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14 June 2017

Version of attached file:

Accepted Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

Schütze, Robert (2018) 'Judicial majoritarianism revisited : 'we, the other court'?', *European law review.*, 43 (2). pp. 269-280.

Further information on publisher's website:

<http://www.sweetandmaxwell.co.uk/catalogue/productdetails.aspx?recordid=427productid=6968>

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Judicial Majoritarianism Revisited: “*We, the Other Court*”?

Robert Schütze

Twenty years ago, an interesting – and swiftly famous – answer to the legitimacy question in relation to the judicial creation of the EU internal market was offered by Miguel Poiares Maduro. Heavily influenced by the “representation-reinforcing theory of judicial review”, developed by J. H. Ely, and ingeniously entitled “*We, the Court*”, the book argued that the jurisprudence of the Court of Justice had been seriously misunderstood when identified with neo-liberal deregulation – a phenomenon that Maduro associated with the U.S. American idea of “economic due process”. For instead of protecting minority economic rights against national (democratic) regulation, the European Court showed a “majoritarian activism”. The judicial review of State legislation by the Court was thus characterised as “a kind of [Union] legislative process”, in which the Court operates as a quasi-legislature that judicially harmonises diverse national rules “in accordance with an “ideally drafted” representation of all States’ interest”. How correct was that description then (and now), and what normative arguments did Maduro propose to justify – and limit – the idea of “judicial majoritarianism”? This – late – “review” revisits the central premises of the famous monograph and subjects them – with the benefit of 20 years of hindsight – to critical scrutiny in the hope of re-opening discussions on the legitimacy of and justice in the internal market.

Keywords: Article 34, internal market, European Court of Justice, judicial majoritarianism, Maduro, “*We the Court*”, judicial legitimacy, democracy.

Introduction

Within the European Union, the “political” will to create the European internal market has been – predominantly – a *judicial* will.¹ Did this make the creation of the internal market *ipso facto* illegitimate? How can one legitimate the judicial activism of the European Court of Justice? In modern societies, legitimising elements for the judicial branch may be offered by democratic,² liberal,³ or economic theories.⁴ And twenty years

¹ M. Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart, 1998); and see now also R. Schütze, “From International to Federal Market: The Changing Structure of European Law” (Oxford University Press, 2017 – forthcoming).

² See only: J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980).

ago, an interesting – and swiftly famous – answer to the legitimacy question with regard to the judicial creation of the EU internal market was offered by Miguel Poiares Maduro. Heavily influenced by the “representation-reinforcing theory of judicial review”, developed by J. H. Ely,⁵ and ingeniously entitled “We, the Court”, Maduro’s book developed a complex web of arguments, whose central premise is expressed as follows:

“[T]hrough the case law of the Court of Justice has led to deregulation, this is so only from a national perspective and does not correspond to the neo-liberal construction of the European Constitution by the Court of Justice. *Instead, the outcome of the decisions of the European Court of Justice in the review of national and [Union] legislation fits within a “European majority policy”.* The Court’s approach to the European Economic Constitution has revealed a peculiar type of activism: defined in this book as *majoritarian activism*. The broad scope given to market integration rules (notably Article [34]) in the review of national regulations was not intended to control the degree of public intervention in the market but to bring about harmonization among national rules through the judicial process.”⁶

This “judicial majoritarianism” thesis has had an enormous influence on academic studies on EU internal market law,⁷ and more generally, on the role of the Court of Justice in the construction of the European Union.⁸ But how correct was the description of “what the Court was doing” then (and now), and what normative arguments did “We the Court” propose to justify – and limit – the idea of “judicial majoritarianism”? This – late – “review” revisits the central premises of the famous monograph and subjects it – with the benefit of 20 years of hindsight – to critical scrutiny regarding its empirical, normative, and practical dimensions. It will be argued that despite the originality and importance of “We the Court”, there remain serious doubts – doubts that will have to be dispelled (or not) by future research on the European Court of Justice.

³ See only: R. Dworkin, *Taking Rights Seriously* (Bloomsbury, 2011).

⁴ See only: R. Posner, *The Economics of Justice* (Harvard University Press, 1981).

⁵ J. H. Ely, *Democracy and Distrust* (supra n.2), and esp. 181. Maduro did not directly draw on Ely but absorbed the latter’s ideas only indirectly *via* Neil Komesar, whose “Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy” (University of Chicago Press, 1997) dedicated a substantial section to a reading of Ely’s famous book.

⁶ *Ibid.*, 2 (emphasis added).

⁷ See here in particular: C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press, 2016), esp. 175, 182 but also 414; as well as: P. Caro de Sousa, *The European Fundamental Freedoms: A Contextual Approach* (Oxford University Press, 2015), esp.11, 19, 37, 44 (and many, many more).

⁸ See only: A. Stone-Sweet, *The Judicial Construction of Europe* (Oxford University Press, 2004), esp. 135, 141.

Descriptive Dimension: Limits and Problems

On a *descriptive* level, “We the Court” famously argued that the jurisprudence of the Court of Justice had been seriously misunderstood when identified with neo-liberal deregulation – a phenomenon that Maduro associated with the U.S. American idea of “economic due process”.⁹ For instead of protecting minority economic rights against national (democratic) legislation, the European Court showed, on the contrary, a “*majoritarian* activism”. In the words of the author:

“Contrary to the traditional conception of judicial activism addressed to the protection of minorities against the democratic majority will, European judicial activism can better be described as majoritarian activism: promoting the rights and policies of the larger European political community (the majority) against the “selfish” or autonomous (depending on the point of view) decisions of national polities (the minorities). (...) *What the Court does when it considers Article [34] is not to impose a certain constitutional conception of public intervention in the market, but to compensate for the lack of [Union] harmonisation. This is why the regulatory balance set by the Court normally corresponds to the view of the Commission, and to the legislation in the majority of Member States. (...) Its yardstick is what the Court identifies as the European Union majority policy, in this way subjecting States regulations to harmonisation in the Court.*”¹⁰

The judicial review of State legislation by the European Court is consequently characterised as “a kind of [Union] *legislative* process”, in which the Court operates as a quasi-legislature that judicially harmonises diverse national rules “*in accordance with an*

⁹ Prior to the New Deal, the Supreme Court pursued a controversial course of “economic due process” under the Fourteenth Amendment in which it forced an economic philosophy of free trade as an individual right upon the States. The most famous manifestation here is *Lochner v. New York*, 198 [U.S. 45](#) (1905). The judgment received a sever critique in a dissent by Justice Holmes, who famously quipped that “[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statistics”. The idea of economic due process however eventually declined (cf. *West Coast Hotel v Parrish*, 300 US 379 (1937), and today *Lochner* has become a veritable “pariah” (D. A. Strauss, *Why was Lochner Wrong?*, (2003) 70 *University of Chicago Law Review* 373 at 374) for the Supreme Court superimposing its *laissez-faire* philosophy on the democratic will of the State legislatures. The reaction against the anti-progressive Supreme Court was indeed so strong that the counter-majoritarian difficulty became the cornerstone of much American thinking about judicial review.

¹⁰ M. Maduro, *We the Court* (supra n.1), 11 and 78 (emphasis added).

“ideally drafted” representation of all States’ interest”.¹¹ And while not telling us what kind of majority he has in mind,¹² the central idea behind the Maduro thesis is that the Court represents the majority, not the minority (!), of the States’ interests. Put concretely: where Germany (backed by a minority of other Member States) insists on a high level of consumer protection that hinders free movement, these national rules will be outlawed; whereas, by contrast, in a situation where France (and a majority of other Member States) adopted such rules, the Court should let these national rules live. Judicial majoritarianism will here mean two things: first, the review standard against which the Court assesses State legislation is not an absolute Union standard but a relative Union standard that is derived from the Member States standards; and, secondly, the Court’s relative standard depends on what represents the (present) majority of Member States within the Union.

Hardly ever spread a thesis so quickly and so widely within European academic circles; and yet: already on a *descriptive* level serious doubts must be in order. For what are we to make of the claim that the Court consistently follows the majority view among the Union Member States? Empirically, the judicial majoritarianism thesis is hard to prove. For unlike the US Supreme Court (in certain contexts),¹³ the European Court of Justice

¹¹ Ibid., 78 (emphasis added).

¹² Sadly, Maduro omits to tell us his definition of “majoritarianism”. How, then, do we count? Do we count States as political entities; or do we count state populations? If we add up the smallest fifteen States within the European Union, we reach about 61 million, that is: a number slightly higher than the size of Italy, but still lower than the respective (!) populations of France, Germany and the United Kingdom. Should the Court thus follow a majority of States representing 12% of the Union population and impose that result on the super-majority of 88% of the Union population? Is that democratic majoritarianism? By contrast, if the Court were to count State populations, the four biggest Member States would represent more than 50% of the Union population. Alas, should the Court impose the will of these four against the will of the remaining 24 States? Is that democratic majoritarianism? Or, should the Court use the qualified (double) majority in the Council?

¹³ On the judicial practice of “State Counting” as a form of judicial majoritarianism in the United States, as well as its many problems, see: R.M. Hills, Jr., Counting States, 32 Harvard Journal of Law & Public Policy 17. The famous example of explicit judicial majoritarianism is the Eighth Amendment (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”), where the Supreme Court uses State counting to see if there is a “national consensus” – for example with regard to the death penalty (cf. *Stanford v Kentucky*, 492 US 361 (1989) as well as *Roper v Simmons*, 543 US 551 (2005)). Judicial majoritarianism is here explicit (ibid, at 561): “The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded. When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. By a similar calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach. See Appendix A, *infra*. (...) A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.”

hardly ever expressly engages in the type of “state-counting” that Maduro suggests.¹⁴ Indeed: having looked at all Article 34 cases myself, the Court hardly ever engages in any significant comparative law exercise;¹⁵ and even if we assume an “inbuilt” comparative dimension within every transnational court,¹⁶ that comparison within the ECJ will be severely truncated and “unrepresentative”.¹⁷ And indeed: when looking closely at the cases that “We the Court” itself identified as illustrations of a majoritarian methodology,¹⁸ the Court here generally points to disparities in the legislation of some (!) Member States;¹⁹ and in the great majority of cases, the Court simply confines its “comparative” methodology to the two Member State legal orders involved in the specific case.²⁰ Is it really indicative of judicial majoritarianism when one State’s

¹⁴ For an – extremely –rare case, where the European Court of Justice engages in this form of express state counting, see: Case C-639/11, *Commission v Poland*, EU:C:2014:173, para.61: “In addition, according to the information at the disposal of the Court, the legislation of 22 Member States, that is to say, the large majority of the Member States, either allows explicitly the registration of vehicles which have their steering equipment on the same side as the direction of the traffic, or tolerates such, even if, in some of those Member States, the state of the roads is similar to that in the Republic of Poland.”

¹⁵ For an academic analysis for those few contexts in which the Court does sometimes expressly use comparative law, see: P. Pescatore, *Le Recours, dans la Jurisprudence de la Cour de Justice des Communautés Européennes, a des normes déduites de la comparaison des droit des États Membres*, (1980) 32 *Revue Internationale de Droit Comparé* 337.

¹⁶ K. Lenaerts, *Interlocking Legal Orders in the European Union and Comparative law*, (2003) 52 *International and Comparative Law Quarterly* 873 at 874: “As an international institution, the [Union] judicature is ‘naturally’ brought to adopt a comparative approach for different reasons: the members of the Court of Justice and the [General Court] have their roots in different legal cultures, the texts and notions to be interpreted are multilingual and most of the cases brought before the [Union] judicature are anchored in a precise national context.”

¹⁷ From a “realist” perspective, there is not one – “the” – Court but the Court has allowed its chambers to operate as fully-fledged “miniature” courts whose decisions have the same legal quality as decisions of the “Full Court”. And since the absolutely great majority of all cases is decided by chambers of three or five judges, only three (or five) jurisdictions will be directly represented in the deliberations. Thus: even assuming an implicit comparative approach à la Lenaerts, the question then is: are three (or five) judges representative of the majority of the Member States?

¹⁸ The cases listed include especially: Case 193/80, *Commission v Italy*, [1981] ECR 3019; Case 298/87, *Smanor*, [1988] ECR 4489; Case C-362/88 *GB-INNO*, [1990] ECR-667; Case C-241/89, *SARPP*, [1990] ECR I-4695; as well as Case C-126/91, *Yves Rocher*, [1993] ECR I-2361. The case that textually comes closest to Maduro’s majoritarianism thesis is Case 362/88, *GB-INNO*, whose para.12 states: “As regards comparison of prices, the Commission has submitted an overview of the relevant legislation in various Member States and concludes that, with the exception of the Luxembourg and German provisions, they all allow both prices to be indicated of the reference price is genuine.”

¹⁹ See only: Case C-241/89, *SARPP* (supra n.18), para.30: “Moreover, that obstacle to intra-[Union] trade is the result of a disparity between the national legislative schemes. The documents before the Court show that although French law prohibits any statements alluding to the word “sugar” or to the physical, chemical or nutritional properties of sugar in the advertising of artificial sweeteners, such statements are allowed in other Member States.” See also: Case 298/87, *Smanor*, esp. para.22.

²⁰ This scenario is the most common one. Two famous cases here are none other than Case 8/74, *Dassonville*, [1974] ECR 837; and Case, 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, [1979] ECR 649.

legislation is struck down because no other State has the exact same rule? With regard to “traditional” product requirements, Maduro indeed seems to think so:

“These are cases regarding State regulation of traditional national products, or of specific national traditions concerning the composition or presentation of products. Here, we see a minoritarian interest – one State’s tradition – as opposed to the majoritarian interest, which takes the form of the interest of all other Member States not sharing or conforming to that tradition.”²¹

Yet are not all “traditional” national laws specific to that Member State and thus, by definition, in a minority of one? Is judicial majoritarianism really at work here? If so, almost all national laws adopted prior to the creation of the Union (and not based on prior international conventions concluded by the Member States) are likely to violate Article 34 TFEU, because they will be “idiosyncratic” to the particular Member State; and there will therefore never be a “majority” of *similar* national legislation. The key question here indeed is “similarity”: If Germany has a fixed alcohol requirement for fruit liqueurs of between 20-25%, while France has one of 15-20% and Italy has no such requirement at all, will the French law be within the majority of those States regulating the alcohol content of fruit liqueurs or will it be in the majority of those States insisting on an alcohol content of below 20%; or will it be in a minority of one?

Be that as it may, can one nevertheless argue that “[i]n cases where no overview of national legislation is given, it is still possible to find other elements of a majoritarian approach” because the Court follows the Commission?²² The problematic premise of this argument is however this: even if it were empirically correct to argue that the Court regularly “follows” the Commission,²³ why should we blindly assume that the Commission always wishes to act as a “virtual” Council? While this might have been, prior to the Maastricht Treaty,²⁴ a rational institutional strategy within the *positive* integration sphere, what incentivises the Commission to do this outside the legislative

²¹ M. Maduro, We the Court (supra n.1), 72. The case that Maduro here has in mind is Case 193/80, Commission v Italy (supra n.18); yet, interestingly – and I think importantly – the Italian law at issue was not a “traditional” law but had only been adopted in 1965 – and it therefore constituted a „new“ measure that was very well “suspect” of economic protectionism.

²² M. Maduro, We, the Court (supra n.1), 73.

²³ For a remarkable empirical analysis of this point, see: B. Kilroy, Integration through Law?: The ECJ and Governments in the EU, (University of California – unpublished thesis).

²⁴ After the 1992 Treaty on European Union, the European Parliament gradually rose to become a co-legislator with the Council. To obtain a qualified majority within the Council would, henceforth, only be one worry of the Commission; as it would now also need to target a majority of the first (!) chamber of the European Union legislator.

process? Why should the *supranational* Union executive, whose very mandate is based on the idea that it is *not* to represent the Member States, act as if it represented a *State* majority outside the sphere of positive integration? The “intuition” that the Commission “instinctively” adopts, in the *negative* integration sphere, the State majority view – as opposed to a progressive State minority – requires proof, hard proof; and because “We the Court” does not give it, we must wait for future analyses to demonstrate (or falsify) that the Commission really behaves, in the context of Article 34, as a quasi-legislative body that acts “*in accordance with an “ideally drafted” representation of all States’ interest*”.²⁵

Normative Dimension: Limits and Problems

Leaving the descriptive *non sequitur* aside, is there not an enormous – normative – appeal in the judicial majoritarianism thesis? The answer depends on the *type* of activity the Court is undertaking and the *type* of national measure reviewed. Where the Court engages in a market-*building* activity, a judicial majoritarian solution is misplaced when it comes to *border* measures. For if the Court would here follow a majoritarian approach, it would simply condone – considering Europe’s protectionist past – national practices that were traditionally followed by the majority – if not all – of the Member States.²⁶ But even when it comes to the review of product requirements or selling arrangements, should the Court always follow the State majority view; or, are there areas in which a “subsidiarity” solution should apply within Article 34?

This – normative – question forms the second important dimension of “We the Court”; and the main premise of Maduro’s argument may here be stated as follows: while majoritarian activism is generally good, unlimited “majoritarian activism” is nevertheless “insufficient and inadequate” because “it focuses exclusively, on problems within the States’ regulatory process and ignores all other institutional malfunctions that may be

²⁵ M. Maduro, *We, the Court* (supra n.1), 78 (emphasis added).

²⁶ The same reasoning applies, *mutatis mutandis*, to fiscal measures where it is simply not the disparity of national rules but their parallel existence that creates obstacles to intra-Union trade. Conveniently, Maduro leaves fiscal measures out of his analysis. For an analysis of fiscal measures and negative integration in a comparative perspective, see: R. Schütze, *Tax Barriers to Intra-Union Trade: American ‘Federalism’, European ‘Internationalism’?*, (2016) 35 *Yearbook of European Law* 382.

present in the judicial, [Union] and market process”.²⁷ Only were national measures are “suspect” of being corrupted by the (national) political process should judicial majoritarianism come into action:

“It is suggested that the Court of Justice should not second-guess national regulatory choices, but should instead ensure that there is no under-representation of the interests of nationals of other Member States in the national political process. As it will not be possible for the Court of Justice to carry out case-by-case assessments to identify such representative malfunction in the national political process, tests must be designed to identify suspect measures. *In this regard, it is possible to individuate two types of interests affected by national measures which interfere with the free movement of goods: cross-national interests and national interests. For the former, the interests affected are uniform throughout the [Union]. For the latter, the interests affected diverge throughout the [Union]. If the interests regulated by a national measure are equal in the different Member States, then there is no suspicion of over-representation of national interests or under-representation of the interests of nationals of other Member States.* That is the case with many national measures regulating market circumstances, which may explain the bias in their favour illustrated in *Keck*.”²⁸

Inspired by the Court’s *Keck* judgment,²⁹ “We the Court”’s thinking here reveals itself as an attempt to generalise the *Keck* solution beyond selling arrangements. Wrongly (but understandably) assuming that the *Keck* Court signalled a “mov[e] from a market building to a market maintenance approach in the area of [the] free movement of goods”,³⁰ the suggestion is that the Court should reduce the scope of Article 34 by focussing its energy on “suspect” national measures, that is: national measures that do *not* deal with cross-national interests. In essence: “if a national measure regulates uniform or cross-national interests it will not prima facie fall under Article [34]”; and, “[i]n this case, a national measure should only be submitted to a balance test by the Court if it is shown to be

²⁷ M. Maduro, *We, the Court* (supra n.1), 104. And see also *ibid.*, 158: “There has been a general acceptance of the different levels of discretion employed by the Court in its case law. In doing so, they have failed to address the institutional choice inherent in the replacement of a State’s assessment of the costs and benefits of a measure by the Court’s assessment of those costs and benefits. Nor have they broached the question of the European Economic Constitution that should underlie any interpretation of Article [34] and its review of market regulation.”

²⁸ *Ibid.*, 173-174 (emphasis added).

²⁹ Joined Cases C-267/91 and C-268/91, *Keck and Mithouard*, [1993] ECR I-6097. Maduro started his PhD in 1991 and defended it in 1996, with the *Keck* judgment given at the end of 1993 – that is right in the middle of the thesis.

³⁰ M. Maduro, *We the Court* (supra n.1), 99. With regard to the prophesy that the *Keck* Court had returned to a more conservative approach to market-building, “We the Court” is of course wrong, see only: R. Schütze, *From International to Federal Market* (supra n.1), Chapter 4.

discriminatory.”³¹ Judicial majoritarianism should thus only applied to national measures tainted by a national “bias”; and national bias is defined as a result of an “institutional malfunction” of national parliaments:

“Even in a context of optimal diversity (in which the goal is efficient State regulation) the States’ political processes present representative problems in the regulation of the common market. Regulatory decisions are made taking into account national interests. Interests of nationals of other Member States are not normally taken into account. Even when national legislation is not enacted with protectionism intents or does not discriminate against foreign nationals, the institutional structure of the States’ regulatory process tends, in any case, to favour home interests. (...) This results in what may be called national bias and is an essential component of the test to be proposed[.]”³²

But are not all *national* measures coloured by a *national* bias? The only way-out of this definitional cul-de-sac is for “We the Court” to refer to the idea of “virtual representation”.³³ In enacting national laws that concern “cross-national” interests, the national parliament is presumed to be “virtually” representing the interests of all European Union citizens because these interests are evenly distributed within the Union; and as the result, a non-discriminatory national measure that deals with a “cross-national” interest should fall outside the scope of negative integration and thus outside the purview of the Court. In this conception, Article 34 derives its legitimation, unlike an economic due process conception, not from the fact that it grants an *economic* fundamental right but – on the contrary – a *political* fundamental right.³⁴

What are we to make of this normative conception of judicial legitimacy? The *theoretical* idea that a Court can neutralise the counter-majoritarian difficulty by adopting an

³¹ Ibid., 174.

³² Ibid., 148.

³³ In the European internal market context, this argument had first been made by W-H. Roth, *Wettbewerb der Mitgliedstaaten, oder Wettbewerb der Hersteller*, (1995) 159 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 78.

³⁴ This point is more expressly made in: M. Maduro, *Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights*, (1997) 3 *European Law Journal* 55 at 72-73: “However, not reading the European Economic Constitution as a neo-liberal programme does not mean that Article [34] cannot be seen as a fundamental economic freedom. (...) I agree that a European Constitution does require a body of fundamental economic rights or freedoms (limiting, if necessary, public intervention in the market) in parallel to those normally found in national constitutions. However, this is not the role in which I would cast Article [34]. (...) My proposal, however, goes beyond a ‘rule of competences’ conception of Article [34]. By attributing to it a role of correction of national political processes vis-à-vis representation of the nationals of other Member States, I maintain a fundamental rights conception of the free movement rules. (...) Free movement rules will be a political fundamental right, not an economic fundamental right.”

“antitrust” orientation that concentrates on the malfunctioning of the political process is surely interesting.³⁵ However, the process-substance distinction for judicial review is nonetheless an unworkable one.³⁶ And the democracy-centred rationale behind process-constitutionalism particularly loses much of its strength in a *federal* context. For within federal contexts, judicial review simply cannot be reduced to an institutional choice between a (*undemocratic*) court and a (*democratic*) parliament. Courts here arbitrate between the legislative claims of the *democratic* majority of the Union and the *democratic* majority of a State. But worse: the very attempt to portray a federal Court as the protector of the *federal* demos by outlawing State legislation on the ground that the State people did not virtually represent the broader European public is not just a convoluted way to conceive the problem, it – arguably – begs the question.³⁷ True, the U.S. Supreme Court has at times subscribed to the idea;³⁸ yet the idea of “virtual representation” is – in my view – a “constitutional stupidity”,³⁹ because “to establish local governments designed to respond to local needs and then question actions by those governments because of a lack of national perspective would be almost perversely incongruous”.⁴⁰

In the words of Laurence Tribe:

“Economic localism cannot be characterized as a symptom of breakdown in local democratic processes. Because this defect is routine rather than exceptional, this model of review serves not

³⁵ J. H. Ely, *Democracy and Distrust* (supra n.2), 102-103: “The approach to constitutional adjudication recommended here is akin to what might be called an „antitrust“ as opposed to a „regulatory“ orientation to economic affairs – rather than dictate substantive results it intervenes only when the „market“, in our case the political market, is systematically malfunctioning.”

³⁶ L. Tribe, *The Puzzling Persistence of Process-Based Theories*, (1980) 89 *Yale Law Journal* 1063.

³⁷ In this sense: W.H. Roth, *The European Court of Justice’s Case Law on Freedom to Provide Services: Is Keck Relevant?*, in M Andenas & WH Roth, *Services and Free Movement in EU Law* (Oxford University Press, 2002), 1: “[T]he representative malfunction argument is based on the assumption that if the under-representation of interests of people from other Member States were corrected in the national political process, the outcome of the decision-making process would be different, protecting the interests of people residing out-of-state. It is submitted that this kind of analysis begs the question: if people residing out-of-state were indeed represented in the national political process, it is by no means clear whether their voice would be heard if they held just a minority view.”

³⁸ See only *Justice Stone in South Carolina State Highway Dept. v. Barnwell*, 303 US 177 (1938), 184 – footnote 2: “Underlying the stated rule has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the State, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the State”.

³⁹ On “constitutional stupidities“ generally, see: W.N. Eskridge & S.V. Levinson, *Constitutional Stupidities, Constitutional Tragedies* (NYU Press, 1998).

⁴⁰ E. M. Maltz, *How much regulation is too much? An Examination of Commerce Clause Jurisprudence*, (1981) 50 *George Washington Law Review* 47 at 80.

as a brake on judicial scrutiny of state laws, but as a directive to the courts to review and invalidate a wide range of quite ordinary legislative measures.”⁴¹

And in the similar words of a second distinguished American scholar:

“The [representation-reinforcing theory of judicial review] assumes that out-of-state interests really ought to be represented – the theory assumes it is a defect in our system that the system denies foreigners representation, as it is a defect if racial minorities or women are unrepresented or represented ineffectively. But that assumption is not warranted. Non-representation of foreign interests follows from the simple fact that there are separate States; and the existence of separate States, while it might be a defect in an ideal political system, can hardly be treated as a defect in ours.”⁴²

In sum: there is a fundamental difference in the underrepresentation of women and the underrepresentation of foreigners in national parliaments. While the former should always be “suspect”, the latter can hardly be conceived of as a “malfunctioning” of a *national* institution that is designed to represent *national* interests. The attempt to ground and legitimate federal judicial review on the basis of the non-representation of “foreign” interests in national parliament is therefore bound to fail. And more generally, we should resist the temptation of trying to justify judicial *activism* by reference to “democratic” grounds because courts are simply not “majoritarian” institutions but “counter-majoritarian” institutions. Independent from the legislature, and isolated from the electorate, the “We” in “We the Court” cannot be a democratic “We”; for even if a federal court may indirectly *confirm* federal majorities, as firstly expressed in the Union legislature, it cannot directly *represent* – unarticulated – federal majorities by pretending to speak in the name of a European “people”.

Practical Dimension: Limits and Problems

⁴¹ L. Tribe, *American Constitutional Law* (Foundation Press, 2000), 1054.

⁴² D. H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, (1985-86) 84 *Michigan Law Review* 1091 at 1164.

What are we to make of the *practical* test to discover “suspect” national rules suggested in “*We the Court*”? Professor Maduro draws the dividing line, as we saw above, between measures that pursue a “cross-national” interest as opposed to a national interest, whereby the former are said to be “uniform throughout the [Union]” so that “there is no suspicion of over-representation of national interest and under-representation of the interests of nationals of other Member States”.⁴³ But what are these uniform interests? Is a use-restriction of jet-skis or a speed-limit on a busy commercial artery a cross-national interest that is uniform throughout the Union?⁴⁴ Does a Finnish trade union represent worker interest in other Member States?⁴⁵ What about the alcohol content in fruit-liqueurs: cross-national or national?⁴⁶ “*We the Court*” offers no real answers to these concrete judicial questions and we shall therefore try to find illustrations from a complementary source: Maduro’s opinions as Advocate General at the European Court of Justice.⁴⁷

Let us start with *Alfa Vita*.⁴⁸ The Greek State had required a bakery licence for all shops producing bread – even bread that was made from frozen “back-off” products. This was claimed to constitute a measure having an equivalent effect to quantitative restrictions in violation of Article 34. Solving this specific problem first according to the “classic approach” adopted by *Cassis* and *Keck*,⁴⁹ Maduro here nevertheless wished to make a number of important clarifications.⁵⁰ Rejecting the idea that free movement rights are absolute rights, he nevertheless admitted that they will have a liberalising effect on the national economy concerned.⁵¹ And insisting on a balancing between trade and other values, the task of the Court was therefore – secondly – said to make sure that States “do

⁴³ M. Maduro, *We the Court* (supra n.1), 173-174.

⁴⁴ Case C-142/05, *Åklagaren v Mickelsson and Roos*, [2009] ECR I-4273.

⁴⁵ Case C-438/05, *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti*, EU:C:2007:292.

⁴⁶ Case 120/78, *Cassis de Dijon* (supra n.20).

⁴⁷ Professor Pires Maduro was Advocate General at the European Court of Justice from 2003 to 2009.

⁴⁸ Joined Cases C-158/04 and C-159/04, *Alfa Vita Vassilopoulos and others*, EU:C:2006:212.

⁴⁹ The Greek law was here found to be a product requirement that consequently fell victim to the *Cassis de Dijon* rule (ibid., paras.9-23).

⁵⁰ In the Advocate General’s words (ibid., para.35): “[I]s there cause to abandon this case-law? I do not think so. However, it is important to clarify it, in particular by reference to the case-law developed in the other fields of free movement.”

⁵¹ Ibid., paras.37-38: “[Union] nationals cannot draw from this provision an absolute right to economic or commercial freedom. (...) It is indeed true that the opening-up of national markets imposed by the [Treaty] provisions relating to freedom of movement can also, in some cases, have an effect of liberalising national economies.”

not adopt measures which, in actual fact, *lead to cross-border situations being treated less favourably than purely national situations*".⁵²

What would this *in casu* mean? For the Advocate General it meant that, while additional costs arising from disparities in the laws of the Member States were outside the scope of Article 34,⁵³ national rules that "did not take account of the particular situation of the imported products" and especially "*the fact that those products already had to comply with the rules of their State or origin*" would violate the prohibition.⁵⁴ And without engaging in an analysis of whether the relevant Greek legislation allowed for the production of Greek "bake-offs",⁵⁵ Maduro simply insisted that discrimination had taken place.⁵⁶ But even if that were true, what makes this a case in which national legislation "discriminated" against cross-border trade as opposed to internal trade? What was the nature of the interest affected: cross-national or national? And even if there was, admittedly, no need to go down the judicial majoritarian route because there was discrimination, where is the systematic comparison of the legislation in other Member States under the first "classic" approach?⁵⁷

⁵² Ibid., para.41 (emphasis added, and referring to his Opinion in Case C-446/03 Marks & Spencer [2005] ECR I-10837).

⁵³ Ibid., para.44: "Such costs, which arise from disparities in the laws of the Member States, cannot be considered to be restrictions on freedom of movement."

⁵⁴ Ibid. (emphasis added); and, again, at para.51: "It is not a question of guaranteeing that the exercise of those freedoms is entirely neutral; it may be more or less advantageous for European citizens. It is more a question of ensuring that Member States take into account the extent to which the rules they adopt are liable to affect the position of nationals from other Member States and make more difficult their full enjoyment of the freedoms of movement." Maduro subsequently expressly identifies his approach with the prohibition of any "discrimination against the exercise of freedom of movement" (ibid., para.46).

⁵⁵ This is, in my view, the greatest *Leerstelle* of the opinion: for if, as Maduro claims, the Greek law concerned "the preparation and production conditions which these products must meet" (ibid., para.15); should the principle of home state control, as established in Cassis, not leave them untouched? Is it really true that the regulation of the "production process" automatically "concern the inherent characteristics of 'bake-off' products" (ibid)?

⁵⁶ Ibid., para.52 that refers to para.21: "A characteristic of 'bake-off' bread is that it has already gone through certain stages of bread production, such as kneading and the first stage of baking. In those circumstances, making it subject to manufacturing requirements identical to those imposed upon fresh bread clearly leads to unnecessary costs, such that marketing is thereby rendered more onerous and therefore more difficult. Furthermore, those costs particularly concern frozen products which, by their nature, are intended to be preserved and transported, particularly from other Member States. Therefore, it seems clear to me that with regard to imported products the legislation at issue is in fact discriminatory and accordingly constitutes a barrier to intra-[Union] trade."

⁵⁷ Maduro mentions the existence of "some" foreign legislation in the context his analysis of Article 36 and mandatory requirements (ibid., para.60): "[F]ar from justifying the existence of the Greek legislation, the foreign legislation relied on by those authorities only goes to show that specific procedures adapted to frozen products exist[.]"

Let us look at a second famous example: *Viking* – a judgment outside the context of the free movement of goods yet pertinent to the free movement case law generally.⁵⁸ The case involved a Finnish trade union that had considered strike action against a Finnish ferry company, Viking Lines, wishing to transfer part of its business to Estonia in order to escape its obligations under a Finnish collective bargaining agreement. The Finnish Union was itself an affiliate of the International Transport Workers’ Federation – a federation of 600 unions in 140 states within this industrial sector – whose support it had requested. Would the strike action violate the free movement principles? Insisting once more that the doctrinal heart of all internal market law was a non-discrimination principle,⁵⁹ Maduro here distinguished between two scenarios: collective action to maintain jobs within Finland, and “collective action *to improve the terms of employment of seafarers throughout the [Union]*”.⁶⁰ And counter-intuitively, the former is said to be legitimate when employed to prevent a company from relocating,⁶¹ while the latter is – surprisingly – thought to be more “suspicious”:

“A policy of coordinated collective action could easily be abused in a discriminatory manner if it operated on the basis of an obligation imposed on all national unions to support collective action by any of their fellow unions. It would enable any national union to summon the assistance of other unions in order to make relocation to another Member State conditional on the application of its own preferred standards of worker protection, even after relocation has taken place. In effect, therefore, such a policy would be liable to protect the collective bargaining power of some national unions at the expense of the interests of others, and to partition the labour market in breach of the rules on freedom of movement.”⁶²

The Advocate General’s reasoning in *Viking* shows – in my view – the fatal indeterminacy and impracticability of “We the Court”’s test for discovering “suspect”

⁵⁸ Case C-438/05, *Viking Line* (supra n.45).

⁵⁹ *Ibid.*, para.62.

⁶⁰ *Ibid.*, para.63 (emphasis added).

⁶¹ *Ibid.*, paras.66-67: “Thus, in principle, [Union] law does not preclude trade unions from taking collective action which has the effect of restricting the right of establishment of an undertaking that intends to relocate to another member State, in order to protect the workers of that undertaking. However, collective action to persuade an undertaking to maintain its current jobs and working conditions must not be confused with collective action to prevent an undertaking from providing its services once it has relocated abroad. The first type of collective action represents a legitimate way for workers to preserve their rights and corresponds to what would usually happen if relocation were to take place within a Member State. Yet, that cannot be said of collective action that merely seeks to prevent an undertaking that has moved elsewhere from lawfully providing its services in the Member State in which it was previously established.”

⁶² *Ibid.*, paras.71.

national rules. For why should the fight of a *Finnish* union for *Finnish* jobs be less suspect than an international (European) federation fighting “to improve the terms of employment of seafarers *throughout the [Union]*” – even if on an obligatory basis? Is the interest to protect worker rights in this case not a cross-national one, whereas the “Finnish” interest to protect national jobs a more suspect measure with a clear national bias? Regardless, the central problem here (as elsewhere) is not *whether* an interest is “uniform throughout the [Union]”;⁶³ the question is *how* that interest is constructed.⁶⁴ The virtual representation theory gives, in this context, an enormous power to the judiciary not just to say what the European constitution “is”, but to even justify its judicial interpretation by reference to democratic theory. Seen in this line, Maduro’s practical test not only breaks down into to a regressive tautology; it entails the danger of camouflaging counter-majoritarian judicial decisions as exercises in democratic governance.

Conclusion

Despite all these – deliberately provocative – questions raised in this late “review”, “We, the Court” presents a highly original argument. Based on his EUI thesis, Maduro’s book was the first to “theorize” the case law on the internal market. This was a remarkably original and laudable endeavour that still deserves much applause today; and no one can deny the enormously positive influence the book has had on thinking “constitutionally” about the internal market.⁶⁵ Nevertheless, the “majoritarian activism” thesis remains, in my view, empirically unproven, theoretically weak, and – at least in the version offered by Maduro – practically unworkable.

Where does this leave us with regard to the legitimacy of the EU common market? In light of the previous analysis, we should completely abandon the attempt to portray the *judicial* creation of the European internal market as *in itself* a democratic process. When *Cassis de Dijon* was decided, it was an “undemocratic” judgment: the move from an

⁶³ M. Maduro, *We the Court* (supra n.1), 173-174.

⁶⁴ In this case: is it the interest of the *Finnish* workers, or is it the interest of the *majority of Member State* workers, or is it the interest of *all workers in the Union*?

⁶⁵ For some recent academic literature inspired by the Maduro thesis, see supra n.8 above.

international to a federal model was a “constitutional moment” that could not have been envisaged, in advance, by the national parliaments of the Member States when signing the original Treaties.⁶⁶ But faced with a choice between an *undemocratic* common market and *no* common market, the Court simply chose the former option. However, democratic input legitimacy is of course not the only accepted source of legitimacy in modern societies. There are other – importantly – ways to normatively justify the judicial creation of the internal market. Free movement right may be seen as liberal individual rights;⁶⁷ or, they may be seen, in an utilitarian light, as “instrumental to increasing the economic welfare of all the Member States”.⁶⁸ Yet while an analysis of these other forms of legitimacy is beyond the scope of the present “review”,⁶⁹ they need to be urgently addressed in future discussions of the legitimacy of the European project. For there is a “justice deficit” within the Union,⁷⁰ in which the gains of the internal market have been undemocratically and unevenly distributed among the people(s) of Europe.

⁶⁶ Unlike the U.S. Constitution, we cannot indirectly attribute (federal) democratic legitimacy on the basis that Congress could have overturned all judicial interpretations thanks to the power of congressional consent. For in the EU legal order, the judicial interpretation of Article 34 is hierarchically *above* Union legislation.

⁶⁷ See only: Case 367/12, Sokoll-Seebacher, EU:C:2014:68 and the role played by Article 16 EU Charter (“The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.”) in the interpretation of free movement law.

⁶⁸ Opinion of Advocate General Maduro in Viking (supra n.45), para.57 (with references to economic theory).

⁶⁹ For a preliminary discussion here, see: R. Schütze, From International to Federal Market (supra n.1), Epilogue.

⁷⁰ For a preliminary discussion here, see: D. Kochenov et al (eds.), Europe’s Justice Deficit (Hart, 2015).