Semiprocedural Judicial Review

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[Note: This is the pre-peer reviewed version of the article. The final version is forthcoming at 6(3) LEGISPRUDENCE _ (Dec. 2012)]

Abstract

This Article explores a novel cross-national phenomenon: the emergence of a new judicial review model that merges procedural judicial review with substantive judicial review. While this model is not yet fully defined, it has already spurred much controversy. The Article explicates this emerging model, which it terms "semiprocedural review," and provides a theoretical exploration of both its justifications and its objectionable aspects. It concludes by evaluating semiprocedural review's overall justifiability and suggesting guiding principles for a more legitimate model of semiprocedural review. The Article pursues these goals through the unique perspective of juxtaposing semiprocedural review with "pure procedural judicial review" and "pure substantive judicial review."

Keywords

Judicial review, procedural review, substantive review, semi-procedural review, proportionality, legislative process, due process of lawmaking

A. INTRODUCTION

Recent scholarship reveals a fascinating cross-national phenomenon: the gradual infiltration of procedural review into constitutional adjudication. Indeed, different scholars have recently identified a "procedural trend" in the case law of the European Court of Human Rights (ECtHR), the European Court of Justice (ECJ), national constitutional courts in Europe, and the U.S. Supreme Court. This procedural turn has not been toward "pure" procedural judicial review, in which courts focus exclusively on the enactment process and strike down legislation based solely on procedural defects in

* Assistant Professor, Bar-Ilan University Faculty of Law. © 2012, Ittai Bar-Siman-Tov. I am indebted to Tsilly Dagan, Reut Gelblum, Patricia Popelier and Werner Vandenbruwaene for insightful comments, and to Shany Winder for excellent research assistance.

1 P. Popelier, 'Preliminary Comments on the Role of Courts as Regulatory Watchdogs' in this issue (observing that "administrative process review by courts is gradually developing into a broader technique of constitutional adjudication").


that process. Instead, courts are increasingly examining the legislature's decision-making process as part of their determination of the substantive constitutionality of legislation. Hence, we appear to be witnessing the emergence of a novel judicial review model that merges procedural judicial review with substantive judicial review. While this model is relatively new, and not yet fully defined, it has already generated much controversy.  

This Article explores this emerging model, which it terms "semiprocedural review" (SPR). The Article expounds upon the nature of this new model and evaluates its justifiability, mainly by juxtaposing it with the "purely procedural" and "purely substantive" models of judicial review. Section B describes and explicates the emerging semiprocedural model of judicial review. Section C juxtaposes SPR with the two pure models of judicial review. The Article then examines the theoretical justifications (section D), as well as theoretical objections (section E), to SPR. It concludes with an overall assessment of the justifiability and desirability of SPR (section F) and with guiding principles for a more legitimate model of semiprocedural review (section G).

B. EXPLICATING SEMIPROCEDURAL REVIEW

"Semiprocedural review" is a model of judicial review which merges the examination of the statute's enactment process with the substantive judicial determination of the statute's constitutionality. Typically, SPR is divided into two stages. At the first stage, courts engage in substantive judicial review: they examine the content of a certain statute and determine whether it infringes upon constitutionally protected rights or other constitutional values. At the second stage, courts turn to an examination of the legislative process in order to determine the permissibility of the infringement.  

1. The Classic Constitutionally-Mandated Semiprocedural Review

The classic and simple version of SPR is when courts enforce constitutional provisions that entrench certain rights or values through procedural entrenchment. By stipulating that certain rights or values can only be infringed by some supermajority or special legislative process, such provisions invite SPR. In enforcing such provisions, courts must first determine whether the content of the legislation in question infringes upon constitutionally protected rights or other constitutional values. At the second stage, courts turn to an examination of the legislative process in order to determine the permissibility of the infringement.  

A classic example of this version of SPR is the South African case of Harris v Minister of the Interior, which invalidated the Separate Representation of Voters Act, 46 of 1951. In this case, the court first concluded that the Act "disqualifies" voters on ground of race or colour within meaning of the relevant entrenched provision of the South Africa Act 1909. It then went on to determine that the Act was not enacted in accordance with the special procedure stipulated in the entrenched provision, which required a two thirds majority of both houses in a joined session.  

A less known, but no less illustrative, case is Bergman v. Minister of Finance—the first case in which the Israeli Supreme Court invalidated a parliamentary Act. In this case, the court first

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7 Ibid, 1924.
8 Harris v Minister of the Interior 1952 (2) SA 428 (A) (S. Afr.)
9 Ibid.
10 HCJ 98/69 Bergman v Minister of Finance [1969] IsrSC 23(1) 693.
concluded that the Act infringed upon the entrenched Basic Law provision guaranteeing equal elections. This substantive stage of the decision entailed a determination about the proper meaning and scope of "equality" in the entrenched provision, as well as statutory interpretation to determine whether the Act in question infringed upon "equal elections" within that meaning of the entrenched provision. Proceeding to the procedural part of the decision, the court examined the legislative process and determined that the required supermajority for such an infringement was not present in all three readings.\(^{11}\)

In both of these examples courts exercised judicial review of the legislative process. In both cases, moreover, the question of whether the legislature met certain procedural requirements in the enactment process was the decisive factor determining the permissibility of the infringement. However, the judicial scrutiny of the legislative process came only after the courts exercised substantive judicial review and found a substantive constitutional infringement. It is this combination of substantive constitutional adjudication (in which courts determine whether the content of the law infringes upon substantive constitutional provisions guaranteeing rights or values) with procedural review (in which courts determine whether the law was enacted in conformity with the procedure required in the constitutional provisions entrenching these rights or values) that make them semiprocedural.

2. The Emerging Judicially-Created Semiprocedural Review

A more complex and interesting emerging version of SPR is in cases where there is no constitutional provision requiring a special legislative process for the infringement of certain rights or values. In these cases, courts themselves develop judicial doctrines that integrate an examination of the legislature's decision-making process into the judicial tests for determining the permissibility of constitutional infringements. Moreover, courts themselves create certain heightened procedural requirements when particular rights or values are infringed. Judicial review of the legislative process in these cases does not completely supplant the traditional balancing tests that courts use to determine the permissibility of infringements. Rather, the procedural review typically supplements the traditional balancing tests and is integrated into them.

In the emerging version of SPR exercised by the ECtHR, the ECJ, and several national constitutional courts in Europe, the judicial examination of the legislative process is often integrated into the courts’ proportionality analysis.\(^{12}\) Hence, in a number of recent cases, these courts seemed to base their conclusion about proportionality, at least in part, on the question of whether the infringing Act was enacted through a process that included procedural requirements such as consultation procedures, appropriate investigations and studies, and sufficient parliamentary debate.\(^{13}\)

The ECtHR's Grand Chamber, for example, explicitly confirmed that "it is relevant" that the "Act was the culmination of an exceptionally detailed examination… and the fruit of much reflection, consultation and debate" in concluding that restrictions on rights were proportional.\(^{14}\) Furthermore, the ECtHR referred, inter alia, to the lack of substantive parliamentary debate or of evidence in the legislative records that the legislature "sought to weigh the competing interests or to assess the proportionality of the restriction" in a couple of decisions holding that infringements on rights failed the proportionality test.\(^{15}\) These decisions were interpreted by European commentators not only as indicating that a deliberative enactment process could lead the court to find restrictions on rights to be

\(^{11}\) Ibid.

\(^{12}\) Popelier, supra, n 1.

\(^{13}\) For a detailed discussion see LENAERTS, supra, n 3; Messerschmidt, supra, n 4; Popelier, supra, n 1; Popelier, supra, n 2; Popelier, supra, n 4, 28-29, 33.

\(^{14}\) Evans v the UK [GC] (App no 6339/05) Reports 2007-I, paragraph 86.

\(^{15}\) Hirst (no 2) v the UK (App no 74025/01) ECHR 30 March 2005 and [GC]ECHR 2005-IX; Alajos Kiss v Hungary (App no 38832/06) ECHR 20 May 2010.
proportional, but also as establishing a requirement on parliament "that decisions limiting political (or indeed other) rights are subject to actual deliberation."\(^{16}\) In fact, some commentators explicitly concluded that these decisions seem to establish "a method of human rights adjudication that requires a court to assess the adequacy of parliamentary debate on an enactment and, if that debate is found wanting, to take this into account in its assessment of the measure's proportionality."\(^{17}\)

A similar semiprocedural approach of examining the appropriateness of the legislative process as part of the proportionality determination can be observed in recent ECJ cases. These cases indicate that at least in cases in which the Community legislature enjoys broad discretion, the Court will exercise very deferential judicial review of the legislature's substantive choices, focusing instead on the legislature's decision-making process.\(^{18}\) Under this semiprocedural review, the Court ensures "that in adopting the act [the Community lawmaking institutions] actually exercised their discretion, which presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate."\(^{19}\) This, in turn, imposes a requirement on these institutions "to produce and set out clearly and unequivocally the basic facts which had to be taken into account as the basis of the contested measures of the act and on which the exercise of their discretion depended."\(^{20}\) As the Court explicitly confirmed in a later case, "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."\(^{21}\) And as Koen Lenaerts aptly summarizes:

[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.'\(^{22}\)

A similar version of SPR emerges from a number of decisions by the American Supreme Court. The clearest and most explicit judicial endorsement of SPR can be found in Justice Stevens' dissent in Fullilove v. Klutznick:\(^{23}\)

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

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\(^{19}\) Case C-310/04 Spain v Council [2006] ECR I-7285 para. 122

\(^{20}\) Ibid, para. 123.

\(^{21}\) Case T-252/07 Sungro, SA and Others v Council and Commission para. 60

\(^{22}\) Lenaerts, supra, n 3, 2-3.

\(^{23}\) 448 U.S. 448 (1980).
judicial review should include a consideration of the procedural character of the decisionmaking process. Applying this approach to the Act in question, Justice Stevens examined the records of the legislative process and found insufficient deliberation and consideration in the enactment process. This kind of perfunctory consideration of an unprecedented policy decision of profound constitutional importance was sufficient grounds, according to Justice Stevens, for concluding that the statute was not "narrowly tailored" and to lead to its invalidation.

For many years, Justice Stevens seemed to be alone amongst the Justices in his support of SPR. However, more recent case-law indicates a growing propensity toward SPR, even if it is more often expressed in practice rather than through explicit, elaborate pronouncements. In these recent cases, the decision about the permissibility of infringements was based, inter alia, on an examination of the legislative record in order to look for evidence of sufficient legislative findings or adequate debate. In one case, for example, the court invalided a restriction on indecent internet speech, noting 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..." American commentators observed that these decisions were marked by their "excruciatingly fine-tuned examination of the record of congressional action on the legislation," and argued that the quality of the legislative process was "a crucial issue" in these cases. These commentators interpreted these decisions as establishing the requirements of legislative studies, findings and deliberation in the enactment of legislation infringing upon constitutional rights or other constitutional values (such as federalism).

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. In all these cases, moreover, the quality of the legislature's decision-making process seemed to influence the court's decision about the constitutionality of the law. However, the examination of the legislative process was not done in isolation, and the quality of that process was not the sole consideration determining the validity of legislation. Rather, the enactment process was reviewed only in cases in which the content of legislation was allegedly unconstitutional. The quality of the process, moreover, was (only) one of the factors courts considered in determining the permissibility of the constitutional infringement. These features make this model semi procedural, rather than purely procedural.

Furthermore, in all these cases, the enactment process was evaluated based on some judicially-created criteria for proper lawmaking. As Patricia Popelier's new study reveals, moreover, the procedural requirements these cases seem to impose on legislatures are remarkably similar to elements of "better regulation" programs. By integrating these requirements into constitutional adjudication, courts take up the role of "regulatory watchdogs" not only when reviewing the work of administrators

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26 Ibid, 552 ("[R]ather 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.")
27 See, Frickey and Smith, supra, n 5, 1717.
28 For a detailed discussion, see Coenen, supra, n 5, 1314-28 and Frickey and Smith, supra, n 5, 1720-27.
30 Frickey and Smith, supra, n 5, 1728.
31 Ibid; Coenen, supra, n 5, 1314-28.
32 Popelier, supra, n 2.
and regulators (such as in the famous Hatton decisions33), but also of legislatures themselves.34 The emergence of this new semiprocedural model of judicial review could therefore be viewed as an important part of the larger "regulatory watchdogs" phenomenon identified by Popelier and explored in this special issue.

While we can already observe the emergence of a semiprocedural model of judicial review, and delineate some of its main characteristics, the relevant case law leaves several open questions. For example, the case law does not provide a clear answer about the exact role that the procedural review plays in the courts' overall determination of constitutionality. Particularly, there is no clear answer to the question of when the presence or absence of certain procedural requirements in the enactment process would be decisive (rather than simply relevant) in determining the fate of legislation infringing upon constitutional rights.35 Nor is the relevant case law entirely clear as to when will SPR be exercised.36 Hence, it appears that the semiprocedural model of judicial review is still evolving, and that its boundaries and exact features are not yet fully defined in the case law.

C. JUXTAPOSING SEMIPROCEDURAL REVIEW

1. Semiprocedural Review and Pure Substantive Review

Under the classic or "pure" model of substantive judicial review, courts determine the constitutionality of legislation based strictly on an examination of the statute's content (or substance). Typically, courts examine whether the content of a certain statute impermissibly infringes upon constitutionally protected rights or values. In making that determination, the process in which the legislature enacted the law is considered irrelevant (even in legal systems in which the determination of infringement is separated from the determination of its permissibility). Only the end product of the legislative process—the content of the enacted law—is the subject of judicial review.37

In contrast, under SPR, 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. The key difference between purely substantive judicial review and SPR is at the stage of determining the permissibility of infringements. Under the purely substantive model, this determination is based entirely on the judgement of judges on whether substantive balancing tests (such as the legitimacy of the pursued objective; the fit between the measure and that objective; and the over-all cost-benefit of the infringing measure) were satisfied on the merits. SPR complements, or even partially substitutes, these substantive judicial judgements with a procedural examination of whether the legislature devoted considered judgement to these questions. It therefore represents a significant departure from the view that constitutionality should be determined purely on the statute's content and which sees the enactment process as completely beyond the reach of courts.38 Moreover, it represents a partial, but dramatic, shift in the role of courts: from serving as

33 Hatton v United Kingdom (App no 36022/97) ECHR 2 October 2001 and [GC](App no 36022/97) ECHR 2003-VIII 8 July 2003.
34 Popelier, supra, n 2.
35 Coenen, supra, n 5, 1316-18.
37 Bar-Siman-Tov, supra, n 6, 1923.
38 However, it is not the only deviation from pure substantive judicial review. Coenen, supra, note 5 identifies a large group of "semisubstantive rules" that complement substantive judicial review with a judicial examinations of issues beyond the content of the law, such as the identity of the decision-maker; the lawgiver's underlying purpose; the age of the law; the manner in which the law came to be
society's ultimate balancers of rights and interests to ensuring that the legislature takes responsibility for this task.39

2. Semiprocedural Review and Pure Procedural Review

Under "pure procedural judicial review" (or "judicial review of the legislative process" in its pure version), courts focus exclusively on an examination of the procedure leading to statutes' enactment. The question of whether the legislature met certain procedural requirements in the legislative process is the sole consideration in determining the validity of legislation. 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.40

There are three key differences between the pure procedural and the semiprocedural models. One difference relates to the methodology of judicial review: the pure model represents the view that the procedural validity of legislation should be examined separately and independently of its substantive validity, whereas SPR merges the two examinations. The second difference regards the justification of judicial review of the legislative process. The purely procedural model represents the view that guaranteeing the integrity of the legislative process is justified in itself, regardless and independently of the need to protect individual rights or substantive values. Under SPR, in contrast, procedural review is only justified when individual rights or other constitutional values are at stake.41

The third difference between the pure procedural and the semiprocedural models relates to the type of procedural requirements courts enforce under each model. Typically, most courts that exercise pure procedural review enforce only procedural requirements found in the formal rules governing the legislative process (with most enforcing only lawmaking requirements that are constitutionally mandated, while others also enforce statutory and parliamentary rules).42 Under the emerging semiprocedural model, in contrast, courts typically enforce judicially-created procedural requirements that go beyond the formal rules, including findings, consultation, and proper debate and deliberation.43 Hence, while the purely procedural model typically holds the legislature to a level of requirements that can be described as "procedural regularity," the semiprocedural model typically subjects the legislature to the much higher standard that can be described as "procedural rationality."44 This difference is not a necessary implication of the nature or definition of these models,45 but rather, a description of how they evolved in judicial practice.46
This last difference may be indicative of a larger phenomenon. Although care should be exercised in making generalizations, it appears that courts both in Europe and the U.S. indicate a clear preference of the semiprocedural model over the purely procedural model. Indeed, in some countries courts completely refuse to exercise pure-procedural review, even when constitutional law-making requirements are violated.48 Moreover, even among courts that do exercise pure-procedural review, most limit the scope of procedural requirements they enforce,49 and display a general tendency to refrain as much as possible from exercising pure-procedural review and striking down a law due to procedural defects in its enactment.50 In contrast, as we have seen, courts demonstrate a growing propensity to exercise SPR and to enforce more demanding procedural requirements under this model, even in legal systems in which courts persistently refuse to exercise pure-procedural review.51

These observations raise several interesting questions: What accounts for the appeal of SPR? And what accounts for the fact that it nonetheless remains controversial? Is SPR necessarily more legitimate and justifiable than the purely procedural model? Is the emergence of SPR a normatively desirable development? What is the proper relationship between SPR and the pure models of judicial review? Continuing with the juxtaposition approach, the next sections explore these questions.

D. THE APPEAL OF SEMIPROCEDURAL REVIEW

The normative appeal of SPR can be explained by examining how this model corresponds with the theoretical justifications of pure substantive judicial review and pure procedural judicial review. By merging procedural and substantive judicial review, SPR benefits from some of the main justifications of both substantive judicial review and procedural judicial review, while also avoiding some of the objections to each of the pure models.

The semiprocedural model's appeal stems, first and foremost, from the fact that it is seen primarily as a tool for protecting fundamental rights.52 Indeed, notwithstanding the plethora of theoretical scholarship dedicated to justifying judicial review, the protection of individual and minority


47 At least in Europe and the U.S.


49 See sources cited in n 42.

50 Ittai Bar-Siman-Tov, 'Legislative Supremacy in the United States?: Rethinking the Enrolled Bill Doctrine' (2009) 97 Georgetown Law Journal 323, 389-90; Ben-Porat & Ben-David, supra, n 48, 2; Alain Delcamp, Secretary General of the French Senate, Parliaments and Constitutional Courts, Association of Secretaries general of Parliaments (2011) 15 ("Courts therefore make sure to exercise minimum control [over compliance with legislative procedure] (even when such procedures have been constitutionalised")).

51 In the U.S., for example, although both models are controversial, courts do exercise SPR and impose demanding procedural requirements, while persistently refusing to exercise pure procedural review. See Bar-Siman-Tov, supra, n 6, 1917. In Belgium, as well, the Constitutional Court in principle only accepts substantive review while excluding pure procedural review (with very limited exceptions), but is showing growing propensity to employ SPR, both in its classic and its emerging judicially-created version. See Popelier, supra, n 4, 26-30, 33.

rights has long been the most dominant justification. Hence, SPR shares with substantive judicial review its most influential justification.

The semiprocedural model's attractiveness also stems, to a large extent, from the fact that it is seen as more deferential to the substantive judgment of the legislature than pure substantive judicial review. The primary objection to substantive judicial review is that it allows unelected and unaccountable judges to displace the substantive choices of the democratically elected and accountable legislature. The semiprocedural model, in contrast, is seen as leaving the substantive choices about rights and interests to the legislature, focusing instead on whether the legislature gave due consideration to these issues:

Reconciling substantive constitutional review with normative democratic theory has proved enormously difficult…. [Semiprocedural] doctrines, however, need not be inconsistent with normative democratic theory if they do not foreclose any substantive legislative choice. They clearly do not do so in theory, for their entire point is to ensure full consideration of constitutional norms by the political branches without dictating the content of those branches' conclusions. Hence, the semiprocedural model is seen as a means of protecting rights and constitutional values, while avoiding, or at least ameliorating, one of the primary objections to substantive judicial review.

A related feature that contributes to the semiprocedural model's attractiveness is its provisional character. Under the classic model of (strong-form) substantive judicial review, the court's constitutional judgments that invalidate a law are considered "final and unrevisable." In contrast, by invalidating a law on procedural grounds, SPR signals to the legislature that it may re-enact the same invalidated law, as long as it follows a proper legislative process. This feature of giving the last word to the legislature enables SPR to evade another primary objection to substantive judicial review.

The combination of the features discussed thus far gives SPR a "dialogic quality." By allowing legislative response to judicial invalidations and leaving room for substantive legislative choice, it is seen as a model that enables an inter-branch dialogue between courts and legislatures; and by encouraging legislatures to pay closer attention to fundamental rights and other constitutional values and to follow a more deliberative legislative process, it is seen as promoting dialogue and deliberation about constitutional rights and values outside the courts. Hence, SPR also draws its legitimacy from dialogue theories, which are becoming increasingly influential in constitutional theory.

At the same time, SPR also shares one of the main justifications of pure procedural judicial review: the need to protect procedural democratic principles such as participation, transparency,

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54 Popelier, supra, n 1.
55 This countermajoritarian difficulty has been articulated most famously in A.M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (2nd edn., 1986).
59 Ibid, 2840.
60 Bateup, supra, n 31, 1128-31.
61 Bar-Siman-Tov, supra, n 6, 1954.
accountability, and deliberation. In fact, because it sets the higher procedural bar of "procedural rationality," it goes further than pure procedural review in advancing a robust version of deliberative democracy.

By employing procedural review as a means for protecting fundamental rights, SPR not only builds upon the primary justification for substantive judicial review, it also avoids one of the primary objections to pure procedural review. Indeed, one of the main sources of resistance to pure procedural review is that it is not aimed at the protection of individual rights. The argument is that since the principal justification for judicial review is the need to protect fundamental rights, and since courts have limited resources and legitimacy capital, they should avoid wasting their precious resources on judicial review models that are not dedicated to vindicating these rights. SPR turns this objection into a justification.

Thus, SPR appears as the best of both worlds: one model of judicial review that can achieve the main aims of both substantive and procedural models, while promoting dialogue, respecting legislative choice, and blunting the main arguments against the two pure models. And yet, while some scholars do see SPR as a "golden mean," the emergence of this model has also sprung "a cottage industry of criticism... in the academic community." So why is SPR so controversial? The next section explores this question.

E. THE OBJECTIONABLE ASPECTS OF SEMIPROCEDURAL REVIEW

The previous section suggested that its semi procedural nature of merging procedural and substantive judicial review accounts for much of SPR's appeal. Its commonalities with each of the pure models, as well as its differences from each of them, appear to explain its normative attractiveness. Continuing with the juxtaposition methodology, this section argues that this model's semi procedural nature also accounts for much of its disagreeability.

1. The Controversial Procedural Aspect of Semiprocedural Review

The main common feature of the semi and pure procedural models is that in both models, courts determine the validity of legislation, at least in part, by scrutinizing the enactment process and evaluating the adequacy of this process. By sharing this feature with the pure procedural model, SPR also shares its main source of criticism. Indeed, "the idea that courts will determine the validity of legislation based on the adequacy of lawmaking procedures is highly controversial."

Such judicial review elicits vigorous criticisms primarily because it "is often seen by its critics as an interference with the internal workings of the legislature and as an intrusion into the most holy-of-holies of the legislature's prerogatives." This argument is at the core of many of the objections to both procedural models, whether these objections are framed in terms of parliamentary sovereignty,

63 Coenen, supra, n 43, 1866-69.
64 Bar-Siman-Tov, supra, n 6, 1926.
66 Popelier, supra, n 1.
67 Coenen, supra, n 49, 2886.
68 Bar-Siman-Tov, supra, n 6, 1918.
69 Ibid, 1927.
parliamentary autonomy, separation of powers or the respect due to the co-equal legislature. Indeed, this argument is at the core of vociferous objections to SPR not only in the UK, but also in countries such as the U.S., which never espoused parliamentary sovereignty and have firmly-established substantive judicial review.

Supporters of procedural judicial review offer a variety of arguments in response to this prevalent objection to procedural review. The most common response refers to features common to both the semi and pure procedural models, namely their deference to the substantive judgments of legislatures and their provisional character. The argument is that a judicial review model that does not interfere with the substantive choices of legislatures and which also gives the final word to legislatures rather than courts should be viewed as more respectful and less intrusive towards legislatures than substantive judicial review. Supporters of SPR argue further that it is also more legitimate and less intrusive than the purely procedural model, because it only reviews the legislative process when substantive constitutional values are at stake, whereas the pure model polices the legislative process "in a free-form, across-the-board way." This argument sounds reasonable, for it means that under the semiprocedural model courts engage in legislative process review in a more limited set of cases, and only when there is the added justification of protecting rights and substantive constitutional values. The next subsection argues, however, perhaps counter-intuitively, that this difference between the semi and pure procedural models actually makes SPR less defensible.

2. The Disagreeable Substantive Aspect of Semiprocedural Review

As we have seen, one of the primary defences of procedural review is the argument that it is more legitimate and respectful towards the legislature, because it focuses on the legislative process, while leaving substantive choices to the legislature. This argument is particularly applicable to the purely procedural model, for it focuses exclusively on the enactment process and completely avoids reviewing the content of the legislation. It therefore leaves the decision about the legislation's content, with all the substantive policy and value choices it entails, entirely to the legislature.

The persuasiveness of this argument is more limited, however, when applied to SPR. In the semiprocedural model, the procedural review does not completely replace the court's substantive review. As elaborated above, the first stage of this model, in which courts determine whether there is a constitutional infringement, is based entirely on traditional substantive review. To be sure, by making the adequacy of legislative procedures a relevant consideration in determining the permissibility of infringements (and particularly by treating this factor as a legitimate reason for concluding that the infringement is permissible), SPR does leave more room for respecting legislative choices than pure substantive review. However, in the emerging semiprocedural model, even the stage of determining the permissibility of infringement still has a dominant substantive aspect, because the procedural review

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72 Bar-Siman-Tov, supra, n 6, 1927.
74 Ibid.
75 Ibid.
76 Coenen, supra, n 49, 2869-70.
77 See section B.
typically complements rather than completely substitutes the traditional substantive balancing tests.\textsuperscript{78} Hence, much of society's substantive choices on issues such as constitutional meaning, the proper balance between rights and interests, the legitimacy of certain objectives, and the permissibility of certain means are still made by courts rather than legislatures.

The semiprocedural model requires courts to make substantive judgments not only while employing this model, but also in deciding when to employ this model. The pure procedural model applies uniformly on all legislation that was improperly enacted, and imposes the same level of procedural requirements on the enactment of all laws, regardless of their subject matter or possible impact on certain constitutional rights or values. In contrast, in SPR, courts scrutinize the enactment process and impose heightened procedural requirements only in "cases in which the substantive values at stake are (in the Court's view) distinctively deserving of judicial protection."\textsuperscript{79} In fact, the semiprocedural model not only puts judges in the position of making substantive value judgments about which substantive values merit greater judicial protection; it also puts courts in a position of dictating to the legislature which substantive values merit greater legislative attention.

Thus, the semi procedural nature of the semiprocedural model inevitably means that it also has a strong substantive aspect. Consequently, this model is susceptible to the main criticisms levelled against substantive judicial review—including democratic legitimacy arguments and institutional competence arguments against courts making substantive constitutional, moral, value and policy judgments. While its procedural aspects allow SPR to blunt these criticisms, unlike the purely procedural model, it cannot completely avoid them.

Of course, as critics of Ely's efforts to develop a value-neutral procedural constitutional theory\textsuperscript{80} already observed, procedural approaches to judicial review also entail value judgements.\textsuperscript{81} Even the purely procedural model requires courts to decide which procedural requirements to enforce, and since legislative procedures embody underlying values, this decision inevitably involves value judgements. There is a crucial difference, however, because the purely procedural model requires courts to make value judgements about which procedural values merit protection, while SPR additionally requires them to make value judgements about which substantive values merit protection.\textsuperscript{82} This difference is important, because—as both theoretical work by democratic theorists and empirical work by social psychologists establish—there is significantly more theoretical and societal agreement about proper procedures than about substantive values.\textsuperscript{83} Moreover, as the next section elaborates, even with regard to the procedural value judgement, there is significant difference between the purely procedural and semiprocedural models, which undermines SPR's justifiability.

3. The Type of Procedural Requirements Enforced and the Justifiability of Semiprocedural Review

As we have seen, under the purely procedural model, courts typically enforce procedural lawmaking requirements found in constitutions (and sometimes also in statutes and parliamentary rules). Under the emerging semiprocedural model, in contrast, courts typically enforce more

\textsuperscript{78} See section B2.  
\textsuperscript{79} Coenen, \textit{supra}, n 5, 1283.  
\textsuperscript{82} Bar-Siman-Tov, \textit{supra}, n 6, 1961.  
demanding "procedural-rationality" requirements, created by courts themselves. This difference has profound consequences for the defensibility and justifiability of SPR.

When courts enforce the less-demanding procedural requirements stipulated in the formal rules regulating lawmaking, they usually protect relatively uncontested procedural values, such as majority vote, political equality and the like, which could be accepted under almost any normative conception of democracy. In contrast, the more demanding procedural-rationality standard enforced under SPR protects procedural values whose acceptance largely depend on the acceptance of a particular, deliberative, notion of democracy. Moreover, when courts enforce constitutional and statutory procedural requirements, they can claim that the value judgement about the type of procedural values that merit protection was already made by the constitutional framers or the legislature, and that they are merely effectuating that judgement. In contrast, when courts enforce judicially-created procedural requirements, they make the value judgement about which procedural values merit protection themselves, hence inviting questions whether it is the legitimate role of courts to make these judgements.

Furthermore, the type of procedural requirements enforced impacts the force of the main criticism against procedural review—the argument that it illegitimately intrudes into the legislative sphere. This criticism is exacerbated when courts turn from enforcing lawmaking requirements mandated by the constitution or even by the legislature itself to imposing upon the legislature heightened judicially-created requirements. This sentiment was nicely captured in U.S. Supreme Court Justice Souter's objection to SPR: "[j]udicial authority to require Congress to act with some high degree of deliberateness… would be as patently unconstitutional as an Act of Congress mandating long opinions from this Court."

The type of procedural requirements enforced also impact arguments about courts' institutional competence to exercise procedural review. It is easier to defend judges' ability to examine whether a law satisfied procedural requirements such as bicameral passage, three readings or a special majority than to defend their competence to evaluate the sufficiency of legislative findings or the adequacy of parliamentary debate and deliberation. In a similar manner, the degree of procedural demands enforced by courts also impacts the strength of arguments against procedural review relating to the ability of legislatures to realistically meet the procedural standards imposed by courts.

The level of procedural demands imposed by courts also impacts the feasibility of reenactment of an invalidated law, and hence the strength of one of the main arguments in favour of procedural review: that judicial invalidations of statutes under procedural review are merely provisional. For example, a decision that remands the statute to the legislature and permits parliament to re-pass it as long as the three-reading requirement is observed imposes significantly less reenactment costs than a

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84 See section C2.
86 Cf. O'Connell, supra, n 16, 51; Popelier, supra, n 1 ("The idea that parliament should act as a forum of rational and informed deliberation has more affinity with a deliberative notion of democracy….").
87 INS v Chadha, 462 U.S. 919, 951 (1983) ("We see therefore that the Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. . . . It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.").
88 Bar-Siman-Tov, supra, n 50, 384; Bryant and Simeone, supra, n 5, 373–75.
90 For this type of criticisms of SPR's imposition of due-deliberation standards see Frickey and Smith, supra, n 5.
91 For this type of criticisms of SPR see R. Colker and J.J. Brudney, 'Dissing Congress' (2001) 100 Michigan Law Review 80.
decision that requires evidence of a high degree of deliberation and fact-finding in the legislative process.  

The type of procedural requirements enforced also has cardinal significance for the applicability and persuasiveness of theoretical justifications for procedural review. An obvious example is the constitutional-supremacy justification. This justification, argues, in brief, that the supremacy of the constitution requires courts to ensure that all branches of government, even the legislature in the enactment of laws, conform to the constitution.  

Under this justification, principles of parliamentary sovereignty and supremacy are countered by the principles of popular sovereignty and constitutional supremacy; while arguments about the judicial duty to respect the legislature are answered with arguments about the overriding judicial duty to respect and enforce the constitution. This justification, however, is only applicable to judicial enforcement of constitutional lawmaking requirements.

The Rule-of-Law justification provides another clear example. Briefly, this justification argues that the Rule-of-Law principle requires, inter alia, that courts ensure that all governmental powers, including in the enactment process, be wielded under the authority of and in accordance with the law. This justification is easily applicable to judicial enforcement of constitutional lawmaking requirements. Its application to procedural rules stipulated in statutes and parliamentary rules is also fairly easy. Such application relies on the relatively uncontested claim that the formal rules governing the legislative process (including internal parliamentary rules) have an integral role in the Rule-of-Law ideal. As I elaborated in greater detail elsewhere, this claim finds support in articulations of this ideal by some of the leading Rule-of-Law theorists, and is compatible with all major Rule-of-Law traditions. The applicability of the Rule-of-Law justification to a model enforcing judicially-created standards of procedural rationality is more difficult. A Rule-of-Law justification for enforcing this type of rules will have to rely on a more contested view that unwritten "procedural virtues – legislative due process, if you like – are [also] of the utmost importance for the rule of law."  

The type of procedural requirements enforced has a more complex impact on the dialogue justification. On the one hand, by insisting on adequate participation, consultation, deliberation and debate when fundamental rights and other constitutional values are at stake, courts play a crucial role in ensuring and promoting political and societal dialogue about those issues. On the other hand, if courts impose too-demanding procedural requirements, they may create such high reenactment costs

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93 Bar-Siman-Tov, supra, n 6, 1937-39.
94 Bar-Siman-Tov, supra, n 50, 371-72, 375-80; Navot, supra, n 37, 194.
95 Bar-Siman-Tov, supra, n 6, 1932-34, 1939-41.
96 Although the question of whether these sub-constitutional rules, which can be changed by the legislature and are often not enforced by courts, should be considered "law" is admittedly less clear cut. Cf. Itai Bar-Siman-Tov, 'Lawmakers as Lawbreakers' (2010) 52 William and Mary Law Review 805, 811-12.
98 Bar-Siman-Tov, supra, n 6, 1932-34.
99 Ibid, 1665-66; Waldron, supra, n 88.
that would undermine the other crucial element of the dialogue justification: the ability of the legislature to respond to judicial invalidations of statutes.\textsuperscript{101}

In a way, this tradeoff mirrors a tension between dialogue theorists about the essential element of the dialogue justification. For some dialogue theorists, the dialogue justification revolves entirely around the claim that judicial invalidations of statutes "usually leave room for, and usually receive, a legislative response."\textsuperscript{102} For others, the essential component of the dialogue justification is the claim that the "Court acts as a catalyst for debate, fostering a national dialogue about constitutional meaning. Prompting, maintaining, and focusing this debate about constitutional meaning is the primary function of judicial review."\textsuperscript{103} Nevertheless, both camps will agree that the claim that courts do not have the final word and that a judicial decision invalidating a statute is merely an invitation for reconsideration by the political process, is an indispensable part of the dialogue justification.\textsuperscript{104} Hence, the dilemma about the level of procedural requirements courts should enforce is unavoidable.

In sum, this section’s analysis suggests that there are three major features of SPR that account for its objectionable or controversial nature: its procedural aspect of allowing courts to determine validity based on the adequacy of legislative procedures; its substantive aspect of requiring courts to make substantive value judgments; and the type of procedural requirements enforced under this model.

\section*{F. SEMIPROCEDURAL REVIEW: THE BEST OR THE WORST OF BOTH WORLDS?}

Section D suggested that SPR seems to enjoy the best of both worlds: its semi procedural nature enables it to benefit from some of the main justifications of each of the pure models, while also blunting the main criticisms against these two models. Section E suggested, however, that due to its semi procedural nature, SPR also suffers the worst of both worlds: Its substantive aspect makes it susceptible to the main criticisms levelled against substantive judicial review; its procedural aspect invites the primary objection levelled against procedural review; and its differences from the purely procedural model (its semi procedural nature and the procedural requirements it enforces) only exacerbate this objection, while also undercutting the persuasiveness of the major justifications of procedural model.

So is SPR the best or the worst of both worlds? It is neither. This emerging model is not as abhorrent as the flood of criticisms it attracted would make it appear, but nor is it a panacea to all the problems associated with substantive or procedural judicial review. It is merely another proof that with judicial review models, like anything else in life, you can't eat the cake and keep it whole.

At the end of the day, I believe that, on balance, the emergence of a semiprocedural model of judicial review is a legitimate and desirable development. I think its advantages of protecting fundamental rights, while also promoting important procedural principles, respecting legislative choice, and fostering dialogue, outweigh its objectionable aspects. Nevertheless, the next section suggests that this model can be structured and employed in ways that will further decrease its objectionable features.

G. PRINCIPLES FOR LEGITIMATE SEMIPROCEDURAL REVIEW

The semiprocedural model's nature accounts for much of the criticisms it attracted. There are, however, features of this model that undercut its legitimacy, which are not necessary implications of its very nature, but rather, a result of the way this model has evolved and been employed in current judicial practice. Hence, this section suggests some guiding principles towards more legitimate semiprocedural review.

1. Be Truly Semiprocedural

In the current judicially-created version of SPR, the adequacy of the legislative process is but one consideration that complements substantive balancing tests in determining the permissibility of constitutional infringements. This creates several problems. First, there is significant uncertainty as to the role and weight of the procedural aspect in the overall judicial decision, which creates inconsistency in the case-law and impairs the ability of legislators and litigants to orient their behaviour. Second, it gives judges unbridled discretion in deciding in each case how much weight to give to the procedural aspect, which invites arguments that SPR "would function merely as an excuse for covert review of the merits of legislation under standards never expressed and more or less arbitrarily applied."

Third, as we have seen, it means that judges continue to make significant substantive judgements about issues such as the legitimacy of certain objectives, the permissibility and overall cost-benefit justification of certain means, etc. It thereby remains too close to pure substantive judicial review, and undermines two related advantages of procedural review: respect to the substantive choices of legislatures and avoiding arguments against judges making substantive value judgements.

My suggestion is that the question of whether the law was enacted through the required procedure will be the decisive, and in fact sole, consideration in determining the permissibility of constitutional infringements. At the first stage, courts should engage in ordinary substantive review to determine whether there is a constitutional infringement and evaluate the severity of that infringement. At the second stage, in which courts determine the permissibility of infringement, the adequacy of the legislative process should completely supplant, rather than supplement, the substantive balancing tests. That is, the stage of determining whether there is a constitutional infringement will be purely substantive, whereas the stage of determining the permissibility of infringement will be purely procedural. Thus the role of courts under SPR will truly transform from society's ultimate balancers of rights and interests to ensuring that legislatures act as more responsible balancers of rights and interests.

Admittedly, this suggestion will require a radical change in judicial doctrine and practice. It might also be more appropriate in legal systems (or type of constitutional issues) in which the substantive balancing tests are judicially-created rather than mandated by a constitutional limitation clause. However, this idea is not unprecedented. This is what courts did under the classic constitutionally-mandated version of SPR, and Justice Stevens' dissent in Fullilove v. Klutznick provides a good example for such judicially-created version. Moreover, the suggestion is not as radical as may appear, because, as principle 6 will elaborate, I suggest that SPR be employed only in

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106 448 U.S. 448 (1980).
107 See section B supra.
cases in which there is reasonable disagreement about rights and their balancing. At any rate, a more modest proposal is that even if the procedural review will continue to be exercised alongside or as part of the substantive balancing tests, courts should be clearer and more consistent about the precise role the procedural review plays.

2. Equality in Deference and Intervention

In the current case law, there is inconsistency and uncertainty on whether the adequacy of legislative procedures is an equally relevant consideration both in concluding that infringements were permissible and in concluding that infringements were impermissible. A couple of American federalism decisions demonstrate the problem. In an earlier decision that invalidated a law, the court gave the impression that the inadequacy of legislative findings was central in determining unconstitutionality. However, in a latter case that raised essentially similar constitutional issues, the court invalidated the law even though Congress meticulously assembled legislative findings. These decisions were rightly criticised for their inconsistency and for giving the impression that judges changed their approach as to the relevance of legislative findings according to the desired outcome. They were also justly criticised for the rule they appeared to establish, taken-together: that while inadequate legislative findings can serve as a consideration for nullifying laws, even the most extensive legislative investigations and findings will be an insufficient consideration for sustaining laws.

I believe the adequacy of the legislative process should equally apply as a consideration for invalidating laws and for sustaining them under SPR. That is, a proper legislative process should weigh in favour of sustaining laws to the same extent that a flawed enactment process should weigh against their constitutionality.

3. Be True to the Dialogic Promise in “Second Look” Cases

The same principle applies with greater force to “second look” cases—cases where courts review the validity of legislation enacted to replace a law invalidated in a previous semiprocedural decision. When courts invalidate a law under SPR, they send the message that the same law may be re-enacted as long as a proper legislative process is followed. As we have seen, this feature is an essential component in this model’s dialogic quality and in its overall justification. Hence, when essentially the same law as the invalidated statute is passed through the required process, courts should be true to their promise.

4. The Type of Procedural Requirements Enforced

As we have seen, the type of procedural requirements enforced under SPR has crucial importance to this model’s legitimacy. SPR is most justifiable when it is constitutionally-mandated. Procedural entrancement of certain rights or substantive values through statutory or internal

113 This definition is adapted from Hogg et al., supra, n 93, 19.
parliamentary rules would also significantly increase the legitimacy of SPR,\(^ {114}\) theoretical controversies about legislative entrenchment notwithstanding.\(^ {115}\)

When courts turn to enforcing judicially-created heightened standards, however, they jeopardize the legitimacy of SPR. To be sure, the arguments for protecting rights, promoting democratic procedural values and fostering political and societal dialogue can justify enforcing unwritten judicially-created procedural principles. However, I believe courts should limit themselves to ensuring the possibility for participation and a minimal level of deliberation and debate in the legislative process. A more demanding level of procedural requirements would provoke arguments about judicial intrusiveness, court's lack of legitimacy and competence, and may unduly hinder the possibility of re-enactment. Judicial imposition of too-demanding rational-legislating standards is also hard to justify from the perspective of the theoretical justifications for procedural review.

5. The Type of Substantive Values Protected

As we have seen, SPR inevitably requires courts to decide which substantive values merit protection. Consequently, its legitimacy is also contingent upon the type of constitutional values courts choose to protect.\(^ {116}\) I believe, for example, that the objections to SPR significantly intensified in the U.S. after the court turned from employing SPR in freedom of speech and Equal Protection cases to federalism cases. This is consistent with the observation that the protection of fundamental rights remains one of the most dominant justifications for both substantive judicial review and SPR.

A discussion of which constitutional values merit judicial protection is of course beyond the scope of this article. Hence, I will only offer a few tentative ideas. SPR will elicit fewer objections if courts limit its use to enumerated constitutional rights. Nevertheless, there may be a case for its application to unremunerated rights and other substantive constitutional values as well, because its deferential nature (especially under its version suggested here) makes it especially appropriate for adjudicating controversial constitutional issues.\(^ {117}\) SPR's employment in such cases may be more objectionable than its employment in enumerated rights cases, but it may still be less objectionable than employing strong-form substantive review in such cases. Moreover, applying SPR equally on all constitutional rights and values (at least all enumerated rights and values) will ameliorate some of the legitimacy problems of courts making substantive value judgements about which rights and values merit greater protection than others.

6. When Should Semiprocedural Review Be Avoided?

SPR should not be employed in cases of egregious human rights violations. In such cases, courts should exercise purely substantive review and invalidate the law regardless of the adequacy of its enactment process. This is based on the position that while protecting fundamental rights is not the only valid justification for judicial review, it should be a sufficient justification, at least in cases of egregious rights violations. In such egregious cases, even an exemplary legislative process should not be a valid reason for upholding the law.

Furthermore, even if the egregious law was enacted through a defective process, thereby giving courts the option of striking it down on procedural grounds, SPR is still not appropriate. That is


because it is important that courts be clear that the substantive violation here is the sufficient and sole reason for invalidating the law. Otherwise, it will send the message that such violations may be upheld if a proper process is followed. In addition to putting courts in a position of sending a wrong societal message, it may put courts in the position of having to violate their dialogic promise in a "second look" case.

In short, in cases in which the substantive violation is so flagrant that the law should be invalidated under any reasonable exercise of purely substantive judicial review, SPR should be avoided. SPR should be applied only in cases in which the adequacy of the legislative process can and should make a difference in determining constitutionality.

Similarly, SPR should not be employed in cases of egregious defects in the legislative process, such as when the law was enacted in blatant violation of the basic constitutional lawmaking requirements. In such cases, courts should exercise purely procedural review and invalidate the law regardless of its content. This is based on the position that the importance of protecting the rule of law, constitutional supremacy, and essential elements of procedural democracy, mandate that courts should have the power to invalidate laws due to egregious flaws in their enactment process, even when no substantive rights or values are at stake.

Consequently, constitutional rights (and perhaps other substantive constitutional values) will be protected on two levels. Egregious substantive violations will be subject to judicial invalidation regardless of the quality of the legislative process. Lighter infringements, in which constitutionality is a matter of reasonable disagreement or a wide "margin of appreciation," will be subject only to procedural safeguards in the sense of ensuring the possibility for participation and a minimal level of deliberation and debate in the legislative process.

The integrity of the legislative process and procedural democratic values will also be protected on two values. All legislation will have to satisfy the most basic procedural lawmaking requirements, such that a flagrant violation of these requirements will be subject to judicial invalidation regardless of the content of the law. Higher standards of lawmaking, such as adequate deliberation, will be required only in enactments implicating constitutional rights or values, and these requirements' violation will only be subject to judicial invalidation in cases of substantive infringements.

I believe the suggested principles may represent the optimal scheme of judicial protection of both substantive and procedural values. Admittedly, it is impossible to predict which judicial review scheme will actually bring about optimal levels of legislative respect for substantive and procedural values. My argument, therefore, is not consequentialist. Rather, I argue that these principles may lead to the optimal scheme from the perspective of the legitimacy of judicial review, for it will ensure that SPR (and each of the pure models) is employed when it is most justified and in a way that is most justifiable.

H. CONCLUSION

Slowly but surely, more as a result of judicial practice than explicit and fully-theorized judicial pronouncements, SPR is emerging as a new and distinct model of judicial review. This Article explicated this emerging model and examined its relationship with purely procedural judicial review and purely substantive judicial review. It explored SPR's normative appeal, as well as its controversial aspects, and evaluated its overall justifiability.

This exploration has led to the conclusion that SPR is, overall, justified and desirable. It also suggested, however, that SPR's legitimacy is very much contingent upon the way courts will develop it in practice, including the type of procedures enforced, the substantive values protected, and the
consistency and uniformity of its use. Contrary to conventional wisdom, moreover, it revealed that SPR is not necessarily more legitimate and less objectionable than pure procedural review. In fact, some of the differences between SPR and the purely procedural model reduce its justifiability. Hence, bringing SPR closer to pure procedural review may actually increase its legitimacy.

Based on these conclusions, the Article suggested some tentative principles regarding how and when SPR should be employed. It suggested principles for strengthening the procedural aspects of SPR and for more consistent, uniform, and across-the-board application of SPR. Finally, it argued that SPR should not replace the purely procedural and purely substantive models of judicial review. Rather, it suggested broad principles regarding when each model should be preferred. These principles will not turn SPR into a flawless judicial review model, but they will bring SPR closer to the goal of benefiting from the best of each of the pure models while avoiding the worst of these models.

It is my hope that this Article will contribute to the understanding, evaluation, and perhaps even development, of this exciting cross-national phenomenon—the emergence of a new semiprocedural model of judicial review.