The Dual Meaning of Evidence-Based Judicial Review of Legislation

Ittai Bar-Siman-Tov
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Abstract

This article contributes to the nascent debate about the globally emerging, yet largely undefined, phenomenon of evidence-based judicial review of legislation, by offering a novel conceptualization of evidence-based judicial review. It argues that evidence-based judicial review can have two related, but very different, meanings: one in which the judicial decision determining constitutionality of legislation is a product of independent judicial evidence-based decision-making; and the other in which the judicial decision on constitutionality of legislation focuses on evidence about the question of whether the legislation was a product of legislative evidence-based decision-making. The article then employs this novel insight about the overlooked dual meaning of evidence-based judicial review to shed new light on some of the major debates about this phenomenon, such as: whether it should be understood as part of substantive or procedural judicial review; the relationship between evidence-based judicial review and evidence-based lawmaking; and the role of legislative findings in constitutional adjudication.

Keywords: evidence-based judicial review; evidence-based lawmaking; rational lawmaking; due process of lawmaking; legislative findings; congressional findings; substantive judicial review; procedural judicial review; semiprocedural judicial review.

1. Introduction

Scholars seem to agree that we are witnessing ‘the emergence of a novel cross-national phenomenon affecting the nature of judicial review,’ which some have recently suggested conceptualizing as ‘evidence-based judicial review.’¹ Yet, beyond agreement about the existence of some emerging trend in the way various national and supranational courts exercise judicial review, there seems to be much contention and confusion about this trend. Thus, in addition to heated normative debates, there are budding debates on how to conceptualize and understand this phenomenon. Indeed, evidence-based judicial review is ‘a fascinating, yet largely undefined, phenomenon.’²

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¹ A. Alemanno, ‘The Emergence of the Evidence-Based Judicial Reflex: A Response to Bar-Siman-Tov’s Semiprocedural Review’ (2013) 1 The Theory and Practice of Legislation 327. See also the articles in this special issue dedicated to evidence-based judicial review of legislation.

² Alemanno (n 1) 340.
This article seeks to contribute to the nascent debate about evidence-based judicial review of legislation by helping to conceptualize this judicial practice. Its underlying argument (presented in Part 2) is that evidence-based judicial review is a still insufficiently understood concept, which, in turn, significantly undermines the entire normative debate on the subject.

Part 3 offers a novel conceptualization of evidence-based judicial review. It argues that evidence-based judicial review can have two related, but very different, meanings: one in which the judicial decision determining the constitutionality of legislation should be a product of independent evidence-based judicial decision-making; and the other in which the judicial decision on the constitutionality of legislation should focus on evidence about the question of whether the legislation was a product of evidence-based decision-making.

Next, Parts 4-5 employ this novel insight about the overlooked dual meaning of evidence-based judicial review to shed new light on some of the major debates about this phenomenon. Part 6 concludes.

2. The Challenges in Understanding Evidence-based Judicial Review

One of the challenges in understanding the phenomenon of ‘evidence-based judicial review of legislation’ (hereinafter: ‘EBJR’) is that it emerged in the case-law of different courts from different jurisdictions. Indeed, even scholars who are divided on questions of how the phenomenon should be understood seem to agree that we are indeed witnessing an emerging cross-national phenomenon, involving both national and supranational courts, from both sides of the Atlantic. It seems, moreover, that the reaction to this phenomenon varies across jurisdictions – sparking ‘a cottage industry of criticism’ in some countries, while being accepted without special resistance in others. Adding to the confusion is the fact that even within a certain jurisdiction, the case-law is often far from consistent or coherent. Moreover, EBJR seems to be

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emerging more as a result of judicial practice, through incremental, case-by-case development, than through explicit and fully-theorized judicial pronouncements in landmark cases. Some even describe the courts’ cases as ‘radically under-theorized.’ Consequently, courts often refrain from explicitly stating that they are exercising EBJR or from elucidating the reasons for employing EBJR in a certain case or for refraining from it in another.

Beyond these challenges, however, there is a fundamental conceptual challenge, which will be the focus of this article. The term ‘evidence-based judicial review of legislation’ is a still undeveloped and rarely-used term. Tellingly, a Google Scholar search for all articles whose full text included the term ‘evidence-based judicial review’, yielded only two very short articles and one doctoral dissertation—all from the last three years (as of June 12th 2016). In comparison, the term ‘evidence-based policy’ yielded about 39,100 sources, and the term ‘evidence-based medicine’ produced about 861,000 results. This, in itself, of course, does not mean that EBJR is an entirely new phenomenon or that this phenomenon received such scant academic attention. It may suggest a more modest conclusion that the conceptualization of this phenomenon as ‘evidence-based judicial review’ is quite new, and that the ‘evidence-based’ concept, which is so common and well-established in other areas of scholarship, is still new to the judicial review scholarship. Yet, it does seem to fit with broader observations in recent scholarship that EBJR is ‘a fascinating, yet largely undefined, phenomenon,’ an issue that has ‘persistently [and] profoundly perplexed judges,’ but has not ‘received the kind of sustained scholarly investigation its import clearly merits.’ This, I believe, is a basic source of confusion in understanding, and normatively evaluating, the phenomenon of EBJR.

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7 Bar-Siman-Tov (n 3).
11 All searches conducted on Google Scholar on June 12th 2016.
12 Cf. R. van Gestel and J. de Poorter, ‘Putting Evidence-Based Law Making to the Test: Judicial Review of Legislative Rationality’ in this issue (‘The idea of “evidence-based law making” is relatively new, but draws on an extensive body of “evidence-based” areas, such as: evidence-based medicine, evidence-based policy, evidence-based management and so on.’).
13 Alemanno (n 1) 340.
3. The Two Meanings of Evidence-based Judicial Review of Legislation

In this Part, I suggest that the concept ‘evidence-based judicial review of legislation’ can be understood in two related, but importantly different, ways. I first define these two meanings (section 3.1) and then demonstrate them with two illustrative cases (section 3.2).

3.1. Defining the Two Meanings of Evidence-based Judicial Review

The basic idea of evidence-based decision-making is ‘the conscientious, explicit and judicious use of current best evidence in making decisions…’ 15 The idea, of course, is that ‘decisions are based on evidence and not made by evidence.’ 16 Therefore, the scholarship on evidence-based decision-making deals not only with promoting decisions that are informed by analyzing the best available data, but also with methods for synthesizing between evidence-based considerations and a variety of other relevant factors and considerations, as well as the decision-maker’s own expertise and knowledge. 17 Evidence-based decision-making was first developed in medicine, but has since gained popularity in a variety of other fields, such as policy and management, 18 and more recently, regulation and legislation. 19

The idea of extending evidence-based decision-making to the judicial review field stems from the recognition that judicial decisions on constitutionality of legislation often require more than normative analysis and constitutional interpretation, and often hinge on empirical and factual questions. 20 These factual

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20 C. E. Borgmann, ‘Appellate Review of Social Facts in Constitutional Rights Cases’ (2013) 101 California Law Review 1185, 1187 (‘the importance of weighing social facts in determining whether laws are constitutional is now so well accepted as to be taken for granted’). In fact, Faigman argues that
questions, moreover, often relate to scientific and social facts about the world, which go beyond the traditional ‘adjudicative facts’ relating to the parties in the specific case. Indeed, even without delving into discussions about constitutional theories and interpretive methodologies, debates about consequentialist vs deontological approaches and debates about the facts/law, fact/value, ought/is distinctions, it appears that most scholars ‘recognize that legal questions almost invariably call for some mixture of normative and empirical analysis.’

Based on this recognition, the basic idea of EBJR is that courts should ensure that the constitutional claims of the parties and the court’s constitutional analysis have a sound evidentiary and empirical basis. EBJR stems to a large extent from common criticisms across jurisdictions about courts’ traditional performance in this area. These include claims that judicial decisions in constitutional cases are insufficiently fact-based and empirical in character, with courts tending to focus on normative and interpretative questions and to relay on ‘Socratic’ reasoning, while neglecting the crucial empirical and factual basis for determining constitutionality. Other criticisms focus on courts’ performance when they do attempt to deal with such empirical questions, especially regarding social and scientific facts.

EBJR can be seen as an effort to avoid two common potential pitfalls of judicial review. On the one hand, courts should avoid automatic and unquestioning deference to the parties’ claims, particularly to the legislature’s empirical assertions and to legislative fact-finding. Courts should make sure that these claims are not based on mere unsubstantiated speculations or ‘junk science,’ and more generally, develop a principled and coherent approach on when to defer to the legislature in even questions of constitutional interpretation often hinge on empirical and factual questions. D. L. Faigman, Constitutional Fictions: A Unified Theory of Constitutional Facts (Oxford University Press 2008).


23 See e.g., Dorf ibid; Choudhry (n 6); Faigman (n 20) 1-2; Petersen (n 22); J. Gerards, ‘How to Improve the Necessity Test of the European Court of Human Rights’ (2013) 11 International Journal of Constitutional Law 466.

these matters.\textsuperscript{25} On the other hand, courts should not do so by substituting the parties’ claims and the legislature’s findings with their own unfounded conjectures. Indeed, EBJR is meant to counter criticisms about ‘the frequent tendency of judges to refer to common-sense assumptions, intuitions and anecdotal evidence while exercising judicial review’ or ‘to rely on their own personal knowledge and guesswork while adjudicating rather than grounding their evaluations in empirically sound arguments.’\textsuperscript{26} Instead, under EBJR, judicial determinations of constitutionality, whether in determining the appropriate level of deference or in deciding on the merits, should be sound, rational evidence-based decisions.

This article’s main argument is that EBJR can have two versions, or two meanings, which differ mainly in their approach on how courts are to be satisfied that the determinations about constitutionality are based on firm empirical grounds rather than unsubstantiated speculations.

\textit{One possible meaning of EBJR} (hereinafter: ‘the first meaning’) is that the judicial decision determining the constitutionality of legislation should be a product of independent judicial evidence-based decision-making. That is, in determining the constitutionality of legislation, the court itself should engage in an evidence-based decision-making process.\textsuperscript{27} For example, when assessing the proportionality of the law – and determining questions such as whether the legislative measure is indeed necessary, fit for its purpose and is sufficiently likely to achieve its stated goal – the court should base its decisions on empirical evidence that can support these conclusions, and require the parties to supply these evidence,\textsuperscript{28} or even engage in its own fact-finding.\textsuperscript{29}

\textit{A second possible meaning of EBJR} (hereinafter: ‘the second meaning’) is that the judicial decision determining the constitutionality of legislation should require evidence that the legislation was a product of legislative evidence-based decision-making. That is, in determining the constitutionality of legislation, the court should look for evidence in the legislative record (or the statute itself)\textsuperscript{30} that the legislature followed an evidence-based decision-making process in enacting the law. For

\begin{footnotesize}
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  \item Alemanno (n 1) 338.
  \item McGinnis and Mulaney (n 8).
  \item Cf. Lee (n 9).
  \item Larsen (n 21).
  \item On this often overlooked distinction of whether the legislative findings appear in the legislative record or the in statute itself, see D. A. Crane, ‘Enacted Legislative Findings and the Deference Problem’ (2014) 102 Georgetown Law Journal 637.
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example, when assessing the proportionality of the law, the court determines its decision, at least in part, on the question of whether there is evidence in the legislative record that the legislature considered the constitutional issue in question; the necessity of the measure; the fit between the measure and the law’s purpose; the availability of less-harmful alternatives; etc. The court examines, moreover, the extent in which the legislative consideration of these issues was a result of an evidence-based legislative process. It examines, inter alia, whether the legislature conducted appropriate investigations and studies, impact assessment and consultation procedures, and sufficient parliamentary debate and deliberation.\(^{31}\)

The difference between these two meanings of EBJR entails differences in questions such as: the main stage in which the evidence-based decision-making process should occur (pre-enactment during the legislative process, or post-enactment during the judicial process); who should shoulder the main burden for producing the evidence required for conducting evidence-based decision-making (the government and the legislature or the parties before the court); and who should carry the main responsibility for evaluating these evidence on the merits (the legislature or the court). These questions, in turn, touch upon fundamental questions about the proper level of judicial deference to legislatures, and more broadly, about the appropriate relationship between courts (and the judicial process) and legislatures (and the legislative process) and about these institutions’ respective legitimacy and competence. Hence, as we can already begin to see (and as the next parts will further elaborate), the distinction between the two possible meanings of EBJR is not a mere nuance. It is a fundamental distinction, with fundamental ramifications for the debates about EBJR.

Moreover, I argue that the dual meaning of EBJR pervades both the academic scholarship and the case-law, albeit, often without cognizance of the distinction between the two meanings of EBJR. An analysis of the emerging scholarship about EBJR suggests that some writers discussing EBJR are in fact discussing EBJR in its first meaning,\(^{32}\) whereas others are in fact discussing EBJR in its second meaning.\(^{33}\) Moreover, this overlooked duality of meanings of EBJR can sometimes be found in the writing of the same scholar.\(^{34}\) Furthermore, I believe that at least part of the apparent incoherence in the case law can be explained by the understanding that some cases can be characterized as employing EBJR in its first meaning, whereas other cases can be understood as employing EBJR in its second meaning. Some cases, moreover, can contain EBJR in both its meanings in the same decision. Indeed, as we shall see (in parts 4-5), the two meanings of EBJR are conceptually distinct, but not necessarily mutually-exclusive. Hence, some models of judicial review are consistent


\(^{32}\) E.g., Lee (n 9).

\(^{33}\) E.g., van Gestel and de Poorter (n 12).

\(^{34}\) E.g., Alemanno (n 1), as discussed in part 5.
with EBJR only in one of its meanings, whereas other models of judicial review enable employing EBJR in both its meanings.

3.2. Illustrating the Two Meanings of Evidence-based Judicial Review

Two famous cases, one from Israel, one from Germany, nicely illustrate the difference between the two meanings of EBJR. These cases discussed essentially the same constitutional question: whether a law about social benefits infringed upon the right to a subsistence minimum, derived from the constitutional right to human dignity. The courts, however, took quite different approaches: the first demonstrating the first meaning of EBJR, whereas the other exemplifying the second meaning of EBJR.

In the first case, Commitment to Peace and Social Justice Society, the Israeli Supreme Court clearly followed EBJR in its first meaning. The case turned, to a large extent, on the question of how should the Court determine whether the right to a subsistence minimum has been violated. The Court held that ‘[i]n order that the court should be able to make [this determination], it must be presented with a complete factual basis, from which the violation of dignity can be deduced.’ It then elaborated what this ‘complete factual basis’ entails:

‘Thus the court will require details, based on appropriate documentation, of the sources of income and the current and fixed expenditure of that person […] It should examine the functioning of all the national and other support systems that assist that person and the steps he takes in approaching them in order to exhaust his rights. It will be necessary to clarify whether the person works, and what are the employment alternatives available to him. [...]’

The Court added that only ‘[i]n view of this factual basis, which will convince the court […] that the situation of a person has indeed reached a prohibited violation of dignity, it will be necessary to order the government authorities to act to remove the violation.’

In implementing this approach, the Court examined the evidence presented to it by the petitioners, and concluded that petitioners failed to provide a concrete factual basis that will enable that Court to make such a determination. This case is

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35 HCJ 366/03 Commitment to Peace and Social Justice Society v. Minister of Finance [2005] (2) IsrLR 335; 125 BVerfGE 175 <1 BvL 1/09> Hartz IV. For a much richer comparison of additional aspects in these two cases see A. Benish and M. Kramer, ‘Filling the Gap: An Interpretation of the Constitutional Right to Life in Dignity following the German Jurisprudence’ (2015) 14 Labour, Society and Law 263.

36 HCJ 366/03 Commitment to Peace and Social Justice Society v. Minister of Finance [2005] (2) IsrLR 335.

37 Ibid para 23.

38 Ibid para 23.

39 Ibid para 23.
particularly illustrative, because the Court made it explicitly clear that petitioners’ failure to provide sufficient evidence was the decisive reason for the Court’s ruling. It stated:

‘As aforesaid, the violation of the right to live with dignity […] is examined in accordance with its consequences; and in these petitions no factual basis has been established from which it can be seen that, as a result of the reduction in the income supplement benefits, the dignity of certain persons has been violated. […]

The first stage of the constitutional scrutiny therefore ends with the conclusion that a violation of the right to dignity has not been proved. In this situation, we do not need to continue to carry out the other stages of the constitutional scrutiny. The petitions against the amendment should be denied.’

This case is also particularly instructive, because the Court quite clearly preferred the first meaning of EBJR over the second meaning of EBJR, which would have required the court to examine whether the legislature followed an evidence-based process in enacting the law that reduced social benefits. During the judicial proceeding, the panel of judges that wrote the decision canceled the order nisi that was made by the original panel that received the case, which ordered the respondents to show cause ‘why they should not determine a standard for human subsistence with dignity as required by the Basic Law: Human Dignity and Liberty.’

Instead of requiring the state to determine such a standard, the Court adopted the view that ‘[w]ithin the first stage of the constitutional scrutiny, the petitioners have the burden of proving that […] there live in Israel persons whose dignity is violated because their living conditions are insufficient.’

Furthermore, and even more tellingly, the Court explicitly refused to give weight to the question of whether the legislature followed an evidence-based process in enacting the law. In fact, the petitioners did not limit themselves to arguments about the constitutionality of the content of the law, but also added arguments about the defective character of the legislative process. As the Court put it: ‘the petitioners complain also of the hurried and superficial legislative process in which the amendments were enacted.’ The petitioners emphasized the difference between the rushed legislative process of the amending law (which was enacted in an expedited process as a part of a massive omnibus bill) and that of the Income Supplement Law which it amended, ‘which took many years, was studied by several professional committees and was considered in the course of dozens of significant sessions of the

40 Ibid para 24.
41 Ibid para 7.
42 Ibid para 19.
43 Ibid para 9.
Welfare Committee of the Knesset.\textsuperscript{44} Moreover, as the lone dissenting Justice observed, even from respondents’ own submissions it was clear that the state failed to consider the human right of the recipients of social benefits to live with dignity when amending the Income Supplement Law.\textsuperscript{45} Even the Court agreed that it was a ‘regrettable legislative process.’\textsuperscript{46} And yet, it held: ‘notwithstanding the serious defects that befell it, we do not find that the legislative process of the amendment to the Income Supplement Law, in itself, undermines the validity of the amendment.’\textsuperscript{47}

\textit{In the second case}, the \textit{Hartz IV} decision,\textsuperscript{48} the German Constitutional Court clearly followed EBJR in its second meaning. In stark contrast to the Israeli Court, the German Court focused on the legislature’s obligation to follow an evidence-based legislative process when enacting statutes that will guarantee a subsistence minimum. The Court held, inter alia, that ‘the legislature has to assess all expenditure that is necessary for one’s existence logically and realistically in transparent and expedient proceedings according to the actual needs,’\textsuperscript{49} and that ‘the assessment of the benefits must be clearly justifiable on the basis of reliable figures and plausible methods of calculation.’\textsuperscript{50}

This case is particularly illustrative, because the Court clearly preferred the second meaning of EBJR over the first meaning of EBJR. It held that it is not for the Court to determine any quantifiable requirements as to what would be considered sufficient to guarantee a subsistence minimum. It added that given the legislature’s margin of appreciation when it comes to assessing the subsistence minimum, the ‘material review as regards the result’ will be quite limited.\textsuperscript{51} Instead, it held that the Court will focus on reviewing the legislature’s ‘procedure to ascertain the subsistence minimum,’ and ‘the method of the assessment of benefits’ to ensure that ‘they do justice to the goal of the fundamental right.’\textsuperscript{52} Hence, the Court held that it will examine:

‘whether the legislature […] has selected a calculation procedure that is fundamentally suited to an assessment of the subsistence minimum, whether, in essence, it has completely and correctly ascertained the necessary facts and, finally, whether it kept within the bounds of what is justifiable in all

\textsuperscript{44} Ibid para 29.
\textsuperscript{45} Ibid, Justice Levi, dissenting.
\textsuperscript{46} Ibid para 29.
\textsuperscript{47} Ibid para 29.
\textsuperscript{48} 125 BVerfGE 175 <1 BvL 1/09> \textit{Hartz IV}.
\textsuperscript{49} Ibid para 139.
\textsuperscript{50} Ibid para 142.
\textsuperscript{51} Ibid para 141-142.
\textsuperscript{52} Ibid 142.
Applying these principles to the case at hand, the Court found that the legislature failed to meet these evidence-based process requirements. This failure was the decisive consideration in the Court’s determination that the provisions on standard benefits for adults and children were unconstitutional. Indeed, this case is noteworthy not only for representing ‘the zenith’ of the evidence-based review trend (as Klaus Meßerschmidt observes in his contribution to this special issue), but also for ‘imposing[ing] strict standards of rational decision-making on the legislator.’ It is, therefore, the mirror image of the Israeli social benefits case, and an exemplary illustration of the second meaning of EBJR.

4. Evidence-based Judicial Review and the Substantive/Procedural Debate

One of the main debates about EBJR is whether it should be understood as part of substantive or procedural judicial review. It seems that most scholars understood this practice as being part of procedural judicial review. Others, however, argued that it should be understood as belonging to substantive judicial review. Others still have suggested that this judicial trend should be conceptualized as part of an emerging intermediate judicial review model that is best understood as ‘semiprocedural judicial review.’

53 Ibid 143.
54 See also K. Meßerschmidt, ‘Evidence-Based Review of Legislation in Germany’ in this issue (observing that ‘The Court declared that the[s]e were unconstitutional, primarily because they were not entirely based on a statistical investigation by the legislature.’).
55 Ibid. See also K. Meßerschmidt, ‘The Good Shepherd of Karlsruhe: The “Hartz IV” Decision on Unemployment Benefits and Social Allowances – A Good Example of Regulatory Review by the German Federal Constitutional Court?’ in P. Popelier et al. (eds), Role of Courts in a Context of Multilevel Governance (Intersentia 2012); S. Rose-Ackerman, S. Egidy and J. Fowkes, Due Process of Lawmaking (Cambridge University Press 2015) 179-186.
57 E., Aleman (n 1).
58 Bar-Siman-Tov (n 3); cf. D. T. Coenen, ‘The Rehnquist Court, Structural Due Process, and
To be sure, any discussion of substantive and procedural models of judicial review provokes the common claim about the elusive distinction between substance and procedure.\(^59\) This is an age old claim.\(^60\) As John Hart Ely already observed, ‘We were all brought up on sophisticated talk about the fluidity of the line between substance and procedure.’\(^61\) Yet, I believe this fluidity is particularly pertinent here. Indeed, I believe that the emerging EBJR phenomenon stirred so much confusion and contestation regarding its substantive or procedural nature, precisely because many of the prominent cases that prompted the debate about this phenomenon challenge the traditional dichotomy between substantive and procedural review. For this reason, I will argue (in Part 5) that these prominent cases are best captured by the semiprocedural review model, which indeed breaks this dichotomy and merges procedural and substantive review.

It is important to stress, however, that the view that there is (and should be) a clear dichotomy between pure substantive judicial review and pure procedural judicial review is not a mere theoretical construct or a strawman. It is a widely-held approach actually practiced by courts in various countries.\(^62\) As I will argue in this part, moreover, at least conceptually, EBJR can certainly be linked with the two pure models of judicial review as well. The key for understanding this link, however, is cognizance of the two meanings of EBJR.

Hence, this part contributes to this budding procedural/substantive debate, by exploring the conceptual relationship between the two meanings of EBJR and three models of judicial review: the (purely) substantive, the (purely) procedural and the semiprocedural models of judicial review.

4.1. Substantive Review and EBJR

Substantive judicial review is a judicial review model in which courts determine the constitutionality of legislation based on an examination of the statute’s content (or

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\(^{61}\) Importantly, however, Ely added: ‘But the realization that the terms carry no monolithic meaning at once appropriate to all the contexts . . . need not imply that they can have no meaning at all.’ J. H. Ely, ‘The Irrepressible Myth of Erie’, (1974) 87 Harvard Law Review 693, 724.

\(^{62}\) The Israeli Supreme Court, for example, has explicitly maintained this dichotomy in many cases, even in cases in which the parties raised arguments that merged together procedural and substantive review. For an elaborate discussion of these cases see Bar-Siman-Tov (n 6). It appears that this pure substantive view is also the traditional approach of English courts (see A. Kavanagh, ‘Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory’ [2014] Oxford Journal of Legal Studies 1); ‘the normal approach’ in cases by the Spanish Constitutional Court (see D. Oliver-Lalana, ‘On the (Judicial) Method to Review the (Legislative) Method’ in this issue (citing Judgment of 16 February 2012 (STC 20/2012, FJ II)); and was also common in traditional German jurisprudence (see Meßerschmidt (n 5) 348 (citing K. Schlaich, ‘Die Verfassungsgerichtsbarkeit im Gefüge der Staatsfunktionen’ (1981) 39 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 99, 109); N. Petersen, ‘The German Constitutional Court and Legislative Capture’ (2014) 12 International Journal of Constitutional Law 650, 655).
substance). Courts determine whether the law violates the constitution by examining (and interpreting) the content of the statute and deciding whether this content is in violation of (their interpretation of) the content of the constitution. In this model’s ‘pure’ version, the constitutionality is determined exclusively based on the content of the law (i.e., the output of the legislative process), whereas the process in which the legislature enacted the law is considered irrelevant.63

The pure model of substantive review is conceptually inconsistent with EBJR in its second meaning, in which courts review the legislative record to determine whether the legislature exercised evidence-based lawmaking. This is because under the pure substantive model, courts determine constitutionality based only on an analysis of the law, whereas questions such as whether the legislature considered the constitutional issue and the quality of its decision-making process are deemed irrelevant, and even illegitimate, for courts to consider.64

The incompatibility of EBJR in its second meaning with the pure substantive model’s requirement that courts focus exclusively on an analysis of the law is nicely illustrated by a judgement by Justice Barak of the Israeli Supreme Court. Criticizing one of the other Justices for basing his determination of unconstitutionality on an examination of the legislative record, which revealed that the legislature failed to consider the constitutional question, Barak stated:

‘I am not willing to rest the entire decision on this legislative history. I myself would have reached the same conclusion even if it transpired that Knesset members had expressed the view that the change does not affect the new lists and maintains their equality of opportunity. Ultimately the decision must be made upon analysis of the law and not upon psychoanalysis of the legislature.’65

The incongruity between EBJR in its second meaning and the pure substantive model (which deems the quality of the legislature’s decision-making process as an irrelevant, and even illegitimate, consideration) was forcefully articulated by Justice Souter of the American Supreme Court:

‘The question for the courts […] is not whether as a predicate to legislation Congress in fact found that a particular activity substantially affects interstate commerce […] The only question is whether the legislative judgment is within the realm of reason […] If, indeed, the Court were to make the

65 Barak, Agudat Derech Erez.
existence of explicit congressional findings dispositive in some close or difficult cases something other than rationality review would be afoot [...]. [It] would imply [...] authority to require Congress to act with some high degree of deliberateness, of which express findings would be evidence. But [...] review for deliberateness would be as patently unconstitutional as an Act of Congress mandating long opinions from this Court. [...] Under such a regime, in any case, the rationality standard of review would be a thing of the past.66

Hence, (pure) substantive review is conceptually consistent only with EBJR in its first meaning, in which courts themselves engage in evidence-based decision-making. Under this understanding, in determining the substantive constitutionality of the law, courts are only concerned with the question of whether they were presented with sufficiently convincing and robust evidence to support the determination of constitutionality, whereas the question of whether the legislature followed an evidence-based legislative process is entirely irrelevant. Consequently, even if the legislature completely failed to follow an evidence-based legislative process or even to consider the constitutional question, the law could be upheld if the government lawyers were able to produce, for the sake of the judicial process, sufficiently convincing evidence to support their claims (or if claimants failed to provide evidence to support their claims). Similarly, even if the legislature conducted a perfect evidence-based process, this (in itself) will not tilt the balance against a determination of unconstitutionality. The Israeli case Commitment to Peace and Social Justice Society about social benefits (discussed in the section 3.2) provides a vivid demonstration of how EBJR in its first meaning is employed within pure substantive review.67

To clarify, under substantive review courts may also consider evidence produced in the legislative processes (such as impact assessment reports, legislative findings, etc.). However, this evidence will not be used as an indication of the legislature’s consideration of the constitutional issue or of the quality of the legislature’s decision-making process, as these questions are deemed irrelevant. Rather, such evidence will be employed as one more piece of evidence, among others, which can help courts in their independent substantive evidence-based determination of constitutionality.68 A good explanation of such judicial use of evidence produced

67 HCJ 366/03 Commitment to Peace and Social Justice Society v. Minister of Finance [2005] (2) IsrLR 335.
68 Admittedly, one can theoretically argue that a strict reading of the ‘enrolled bill doctrine’ would prevent courts from considering materials from the legislative process even for such purposes, but I very much doubt if this is a proper interpretation of this doctrine. For a more elaborate explanation on this doctrine, see I. Bar-Siman-Tov, ‘Legislative Supremacy in the United States: Rethinking the Enrolled Bill Doctrine’ (2009) 97 Georgetown Law Journal 323.
during the legislative process that is consistent with EBJR in its first meaning, and therefore also with substantive judicial review, is Justice Stevens’s majority opinion in the American Supreme Court case, Gonzales v. Raich:

‘While congressional findings are certainly helpful in reviewing the substance of a congressional statutory scheme, particularly when the connection to commerce is not self-evident, and while we will consider congressional findings in our analysis when they are available, the absence of particularized findings does not call into question Congress’ authority to legislate.’

4.2. Procedural Review and EBJR

Procedural judicial review is a judicial review model in which courts determine the validity of legislation based on an examination of the procedure leading to statues’ enactment. Courts determine the law’s validity by examining the legislative record and deciding whether the legislature met certain procedural requirements in the legislative process. In this model’s ‘pure’ version, courts focus exclusively on the legislative process, whereas the content of the legislation is deemed completely irrelevant. Judicial review of the legislative process is exercised uniformly on all legislation that was improperly enacted, regardless of the constitutionality of its content, and improper enactment is considered sufficient grounds for invalidating an otherwise constitutional statute.

The pure procedural model of review is conceptually inconsistent with EBJR in its first meaning, in which courts employ evidence for their own substantive determination of constitutionality. This is because under pure procedural review, courts determine the validity of legislation based solely on the enactment process, while treating the substantive constitutionality of the law’s content as irrelevant.

Pure procedural judicial review is, therefore, conceptually consistent only with EBJR in its second meaning, in which courts review the legislative record to determine whether the legislature exercised evidence-based lawmaking. Under a purely procedural version of EBJR, the exclusive consideration in exercising judicial review would be whether the legislature conducted an evidence-based legislative process. Failure to follow an evidence-based process when enacting the law would be fatal, no matter how much robust evidence supporting constitutionality the parties could produce for the judicial process. Indeed, evidence assembled and produced after the completion of the legislative process would be irrelevant. On the other hand, if the legislature did exercise evidence-based lawmaking, this, in and of itself, would be sufficient grounds for upholding the law. As long as evidence-based enactment

69 Gonzales v. Raich, 545 U.S. 1, 21 (2005).
process was followed, the court would refuse to second guess the legislature’s judgement and its substantive consideration of the constitutional question at hand.

Furthermore, a pure procedural version of EBJR will go even further: the requirement for an evidence-based enactment process would apply across the board, regardless of whether the law’s content raises constitutional issues. Failure to follow an evidence-based legislative process would be sufficient grounds, in and of itself, for invalidating an otherwise constitutional law.

An example of how such version of EBJR would look like can be found in a case by the Israeli Supreme Court, which explicitly considered, and rejected, the idea of requiring evidence-based lawmaking within the pure procedural model. In this seminal case, the Court considered the constitutionality of a legislative procedure called the ‘Arrangements Law’ – the practice of combining numerous unrelated measures in one long governmental omnibus bill, which is passed via an accelerated process that deviates from regular legislative procedure. Although this procedure did not violate any formal rules regulating the legislative process, the petitioners argued that ‘the law… before us and laws of the Arrangements Law type in general should be declared void, because no ‘legislative due process’ takes place in the course of legislating them, and because they are adopted without a sufficient factual basis and without sufficient debate.’ The Court agreed that

‘[T]he question whether there is a basis for adopting a legal requirement of a ‘legislative due process’ in our law has particular importance in the context of the Arrangements Law, since… this legislative mechanism gives rise to many claims that it does not involve a proper decision-making process, that it is not based on a sufficient factual basis and on thorough and comprehensive deliberations, and that such a process is likely also to impair the product of the legislative process.’

Hence, the Court asked: ‘Within the framework of judicial scrutiny of the legislative process, should we insist upon a minimum amount of participation in the legislative process or a minimal factual basis and a minimal debate on the draft law before the law is adopted?’ The Court answered this question in the negative, stating:

‘[T]he legislative process of the Knesset should not be subject to a demand to comply with due process in making decisions, in the same way that administrative authorities

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74 Ibid para 28.
are... The purpose of judicial review of the legislative process is not to ensure that the Knesset carries out the optimal legislative process. The purpose of judicial review of the legislative process is also not to ensure that the Knesset carries out a responsible and balanced process for each draft law.\(^75\)

Therefore, while establishing other judicial tests for the procedural validity of legislation, the Court held that it will not invalidate a law solely on the ground that it was not enacted through a deliberative evidence-based legislative process.\(^76\)

This case is particularly illustrative, because it was clear that the Court considered the adoption of a requirement for evidence-based lawmaking within the purely procedural model, rather than the semiprocedural model. In fact, the petitioners raised both arguments against the legislative process and arguments against the substantive constitutionality of the law, claiming that it violated several constitutional rights. The petitioners, moreover, did not clearly distinguish between these types of arguments, raising instead claims that merged the procedural and the substantive. The Court, however, followed the traditional view that keeps a strict separation between procedural review and substantive review. It began its analysis by stating that ‘[t]he diverse claims of the petitioners… can be classified into two main categories: claims concerning the ways in which the law was enacted and claims relating to the content of the law.’\(^77\) It then went on to employing the pure procedural model, and considered the arguments against the legislative process (including the possibility of creating a requirement for evidence-based lawmaking), without any regard to the claims against its content. The arguments against the law’s substantive constitutionality were considered in an entirely separate part of the decision, using the pure substantive model of review, without any regard to the hurried enactment process.

### 4.3. Semiprocedural Review and EBJR

Semiprocedural judicial review is a judicial review model in which courts determine the constitutionality of legislation based on an examination of both the statute’s content and its enactment process. Instead of treating substantive and procedural review as two separate spheres, it merges the examination of the statute’s enactment process with the substantive judicial determination of the statute’s constitutionality. Under this model, the question of whether the legislature met certain procedural requirements in the legislative process becomes relevant, and sometimes decisive, in the judicial determination of the statute’s substantive constitutionality. At the same

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\(^75\) Ibid para 29.

\(^76\) Ibid. The Court held that it ‘will restrict its judicial review of the legislative process to protection of the right of members of the Knesset […] to participate in the legislative process,’ and noted that this may contribute to conditions that enable a deliberative rational legislative process. However, failure to follow a deliberative evidence-based legislative process will not be sufficient grounds for invalidate the law.

\(^77\) Ibid para 3.
time, defects in the legislative process, in and of themselves, are insufficient grounds for invalidating the law. Instead, courts turn to examining the enactment process only if the content of the law seems to infringe the constitution.\textsuperscript{78}

Like pure procedural review, semiprocedural review is also conceptually consistent with EBJR in its second meaning. The semiprocedural version of EBJR is similar to the purely procedural version of EBJR in some important respects. Both versions include judicial scrutiny of the legislative process and evaluation of the quality of that process.\textsuperscript{79} Likewise, the quality of the legislative process and the questions of whether the legislature considered the constitutional issue and followed an evidence-based process are relevant, sometimes even decisive, considerations.\textsuperscript{80}

However, the semiprocedural version of EBJR also differs from the purely procedural version of EBJR in several respects. First, under the semiprocedural version, the questions of whether the legislature considered the constitutional issue and followed an evidence-based process will rarely be the exclusive consideration in determining the constitutionality of the law.\textsuperscript{81} Rather, these questions typically supplement, rather than completely supplant, the traditional substantive tests for determining constitutionality (such as proportionality analysis).\textsuperscript{82} More importantly – and this is the crucial difference – under the semiprocedural version, the judicial review of the legislative process (and the requirement that the legislature follow an evidence-based process) are only triggered when the content of the law putatively infringes the constitution.\textsuperscript{83} That is, under the semiprocedural version, there is no universal requirement for enacting all laws, regardless of their content, through an evidence-based legislative process.

Finally, another important difference between the purely procedural and semiprocedural versions of EBJR is that the purely procedural version is conceptually consistent only with EBJR in its second meaning. In contrast, semiprocedural judicial review is also consistent with an approach that merges the two meanings of EBJR. That is, the court can be concerned both with the question of whether the legislation was a product of an evidence-based legislative process and with the question of whether the court was presented with sufficient evidence that would enable it to exercise independent evidence-based decision-making. Consequently, in determining constitutionality, the court may consider both evidence created during the legislative process and evidence produced only post-enactment for the judicial process.

This latter semiprocedural version of EBJR is still different from the (purely) substantive version of EBJR, due to the different role that legislative findings and

\textsuperscript{78} Bar-Siman-Tov (n 3).
\textsuperscript{79} See also Bar-Siman-Tov (n 3) 278.
\textsuperscript{80} Ibid.
\textsuperscript{81} Ibid.
\textsuperscript{82} Ibid 274.
\textsuperscript{83} Ibid 278.
other evidence from the legislative process play in the judicial determination. In the substantive version, this evidence is employed only instrumentally to assist the court’s independent substantive evaluation of the constitutionality of the content of the law. The absence, presence or sufficiency of legislative findings is not crucial in determining the constitutionality of legislation. If legislative findings exist, the court may use the content of the legislative findings as one more source of evidence in its own constitutional analysis. If legislative findings do not exist, the court may ask the parties to supply other sources of evidence that can support its ability to engage in evidence-based decision-making. In contrast, in the semiprocedural version of EBJR, the existence of legislative findings (and other evidence from the legislative process) becomes much more important in determining the constitutionality of legislation. Here, the Court is concerned with the absence or presence of evidence in the legislative process also as an indication of whether the legislature followed an evidence-based process, and the quality of the legislative process is a crucial (even if not exclusive) consideration in determining constitutionality.

With these conceptual understandings in mind, we can turn to my final argument that many of the prominent cases that spurred the debate about EBJR are best characterized as semiprocedural.

5. Evidence-based Judicial Review as Semiprocedural Review

Given the diversity and inconsistency of the cases across (and even within) jurisdictions, and the often inexplicit and undertheorized way these cases employ EBJR, great caution should be exercised in making any generalizations. Moreover, as I demonstrated in the previous sections, some EBJR decisions can admittedly be characterized as purely substantive. Yet, I believe that at least the cases that are most often cited as the leading paradigmatic examples of EBJR cannot be characterized as belonging to the pure substantive or pure procedural models of judicial review.

First, I believe that an analysis of the way judges themselves described their decisions in some of the paradigmatic and oft-quoted cases of EBJR supports the view that these cases should not be understood as (pure) substantive review. As we already saw in section 3.2, in the leading German case of EBJR, Hartz IV, the Court was explicit in stating that its judicial review of constitutionality will focus on the legislature’s ‘procedure to ascertain the subsistence minimum,’ rather than the ‘material review as regards the result’ of this process. It was also clear that the Court’s review of the legislative process stemmed from the German Court’s view

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84 See part 4.1 supra.
85 Moreover, as Popelier and De Jaegere seem to indicate in their contribution to this special issue, it may be that in some jurisdictions, such as Belgium, most EBJR cases were purely substantive. P. Popelier and J. De Jaegere, ‘Evidence-Based Judicial Review of Legislation in Divided States: The Belgian Case’ in this issue.
86 125 BVerfGE 175 at 141-142 <1 BvL 1/09> Hartz IV.
about the legislature’s obligation to follow an evidence-based legislative process that does ‘justice to the goal of the fundamental right’ when enacting statutes that will guarantee a subsistence minimum.87

Similarly, in the classic example from the U.S., *Fullilove v. Klutznick*, Justice Stevens explicitly stated that he was not following the substantive approach: ‘rather than take the substantive position… I would hold this statute unconstitutional on a narrower ground. It cannot fairly be characterized as a ‘narrowly tailored’ racial classification because it simply raises too many serious questions that Congress failed to answer or even to address in a responsible way.’88 Indeed, in addition to explicitly indicating that Congress’s ‘perfunctory consideration’ of the issue was a decisive consideration for his determination of unconstitutionality,89 Stevens also explicitly indicated that this stems from his general principled position that:

‘Although it is traditional for judges to accord the same presumption of regularity to the legislative process no matter how obvious it may be that a busy Congress has acted precipitately, I see no reason why the character of their procedures may not be considered relevant to the decision whether the legislative product has caused a deprivation of liberty or property without due process of law. Whenever Congress creates a classification that would be subject to strict scrutiny under the Equal Protection Clause […] it seems to me that judicial review should include a consideration of the procedural character of the decisionmaking process.’90

Likewise, in the classic semiprocedural example from Israel, *Agudat Derech Erez*, Chief Justice Landau explicitly indicated that a crucial consideration for him in determining constitutionality was whether the legislature properly considered the constitutional question: ‘As for myself, I would be prepared to go far in accepting the decision of the Knesset, as expressed in the… Law… When does this apply? When we have some indication that the Knesset indeed considered the rights of new lists. I found no such indication in the short ‘legislative history’ of the […] Law […].’91 After scrutinizing the legislative record, the Chief Justice concluded:

‘In view of all this I am constrained to conclude that the […] Bill was presented to the Knesset, in all its readings, in complete disregard of the important issue of preserving the new lists’ equality of opportunity - the issue that was raised before us in these two petitions. This issue was not given any

87 See section 3.2 supra.
89 Ibid.
90 Ibid.
Landau then added that it was ‘[f]or this reason’ that he came to the conclusion that the law infringes the relevant constitutional provision.  

The other leading examples of EBJR cases are less explicit, but in all of them, the judges themselves indicated that they were not looking for evidence produced in the legislative process solely for their own independent evidence-based determination of substantive constitutionality. Rather, they indicated that they were also interested in the procedural quality of the legislature’s decision-making process itself as a relevant consideration in determining constitutionality.

For example, in Reno v ACLU, the U.S. Supreme Court emphasized that ‘[p]articularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the [Act], we are persuaded that the [Act] is not narrowly tailored [...]’ Likewise, in Board of Trustees of the University of Alabama v Garret, the Court made it clear that its decision to invalidate the law was based to a large extent on Congress’s failure to assemble sufficient evidence that would support its authority to legislate and to document such evidence in the legislative record. The majority opinion stated that ‘[t]he legislative record… simply fails to show that Congress did in fact identify’ the required empirical basis for its legislation. Furthermore, the Court focused on reviewing ‘the evidence that Congress considered in the present case,’ and therefore refused to give weight to evidence that seemed to support constitutionality but did not constitute ‘legislative findings’ and was not ‘submitted […] directly to Congress.’ Indeed, as Buzbee and Schapiro aptly observe (and several American court observers seem to agree), in Garrett the ‘legislative record review became explicit. The Court did not purport to rely on the traditional rational basis standard that legislation must be upheld if evidence supports it, regardless of whether Congress considered the evidence. In

92 Ibid.
93 Ibid.
95 Board of Trustees of the University of Alabama v Garret, 531 U.S. 356 (2001).
96 Ibid at 368-370 (parsing the legislative record and holding that ‘The legislative record… simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled,’ that ‘Congress assembled only such minimal evidence’ and that this evidence ‘fall[s] far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based.’)
97 Ibid at 368.
98 Ibid at 374.
99 Ibid at 370. In addition to refusing to consider evidence that was not submitted to Congress, the majority’s decision was criticized by commentators for reviewing the legislative record ‘exceptionally strictly, in a way that reduced most of Congress’s examples to irrelevance.’ W. D Araiza, ‘After the Tiers: Windsor, Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism’ (2014) 94 Boston University Law Review 367, 380.
Garrett, the Court stopped denying that it was imposing a record requirement on Congress.\footnote{100}{Buzbee and Schapiro (n 21) 118. See also Coenen (n 58) 1325-26; Frickey & Smith (n 56) 1725-27.}

Similarly, in \textit{Evans v the UK}, the ECtHR’s Grand Chamber explicitly confirmed that ‘it is relevant’ for the proportionally analysis that the legislation ‘was the culmination of an exceptionally detailed examination’ and ‘the fruit of much reflection, consultation and debate’;\footnote{101}{Evans v the UK [GC], no. 6339/05, Section 86, ECHR 2007–I.} and even more tellingly, in \textit{Animal Defenders v UK}, the ECtHR summarized its case-law as follows: ‘It emerges from that case-law that, in order to determine the proportionality of a general measure, the […] quality of the parliamentary […] review of the necessity of the measure is of particular importance.’\footnote{102}{Animal Defenders International v the United Kingdom [GC], no. 48876/08, § 108, ECHR 2013 (extracts).}

The ECJ has similarly clarified its own previous decisions, in \textit{Sungro}, stating that ‘it was not the contested provisions themselves, but the failure to take account of all the relevant factors and circumstances, in particular by carrying out a study of the reform’s impact, before their adoption which was criticised from the point of view of an infringement of the principle of proportionality.’\footnote{103}{Case T-252/07 Sungro, SA and Others v. Council and Commission [2010] ECR II-55, para 60.} Consider, moreover, the way the President of the Court, Koen Lenaerts (in academic writing) summarized the ECJ cases:

‘[R]ecent case-law reveals that the ECJ has also striven to develop guiding principles which aim to improve the way in which the political institutions of the EU adopt their decisions. In those cases, the ECJ decided not to second-guess the appropriateness of the policy choices made by the EU legislator. Instead, it preferred to examine whether, in reaching an outcome, the EU political institutions had followed the procedural steps mandated by the authors of the Treaties. Stated simply, I argue that judicial deference in relation to ‘substantive outcomes’ has been counterbalanced by a strict ‘process review.’\footnote{104}{Lenaerts (n 56) 2-3.}

The same can be said even about the main case that Alberto Alemanno cites to support his argument that the case-law should be conceptualized as substantive EBJR. In this case, \textit{Schecke}, the ECJ explicitly indicated that it based its determination (at least in part) on the observation that ‘[t]here is nothing to show that, when adopting [the regulation], the Council and the Commission took into consideration methods of [attaining the regulation’s] objective […] while at the same time causing less
interference with [the relevant] right.\textsuperscript{105} Indeed, this case is often cited by commentators as a case that ‘illustrate[s] this shift to a more procedural test in the case law of the Court.’\textsuperscript{106} Moreover, Alemanno himself seems to admit that the decisive factor in the court’s decision was not the court’s substantive conclusion that ‘the EU legislature actually breached the fundamental right,’ but rather, ‘the absence of a satisfactory and adequate evidence-based policymaking process.’\textsuperscript{107}

This is noteworthy because Alemanno is the leading proponent of the view that the emerging judicial phenomenon under consideration should not be conceptualized as semiprocedural review, but rather as an evidence-based turn within substantive judicial review. Respectfully, I believe that Alemanno’s arguments may perhaps been influenced by incognizance of the dual meaning of EBJR. Alemanno seems to be thinking of the first meaning of EBJR when he insists that ‘what characterizes the emergence of this new trend of judicial review is not its procedural (be it full or semi-) component of the review. Rather, what is central to this new form of scrutiny is the instrumental use of the evidence gathered during the [legislative] decision-making process [...]’\textsuperscript{108} Alemanno similarly argues that ‘courts today, when called upon to establish the legality of an act, supplement their substantive scrutiny with references to some of the procedural requirements as these have progressively been incorporated into the policy process. Studies, consultation procedures, and parliamentary debates all provide a useful critical mass of materials orienting the court when making a determination about the legality of a given act.’\textsuperscript{109} As noted in section 4.1, such use of evidence from the legislative process is within the first meaning of EBJR and therefore indeed consistent with substantive judicial review.

However, I think that some of Alemanno’s other arguments are in fact better understood as belonging to the second meaning of EBJR and can therefore not be reconciled with (pure) substantive judicial review. In fact, at the end of his argument quoted above, Alemanno writes: ‘[…] what is central to this new form of scrutiny is the instrumental use of the evidence gathered during the decision-making process \textit{in order to verify the adequacy and quality of that process}’ (emphasis added).\textsuperscript{110} A similar mixture of the two meanings of EBJR (and consequently of the substantive/procedural question) can be found in his claim that

‘[C]alled upon to exercise substantive review of a contested act, [courts] supplement their (substantive) analysis with references to the process that led to the adoption of that act.'
In particular, courts refer to the evidence, investigations, parliamentary debate, and consultation input - often called ‘semisubstantive rules’ - that have led to the adoption of the contested act. As a result, under this emerging ‘judicial trend’, these procedural requirements typically act, regardless of their legal status, as proxies for the determination of constitutionality infringements.\textsuperscript{111}

Immediately after this statement, Alemanno explicitly notes that he agrees with the argument by the leading proponent of the semiprocedural conceptualization of EBJR that ‘what all these European and American cases have in common is that the courts scrutinized the legislative process and evaluated the quality of that process.’\textsuperscript{112}

As I understand it, if courts scrutinize the legislative process not strictly as a source of evidence for their independent determination of substantive constitutionality, but rather, ‘in order to verify the adequacy and quality of that process’ and if courts treat these ‘procedural requirements’ ‘as proxies for the determination of constitutionality,’ this is not purely substantive review. Rather, it merges the two meanings of EBJR, and consequently, merges substantive and procedural review. In short, contrary to Alemanno’s claim, I believe that at least the main cases that are often cited as the paradigmatic examples of EBJR cannot be characterized as belonging to the (pure) substantive review model.

At the same time, while many prominent scholars described the emerging EBJR phenomenon as ‘procedural review,’\textsuperscript{113} I do not believe these leading cases can properly be characterized as (pure) procedural review either. As we saw, in most of these cases, the judicial examination of the legislative process did not completely supplant the traditional substantive tests for determining constitutionality. Rather, it was usually integrated into them, such as in determining whether the law was proportional, necessary or narrowly tailored. Moreover, the quality of the legislative process was usually only one of the considerations (even if a decisive consideration) in determining constitutionality.\textsuperscript{114} As Klaus Meßerschmidt observed, these cases ‘did not substitute procedural review for substantive review. The judges only added some procedural arguments as a side part to their substantive review.’\textsuperscript{115}

Finally, and most crucially, in all these cases, the judicial review of the legislative process and the requirement that the legislature follow an evidence-based process were not done in insulation. They were always conducted only in cases that involved arguments that the content of the law infringes some constitutional values or rights. As Dan Coenen, a leading observer of this phenomenon in the American case-

\textsuperscript{111} Ibid 331-32.
\textsuperscript{112} Ibid.
\textsuperscript{113} See the sources cited in note 56 above.
\textsuperscript{114} See also I. Bar-Siman-Tov (n 3) 278.
\textsuperscript{115} Meßerschmidt (n 5).
law aptly observed, the court employs (what I term) EBJR in its second meaning only in ‘cases in which the substantive values at stake are (in the Court’s view) distinctively deserving of judicial protection.’ And as Rose-Ackerman, Egidy and Fowkes pertinently observe in summarizing the German case law, including Harz IV:

‘It is noteworthy that the procedural violations before the Constitutional Court involved harm to an individual right holder, not the problems facing the general public as it seeks to evaluate the policy impact of a law and to hold politicians to account. The procedural requirements are linked to the violation of individual rights, not the promotion of broad democratic values.’

And the same is true for other jurisdictions – the protection of rights or other constitutional values (such as federalism) has led the courts to review the legislative process.

Indeed, the crucial point is that none of these cases imposed upon the legislature a general obligation to follow an evidence-based legislative process for all legislation, regardless of whether its content infringes upon the constitution. As we saw in the previous section, the Israeli Supreme Court in fact explicitly rejected this possibility. The U.S. Supreme Court has likewise explicitly held that there is no general formal requirement upon Congress to make findings of fact or to follow an evidence-based legislative process in order to legislate. Indeed, even Justice Stevens, ‘the most ardent proponent of a ‘due process of lawmaking’ philosophy’ in that Court, has emphasized that ‘we have never required Congress to make particularized findings in order to legislate […] absent a special concern such as the protection of free speech.’ Similarly, “the ECJ has not followed the Advocate General’s opinion in terms of for example requiring that impact assessments are a binding procedural step without which the legality of the underlying act will be affected.”

The semiprocedural nature of the EBJR cases also stems from the fact that several of these cases, particularly in the U.S., often combine aspects of both meanings of EBJR (and consequently of both procedural and substantive review).

116 Coenen (n 58) 1283.
117 Rose-Ackerman, Egidy and Fowkes (n 55) 185-186.
119 HCJ 4885/03 Isr. Poultry Farmers Ass’n v. Gov’t of Isr. Supra (n 56).
120 Crane (n 30) 643; Rose-Ackerman, Egidy and Fowkes (n 55) 73.
121 Coenen (n 58) 1386.
122 Gonzales v Raich, 545 U.S. 1, 21 (2005) (citations omitted).
124 I’m careful to say that this may be more an American than a European trend, because van
As Bertrall Ross recently observed about the American case-law, on the one hand, ‘More than ever, the constitutionality of laws turns on judicial review of an underlying factual record, assembled by lawmakers.’\(^{125}\) This increasing legislative record review and emphasis on requiring sufficient legislative findings in the legislative record is consistent with EBJR in its second meaning and with procedural review. On the other hand, ‘the Court is increasingly questioning the credibility of the record itself,’ and independently assess the evidence.\(^{126}\) This, in turn, is consistent with EBJR in its first meaning and therefore with substantive review.\(^{127}\)

In short, contrary to the very common misconception, and despite the fact that the paradigmatic cases that sparked the debate about EBJR have a clear procedural aspect, I believe these cases cannot be appropriately conceptualized within the (pure) procedural model of judicial review. Rather, as these cases merge procedural review with substantive review, they are more appropriately conceptualized as semiprocedural.

6. Conclusion

The emergence of the evidence-based judicial review phenomenon has left many court-observers perplexed. It has raised many debates on how to understand this phenomenon, in addition to a heated normative debate. This article tried to contribute to these debates, by clearing some of the conceptual misunderstanding of EBJR, which significantly debilitates the debates over this phenomenon. In particular, the article focused on revealing and elucidating the unobserved dual meaning of EBJR and its relationship to the substantive, procedural and semiprocedural models of judicial review.

This insight helped clarify one of the main debates over EBJR: whether it should be understood as part of substantive or procedural judicial review. In the process, it also helped to shed light on related questions perplexing the debate over Gestel and de Poorter (n 12) argue that ‘What the ECJ and the Dutch courts appear to have in common is that they are hesitant to look beyond a procedural review in order to challenge the facts, empirical data, and scientific knowledge applied by legislators and regulators.’\(^{125}\)


Ibid. J. Martinez, ‘Rational Legislating’ (2005) 34 Stetson Law Review 547, 583 makes a similar claim: ‘Judicial inquiry into whether evidence exists in the legislative record for legislative findings leading to enactment of legislation is thus the hallmark of the Court's evolving jurisprudence in these areas. Significantly, however, the Court in these fields has exercised judicial review that second-guesses the legislative determination of whether the evidence indeed supports the findings, and whether the findings, in turn, lead to the legal rules enacted.’\(^{126}\)

In addition to his argument about the Court’s shift from reviewing the adequacy of the legislative record to also questioning the substantive credibility of the evidence in the legislative record, Ross adds another argument, which bolsters and complicates the mixture of process and substance in EBJR even further: he argues that ‘Justices question the credibility of the record when they suspect a malfunctioning of the political process that shaped the record.’ Ross (n 125) 2032.
EBJR, such as the relationship between evidence-based judicial review and evidence-based lawmaking, and the role of legislative findings in constitutional adjudication.

As we saw, moreover, the distinction between the two meanings of EBJR touches upon fundamental questions about the role of courts vis-à-vis legislatures (and the legislative process), institutional capacities of courts vs legislatures, and the appropriate division of labor between legislatures, courts and litigants in engaging with evidence-based decision-making. Hence, although this article has focused on conceptual exploration rather than normative evaluation of EBJR, its insights can help focus the normative debate by revealing what’s at stake when choosing between the two versions of EBJR.