Why legislatures owe deference to the courts
A commentary on Dimitrios Kyritsis’ Where our protection lies: separation of powers and constitutional review

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1 Introduction

In his intriguing book Where Our Protection Lies: Separation of Powers and Constitutional Review Dimitrios Kyritsis develops a sophisticated argument establishing the justifiability of judicial review. Kyritsis' theory emphasizes the importance of the institutional division of labor between different institutions of governance and their ramifications on the legitimacy of the polity. Kyritsis believes that the governing institutions are engaged in a single joint enterprise: the enterprise of governing. The joint commitment to govern is particularly important for his theory as the cooperation, coordination and harmony among the governing institutions is a central theme of Kyritsis’ enterprise. One of the primary duties resulting from joint governance is the duty of each participant in the enterprise of governance to “respect the contributions of their fellow participants in the joint institutional efforts”. This duty of respect implies a duty of ‘robust deference’ on the part of the judges. Robust deference requires courts to give effect to legislative decisions that are sub-optimal in terms of content.

My own commentary exploits the concept of robust deference and establishes the significance of robust legislative deference (deference owed by the legislature to the court). Legislative deference is required to manifest the fact that legislation operates within certain boundaries; the legislature is not omnipotent; it has duties to act in certain ways. Judicial review is designed to publicly acknowledge the presence of such duties and their mandatory force. Judicial review implies that the protection of rights should not hinge on the good will of the legislature or even on its sound judgments. Citizens are not at the mercy of the legislature and its will or wisdom even when legislatures are indeed protective of rights.
One of the implications of my view is that within a certain sphere, a liberal polity ought to defer to courts even when courts are not superior in their epistemic (or more generally instrumentalist) competence, namely even when courts do not make better decisions than legislatures. By doing so, courts protect not (only or primarily) the rights of citizens (as those often can be protected by legislatures) but the understanding that rights do not hinge on the good will or the sound judgment of legislatures.

After describing in Part 2 Kyritsis' views concerning institutional legitimacy and Kyritsis' concept of robust judicial deference, Part 3 develops and defends the concept of robust legislative deference.

2 Institutional legitimacy and robust judicial deference

The ultimate normative desideratum that the governing institutions ought to realize is political legitimacy. Legitimacy requires political institutions to satisfy a minimum threshold; not any deviation from justice undermines the legitimacy of these institutions. As Kyritsis says legitimacy is “what you get when the quest for justice comes up against the basic realities of political life”.

Legitimacy, as understood by Kyritsis can be achieved only by satisfying both institutional and substantive conditions. The substantive conditions concern the primary rules governing the polity: these rules ought to be minimally just. The institutional concerns are more central to Kyritsis’ project as Kyritsis believes (and I am also an enthusiastic proponent of the view) that institutional concerns are not parasitic upon substantive ones. In Kyritsis’ view, defects of content or quality can sometimes be legitimate when they result from counter-availing considerations of institutional design. In other words, institutional values can sometimes require us to defer to institutions that are not epistemically superior (or perhaps even are epistemically inferior). The institutional concerns that are of primary interest to Kyritsis are those that govern the relations between the legislature and the courts.

In a carefully articulated observation Kyritsis argues:

Courts cannot just ask themselves what would be the optimal decision from the point of view of fundamental rights protection. They must also take into account that they are partners in a project that they share with the other branches of government.

Hence, Kyritsis concludes judges “are bound to respect the contributions of their fellow participants in the joint institutional effort”. Such a respect entails a duty of ‘robust deference’ on the part of the courts to the legislature. Robust deference requires courts to defer to other institutions (in particular the legislature) even when such a deference has costs in terms of the quality of the decisions, i.e., even if courts would have made a better decision than the legislature had they rather than the legislature been given the power to do so.

Let me articulate the significance of this view by contrasting it with a popular different instrumentalist view. Some theorists believe that the separation of powers or, more broadly, the institutional structure of the polity rests purely on epistemic (or more broadly instrumental) reasons. Epistemic deference is justified when different institutions have different epistemic competence. In such a case the epistemically inferior institutions always owe a duty of deference to the epistemically superior institution.
The epistemic superiority of one institution over another may result from different reasons. Sometimes one institution is particularly knowledgeable, informed or has better deliberative powers. At other times a particular institution is more motivated to make the right decision or is less constrained than other institutions. Hence, under the instrumentalist view, the division of labor among different institutions must be justified in epistemic (or more broadly instrumental) terms. The desirability of constitutional directives and/or judicial review depends upon whether they bring about (or are likely to bring about) decisions that are superior to those that would have been made in the absence of constitutional directives or in the absence of judicial review. This is a theory of the type that I have labelled in the past constitutional instrumentalism.  

Epistemic (or, more broadly, instrumentalist) deference has dominated the discussions concerning the relations between the legislature and the judiciary. In the past I identified five influential theories purporting to justify judicial review on epistemic/instrumental terms: rights-based, democracy-enhancement theories, the settlement theories of judicial review, the dualist democracy argument and institutionalist instrumentalism.  

Kyritsis rightly recognizes the importance of epistemic deference but he also acknowledges that epistemic deference is not the only type of deference that courts owe to the legislature. Robust deference, namely deference that binds courts even when epistemic considerations are not present is a necessary additional form of deference. Under Kyritsis view:

Courts cannot just ask themselves what would be the optimal decision from the point of view of fundamental rights protection. They must also take into account that they are partners in a project that they share with the other branches of government...By virtue of the fact that judges participate in a project that is underlain by such considerations, they are bound to respect the contributions of their fellow-participants in the joint institutional effort. Sometimes this means giving effect to decisions that are sub-optimal from the point of view of content.  

I agree! There are institutional considerations that are not derivative of or parasitic on the resulting merit of the decisions and which require courts to defer to the legislature. We do not merely grant powers to legislatures because they are good at what they are doing; in addition, the legislature has some prerogatives resulting from the fact that it is a representative institution. As a matter of fact, sadly we grant legislatures powers despite the fact that they are often quite incompetent at what they are doing. The question is what can explain our willingness to grant legislatures such broad powers even when we have grave doubts as to their competence. Why should any consideration other than their quality in decision-making matter? This is a primary puzzle of constitutional theory.  

Much of Kyritsis’ discussion addresses this point. In particular, chapter 6 provides valuable contributions explaining the distinct virtues of representative institutions and chapter 7 provides additional rationales justifying the prerogatives of representative institutions. I have little to add to this valuable analysis; I wish only to point out that without explicitly recognizing it, Kyritsis identifies two types of considerations that can justify judicial (robust) deference to the legislature: conventional and natural.  

The conventional deference results from an (explicit or implicit) agreement or a custom. In illustrating the rationale for robust constraints Kyritsis uses an example to explain why conventions can give rise to deference. He imagines that two people wish to paint a home together and they agree that one of them will be painting the living room while the
other will be painting the bedroom. Assume also the former is much better in painting houses than the latter and, consequently, the former’s interference will greatly improve the look of the house. Kyritsis believes that it is still the case that the former has reasons not to interfere in the latter’s work as the point of the joint endeavor “is to structure cooperation” and not merely to improve the quality of the house. The success of the joint endeavor (the painting) is important but, in addition, the joint endeavor contributes to the forging of relationship between the two participants and, such relationship may require that we sacrifice the quality of the painting for the sake of successful cooperation. Similarly, the scope of constitutional review is not only determined by considerations concerning the quality of the resulting decisions. Courts should also respect the contribution of their fellow citizens to other institutions of governance. Such respect provides a reason for conventional robust deference that hinges on the prior agreement or understanding between the different institutions.

16 Real life rather than hypothetical examples can illustrate this point. The constitutional rules governing the allocation of powers among different entities are conventions of this type. In the US criminal law is a state matter while in Canada it is a federal matter. This convention justifies different forms of deference – forms which are determined by the convention specified in the relevant constitutional provisions.

17 There is however a central limitation on conventional deference. Conventional deference (as its name indicates) rests on a convention; its content hinges on the content of the convention. It follows therefore that deference is owed only if it has been practiced or agreed upon. Further, while conventional deference may often be justified and it may justify deference of courts to the legislature even when the courts are epistemically superior, in cases of conventional deference there are often good reasons to change the convention such that it will promote (or be conducive to) epistemic concerns. A change in the convention (e.g., the convention requiring deference on the part of the court) such that it will better address epistemic considerations has benefits (in terms of the quality of the resulting decisions) and, consequently, it may be a desirable change.

18 Yet there can be another type of reasons for robust deference. To a large extent the division of labor between the legislature and the courts, rests upon what I will label natural robust deference. Natural robust deference suggests that certain institutions by virtue of who they are and what they represent have natural functions in the society which should give rise to deference on the part of other institutions. In such cases deference is not conventional; it is the byproduct of certain natural features of the institutions resulting from their particular function or their symbolic status.

19 Think of the legislature; Kyritsis recognizes that the legislature ought to have a prominent role in governing not because (or not only because) it is more likely to make the right decisions or even because of particular conventions requiring deference to the legislature. Instead, Kyritsis points out that “legislatures are representative institutions”. They bear close institutional relation to the electorate which is absent in the case of courts. The deference that courts owe to the legislature rests on the special status of the legislature as a body representing the electorate. Representative institutions are ones that secure individual independence which is conducive also to political stability. Consequently, courts owe robust deference not merely because of an agreement or a conventional understanding but because of the particular nature of the legislature, in particular for the reason that the legislature is a representative institution.
20 Kyritsis believes that courts owe robust deference to the legislature not merely because it is practiced in a particular legal system or because such a deference shows the willingness of courts to be a partner in the enterprise of governing. In addition, robust deference of courts to the legislature is a byproduct of the fact that the legislature is a representative institution and that representative institutions have prerogatives that other institutions do not have (even when those other non-representational institutions are superior decision-makers).

21 Judicial deference to the legislature has traditionally been considered to be an important virtue of courts. It rests on the fact that courts are not representative and that, as a general rule, courts ought to defer to representative institutions. In a famous decision, Lord Hope explained that courts should “defer, on democratic grounds, to the considered opinion of the elected body as to where the balance is to be struck between the rights of the individual and the needs of society”. Bickel famously coined the term ‘passive virtues’ to capture the very same sentiment.

22 Hence, Kyritsis’s focus on the judicial deference to the legislature follows a long tradition. Courts and theorists defend the duty of courts to defer to the legislature. Terms such as ‘judicial restraint’ or the ‘passive virtues’ have been invented to refer to the duty of courts to defer to other institutions including in particular the legislature. It is less fashionable to speak of the deference of the legislature to the court. I will however argue in the next part that legislatures have a natural duty of deference to the courts.

3 Robust Duty of Deference owed to the Courts

23 In his discussion of moral and constitutional rights, Kyritsis makes the following claim:

Effective protection of people’s fundamental moral rights is an important aim of the entire legal order, not only courts. Hence on this conception judicial enforcement – and the procedural right to demand it – is treated as merely one strategy for checking the legislature. This does not mean that our rights are left unprotected. Where courts cannot tread, other institutions may have to take up.

24 I disagree with one important observation in this paragraph. I disagree with the observation that in protecting our moral rights, courts are merely ‘one strategy.’ As a matter of fact, I wish to defend the view that courts are the preferred (although not the only) strategy for protecting our moral rights and I shall also argue that due to their privileged status, they are owed robust natural duty of deference when moral rights are at stake. While the concept of legislative deference to the courts is less popular in scholarly or in judicial circles than judicial deference, it is important for a liberal polity.

25 Judicial deference as argued above is a byproduct of the institutional role of the legislature as a representational institution. The legislature is owed deference because it represents the citizens. In contrast, I shall argue, the Court is owed deference precisely because it is a non-representative body. Its decisions embody the understanding that our basic moral rights do not hinge on popular sentiments; citizens have no power to change them or amend them and their mandatory force is independent of what people want or even judge to be true or just. Representation is therefore the ultimate grounds for both judicial deference to the legislature and legislative deference to the court. In the former case, representation entails a duty of deference to the representational body (the legislature) while in the latter case, representation entails a duty of deference to the non-representational body (the courts).
To illustrate the distinctive features of courts which should give rise to deference, let us use an example. In *Texas v. Johnson* the Supreme Court of the United States invalidated prohibitions on desecrating the American flag. This decision was based on the First Amendment of the US Constitution prohibiting limitations on freedom of expression. The prohibitions on desecrating the flag reflected prevailing public sentiments and they were enacted in most US states. The intensity of the popular sentiment supporting such prohibitions is evident even after *Texas v. Johnson*.18

Assume that instead of challenging the constitutionality of the prohibition on desecrating the flag in Court, political activists succeeded in abolishing the prohibitions in all states by convincing the public that the prohibitions are unconstitutional or simply immoral. In line with Kyritsis, one may argue that this method is as good (if not better) as the constitutional challenge in the Court. After all, in Kyritsis' view, “effective protection of people’s fundamental moral rights is an important aim of the entire legal order, not only courts”. Hence, as long as protection of the right to free speech is effectively provided by legislatures, it is as good as protection which is provided by the Court.

I disagree; I think there is a fundamental difference between a society in which fundamental moral rights are effectively protected by the legislature and a state in which fundamental moral rights are protected by the judiciary. Even if legislatures should and ought to take moral rights into account, legislation is often motivated by concerns about the public good. It is always an open question whether a decision made by the legislature rests on fundamental rights or simply on concerns for efficiency or utility.19 In contrast a decision by the Court that a law is invalid on the grounds that it violates a constitutional right cannot but be interpreted as pronouncing the view that the prohibition is a violation of the right at stake.

Hence, while a judicial decision which pronounces that prohibiting the burning of the flag is unconstitutional conveys unambiguously the message that the prohibition on burning the flag is a wrong, a decision on the part of the legislature can always be rationalized in other ways. A court declaring that the statute prohibiting the burning of the flag is invalid on the grounds that it conflicts with basic rights makes a clear and non-ambiguous assertion that the state is bound not to enact such a statute. By invalidating the statute, the court affirms that the state has a duty not to enact such a statute because it violates a right. No such implication follows from a decision by the legislature to abolish the prohibition. Thus it is wrong to maintain that a legislative decision to protect my right to burn the flag is as good as a judicial decision to protect such a right. Admittedly in both cases I can burn the flag without being subjected to criminal sanctions. Yet the grounds of the former decision can be that the legislature has indeed a power to prohibit the burning of the flag but it decided not to use its powers. In contrast, the grounds of the latter decision are that the legislature itself is bound to protect the right to burn the flag and that the prohibition is therefore a violation of a fundamental right. Hence the legislature has no prerogative to impose such a prohibition; it is beyond its powers.

Consider the following analogy borrowed from *Why Law Matters*.20 A needs $100 to cover some urgent costs. Fortunately, B owes A $100 and A turns to B to get his money back. B denies that he owes A the money, but, as a gesture of friendship, is willing to grant A $100 ‘as a present’, as B professes to understand that A faces economic hardship.
A is justifiably resentful and perhaps furious. A cares not merely that the $100 be given to him to cover his urgent costs, but also that it be given to him as a repayment of a debt rather than a present. A wants B to repay a debt, rather than merely to get the money. I argued in *Why Law Matters* that this analogy can help us to understanding the nature of mandatory constitutional provisions as those are intended to convey the clear message that the legislature is bound by its rights-based duties. Here I would extend it and argue that judicial review is an institutional method which manifestly conveys the existence of a duty on the part of the legislature to act or not to act in certain ways. In this respect it is fundamentally different from a legislative decision even when the judicial and legislative decisions are identical in their content.

Challenging a legislative decision in the Court is fundamentally different than amending a law through democratic means. By amending the law, the legislature conveys the idea that it has powers to reenact it if it so wishes. In contrast, a challenge concerning the constitutionality of a statute should be equated with a pronouncement that the statue is impermissible; that the legislature has no power to legislate it; that it violates fundamental moral rights in a way that cannot be remedied even if the majority thinks or judges otherwise.

The difference between legislative and judicial decisions has important ramifications. It is sometimes justified to try and change a statute through democratic means but it is not justified to challenge the law in court. More interestingly, this difference between the legislature and the judiciary raises doubts concerning the established view that changing a law through democratic means is at least prima facie superior to challenging it in court as the former practice is somehow more respectful of democracy. As a matter of fact, it is sometimes better to successfully challenge a statute in court than to amend it in the legislature as a judicial decision to invalidate a statute on constitutional grounds constitutes an unambiguous pronouncement that the statute is not only undesirable or inefficient. Instead, it implies that it is a violation of a right and that the legislature has no power to pass it.

This finding is particularly true in cases of fundamental moral rights. In cases concerning foundational moral rights the Court has a distinctive constitutional role; its role is not only to protect the moral right but to protect it in the right way, namely in a way that conveys the message that rights are mandatory constraints on the powers of the state; that they are not contingent on the good will on the part of the state or on the moral judgments of people.

The observation has important implications concerning deference. It implies that the legislature has a duty of robust deference owed to the judiciary. Even if the legislature is better able and willing to identify and enforce our moral rights, it still owes a duty of deference to the Court as legislative intervention in the judicial decision undermines the distinctive function of courts as implicitly pronouncing the counter-majoritarian presuppositions of liberalism. The special status of the courts with respect to rights indicates that rights exist and that their force does not hinge on public sentiments; they bind us willy-nilly and independently of our preferences or judgments.

This finding reveals an unfamiliar deficiency of democracy (understood as a majority rule). In pointing out the oppressive nature of democracy, theorists often pointed out that democracy may prioritize the interests of majorities (and, at times, the interests of well-organized powerful minorities over those of dispersed unorganized majorities). Yet
the analysis proposed above has exposed an additional concern; in the absence of judicial review, the rights of individuals in a democracy are contingent on the judgements and inclinations of the majority. Even if the majority protects these rights vigorously (and is likely to do so in the future), it is still the case that individuals’ rights are a byproduct of choice or discretion rather than that of a duty. This is a non-contingent deficiency of democratic institutions. Even if the legislature is highly enlightened and is devoted to the protection of rights and justice, it is still the case that granting it powers over our rights has detrimental effects. The mere fact that our rights are at the mercy of the legislature is a deficiency that needs to be addressed. Judicial review is needed not (only) to protect our rights as those can be protected by an enlightened legislature; they are needed to convey the idea that those rights are not contingent on the views or judgments of the majority or on prevailing public sentiments.

37 If this is right it has important ramifications concerning the duties of the legislature; more specifically, the legislature has duties of robust deference to the Court. When a moral right is at stake, it is primarily the role of the Court to determine its scope and its intensity. The legislature ought to defer to the judgments of the Court even if the legislature is better at identifying the content of the right. Precisely as the legislature being a representative institution is owed deference on the part of the courts, it is also the case that the Court being a non-representational institution is owed a duty of deference on the part of the legislature.

4 Conclusion

38 Kyritsis’ methodological starting point rests upon the conviction that constitutional instrumentalism is false and that the desirability of legal and political institutions does not hinge merely on the prospects that these institutions are conducive to epistemic or other instrumental concerns. Instead, various institutions that are typically perceived as means designed to achieve epistemic ends are valuable for intrinsic institutional reasons.

39 As is evident in this commentary, I endorse this starting point.21 As a matter of fact, I used this starting point to extend and deepen Kyritsis’ conclusions concerning robust deference. Robust deference is owed not only to legislature but also to courts as courts have a distinctive role in protecting moral rights in a liberal democracy.

40 To the extent that there is a disagreement between me and Kyritsis this disagreement concerns Kyritsis’ belief that Effective protection of people’s fundamental moral rights is an important aim of the entire legal order, not only courts. Hence on this conception judicial enforcement – and the procedural right to demand it – is treated as merely one strategy for checking the legislature.22

41 In contrast to Kyritsis, I believe that judicial review is not merely one strategy but the strategy by which moral rights should be protected. While it is important that fundamental moral rights be protected by all branches of government, the court has a special institutional role in protecting these rights and hence, the legislature owes ‘robust deference’ to the court when fundamental moral rights are at stake.
BIBLIOGRAPHY


NOTES

6. Under constitutional instrumentalism, the desirability of constitutionalism hinges on the likely contingent consequences of constitutionalism, most typically the substantive merit of the resulting decisions. See Harel 2014b:136-37; Harel 2014a. For a valuable critique of my view on the matter, see Nehushtan 2015. The most eloquent defense of constitutional instrumentalism can be found in Raz 1998.
9. It is of course a separate question whether legislatures are typically representative. Vast literature argues that they are not. Some theorists even argued that courts are more representative than legislatures. See, e.g., Jennings Perreti 1999: 194-198.
13. *Regina v. Director of Public Prosecutions Ex Parte Kebeline and Others* [1999].
16. Yet there are many who criticize the idea of judicial deference. For an effective critique of the ideal of judicial deference, see Riker & Weingast 1988: 373-401.
17. For a similar argument, see Harel 2014b: chapter 5. Yet in chapter 5 I used the argument to defend mandatory constitutional directives while here I use it to justify judicial review.
18. There are two facts that indicate the popular support for such prohibitions. First after the Court’s decision there was a proposal to amend the US Constitution and give the Congress the power to prohibit the desecration of the flag. See https://www.congress.gov/bill/109th-congress/senate-joint-resolution/12/text. Second many of the prohibitions against desecrating the flag are still in force even after the Court decided they are unconstitutional. See https://www.thoughtco.com/state-laws-on-flag-desecration-250038.

19. Of course even this is an idyllic view of legislation as it is often the case that legislation is, in reality, motivated by self-interest. Arguably, in such cases judicial review is particularly necessary. My point however is that even in the cases in which legislation is motivated by concern for the public good, courts have an important role and deference to the courts serves an important role.


ABSTRACTS

In his intriguing book, Dimitrios Kyritsis establishes the justifiability of judicial review. Under his view, the institutional duties of the Court are not parasitic on epistemic or any instrumental concerns. One of the primary institutional duties includes the duty of judicial ‘robust deference’ to the legislature. Robust deference requires courts to give effect to legislative decisions that are sub-optimal in terms of content. My commentary establishes the significance of legislative robust deference to the Courts. Such a deference on the part of the legislature is required when basic moral rights are at stake. One of the implications is that within a certain sphere, a liberal polity ought to defer to courts even when the courts are inferior in their epistemic competence. It is the unique role of judges as embodying the ideal of inviolability and invulnerability of individuals to majoritarian sentiments that justifies legislative deference to judicial decisions.

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