Judicial review and institutional balance
Comments on Dimitrios Kyritsis

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1 In a perfect world, there would be no judicial review. There would be no judicial review because it would be unnecessary. Judicial review would be unnecessary, in a perfect world, because the legislature would always ‘get it right’. Statute after statute, the legislature would simply spell out what constitutional rights require. And it goes without saying that, in an ideal world, the executive would follow suit.

2 Our real world, however, is not perfect, for all sorts of reasons. Sometimes regimes are wicked, and the legislature makes laws that foster the wealth of a limited elite of oligarchs or, worse, dictators suppressing rights of all those people who do not happen to have the luck of being member of the leading group. Even in not-so-wicked systems legislatures more often than not are inclined to compromise with certain rights in favor of other interests. People then claim that the former have been violated, others deny that there was such violation, and hence rational (or not-so-rational) disagreement occurs frequently. This is why many legal systems provide for judicial review of legislative decisions. In consequence, our real world confronts us with the problem of the legitimacy of judicial review.

3 Dimitrios Kyritsis has provided us with a marvelously interesting theory of the legitimacy of judicial review. In this paper, I shall juxtapose my own theory of judicial review to Kyritsis’ account in order to develop a precise picture of where we accord and where we disagree, thus providing a basis for further fruitful discussion between us. I will briefly summarize Kyritsis’ theory, limiting my summary to those parts which are relevant for my discussion (1). I will then lay down my own theory of institutional practical concordance that can be applied to the problem of judicial review (2). The third section collects some common ground between our theories (3), while the fourth section briefly lists a couple of rather minor differences and problems (4). In the fifth section, I engage in what I think is the most important difference between our theories, namely the choice between a combination model or a separation model (5).
1 The legitimacy of judicial review

In his monograph *Where our protection lies. Separation of powers and constitutional review*, published by the Oxford University Press in 2017, Dimitrios Kyritsis develops a quite rich and complex account of judicial review. It is not possible here to present a full discussion of his theory. Instead, I will collect the various instances in which Kyritsis makes the legitimacy of judicial review dependent upon the idea of balance between institutional powers.

Kyritsis refers to a balanced account of judicial review at various points throughout his book. In fact, this issue appears in all chapters except for chapters two and four. That the relevant passages are so widespread demonstrates that it is indeed one of the main points of the book, notwithstanding that Kyritsis does not assemble his various remarks on this issue into a longer sub-chapter.

Right at the beginning of his book, Kyritsis stresses that the best model of judicial review is a middle way between the two extremes of the enthusiasts and the sceptics. Instead of either unconditionally denying or accepting the legitimacy of judicial review, the vital task was to ‘weigh’ its merits and demerits in order to determine ‘under what conditions’ it was legitimate. Kyritsis objects to solutions ‘in an all or nothing fashion’ and demands judging the legitimacy of judicial review ‘on a case-by-case basis’. These considerations already suggests some sort of balancing mechanism, and Kyritsis is explicit on this from the very beginning. ‘Our concern for legitimacy’, he writes, dictate a ‘balancing exercise’ in which fundamental rights ‘are weighed up against considerations of institutional design’.

What ultimately determines the overall legitimacy of a political regime, according to Kyritsis, is striking the proper balance between two types of moral consideration, namely considerations of content of basic rights and considerations of institutional design.

Having established the necessity to consider institutional design in evaluating the legitimacy of judicial review, Kyritsis uses these institutional considerations for criticizing both Dworkin and so-called ‘dialogue’-theories. In chapter three, he introduces a different terminology than he used in previous chapters: Kyritsis labels considerations of content as ‘first-order considerations’ and considerations of constitutional design as ‘second-order considerations’. He then objects to Dworkin’s theory that it would not properly account for the discreteness of second-order considerations. Dworkin, according to Kyritsis, projects first-order concerns on institutional design, making second-order considerations derivative from considerations of content. That way, Kyritsis claims, the independent character of second-order considerations is lost.

At this point, I do not wish to discuss whether this objection to Dworkin is accurate. I rather want to record the desideratum Kyritsis derives from his analysis of Dworkin’s theory, namely that theories of judicial review must account for the distinctness of second-order concerns.

This is followed, in chapter five, by a similar objection to so-called ‘dialogue’ theories. Dialogue theories of judicial review often maintain that only a weak review standard was appropriate, and that the legislature must have the last word. According to Kyritsis, such theories downplay second-order considerations of institutional design in two different ways. First, they do not account for the authoritative impact of judicial decisions, namely
for the fact that courts officially determine the concrete content and meaning of our legal
rights. Kyritsis refers to Raz and to Waldron to underline this point. Courts enjoy
practical, not merely theoretical authority in Raz’ sense. They create coercive
‘institutional settlement’ of a legal dispute. Second, judges are not free to bring into the
dialogue whatever moral insights they may have. Rather, they are bound by the limiting
framework of their legal system as well as by their own institutional role in the legal
enterprise. Based on this double impact of institutional considerations, Kyritsis stresses
that we must distinguish and balance the authoritative and the discursive dimensions of
judicial review.

2 The theory of institutional practical concordance

Kyritsis’ project to reconstruct the relationship between courts and legislature ‘through
the lens of the idea of institutional cooperation’ closely resembles my own theory of
institutional practical concordance. Like him, I endorse a theory that acknowledges and
combines both the authoritative and the discursive dimensions of judicial review. Originally, I had developed my theory to solve the conflicts of jurisdiction in the
multilevel system of European fundamental rights protection. Subsequently, I applied
this theory to the judicial review of positive rights specifically. I claim, however, that
this theory has a universal character. Its analytic power makes it applicable to resolving
the puzzle of judicial review more generally.

The vital point here is that we can reconstruct the problem of judicial review as a conflict
of competences. A competence is a legally established ability to change the normative
situation by means of an institutional act. In the case of judicial review, the conflict lies
between the competences of the legislature to decide upon the important issues of society
and the competence of the constitutional court to control these legislative decisions. As I
have argued elsewhere, competences are a specific kind of legal norms. They are
principles, as opposed to rules. Principles can be satisfied to varying degrees, whereas
rules are norms that are always either fulfilled or not. Principles theory distinguishes
between material principles and formal principles. Material principles establish
substantial content; the most important examples of material principles are
constitutional rights. Formal principles, in contrast, establish who has authority to make
material decisions. They depict the authoritative dimension of a legal system. I argue
that formal principles represent competences.

This norm-theoretic fundament is of the utmost importance for the project of developing
a legitimate model of judicial review, because the particular characteristics of principles
can help in that regard. Principles are optimization requirements, and they frequently
compete with each other. Principles require that something be realized to the greatest
extent possible, given the factual and legal possibilities. We are most familiar with these
characteristics in the case of material principles. Their object of optimization is of
material character, e.g. freedom of speech, protection of the honor and reputation of a
person, etc. There exist, however, also principles who have a formal object of
optimization, e.g. unfettered majority decisional power, control exercised by a
constitutional court, etc. Here, I focus on formal principles.

In the present context, the legal possibilities for optimization matter, and these are
defined by competing principles in a situation of conflict. Competing principles pull in
different directions, and the correct route of conduct has to be determined by balancing, according to the specific weights these principles have in a given case.\textsuperscript{23}

We can reconstruct the problem of judicial review very well with the help of these analytical tools from principles theory.\textsuperscript{24} Many constitutions do not only contain several fundamental rights qua material principles that compete with each other. They also contain several competences qua formal principles that likewise compete with each other. Many constitutions strive at protecting the competence of the democratically elected legislature. They also, however, aim at protecting fundamental rights by establishing a control-competence exercised by courts. In the exercise of judicial review, both competences compete. They cannot both be fully realized. They must, however, both be realized to the greatest extent possible, qua optimization requirements. The solution to the institutional problem of judicial review, therefore, lies in balancing the competing formal principles in order to determine which competence ought to gain preference in a given case.\textsuperscript{25}

The core of this solution is the idea of a practical concordance of competences. The idea of practical concordance had been developed by Konrad Hesse as a means to solve conflicts between fundamental rights.\textsuperscript{26} It is nowadays the prime notion in German constitutional doctrine on rights conflicts. The core of Hesse’s highly influential idea is that when fundamental rights compete with each other in a situation of conflict, as they frequently do, neither of those rights has to give way completely. Rather, they must be correlated to each other in such a way that both of them gain reality. In other words, both rights need to be limited to a certain extent so that both attain optimal effectiveness as far as possible.\textsuperscript{27}

I have transferred Hesse’s idea from the substantial level of fundamental rights to the institutional level of legal authority and competence.\textsuperscript{28} The theory of institutional practical concordance allows for distinguishing and determining different degrees of legal authority in a spectrum of institutional powers. It stands in sharp contrast to theories that acknowledge only two possible relationships between different legal authorities, namely either cooperation or friction.\textsuperscript{29} The theory of institutional practical concordance provides a middle way between these two extreme views. Furthermore, it is dynamic in two important respects.\textsuperscript{30} First, it allows for a shift in the relative powers, according to the particular circumstances of the case. Second, it allows for the institutional balance between the competing competences of the legislature and the courts to change over time.

3 Agreements

Many of the aforementioned elements of my theory seem to match quite well with Kyritsis’ theory of judicial review. I concur with numerous points he makes in his book, e.g. with his critical stance\textsuperscript{31} towards fashionable ‘dialogue’ theories that downplay actions of institutional authority to mere ‘conversations’. I will, however, only discuss here those points of agreement between us that relate specifically to the idea of institutional balance in judicial review.

First, Kyritsis invokes two types of moral consideration, relating to the content of basic rights and to institutional design. My theory refers to them as material and formal principles respectively. Just like Kyritsis, the theory of institutional practical concordance
also insists on distinguishing a material and a formal level of constitutional theory. This
closeness between our theories is confirmed by the examples Kyritsis lists as second-
order considerations: the makeup of the institutions; the processes they followed in
producing their decisions; separation of powers; checks and balances among the different
legal authorities. All these considerations are formal principles, or at least factors that
matter for determining the concrete weight of a competence. For example, both the
makeup of an institution and the processes it followed in producing its decision
determine the quality of that decision. The better the quality of a primary decision is, the
higher weight carries the primary decision in a given case. As I have demonstrated
elsewhere, the legislative process producing a statute can display either very thorough
engagement with the subject matter, bringing together abundant expertise, or a rather
superficial and hurried handling. In the former case, the weight of the competence of
the legislature to decide the matter will be considered as high, all other factors being
equal, so that judicial review may only be exercised with great restraint. In the latter
case, in contrast, the importance of exercising control by judicial review increases.

These considerations lead to a second agreement between our theories. They
demonstrate that judicial review under the theory of institutional practical concordance
is not a matter of either-or, but a matter of degree. The problem of judicial review is not
whether the legislature should determine the scope of protection of fundamental rights,
or, alternatively, whether this is the task of the judiciary. The problem is rather how both
competences combine and interact constitutionally with each other. This matches highly
with Kyritsis’ position that the legitimacy of judicial review should not be judged in an all
or nothing fashion, but rather ‘on a case-by-case basis’. Furthermore, my theory’s
approach to distinguish degrees of review and to determine the correct degree within a
spectrum resonates decidedly well with Kyritsis’ aim to justify a middle way between the
two extreme positions of enthusiasts and sceptics.

The third point on which our theories coincide concerns the role of balancing in
determining a legitimate model of judicial review. Kyritsis stresses that a balancing
between fundamental rights and institutional design was necessary and that this
balancing would allow to determine ‘under what conditions’ judicial review was legitimate.
This precisely is the point that the theory of practical concordance of competences claims to enlighten, by providing a detailed account of this balancing
mechanism that spells out its operations details. One of the most important points of
principles theory is that there is no possibility to determine unconditional preference
relations between the competing principles, which would settle the preference generally,
abstractly, and finally. Rather, the outcome of a balancing of principles will always be
dependent upon the legal and factual circumstances of concrete cases, and hence only
conditional preference relation can be determined. Anyone who talks, like Kyritsis, of
conditional rather than unconditional preference relations between constitutional
principles has joined the camp of principles theory. So our two theories concur well in
that they both deny the possibility of determining unconditional preferences among the
competences of legislatures and courts.

Fourth, while Kyritsis acknowledges that judges argue by reference to moral insights on
the scope of rights, he also underlines the limiting framework of their institutional role. This account echoes the special case thesis that I also endorse in my theory of
institutional practical concordance. The special case thesis holds that legal argumentation is an instance of moral reasoning, but that it is bound to the context and
frame of a concrete legal system. The latter provides limitations to moral discourse by means of statutes, precedents, legal doctrine, etc. It is this second part of the special case thesis that is relevant here. If it is true that the argumentation of constitutional courts exercising judicial review is legal argumentation, then constitutional argumentation is subject to the special case thesis. This is so, in particular, with respect to the so-called external justification in balancing constitutional principles.

This is my list of points of agreement between our two theories. To be sure, agreement is a bidirectional process, so I am curious to learn whether Kyritsis from his perspective also accepts these points in his reply.

4 Differences and problems

Without any inclination to downplay the significant quality of our agreements, I would like to invite attention to some problems I have with parts of Kyritsis’ account, and thereby I mean to note certain differences between our theories. I would like to mention four minor differences between our theories in this section (4.1-4.4) and a major difficulty I have with Kyritsis’ account of judicial review in the next section (5).

4.1 Proportionality

Kyritsis touches upon proportionality in a rather brief section in his eighth chapter. In particular, he raises ‘deeply sceptical’ concerns about the ‘consequentialist undertones’ of proportionality analysis, citing and thereby presumably following Tsakyrakis’ criticism. However, as I have demonstrated elsewhere, proportionality analysis by no means implies a crude utilitarian and consequentialist moral theory, and I would regret if Kyritsis should have signed this frequent misunderstanding of proportionality analysis employed by Tsakyrakis. Proportionality analysis must be linked to and supplemented with both a theory of legal argumentation and a theory of moral values. Proportionality analysis carries always a ‘moral infection’. Proportionality cannot avoid moral reasoning altogether. Rather, moral reasoning is a necessary component of rights adjudication. As I have laid down elsewhere, this ‘moral infection’ follows from two different elements: the special case thesis and the distinction between internal and external justification. According to the special case thesis, legal argumentation is a special case of general practical argumentation. In the case of proportionality analysis, the evaluation of degrees of satisfaction and non-satisfaction of the competing principles will always depend on substantial, contested moral considerations. The internal formal structure of proportionality is indeed neutral towards morality. But any application of this internal structure depends on theoretically informed practical reasoning provided from outside. This is the so-called external justification that feeds into the internal structure of proportionality. Internal and external justification must always complement each other, and taken together they demonstrate that proportionality analysis cannot offer the relief of being detached from moral discourse. I have characterized proportionality by a relation of inheritance between the premises and the conclusion. The outcome of proportionality analysis necessarily inherits all unreliabilities of those substantial, moral, political, contested propositions used in externally justifying the premises used. It is precisely one of the main benefits proportionality analysis provides that it brings to open daylight the need to morally justify the premises used in determining the aims and means
as well as their relations of suitability, necessity, and proportionality in the narrower sense.

25 Despite this moral infection, and this is the point I would like to draw Kyritsis’ attention to, proportionality does not automatically come with a specific moral theory, like, e.g., utilitarianism. Rather, it is open to be supplemented by all sorts of moral theories. Proportionality is ‘a formal structure that essentially depends on premises provided from outside’.°°°° In other words, the moral considerations used to justify the premises in proportionality analysis, most notably the assignment of abstract and concrete weights to the competing principles at the balancing stage, have to be justified by arguments which are separate to and independent of proportionality per se.°°°° These arguments are fed into proportionality’s formal structure from the outside; they are not specifically proportionality-arguments. They are used in proportionality analysis, but they originate from elsewhere.°°°° External justification is not specific to proportionality analysis, but an entirely different battlefield on which proportionality as such has no stakes. My point here is, in the light of Kyritsis’ sceptical remark on consequentialism, proportionality is not linked to consequentialist thought any more than to any other moral theory.

26 To be sure, proportionality analysis does not figure prominently in Kyritsis’ book. This is somewhat unfortunate since a proper understanding of proportionality analysis helps enormously in solving many of the problems critical voices ascribe to judicial review. Many of the issues engaged by Kyritsis, e.g. the notion of deference or the different degrees of the review intensity, are the bread and butter of proportionality analysis. Principles theory has developed proportionality as a form of legal argument in constitutional rights reasoning to a much more elaborated complexity than parts of the critical literature realize.°°°° In fact, this theory offers a detailed theory of various types of deference, and it thus supports the very point Kyritsis°°°° convincingly makes in his chapter eight, namely that nothing in the logic of constitutional rights precludes deference – a point which I could not concur more with.

4.2 The separation of powers

27 A second minor difference between Kyritsis’ account and my own theory relates to the status of the separation of powers. Right at the beginning of his book, Kyritsis introduces the principle of separation of powers as the main device for solving the problem of the legitimacy of judicial review. He characterizes the separation of powers as ‘an overarching principle of political morality’ which guides the relation between courts and the legislature in their ‘joint project’ of protecting our rights.°°°° I have doubts about the term ‘overarching’. If this were so, then the balancing between the various considerations determining the legitimacy of judicial review would, so to speak, happen within the one super criterion of separation of powers. I doubt whether all factors relevant for the legitimacy of judicial review could be characterized as sub-aspects of the separation of powers. If, however, the separation of powers is only one of the competing principles and if it is in tension with other principles, it can hardly be assigned the status of an overarching super criterion.

28 It seems more plausible to argue that the balancing procedure relevant for determining the legitimacy of judicial review entails considerations of both the formal and the material aspects of the rule of law. The separation of powers, however, is related to the formal aspect of the rule of law only. It follows that it is the rule of dual-natured law°°°° in
its entirety, rather than the separation of powers, which invites itself as the ‘overarching’
principle Kyritsis is looking for. The separation of powers alone will not do the trick.

4.3 Discourse and judicial review

The third minor difference between our theories lies, arguably, in the appreciation given
to the discursive elements of judicial review. Kyritsis aptly describes the tension between
first-order and second-order considerations as well as the challenge to embrace both
types of considerations in a full-blown theory of judicial review. I concur to both these
points. I also concur to his argument that fashionable ‘dialogue’ theories underplay the
authoritative, competence-related side of judicial review. Kyritsis very convincingly
stresses that ‘dialogue’ theories lack the normative resources to account for limits of
judicial review.58

Two remarks, however, are appropriate. First, one wonders whether Kyritsis makes the
opposite mistake, by downplaying the discursive element of judicial review and laying too
much stress on its institutional dimension. This worry is warranted by his remarks that
the discursive potential to improve public deliberation was merely a ‘valuable side-effect’
and that constitutional review was ‘primarily “power-oriented”’.59 In contrast to these
remarks, I would like to underline that the discursive potential to improve public
deliberation is one of the main effects of constitutional review. In my view, the power-
oriented and the discourse-oriented dimensions of constitutional review carry the same
abstract weight. I would like to underline that it is as much a mistake to emphasize the
authoritative dimension of constitutional adjudication at the expense of its discursive
dimension as it is a mistake to shift the weights of these two dimensions the other way
round. I only find, however, the latter mistake accounted for in Kyritsis’ book.60

Second, it cannot be stressed enough that the criticism Kyritsis rightfully raises against
‘dialogue’ theories do not affect discourse theory of the Habermas-Alexy type. The latter
theory does account for the institutional dimension of constitutional review.61 The fact
that causes me stressing this point is the use Kyritsis makes of the label ‘discursive’ in the
course of his criticism of dialogic theories. ‘Discourse’ and ‘dialogue’ represent two
entirely different schools of thought, and the former is not affected by Kyritsis’ rightful
criticism of the latter.

4.4 Weak or strong or none?

In terms of constitutional design, a twofold normative question arises: Should a legal
system provide for judicial review at all? And if this question is answered in the
affirmative: Should the degree of scrutiny exercised by the court be weak or strong? I do
not wish to engage in these problems here. Rather, I would like to comment on the
character of these questions. Political morality, according to Kyritsis, decides upon
whether to provide for judicial review at all and if so, what degree of review is legitimate.
He stresses right at the beginning that his theory ‘does not prescribe constitutional
review as a necessary feature of legitimate political orders’ and that it ‘merely seeks to
add constitutional review to the menu of options’.62 In a similar vein, he stresses that he
does ‘not seek to give a normative argument’ for either weak or strong review because
this was a matter of ‘institutional choice’.63 In short, according to Kyritsis, these questions
are of political, rather than legal character.
I find this position a peculiar abdication of constitutional theory as a legal discipline, at least as far as the choice between different degrees of scrutiny is concerned. In contrast to Kyritsis, I would like to stress that from the perspective of the theory of practical institutional concordance, the competing formal principles as well the relevant factors determining their concrete weight are of legal character, rather than merely principles of political morality. After all, the whole bunch of aspects elaborated on in Kyritsis book are not merely pieces of political prudence. Rather, they are binding constitutional norms: separation of powers, subsidiarity, substantive principles and fundamental rights, democracy, and so on. Handing the problem of judicial review over to political morality does not utilize well the capacities of constitutional law to provide for legal certainty and the legal constraint of power.

A second worry I have with Kyritsis’ account of determining the correct degree of scrutiny is that it seems to be overly strict and too abstract. Once the political choice for a particular system of judicial review has been made by the constitutional designers, the degree of scrutiny is fixed once and for all within a legal system. In sharp contrast to such a system-wide choice, the theory of practical concordance allows for flexible degrees of scrutiny also within a particular system. The balancing of competences is sensitive to the specific circumstances of concrete cases or, at least, groups of cases. That way, once a system provides for judicial review at all, the full range of scrutiny is in principle available to the courts. The courts must of course justify their choice of a particular degree of control intensity in a particular case by a formal balancing. Such a flexible, yet legally (rather than politically) structured account of the correct intensity of control is preferable to a system-wide settlement because it allows better for case-sensitive judgements. Kyritsis’ idea that some choice between a range of options is required is going down the correct path. Nevertheless, he should allow for the last step and provide for choices being made within a system.

5 Combination model versus separation model

The problem of adopting either a combination model or a separation model concerns, in Kyritsis’ terms, the relation between first-order and second-order considerations or, in principles theoretical terms, the relation between material and formal principles. It does Kyritsis great credit that he is one of the very few scholars outside principles theory who have to date addressed this topic in more than superficial extent. In fact, much of what he writes reminds one of the debates among principles theory scholars which started with the famous exchange between Trevor Allan and Robert Alexy. I will first summarize Kyritsis’ consideration of the subject. I will then recollect the Alexy-Allan-debate and lastly engage in some further thoughts.

Kyritsis stresses at various instances throughout his book that his theory of judicial review does not only allow for balancing first-order and second-order consideration against each other; rather, his theory demands such balancing. Mainly in his chapters seven and eight he discusses the point I would like to elaborate on now. It concerns the problem whether a direct balancing of material and formal principles is at all possible.

Kyritsis appears to adopt the view that such a direct balancing was possible. Directly subsequent to stressing that his account of legitimate judicial review combines substantial rights considerations with sensitivity to authority, Kyritsis stresses that
considerations of institutional design may actually ‘relax the grip’ of deontological constraints which stem from substantial moral rights. In result, the substantive content of constitutional rights may fall short of moral rights’ content precisely for reasons of institutional design:

[I]nstitutional considerations such as the need for coordination or expertise may have a bearing on the content of constitutional rights [...] the judge must assign normative weight to inputs that are morally sub-optimal.

The main argument, however, against such direct balancing between formal and material principles is the argument from incommensurability. Waldron argued that balancing formal and material sources of legitimacy was constituting a ‘category-mistake’. In the same vein, Allan claimed that formal considerations of institutional design were ‘external’ to justice-related rights reasoning and that both operated ‘on different scales of assessment’. Kyritsis is not convinced by these objections, and nor am I. Commensurability is, generally, not a precondition for balancing, but its outcome. It is the very point of balancing to make the competing principles commensurable, even if this task – left to us by the fact that the constitution entails both material and formal principles – is a difficult one.

There is, however, a variant of the objection from incommensurability that is worth considering further. It figured prominently in the Alexy-Allan-debate. Alexy had, originally, adopted a view quite similar to Kyritsis’ position, allowing for a direct balancing between formal and material principles. We call this the combination model, because both types of principles are combined in the same balancing exercise. The combination model was already present in Dworkin’s early work. Dworkin called formal principles ‘conservative principles’ and material principles ‘substantive principles’. A main problem of the combination model, however, is to explain from a substantive perspective why it should be morally justified to deviate from the substantive requirements of rights merely for the reason that some authority thinks such deviation suitable or appropriate. Constitutional rights, after all, will lose their binding power upon exactly those authorities in that way. This problem is, presumably, the reason why Alexy later stressed that procedural principles could override substantive rights only in connection with other substantive principles.

Allan, however, objected to this combination model that a formal principle like, e.g., the principle of democracy fostering the authority of parliament, could never justify an infringement with a substantive right which is substantively unjustified. Alexy, in his response, conceded this point and offered a further argument against the combination model. He concluded that formal principles could not ‘directly’ participate in the balancing of substantive principles.

With these considerations, the combination model is under attack, and it seems to me that Kyritsis could expand his response to these challenges, given that there is an alternative to a combination model, namely a separation model. The separation model strictly distinguishes the substantive level of constitutional rights from the formal level of power and authority. In the separation model, the balancing which determines the legitimacy of judicial review does not occur directly between formal and material principles, but between formal principles exclusively. The separation model, therefore, is not affected by Allan’s criticism. As far as the balancing between material principles, e.g., competing human rights, is concerned, the separation model keeps this balancing free of any considerations of competence conflict. This is preferable to the combination model.
since any state authority is bound to the substance of constitutional rights. This bonding was compromised if considerations of competence were intertwined with the material balancing, as the combination model claims. Rivers has rightfully stressed the ‘logical gap between what a legislature does when it seeks to set proportionate limits to rights and what a court does when it reviews that legislation’. Aspects of the latter are generally irrelevant for the former. In the separation model, the solution to the conflict inherent in judicial review, namely the conflict between the competences of the legislature to decide and the competence of the court to control, is settled on the formal level, by balancing formal principles.

Both models have to meet the challenge of explaining in detail how exactly the balancing operates. The separation model has already presented some of these operational details, including the law of formal balancing, the formal weight formula, and the list of factors relevant to the external justification of the concrete weights of the competing competences. It seems to me that, in contrast, the combination model is not yet fully developed as to the operational details regarding the alleged balancing between material and formal principles. I would like to submit that my own theory supplies the operational details of balancing competences in judicial review, and it thereby provides answers to questions which Kyritsis leaves open. With an eye on the list of agreements between our theories, this invites the thesis that our theories stand in a supplementary and mutually reinforcing relation to each other.

It would be highly interesting to hear how Kyritsis evaluates the separation model. In particular, its strikes me that Kyritsis – although being a proponent of the combination model, if my interpretation is correct – seems to defend the separation model in the course of his engagement with the position Allan has taken in more recent work. Addressing Allan’s recent writings, Kyritsis first reports that Allan now seemed to acknowledge the ‘interplay between considerations of institutional design and content’ and an ‘internal’ stance of deference in judicial rights reasoning. This new position of Allan, if reported correctly by Kyritsis – a question that I will not address here –, sounds very much like the old combination model, integrating first-level and second-level elements in one single reasoning, rather than in separate levels of deliberation. My point is that, when Kyritsis, on the next page, moves on to criticize Allan’s new position, he seems to be arguing in favor of a separation model: Kyritsis demands to uphold Dworkin’s distinction between background rights and institutionalized rights. Kyritsis’ criticism here necessary disentangles material background rights considerations from considerations of institutional design and competence. If Kyritsis were inclined to further develop this line of thought maintained in his answer to Allan, he would presumably have to give up or at least clarify some of his statements that point towards the combination model. He would, however, gain the possibility to connect this own theory to the separation model in a beneficial way. The separation model could provide the operational details for spelling out how the main lines of Kyritsis’ theory actually determine both the fundamentals and limits of judicial review as a legitimate means to protect the rights we have. I acknowledge, though, that Kyritsis’ position in this regard perplexes me slightly since he seems to oscillate between the combination model and the separation model. At the end of this answer to Allan, he goes back to acknowledging the difficulties to disentangle the two levels, at least in the context of particular cases. This is why I would appreciate to hear more from Kyritsis on the choice between a combination and a separation model.
6 Conclusion

Dimitrios Kyritsis has provided us with a marvelously interesting theory of the legitimacy of judicial review. In this paper, I have juxtaposed my own theory of institutional practical concordance to Kyritsis’ account. After briefly summarizing Kyritsis’ theory, as far as it addresses the legitimacy of judicial review specifically, I laid down some basic elements of my own theory of institutional practical concordance that can be applied to the problem of judicial review. This allowed for collecting some agreements between our theories. We both, first, distinguish between a material and a formal level of constitutional theory, between the content of basic rights and questions of institutional design. Second, we both aim at developing a middle way between the two extreme positions of judicial review enthusiasts and sceptics. We both reconstruct judicial review as a matter of degree, rather than in an either-or-fashion. Third, our theories concur in employing some notion of balancing in order to determine under what conditions judicial review is legitimate. Fourth, we both accept special case thesis; we acknowledge that rights adjudication takes reference to moral insights while still being limited by an institutional framework. I have then listed four minor differences between our approaches. They regard the relation between the proportionality test and moral argument, the status of the separation of powers as a super-criterion or as one constitutional principle among others, the role of discourse in judicial review, and the spectrum of various control intensities. The most important difference between our theories lies in our divergent answers to the question of how to reconstruct the relation between material and formal elements of our constitutions, in other words, in the choice between a combination model or a separation model. After explaining these two models with the help of an earlier debate between Alexy and Allan, I have demonstrated why I think that Kyritsis maintains the combination model, but sometimes also flirts with the separation model. I conclude by cherishing this opportunity to develop a precise picture of where we accord and where we disagree, inviting further fruitful discussion between us. After all, it is our mutual project to spell out the details of where our protection lies.

BIBLIOGRAPHY


NOTES

13. Klatt 2015a; this paper is based on a major German monograph, my habilitation thesis, Klatt 2014b.
15. See, in particular, my concluding remark in Klatt 2015b: 382.
18. Note that the concept of principle employed here is different from Dworkin's concept of principle.
25. For details of this balancing operation, see Klatt 2015b: 364-376.
27. For a brief overview on Hesse's idea, see Marauhn & Ruppel 2008.
30. For a similar approach cf Fritzsche 2010: 386.
31. The title of Kyritsis chapter 5 tells its own tale: 'A Little Less Conversation, a Little More Action'.
33. On factors for determining the concrete weight of a competence, see Klatt 2015b: 367-373, 2014b: 222-244.
35. Or, indeed, anything between those poles.
57. On formal and material elements in the 'rule of dual-natured law', see Klatt 2016: 29-30.
61. See, e.g., Klatt 2015b.
ABSTRACTS

Dimitrios Kyritsis has provided us with a marvelously interesting theory of the legitimacy of judicial review. In this paper, I juxtapose my own theory of judicial review to Kyritsis’ account in order to develop a precise picture of where we accord and where we disagree, thus providing a basis for further fruitful discussion between us. I briefly summarize Kyritsis’ theory, limiting my summary to those parts which are relevant for my discussion. I then lay down my own theory of institutional practical concordance that can be applied to the problem of judicial review. The third section collects some common ground between our theories, while the fourth section briefly lists a couple of rather minor differences and problems. In the fifth section, I engage in
what I think is the most important difference between our theories, namely the choice between a combination model or a separation model.

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Keywords: judicial review, competence, balancing, formal principles, separation of powers

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