membership. Kirchheimer argued that this was because of the nature of modern bureaucracy, which coordinates individuals through a complex division of labour. The nature of modern bureaucracy naturally compartmentalizes action and insulates individuals from one other, which at first glance seems to grant some members plausible deniability for involvement in the organization’s more overtly illegal or revolutionary activities.

However, Kirchheimer rejected the idea of conceiving of an individual’s role as separate from the overarching purpose of their organization. He argued that every member, regardless of whether their individual contribution was illegal or revolutionary, contributes in some way to the organization’s principal goals. In his view, any form of active participation that helps sustain an organization amounts to an endorsement of its goals. At one point, Kirchheimer even likened members of a modern bureaucratic apparatus to “human robots” executing their “orders” in “a highly centralized political machine.”[[41]](#footnote-41) In the context of an antidemocratic organization, he underscored how carrying out any orders would further its political agenda. Kirchheimer concluded that regardless of how innocuous or law-abiding an individual’s particular role might seem, their association with an antidemocratic organization made them complicit in its overarching political goals.

While Kirchheimer’s language may seem hyperbolic, the phenomenon of revolutionary antidemocratic parties maintaining links to a military wing or to violent militias is not uncommon. A notable recent example is the connection of Donald J. Trump, the former President and current leader of the US Republican Party, to the “Oathkeepers” militia involved in the January 6 insurrection, a tie that may only have had Roger Stone as an intermediary. This general phenomenon underscores the importance of recognizing a wide range of accountability for supporting antidemocratic organizations. Doing so is vital for preventing antidemocratic groups from compartmentalizing a militant revolutionary faction form its mainstream political wing – a strategy that, if left unchecked, might insulate members of the broader organization from the fallout of its more radical and violent elements.

In sum, Kirchheimer highlighted the significance of the FCC’s revised approach to determine an organization’s unconstitutionality. Drawing on the Basic Law’s constitutional innovations, such as the entrenchment of its political identity and the regulation of parties, the FCC shifted the criterion for detecting an organization’s unconstitutionality from illegality to the relationship between an organization's political goals and members’ concrete actions to realize those goals.

**Timing Restrictions**

An important consequence of that new criterion, according to Kirchheimer, was that the timing of the legitimate use of political rights restrictions could be re-evaluated. Political rights restrictions could be deployed earlier, before an organization was strong enough to pose an imminent existential threat. Democrats could be more confident in defending democracy against legal revolutionary threats.

In essence, insofar as unconstitutionality can be defined by the substance of an organization’s political goals, it becomes possible to identify an organization as a threat as soon as its members begin to actively pursue those goals. That identification, Kirchheimer argued, rendered an organization a valid target for political rights restrictions, including its potential dissolution under a party ban.[[42]](#footnote-42) Kirchheimer believed that there was no reason for a democracy to tolerate an antidemocratic organization bent on its overthrow. In his view, the fact that an antidemocratic organization failed to attract a broad enough base of support was not a compelling reason to tolerate it on the margins of civil society.[[43]](#footnote-43) Inaction may only bolster the chances of antidemocrats to gain strength and ultimately seize power.

In line with that argument, Kirchheimer approved of the FCC’s decisions to dissolve both the Socialist Reich Party (essentially a rebranded NSDAP) and the KPD under Article 21.2 of the Basic Law. In his view, those decisions exemplified the effective use of political rights restrictions. Drawing on those precedents, he argued that the critical factors for an organization’s candidacy for suppression was its intent to undermine the constitution and whether its members had acted toward that end – rather than whether the organization might actually be any good at insurrection and could pose a genuine immediate threat.[[44]](#footnote-44) Kirchheimer emphasized that the causal relationship between unconstitutional goals and actions was what mattered for assessing whether an antidemocratic organization should be considered a threat. Moreover, that approach would help to better align normative theorizing about democracy’s self-defence with actual juridical practice.[[45]](#footnote-45)

Recent experiences seem to support the underlying concern that motivated Kirchheimer’s argument to act against antidemocrats sooner, regardless of how remote the threat appeared to be in the present moment. Drawing on the recent history of democratic backsliding in Poland and Hungary, Pech and Scheppele have argued that the most effective way to prevent consolidated autocracy that trashes core democratic values is “to act fast as soon as the danger signals are clear.”[[46]](#footnote-46) Democrats often prefer to wait, hoping that cooler heads will prevail and democratic institutions will hold the line, so to speak. Sometimes they do. Sometimes they do not. While democrats delay responding, antidemocrats can continue consolidating their possession of state power and rolling back democratic essentials. Speed and timing matter in defending democracy.

Kirchheimer provides part of the normative foundation for acting sooner against antidemocrats. He argued that the imminence or gravity of a threat was less relevant than whether that organization met the criterion for unconstitutionality outlined above, a criterion based on the relationship between its goals and its members’ actions. On that basis, a constitutional court could proceed to decide whether a political organization should be dissolved or not.

**“Tactical Motivations”**

Besides advocating for the early deployment of political rights restrictions based on his revised criterion for defining genuine threats to democracy, Kirchheimer also discussed what he referred to as “tactical motivations” for deploy political rights restrictions sooner.[[47]](#footnote-47) He argued that these motivations applied to organizations that were “practically unimportant or even obscure.” Drawing on his experiences with the NSDAP and KPD during the Weimar era, he highlighted the dangers of treating an antidemocratic party as if it were just a normal political party.[[48]](#footnote-48) Allowing antidemocrats to participate in democratic institutions, even if they are marginal and lack the ability to seize political power outright, can still profoundly and negatively impact a democracy. The legal and parliamentary privileges typically extended to these parties can inadvertently advance their subversive objectives.

Even with a marginal presence in the legislature, an antidemocratic party can still disrupt democratic proceedings. Although it may lack the ability to legislate by itself, simply being present in parliament affords a party the opportunity to speak, participate in committees, direct agencies, and vote on legislation. Antidemocrats can use that position to engage in obstructionist tactics, such as delaying crucial votes or sinking vital legislation. In situations where a centrist party relies on the support of marginal parties to form a governing coalition, it may concede key cabinet and ministerial positions to antidemocrats in its coalition or consent to pass legislation that advances an antidemocratic agenda. Today, there are several cases of centre-right parties allying with smaller far-right parties whose platform includes antidemocratic values, such as in Italy, Sweden, and Finland. A particularly notable example is in Israel. Netanyahu successfully formed his current governing coalition by securing the support of Otzma Yehudit, an offshoot of the extremist Kach party banned for terrorism in 1994. In exchange for Otzma Yehudit’s support, Netanahu agreed to appoint its leader Itamar Ben-Gvir as his National Security Minister. Ben-Gvir has used his ministerial role to push a divisive and belligerent agenda, for example by legalizing controversial West Bank settlements in early 2023.

Kirchheimer noted that representatives from an officially recognized antidemocratic party will receive the same benefits and immunities as their counterparts from conventional parties.[[49]](#footnote-49) This can include broad immunity against criminal prosecution. A recent instance is Trump’s invocation of executive privilege. Trump has claimed immunity for basically everything he did while serving as President. He does so in the hopes of overturning the various criminal accusations he currently faces, including electoral fraud, attempt to overturn election results, conspiracy to defraud the United States, obstruction of official proceedings, conspiracy to obstruct official proceedings, conspiracy against rights, and incitement. This defence strategy exemplifies Kirchheimer’s concern: antidemocrats may exploit immunities to forestall prosecution for past offenses and potentially to shield future antidemocratic activities.

Besides offering immunity from prosecution to elected representatives, democratic states often provide financial support and make various other resources available to legally constituted parties.[[50]](#footnote-50) When an antidemocratic party is recognized as a valid political party, it gains access to those resources, which it can use to fund its antidemocratic activities as well as expands its base.

Kirchheimer also argues that electoral success provides a party with a platform for “easy communication beyond the confines of the party organization proper,” which extends into the broader public sphere.[[51]](#footnote-51) Antidemocratic parties can use that platform to continuously refine and test their messaging, which allows them to adapt to changing political circumstances. While Kirchheimer does not discuss the media’s role in normalizing such parties, his discussion resonates with recent arguments. Media coverage of antidemocrats, whether as candidates or officeholders, can inadvertently amplify and propagate their messages, a phenomenon that DiResta describes as a process of “amplifiganda.”[[52]](#footnote-52) As they air such views, Issacharoff suggests, the media also helps to legitimate and normalize that message.[[53]](#footnote-53)

There is a final “tactical” consideration for intervening early against potential threats to democracy. Kirchheimer argues that assessing the constitutionality of a fringe political organization well before it becomes an imminent and existential threat allows for the evaluation to be conducted according to normal rule of law procedures, by normal police, and at a normal pace.[[54]](#footnote-54) This process includes investigating and gathering evidence, conducting the trial and prosecution, deliberating on the decision, and, if authorized by the court, implementing repressive measures. In addition, before an antidemocratic organization consolidates a strong and organized base of support, it will struggle both to exert undue influence on democratic institutions and to mount extralegal resistance. Finally, even a marginal organization can provoke a disturbance violent enough to require police intervention, exemplified by the NSDAP's Beer Hall Putsch in 1923.

A democratic state will have to deploy resources commensurate with an antidemocratic organization’s capacity for resistance. The dissolution of an antidemocratic organization becomes significantly more difficult as it consolidates its resources, establishes a robust base, and mainstreams its extremist ideology. Waiting until an antidemocratic organization becomes a serious or even existential threat makes it more likely that a democracy will need to adopt extraordinary measures in the context of an immediate emergency or constitutional crisis. Furthermore, when faced with an imminent existential threat or emergency, a democracy will need to react urgently and expedite its legal processes, thereby bringing the paradox of militant democracy to the fore. Ultimately, acting early to suppress an antidemocratic organization, as soon as it reveals its political goals, is not only more likely to succeed but will also more likely align with the principles of the liberal rule of law.

Kirchheimer’s additional “tactical” considerations present more compelling reasons for why democracies ought to proactively intervene against emerging antidemocratic organizations. He argued that these considerations should help alleviate democrats’ reluctance to act against groups that, despite appearing to pose only a remote threat, were still substantively opposed to a democratic public order.

**Resolving the Practical Paradox**

Establishing a normative basis to deploy political rights restrictions sooner, as soon as an organization can be detected as unconstitutional, can address the practical paradox of militant democracy described above. Kirchheimer helps to establish that normative basis by justifying the shift in the criterion for detection from the imminence of a revolutionary threat to whether an organization’s substantively revolutionary goals link to concrete actions members take in their pursuit.[[55]](#footnote-55) The other tactical considerations that he provides serve to reinforce that normative argument.

Kirchheimer concretized his overall normative argument with reference to the NSDAP’s rise to power, in the process offering a reply to what would become a common critique of militant democracy: the practical paradox that by the time a party ban may be legitimately deployed, an antidemocratic organization will likely be too powerful to be stopped bylegal sanctions anyway. Kirchheimer counters this critique by shifting the focus away from the efficacy of a hypothetical 1932 ban on the Nazi party. He argued that the more relevant question to ask was whether the 1923 NSDAP ban should have been maintained and whether Hitler should have been compelled to complete his prison sentence before being deported back to Austria?[[56]](#footnote-56) The NSDAP had been successfully suppressed and Hitler imprisoned following the 1923 Beer Hall Putsch. However, as the Weimar Republic began to stabilize around 1924, the threat from right-wing antidemocratic organizations like the NSDAP seemed to wane. This in turn lead to complacency among Weimar’s republicans, who worried about the constitutionality of continuing to use the RSG, among other things. Despite the apparent calm, right-wing antidemocrats never actually abandoned their goals. While the 1922 RSG may not have provided a firm-enough constitutional basis to continue suppressing the NSDAP, the more robust measures of Article 21.2 of the *Basic Law* might have. Although alternative histories should always be taken with a grain of salt, Kirchheimer thought it was reasonable to ask whether maintaining those early sanctions against the NSDAP and its leadership, when the party was still marginal, could have altered its later rise to power.

Antidemocratic organizations are not born with the strength to seize power. Instead, they slowly build their base, while testing and refining their antidemocratic message in public. After the ban was lifted in 1925, the NSDAP embarked on an aggressive public campaign. And its share of the vote grew incrementally, from 3% in 1928, to 18% in 1930, finally reaching 37% in 1932. While a complex series of factors led to the NSDAP’s eventual assumption of power, sustained political repression might have prevented it from becoming an unstoppable force by 1932.

In sum, Kirchheimer argued that early intervention was both normatively justifiable and carried practical advantages. It stops antidemocratic organizations before they can damage democracy from within government, before they have the chance to persuade or propagandize the electorate or normalize their political goals, and before they can obtain public funding and other forms of material support to grow themselves. It also provides democracies with the chance to respond to them using normal legal procedures and institutions. It increases the likelihood that democracies will be able to prevent antidemocrats’ ascent to power from becoming unstoppable. Timing matters when it comes to defending democracy against its enemies. Kirchheimer’s considerations help set the use of political rights restrictions on a firmer constitutional and normative basis.

**Reservations**

Kirchheimer did not uncritically endorse political rights restrictions, however. He had reservations about their effects on democracy and discussed reasons to tolerate antidemocratic parties. Kirchheimer cautioned that, although political rights restrictions could successfully remove an immediate threat and allow a democracy to regain its balance amidst a crisis, they were not a long-termsolution.[[57]](#footnote-57) He recognized that antidemocratic movements often have roots in socio-economic distress. While repressive measures could effectively contain an immediate threat and safeguard democratic institutions, they fail to address the underlying socio-economic problems that may fuel antidemocratic extremism. Kirchheimer thus saw political rights restrictions as a short-term measure that could buy time for a democracy to implement more fundamental social changes. Lasting political stability, he argued, also required redistributive measures and effective social safety nets.[[58]](#footnote-58)

In making this argument, Kirchheimer’s approach aligns with what has been called the cumulative act effect or “Swiss cheese model” of risk management, which I discuss elsewhere in relation to democracy’s defence.[[59]](#footnote-59) Popularized during the COVID-19 pandemic, this model holds that no single defence against a threat is fool proof. Each has weaknesses and blind spots, akin to the holes in a single slice of Swiss cheese. Relying on a single measure may allow threats to slip through its gaps. However, by layering different defences, the weaknesses of any single layer can be offset by the strengths of others, improving security overall. Applied to democracy’s self-defence, this model suggests a multifaceted strategy that combines immediate measures that can halt legal revolutionary methods, such as the political rights restrictions of militant democracy, with longer-term solutions that aim both at addressing the underlying causes of antidemocratic extremism, such as socio-economic distress, and at fostering a healthy democratic culture through civic education and constitutional patriotism. From this perspective, measures of militant democracy are integral to defending democracy.

Furthermore, Kirchheimer cautioned against the potential blowback from successfully repressing an antidemocratic organization.[[60]](#footnote-60) While restrictions may remove an immediate threat, they will not eradicate underlying antidemocratic sentiments. At best they will disband the organization, severing members’ institutional connections to their leaders and to one another. Still harbouring antidemocratic views, they may turn to uncoordinated violence and protests. Fragmented, they will most likely pose a lesser threat than as an organized body. But even a series of uncoordinated actions could destabilize an already fragile democracy.

Kirchheimer tempered his support for rights restrictions by acknowledging that there are situations where it may be preferable to tolerate an antidemocratic organization. He suggested that, within some antidemocratic organizations, the process of internal deliberation and building a consensus could potentially moderate members’ extreme views.[[61]](#footnote-61) Even if directed against democracy, an organization with internally democratic procedures may inadvertently instil a broader appreciation for democratic principles. In addition, simply participating in a political organization, even an antidemocratic one, might sublimate members’ more radical impulses by providing them with an outlet for expressing their political grievances. For those reasons, Kirchheimer recommended deciding on the use of political rights restrictions on a case by case basis.

Finally, Kirchheimer emphasized that the judiciary must have final authority over political rights restrictions.[[62]](#footnote-62) He wrote that the use of political rights restrictions presupposed “a framework of substantive and procedural norms” that bind both the governed and government alike and that the state’s efforts to impose restrictions be overseen by an independent third party, one committed to upholding the rule of law and whose decisions were subject to public scrutiny.[[63]](#footnote-63) Echoing his broader discussion about the centrality of the formal rule of law for modern political legitimacy, Kirchheimer argued that political rights restrictions must be administered according to the liberal rule of law by an independent judiciary.[[64]](#footnote-64) This entails that restrictions adhere to clear, publicly known, general rules that were applied impartially and equitably. Those affected must be afforded a fair trial and the opportunity to publicly defend themselves against charges. And there must be legal pathways that allow organizations to contest these restrictions, demonstrate their reform, and potentially be reinstated.[[65]](#footnote-65)

Still, chastened by the experience of Weimar, Kirchheimer concluded that a democracy may legitimately defend itself against its enemies by deploying political rights restrictions, along with other mechanisms of militant democracy. Although he never explicitly used the concept “militant democracy,” this manuscript has analysed how Kirchheimer’s arguments help advance contemporary normative theorizing about the subject. Kirchheimer believed that the German Basic Law modelled how a democracy might legitimately defend its most essential features against internal threats seeking legal revolution. His most original contribution may be the above arguments which, taken together, offer a solution to the practical paradox of militant democracy. Kirchheimer proposed that an unconstitutional organization could be defined by the relationship between its political goals and its members’ concrete actions to realize those goals. And he defended the pre-emptive use of political rights restrictions based on the substantive nature of the threat posed, rather than its immediacy. Given the array of threats against democracy today, Kirchheimer’s arguments may help democracies in their self-defence, not only by bolstering democrats’ confidence in the use of existing measures of militant democracy but also justifying the design of future democratic constitutions to be more militant against existential threats.

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1. This definition builds on the following definitions of militant democracy Patrick Macklem, "Militant Democracy, Legal Pluralism, and The Paradox of Self-Determination," *International Journal of Constitutional Law* 4, no. 3 (2006): 488; Samuel Issacharoff, "Fragile Democracies," *Harvard Law Review* 120, no. 6 (2007): 1406; András Sajó, "Militant Democracy and Emotional Politics," *Constellations* 19, no. 4 (2012): 562; Peter Niesen, "Banning the Former Ruling Party," *Constellations* 19, no. 4 (2012): 540; Alexander S. Kirshner, *A Theory of Militant Democracy: The Ethics of Combatting Political Extremism* (New Haven: Yale University Press, 2014), 6-7, 11; Svetlana Tyulkina, *Militant Democracy: Undemocratic Political Parties and Beyond* (New York: Routledge, 2015), 185; Jan-Werner Müller, "Militant Democracy and Constitutional Identity," in *Comparative Constitutional Theory*, ed. Gary Jacobsohn and Miguel Schor (Cheltenham: Edward Elgar, 2018), 415; Anthoula Malkopoulou and Ludvig Norman, "Three Models of Democratic Self-Defence: Militant Democracy and Its Alternatives," *Political Studies* 66, no. 2 (2018): 442; Bastiaan Rijpkema, *Militant Democracy: The Limits of Democratic Tolerance* (New York: Routledge, 2018), 153-54, 94. [↑](#footnote-ref-1)
2. Kirshner, *A Theory of Militant Democracy*. Kirchheimer raises something like the paradox of democracy’s self-defence in a late publication: Otto Kirchheimer, "Politics and Justice," in *Politics, Law, and Social Change: Selected Essays of Otto Kirchhimer*, ed. Frederic S. Burin and Kurt L. Shell (New York: Columbia University Press, 1969), 414. [↑](#footnote-ref-2)
3. Anthoula Malkopoulou, "Militant Democracy and Its Critics," in *Militant Democracy and Its Critics: Populism, Parties, Extremism*, ed. Anthoula Malkopoulou and Alexander S. Kirshner (Edinburgh: Edinburgh University Press, 2019), 2. [↑](#footnote-ref-3)
4. Stefan Sottiaux and Stefan Rummens, "Concentric Democracy: Resolving the Incoherence in the European Court of Human Rights’ Case Law on Freedom of Expression and Freedom of Association," 10, no. 1: 114; Stefan Rummens, "Resolving the Paradox of Tolerance," in *Militant Democracy and Its Critics: Populism, Parties, Extremism*, ed. Anthoula Malkopoulou and Alexander S. Kirshner (Edinburgh: Edinburgh University Press, 2019), 112-14; Alexander S. Kirshner, "Militant Democracy Defended," in *Militant Democracy and Its Critics: Populism, Parties, Extremism*, ed. Anthoula Malkopoulou and Alexander S. Kirshner (Edinburgh: Edinburgh University Press, 2019), 57-58. [↑](#footnote-ref-4)
5. I argue elsewhere that militant democracy actually has three interrelated fundamental constitutional features: constitutional unamendability, political rights restrictions, and a constitutional court with final authority over constitutionality. See XXX [↑](#footnote-ref-5)
6. The following are examples of prominent normative theories of militant democracy that limit the use of political rights restrictions to either a narrow subset of antidemocrats or restrict its use to a measure of last resort: Niesen, "Banning the Former Ruling Party."; Kirshner, *A Theory of Militant Democracy*; Rijpkema, *Militant Democracy*; Miodrag Jovanović, "How to Justify ‘Militant Democracy’: Meta-Ethics and the Game-Like Character of Democracy," *Philosophy and Social Criticism* 42, no. 8 (2016). [↑](#footnote-ref-6)
7. Müller, "Militant Democracy and Constitutional Identity," 419. [↑](#footnote-ref-7)
8. Jan-Werner Müller, "Militant Democracy," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 1263-64; Melissa Schwartzberg, *Democracy and Legal Change*, Cambridge Studies in the Theory of Democracy, (New York: Cambridge University Press, 2007), 157-58. [↑](#footnote-ref-8)
9. Hubertus Buchstein, "Von der umstrittenen Verfassung zur streitbaren Verfassung: Otto Kirchheimers verfassungspolitische Grenzziehungen während der Weimarer Republik " in *Die Grenzen der Verfassung*, ed. Michael Hein, Felix Petersen, and Silvia von Steinsdorff (Baden-Baden: Nomos Verlagsgesellschaft mbH & Co. KG, 2018), 56. [↑](#footnote-ref-9)
10. On the institutional conservatism of militant democracy, see Patrick Nitzschner, "On Militant Democracy’s Institutional Conservatism," *Philosophy and Social Criticism* 0, no. 0. [↑](#footnote-ref-10)
11. Besides political rights restrictions, Kirchheimer discussed other mechanisms of militant democracy, including implied unamendability and the “positive” vote of no confidence, which respectively find expression today in Article 79.3 and Article 67 of the German Basic Law. See Buchstein, "Otto Kirchheimers verfassungspolitische Grenzziehungen," 66; Hubertus Buchstein, *Enduring Enmity: The Story of Otto Kirchheimer and Carl Schmitt* (New York: Columbia University Press, 2024), 14.5. [↑](#footnote-ref-11)
12. For an overview of Kirchheimer’s early views as well as his early relationship to Carl Schmitt, see Keith Tribe, "Symposium on the Work of Otto Kirchheimer at the Freie Universität, West Berlin 13-15 November 1985," *History of Political Thought* 8, no. 1 (1987); Buchstein, *Enduring Enmity*, Chapter 2. [↑](#footnote-ref-12)
13. Buchstein, "Otto Kirchheimers verfassungspolitische Grenzziehungen," 67. [↑](#footnote-ref-13)
14. Scheuerman analyses in detail another of Kirchheimer’s principal concerns from that time: antidemocratic elites in government exploiting their discretionary powers and ambiguities within the Weimar Constitution to destroy democracy, liberalism, and the formal rule of law from the top down See William E. Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (Cambridge: The MIT Press, 1994). [↑](#footnote-ref-14)
15. Gotthard Jasper, *Der Schutz der Republik: Studien zur staatlichen Sicherung der Demokratie in der Weimarer Republik 1922-1930* (Tübingen: J.C.B. Mohr (Paul Siebeck), 1963), 114-15, 295-96. [↑](#footnote-ref-15)
16. Otto Kirchheimer, "Legality and Legitimacy," in *The Rule of Law under Siege*, ed. William E. Scheuerman (Berkeley: University of California Press, 1996), 52. [↑](#footnote-ref-16)
17. Buchstein, *Enduring Enmity*, Ch. 3.3. [↑](#footnote-ref-17)
18. Jasper, *Der Schutz der Republik*, 127, 81-82. [↑](#footnote-ref-18)
19. Kirchheimer, "Legality and Legitimacy," 52-53. [↑](#footnote-ref-19)
20. Jasper, *Der Schutz der Republik*, 284ff. [↑](#footnote-ref-20)
21. Kirchheimer, "Remarks on *Legality and Legitimacy*," 75. Kirchheimer would eventually modify his argument. By 1932 he would claim that the Weimar Constitution did in fact contain a political decision – but that the prevailing statutory positivist interpretation of the constitution had misrecognized its identity, undermining democrats’ ability to use that decision to defend its democracy. [↑](#footnote-ref-21)
22. Kirchheimer, "Weimar - And What Then?," 72. See Buchstein, "Otto Kirchheimers verfassungspolitische Grenzziehungen," 58; Buchstein, *Enduring Enmity*, Ch. 3.6, 5.1. [↑](#footnote-ref-22)
23. Kirchheimer, "Legality and Legitimacy," 53. Buchstein, "Otto Kirchheimers verfassungspolitische Grenzziehungen," 66. Hauriou’s work inspired Schmitt’s distinction between constitution and constitutional law, on which Schmitt based his theory of implicit unamendability. [↑](#footnote-ref-23)
24. Kirchheimer, "Legality and Legitimacy," 54. [↑](#footnote-ref-24)
25. Kirchheimer, "Politics and Justice," 425. [↑](#footnote-ref-25)
26. Kirchheimer, "Remarks on *Legality and Legitimacy*," 75, 77. [↑](#footnote-ref-26)
27. Buchstein, *Enduring Enmity*, 14.5. [↑](#footnote-ref-27)
28. See Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham: Duke University Press, 2012), 57ff; Müller, "Militant Democracy," 1259. [↑](#footnote-ref-28)
29. Jasper, *Der Schutz der Republik*, 144. [↑](#footnote-ref-29)
30. In addition, Article 9.2 empowers the state to determine political associations to be unconstitutional. [↑](#footnote-ref-30)
31. Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton: Princeton University Press, 1961), 142, 47, 50. Kirchheimer, "Politics and Justice," 411. [↑](#footnote-ref-31)
32. Buchstein, *Enduring Enmity*, 14.6. [↑](#footnote-ref-32)
33. See Buchstein, *Enduring Enmity*, 14.5. [↑](#footnote-ref-33)
34. Kirchheimer, *Political Justice*, 143, 46-47. [↑](#footnote-ref-34)
35. Kirchheimer, *Political Justice*, 144. [↑](#footnote-ref-35)
36. Kirchheimer, *Political Justice*, 141-42. [↑](#footnote-ref-36)
37. Franziska Brandmann, "Radical-Right Parties in Militant Democracies: How the Alternative for Germany’s Strategic Frontstage Moderation Undermines Militant Measures," *European Constitutional Law Review* 18, no. 3 (2022). [↑](#footnote-ref-37)
38. Brandmann, "Radical-Right Parties in Militant Democracies," 425-26, 38. [↑](#footnote-ref-38)
39. For Arendt’s views on thinking and moral responsibility, see my XXXX. Javier Burdman, "Between Banality and Radicality: Arendt and Kant on Evil and Responsibility," *European Journal of Political Theory* 18, no. 2 (2019). [↑](#footnote-ref-39)
40. Kirchheimer, *Political Justice*, 147. [↑](#footnote-ref-40)
41. Kirchheimer, "Politics and Justice," 412. [↑](#footnote-ref-41)
42. Kirchheimer, *Political Justice*, 137. [↑](#footnote-ref-42)
43. Kirchheimer’s remarks here seem to anticipate a limit to Rummen’s concentric model of democracy’s self-defense. See Stefan Rummens and Koen Abts, "Defending Democracy: The Concentric Containment of Political Extremism," *Political Studies* 58 (2010); Sottiaux and Rummens, "Concentric Democracy." [↑](#footnote-ref-43)
44. Kirchheimer, *Political Justice*, 137-42. [↑](#footnote-ref-44)
45. Kirchheimer, *Political Justice*, 158. [↑](#footnote-ref-45)
46. Laurent Pech and Kim Lane Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU," *Cambridge Yearbook of European Legal Studies* 19 (2017): 7. [↑](#footnote-ref-46)
47. Kirchheimer, *Political Justice*, 150. [↑](#footnote-ref-47)
48. This section draw on arguments from my forthcoming XXXX [↑](#footnote-ref-48)
49. Kirchheimer, *Political Justice*, 161-62. [↑](#footnote-ref-49)
50. Kirchheimer, *Political Justice*, 162. [↑](#footnote-ref-50)
51. Issacharoff, "Fragile Democracies," 1410. [↑](#footnote-ref-51)
52. Renée DiResta, "It’s Not Misinformation. It’s Amplified Propaganda.," *The Atlantic*, 9 October 2021, https://www.theatlantic.com/ideas/archive/2021/10/disinformation-propaganda-amplification-ampliganda/620334/. [↑](#footnote-ref-52)
53. Issacharoff, "Fragile Democracies," 1426-29. [↑](#footnote-ref-53)
54. Kirchheimer, *Political Justice*, 150-51. [↑](#footnote-ref-54)
55. For an analysis of the underlying problems related to the detection of antidemocrats, see Bastiaan Rijpkema, "Militant Democracy and the Detection Problem," in *Militant Democracy and Its Critics: Populism, Parties, Extremism*, ed. Anthoula Malkopoulou and Alexander S. Kirshner (Edinburgh: Edinburgh University Press, 2019). [↑](#footnote-ref-55)
56. Kirchheimer, "Politics and Justice," 418. [↑](#footnote-ref-56)
57. Kirchheimer, *Political Justice*, 170-71. See Buchstein, "Otto Kirchheimers verfassungspolitische Grenzziehungen," 64-65. [↑](#footnote-ref-57)
58. Kirchheimer, *Political Justice*, 172. For a more recent account of the role that social democracy can play in defending democracy, see Malkopoulou and Norman, "Three Models of Democratic Self-Defence: Militant Democracy and Its Alternatives." [↑](#footnote-ref-58)
59. See XXX [↑](#footnote-ref-59)
60. Kirchheimer, *Political Justice*, 172. [↑](#footnote-ref-60)
61. Kirchheimer, *Political Justice*, 160-61. [↑](#footnote-ref-61)
62. Kirchheimer, *Political Justice*, 421, 29-30. [↑](#footnote-ref-62)
63. Kirchheimer, *Political Justice*, 120. [↑](#footnote-ref-63)
64. Kirchheimer, "Politics and Justice," 420. On Kirchheimer’s support for the liberal rule of law, see Scheuerman, *Between the Norm and the Exception*, 220, 33. [↑](#footnote-ref-64)
65. Müller elaborates on this in Jan-Werner Müller, "Individual Militant Democracy," in *Militant Democracy and Its Critics: Populism, Parties, Extremism*, ed. Anthoula Malkopoulou and Alexander S. Kirshner (Edinburgh: Edinburgh University Press, 2019), 26; Jan-Werner Müller, *Democracy Rules* (New York: Farrar, Straus & Giroux, 2021), 170. [↑](#footnote-ref-65)