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The Countermajoritarian Opportunity?: Courts, Rights, and the Accommodation of Difference

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Tolerating and being tolerated
is a little like Aristotle's
ruling and being ruled;
it is the work of¹

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¹ MICHAEL WALZER, *ON TOLERATION* xi (1997).

I. INTRODUCTION

Over the past two decades, and in several regions of the world, there has been an expansion of judicial power.² In this same time period, there has also been a growing interest in, and rather heated debate concerning, the relationship between democracy and nationalism. Scholars in all regions of the world, not least of all Europe, are searching for institutional arrangements that might effectively, and democratically, help polities best accommodate difference.³

This article brings together separate bodies of literature on these two global developments: the expansion of judicial power, and the challenges of accommodating difference in democracies.⁴ The article proceeds in four steps. The first section presents claims from an important body of literature concerning the U.S. Supreme Court and American democracy and suggests why this literature is useful for understanding current trends in Europe. The second section shifts focus and discusses several “toleration regimes”—or ways of organizing difference—in the world, and their role in diverse societies. The third section then argues that there is a direct relationship between these specific toleration types, and the strength of judicial activism.⁵ Drawing these arguments together, the final section concludes that in

² Expansion in terms of both more legal institutions, and more arenas where judicial institutions are prominent and decisive. For some empirical examples of these expansions, see Kim Lane Shepple, Professor of Law and Sociology, University of Pennsylvania, *Democracy by Judiciary: (Or Why Courts Can Sometimes Be More Democratic Than Parliaments)*, Address at the Washington University School of Law Conference on Constitutional Courts (Nov. 1-3, 2001); Herman Schwartz, *Eastern Europe’s Constitutional Courts*, 9.4 J. OF DEMOCRACY 100, (1998).

³ As per my *Rethinking Judicial Review: Shaping the Toleration of Difference?* in *RETHINKING THE RULE OF LAW AFTER COMMUNISM* 61, 63 (Adam Czarnota, Martin Krygier, Wojciech Sadurski eds., 2006). *Also see, e.g.*, Alfred Stepan, *Modern Multinational Democracies: Transcending a Gellnerian Oxymoron*, in *THE STATE OF THE NATION: ERNEST GELLNER AND THE THEORY OF NATIONALISM* 219 (John A. Hall ed., 1998). *See also* SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996); BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1983); ERNEST GELLNER, *NATIONS AND NATIONALISM* (1983).

⁴ This article focuses, for the most part, on domestic European courts. A longer book project, from which this is drawn, explores the interplay of factors such as the European Court of Justice and the European Court of Human Rights, but time and space constraints make the full exploration here impossible.

⁵ I am using the word “activist” in descriptive, rather than normative, terms. Thus, measuring judicial activism involves “seeing how often a court strikes down the actions of other parts of government, especially the actions of Congress.” Cass R. Sunstein, *A Hand in the Matter: Has the Rehnquist Court Pushed Its Agenda on the Rest of the Country?*, LEGAL AFFAIRS, (Mar.-Apr. 2003), http://www.legalaffairs.org/issues/March-April-2003/feature_marapr03

Europe, for better or for worse,⁶ several activist constitutional courts are shaping democracy with adjudication, by moving countries toward specific toleration regimes and away from others.⁷

II. THE COUNTERMAJORITARIAN ‘PROBLEM’ REVISITED

There is a long-standing discussion within U.S. constitutional scholarship about the U.S. Supreme Court’s impact on American democracy. This discussion has framed our thinking about the contours of judicial power more generally.⁸ One side of this literature, broadly speaking, views any activism from the U.S. Supreme Court as an obstruction to democracy.⁹ This side forms the point of departure for this article.¹⁰ Focusing on the specific mechanism of judicial review, this literature critiques the institution of the Supreme Court for posing a “countermajoritarian difficulty.” Stated generally, the countermajoritarian difficulty occurs when the Supreme Court

_sunstein.msp (critiquing the Rehnquist court). And, I am using this term to describe constitutional court activism across democracies, as well as an individual constitutional court’s activism relative to its own past practices.

⁶ The article attempts to be positive rather than normative. For the normative argument with respect to postcommunist Europe, see Cindy Skach, *Rethinking Judicial Review: Shaping the Toleration of Difference?*, in *RETHINKING THE RULE OF LAW IN AFTER COMMUNISM* 61 (Adam Czarnota, Martin Krygier, & Wojciech Sadurski eds., 2006), which grew out of the conference, “Rethinking the Rule of Law in Postcommunist Europe,” held by European University Institute in Florence, Italy on February 22-23, 2002.

⁷ Will Kymlicka first offered the challenge for us to find “new domestic, regional, or transnational mechanisms which will hold governments accountable for respecting both human rights and minority rights.” WILL KYMLICKA, *POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM AND CITIZENSHIP* 88 (2001). Several constitutional courts in Europe, perhaps problematically, are providing one answer. *See id.* at 69-90.

⁸ Although there is, of course, a debate on constitutionalism and courts within the German/Austrian legal tradition, the literature concerning constitutional development in the U.S. after the “countermajoritarian difficulty” was introduced and problematized by Alexander Bickel in 1962 and provides, as I will show here, the best starting point for this article. *See* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

⁹ *See id.* (classic discussion). *See also* Barry Friedman, *The Birth of the Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153 (2002) (more recent discussion).

¹⁰ Readers interested in the other side should refer to CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* (2001); FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* 3–62 (1999); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

overturns the will of the democratically elected legislature.¹¹ Stated even more generally, the main objection to judicial review in the U.S. is that it enables a non-elected, non-accountable set of judges to interfere with the popular will.

This “countermajoritarian critique” of judicial power, which has its origins in Alexander Bickel and is currently expressed in the work of Mark Tushnet and others, can be divided into two subsets for analytical purposes:¹² (1) the Supreme Court is a countermajoritarian institution because judicial review counters the will of the democratically elected legislature, through which the popular will is expressed, and (2) the Supreme Court is a countermajoritarian institution because judicial review robs society and public debate of important issues about rights, which are essential to the full development and expression of the popular will.

A. *The Supreme Court Against the Majority*

The first subset concerns the relationship between two crucial foundations of U.S. democracy: the judiciary and the legislature.¹³ Simply put, the problem with judicial review is that “. . . a body that is not elected or otherwise politically responsible in any significant way is telling the people’s elected representatives that they cannot govern as they’d like.”¹⁴ Thus, as expressed by this literature, when the U.S. Supreme Court overturns legislation enacted by the popularly elected U.S. Congress, it ruptures popular sovereignty (as it is expressed by the legislature).¹⁵ As Robert A. Dahl plainly

¹¹ Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334–35 (1998). For one of the most recent takes on the countermajoritarian potential of the court, see Sunstein, *supra* note 5.

¹² The following sections draw directly from my *Rethinking Judicial Review: Shaping the Tolerance of Difference?* in *RETHINKING THE RULE OF LAW AFTER COMMUNISM* 61, 63 (Adam Czarnota, Martin Krygier, Wojciech Sadurski eds., 2006).

¹³ From this follows a set of other critiques, and the Supreme Court has been accused of several directly “anti-democratic” practices, such as incorrectly framing national problems, using arbitrary vetoes against the democratic legislature, deceiving the public, and working against federalism. See these critiques in Ramesh Ponnuru, *Supreme Hubris: How the Court overrules the Constitution*, NAT’L REV., July 31, 2000, at 28–31.

¹⁴ Ely, *supra* note 10, at 4–5. On the debate concerning judicial power, generally, see for example, CARLOS SANTIAGO NINO, *THE CONSTITUTION OF DELIBERATIVE DEMOCRACY* (1996); ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* (1992); RONALD DWORKIN, *LAW’S EMPIRE* (1986); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980); James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

¹⁵ That is, any non-elected body, overturning a decision made by parliament, the sovereign body chosen directly by the people, may be said to be rupturing the popular will. This is the claim regarding the U.S. Supreme Court, whose justices are appointed rather than directly

states, “. . . no amount of tampering with democratic theory can conceal the fact that a system in which the policy preferences of minorities prevail over majorities is at odds with the traditional criteria for distinguishing a democracy from other political systems.”¹⁶ With similar respect for majority rule, Ian Shapiro argues that only in some specific cases should the Court intervene to remedy a temporary perversion of majority rule. But in these cases, there is essentially only one detailed, unambiguous, limited explanation that could be given for this intervention, and this explanation “can at most legitimate intervention to make majority rule operate.”¹⁷

Cass Sunstein echoes these critiques, stressing the value of Congress’ role in American democracy. Consider, for example, Sunstein’s argument that, given the aspirations of deliberative democracy, “. . . the principal vehicle [for promoting deliberative democracy] is the legislature, not the judiciary; the judiciary is to play a catalytic and supplementary role.”¹⁸ Sunstein’s arguments against judicial activism are qualified, for he distinguishes judicial restraint from minimalism, advocating minimalism (only small and incremental interpretations) as a (special) form of judicial restraint. Nevertheless, for Sunstein, “[t]he most tyrannical governments are neither deliberative nor accountable,” and he seeks to distinguish judicial minimalism as the mechanism that promotes both deliberation and control by voters (accountability).¹⁹ Again, these critiques are based on a deep appreciation of legislative sovereignty, and on the assumptions that (1) the legislature is the fundamental representative institution of the public will, which (2) operates more or less as planned in a majoritarian democracy.²⁰

elected by the people. Appointment procedures in other supreme and constitutional courts, of course, vary, and national parliaments might have a stronger role in judicial appointments, making the problem less acute. The German Constitutional Court, for example, has members chosen in equal numbers by the legislature and the upper house, with a fixed term rather than life-long tenure.

¹⁶ Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 279–95 (1957).

¹⁷ The specific explanation Shapiro discusses is the “footnote four” justification, referring to Justice Stone’s opinion in *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 (1938). Ian Shapiro, *Three Fallacies Concerning Majorities, Minorities, and Democratic Politics*, in MAJORITIES AND MINORITIES, NOMOS XXXII 79–125, at 106 (John W. Chapman & Alan Wertheimer eds., 1990) (emphasis added).

¹⁸ CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 267 n.5 (1999).

¹⁹ *Id.* at xiv.

²⁰ Some scholarship questions the assumptions of the countermajoritarian critique, indicating for example that the U.S. Supreme Court’s decisions tend to be in line with the dominant lawmaking majority, Dahl *supra* note 15, or by indicating a “reciprocal and positive relationship between long-term trends in aggregate public opinion and the Court’s collective decisions.” See William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian*

But Sunstein's critiques are also predicated upon a deliberative conception of democracy, which ". . . requires citizens to adopt a civic standpoint, an orientation toward the common good."²¹ Such a conceptualization of democracy revolves around the idea of the public taking responsibility for itself and not merely delegating to representative agents. Sunstein's appraisal of U.S. Supreme Court activism is thus based on a fusion of majoritarian and deliberative conceptualizations of democracy (e.g., that the majority's will should be respected, and that this majority should strive to represent the common good through deliberation and debate), which is where several of the countermajoritarians seem to be today.²² And this position leads us to the second subset.

B. *The Supreme Court Against Public Debate*

The second subset of the countermajoritarian critique I want to distinguish concerns not the relationship between the judiciary and the legislature, per se, but rather the more direct relationship between the judiciary and society. This critique charges that judicial review removes some of the most crucial questions regarding fundamental rights from public debate and decision, thereby negatively affecting democracy.²³ According to this line of argument, limiting Court activism, or even triumphantly removing the possibility of judicial review all together, would give crucial decisions back to "the people." Mark Tushnet, an adamant proponent of this view, has argued that "[d]oing away with judicial review would have one clear effect: it would return all constitutional decision-making to the people acting politically. It would make populist constitutional law the only constitutional law there is."²⁴ That is, although the U.S.

Institution? The Impact of Public Opinion on Supreme Court Decisions, 87 AM.POL. SCI. REV. 87-101, 87 (1993).

²¹ DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS ix (James Bohman & William Rehg eds., 1999).

²² Although not necessarily impossible from an empirical perspective, this fusion is ultimately contradictory. Majoritarian democracy is characterized by institutions that strengthen and prioritize decisions made by the majority. Such institutions include, for example, winner-take-all electoral systems and presidential constitutions. But another way of being a representative democracy is through the consensus-model democracy, which is characterized by institutions that try to respond to as many of the interests in society as possible, rather than the majority. The institutions of consensus democracy include proportional representation and parliamentary democracy. The consensus model of democracy thus seems better suited the the aims of deliberative democracy, which only seeks to use majoritarian decision making mechanisms when consensus fails. See AREND LIJPHART, PATTERNS OF DEMOCRACY (1999)(discussing the distinction between these two models of representative democracy).

²³ See, e.g., MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); SUNSTEIN, *supra* note 17.

²⁴ TUSHNET, *supra* note 22, at 154.

Supreme Court has played an important role as public “educator” with respect to rights and the meaning of the constitution, “[t]he courts are surely not the only institutions that educate us about our fundamental rights, and we might get a decent education even if the courts played a much smaller role.”²⁵ Within a similar line of argument, which aims to bring “rights talk” back to the public sphere, Robert Nagel maintains that “[t]he belief that the judiciary should routinely confront and reshape society is . . . a function of narrowed perspective.”²⁶ He goes on to note that “if the practices that give meaning to the Constitution are acknowledged, the capacity of the non-judicial institutions to sustain constitutional standards need not be viewed so pessimistically.”²⁷ And civil society (however that is conceived of by Nagel) is, for Nagel and others such as Tushnet, the most important actor working with such practices to sustain constitutional standards. In this way, for Nagel, the key is for “the political culture to develop moral understandings and to initiate wise change,” without a Supreme Court interrupting this process and undermining the public debate and social cohesion that he argues is necessary in a constitutional democracy.²⁸

Such critiques of judicial review raise interesting questions about the relationship between judicial power and democracy, and have long been an important focal point of American constitutional scholarship.²⁹ It is obvious that the above critiques, and the debate in American constitutional law generally, are based mainly on the post-New Deal experiences of the U.S. Supreme Court.³⁰ It is less obvious that these critiques of judicial review take into account (1) relatively robust and diverse immigrant civil society in the United States, and (2) a template of two, democratic, center-leaning political parties grafted onto this society. In any other long-standing democracy, these conditions do not apply, as there are different historical, political, and social contexts to consider. Take, for example, France, Germany, and Italy. As late as 1945, all three countries were nation states that did not experience the constant immigration that has been the experience of the U.S. since its founding. Until the postwar era, France, Germany, and Italy also had parliamentary systems and electoral formulas that made for diverse (if unstable) multiparty politics. Even after 1945, this

²⁵ *Id.* at 168.

²⁶ ROBERT NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 23 (1989).

²⁷ *Id.*

²⁸ *Id.* at 26.

²⁹ The point is made in my *Rethinking Judicial Review: Shaping the Toleration of Difference?* in *RETHINKING THE RULE OF LAW AFTER COMMUNISM* 61, 63 (Adam Czarnota, Martin Krygier, Wojciech Sadurski eds., 2006).

³⁰ This period was characterized by a fascinating struggle between Franklin Delano Roosevelt, who attempted, using Congress and presidential executive orders, to push an economic recovery program in the wake of the Great Depression and some of the more conservative justices on the U.S. Supreme Court at that time who opposed the New Deal agenda.

trend continued somewhat. Thus, until the end of the 20th century, none of these three countries, institutionally or socially, closely resembled the American mold.

But what about now? In Europe, there is an intriguing transition to more majoritarian institutional arrangements, including two-party systems, in which small political parties are present, but two major parties are consistently the main competitors for power. Changes in electoral code, such as that in Italy in 1994 which reduced the seats allocated by proportional representation to 25% and added thresholds to keep smaller parties out of parliament, are *de jure* examples. Over the past decades, Germany has seen the emergence of bi-polar political competition, as has France. But some of the transition is also *de facto*. For example, the re-emergence of the extreme right in several countries is upsetting traditional axes of party competition and forcing “unholy alliances” between the traditional right and left.³¹ The far-right’s influence on competition was perhaps most poignantly displayed by Jean-Marie Le Pen’s astounding success in the French Presidential elections of 2002, which left an already bankrupt *gauche plurielle* (the multiple parties of the left) in even greater disarray.

In part, these new, shifting party dynamics and patterns of representation owe to the rapidly changing nature of European social reality. For example, the migration of Muslims from Africa, Asia and especially since 2005, the Middle East, to Western Europe is increasing.³² Back in 1998, a ranked index of 118 countries with at least 1% of the population being Muslim ranked France ranks as the highest Western European nation in the index (7.1% of total population Muslim).³³ Germany followed (4.4%).³⁴ This is not surprising: in the 1990–98 period, the largest annual average immigration flows to France came from Morocco and Algeria; in Germany, the highest flows in this same period came from Poland, Turkey, and the Federal Republic of Yugoslavia.³⁵ Now the flows are from the Middle East.

This signifies something quite striking: as European party politics seem to be moving toward a more bi-polar, American-like, majority pattern, European societies have, with immigration bringing peoples of different languages and religions, been moving away from the relatively solid nation-states they once were. The U.S. has always seen the coexistence of a diverse immigrant society and majoritarian, bi-polar politics. But the European coexistence is new. Do these twin developments imply that European

³¹ As early as the 1990s, municipal electoral elections in France saw several cases of the RPR/UDF and Socialist candidates agreeing to exchange “withdrawal” agreements for districts involving triangular runoff with the FN.

³² See, e.g., Rick Gladstone, *Syrian Refugee Spillover into Europe Surges*, N.Y. TIMES, Sep. 13, 2013, at A8.

³³ THE ILLUSTRATED BOOK OF WORLD RANKINGS Index 4.5 (George Kurian ed., 2001).

³⁴ *Id.*

³⁵ Org. for Econ. Coop. & Dev. [OECD]. *Trends in International Migration*, Chart I.4 (2001), <http://www.oecd.org/migration/internationalmigrationpoliciesanddata/2508596.pdf>.

legislatures can no longer claim to represent the public will, and the society that forms that will? If so, what does that imply for other institutions, and in particular, for constitutional courts?

III. WALZER'S TOLERATION REGIMES

In order to focus this question, it is helpful to define civil society as that arena where self-organized groups, movements, and individuals remain relatively autonomous from the state and attempt to advance their own interests.³⁶ Or, as Habermas maintains, “[c]ivil society is composed of those more or less spontaneously emergent associations, organizations, and movements that, attuned to how societal problems resonate in the private life spheres, distill and transmit such reactions in amplified form to the public sphere.”³⁷ Certainly much research has gone into showing how civil societies are important for robust democracy.³⁸ But how are the differences within societies, cultural, religious, racial or otherwise, managed by states, especially when rights claims come into question?³⁹ Michael Walzer’s conceptualization of toleration regimes identifies five political arrangements, or what he calls regimes, that countries utilize to manage difference in the modern world.⁴⁰ Walzer’s regimes are: (1) multinational empires, (2) international society, (3) nation-states, (4) immigrant societies, and (5) consociations. The last three are the most relevant regimes for this article.

A nation-state is, in some important respects, a “bordered power-container.”⁴¹ For many, it is a loaded concept.⁴² This article focuses on the type of political arrangement Walzer has in mind when he notes that in nation-state regimes, only “a single dominant group organizes the common life in a way that reflects its own history and

³⁶ See my *Rethinking Judicial Review: Shaping the Toleration of Difference?* in *RETHINKING THE RULE OF LAW AFTER COMMUNISM* 61, 63 (Adam Czarnota, Martin Krygier, Wojciech Sadurski eds., 2006).

³⁷ JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 366–67 (1999).

³⁸ See, e.g., ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993); *CIVIL SOCIETY: THEORY, HISTORY, COMPARISON* (John A. Hall ed., 1995).

³⁹ I am aware that there is a vast literature dealing with these questions. Again, for the purposes of limiting this article I am not entering into it here.

⁴⁰ WALZER, *supra* note 1.

⁴¹ ANTHONY GIDDENS, *THE NATION-STATE AND VIOLENCE* (1985).

⁴² See, e.g., CHRISTIAN JOPPKE, *CHALLENGE TO THE NATION-STATE: IMMIGRATION IN WESTERN EUROPE AND THE UNITED STATES* 1–4 (1998). See also *IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA* (Rogers Brubaker, ed., 1989); *ROGERS BRUBAKER, CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY* (1992).

culture and, if things go as intended, carries the history forward and sustains the culture.”⁴³ And therefore, “[t]oleration in nation-states is commonly focused not on groups but on their individual participants, who are generally conceived stereotypically, first as citizens, then as members of this or that minority.”⁴⁴ For Walzer, Germany and Italy (and for the most part, France) are nation-states.

In an immigrant society regime, in contrast, the state is not (supposed to be) “captured” by one or another dominant majority. The state is expected to be “perfectly indifferent to group culture or equally supportive of all the groups.”⁴⁵ Individuals are thus encouraged by the state to tolerate all individuals, as well as their personalized versions of religion, culture, etc. Importantly in this regime, “[n]o group . . . is allowed to organize itself coercively, to seize control of public space, or to monopolize public resources.”⁴⁶ The United States and Canada are good examples of Walzer’s toleration via immigrant society regimes.⁴⁷

Third, there is an arrangement for toleration known as a consociation regime.⁴⁸ Walzer, after Lijphart, defines a consociation as “a simple, unmediated concurrence of two or three communities (in practice, of their leaders and elites) that is freely negotiated between or among the parties.”⁴⁹ The two most important elements in this regime of toleration are power sharing and proportionality. In contrast to the immigrant society regime the consociation regime is characterized by toleration not so much between individuals but rather between groups. And “the different groups are not tolerated by a single transcendent power; they have to tolerate one another and work out among themselves the terms of their co-existence.”⁵⁰ Therefore, as Walzer notes, in this regime “mutual toleration depends on trust, not so much in each other’s good will as in the institutional arrangements that guard against the effects of ill

⁴³ WALZER, *supra* note 1, at 25.

⁴⁴ *Id.*

⁴⁵ *Id.* at 32.

⁴⁶ *Id.*

⁴⁷ Walzer, however, does note that France is also a nation-state. *Id.* at 39. His regimes of toleration are not mutually exclusive, and I return to the case of France below.

⁴⁸ Arend Lijphart gave us an analysis of consociationalism, picking up on David Apter’s early analysis. See DAVID APTER, SOME CONCEPTUAL APPROACHES TO THE STUDY OF MODERNIZATION (1968). See also AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION (1977).

⁴⁹ WALZER, *supra* note 1, at 22. Walzer’s regimes are not meant as elements of a mutually exclusive, jointly exhaustive typology.

⁵⁰ *Id.*

will.”⁵¹ The European consociations mentioned by Walzer are Belgium and Switzerland.⁵²

IV. TOLERATION REGIMES AND THE COURTS

What is the institutional space, on the one hand, and the political demand, on the other hand, for a constitutional court within each of these regimes? How are these patterns related to new patterns of European democratic practice?

To begin to address this question, this section organizes these European democracies with respect to the existence of constitutional courts and the degree of their activism. Lijphart has given an estimate of the strength of judicial review in a set of democratic countries. This index, though now quite dated, is useful for beginning the discussion. It is based on the *de jure* existence of judicial review, and on the *de facto* level of activism, with a 4.0 indicating the strongest review, and 1.0 indicating no review.⁵³ Separating some of the European countries in Lijphart’s work into Walzer’s five toleration regimes produces, an interesting, if tentative, relationship between accommodation models and the strength of judicial review.⁵⁴ Both the United States (4.0), and Canada after 1982 (4.0)—our immigrant society regimes—rate highest in Lijphart’s index, with both having strong judicial review. Next, three of the classic examples of a nation-state regime have constitutional courts with moderately strong to strong judicial review: Germany (4.0), Austria (3.0), and Italy (2.8). And then in the consociation regimes—Switzerland (1.0), and Belgium before 1984 (1.0)—judicial review is not strong at all.⁵⁵ See Table 1.

⁵¹ *Id.* at 24 (emphasis added).

⁵² *Id.* at 22.

⁵³ AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 216–31 (1999). This is a first approximation, and I do not rule out the intervening influence of both the European Union and federalism, which need to be explored in greater detail. However, I regressed data Lijphart offers us on judicial review and federalism for 14 democracies, and while there does seem to be a positive relationship suggesting a very general trend, it is not a terribly strong relationship with this data. A serious regression analysis using more recent data would be important.

⁵⁴ See my *Rethinking Judicial Review: Shaping the Toleration of Difference?* in *Rethinking the Rule of Law After Communism* 61, 63 (Adam Czarnota, Martin Krygier, Wojciech Sadurski eds., 2006).

⁵⁵ *Id.* at 226. Also, as Lijphart notes, Belgium, like France, is one of the interesting, changing cases. It has, after the creation of the Court of Arbitration in 1984, and a subsequent amendment in 1988, developed a medium strength review (3.0).

Table 1: Toleration Regimes and Judicial Power

Toleration Regime	Judicial Review	Examples	Mean Score
Consociation	None	Switzerland, The Netherlands, Belgium before '84	1.0
Nation-State	Medium to Strong	Germany, Italy, Austria	3.3
Immigrant Society	Strong	Canada, the United States	4.0

The apparent correlations here between the strength of judicial review and the category of toleration regime are striking. Moreover, when a state transitions from one toleration regime toward another seems also to be correlated with changes in the strength of judicial review and its practice. For example, in spite of its long-standing Republican tradition, France is, in many ways, rapidly becoming an immigrant society. For this reason, Walzer classifies it as a complicated case.⁵⁶ This apparent move to an immigrant society appears to have coincided with France's move from no judicial review (1.0) toward its own version of judicial review after 1974 (2.2).⁵⁷ Indeed, as Christian Joppke and Steven Lukes note, the 1997 French Council of State's "vindication of the right of Muslim girls to wear a veil in public schools, provided that they do not proselytize," was a receptiveness to difference that was at the time dramatically different from past assimilatory pretensions of the French state.⁵⁸ The Council's decision was an advisory decision, not a form of judicial review; and it advised that certain accommodations for difference, in this case the wearing of the

⁵⁶ See WALZER, *supra* note 1 at 37–51 (discussing France, Israel, Canada and the EU).

⁵⁷ See ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* (1992).

⁵⁸ See Christian Joppke & Steven Lukes, *Introduction: Multicultural Questions*, in *MULTICULTURAL QUESTIONS* 1–26 (Christian Joppke & Steven Lukes eds., 1999).

Islamic veil in primary schools, were compatible with the French concept of *laïcité*. However legislation, and legislators deciding not to follow the Council's move toward protecting an immigrant society, passed in 2004 then prohibited the veil in public primary schools across France, and legislation in 2011 prohibited full face coverings in the public sphere.⁵⁹ Although the French Constitutional Council defended the 2011 legislation, and moved away from the opinions of the Council of State, the earlier decisions ring of Walzer's conception of an immigrant society, in which the state is expected to be "perfectly indifferent to group culture or equally supportive of all the groups."⁶⁰ The moves are clearly not linear.

The German case is also interesting in this respect. Germany has had a powerful form of judicial review since 1949.⁶¹ The memory of Weimar and the Third Reich, and of the Allied powers' interests in protecting federalism, certainly influenced the constitutional engineering of a powerful court.⁶² But recalling the evidence on immigration presented earlier, Germany has also seen increased immigrant flows from several, predominantly Muslim, countries. Is judicial activism increasing? If so, on whose behalf? Is the Court, in ways both similar and different to France, softening the state's position with respect to difference? The public tumult in Bavaria following the German Constitutional Court's 1995 ruling is indicative of this puzzle. In that decision, the Court overturned a Bavarian regulation requiring crosses to be hung in

⁵⁹ For the 2004 decision, see the discussion in CHRISTIAN JOPPKE & JOHN TORPEY, *LEGAL INTEGRATION OF ISLAM: A TRANSATLANTIC COMPARISON* ch. 2 (2013); PATRICK WEIL, *LA RÉPUBLIQUE ET SA DIVERSITÉ. IMMIGRATION, INTÉGRATION, DISCRIMINATION* (2005).

⁶⁰ It seems as if a more systematic analysis of these and other rulings, of their timing relative to those of other political organs, and of public sentiment, will begin to provide answers to the apparent correlations above. For example, in 1994, when then Minister of Interior Charles Paqua inaugurated a new mosque in Lyon, he stressed the need for there "to be a French Islam." Whether this turn in the political class prompted the Council to take action or not is certainly an important question. See Alan Riding, *Lyon's Journal; A New Mosque as a Beacon for a French Islam*, N.Y. TIMES, October 29, 1994, at 4.

⁶¹ The Grundgesetz established a separate Federal Constitutional Court, and Germany's form of judicial review also includes the fascinating *Verfassungsbeschwerde*, the best translation of which is probably "constitutional complaint." This enables individuals to petition the German Constitutional Court when they feel all other avenues have been exhausted. See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW], May 23, 1949, BGBl. I (Ger.). See also GEORG VANBERG, *THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY* (2005).

⁶² See DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY OF GERMANY* (2012). See also CINDY SKACH, *BORROWING CONSTITUTIONAL DESIGNS: CONSTITUTIONAL LAW IN WEIMAR GERMANY AND THE FRENCH FIFTH REPUBLIC* (2005).

classrooms.⁶³ Grouping this case and several others from the 1990s together, “lawyers close to the CDU-CSU began arguing that the Constitutional Court was violating the majority’s ‘positive’ rights in a series of cases.”⁶⁴ The ruling by the German Constitutional Court in September 2003 protected Muslim women’s right to wear headscarves in public schools, but enabled individual states to pass legislation on the public display of religious symbols, further opening the debate.⁶⁵ Italy and Belgium have also seen increased immigration flows over the past decade and relative increases in judicial activism. And over the next decade, it will be interesting to watch any developing activism of the Supreme Court of the United Kingdom, which began working as a supreme court in 2009, replacing the Appellate Committee of the House of Lords as the highest court in the United Kingdom.⁶⁶

V. THE COUNTERMAJORITARIAN OPPORTUNITY DEFINED

All this leads to the following hypothesis: Constitutional courts, through their decisions, are leading European democracies out of their current toleration regimes into other forms of toleration, and other conceptions of state and nation. The beginning of this article noted that the “countermajoritarian” critiques of the U.S. Supreme Court rested on assumptions of (1) a relatively robust and diverse immigrant civil society, and (2) a template of two, democratic, center-leaning political parties grafted onto this society. As European democracies exhibit to a greater extent these characteristics of diversity and two-party politics, the European constitutional courts are seizing the opportunity. That is to say, the inherent and rather stable incongruence between the (1) American two-party system and the (2) American immigrant society has given birth to an (3) activist Supreme Court.⁶⁷ Constitutional courts in Europe are now witnessing a similar incongruence develop in their own countries, and seizing it as an opportunity to assert institutional power. In so doing, several European courts are turning nation-state regimes into immigrant society regimes through the decisions they make, and they are doing so because it is within immigrant society regimes that

⁶³ See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 12, 1987, ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE], 93, , 1987 (Ger.). See also Stephen Kinzer, *Crucifix Ruling Angers Bavarians*, N.Y. TIMES, August 23, 1995, at A3.

⁶⁴ Peter C. Caldwell, *The Crucifix and German Constitutional Culture*, 11 CULTURAL ANTHROPOLOGY 259, 265 (1996). The CDU, Christian Democratic Union, and its sister party in Bavaria, the Christian Social Union of Bavaria, are the two main conservative parties in Germany.

⁶⁵ Cindy Skach, *Şahin v. Turkey. App. no. 44774/98; "Teacher Headscarf." Case no. 2BvR 1436/02*, 100 AM. J. INT’L L. 186–95 (2006).

⁶⁶ THE SUPREME COURT, <http://www.supremecourt.gov.uk/> (last visited Nov. 4, 2013).

⁶⁷ Federalism is, of course, an interesting part of this puzzle and needs to be explored in greater detail.

constitutional courts have the most scope for strong judicial review.⁶⁸ Consider once again the two subsets of the countermajoritarian critique distinguished earlier: (1) the U.S. Supreme Court is a countermajoritarian institution because judicial review counters the will of the democratically elected legislature, through which the popular will is expressed, and; (2) the Supreme Court is a countermajoritarian institution because judicial review robs society and public debate of important issues about rights, which are essential to the full development and expression of the popular will. If one accepts that Europe is witnessing twin changes in the representativeness of European legislatures, and the heterogeneity of its popular will, constitutional courts may indeed be using this European moment as their countermajoritarian opportunity. With the popular will increasingly fragmented, and the legislatures increasingly distant from this fragmentation, there is a greater need for interpreting the constitution in diverse times, which courts are increasingly embracing as their constitutional moment.

⁶⁸ Importantly, I am differentiating between an immigrant society defined simply by immigrant flows, and an immigrant society toleration regime, as defined by Walzer. I am not suggesting that court decisions are responsible for the former.