

*Rethinking Judicial Review: Shaping
the Toleration of Difference?*

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INTRODUCTION

Over the past decade, and in several regions of the world, the crafting of constitutional courts with the power of judicial review has become an important domestic dimension of democratic institution building (see, for example, Schwartz 1998; Scheppelle 2001; Skach 2000). In this same time period, there has also been a growing interest in, and rather heated debate concerning, the relationship between democratization and nationalism, as scholars ask what institutional arrangements might effectively, and democratically, help polities best accommodate difference (see Stepan 1998; Gellner 1983; Anderson 1983; Huntington 1996).

This chapter is an attempt to bring these hitherto rather separate bodies of literature together in order to learn something new about judicial power. In so doing, this chapter also speaks specifically to the timely challenge of finding “new domestic, regional, or transnational mechanisms which will hold governments accountable for respecting both human rights and minority rights” (Kymlicka 2001: 88).

The chapter proceeds in four steps. The first section briefly discusses an important body of literature concerning the relationship between constitutional courts and democracy. The second section suggests that there might exist a different relationship, one between constitutional courts and *democratization* (as a concept that is conceptually and analytically distinct from democracy). The third section then shifts focus, and discusses existing regimes of multinational toleration in the world. The section asks whether there is some interesting relationship between these regimes and the strength of judicial review. The final section asks what such a relationship might have to say about the way we conceive of judicial power.

CONSTITUTIONAL COURTS AND DEMOCRACY

A substantial part of U.S. constitutional scholarship concerns the relationship between the U.S. Supreme Court and American democracy.¹ This literature, and the critiques of and responses to it, has framed much of our thinking about the contours of judicial power. One body of literature within this scholarship offers a critique of judicial review by posing what is known as the

“countermajoritarian” difficulty. Stated simply and generally, the “counter-majoritarian” difficulty is found in the fact that the Supreme Court interferes with the popular will (Friedman 1998: 334). The counter-majoritarian critique of judicial power, which had its origins in Alexander Bickel and is currently expressed in the work of scholars like Mark Tushnet, can be divided into a series of subsets in order to be examined more effectively. Here let me suggest two subsets of the difficulty: (1) judicial review counters the will of the democratically elected legislature; and (2) judicial review robs society and public debate of important issues about rights.

The first subset concerns the relationship between two crucial institutions, indeed two crucial foundations, of U.S. democracy: the judiciary and the legislature.² Simply put, the problem here 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.”³ Thus, to the extent that the U.S. Supreme Court overturns legislation enacted by the popularly elected U.S. Congress, it interrupts the work of the legislature, which in turn interrupts popular sovereignty.⁴ As Robert A. Dahl plainly 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” (Dahl 1957: 283).

Cass Sunstein echoes these critiques, stressing the value of the role played by Congress in American democracy. Consider, for example, Sunstein’s argument that, given the aspirations of deliberative democracy, “the principal vehicle is the legislature, not the judiciary; the judiciary is to play a catalytic and supplementary role” (Sunstein 1999: 267, footnote 5). Sunstein’s arguments against judicial activism are qualified, for he distinguishes judicial restraint from minimalism, advocating minimalism as a (special) form of judicial restraint. Nevertheless, for Sunstein, “[t]he most tyrannical governments are neither deliberative nor accountable,” and he seeks to identify judicial minimalism as the mechanism that promotes both deliberation and control by voters (accountability) (Sunstein 1999: xiv). These critiques are based on an appreciation of legislative sovereignty, and of the acceptance or assumption of the legislature as a fundamental, if not the fundamental, institution of majoritarian democracy.⁵ Sunstein’s critiques are also based on the concept of deliberative democracy, which “requires citizens to adopt a civic standpoint, an orientation toward the common good” (Bohman and Rehg 1999: introduction). 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 critique of U.S. Supreme Court activism is thus based on a fusion of majoritarian and deliberative conceptualizations of democracy.

A second subset of the counter-majoritarian critique concerns itself not

with the relationship between institutions *per se*, but rather, with the relationship between the judiciary, on one the hand, and society, on the other hand. The legislature is no longer the point of opposition with the Supreme Court. Now the problem concerns itself with how judicial review removes some of the most crucial questions regarding fundamental rights from public debate and decision, thereby negatively affecting democracy (see, for example, Tushnet 1999; Sunstein 1999). According to this line of argument, limiting court activism, or doing away with judicial review all together, would give crucial decisions back to “the people”. Tushnet, a proponent of this view within the counter-majoritarian critique, 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” (Tushnet 1999: 154). Therefore, although Tushnet acknowledges that the U.S. 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” (Tushnet 1999: 168).

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”. He goes on to note that “[i]f 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” (Nagel 1989: 23). Thus, civil society, however that is conceived of by Nagel, is argued to be the most important element for sustaining constitutional standards.

These critiques provide some powerful arguments and raise questions about the relationship between judicial review and democracy, and these “counter-majoritarian” critiques have long been an important focal point of modern constitutional scholarship. Yet, here I want to suggest that this critique cannot be the basis for a discussion of judicial power in transitional societies.

The above critiques, and the debate in American constitutional law generally, are based mainly on the experiences of the U.S. Supreme Court, and thus assume: (1) stable political institutions; (2) well-organized and resourceful political parties; and (3) a relatively robust civil society. Indeed, the U.S. has enjoyed a relatively non-polarized, non-fragmented, institutionalized party system for many decades. In transitional polities, these assumptions do not hold, as there is often a very different political and social context. We thus are forced to ask a different question: How does constitutional court activism affect democracy in situations of uncertainty, when political institutions and civil societies are neither stable nor well-developed, and often

fragmented and polarized? This turns the debate on its head, since the two categories of reasons against constitutional review that I just distinguished—that civil society itself should protect constitutionalism and that the legislature and its political parties are sovereign—cannot have the same resonance in transitional contexts. Let me elaborate the differences of context, focusing on the specific nature of transitional civil societies and transitional party systems in new democracies.

There are numerous ways in which consolidated and non-consolidated democracies differ, and consequently, why constitutional court activism must be made relative to context. In non-consolidated democracies, the most pressing challenges to consolidation are often posed by weak civil societies, and fragmented and non-institutionalized political parties and party systems. We can 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. Or, as Jürgen Habermas notes, “[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” (Habermas 1999: 366–67). Much research has gone into showing how civil societies are important for democracy (see, for example, Putnam et al. 1993; Hall 1995).

After a period of non-democratic rule, civil societies can often be weak, fragmented, or poorly organized.⁶ This is particularly true for Central and Eastern Europe, where in some countries, “[t]he depoliticization, infantilization, and atomization that communism imposed on society could not be sloughed off overnight” (Schöpflin 1994: 131; see also Wesolowski 1998). The weakness of civil society in postcommunism follows from the fact that civil societies were often completely penetrated by the state during the previous non-democratic regime. Alternatively, in some cases where civil societies *were* able to exist somewhat autonomously from the non-democratic state, they were nevertheless unable to make the transition from working “against the state” to working with it, as their organizing role had originated and been defined under a period of strong resistance.⁷

There is obviously a great variety within the postcommunist world. But generally, the resurrection of civil society poses one of the greatest challenges for the consolidation of postcommunist democracy. Problems of resurrection are often exacerbated by complex citizenship and nationality questions that civil society must address, and compounded by the fact that the boundaries between civil society, political society, and the state must often be rebuilt or redrawn; for often the totalitarian legacy of party-state fusion and the penetration of society by the regime have left a problematic collective consciousness. Evidence is found in the fact that in several East European

states, public opinion during the first several years of transition tended to favor a return to the past, valuing the previous non-democratic regime over the current, democratizing regime.⁸ This raises troubling questions about the potential non-democratic orientation of these civil societies and a possible lack of commitment to pluralism and toleration.

Moreover, the distinctions between individual and group rights, as well as questions of transitional justice, must be publicly rethought in transitional societies (Teitel 1999 and Gross 1999). In certain transitional states, the individual-versus-group-rights challenge is often rooted in questions regarding national, ethnic, religious, or linguistic minority rights, which can easily (if unintentionally) be sidelined in the face of the pressing economic reforms that tend to dominate legislative agendas. In sum, civil society in new democracies, and particularly in the postcommunist democracies, must be seen as fundamentally different from that of the long-standing, consolidated democracies.

Another crucial difference between consolidated and non-consolidated democracies lies in the nature of political parties and party systems. Well-functioning political parties and party systems are crucial institutions in consolidated democracies. Specifically, consolidated democracies usually enjoy *institutionalized* party systems. The institutionalization of a party system is indicated by low electoral volatility, the stability of party roots in society, and citizens' acceptance of parties as the legitimate intermediary in the democratic process (Sartori 1966: 293; Mainwaring and Scully 1995: 20).

Institutionalized party systems are important for building and sustaining stable and coherent majorities, because "where the party system is more institutionalized, parties are key actors that structure the political process; where it is less institutionalized, parties are not so dominant, they do not structure the political process as much, and politics tends to be less institutionalized and therefore more unpredictable" (Mainwaring and Scully 1995: 22).

Building sustainable political party majorities from within a non-institutionalized party system is particularly problematic. Low levels of predictability, and high party fluidity and volatility, impede actors from having the necessary information about their strengths and the strengths of their opponents. This lack of information makes bargaining, which is the key to coalition formation, extremely difficult.⁹ And unless a polity can produce single party majorities, coalitions are necessary, and thus, so is bargaining.

In transitional polities, political parties and party systems often lack institutionalization.¹⁰ After a period of non-democratic rule, political parties, often proscribed during the non-democratic period, must struggle to organize at both the local and national levels, gain legitimacy and trust from the electorate, and institutionalize themselves as viable channels of interest mediation. Thus, legislatures tend to initially be characterized by instability in the wake of party and party system development and electoral volatility. In

addition, some transitional states, and several of the postcommunist states in particular, exhibit polarization in the political, economic, religious, linguistic, or ethnic spheres, which often manifests itself in the party system (Kitschelt et al. 1999: 169–73).

In the face of such polarization, what or whom, does a legislative majority represent, even if one does exist? If we take a snapshot and look at the incidence of minority government and coalition government in the new democracies in 1998–99, 62% (16 of 26) of the governments in Central and Eastern Europe at that time were either minority governments, or had coalitions of at least two political parties, suggesting systemic fragmentation.¹¹

Adding to this fragmentation is the fact that in countries such as Bosnia and Herzegovina, new parties often form around long-standing ethnic issues. Part of the problem is one of supply: many postconflict societies lack the space for parties to appeal to voters on non-ethnic issues. In the Federation of Bosnia and Herzegovina, the Social Democratic Party and the Social Democrats, both of which draw support from all three of the country's ethnic groups—the Serbs, Croats, and Muslims—merged in 1999 to become the Bosnia Social Democratic Party (SDP). This merger helped the SDP to make significant gains, and the fruits of their merger were evident in the November 2000 general elections. But this merger took time.

Herein lies the problem of applying the logic of the counter-majoritarian difficulty in the existing literature to transitional democracies, particularly multinational ones. When political parties are themselves still in the process of institutionalization, how can the legislature be expected to take up questions of protecting fundamental freedoms (*pace* Sunstein)? How can a civil society, which sometimes continues to value the previous non-democratic regime more positively than the current one during a painful political and economic transition, perform a controlling function over government, and over the government's protection of fundamental rights (*pace* Tushnet)? Often the branches of government are themselves in the process of establishing a pattern of power-sharing and decision making—processes that are not always consensual. Transitional civil societies, political parties, and legislatures are usually struggling to improve their efficacy and legitimacy, and thus are not in a particularly strong position to take on crucial, and potentially very divisive, questions concerning fundamental rights.

CONSTITUTIONAL COURTS AND DEMOCRATIZATION

Let me propose a way of conceptualizing constitutional court activism and democracy that will enable us to incorporate transitional states into the debate. I start with a continuum of democratic consolidation. See *Figure 1*.

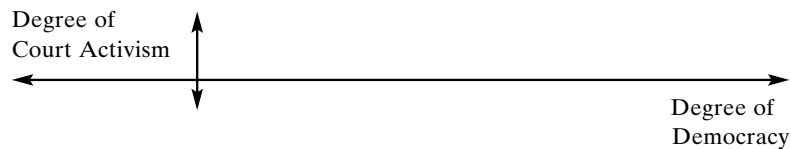


Figure 1. Democracy and Activism.

In some contexts, it might be more beneficial for our understanding of judicial power if we acknowledge that constitutional court activism and democratic consolidation may co-vary. That is, in new democracies, not only might the counter-majoritarian difficulty not apply; but also, court activism and strong judiciaries might serve several functions that are actually conducive to democratic consolidation. Here let me briefly explicate two of the functions that court activism could serve in a new democracy, in the absence of other strong political and social institutions: the “focusing” function and the “party building” function.

First, an active constitutional court can play an important focusing function in a transitional society. It can draw attention to fundamental issues within a society and offer “visibility and legitimacy for issue advocates” where they otherwise would not find it. Let us recall that deliberative democracy “requires citizens to adopt a civic standpoint, an orientation toward the common good” (Bohman and Rehg 1999: introduction). This type of democracy is about the public taking responsibility for itself, and not merely delegating to representative agents. As for of the numerous challenges civil societies face in transitional states, as well as the initial inherent weakness of civil society, constitutional courts may actually be more effective at pushing civil society toward a common good and a sense of civic responsibility. Courts, through the cases they review and the decisions they make, in combination with the media attention given to the constitutional court’s decisions, can focus attention on issues which may otherwise not have received public scrutiny, or even legislative scrutiny. Through this focusing function, activist constitutional courts can compensate for leaders’ and legislators’ inattention to democratic values, and can nourish civil society by focusing public attention and public debate on both individual and group rights. Research has shown that the U.S. Supreme Court, for example, has been an important agenda setter in this sense, prompting the media “to increase its coverage of the issues and to sustain this heightened level of attention” (Flemming et al. 1997: 1247). This heightened attention is perhaps even more necessary in transitional democracies.

Second, constitutional court activism can provide a “party building” function to transitional states. As described above, non-institutionalized party systems often pose one of the major challenges to democratic consolidation in transitional states. Constitutional court activism may be necessary, initially,

to mediate between warring political factions in the various branches of government. In this way, constitutional review sets boundaries between branches and protects the balance of power. This may be particularly beneficial to nascent legislatures that face encroachment by ambitious chief executives. But constitutional review may also help institutionalize political parties and crystallize party systems. Through various decisions, courts can emphasize the channeling function of parties and stress their relationship to civil society. Decisions regarding campaigns and party finance, for example, help establish the boundaries between parties, civil society, and the state. Decisions regarding the responsibilities of parties to the democratic goals of society similarly help establish such boundaries. This function is particularly necessary in polarized countries, where several anti-democratic extremist parties vie for public votes and attention, and threaten the democratic goals of pluralism and toleration.

There is the immediate objection that courts might just privilege that *status quo*, that they will not actually take up the kinds of cases and make the types of decisions that would enable them to provide these “focusing” and “party building” functions. Another objection comes from Will Kymlicka, who has suggested that in some cases, certain judges might interpret certain rights in culturally biased ways. He offers examples from the negative experiences of Native Americans with the U.S. Supreme Court, and concludes that “to assume that supreme courts at the national level should have the ultimate authority over all issues of individual and minority rights within a country may be inappropriate in the case of indigenous peoples and other incorporated national minorities” (Kymlicka 2001: 85).

Here I want to suggest that while Kymlicka’s objection is an important one, it may not be a problem with judicial review on its own, but rather, with the combination of judicial review and a particular model of accommodation of difference. This leads me to a discussion of the models of accommodation and the place for judicial review within them.

TOLERATION REGIMES AND THE CHALLENGE OF MULTICULTURALISM

Several of the long-standing, Western democracies developed models of accommodation for their diverse societies (Kymlicka 2000). Michael Walzer has identified five regimes, or political arrangements, for the toleration of difference in the modern world (Walzer 1997). Walzer’s regimes are: (1) multinational empires; (2) international society; (3) consociations; (4) nation-states; and (5) immigrant societies. Taking this typology, what is the space for a constitutional court within each of these regimes? That is, is there a way to combine judicial activism with one of these toleration regimes in order to both assure the successful accommodation of difference and for judicial power to

serve as a democratizing force? I will briefly discuss the three most common regimes identified by Walzer: nation-states, immigrant societies, and consociations; and then focus on consociations.

For the purposes of this chapter, I will assume, with Kymlicka, that a state with a successful accommodation of difference, from a liberal democratic perspective, meets each of the following criteria (Kymlicka 2000: 212): (1) democracy; (2) individual rights; (3) economic prosperity; (4) inter-group equality; and (5) peace and individual security.

Nation-states and judicial review

Walzer notes that “[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” (Walzer 1997: 25). Arend Lijphart has given an estimate of the strength of judicial review in a set of democratic countries, based on the *de jure* existence of judicial review, as well as the level of *de facto* activism (Lijphart 1999, especially pp. 216–31). Interestingly, three of today’s robust examples of a nation-state have constitutional courts with moderately strong judicial review: Germany, Austria, and Italy.

Immigrant societies and judicial review

In an immigrant society, “[n]o group... is allowed to organize itself coercively, to seize control of public space, or to monopolize public resources” (Walzer 1997: 32). The United States and Canada are characterized by Walzer as immigrant societies.¹⁴ Both the United States and Canada, interestingly, rate very high in Lijphart’s index of the strength of judicial review.

Consociations and judicial review

Lijphart offers the classic analysis of consociationalism, picking up on David Apter’s early analysis (see Apter 1968). 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” (Walzer 1997: 22).¹⁵ The two most important elements in this regime of toleration are power sharing and proportionality. Some of the long-standing examples of consociationalism include the Netherlands, Belgium, and Switzerland. Newer examples include Bosnia and Herzegovina. Interestingly, judicial review does not seem to be strong in any of these consociations (Lijphart 1999: 226).

Separating some of these countries into three of Walzer’s five toleration regimes, we can see an interesting, if tentative, relationship between accommodation models and the strength of judicial review. See *Figure 2*.

TOLERATION REGIME	JUDICIAL REVIEW
<i>Consociations</i>	<i>Weak or none</i> (Switzerland, Netherlands, Belgium before '84)
<i>Nation-states</i>	<i>Medium to strong</i> (Germany, Italy, Austria)
<i>Immigrant societies</i>	<i>Strong</i> (U.S., Canada)

Figure 2. Toleration Regimes and Judicial Power.

Due to space constraints, I am unable to evaluate all of the above relationships.¹⁶ Here let me briefly consider the consociationalism-judicial review relationship. Consociationalism, as a toleration regime, has important limits. Walzer suggests, for example, that the main problem with a consociational arrangement is its fragility: a social or demographic change can shift the balance and strength of groups within that society, and the fear of the disturbance this shift might cause can actually break up the consociational arrangement (Walzer 1997: 23). What is the fear? “That the consociation will be turned into an ordinary nation-state where I will be a member of the minority, looking to be tolerated by my former associates, who no longer require my toleration” (Walzer 1997: 24). Indeed, the return of refugees to certain regions within Bosnia and Herzegovina is currently sparking fears that the existing, delicate consociational balance may be disturbed.

One of the challenges of making consociationalism work in a postwar society such as Bosnia involves moving away from strictly national-based political programs. In particular, “the parties have to develop programmes which focus less on national differences and rather on alternative approaches to the economy, social affairs, education and other matters” (Bieber 1999: 94). This has been particularly challenging in BiH, and it is one reason (a) that a constitutional court with the power of judicial review has been carved into this polity; and (b) that this court has been *internationalized*. The Constitutional Court of BiH came into being in 1995 and gained its credibility through the import of foreign justices and norms. There are nine judges in total. Four judges are selected by the House of Representatives of the Federation, and two by the Assembly of the Republika Srpska. These judges must be citizens of Bosnia and Herzegovina. The remaining three judges are appointed by the President of the European Court of Human Rights. These three, *international* judges must *not* be citizens

of Bosnia and Herzegovina or of *any neighboring state*. The former Vice-President of the BiH Constitutional Court, Prof. Dr. Joseph Marko of Austria, noted that the Constitutional Court, particularly because of its international composition, has been a crucial force. He tellingly remarked that the “reconstruction of multiethnic society is a goal of the Constitutional Court of Bosnia-Herzegovina, although there’s no pure, positivistic legal ground for it.”¹⁷

The Constitutional Court of BiH is a testament to the fact that powerful constitutional courts, even if they must be constructed from without, are increasingly considered crucial elements of democratic consolidation in postconflict societies. Moreover, in most of East Central Europe, the crafting of constitutional courts preceded the development of toleration regimes; consequently, it is often courts that shape the toleration regime of a particular country.¹⁸

CONCLUSIONS AND FUTURE STEPS

Much of the literature within constitutional scholarship on the “counter-majoritarian difficulty” has dealt not only almost exclusively with consolidated democracy in the U.S., but also, with the immigrant society model of accommodation. This chapter has tried to explore some questions that arise about the nature of judicial power when we move simultaneously out of these two contexts: from democratic to democratizing states, and from immigrant societies to other toleration regimes.

NOTES

- 1 Several works have suggested the Supreme Court’s *democracy-promoting* functions. See, for example, Michelman 1999, especially chapter 1; Bickel 1962; Ely 1980; Eisgruber n.d.
- 2 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 Ponnuru 2000.
- 3 John Hart Ely, quoted in Peretti 1999: 191. Generally, on the debate concerning judicial power, see, for example, Thayer 1893; Dworkin 1986; Choper 1980; Burt 1992; Nino 1996.
- 4 Appointment procedures, of course, vary. 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.
- 5 Some scholarship takes a different line than that found in the counter-majoritarian critique, indicating for example that the U.S. Supreme Court’s decisions tend to be in line with the dominant lawmaking majority (Dahl 1957), or by indicating a “reciprocal and positive relationship between long-term trends in aggregate public opinion and the Court’s collective decisions” (Mishler and Sheehan 1993: 87).

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- 6 There is, of course, great variation, in part depending upon the degree of repressiveness of the prior regime type; and of the role of civil society protests in bringing down the regime.
 - 7 For the discussion of how legacies and past experiences shape political processes in Central and Eastern Europe, see Ekiert 1991; Comisso 1997; Elster et al. 1998; Crawford and Lijphart 1997.
 - 8 See the data in Rose et al. 1998.
 - 9 See Riker 1962, especially his discussion of bargaining through side-payments, pp. 105–23.
 - 10 See the theory and then evidence presented in Linz and Stepan 1996, individual chapters.
 - 11 *Transition Report 1999: Ten Years of Transition*, p. 104. The theory that the median voter is nevertheless represented by minority government does not necessarily hold for new democracies. See Laver 2000.
 - 12 Although working within a different context, somewhat similar arguments were put forth by John Hart Ely, who argued that the Supreme Court could reinforce democracy and could protect groups at special risk. See Ely 1980; see also the discussion in Sunstein 1999: 6–8.
 - 13 This is what Roy B. Flemming, John Bohte, and B. Dan Wood have argued the U.S. Supreme Court has done, since certain crucial decisions “prompted the media to increase its coverage of the issues and to sustain this heightened level of attention” (Flemming et al. 1997: 1247).
 - 14 Walzer, however, does note that France is also a nation-state. His regimes of toleration are not mutually exclusive.
 - 15 Walzer’s regimes are not meant as elements of a mutually exclusive, jointly exhaustive typology. As such, several of his regimes overlap in terms of both their defining characteristics. The leading piece on consociationalism is still Lijphart 1977.
 - 16 The book-length investigation is found in my *Constitutional Justice: Judicial Review in the Modern World* n.d.
 - 17 Joseph Marko, comments made at the Annual Meeting of the Association for the Study of the Nationalities, Columbia University, New York, 13 April 2000.
 - 18 A contrary, rather pessimistic view of judicial review in BiH is found in Hayden 1999, especially pp. 131–32.

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