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Militating Democracy: Comparative Constitutional Perspectives

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MILITATING DEMOCRACY: COMPARATIVE CONSTITUTIONAL PERSPECTIVES

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Can constitutional review by judges save democracy? This Article identifies and discusses the rise of "militant constitutional democracy" by exploring diverse approaches to the role of constitutional and transnational judicial review in rights protection and the challenges that these approaches present to the workings of democracy, the possibilities of compromise, consensus, and conciliation in political life, and the challenge to other constitutional values as well. "Militant constitutional democracy"[1] ought to be understood as belonging to transitional constitutionalism, associated with periods of political transformation that often demand closer judicial vigilance in the presence of fledgling and often fragile democratic institutions; it may not be appropriate for mature liberal democracies. As more robust institutions emerge, a more liberal form of constitutionalism may be apposite, which could offer a more pluralist approach to the tolerance even of illiberal practices, so long as these are understood as private, and not capturing of the State. Finally, the critical divide that may well illuminate comparative approaches to this area may devolve less on differing views of the value of the protection of individual expression or association and more on the differing approaches to the regulation and ergo *conceptualization of the public sphere and its relation to the State.*

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1. *See infra* notes 65–67 (defining "militant democracy" or "Streitbare Demokratie" as expressed in the German Basic Law and in its jurisprudence, and referring to provisions indicating constitutional intolerance of any opposition to democracy); *see also* Grundgesetz [GG] [Basic Law] arts. 18, 20, 21(2) (F.R.G.); *see, e.g.*, Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], Aug. 17, 1956, 5 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 85 (declaring the Communist Party of Germany unconstitutional because of its ideological opposition to the "free democratic basic order"). For the first articulation of the concept, see Karl Loewenstein, *Militant Democracy and Fundamental Rights, I*, 31 AM. POL. SCI. REV. 417 (1937) (proposing that the emergent trend was that, at the time, "democracy becomes militant"). Loewenstein observed that in responding to fascism, "[m]ore and more, it has been realized that a political technique can be defeated only on its own plane and by its own devices." *Id.* at 430–31, 432 ("If democracy believes in the superiority of its absolute values . . . every possible effort must be made to rescue it, even at the risk and cost of violating fundamental principles.").

I. INTRODUCTION

On September 30, 2005, the Danish newspaper *Jyllands-Posten* published a now-infamous set of cartoons depicting the Prophet Mohammed in derogatory terms and associating Islam with terrorism.[2] Many saw the cartoons as highly offensive and as exhibiting intolerance toward Islam.[3]

After the cartoons' initial publication, Muslims' complaints received little response. While the newspaper issued an apology for any offense that had been caused, it did so without acknowledging wrongdoing. Meanwhile, in France, a newspaper—in what it called a "free speech" protest—added fuel to the fire by reprinting the cartoons. This was followed by other republications.[4]

The fury the cartoons provoked shocked many non-Islamic inhabitants of the West. To understand what was at stake for those outraged, this incident must not be taken in isolation, but rather viewed against the backdrop of a perceived pattern of disparagement of Islam in the public sphere. Many Muslims feel they are being relegated to second-class citizenship in Europe.[5] The publication of the cartoons, by a newspaper they

2. *Muhammeds ansigt* [The Face of Muhammed], JYLLANDS-POSTEN, Sept. 30, 2005, at 3.

3. Michael Kimmelman, *A Startling New Lesson in the Power of Imagery*, N.Y. TIMES, Feb. 8, 2006, at E1.

4. The Cartoon controversy was reignited recently when seventeen Danish newspapers, including *Jyllands-Posten*, *Politiken*, and *Berlingske Tidende*, reprinted the Mohammad cartoon on February 13, 2008, to show their commitment to freedom of speech after an alleged plot on the life of one of the cartoonists behind the drawings was revealed. *Flat-Earth Fears*, ECONOMIST, Mar. 22, 2008, at 61.

5. *See* Press Release, U.N. Office at Geneva, Special Rapporteur on Racism tells Committee that Racism and Racial Discrimination are on the Upswing (Mar. 7, 2006), *available at* http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/F4FB198CA60BD373C125712A004AF750?OpenDocument (stating that the Danish cartoons were a symptom

suspect would never consider publishing anti-Christian or anti-Jewish cartoons, contributes to the sense that they lack full citizenship, and are therefore unequal members of society.

Europe today is struggling with issues of identity—issues that could be seen, at least beneath the surface, in the recent debates over the draft European constitution, and that are not unrelated to the ultimate failure of the constitutional project.[6] How will Europe reconcile its varying affiliations—regional, national, local, and individual?[7] In light of new demographics, to what extent must the region and its constituent polities rethink the role of the public sphere? How does the present context relate to the explicit ideals of the European human rights system? To what extent do current issues of representation of culture in the public sphere in Europe bear resemblance to these matters as they have been addressed in U.S. constitutionalism? The cartoons incident provides an entry point with respect to addressing these questions.

II. COMPARATIVE PERSPECTIVES ON THE PUBLIC SPHERE

The following section examines the parameters of freedom of expression and association from a comparative perspective. Rights protection in Europe, both regionally and at the level of the State, shows itself as more in the supervision of particular liberal democratic values than it does in the United States, where the constitutional tradition is characterized by a more liberty-oriented approach to values in the public sphere.

In the cartoons affair, French and other publications in the region purported to adopt a "free speech" perspective—often invoking the U.S. Constitution's First Amendment.[8] But European approaches to freedom of expression, as reflected in the domestic constitutional practice of Europe's established liberal democracies and the jurisprudence of the European Court of Human Rights, take a different tack, at least as regards the issues raised by religion in the public sphere. The region is

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of increasing racism and xenophobia, which in turn coincided with the emergence of extremist political parties).

6. *See* Treaty Establishing a Constitution for Europe, Oct. 29, 2004, 2004 O.J. (C 310) 1; J.H.H. Weiler, *A Constitution for Europe? Some Hard Choices*, 40 J. COMMON MKT. STUD. 563 (2002); *see generally* J.H.H. WEILER, THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION (1999).

7. On the tension between the pressures of integration and the preservation of cultural diversity, see Armin von Bogdandy, *The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity—Elements of a Beautiful Friendship* (Jean Monnet Working Paper Series 13/07, 2007), *available at* http://www.jeanmonnetprogram.org/papers/07/071301.html.

8. U.S. Const. amend. I.

indubitably in the midst of developing a harmonized or common approach to the parameters of free expression.

The now-evolving European approach—while not identical to that being pursued in the legal systems of individual Member States—is nevertheless shaped by national traditions and internal constitutional arrangements in the region. The mainstream approach to the European Convention on Human Rights (European Convention) tends to privilege the State, whether through the application of the margin of appreciation,[9] or through the normative balance struck between competing rights. In an early case, the European Court of Human Rights (European Court) characterized its role: "The Court's supervisory functions oblige it to pay the utmost attention to the principles characterizing a 'democratic society.' "[10]

The European approach at the regional level (the European Convention regime) differs from that of the United States in two key respects—differences that are relevant to the issues the cartoons raise, as well as to other related challenges involving the balancing of religion-related rights against other civil liberties. These differences, as we shall see, point to distinctive and diverse concepts of the public sphere. Indeed, one might say that each rights regime at issue is tied to a particular view of the role of the State, in the varying levels of regulating and ordering of the public sphere in the service of democracy.

In the United States, the values animating the "free speech" doctrine tend to draw from liberal philosophical values underlying the U.S. Constitution. Rights are often framed in a radically individualist fashion, along with a related commitment to keeping the public sphere free of regulation to the greatest extent possible.[11] By contrast, in Europe, at both the regional (European Convention) and domestic levels, constitutional doctrine relating to freedom of expression has tended to be far more protective of other, non-speech-related communitarian values, such as preventing social unrest, or promoting societal inclusiveness and anti-discrimination values.[12] One way to think about these European arrangements is as a system of "balanced rights," particularly when it comes to the constitutional protection of equality, specifically on the basis of race and religion. Dating back to the atrocities of World War II, the

9. *See, e.g.*, Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) 5 (1976) (applying the margin of appreciation given to legislators to interpret and apply the laws).

10. *Id.*

11. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding that salutes to the U.S. flag and recitals of the Pledge of Allegiance cannot be made mandatory in public schools under the First Amendment); Cantwell v. Connecticut, 310 U.S. 296 (1940) (incorporating religion-related free exercise rights).

12. Convention for the Protection of Human Rights and Fundamental Freedoms art. 10(2), Nov. 4, 1950, E.T.S. No. 5 [hereinafter European Convention on Human Rights].

European Convention and post-war European constitutions make explicit references, not merely to individual rights, but also to collective goals, which are often balanced with protected rights; one might characterize this as a "balanced rights" approach. Indeed, these references throughout the European Convention and its constituent state constitutions suggest that there may well be a distinctive normative conception of the public sphere that emerges in and is associated with post-war Europe, seen as critical to maintaining the social order.[13]

Accordingly, while protecting the right to "freedom of expression,"[14] Article 10(2) of the European Convention recognizes that the exercise of such freedoms and other liberties is limited by justifications "necessary in a democratic society."[15] Thus, justifications under the European Convention might well include the need to protect order or security, as well as reputation concerns and other values.[16] Indeed, these are impliedly justified not only in rights terms, i.e., in terms of competing rights, but also, and more problematically, sometimes in terms of societal interests, which therefore points to a strong view of the public sphere.

In the United States, by contrast, the balance, at least in this context, is generally struck in a more liberal individualist direction. Of course, there are limits even in U.S. constitutional law, such as in the limits to protection of defamatory speech,[17] but the burden is on the individual to prove defamation, and there is little tolerance (much less support) of the notion of collective or group harm or libel.[18] In the cartoonist's and newspapers' favor, this is far less obvious in Europe, which takes far more seriously the audience's—often conceived as the community's—point of view. Of late, there have been numerous illustrations of such restrictions in Europe by political actors and in the courts. For example, in early 2006, a controversy erupted over the offensiveness of a public arts project celebrating the new European Union presidency. Among a series of one hundred fifty different images flashed to motorists on billboards across Vienna, Austria, were posters depicting naked models posing as world leaders: the images included models wearing masks of

13. Germany's post-war Constitution, for example, explicitly contemplates militant vigilance in provisions in which undermining the "free democratic basic order" may result in the forfeiture of certain freedoms. *See* Basic Law arts. 18, 21.

14. European Convention on Human Rights, *supra* note 12, art. 10(1).

15. *Id.*

16. *Id.*

17. N.Y. Times v. Sullivan, 376 U.S. 254 (affirming First Amendment limits on defamation law).

18. *See, e.g.*, Nat'l Socialist Party of Am. v. Skokie, 432 U.S. 43 (1978) (upholding the First Amendment rights of neo-Nazis to march despite the protests of Skokie residents and Holocaust survivors). *But see* Beauharnais v. Illinois, 343 U.S. 250 (1952) (upholding an Illinois law limiting the publication or exhibition of material libelous to certain groups).

Queen Elizabeth II, George W. Bush, and Jacques Chirac apparently having sex, and a poster of a woman lying on a bed, naked except for a pair of knickers bearing the E.U. flag.[19] Whatever the merits of the ads as political expression, following protests by Catholic clergy and opposition politicians, the posters were immediately withdrawn for ostensible offensiveness. That these determinations have been accepted both at the state and regional levels reflects a distinctive view of the public sphere as a space of ordered social relations and related normativity.

The twin pressures of new demographics and regionalism in Europe underscore the fault lines in how rights-protective public spheres are understood on the continent.[20] As these understandings confront the pressures in question, a crucial challenge is to apply the law to Muslims without discrimination, whether at the domestic or regional (European Convention) level. Have prevailing legal standards with regard to the offensiveness of speech to religious communities been applied consistently where such speech has targeted Islam? We shall see that this has not often been the case, and we will need to examine why not.

III. RIGHTS IN CONFLICT: THE PROBLEM OF 'HATE SPEECH'

Another area of divergence regarding the parameters of free expression concerns the regulation of "hate speech." "Hate speech"—generally protected in the United States by the First Amendment, except in rare cases—is in Europe often prohibited by law and does not enjoy constitutional protection. Throughout Europe, after World War II, many countries adopted legislation specifically limiting speech, especially speech denying the Holocaust. Numerous European countries, including Germany, France, and Austria, among others, have such legislation.[21] This form of regulation has expanded to encompass the protection of other peoples and their genocides, e.g., the Armenian genocide.[22]

Even more relevant to the cartoon controversy, Denmark had previously adopted anti-hate legislation, penalizing cartoon expressions that threaten, deride, or degrade on the grounds of race, color, national or

19. *Austria Drops "Porno" Posters From Sex-ed up EU Campaign*, DEUTSCHE WELLE, Dec. 30, 2005, http://www.dw-world.de/dw/article/0,2144,1839922,00.html.

20. On the current struggles over new ethnicization in the region, see Jerry Z. Muller, *Us and Them: The Enduring Power of Ethnic Nationalism*, FOREIGN AFF., Mar.-Apr. 2008, at 18, 32; von Bogdandy, *supra* note 7 (discussing the tensions between the aims of E.U. integration and the preservation of cultural diversity in the region).

21. *See generally* RUTI G. TEITEL, TRANSITIONAL JUSTICE 69–117 (2000) (analyzing the adoption of Holocaust-derived laws as responses to prior racist speech).

22. *See, e.g.*, A.N. 610, 12th Gen. Assembly (2006), *available at* http://www.senat.fr/leg/ppl06-020.html; *see also* Thomas Crampton, *French Pass Bill that Punishes Denial of Armenian Genocide*, N.Y. TIMES, Oct. 13, 2006, at A10.

ethnic origin, belief, or sexual orientation.[23] In the *Jersild v. Denmark* case at the European Court of Human Rights, which preceded the cartoon incident, the Danish government had sought to enforce these laws against a television journalist.[24] And even though the European Court of Human Rights drew the line at criminal prosecution, it nevertheless found that there had been an attempt to counterbalance the racist views, recognizing, as did the Danes, the presence of legitimate countervailing values at stake.[25]

In a recent defamation case, *Lindon v. France*, the European Court of Human Rights considered the relevance of guarantees of freedom of expression in Articles 6 and 10 of the European Convention on Human Rights. In this case, at issue was a novel that represented the leading extreme right politician Jean-Marie Le Pen in a highly unflattering manner.[26] While accepting that arguably "the limits of acceptable criticism are wider as regards a politician,"[27] the European Court of Human Rights upheld the defamation action, pointing to "the nature of the remarks made, in particular to the underlying intention to stigmatize the other side, and to the fact that their content is such as to stir up violence and hatred, thus going beyond what is tolerable in political debate, even in respect of a figure who occupies an extremist position in the political spectrum."[28] Given the racist views of the politician in question, one may question whether the Court's decision serves the asserted goals of a public sphere ordered to support social peace and cohesion, underscoring the importance of a searching inquiry into the current role of the judiciary in structuring the public sphere.

Beyond the area of political expression, throughout much of Europe, anti-religious hate speech, in particular, is against the law. Thus, in Europe, there are countries that still prohibit blasphemy,[29] while in the United States, such speech would be plainly First Amendment protected.[30] To the extent that these issues raised constitutional issues in the

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23. STRAFFELOVEN [Penal Code] § 266(b) (Denmark).

24. Jersild v. Denmark, 298 Eur. Ct. H.R. 1 (ser. A) 1 (1994).

25. *Id.* at 16–17.

26. *See* Lindon, Otchakovsky-Laurens & July v. France, App. Nos. 21279/02, 36448/02 (Oct. 22, 2007), *available at* http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (regarding the publication of "Jean Marie Le Pen On Trial").

27. *Id.* ¶ 46.

28. *Id.* ¶ 57.

29. *See, e.g.*, STRAFGESETZBUCH [StGB] [Penal Code] BGBl No. 60/1974, § 188 (Austria).

30. *See Barnette*, 319 U.S. at 633; Cantwell, 310 U.S. at 303–04. For a comparison of U.S. and European protections in this area, see Robert Post, *Religion and Freedom Of Speech: Portraits of Muhammad*, 14 CONSTELLATIONS 72 (2007); *see also* Robert Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297 (1988).

United States, they were worked out earlier in the early twentieth century waves of religious immigration in cases challenging established religious majorities and spurring development of constitutional minority rights protections.[31]

In recent jurisprudence, the European Court of Human Rights has upheld the regulation of anti-religious speech, based on the value of "religious peace." In 1994, in *Otto Preminger v. Austria*, the European Court of Human Rights upheld Austria's censorship of a satirical film that mocked Christian religious beliefs.[32] Grounding its decision ostensibly on the absence of a European consensus, and given the religious demographics in the area—the high percentage of Catholics in Tyrol—the European Court deferred to the national authorities so as "to ensure religious peace in that region."[33] Similarly, in a case brought against the United Kingdom, the European Court of Human Rights deferred to the State in a case in which an eighteen-minute video, *Visions of Ecstasy*, was said to constitute blasphemy.[34] The Court held that "a wider margin of appreciation is generally available to Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion."[35] The Court came to this conclusion despite the fact that in the case of this particular statute, the underlying value at stake could not so easily be said to imply religious peace or tolerance. In the U.K. statute, blasphemy was defined only with respect to expression of offensiveness to Christian religious sensibilities;[36] here then, the Court was clearly privileging majoritarian community values.[37] This is not the only instance in which, in its deference to state action in support of majoritarian sensibilities, the Court has arguably countenanced discrimination against religious minorities and failed to afford them full protection.[38]

Turning to Holocaust denial laws in the region, in *Faurisson v. France*,[39] a Holocaust denier challenged his conviction under French law, claiming that it violated his freedom of expression rights under the U.N.

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31. *See, e.g.*, *Cantwell*, 310 U.S. at 296 (protecting proselytizing rights in cross religious neighborhood).

32. Otto-Preminger Institut v. Austria, 295 Eur. Ct. H.R. (ser. A) 1 (1994).

33. *Id.* ¶¶ 56, 59 ("[I]t wasn't possible to discern throughout Europe a uniform conception of the significance of religion in society.").

34. Wingrove v. United Kingdom, 1996-V Eur. Ct. H.R. 1938.

35. *Id.* ¶ 58.

36. *See id.* ¶ 13.

37. *Id.* ¶ 50 (recognizing that the English law of blasphemy "only extends to the Christian faith").

38. *See also* Cha'are Shalom Ve Tsedek v. France, 2000-VII Eur. Ct. H.R. 231 (holding that France did not violate the Article 9 rights of an ultra-Orthodox group).

39. Faurisson v. France, Judgment, U.N. Human Rights Comm., Commc'n No. 550/1993, at ¶ 3.1, U.N. Doc. CCPR/C/58/D/550/1993 (Nov. 8, 1996).

International Covenant of Civil and Political Rights, Article 19(2) (ICCPR).[40] Nevertheless, the Human Rights Committee concluded that there had been no violation of the ICCPR in light of the content of the expression. They observed that the French government saw "the denial of the existence of the Holocaust as the principal vehicle for anti-Semitism."[41] For this reason, the prosecution was considered "necessary" within the balanced rights scheme of the ICCPR.[42]

Similar precedents exist in Germany. For example, in 1994, the German Constitutional Court reached a similar decision upholding a conviction based on the statutory ban on Holocaust denial, following a meeting in Munich, at which revisionist historian David Irving questioned the Holocaust.[43] While the ban was challenged as contrary to Article 5(1) of the German Basic Law, which provides for freedom of expression, the Constitutional Court upheld the ban on assembly—and the ensuing restriction on Irving—as compatible with Germany's Basic Law and in conformity with the German Criminal Code, which contemplated the offense of Holocaust-denial.[44]

To the extent that the developments discussed above reflect strong commonalities among European jurisdictions, the question arises as to whether and to what extent Muslims are implicitly exempt from European hate speech protections. What is the status and treatment of anti-Islamic speech? The United States allows a range of hate speech, whether anti-Christian, anti-Semitic, or anti-Islamic.[45] Meanwhile, Europe purports to constrain a whole range of hate speech. Yet Europe does not necessarily do so when that speech targets Muslims and Islam, even though such protection would seem to be the present working assumption of a significant part of the international community. Such international assumptions are reflected in a measure recently adopted by the U.N. General Assembly as a global counter-terrorism strategy that would "promote mutual respect for and prevent the defamation of religions."[46]

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40. International Covenant on Civil and Political Rights art. 19(2), Dec. 16, 1966, 999 U.N.T.S. 171.

41. *Id.* ¶ 9.7.

42. *Id.*

43. Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], Apr. 13, 1994, 90 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 241 (F.R.G.).

44. Strafgesetzbuch [StGB] [Penal Code], Nov. 13, 1998, Bundesgesetzblatt, Teil I [BGBl. I] § 3322, as amended, § 130(2).

45. *See* Brandenberg v. Ohio, 395 U.S. 444 (1969); *Cantwell*, 310 U.S. at 296 (protecting anti-Catholic proselytizing); *see also Skokie*, 432 U.S. at 43.

46. The United Nations Global Counter-Terrorism Strategy, G.A. Res. 60/288, Annex (I) ¶ 2, U.N. Doc. A/RES/60/288 (Sept. 20, 2006).

IV. RELIGION IN THE PUBLIC SPHERE: ISLAM IN EUROPE AND THE PROBLEM OF VIEWPOINT DISCRIMINATION

A parallel issue arises when it comes to religious freedoms in the public sphere, with a divide between the United States and Europe on the question of how best to protect such rights. In the United States, religious rights, as the constitutional language reflects, are seen as protected for the individual's "free exercise"[47] thereof. Accordingly, in the United States, limiting the wearing of religious garb in the public space would generally be justified in terms of a compelling competing state interest or another constitutional right, such as the right against establishment of religion.[48] However, in Europe generally and in France, more particularly, issues of religious freedom tend to be seen again in terms of a balance of individual and community rights.[49] Bans on the wearing of garb with religious significance have been justified by the ideal of keeping the public sphere secular.[50] Within this understanding of the public sphere as the site of state action, there is an implicit justificatory logic that seeks to avoid unnecessary expression that might be misunderstood as a message of government speech. Additionally, there is concern that the wearing of religious garb could be seen as a form of proselytizing when in public. France ended up banning overt religious symbols on this basis, prohibiting headscarves, together with skullcaps or outsize crosses, from being worn in state primary and secondary schools.[51] While ultimately including other garb, tellingly, the ban's original draft singled out the hijab for exclusion from public life.[52] The fact that the

47. *See* U.S. Const. amend. I.

48. *See, e.g.*, United States v. Bd. of Educ. for Sch. Dist. of Philadelphia, 911 F.2d 882 (3rd Cir. 1990) (upholding the termination of a public school teacher for wearing religious attire in the course of her duties). Although there have been some changes in the Supreme Court's doctrine in this regard, for the proposition that states may, but are not required to, accommodate illegal acts taken for religious reasons, see Employment Div. v. Smith, 494 U.S. 872 (1990).

49. *See* Carolyn Evans, *The "Islamic Scarf" in the European Court of Human Rights*, 7 MELB. J. INT'L L. 52 (2006); Alan Cowell, *For Multiculturalist Britain, Uncomfortable New Clothes*, N.Y. TIMES, Oct. 22, 2006, at 43 (highlighting the controversy in Britain in the aftermath of Tony Blair's reference to the veil as a "mark of separation").

50. *Cf.* Law No. 2004-228 of Mar. 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2005, p. 5190 (banning students from wearing conspicuous religious symbols in schools operated by the French Government) [hereinafter Law No. 2004-228]; *see generally* JOAN SCOTT, THE POLITICS OF THE VEIL (2007) (providing an extensive analysis of the controversy surrounding the veil in France).

51. Law No. 2004-228, *supra* note 50, at 5190.

52. Noelle Knox, *Effort to Ban Head Scarves in France Sets off Culture Clash*, USA TODAY, Feb. 4, 2004, at 7A.

early legislation singled out Muslims reflects an intent that further supports the ban's disproportionate impact on Muslims.[53]

Recently, a number of other countries in Europe have followed France's example. There have been ongoing attempts to regulate headscarves in a variety of settings in Belgium, the Netherlands, Germany, and the United Kingdom. In 2003, while holding that a local school had gone beyond its powers in prohibiting a school teacher from wearing the headscarf in the classroom, Germany's Constitutional Court left the question to the legislatures of local *Länder*, thus regulating the issue at the state level.[54] In the Netherlands, there has been deliberation over legislation that would ban any wearing of the burka or the hijab in public areas.[55] In the United Kingdom, the government recently proposed regulations forbidding full-face veils in its schools, and a high court recently upheld such a school niqab ban.[56] In 2004, in a case involving a regulation of the Islamic headscarf in universities, *Şahin v. Turkey*, the European Court of Human Rights, invoking the "margin of appreciation" for state law, sustained the ban on the grounds of "necessity in a democratic society."[57] Here, it is not merely deference that is in operation, but an arguably extreme[58] concept of secularism as necessary to a democratic constitutional order within the Court's conception of democratic "necessity." This controversy is likely to soon return to the regional court, as there are pressing new challenges in Turkey in light of recent proposed constitutional amendments aimed at altering its longstanding militant secularist system, amendments which have been struck down by the

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53. *See* Law No. 2004-228, *supra* note 50, at 5190.

54. *See* Axel Frhr. von Campenhausen, *The German Headscarf Debate*, 2004 BYU L. REV. 665.

55. *Dutch Government Backs Burqa Ban*, BBC.COM, Nov. 17, 2006, http://news.bbc.co.uk/2/hi/europe/6159046.stm; *Niederlande wollen Burka verbieten* [*Netherlands Moves to Ban Burqa*], SPIEGEL ONLINE, Nov. 17, 2006, http:www.spiegel.de/politik/ausland/0,1518,449247,00.html.

56. *See* Alan Cowell, *Britain Proposes Allowing Schools to Forbid Full-Face Muslim Veils*, N.Y. TIMES, Mar. 21, 2007, at A10; *Muslim Pupil Loses Veil Challenge*, GUARDIAN, Feb. 21, 2007, http://education.guardian.co.uk/schools/story/0,,2018006,00.html; *see also* Martin Wainwright, *Tribunal Dismisses Case of Muslim Woman Ordered Not to Teach in Veil*, GUARDIAN, Oct. 20, 2006, http://education.guardian.co.uk/schools/story/0,,1927251,00.html (reporting that an employment tribunal dismissed the claims of discrimination and harassment on religious grounds by a British Muslim teacher, arising as a result of wearing a veil at a primary school); Andrew Woodcock & Tim Ross, *School Heads Given the Right to Ban Veils*, INDEP., Mar. 20, 2007, http://www.independent.co.uk/news/education/education-news/school-heads-given-the-right-to-ban-veils-441046.html.

57. Şahin v. Turkey, 41 Eur. Ct. H.R. 109, 134 (2003).

58. Extreme in the sense that the spectrum of domestic constitutional traditions in Europe with respect to religion is quite wide, and the Court, in its concept of "necessity," seems to endorse the secularist far end of that spectrum. On the diversity of constitutional traditions within the European Union countries with respect to religion, see generally, J.H.H. WEILER, UN'EUROPA CRISTIANA: UN SAGGIO ESPLORATIVO (2003).

country's own Constitutional Court as violative of longstanding constitutional commitments to secularism.[59]

Ultimately, the approach taken in *Şahin* may well translate to be redundant with deference to majority rule at the European Court and reflect the limits of the principle of the margin of appreciation as a rights-protective principle. In another case coming out of Switzerland, *Dahlab v. Switzerland*, a teacher was fired for wearing Islamic garb. The Court found the claim inadmissible under the European Convention, weighing the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony. The Court held that "the Geneva authorities did not exceed their margin of appreciation," and that the "measure prohibiting the applicant from wearing a headscarf while teaching" may be considered "justified in principle and proportionate to the stated aim of protecting the rights and freedoms of others, public order and public safety," and was "necessary in a democratic society."[60]

What is fundamentally at stake here? How should the relevant constitutional dilemma be framed? The present form of the European approach to regulating the public sphere is perceived as the natural point of departure for conceptualizing a constitutional baseline of religious neutrality. Yet, this places at great disadvantage new churches and minority religions, which, as a result are seen as somehow disruptive of the prevailing terms of the public sphere. Accordingly, with the relative homogeneity of post-war Europe's constituent countries now in flux, issues

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59. Turkey's Constitutional Court ruled on June 5, 2008, that the Turkish parliament had violated the constitutionally enshrined principle of secularism when it passed amendments to lift the headscarf ban on university campuses. Press Release, Office of the Prime Minister, Directorate Gen. of Press & Info., Top Court Annuls Constitutional Change Allowing Headscarf (June 6, 2008), *available at* http://www.byegm.gov.tr/YAYINLARIMIZ/chr/ing2008/06/08x06x06.htm#3; *Turkish Top Court Annuls Headscarf Law, Deals a Blow to Ruling AKP*, TURK. NEWS, June 5, 2008, http://www.turkeygrid.com/component/content/article/1-latest/333-turkish-top-court-annuls-headscarf-law-deals-a-blow-to-ruling-akp.html ("The law of February 9th making constitutional amendments to lift a ban on headscarf at universities has been cancelled based on the constitution's articles no. 2, 4 and 148. The execution of the law has also been stopped."). The constitutional amendments had been adopted by an overwhelming majority of parliament, to modify the prevailing Turkish Constitution, adopted in 1982, under the then-military regime brought to power by the September 12, 1980, military coup. This constitution severely restricts the fundamental freedoms and human rights enshrined in Turkey's international human rights obligations, including limitations on freedom of expression, with a particularly negative impact on Turkey's minorities. On July 30, 2008, the Constitutional Court decided not to ban Turkey's ruling Justice and Development Party (AKP) for attempting to abolish the headscarf ban through parliament. *See* Sabrina Tavernise & Sebnem Arsu, *Court Declares Turkey's Ruling Party Constitutional but Limits Its Financing*, N.Y. TIMES, July 31, 2008, at A6. The Constitutional Court nonetheless issued a "serious warning" to the party by cutting its public financing in half. *See id.*

60. *See* Dahlab v. Switzerland, 2001-V Eur. Ct. H.R. 449, 458–59, 461 (2001).

of cultural diversity are increasingly coming to the fore.[61] There is also a related backlash, seen in the recent adoption of policies to promote national culture in the Netherlands, Denmark, and the United Kingdom, among others. Once again, in Europe, this is being played out along Western/Non-Western lines.[62] In the United States, one might conclude that similar struggles were waged earlier in U.S. history due to the substantial religious immigration of minorities from Europe and elsewhere, and the resulting demographic and constitutional changes.[63] At the time, largely the beginning of the twentieth century, however, the U.S. Supreme Court was called upon to resolve conflicts between religious exercise rights and other competing state interests and civil liberties.[64] The ensuing ramifications for the evolution of constitutionalism and its incorporation throughout the land also shaped a related understanding of the public sphere as liberal in its treatment of social relations.

Yet, the argument here is hardly that Europe can—or should—adopt the same approach as the United States to questions of religious freedom. Indeed, the diverse approaches discussed here may well be associated with deep differences of a historical, social, or political character—differences that result in distinctive ways of conceptualizing the public sphere as well as citizen-state relations. In Part V, this Article argues that equality in the protection of minority groups implicates fundamental constitutional values that should inform an approach to the balance of rights in the area of religion in the public sphere. Inclusion and equal treatment of Muslims in the public sphere entails extending to them the full benefit of laws that protect other groups—including anti-hate-speech laws—should Europe continue to choose to have them. The discussion above reflects the problems of rights balancing in what appears to be a politicized discriminatory direction, challenging the notion

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61. *See Look out, Europe, They Say*, ECONOMIST, June 24, 2006, at 29; *see also Uproar as Archbishop Says Sharia Law Inevitable in UK*, GUARDIAN, Feb. 8, 2008, http://www.guardian.co.uk/politics/2008/feb/08/uk.religion (describing backlash and controversy created by Archbishop of Canterbury's suggestion that adoption of certain Sharia law principles was "unavoidable" to achieve social cohesion for Muslims in the U.K.). For the full text of the speech, *see* http://www.bishopthorpepalace.co.uk/1575.

62. *See, e.g.*, Wet inburgering [Civic Integration Act], Nov. 30, 2006, 2006 Staatsblad van het Koninkrijk der Nederlanden [Stb.] [Official Gazette of the Kingdom of the Netherlands] 645 (entered into force Jan. 1, 2007) (proposing an "integration test for 'nonwestern'" migrants). The Act serves as a model for other E.U. Member States such as Germany, Denmark, France, and the United Kingdom. *See id.*

63. For a useful account of religious immigration and the development of related constitutional rights protection in the United States, see generally MORTON BORDEN, JEWS, TURKS, AND INFIDELS (1984).

64. *See, e.g.*, *Cantwell*, 310 U.S. at 296.

that the sort of review contemplated by the European convention scheme can plausibly be done in a principled way.[65]

V. COMPETING MODELS OF CONSTITUTIONAL DEMOCRACY

This Part seeks to evaluate the alternative paradigms of constitutional democracy proposed here, which one might classify in terms of ideal types: "militant" versus "liberal" democracy. Recent controversies in Europe can be seen in light of these differing paradigms involving varying parameters on the rights to religious exercise and political expression and association, among other protected civil liberties.

Contrary to the usual tendency to reflect upon these differences in the abstract, as a clash of timeless and universal values, I want to consider the problem in terms of the concrete challenges of realizing constitutional guarantees of democracy in the contemporary context. Moreover, I want to situate the problem in light of diverse traditions regarding the public sphere.

The European Court of Human Rights has pursued a distinctive approach to the relation of human rights, constitutionalism, and democracy. "Militant democracy" is a post-war response to a particular constitutional history: the vulnerability of the pre-War Weimar Republic and its collapse at the hands of a totalitarian political movement.[66] The rise of constitutionalism in the post-war context gave rise to a distinctive normative take on constitutional democracy. The term refers to the understanding of some rights protected in Germany's post-war constitution as capable of derogation or forfeit where they might threaten the democratic order. This approach was confirmed during the Cold War, when Germany's Constitutional Court invoked Article 21(2) of the Basic Law, which limits constitutional protection of "Parties that, by reason of their aims . . . seek to undermine or abolish the free democratic basic order."[67] Interpreting this Article, the Court upheld a law allowing the dissolution of the Communist Party on the grounds that "the Basic Law represents a conscious effort to achieve a synthesis between the principle of tolerance with respect to all political ideas and certain inalienable values of the political system . . . [the Basic Law] has in this sense created a

65. For a discussion of some of the issues raised by the application of a balancing approach to constitutional rights dilemmas, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 979–81 (1987).

66. In various provisions, the German Basic Law requires protection of the "free democratic basic order" as a limitation on the exercise of stated freedoms. *See* Basic Law arts. 9(2), 21.

67. *Basic Law* art. 21(2).

'militant democracy.' "[68] The critique leveled here derives in part from non-European approaches that tend to privilege alternative, and, perhaps, equally historically contingent understandings of the normative relation of individual human rights, rule of law, and democracy; but it also draws from the observation that the conditions of the post-war schema are undergoing change with implications for the constitutional regime in the region.

In the *Refah Partisi v. Turkey* case, involving an attempt to regulate the Islamic party in Turkey,[69] the European Court adopted a "militant democracy" understanding, resonating with the "balanced rights" model that has characterized the area of religion as previously discussed. The decision to defer to the State's decision to ban the party reflects a distinct view of human rights and democracy, predicated upon the core compromise that lies at the heart of the European Convention of Human Rights system. Many of the rights protected under the scheme are derogable, and subject to competing understandings of what constitutes interests in the protection of the free democratic order in the community, citing supervening security or other similarly compelling public purposes. In the words of the European Court, "[s]ome compromise between the requirements of defending democratic society and individual rights is inherent in the Convention system."[70] The constitutional inquiry stops short of evaluating the profound constitutional dilemmas of exactly which values are most relevant to the constitutional protection of democracy, and whether the principle of "militant democracy" raises critical tradeoffs best understood within the particularities of legal and political culture.

VI. CONTOURS OF MILITANT CONSTITUTIONAL REVIEW

Under the militant democracy model identified above, the nation-State's constitutional court is assigned the role of guardian of the democracy. In Europe, as the scrutiny afforded party politics reflects, the question of the status and treatment of political parties under the Member States' constitutions as well as under the European Convention is a

68. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Aug. 17, 1956, 5 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 85, 139 (F.R.G.). For another example, from the far right, see Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 23, 1952, 2 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (F.R.G.). *See also* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 217–38 (2d ed. 1997).

69. Refah Partisi [The Welfare Party] v. Turkey (No. 2), 37 Eur. Ct. H.R. 1, 9 (2003).

70. *Id.* ¶ 96.

significant area for judicial review.[71] By contrast, in the United States, political parties figure hardly at all in constitutional adjudication.[72]

The divergences here can be attributed to different political structures, whether presidential or parliamentary systems, as well as differences in historical legacies. Germany's Basic Law and the European Convention of Human Rights are both post-World War II documents, embodying a view of constitutional rights that is characteristic of that political generation—a view that was profoundly shaped by the experience of a weak or fragile democracy in the Weimar Republic and by distrust of populist democratic politics when not disciplined by the rule of law and a framework of rights. Close constitutional scrutiny of forms of political association, known as "militant democracy,"[73] as discussed above, derives from the position enunciated in the German Basic Law regarding the potential placing of constitutional limits upon political parties. Under this scheme of constitutional supervision, the constitutional order cannot afford to be indifferent concerning the role of political parties in a democracy. Moreover, managing this scheme is up to the judiciary as the guardian of the constitutional democracy.

The European Court's justification for dissolving the party in *Rafah Partisi* above is, implicitly, based on the "militant democracy" model, which is rationalized based on the European Convention scheme, precedent, and history; the model reflects dimensions of the constitutional regime's feature, implied in the embedded clash of the regional Convention's human rights protection with countervailing local understandings. This federalist arrangement has implications for the relevant principles of constitutional interpretation, though not completely analogous to the U.S. federal-state relationship. Indeed, in the European Court of Human Rights, the limits on rights are both internal and explicit within the rights-granting provisions themselves. For example, Article 11 political rights and Article 9 religious rights contain limits based on protecting the rights and freedoms of others, public order, and public safety.[74]

There are precedents that address the parameters of the application of such limits, particularly regarding freedom of association, such as the *Communist Party of Turkey v. Turkey* case,[75] and the *Socialist Party v.*

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71. *See, e.g.*, Basic Law art. 21 (regulating political parties).

72. Relatedly, there is little or no mention of political parties in most U.S. constitutional law case books. *See, e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (5th ed. 2005). On the constitutionalization of political parties, see Samuel Issacharoff, *Introduction: The Structures of Democratic Politics*, 100 COLUM. L. REV. 593, 594 (2000).

73. Basic Law art. 21(2); NORMAN DORSEN ET AL., COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 1276–87 (2003); *see generally* KOMMERS, *supra* note 68, at 217–38.

74. European Convention on Human Rights, *supra* note 12, arts. 9, 11.

75. United Communist Party of Turkey v. Turkey, 26 Eur. Ct. H.R. 121 (1998).

Turkey case,[76] each involving the banning of the party, and whether this was a valid limit to rights guaranteed by the European Convention on Human Rights. In these cases, the Court insisted on a high standard of "convincing and compelling evidence" that such limitations on rights were necessary.[77] Other cases apply the notion of "militant democracy"[78] in establishing limits to the exercise of freedoms of political expression and association in cases in which they jeopardize public stability and order. As mentioned, this doctrine was the basis for the German Constitutional Court's dissolution of its Communist Party during the Cold War.[79]

History has also played a role in guiding judicial interpretation. The European Court's approach to "necessity in a democratic order" bears the marks of the origins of the European Court of Human Rights scheme and the post-war generation's determination that what happened in Europe between 1933 and 1945 never be repeated. It is the touchstone of post-war history that becomes persuasive in the Court's sweeping interpretation of "necessity" in *Refah Partisi*, in which the Court concluded that it is "not improbable that totalitarian movements organized in the form of political parties might do away with democracy . . . there being examples of this in modern European history."[80]

Indeed, some of the issues at stake recall even earlier stages of European history. The longstanding problems regarding the treatment of minorities in the region, particularly insofar as the protection of religious expression and related association, significantly predate the European Convention, and indeed go back to the interwar period and its regime,[81] and, even in some sense, go back to the Treaty of Westphalia. For it was in order to limit religious wars, that the Treaty of Westphalia left to state sovereigns the regulation of the minorities in their respective territories—an approach that, after the wars of the last century, appears utterly lacking. Yet this approach clearly prefigures, and one might say is the political regime that underlies, the deference to the sovereign contemplated by its adjudicatory counterpart—i.e. the margin of appreciation, a Westphalian pact of regional and now constitutional dimensions. The

76. Socialist Party v. Turkey, 27 Eur. H.R. Rep. 51 (1998).

77. *See id.* ¶ 50; *United Communist Party of Turkey*, 26 Eur. Ct. H.R. 121, ¶ 46.

78. *See Wingrove*, 1996-V Eur. Ct. H.R. at 1938; German Communist Party v. Federal Republic of Germany, App. No. 250/57, 1955–57 Y.B. Eur. Conv. on H.R. 222 (Eur. Comm'n on H.R.).

79. *See* Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Aug. 17, 1956, 5 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 85 (F.R.G.).

80. *Refah Partisi (No. 2)*, 37 Eur. Ct. H.R. 1, ¶ 99.

81. *See, e.g.*, Minority Schools in Albania, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 64 (Apr. 6).

question is whether this scheme is apt given the other changes now confronting the region.

VII. NECESSITY IN DEMOCRACY: TO WHAT EXTENT IS THERE A GUIDING PRINCIPLE?

While there is undoubtedly a historical basis for the "militant democracy" model, the prevailing jurisprudence has not given rise to coherent guiding principles. Left unresolved is the central institutional question of what is the significance of the appeal to "necessity" and whether this constitutes a determination for a court, or is a self-judging decision of the political branches falling within the "margin of appreciation."[82]

Indeed, the jurisprudence discussed above raises the question of whether the European Court's exercise of its supervisory function constitutes an indirect or embedded form of judicial activism, insofar as it affirms conclusions that run against the State's political branches. Proposing that the State's order can be threatened, whether by the advocacy of non-democratic "means" or "ends," the party's direction is seen as embracing "violent" means. But, in *Şahin*, the European Court also concedes that there was little or no evidence to support their conclusion, and that the basis for the decision rests in preemption, rationalizing the timing of preventive action as preceding clear imminent danger to democracy.[83] Yet in so ruling, to what extent was the Court overreaching when it imputed certain views to the party as a whole, where these were not an explicit part of the party's official platform, and where, in so doing, the Court departed from some of its own prior precedents?[84]

According to the European Court, sharia is "incompatible with the fundamental principles of democracy."[85] By asserting this fundamental

82. *See, e.g.*, Handyside, 24 Eur. Ct. H.R. (ser. A) at 5.

83. *See id.* ¶¶ 46–48, 57.

84. *See United Communist Party of Turkey*, 26 Eur. Ct. H.R. 121; *Socialist Party*, 27 Eur. H.R. Rep. 51. Insofar as they, too, rely on interpretation of party platforms, these challenges also resonate with the now historical U.S. constitutional decisions against the U.S. Communist Party, a challenging period in the evolution of the Court's First Amendment jurisprudence. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951).

85. *Refah Partisi (No. 2)*, 37 Eur. Ct. H.R. 1, ¶ 123; *see also* Zana v. Turkey, 27 Eur. Ct. H.R. 667 (2001) (upholding against an Article 10 challenge to a conviction and sentence for statements advocating for the Kurdistan Workers' Party's (PKK) national liberation movement). *But see* Aksoy v. Turkey, 34 Eur. Ct. H.R. 57 (2002) (overturning convictions of a Kurdish member of Parliament under antiterrorism due to a violation of Article 10 of the European Convention of Human Rights); Sener v. Turkey, 37 Eur. Ct. H.R. 34 (2003) (overturning the antiterrorism conviction of a Turkish journalist who wrote an article regarding Kurdish separatism due to a violation of Article 10).

incompatibility with the European public order, the Court's articulation reflects a significant attack on Islam's legitimacy and its potential as an alternative political option in Europe. This dimension of the Court's conclusion is highly problematic, given that many parties in Europe, such as the Christian Democrats, originated with an affiliation to religion. Yet, at present, of the religions in Europe, it is Islam that turns out to be "fundamentally" incompatible with democratic society.[86]

It is in this context that the evolution in the European Court of Human Rights' principle of "margin of appreciation," and awareness of its limits when it comes to the protection of individual rights, seems to lack sensitivity to or awareness of the place of Islam and its challenges as a minority in the Europe of today.

VIII. MILITANCY VERSUS LIBERALISM: COMPARATIVE PERSPECTIVES

The European Court of Human Rights is grappling with newfound issues of identity in Europe, simultaneously addressing issues posed by new migration at the same time as new regionalism.[87] To what extent can Europe's varying affiliations—regional, national, local, individual—be reconciled? What ought to be the role of the judiciary in the region?

For some time now, the United States and its constitutional system have offered a competing jurisprudential model, namely, a constitutional scheme in which rights are framed and protected in a radically individualist fashion. The U.S. Constitution makes no reference to collectivist goals, such as political or cultural survival, which are asserted both in the postwar European constitutions, as well as in the European Convention rights scheme. Insofar as there is a formulation of the constituent value, one might say that the U.S. Constitution is framed in individual rights terms, subject to certain limits related to state police power or compelling state interests. Indeed, this concept of liberal democracy constitutes the central alternative to the one embraced transatlantically at the moment.

At the same time, it would be wrong to understand the U.S. model as one of extreme individualism. Throughout history, the applications of the U.S. model have been inconsistent and some might say variable as a result of its constitutional aims, including, in some instances, collectivist purposes. Thus, for long stretches of U.S. history, rights were protected on a state-wide basis. Subsequently, even after constitutional

86. *Sener*, 37 Eur. Ct. H.R. 34, ¶ 19.

87. WEILER, *supra* note 6, at 10–102 (elucidating dimensions of the transformation of Europe).

incorporation,[88] a transitional phase in which many individual rights shifted from constitutional protection at the local to the national level, there were, nevertheless, several periods—such as periods of nativism, wartime, and the McCarthy era—during which, even if not explicitly, Supreme Court case law appeared to contemplate the balancing of individual rights and collectivist goals.[89]

Even so, for some time now, the highly rights-protective approach is no longer the reigning precedent. While U.S. constitutionalism appears as a general matter to support individual rights formulated in terms of the perpetuation of minority cultures—such as, for example, the protective constitutional treatment of the Amish in early America[90]—even where these rights are in conflict with the prevailing state regulation. There has been some retrenchment, however, in the religious area. Turning away from a robust fundamental rights jurisprudence, the contemporary U.S. Supreme Court has suggested that too much rights accommodation might somehow jeopardize a cardinal rule of law value: equal and general application of the laws,[91] or the stability of the majority culture,[92] a concern that would appear to be analogous to that now confronting Europe.

With these caveats, there remains, nevertheless, a big difference between a system in which compromise lies at the very heart of the system—in the words of the European Court, "inherent"—and the liberal democracy approach, defined herein, by which persons are urged to make their diverse multicultural claims within an equal individual rights model. In one conception, there is space contemplated for minorities, whether political, religious, or otherwise, to make a collective claim, with the potential of shaping national culture; in the other, there is simply no analogous space. In the militant democracy scheme, the individualist rights claim and its related group differences remain outside the space of political and juridical negotiation and its potential consensus.

All of which is not to say that Europe can or should adopt the U.S. doctrinal approach. After all, the current European Convention system is dealing with constitutional and political issues of a demographic and regional nature not fully analogous to those of the United States. Nevertheless, given the relative post-war homogeneity of many of Europe's

88. *See generally* Palko v. Connecticut, 302 U.S. 319 (1937) (discussing the values at issue in an early claim for incorporating constitutional rights).

89. *See* Dennis v. United States, 341 U.S. at 494; Korematsu v. United States, 324 U.S. 885 (1945).

90. *See* Wisconsin v. Yoder, 406 U.S. 205, 234 (1972).

91. *See* Employment Div. v. Smith, 494 U.S. 872, 890 (1990) (warning against "a system in which each conscience is a law unto itself").

92. *See id.* at 878–79.

constituent countries and the comparatively recent issues of assimilation and human rights accommodation, many of the issues of cultural diversity that have long been settled in the U.S. constitutional context are presently relatively vital in Europe and in urgent need of guidance. Comparative analysis illuminates not necessarily the need for transplantation, but, rather, useful transatlantic engagement.

The European Court's approach tends to narrow or limit the possibilities for adjustment or modification of the prevailing model of militant democracy. When it upholds the prohibition of the veil or the preemptive dissolution of a political party, the Court tends to dis-empower altogether certain forces or groups in today's European society, thus precluding a compromise that is integrating or inclusive. Hence an approach conceived to restrain social conflict may, applied to today's Europe, end up sharpening or exacerbating volatile social cleavages. The measures upheld by the European Court of Human Rights, whether of preemptive party dissolution or of the prohibition of the veil, are extreme: as judicial remedies, they are zero-sum, establishing winners and losers, allowing little room for compromise.[93] Given that these are profound issues involving the parameters of political and religious tolerance in the forging of European identity, the European Court's judicial strategy here does not necessarily advance the building of needed tolerance in the region.

The issues raised here and confronted by the respective judiciaries transcend their regions to present distinctive approaches to core individual rights confronting States at this time. Indeed, ultimately, the strength of the judicial power in the region and its global view may well spur a re-conceptualization of historical "militant democracy." Comparative perspectives on constitutionalism and democracy are all the more relevant at present, where globalization and other developments, such as the campaign against terrorism, necessitate the generation of context-sensitive constitutional principles apt to protect both civil liberties and the rule of law.[94] At a time when there appears to be a perception of heightened threats to public security,[95] there may be an even greater need for guidance in the harmonization of constitutional liberties with adherence to the rule of law.

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93. *See generally* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (discussing drawbacks of judicial activism).

94. *See* Sandra Day O'Connor, Assoc. J., U.S. Sup. Ct., Keynote Address at the American Society of International Law Proceedings (Mar. 16, 2002), *in* 96 AM. SOC'Y INT'L L. PROC. 348, 348–52 (2002).

95. *See* Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

IX. CONCLUSION

This Article began by exploring a number of instances of divisive controversies pertaining to issues of expression involving freedom of religion and association, and the status and treatment of Islam in contemporary Europe. It argued that one way to understand the conflict is in terms of two divergent models of constitutional democracy in Europe and the United States, which could be conceived as militant versus liberal approaches to constitutional oversight of the democratic order.

Despite the historical merits of "militant democracy" as a response to the challenge of transition, demographic change and regional evolution may well imply the reevaluation of prevailing rights-protection principles, both in relation to domestic constitutional practice and at the regional level. The acceptance today of a robust conception of the rule of law and the legitimacy of the judiciary offers the potential for the emergence of an alternative to post-war vigilance, with extreme militancy and strong "republicanism" replaced by a more nuanced approach to the balance of values where individual rights meet the public space. Indeed, this process seems to be already underway.[96] Moreover, such a development would be important on the road to shaping European consensus in these vital areas of freedom of expression and association. Finally, to whatever extent Europe continues to deploy militant supervision, or a "rights balancing" approach, at the very least, minimal rule of law guarantees require that constitutional principles should be applied equally to diverse religions in the public sphere, certainly a threshold basis for guaranteeing the legitimacy of whatever ultimate European normative scheme here.

96. Here one might compare States in the region, such as Turkey and Germany, with regards to their relative constitutional militance, and, relatedly, the direction of the European Court of Human Rights' supervision. Here there already seems to be evidence that Germany is growing more tolerant of radical political activity, as is the European Court of Human Rights. *See* KOMMERS, *supra* note 68; *see also* Vogt v. Germany, 21 Eur. H.R. Rep. 205 (1996) (overturning the firing of teachers from public schools based on membership in the new German Communist Party).