Revus
Journal for Constitutional Theory and Philosophy of Law / Revija za ustavno teorijo in filozofijo prava

in print | 2019
(- Already online -)

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Electronic version
URL: http://journals.openedition.org/revus/5146
DOI: 10.4000/revus.5146
ISSN: 1855-7112

Publisher
Klub Revus

Electronic reference
Donald Bello Hutt, « **POLITICAL REPRESENTATION AS A REGULATIVE IDEAL** », *Revus* [Online], in print | 2019, Online since 22 April 2019, connection on 23 April 2019. URL : http://journals.openedition.org/revus/5146 ; DOI : 10.4000/revus.5146

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1 Introduction

1 In his *Where our Protection Lies: Separation of Powers and Constitutional Review*, Dimitrios Kyritsis rebuffs sceptical accounts of constitutional review. More precisely, he rejects what he calls "the democratic objection". That is, the thesis that considers constitutional review illegitimate because given the nature of representative institutions, endowing judges with the power to strike down legislation fails to respect a principle of political equality engrained in majoritarian democratic procedures. He challenges what he takes to be a crucial assumption of this claim, namely the *equation* of democratically elected legislatures with the people conceived of as a self-governed collective. This assumption, claims he, "is false. Despite their indubitable democratic credentials, legislatures in the legal system with which we are most familiar ought not to be regarded as expressing the voice of the 'People'".[1]

2 These pages critique Kyritsis' portrayal of the democratic objection and the support for constitutional review he derives from its rejection.[2] I argue that his discussion of the concept of political representation fails to account for the role of legislatures and judiciaries qua participants of a representative political system. Kyritsis neglects that the *trustee* and the *proxy* models of political representation are *regulative ideals*. Instead, his rejection of the democratic objection proceeds on the basis that these categories are rationalisations of political practices.

3 I proceed by first describing Kyritsis' portrayal of the democratic objection (section 2). I then criticise such depiction by showing that Kyritsis' use of the "trustee" and "proxy" models of political representation mistakenly depicts these categories as instances of rationalisations of actual political practices, rather than as regulative ideals (section 3). I then offer some reflections on how my reading of the proxy/trustee divide and its

elements as regulative ideals count against Kyritsis' support for judicial constitutional review (section 4). I first show that even if we accept Kyritsis' discussion of political representation, it remains unclear whether we are in the position to reject the democratic objection and to justify judicial constitutional review (subsection 4.1). I then argue that my characterisation of political representation as a regulative ideal warrants a more substantive conception of political representation than the one advocated for by Kyritsis. Such a conception is inspired by Nadia Urbinati's idea of representation as advocacy. I finish by taking stock of the preceding sections (section 5).

2 The democratic objection

> [C]onstitutional review sceptics ... take issue primarily with the power of judges to strike down democratically reached decisions, which they find in contravention of the abstract moral principles enshrined in the constitution. They argue that this type of judicial oversight is an affront to democracy, however popular it may have proved in the real world and regardless of its contingent beneficial consequences. In other words, they claim, we can accept constitutional review only at a substantial cost to democracy and thus, *ceteris paribus*, to the legitimacy of the legal order. Let's call the sceptics' argument the democratic objection.[3]

4 Constitutional review sceptics endorse different forms of this objection. Kyritsis takes issue with one of them, namely the one advanced by Waldron and Bellamy, who base their respective versions of the objection on the nature of legislatures and courts. He attributes both scholars with sharing the idea that "[b]efore we decide whether we must have judges supervise the legislature, we must first try to understand what is the point of having legislatures decide anything".[4]

5 Waldron argues that in the face of the disagreements characteristic of societies affected by the circumstances of politics,[5] majority-vote incarnates the due consideration and respect that decision-making procedures ought to have for the individuals affected by their outcomes. Confronted with the question of which systems of government best instantiate such ideals, Waldron champions systems of legislative supremacy. Majoritarian procedures of the kind employed in legislatives representative settings instantiate a moral principle of equal respect that is lost when the final word in the determination of what counts as constitutional is given to a countermajoritarian body such as the judiciary.[6]

6 Bellamy adds a further layer. In his view, judicial review impinges upon the freedom of individuals understood as non-domination.[7] To the extent that the terms and regulations of the shared life of citizens are removed from majoritarian decision-making bodies and entrusted instead to countermajoritarian institutions, citizens suffer a loss in their freedom as non-domination inasmuch as they would find themselves living under the potential arbitrary exercise of the will of another, i.e., judges.[8]

7 Kyritsis challenges what he takes to be a crucial assumption of these claims, "namely the *equation* of democratically elected legislatures with the people conceived of as a self-governed collective".[9] This assumption, he affirms, is false; "legislatures in the legal systems with which we are most familiar ought not to be regarded as expressing the voice of the 'People'".[10] For Kyritsis, it thus follows that

> [s]ystems of constitutional review are not morally inferior to systems of legislative supremacy from the get-go. At least not for the reasons that Waldron and Bellamy put forward. The political societies with which we are most familiar are confident

> to entrust the common good to the independent judgment of public officials, some elected, some unelected.[11]

8 Against this, one could insist that even if we bought into the preceding quote, it would remain true that "judges will rely on their substantive views of the merits of a certain decision". But Kyritsis' reply is straightforward: "[O]f course, but so does everyone else".[12]

9 Underpinning Kyritsis' conclusion is a reliance on a particular understanding of political representation and its institutional incarnation, namely that the fact that legislatures "'represent' the people in the sense that they speak in their name [does not] ... get us far".[13] Under his perspective, the democratic objection makes sense to the extent that "proxy" models of representation obtain, that they best capture the substance and procedures of political representation. Instead, Kyritsis aims at convincing us that "trustee" models "more accurately [reflect] certain fixed points of the practice of political representation as we know it. In other words, [that] [they] better capture *our* conception of representation".[14] Legislators are, in his opinion, "best viewed as trustees of citizens rather than as their proxies".[15] Hence, there is no substantive difference between legislatures and other decision-making bodies in terms of the equality of respect that institutions ought to show for individuals. Both representative and countermajoritarian institutions make much room for judgement that is independent from the judgement of citizens affected by their decisions.

3 Models of political representation as regulative ideals

10 Kyritsis' use of the "trustee" and "proxy" models of political representation misses the fact that both categories are regulative ideals rather than rationalisations of institutional practices. The distance between representatives and those they represent to which Kyritsis refers,[16] rests on a misguided understanding of this divide.

11 Kyritsis' discussion struggles with a problem of conceptual accuracy affecting the literature on political representation in general, for although the concern is increasing,[17] conceptual analyses of this notion remain significantly underdeveloped. In Rehfeld's wording,

> [t]here is now a striking lack of precision in the literature on political representation ... Given the prominence of the idea of representation in democratic theory and its resurgence as a research focus in political theory over the last twenty years, the absence of precision is surprising.[18]

12 Kyritsis rightly avers that Waldron falls short of providing an adequate discussion of representation.[19] But this is a *tu quoque*. Unfortunately, Kyritsis' own understanding of political representation is also permeated by conceptual inaccuracy. Although he warns us that he does not intend to capture all aspects of the concept,[20] the disclaimer falls short of justifying why we should buy into his version of political representation at all. After all, he avows that he introduces the "trustee/proxy" distinction "*solely* to draw attention to two different ways of understanding the dependence of representatives on their constituents".[21]

13 In expressing this caveat, however, Kyritsis is making things too easy on himself. One must wonder what else the distinction is for, if not for providing images that best account for our representative institutions and their relationship with those they are supposed to

represent. These are alternative conceptions that – and this is central – both describe *and* provide normative guidance to those institutions and to the practices they engage in; they provide us with evaluative standards. In short, the terms of the distinction are not, and should not be, rationalisations of what happens in real-life; they are better accounted for as regulative ideals.

14 Kyritsis, however, generally employs the distinction in a way that resembles a rationalisation of practices of political representation. That is, he takes some salient features of the operations of legislatures, namely distance and independent judgement, and then tests whether they fit the proxy or trustee models to conclude that both categories recognise that *the people* always have their wills replaced by the wills of those they elect. Thus, he is led to the conclusion that the "trustee" model is a better reflection of what happens in representative institutions — it "stresses the existence of an element of independent judgement in the institutional role of representatives, which the 'proxy' model downplays".[22]

15 Kyritsis thus suggests that the "trustee" model "more accurately reflects certain fixed points *of the practice of political representation*". "In other words", he says, "it better captures our conception of political representation". [23] But the claim that the "trustee" model better captures our conception of political representation is not tantamount to saying that it is the best reflection of our practices, and *vice versa*. The second clause does not say the same as the first "in other words". The first clause emphasises the capacity or suitability of the "trustee" model to accommodate our descriptions of representative governments to what happens when they operate in practice; The second emphasises the capacity of the model to capture our *conceptions* of political representation. The first resembles a rationalisation of the trustee model; the second is more theoretically normative, closer to a *regulative ideal*. Through the chapters I focus on,[24] Kyritsis more consistently refers to the trustee model in the first sense.

16 I am certainly not charging Kyritsis with all the vices intrinsic to rationalisations – I am using the word in a much less theoretically-laden fashion.[25] My point is a limited one, to wit, that we should not account for our models of political representation as if they were descriptions of our political practices so that we may then derive consequences for institutional design. We should not, that is, look at our practices, describe them, and then formulate our political concepts merely on the basis of those descriptions. *Qua* political concept, this applies to representation as well. Rather, in building up our models, we should rationally reconstruct the practices we have in front of us, according to their best possible version in *normative* terms. It would, otherwise, make little sense to engage in a theoretical exercise of abstraction in the first place – a problem faced by the political realist claim that the trustee model "more accurately reflects certain fixed points of the practice of political representation".[26] Political realism is too a theorisation of the practices we aim at scrutinising. It is a not an *external* perspective of the world, as it were. As Weber taught us, the process of knowledge in our disciplines is permeated by and necessitated of the subjective perspective of the theorist examining social phenomena.[27] No knowledge is presuppositionless.

17 I here speak of regulative ideals in a Kantian sense, namely as horizons towards which our practices should be directed, even though they "lack the conditions of their objective reality, and nothing is to be found in them but the mere form of thought".[28] This is, in my view, a more charitable way of theorising representation. Practices of representation should be evaluated against the backdrop of theoretical constructions not for the sake of

merely determining their adequacy to some form of objective reality or practice. Rather, we better account for the idea of representation when we examine it against *normative* categories telling us not only whether what we have in front of us is an instance of representation, but whether the practice under scrutiny is closer to or further from the ideal. In doing so, they are performative – instead of merely describing, they compel us or invite us to fulfil the ideal. In Kant's wording, "[e]ven if one were not to grant objective reality (existence) to these ideals, yet they are not therefore to be regarded as chimeras. They provide us, rather, with an indispensable standard of reason".[29]

18 The standard reply available to the political realist is that the chances of achieving the ideal are scarce.[30] But such reply is question begging: the point of a regulative ideal is that its practical feasibility is not a fixed standard by which the normative attractiveness of our practices should be measured. Because regulative ideals are *normative* concepts, their feasibility, or lack thereof, does not cancel, but qualifies the duties, obligations, rights, etc. deriving from it. This is why Kant insisted that realising the ideal – in our case, of representative institutions – in an example

> is unfeasible and has, moreover, something preposterous and not very edifying about it. For in such an attempt the natural limits that continually impair the completeness in the idea make any illusion impossible, and the good itself that lies in the idea is thereby made suspect and similar to a mere invention.[31]

19 Some of the foremost works on the subject attest to the adequacy of accounting for models of political representation as regulative ideals. This perspective, for example, underlies the way in which Pitkin initially discusses descriptive models of representation, of which the proxy model is a species. Those who theorise political representation descriptively are sometimes led "to formulate their ideas in terms of what a representative legislature *should,* by its very nature, be like".[32] Likewise, several authors who Pitkin sees as representative of descriptive theses frame their accounts as regulative ideals. This is the case with John Adams, who thought that the representative legislature "*should* be an exact portrait in miniature, of the people at large, as it *should* think, feel, reason and act like them".[33] It is also the case with James Wilson's contention that "the legislature *ought to* be the most exact transcript of the whole society ... the faithful echo of the voices of the people".[34]

20 It is unlikely that these authors were claiming that representative bodies *factually* reflect the will and preferences of their constituents. And yet, this is the assumption underpinning Kyritsis' attempt to diffuse the democratic objection. Even those archetypes of representation that Pitkin calls descriptive are also normative models attempting to produce political institutions that resemble as much as possible the body politic the system is supposed to govern. But the roles we ascribe to political institutions, whether reflecting the interests, preferences, and wishes of a constituency or producing independent judgments á la Burke, are *standards*, not the resulting description of a practice that is *already there*. The relevant question for distinguishing between proxy and trustee models is not so much "are our representatives doing exactly what their citizens want, prefer, or think?", but "does our account more accurately reflect the relevant patterns of the practice *and* its normative desiderata?" The first question is almost a non-starter, for no one would reasonably argue that proxy models exist somewhere – no legislator or judge is capable of reproducing the exact portrait of the society in whose governance she is collaborating. Kyritsis is only superfluously right in this regard when

he avows that independent judgement is always present in any decision-making procedure with delegations of some sort.

21 The second sort of question, which puts the emphasis not only in practice, but in normative aspects, is more interesting. It compels us to ask whether our institutions *should ideally* reflect *as much as possible* the constituency they are mandated to represent, or whether their accountability is instead measured by the quality of the outcomes they reach. This is important: this way of framing the question preserves the problem of distance as something valuable to assess a system as more or less representative. This is, unfortunately, what Kyritsis downplays.

22 This admittedly limited critique does not amount to a full rejection of Kyritsis' argument in his book – far from it. However, I think it does raise an important question for the purposes of solving the problem of the legitimacy of judicial review of legislation. The question is this: to the extent that the choice between proxy and trustee models of political representation does not essentially fall upon determining how actual practices operate but rather on how one would warrantedly want institutions to function with regard to the preferences and arguments of citizens, which institutional arrangement is better suited to track these preferences and arguments not only as a matter of practice, but also as a matter of principle?

4 Consequences for the warrantedness of constitutional review

23 Kyritsis' rejection of the democratic objection proceeds on the assumption that there is some value in the ways in which Waldron and Bellamy talk of majority rule. Nonetheless, he asks: even if, *arguendo,* this was the case, "does it make any difference in the debate concerning the legitimacy of constitutional review?"[35] He answers in the negative. As I have argued in the preceding section, the reason is because of the fact that Waldron and Bellamy sidestepped an analysis of the concept of representation that would prove that the democratic objection underestimates an inescapable distance between represented and representatives. He thus concludes that the views of representatives

> no less than those of judges, are accorded, to use Waldron's terminology, 'superior voting weight'. [Hence] ... if we have no problem in the abstract with this arrangement, we should not have a problem in the abstract with a system of constitutional review of legislation either (not for this reason anyway).[36]

24 But, as I have suggested, although Kyritis is correct in pointing at the rather superficial way in which Waldron and Bellamy discuss political representation, he does not fare any better in this regard. The relative superior voting weight that legislatures and judges are accorded within actual institutional arrangements is not *per se* a reason for theorising political representation in any specific way – it merely says that this is "the way things are", as it were. This failure to see the regulative nature of conceptions of political representation has negative consequences for the justifiability of judicial review.

25 In this section I perform a twofold analysis of some of those consequences. The first part will buy into Kyritsis' argument and claim that even under his assumptions, it is still not clear that there are enough grounds to reject the democratic objection and for the subsequent justification of constitutional review by judges. The second subsection argues that understanding political representation as a regulative ideal is conducive to a more

substantive conception of the trustee model than the one endorsed by Kyritsis. This conception, redolent of Urbinati's idea of representation as advocacy, takes the problem of distance as a given, but interprets it in a way that sees independent judgement as a characteristic and desirable feature of representative institutions. Such a feature is not only an observation of what happens in reality, but a normatively desirable trait of the practice of political representation by elected institutions. Yet, because of this limitation to elected institutions, the argument falls short of justifying constitutional review by the judiciary.

4.1 Constitutional review under Kyritsis' conception of political representation

26 I have hitherto been critical of Kyritsis' portrayal of the trustee model for not noticing its nature as a regulative ideal. Yet, Kyritsis is right that the leeway in judgement given to representatives is inescapable. Let us grant, *arguendo,* that given such inescapability, the trustee model is the best available conception of political representation, inasmuch as it reflects the unavoidable distance between citizens and their rulers. Does this count in favour of judicial review of legislation? No, it does not. The reason is that whereas the independent judgements, reasonings, and decisions of elected representatives are to be ascribed to citizens as if these were their own actions, this is not the case with constitutional judges, whose task is not, or put more charitably, is not best accounted for, as a representative one.

27 Some scholars, however, have argued that judges indeed perform representative functions, either by making sure that the representative process works adequately or by safeguarding minority rights.[37] But this is the wrong way to describe judicial functions in these contexts. The tasks of constitutional courts are not best described by saying that judges are part of a representative procedure. The competences given to courts by different constitutions in different countries to perform constitutional review are framed in ways that show that what is expected from these courts is the determination of constitutional meaning, not what the views or the preferences of the citizenry are.[38] These constitutions grant courts the power to safeguard the constitution, not democracy or the representative system.[39] These procedures are countermajoritarian and, thus, hardly representative of the citizens' views. They could not be portrayed as such even under a conception of representation limiting the role of the representatives to s*tand for* the represented.[40] By contrast, constitutional courts *stand against* the views of the majority.[41]

28 The only conception of representation that would give support to an institutional setting in which the represented could have their wills replaced by the representative as a matter of right/principle, is Hobbes'. Hobbes' representative has a special unlimited right and no special obligations "because someone else bears the responsibility for his action".[42] But again, such special right can hardly be described as a right *to represent*. As Pitkin has argued, the Hobbesian conception is inadequate because

> [r]epresenting does not mean merely acting with authority from another. There may be such relationship, but [Hobbes' examples] are not what representation is normally like, and they are not what 'representation' means. Although Hobbes defines it in this way, his own use of the word does not always conform to the definition.[43]

29 In a similar vein, some have argued that courts are fit for going "beyond the arguments [they were] able to collect in [the judicial process] through empathetic imagination of the potential community of interlocutors".[44] Yet, our knowledge about the social gaps between court members and the citizens whose point of view they are to imagine beyond the arguments brought before them – most often, minorities – does not support this conclusion. As I have argued elsewhere,[45] there is no guarantee, no matter how heterogeneous the court is in terms of its composition, that its members will be able to know the preferences, lacks, needs, arguments, etc., of a community that is more diverse than the court can ever be. Even if, *arguendo,* one assumed that this is indeed the role of a court, there is no correlation between the duty we expect judges to fulfil and their actual capacity to do so.[46]

30 Alexy has also pursued a strategy along these lines. He has argued that processes of representation are not limited to those emerging from electoral or majoritarian procedures. Instead, he sees representation as a relation between a a *repraesentandum* and a *repraesentans* that can also be exercised via argumentation. He concedes that generally, judges "have no direct legitimacy and people have, as a whole, no possibility of control by denying them re-election".[47] Yet, in his view, the justification for a representative process also lies in the rationality of the procedures by which correct rules and principles are identified and applied to individuals.[48]

31 But again, I do not see why one would call this 'representation' at all. Alexy himself affirms that it is important that constitutional courts "not only claim that [their] arguments are arguments of the people; a sufficient number of people must, at least in the long run, accept these arguments for reasons of correctness".[49] Although this *ex post* acceptance by the citizenry looks similar to a notion of legitimacy, it is still not representation. As it happens, Pitkin applies this reasoning to the case of a judge who issues an injunction binding on a union. The injunction certainly imputes normative consequences to the union, and "yet we do not say that [the judge] is the union's representative or represents it when he does so".[50] Not every ascription of normative consequences to a third party counts as representation.

32 So, even if one granted Kyritsis that the distance between representative and represented is inescapable and that independent judgement is an ineliminable feature of the represented/representative relationship, he still needs to answer why these are tenets that apply to the relationships between citizens and courts. He needs to show why such a relationship is one of representation.

4.2 A normatively desirable distance

33 Kyritsis is right in pointing out that it is a feature of our polities that decisions are often made in contexts in which decision-makers have ample room for independent judgement. Among other things, this is what makes trustee models attractive – they are recognisable in actual practice.

34 This leads Kyrtisis to reject the democratic objection. But, as I have argued, this is only one part of the question and, in my view, is not the most interesting one. The other part of the question goes as follows: is the trustee model *normatively* attractive? Put differently, is independent judgement a desirable feature, or is it instead something ordinary citizens must simply live with?

35 My take is that independent judgement and the distance between represented and representative is not only something we cannot do without – it is also a normatively desirable feature. To explain why this is the case, I will rely on Urbinati's notion of representation as advocacy. This way of conceiving of representation, which can be largely described as a discursive version of the trustee model, is useful in accounting for political representation as an attractive characteristic of our elected institutions. Constitutional review of legislation by judges, however, is thus not benefited by this reading of representation.

36 Representative assemblies are often seen as a "second best".[51] Our basic intuition when we speak of democratic government is that the ideal is that "the people themselves",[52] not someone else on their behalf, should adopt the decisions binding them as a collective. As Urbinati puts it, "[i]ndirectness has never enjoyed much fortune in democratic theory".[53]

37 This way of underscoring the value of direct participation over representative government is, however, the wrong way of presenting the problem. As recent scholarly literature evinces, representative practices foster a desirable discursive feature in democratic government which purely direct democracy tends to overshadow. Directness more easily puts individuals to decide on the basis of their own interests, not on the basis of other-regarding preferences.[54] Contemporary democratic theory encourages a revision of the idea of representation in ways that allows us to understand that indirectness in politics is not only a necessary evil but, to use Young's words, should be understood "as both necessary and desirable".[55]

38 One version of these developments, which I want to avoid, is the so-called constructivist turn in political representation. I lack the space here to give a full-fledged argument for my reluctance. It is enough to say that, to the extent that constructivist approaches put a premium on the capacity of representatives to create and frame the preferences of their constituents,[56] they tend to neglect that the latter do in fact have preferences and ideas which should and could be taken into account. With this I am not saying that representatives should not have a say in framing preferences; quite the opposite. What I differ with is the idea that representatives should proceed on the basis that those interests and preferences warranting the policies they generate and offer to their represented cannot possibly be known. By contrast, these interests and preferences are the main framework or material from which policies, laws, and so forth, are to emerge.

39 In this context, Urbinati's notion of representation as advocacy is particularly illuminating. She offers an explanation and a justification for the compatibility between representation and deliberative public discourse that sees speech as

> a means of mediation that belongs to all citizens, linking them and separating them at the same time ... It gives meaning to voting, which presumes evaluation and discrimination among articulated opinions... Thus, it is not indirectness per se that distinguishes representative democracy from direct democracy.[57]

40 Rather, what distinguishes these two notions is their lack of simultaneity. Judgement and resolution in modern democracies take place at separate times, but not in disconnection to each other. The nature of that linkage is not personal, but discursive. These means that the fact that there is distance and independent judgment does not entail a disconnection between represented and representative. In this vein, I subscribe to Waldron's interpretation of Urbinati:

> [W]hatever its relevance in other functions of government, the abstraction that representation involves is particularly appropriate for lawmaking, which is a domain in which we are striving to produce abstract norms, abstracts in the sense of general, rather than directives focused on some particular person or situation in the way that a bill of attainder is focused or in the way that a judicial decision might be focused, at least in the first instance.[58]

41 Put in Habermasian terms,[59] the relationship between the formal and the informal public sphere is better accounted for if one abandons the idea that representation is just a practical tool for dealing with scale, space, and time constraints and if one understands the concept as an enabler for deliberation and law-making.

42 The question is, then, what sort of framework would be optimal for assessing the type of conversation that would transmit deliberations taking place in the informal public sphere to democratic institutions, in ways that their deliberations represent individuals not only territorially, but discursively as well.

43 I do not have the time and space here to develop these ideas, which are being increasingly shared by political theorists.[60] I shall instead close by asking what the role of a countermajoritarian non-representative procedure such as judicial review could have in a deliberative representative scheme such as the one sketched here. I have argued elsewhere that deliberation is not a feature we should seek in the judiciary.[61] But there is something to be said in favour of constitutional review when courts are not deemed as superior to the legislature in the determination of what counts as constitutional or not. It seems to me that courts can have a role in triggering discourse and as "warning signs" when representative institutions fail at transferring and translating popular discourses into the formal public sphere.[62] Although limited, there is then room for constitutional review, but not for the reasons Kyritsis wields. Such reviewing does not imply that courts ought to be seen as representative institutions.

5 Conclusions

44 I have discussed some problem areas in which *Where Our Protection Lies*, namely those related with Kyritsis' understanding of political representation and the rejection of the democratic objection he derives from such conception.

45 The version of the democratic objection criticised by Kyritsis rests on a particular understanding of the nature of legislatures and their roles as representatives. In this essay I have argued in favour of the idea that there is something specific about democratic institutions that makes them representative in a relevant sense. This is not the case with courts.

46 From my arguments it follows that the support for constitutional review by unelected judges cannot derive from rejecting the democratic objection on the basis that because independent judgement is always a feature of any institution, one should have no problem with accepting courts making decisions on behalf of the people. I have suggested instead that the acceptance of the distance and the indirectness between the people and their representatives is a reason for preferring elected majoritarian institutions to the extent that we conceptualise models of political representation as regulative ideals. Under these circumstances, the democratic objection is correct in considering majoritarian democratic institutions as better suited to perform representative functions.

47 For all these reasons, Kyritsis' contention that the democratic objection is wrong because the equation of democratic majoritarian institutions with "the people" is false, does not obtain. To the extent that one sees these notions as more than mere reflections of political practice and conceives of them as regulative ideals, one is led to the conclusion that the democratic objection does not miss its target.

-***Acknowledgment***.- *This paper has greatly benefited from comments by two anonymous reviewers.*

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NOTES

1. Kyritsis 2017: 82.
2. This means that, although my argument may have repercussions for different additional arguments advanced in Kyritsis' book, my contentions are limited to the conclusions drawn from his depiction of the democratic objection, particularly chapters 4 and 6 of *Where Our Protection Lies*.
3. Kyritsis 2017: 81.
4. Kyritsis 2017: 82.
5. Waldron 1999: 102.
6. Waldron 2006: 1376 et seq.
7. For definitions of freedom as non-domination, see e.g. Sydney 1698: 17; Pettit 1997: 51-79; Pettit 2012: 7-8; Skinner 1998; Larmore 2001: 229-230; Bello Hutt 2018c: 84.
8. Bellamy 2007.
9. Kyritsis 2017: 82.
10. Kyritsis 2017: 82.
11. Kyritsis 2017: 96.
12. Kyritsis 2017: 97.
13. Kyritsis 2017: 89. I will refer to this in different parts as the "distance" or the "independent judgment" problem.
14. Kyritsis 2017: 92. Emphasis in the original.
15. Kyritsis 2017: 89.
16. Kyritsis 2017: 89.
17. Consider, for example, Urbinati 2000 and Urbinati 2006; Ankersmith 2002; Rummens 2012; Rehfeld 2018.

18. Rehfeld 2018: 4.

19. Kyritsis 2017: 89.

20. Kyritsis 2017: 90.

21. Kyritsis 2017: 90. My emphasis.

22. Kyritsis 2017: 91.

23. Kyritsis 2017: 92.

24. See especially Kyritsis 2017: chs. 4 and 6.

25. Epistemologists are not kind in theorising rationalisation. Schwitzgebel & Ellis (2017: 171), for example, affirm that rationalisations typically result in "epistemically unwarranted degrees of confidence, if not false belief; it obstructs the critical evaluation of one's own reasoning; and it impedes the productive exchange of reasons and ideas among well-meaning interlocutors". This is certainly not the case with Kyritsis' work.

26. Kyritsis 2017: 92.

27. Weber 1949

28. Kant 1996: 560.

29. Kant 1996: 562.

30. I use *realist* in a Schmittian sense, that is, as unconstrained by norms/rules. Not that Kyritsis is a political realist *tout court,* but his conception of political representation (at least in my reading) smacks of political realism. His methodological commitments, as drawn in his notion of a Moralized Constitutional Theory (MCT) are certainly not realists, but they are framed in ways that admit realist interpretations of certain concepts. That is, MTC's (morally) correct answers to concrete questions of constitutional law, admit or at least are compatible with realism; in the case at hand, with how political representation operates in practice.

31. Kant 1996: 562.

32. Pitkin 1967: 60. My emphasis.

33. Adams [1776] 1979. Cited in Pitkin 1967: 60.

34. Wilson [1787]. Cited in Pitkin 1967: 61.

35. Kyritsis 2017: 89.

36. Kyritsis 2017: 89.

37. The foremost example is Ely 1980.

38. Bello Hutt 2018a: 246.

39. See, for example, the constitutions of Chile (Articles 93.1 and 93.4), France (Articles 61, paragraph 1 and 2, and 62 final paragraph), Bolivia (Articles 196 and 202.1), Colombia (Article 241.8 second paragraph).

40. Pitkin 1967: 60-91.

41. As the expression *countermajoritarian* conveys. Yet, some, like Dahl (1967: 155), have argued, in the context of the United States, that the "views of the court will never be out of line for very long with the policy views dominant among ... law-making majorities". Others have insisted that the legislative and the executive branches share with the judiciary a major role in interpreting the constitution, and that judicial rulings rest undisturbed for as long as the first two and the general public do not show opposition to them (Fisher 1988: 244; Kramer 2004: 970). Yet, these considerations ignore the real influence of the judiciary in the political process. Although it may be true that the courts' decisions are relatively streamlined and statistically aligned with other institutions, judges still have the power to nudge matters in one direction or another when public opinion is uncertain or divided. That judges refrain from doing this in practice says nothing about whether the limits that constrain the court and maintain it in alignment with public opinion are democratically imposed by elected institutions, or if they are the result of the court's self – understanding of its institutional role and duty. In Kramer's wording, the determination and definition of where judicial competence ends "is entirely in the court`s own

hands, leaving judges alone to decide where the proper boundary lies between the adjudicated and the unadjudicated constitution" (2005, 1346).

42. Pitkin 1967: 20.

43. Pitkin 1967: 28.

44. Mendes 2013: 135.

45. Bello Hutt 2018b: 1145.

46. Gargarella 1996:181.

47. Alexy 2005: 579.

48. Alexy 2005: 579. In the same vein, see Rosanvallon 2011: 121-168.

49. Alexy 2005: 580.

50. Pitkin 1967: 52.

51. Waldron 2016: 134.

52. Madison 2006.

53. Urbinati 2000: 758.

54. As in the case of economic and pluralist theories of democracy. See Bello Hutt 2018a; Buchanan 1954; Dahl 1967; Downs 1997; Schumpeter 2003: 269-302; Held 2006: ch. 5.

55. Young 1997, 352.

56. Saward 2006: 302.

57. Urbinati 2000: 765.

58. Waldron 2016: 136.

59. Habermas 1996: 305-314.

60. Consider the literature cited by Urbinati in Urbinati 2000: 759. Kateb 1992, Plotke 1997, and Young 1997. Also the empirical literature on deliberative democracy aims precisely in this direction. See for example, Chambers 2003; Fung 2003; Delli Carpini, Lomax Cook and Jakobs 2004; Boswell, Hendriks and Ercan 2016.

61. Bello Hutt 2018b.

62. I have argued this in Bello Hutt 2017.

ABSTRACTS

This article discusses Dimitrios Kyritsis' critique of the 'democratic objection' to constitutional review. Kyritsis performs a misguided comparison between legislatures and the judiciary regarding their institutional roles qua participants in a representative system. The mistake rests on his reliance on a conception of the "trustee/proxy" divide that overlooks that both categories are regulative ideals, not reflections of how political practice operates. Such understanding of political representation, as well as of the corresponding institutional roles of courts and legislatures within a representative system, leads to a refutation of Kyritsis' argument that the democratic objection falls short of justifying the rejection of constitutional review. After reconstructing Kyritsis' discussion of the democratic objection, his arguments are rejected based on a revision of the notion of political representation. The revision is then shown to directly affect the argument in favour of constitutional review.

INDEX

Keywords: constitutional review, democratic objection, political representation, regulative ideals, representation as advocacy

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