THE PUZZLING RESISTANCE TO JUDICIAL REVIEW OF THE LEGISLATIVE PROCESS

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Should courts have the power to examine the legislature's enactment process and strike down statutes enacted contrary to procedural lawmaking requirements? This idea remains highly controversial. While substantive judicial review is well-established and often taken for granted, many judges and scholars see judicial review of the legislative process as utterly objectionable. This Article challenges that prevalent position and establishes the case for judicial review of the legislative process.

The Article contends that, ironically, some of the major arguments for substantive judicial review in constitutional theory, and even the arguments in Marbury v. Madison *itself, are actually more persuasive when applied to judicial review of the legislative process. Furthermore, the Article claims that some of the arguments raised by leading critics of judicial review may actually be employed as arguments justifying judicial review of the lawmaking process. Therefore, countering the orthodoxy in American constitutional law and theory, the Article argues that judicial review of the enactment process is no less important and is, in fact, more justifiable than substantive judicial review.*

INTRODUCTION

"The irony of today's great American debate" in constitutional law and theory, Guido Calabresi once observed, "is that both sides share the same approach to judicial review"[1] – an approach that "emphasizes a decisive judicial role and requires that . . . judges ultimately be responsible for enforcing [rights] against government action."[2] This Article argues for a different model of judicial review – judicial review of the legislative process. Under this model, the judicial role is neither decisive nor focused on defending constitutional rights from legislative action. In fact, this model is not even concerned with the content of legislation. Instead, the model requires courts to

[1] Guido Calabresi, *The Supreme Court, 1990 Term – Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 109-10 (1991).

[2] *Id*. at 82.

examine the *procedure* leading to a statute's enactment and to enforce the procedural requirements for lawmaking.[3]

The Supreme Court has been persistently reluctant to exercise judicial review of the legislative process.[4] For more than a century, federal courts have consistently refused to entertain challenges to legislation based on procedural defects in the enactment process,[5] even when the alleged defects were violations of the Constitution's lawmaking requirements.[6] Indeed, the courts refused to recognize an exception to the long-established rule that courts may not inquire into the process of enactment, even in "cases involving allegations that the presiding officers of Congress and the President . . . conspired to violate the Constitution by enacting legislation that had not passed both the House and Senate."[7]

To be sure, at times the Court has employed what I term "semiprocedural judicial review," which entails some form of examination of the enactment process as part of the Court's substantive constitutional review of legislation.[8] However, even this semiprocedural review provoked vigorous objections within the Court,[9] as well as "a flood of scholarly criticism."[10] Indeed, the idea

[3] For a more detailed definition of "judicial review of the legislative process," see *infra* Part I.A.

[4] *See, e.g.*, Field v. Clark, 143 U.S. 649, 672 (1892) (setting forth the "enrolled bill" doctrine, which effectively insulates the legislative process from judicial review); Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. REV. 477, 493, 545 (1994) (describing "the Court's persistent refusal to embrace judicial review of the legislature's deliberative process").

[5] Ittai Bar-Siman-Tov, *Legislative Supremacy in the United States?: Rethinking the "Enrolled Bill" Doctrine*, 97 GEO. L.J. 323, 325 & n.3 (2009) (observing that for over a century federal courts have consistently invoked the enrolled bill doctrine, which effectively prevents judicial review of the legislative process).

[6] *Id.* at 333. I have argued elsewhere that this position is doctrinally unstable and hard to reconcile with decisions such as Clinton v. City of New York, 524 U.S. 417 (1998); United States v. Munoz-Flores, 495 U.S. 385 (1990); and INS v. Chadha, 462 U.S. 919 (1983). Bar-Siman-Tov, *supra* note 5, at 347-48, 350-53. A significant number of recent decisions by lower federal courts made clear, however, that the resistance to judicial review of the legislative process, embodied in the "enrolled bill" doctrine, remains in full force today. *See id.* at 352; cases cited *infra* note 13.

[7] OneSimpleLoan v. U.S. Sec'y of Educ., 496 F.3d 197, 208 (2d Cir. 2007).

[8] *See infra* Part I.C.

[9] *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 376-77 (2001) (Breyer, J., dissenting) (criticizing the majority for "[r]eviewing the congressional record as if it were an administrative agency record"); United States v. Lopez, 514 U.S. 549, 613-14 (1995) (Souter, J., dissenting) ("[Judicial] review for deliberateness [in the legislative process] would be as patently unconstitutional as an Act of Congress mandating long opinions from this Court."); Thompson v. Oklahoma, 487 U.S. 815, 877 (1988) (Scalia, J., dissenting) ("We have in the past studiously avoided . . . interference in the States' legislative processes, the heart of their sovereignty. Placing restraints upon the manner in

that courts will determine the validity of legislation based on the adequacy of lawmaking procedures is highly controversial in the academic literature.[11]

A striking feature of this resistance to judicial review of the legislative process is that it appears that most judges and scholars "find it improper to question legislative adherence to lawful procedures" while "tak[ing] substantive judicial review for granted."[12] The prevalent view is that judicial review of the legislative process is somehow less legitimate than the classic model of judicial review, which grants courts power to scrutinize the content of legislation and to strike down laws that violate fundamental rights.

This Article challenges the predominant view and establishes the theoretical case for judicial review of the legislative process. In the process, this Article reveals another great irony in constitutional theory: some of the major arguments of leading constitutional theorists in favor of substantive judicial review, and even the arguments in *Marbury v. Madison* itself, are in fact equally – and perhaps more – persuasive when applied to judicial review of the legislative process. Moreover, some of those arguments raised by leading critics of substantive judicial review may actually support arguments for judicial review of the lawmaking process.

The theoretical case for judicial review of the legislative process has important practical significance. The lower federal courts were confronted with this issue in multiple cases in the past few years.[13] While all these cases

which the States make their laws . . . is not . . . ours to impose.").

[10] Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 465-66 (2003); *see also* A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328 (2001); William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2002).

[11] Staszewski, *supra* note 10, at 465-66.

[12] Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 242-43 (1976).

[13] *See, e.g.*, United States v. Davis, 375 F. App'x 611, 612 (7th Cir. 2010); United States v. Farmer, 583 F.3d 131, 151-52 (2d Cir. 2009); United States v. Collins, 510 F.3d 697, 698 (7th Cir. 2007); United States v. Miles, 244 F. App'x 31 (7th Cir. 2007); United States v. Campbell, 221 F. App'x 459 (7th Cir. 2007); Salomone v. United States, No. 1:08-CV-1574-JEC, 2009 WL 2957279 (N.D. Ga. Sept. 15, 2009); United States v. Chillemi, No. CV-07-0430-PHX-PGR, 2007 WL 2995726 (D. Ariz. Oct. 12, 2007); United States v. Harbin, No. C-07-260, 2007 WL 2777777 (S.D. Tex. Sept. 21, 2007); United States v. McCuiston, No. C-07-193, 2007 WL 2688502 (S.D. Tex. Sept. 12, 2007); Zeigler v. Gonzales, No. 06-0080-CG-M, 2007 WL 1875945 (S.D. Ala. June 28, 2007); Cal., Dep't of Soc. Servs. v. Leavitt, 444 F. Supp. 2d 1088 (E.D. Cal. 2006); Conyers v. Bush, No. 06-11972, 2006 WL 3834224 (E.D. Mich. Nov. 6, 2006); Pub. Citizen v. Clerk, U.S. Dist. Court for D.C., 451 F. Supp. 2d 109 (D.D.C. 2006), *aff'd sub nom.* Pub. Citizen v. U.S. Dist. Court for D.C., 486 F.3d 1342 (D.C. Cir. 2007); Cookeville Reg'l Med. Ctr. v. Leavitt, No. 04-1053, 2006 WL 2787831 (D.D.C. Sept. 26, 2006); OneSimpleLoan v. U.S. Sec'y of

reiterated the judicial refusal to hear claims that statutes were not validly enacted, some of the lower courts conceded that this issue merits reconsideration.[14] Many state courts have also confronted this question, and several have decided to depart from the traditional nonjusticiability view that prevails in the federal courts.[15] In fact, even in some of the states that still follow the traditional nonintervention view, lower courts have recently suggested that this view "is due for re-examination."[16] Foreign courts are examining the issue at an increasing rate, and as one scholar observed, this "dilemma . . . is one of the more difficult questions under discussion today in foreign doctrine."[17]

Most recently, this question came to the foreground in the dramatic final stages of the enactment of President Obama's healthcare reform. As the House majority was seeking ways to secure the passage of this historic, albeit controversial, legislation,[18] it considered procedural maneuvers that raised significant debate on the constitutionally-required procedures for enactment and the role of courts in enforcing those procedures.[19] This strategy was eventually abandoned,[20] but with the ever-growing partisanship and ideological

Educ., No. 06 Civ. 2979, 2006 WL 1596768 (S.D.N.Y. June 9, 2006), *aff'd*, 496 F.3d 197 (2d Cir. 2007); *see also* United States v. Wolford, CRIM Action No. 08-29, 2009 WL 1346034, at *1-3 (W.D. Pa. May 13, 2009) (citing several additional decisions by circuit and district courts, and observing that "numerous district courts" were confronted with this question).

[14] *Pub. Citizen*, 451 F. Supp. 2d at 115-16.

[15] *See generally* Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797 (1987).

[16] Cal. Taxpayers' Ass'n v. Cal. Franchise Tax Bd., No. 34-2009-80000168, slip op. at 9-11 (Super. Ct. Cal. May 20, 2009), *available at* http://www.ftb.ca.gov/businesses/Official_Court_Ruling_34-2009-80000168.pdf.

[17] Suzie Navot, *Judicial Review of the Legislative Process*, 39 ISR. L. REV. 182, 193 (2006).

[18] David M. Herszenhorn & Robert Pear, *Democrats Consider New Moves for Health Bill*, N.Y. TIMES, March 16, 2010, http://www.nytimes.com/2010/03/17/health/policy/17health.html.

[19] *See, e.g.*, Amy Goldstein, *House Democrats' Tactic for Health-Care Bill is Debated*, WASH. POST, March 17, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/03/16/AR2010031602746.html; Michael W. McConnell, Opinion, *The House Health-Care Vote and the Constitution*, WALL ST. J., March 15, 2010, http://online.wsj.com/article/SB10001424052748704416904575121532877077328.html; Michael C. Dorf, *Deeming Again*, DORF ON LAW (March 24, 2010, 1:42 AM), http://www.dorfonlaw.org/2010/03/deeming-again.html; Josh Gerstein, *Is 'Deem & Pass' Unconstitutional? It Doesn't Matter*, POLITICO (March 17, 2010, 10:02 AM), http://www.politico.com/blogs/joshgerstein/0310/Is_deem__pass_unconstitutional_It_doesnt_matter.html.

[20] Lori Montgomery, *House Leaders Plan Separate Health Vote, Rejecting "Deem and Pass,"* WASH. POST, March 20, 2010, http://www.washingtonpost.com/wp-

polarization in Congress, the courts are bound to confront such cases again sooner rather than later.[21]

A theoretical examination of judicial review of the legislative process may also contribute to broader debates about judicial review and other issues in constitutional theory. The traditional debates within constitutional theory have been significantly influenced by their focus on a single concept of judicial review. Consequently, drawing attention to other models of judicial review may help to shed new light on these debates.[22] By examining some of the leading arguments in the existing debate through the prism of judicial review of the legislative process, this Article demonstrates some of the ways in which the persuasiveness and applicability of these arguments change according to the model of judicial review. This examination may also invite reevaluation of these classic arguments.

Part I defines "judicial review of the legislative process" and distinguishes it from "substantive judicial review" and "semiprocedural judicial review." Part II discusses the arguments underlying opposition to judicial review of the legislative process. Part III challenges the view that only substantive judicial review is justified, by establishing the crucial importance, both practical and normative, of reviewing the legislative process as well. Part IV turns to leading constitutional theories justifying and opposing judicial review. It argues that when applied to judicial review of the legislative process, the justifications are even more persuasive, while the objections to substantive judicial review are mitigated and sometimes even serve as justifications. Finally, Part V incorporates the arguments from the previous two parts to establish the theoretical case for judicial review of the legislative process.

Before turning to this discussion, a clarification is in order. Although many of this Article's arguments juxtapose judicial review of the legislative process with substantive judicial review, this Article does not advocate the former as an alternative to the latter. Rather, this Article supports the view that judicial review of the legislative process should supplement, rather than supplant, substantive judicial review. The purpose of juxtaposing these two models of judicial review is not to challenge substantive judicial review itself, but rather to challenge the dominant position that only substantive judicial review is legitimate and that judicial inquiry into the legislative process is fundamentally objectionable.

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dyn/content/article/2010/03/20/AR2010032001651.html.

[21] Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 WM. & MARY L. REV. 805, 867 (2010) ("As long as the intense partisanship and ideological polarization in Congress . . . persist, rule violations and procedural abuses [in the legislative process] are likely to be prevalent.").

[22] Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2781 (2003).

I. DEFINING JUDICIAL REVIEW OF THE LEGISLATIVE PROCESS

Current scholarship employs a wide array of terms to describe judicial review models that entail some form of scrutiny of the legislative process. Sometimes, different terms are used to describe essentially the same model of judicial review.[23] At other times, the same term – most commonly "due process of lawmaking" – is used to describe a variety of dissimilar approaches.[24] It is therefore essential to begin by elucidating the term "judicial review of the legislative process" and distinguishing it from "substantive judicial review" and "semiprocedural judicial review."[25]

A. *Judicial Review of the Legislative Process*

"*Judicial review of the legislative process*" (JRLP) is a form of judicial review in which courts determine the validity of statutes based on an examination of the procedure leading to their enactment.[26] The idea is that a bill must meet certain minimum procedural requirements in its enactment process in order to become law and that courts should be given the power to determine whether these requirements have been met.

This broad definition encompasses a variety of specific models of JRLP. These models differ, *inter alia*, in their answer to the question of which procedural requirements courts should enforce – in other words, which procedural defects in the legislative process will justify judicial review and

[23] For example, scholars have used a variety of terms to describe the Rehnquist Court's federalism cases that examined the legislative record for sufficient congressional findings as part of their determination of the constitutionality of legislation. Examples include "on the record constitutional review," "legislative record review," "the model of due deliberation," and "semi-substantive judicial review." *See* Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281, 1281-83 & nn.3, 11 (2002).

[24] The term "due process of lawmaking" was coined in Linde, *supra* note 12, at 235-55, to refer to judicial enforcement of lawmaking procedures required by the Constitution, statutes, and legislative rules. Philip P. Frickey, *Honoring Hans: On Linde, Lawmaking, and Legacies*, 43 WILLAMETTE L. REV. 157, 170 (2007). Today, however, the term "encompasses a variety of approaches to the legislative process," well beyond the meaning intended by Linde. WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 175-78 (3d ed. 2001).

[25] While this Article focuses on juxtaposing JRLP with substantive and semiprocedural judicial review, it is also worth distinguishing it from a fourth category of judicial review that is often confused with JRLP. "*Structural judicial review*" – or the "model of institutional legitimacy," as Frickey and Smith term it – constitutes a separate form of judicial review because it does not focus on the enactment procedure, but rather on the identity of the appropriate governmental institution for a given decision. Judicial enforcement of federalism, separation of powers, and the nondelegation doctrine can all be seen as falling under this category. *See* Frickey & Smith, *supra* note 10, at 1713-16.

[26] *See* Navot, *supra* note 17, at 182.

invalidation of statutes.[27] Most common is the model that allows courts to enforce only lawmaking requirements that are constitutionally mandated, such as the bicameral passage and presentment requirements set forth in Article I, Section 7 of the U.S. Constitution or the three-reading requirement set forth in many state constitutions. To be sure, federal courts and some state courts refuse to examine the legislative process even in order to determine compliance with such constitutional requirements.[28] Among the state courts that do exercise JRLP, however, most follow the common model and restrict themselves to enforcement of constitutional rules.[29]

In other countries, courts enforce both constitutional and statutory rules that specify the steps required in the legislative process,[30] and some foreign courts enforce internal parliamentary rules as well.[31] Finally, some models allow courts to enforce unwritten procedural principles, with some versions emphasizing procedural requirements such as due deliberation,[32] while others focus on requirements such as formal equality and fair participation.[33] Some of the arguments developed in this Article lend support to JRLP in all its variations. This Article, however, focuses on the models that enforce the formal rules that govern the enactment process, whether constitutional or subconstitutional,[34] but not unwritten procedural principles such as due deliberation.[35]

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[27] *Cf. id.* at 102-12.

[28] *See* 1 NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 15:3 (2009).

[29] Baines v. N.H. Senate President, 876 A.2d 768, 775-77 (N.H. 2005) (holding that, similarly to most states, courts enforce lawmaking procedures required by the New Hampshire Constitution but that statutory procedures and internal rules governing the passage of legislation are not justiciable); SINGER, *supra* note 28, at § 7:4 ("The decisions are nearly unanimous in holding that an act cannot be declared invalid for failure of a house to observe its own rules. Courts will not inquire whether such rules have been observed in the passage of the act.").

[30] *See* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 309-14 (3d ed. 1992); Navot, *supra* note 17, at 202, 207 (discussing Germany).

[31] HCJ 5131/03 Litzman v. Knesset Speaker 59(1) PD 577, 588 [2004] (Isr.), *translated in* 2004 ISR. L. REP. 363 (2004) (stating that the Israeli Court will enforce even internal parliamentary rules and describing several countries' different approaches to this question).

[32] Victor Goldfeld, Note, *Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation Through Judicial Review of Congressional Processes*, 79 N.Y.U. L. REV. 367, 379-92 (2004).

[33] HCJ 4885/03 Isr. Poultry Farmers Ass'n v. Gov't of Isr. 59(2) PD 14 [2004] (Isr.), *translated in* 2004 ISR. L. REP. 388 (2004).

[34] For an overview of the constitutional and subconstitutional rules that govern the congressional legislative process, see Bar-Siman-Tov, *supra* note 21, at 811-13.

[35] In other words, from the various models of "due process of lawmaking" discussed by Frickey and Smith, only their "model of procedural regularity" would satisfy my definition of JRLP. *See* Frickey & Smith, *supra* note 10, at 1711-13.

The primary feature of JRLP (in all its variations) is that courts scrutinize the process of enactment rather than the statute's content. JRLP is indifferent to the content of legislation passed by the legislature, focusing exclusively on the enactment process. Furthermore, JRLP grants courts the power to examine the legislative process regardless of the constitutionality of the statute's content and to invalidate an otherwise constitutional statute based solely on defects in the enactment process. Another feature of JRLP is that it does not preclude legislative reenactment; it simply remands the invalidated statute to the legislature, which is free to reenact the exact same legislation, provided that a proper legislative process is followed.[36]

B. *Substantive Judicial Review*

The preceding discussion of JRLP's features helps to answer several questions: (1) what is reviewed by the Court (the enactment process rather than content); (2) when is the review employed (uniformly on all legislation that was improperly enacted rather than only when constitutional rights or other substantive values are at stake); and (3) what is the consequence of judicial invalidation of a statute (provisional rather than conclusive)? In each feature, JRLP is distinctively different from the current American model of substantive judicial review.

"*Substantive judicial review*" examines whether the content of legislation is in accordance with the Constitution. Typically, it asks whether the content of a certain statute infringes upon individual liberties or rights guaranteed in the Bill of Rights. In its "pure form," substantive judicial review is not interested in the way in which the legislature enacted a law; it is interested merely in the result or outcome of the enactment process.[37] Moreover, under the American model of substantive judicial review, the Court's constitutional judgments are considered "final and unrevisable."[38]

In many other areas of law there is significant discussion about the elusive distinction between substance and procedure.[39] It should be clarified, therefore, that no argument advanced in this Article rests on the claim that there is a sharp and clear distinction between process and substance as a general conceptual matter. In fact, several of the arguments in the subsequent parts highlight some of the many ways in which substance and process interact. Moreover, this Article's distinction between JRLP and substantive judicial review is not meant to deny that, in practice, many judicial doctrines can be

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[36] Bar-Siman-Tov, *supra* note 5, at 384.

[37] *See* Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1596-97 (2001).

[38] *See* Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813, 817-18 (2003).

[39] *See, e.g.*, Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1018-27 (2008).

characterized as falling between these forms of judicial review.[40] The next section discusses one such model that merges substantive and procedural judicial review.

C. *Semiprocedural Judicial Review*

Under "*semiprocedural judicial review*," a court reviews the legislative process as part of its substantive constitutional review of legislation. The court begins by examining the content of legislation, and only if that content infringes upon constitutional rights (or other constitutional values such as federalism) does the court examine the legislative record to ensure the satisfaction of some procedural requirements in the legislative process. Under this model, defects in the legislative process, such as inadequate deliberation, may serve as a decisive consideration in the judicial decision to strike down legislation. However, these procedural requirements – and the judicial examination of the legislative process itself – are only triggered when the content of the legislation is allegedly unconstitutional.[41]

The best example of a decision employing the semiprocedural approach is Justice Stevens's dissent in *Fullilove v. Klutznick*[42]:

> Although it is traditional for judges to accord [a] presumption of regularity to the legislative process . . . 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.[43]

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[40] *See* Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 258 (2008) (stating that there is no "rigid dichotomy between 'procedural' and 'substantive' judicial review. The terms are best understood as poles on a continuum of judicial intervention.").

[41] This definition builds, of course, on Coenen's definition for "semisubstantive review." *See* Coenen, *supra* note 23, at 1282-83. I eventually decided to use the term "semiprocedural judicial review," rather than "semisubstantive review," to avoid confusion, because only a very limited subset of rules that Coenen considers semisubstantive (his findings or study-based "how" rules) satisfy my definition of "semiprocedural judicial review." *See id.* at 1314-28.

[42] 448 U.S. 448 (1980). For academic semiprocedural approaches, see, for example, Calabresi, *supra* note 1, at 103-08; Coenen, *supra* note 37, at 1596; Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1183-90 (1977); Lorraine E. Weinrib, *Canada's* Charter of Rights*: Paradigm Lost?*, 6 REV. CONST. STUD. 119, 127 (2002); Lorraine E. Weinrib, *The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights Under Canada's Constitution*, 80 CAN. B. REV. 699, 730-31 (2001).

[43] 448 U.S. 448, 550-51 (1980) (Stevens, J., dissenting).

While this remains the clearest example of a semiprocedural decision, in a number of more recent cases – including *Turner Broadcasting System, Inc. v. FCC*,[44] *Kimel v. Florida Board of Regents*,[45] and *Board of Trustees of the University of Alabama v. Garrett*[46] – the Court appeared to look for evidence in the legislative record that Congress based its decisions on sufficient legislative findings as part of the Court's substantive review of the legislation.[47]

The key difference between semiprocedural judicial review and JRLP is that under the semiprocedural approach, judicial review of the enactment process is only justified when individual rights (or fundamental substantive values) are at stake.[48] In contrast, I argue that JRLP is legitimate regardless of the constitutionality of the legislation's content and independently of the need to protect individual rights or fundamental substantive values.

II. THE RESISTANCE TO JUDICIAL REVIEW OF THE LEGISLATIVE PROCESS

The resistance to JRLP is shared by many judges,[49] constitutional scholars,[50] and legislation scholars.[51] The prevalent view is that courts should exercise substantive judicial review – and perhaps also structural judicial review, in the sense of separation of powers and federalism – but should abstain from engaging in JRLP. The rejection of JRLP is often explicitly accompanied by a reaffirmation that courts should, of course, review the constitutionality of the statute's content.[52] Despite the large variety of arguments employed,[53] the

[44] 512 U.S. 622 (1994).

[45] 528 U.S. 62 (2000).

[46] 531 U.S. 356 (2001).

[47] For a detailed discussion, see Coenen, *supra* note 23, at 1314-28, and Frickey & Smith, *supra* note 10, at 1720-27.

[48] *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 21 (2005) ("[W]e have never required Congress to make particularized findings in order to legislate, . . . absent a special concern such as the protection of free speech." (citations omitted)); Coenen, *supra* note 23, at 1283 ("[T]he Court confines its use of semisubstantive rulings to cases in which the substantive values at stake are (in the Court's view) distinctively deserving of judicial protection.").

[49] Indeed, courts often see the enactment process as a primary example of a nonjusticiable political question. See, for example, Baker v. Carr, 369 U.S. 186, 214 (1962); Pub. Citizen v. U.S. Dist. Court for D.C., 486 F.3d 1342, 1348 (D.C. Cir. 2007), and decisions cited therein. *See also* cases cited *supra* notes 4, 7, 13.

[50] *See, e.g.*, Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1505-07 (2005).

[51] *See, e.g.*, Elizabeth Garrett, *Framework Legislation and Federalism*, 83 NOTRE DAME L. REV. 1495, 1530-39 (2008); Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 573-76 (2005); sources cited *supra* note 10.

[52] Thompson v. Oklahoma, 487 U.S. 815, 876-77 (1988) (Scalia, J., dissenting) ("I know of no authority whatever for our specifying the precise form that state legislation must take, as opposed to its constitutionally required content."); Field v. Clark, 143 U.S. 649, 672

common position is that JRLP is somehow less legitimate than substantive judicial review. Two major lines of argumentation seem to underlie this position.

The first argument is that JRLP is less justified than substantive judicial review because JRLP is not aimed at the protection of individual rights. This claim is based on the view that "the principal justification for the awesome (and antimajoritarian) power [of] judicial review" is "[t]he necessity of vindicating constitutionally secured personal liberties."[54] The view that ties the justification for judicial review to the protection of individual and minority rights resonates with a deep-seated belief in constitutional law and theory[55] and has long dominated debates about judicial review.[56] Indeed, this view "has become the global conventional wisdom."[57]

The prevalent view, which bases the justification for judicial review on the protection of individual liberties, becomes particularly challenging when combined with arguments for limiting the scope of judicial review. One pertinent example is the argument that courts have very limited resources and legitimacy capital, and they should therefore "not act in ways which 'waste' their institutional capital."[58] In simplified form, the argument is that (1) given the high costs of judicial review and the courts' limited institutional capital, judges should exercise this power only when most justified; and (2) this exercise of power is most justified when used to protect individual and

(1892) (holding that courts should refrain from examining the process of enactment, "leaving the courts to determine, when the question properly arises, whether the act . . . is in conformity with the constitution").

[53] For an overview of the arguments against JRLP, see Bar-Siman-Tov, *supra* note 5, at 329-31.

[54] Choper, *supra* note 50, at 1468.

[55] *See, e.g.*, Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 COLUM. L. REV. 418, 421 (1995) (reviewing LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994)) ("[C]onceru [sic] with the capacity of a majority to abuse its authority and oppress the minority resonates deeply with longstanding themes in democratic political theory and the American constitutional tradition."); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 971-72 (2005) ("The civil rights movement solidified [the view], exalting the 'countermajoritarian' protection of individual and minority rights as the primary purpose of constitutional law.").

[56] Yuval Eylon & Alon Harel, *The Right to Judicial Review*, 92 VA. L. REV. 991, 995 (2006); Adrienne Stone, *Judicial Review Without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review*, 28 OXFORD J. LEGAL STUD. 1, 1-2 (2008).

[57] Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 891 (2003).

[58] Ruth Gavison, *The Role of Courts in Rifted Democracies*, 33 ISR. L. REV. 216, 233 (1999).

minority rights.[59] The argument, therefore, poses a serious challenge to this Article's claim that JRLP is justified regardless of the content of legislation and its impact on individual liberties.

The second argument is that JRLP is more objectionable than substantive judicial review. The claim is that several of the major concerns about judicial review in general – including "separation of powers concerns . . . [and c]oncerns regarding judicial activism and the countermajoritarian difficulty" – are "at their zenith when courts invalidate the work of the elected branches based on perceived deficiencies in the lawmaking process."[60]

Among these concerns, the primary and most common objection to JRLP is the argument that such judicial review violates the separation of powers and evinces lack of respect due to a coequal branch.[61] JRLP 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.[62] Justice Scalia expressed this view when he held that "[m]utual regard between the coordinate branches" prohibits courts from inquiring into "such matters of internal process" as Congress's compliance with the constitutional requirements for lawmaking,[63] or when he objected in another case to "interference in the States' legislative processes, the heart of their sovereignty."[64] This argument is also at the core of most academic criticisms of JRLP and of semiprocedural judicial review.[65] These critics argue that any type of judicial inquiry into the enactment process is much more intrusive and disdainful than substantive judicial review.[66]

This Article challenges the conventional wisdom that JRLP is less legitimate than substantive judicial review. The following parts establish the practical and normative importance of reviewing the legislative process and the theoretical justifications for such review.

III. WHY PROCESS?[67]

Why should courts not focus exclusively on reviewing the content of statutes and their impact on individual rights? Why divert some of the judicial attention and institutional capital to the enactment process of statutes as well?

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[59] Choper, *supra* note 50, at 1468.

[60] Staszewski, *supra* note 10, at 468.

[61] Bar-Siman-Tov, *supra* note 5, at 329-30 & n.29.

[62] *Id*. at 383.

[63] United States v. Munoz-Flores, 495 U.S. 385, 410-11 (1990) (Scalia, J., concurring).

[64] Thompson v. Oklahoma, 487 U.S. 815, 877 (1988) (Scalia, J., dissenting).

[65] *See* Bar-Siman-Tov, *supra* note 5, at 330 & n.29; Staszewski, *supra* note 10, at 468 & n.256.

[66] Dan T. Coenen, *The Pros and Cons of Politically Reversible "Semisubstantive" Constitutional Rules*, 77 FORDHAM L. REV. 2835, 2868-72 (2009).

[67] This Part builds upon and elaborates some of the ideas I originally discussed much more briefly in Bar-Siman-Tov, *supra* note 21, at 813-15.

The answer lies in appreciating the importance of the legislative process and of the rules that govern it.

A. *Process and Outcomes*

Recently, a leading congressional scholar observed, "Most participants [in the legislative process] and outside experts agree that a good process will, on average and over the long run, produce better policy."[68] Admittedly, there are significant methodological challenges to systematically proving this truism – challenges which primarily result from the lack of widely-accepted criteria for defining good policy.[69] Notwithstanding this difficulty, several case studies and a wealth of anecdotal evidence support the argument that a flawed legislative process results in "poor laws and flawed policy"[70] or in laws that serve rent-seeking interest groups rather than the collective public good.[71] Empirical research demonstrates, moreover, that deviation from the regular

[68] Barbara Sinclair, *Spoiling the Sausages? How a Polarized Congress Deliberates and Legislates*, *in* 2 RED AND BLUE NATION? CONSEQUENCES AND CORRECTION OF AMERICA'S POLARIZED POLITICS 55, 83 (Pietro S. Nivola & David W. Brady eds., 2008) (internal quotation marks omitted).

[69] *Id.* at 78-83 (arguing that while there is rough agreement about what good process entails, the lack of a broadly agreed upon standard of what constitutes good policy and insufficient systematic data pose a significant challenge to proving that good process leads to good policy).

[70] *See, e.g.*, THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK 1-6, 13, 141-46, 173-74, 216-24 (2008) (claiming that a flawed legislative process "results in the production of poor laws and flawed policy," and discussing several cases that support this claim); GARY MUCCIARONI & PAUL J. QUIRK, DELIBERATIVE CHOICES: DEBATING PUBLIC POLICY IN CONGRESS 2-3, 55-91 (2006) (providing several examples that "illustrate the dangers of inadequate or distorted legislative deliberation," as well as several case studies); *cf.* Christopher H. Foreman Jr., *Comment on Chapter Two*, *in* Nivola & Brady, *supra* note 68, at 88, 92 ("The judgment of recent critics highlights a significant deterioration of quality [of laws] as a consequence of a recent decline in deliberative norms.").

[71] *See, e.g.*, MANN & ORNSTEIN, *supra* note 70, at 217-18 (arguing and providing examples to demonstrate that deviation from "regular order in Congress creates greater opportunities for parochial, special interest provisions to be added to legislation out of public view"); Seth Grossman, *Tricameral Legislating: Statutory Interpretation in an Era of Conference Committee Ascendancy*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 251, 272-88 (2006); Andrew Jay Schwartzman et al., *Section 202(h) of the Telecommunications Act of 1996: Beware of Intended Consequences*, 58 FED. COMM. L.J. 581, 582 (2006); Charles Tiefer, *How To Steal a Trillion: The Uses of Laws About Lawmaking in 2001*, 17 J.L. & POL. 409, 442-47 (2001); Goldfeld, *supra* note 32, at 368-69; Max Reynolds, Note, *The Impact of Congressional Rules on Appropriations Law*, 12 J.L. & POL. 481, 508-09, 513-14, 518-19 (1996); E. Bolstad, *Earmark Tampering Suggested*, ANCHORAGE DAILY NEWS, Aug. 10, 2007, at B1; David Heath & Christine Willmsen, *Congress Hides $3.5B in Earmarks*, SEATTLE TIMES, Oct. 14, 2008, http://seattletimes.nwsource.com/html/localnews/2008265781_apwaearmarkreform.html.

rules that govern the legislative process can, and does, distort policy outcomes away from the policy preferences of the chamber's median and toward the preferences of majority party caucus.[72]

Indeed, regardless of one's view of what constitutes good process or good policy, one thing that has been repeatedly proven by theoretical, experimental, and empirical studies is that legislative procedures and rules have a crucial impact on policy outcomes.[73] Moreover, there is evidence that legislators are well aware of this impact,[74] which unfortunately creates a strong incentive to manipulate and violate legislative rules and procedures.[75] Hence, even considered from the sole point of view of legislative outcomes, there is good reason to pay greater attention to the process as well.

B. *Process and Legitimacy*

Legislative procedures play a vital role in both the normative and the sociological legitimacy of the legislature and its laws.[76] From a normative perspective, several scholars have observed a significant shift in normative

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[72] Nathan W. Monroe & Gregory Robinson, *Do Restrictive Rules Produce Nonmedian Outcomes? A Theory with Evidence from the 101st-108th Congresses*, 70 J. POL. 217, 229 (2008) ("[T]he majority party can and does use restrictive rules to achieve outcomes that are closer to the median position of the party than would occur under the 'unmanipulated' processes of the House. In other words . . . the policy outcome (at least in the House) has been biased in favor of the median member of the majority party caucus."); *cf.* Cary R. Covington & Andrew A. Bargen, *Comparing Floor-Dominated and Party-Dominated Explanations of Policy Change in the House of Representatives*, 66 J. POL. 1069, 1085 (2004) (finding that the majority party exerts a preponderant influence on legislative outcomes and suggesting that this lends support to the claim that the rules written by the majority party indeed produce legislative outcomes that heavily advantage that party).

[73] *See* BRYAN W. MARSHALL, RULES FOR WAR: PROCEDURAL CHOICE IN THE U.S. HOUSE OF REPRESENTATIVES 87-103, 120-23 (2005); Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 393 (2003); Gary W. Cox, *On the Effects of Legislative Rules*, 25 LEGIS. STUD. Q. 169, 174-88 (2000); Karl-Martin Ehrhart et al., *Budget Processes: Theory and Experimental Evidence*, 59 GAMES & ECON. BEHAV. 279, 293 (2007); Keith E. Hamm et al., *Structuring Committee Decision-Making: Rules and Procedures in U.S. State Legislatures*, 7 J. LEGIS. STUD. 13, 13 (2001); Monroe & Robinson, *supra* note 72, at 228-29; Bjørn Erik Rasch, *Parliamentary Floor Voting Procedures and Agenda Setting in Europe*, 25 LEGIS. STUD. Q. 3, 4 (2000); Tim Westmoreland, *Standard Errors: How Budget Rules Distort Lawmaking*, 95 GEO. L.J. 1555, 1557 (2007).

[74] Bar-Siman-Tov, *supra* note 21, at 841-42.

[75] *Id*. at 842-43.

[76] For a discussion of the distinction between empirical-sociological legitimacy and normative-moral legitimacy, see Richard H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795-1801 (2005); A. Daniel Oliver-Lalana, *Legitimacy Through Rationality: Parliamentary Argumentation as Rational Justification of Laws*, *in* THE THEORY AND PRACTICE OF LEGISLATION: ESSAYS IN LEGISPRUDENCE 239, 241 (Luc J. Wintgens ed., 2005).

democratic theory. Here, the shift has been from substantive legitimacy toward legitimate political procedure.[77] Simplified, substantive legitimation approaches in democratic theory focus on the content of the law and its conformity with some substantive moral standard. On the contrary, procedural legitimation approaches appeal to features of the process by which laws are generated as the only (or main) source of legitimacy.[78] Proceduralist democratic theorists argue that there is too much reasonable disagreement on the meaning of substantive justice, the common good, and other moral principles, and therefore no normative substantive standard can appropriately be used in justifying the law.[79] Instead, proceduralist democrats seek to establish the legitimacy of law, "in the midst of a great deal of substantive moral and ethical dissensus,"[80] by arguing that "[i]f justification for the force of law can be found in the generally accepted . . . processes whence contested laws issue, then no number of intractable disagreements over the substantive merits of particular laws can threaten it."[81]

From the sociological legitimacy perspective, experimental and field studies demonstrate that a person's perception that the decision-making process is fair increases that person's sense that the outcome is legitimate. In turn, this leads to greater support for the decision, regardless of whether the person agrees substantively with the outcome.[82] Some of these studies even suggest that "the *process* employed in attaining the decisions may be equally, if not more, important" to people than the result.[83]

When applied to Congress and its lawmaking process, studies confirm the hypothesis that a person's perception of congressional procedures – particularly the belief that Congress employs fair decision-making procedures in the legislative process – significantly impact the legitimacy of Congress, of evaluations of the lawmaking process, and of its outcomes.[84] Furthermore,

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[77] David Estlund, *Introduction*, *in* DEMOCRACY 1, 2-7 (David Estlund ed., 2002); Frank I. Michelman, *The Not So Puzzling Persistence of the Futile Search: Tribe on Proceduralism in Constitutional Theory*, 42 TULSA L. REV. 891, 891-92 (2007).

[78] *See* Luc J. Wintgens, *Legitimacy and Legitimation from the Legisprudential Perspective*, *in* LEGISLATION IN CONTEXT: ESSAYS IN LEGISPRUDENCE 3, 6-7 (Luc J. Wintgens & Philippe Thion eds., 2007); José Luis Martí Mármol, *The Sources of Legitimacy of Political Decisions: Between Procedure and Substance*, *in* THE THEORY AND PRACTICE OF LEGISLATION: ESSAYS IN LEGISPRUDENCE, *supra* note 76, at 259.

[79] Estlund, *supra* note 77, at 6-7.

[80] Michelman, *supra* note 77, at 892.

[81] *Id.*

[82] *See, e.g.*, Michael X. Delli Carpini et al., *Public Deliberation, Discursive Participation, and Citizen Engagement: A Review of the Empirical Literature*, 7 ANN. REV. POL. SCI. 315, 327 (2004).

[83] Joseph L. Arvai, *Using Risk Communication to Disclose the Outcome of a Participatory Decision-Making Process: Effects on the Perceived Acceptability of Risk-Policy Decisions*, 23 RISK ANALYSIS 281, 287-88 (2003).

[84] Amy Gangl, *Procedural Justice Theory and Evaluations of the Lawmaking Process*,

many studies have found that the fairness of decision-making procedures also affects feelings of obligation to obey the law and actual, everyday law-following behavior.[85] These studies also show that although there are widespread differences in evaluations of substantive outcomes, there is striking agreement across ethnic, gender, education, income, age, and ideological boundaries on the criteria that define fair decision-making procedures, as well as widespread agreement that such procedures are vital to legitimacy.[86]

Studies by political scientists on public attitudes toward Congress and other political institutions also provide ample evidence that "people actually are concerned with the process as well as the outcome. Contrary to popular belief, many people have vague policy preferences and crystal-clear process preferences."[87] These scholars' research reveals, moreover, that the public's deep dissatisfaction with Congress is due "in no small part" to public perceptions about the lawmaking process.[88] As two leading scholars conclude in summarizing research about Americans' unhappiness with government, "[W]e are struck by the frequency with which theories and findings suggest explanations based on the way government works and not explanations based on what government produces."[89]

25 POL. BEHAV. 119, 135 (2003); Tom R. Tyler, *Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 LAW & SOC'Y REV. 809, 827 (1994); Stacy G. Ulbig, *Policies, Procedures, and People: Sources of Support for Government?*, 83 SOC. SCI. Q. 789, 793-96 (2002).

[85] TOM R. TYLER, WHY PEOPLE OBEY THE LAW 273-74, 278 (2d ed. 2006); Martinez, *supra* note 39, at 1026-27.

[86] Tyler, *supra* note 84, at 826, 829; *see also* Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 132 (1988).

[87] JOHN R. HIBBING & ELIZABETH THEISS-MORSE, STEALTH DEMOCRACY: AMERICANS' BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK 6 (2002); *see also* Gangl, *supra* note 84, at 136.

[88] JOHN R. HIBBING & ELIZABETH THEISS-MORSE, CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS 1 (1995); *see also* Carolyn L. Funk, *Process Performance: Public Reaction to Legislative Policy Debate*, *in* WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE? 193, 203 (John R. Hibbing & Elizabeth Theiss-Morse eds., 2001) ("The experimental findings suggest that the behavior of political leaders engaged in legislative policy debate contributes to public dissatisfaction with government. . . . These findings provide direct evidence that the presence of animosity in elite debate can elicit public anger and disgust."); Gangl, *supra* note 84, at 119 ("[M]ore and more researchers have focused on the lawmaking process and Americans' reactions to it to help explain widespread public disdain toward government.").

[89] John R. Hibbing & Elizabeth Theiss-Morse, *The Means* Is *the End*, *in* WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE, *supra* note 88, at 243, 243.

C. *Process and the Rule of Law*

The rules that govern the legislative process – and the idea that this process must be rule-governed – have vital importance for the Rule of Law ideal.[90] To be sure, Rule-of-Law arguments often invite the objection that the meaning of the phrase "the Rule of Law" is so contested that such arguments "should be regarded as relatively ad hoc and conclusory."[91] Nevertheless, my claim that the legislative process should be a rule-governed process rests on a relatively uncontested view of the Rule of Law. This claim is also compatible with the three major conceptions of the Rule of Law: the "thin/formal conception," which, following Fuller, stresses formal requirements like generality, publicity, consistency, prospectivity, and so on; the "thick/substantive conception," which also includes human rights, fundamental substantive values, or some moral criteria; and, of course, the "procedural conception," which emphasizes procedural requirements and safeguards in the creation and application of legal norms.[92]

The idea that the legislative process should be a rule-governed process stems from one of the most widely-accepted understandings of the Rule of Law: government should be ruled by the law and subject to it. As a recent review of the Rule-of-Law literature observed, disagreements about rule of law definitions notwithstanding, "virtually everyone agrees" that the principle that the government is bound by law is at the core of the Rule-of-Law ideal.[93] This principle requires that governments exercise power, including the legislature's lawmaking power, under the authority of and in accordance with the law.[94] Hence, the rules that confer the necessary powers for making valid law and the rules that instruct lawmakers how to exercise their lawmaking power are both essential components of the Rule of Law.[95] These rules play an important role in ensuring that "the slogan of the rule of law and not of men can be read as a meaningful political ideal."[96]

My claim that the rules governing the legislative process are important for the Rule-of-Law ideal is not only consistent with procedural conceptions of the Rule of Law – conceptions which emphasize procedural restrictions on

[90] Bar-Siman-Tov, *supra* note 21, at 815.

[91] Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 6 (1997).

[92] For a discussion of these three conceptions of the rule of law, see *id.* at 14-24, 54 n.260; Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 6-9 (2008).

[93] Adriaan Bedner, *An Elementary Approach to the Rule of Law*, 2 HAGUE J. ON THE RULE OF LAW 48, 50, 58 (2010).

[94] *See* Frederick Schauer, *Legislatures as Rule-Followers*, *in* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 468, 468-69 (Richard W. Bauman & Tsvi Kahana eds., 2006).

[95] JOSEPH RAZ, *The Rule of Law and its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 211-13, 216 (2d ed. 2009).

[96] *Id.* at 213, 216.

governmental power[97] – but it is also consistent with formal conceptions of the Rule of Law. Admittedly, Lon Fuller's famous eight requirements for the inner morality of law[98] – the epitome of the formal conception of the Rule of Law[99] – do not explicitly refer to the idea that lawmaking should be governed by procedural rules. However, Fuller does recognize the importance of procedural devices in ensuring congruence between official action and the law, at least in the administration and application of law.[100] More importantly, an analysis of Fuller's work demonstrates that the rules that govern the legislative process are instrumental for several of the Rule-of-Law principles identified by the thin/formal conception of the Rule of Law.

A primary example is the consistency of the law through time.[101] Fuller argues that of his eight principles, that which requires that laws should not be changed too frequently or too suddenly "seems least suited to formalization in a constitutional restriction. It is difficult to imagine, for example, a constitutional convention unwise enough to resolve that no law should be changed more often than, say, once a year."[102] However, he fails to see that there is, in fact, a straightforward means to realize this Rule-of-Law principle through formalized rules. The means are the rules that govern the legislative process. One of the important purposes of procedural rules such as bicameral passage, discussion in committee, and three readings is precisely to slow down the legislative process and to make legislation an arduous and deliberate process.[103] These rules ensure, *inter alia*, that laws will not change too frequently or too hastily, thereby promoting the Rule-of-Law principle of stability.[104] The rules that govern the legislative process also serve the purpose of giving citizens notice that the law is about to change and providing them time to orient their behavior accordingly.[105]

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[97] For a discussion of such procedural conceptions and their emphasis on procedural safeguards, including in the legislative process, see Fallon, *supra* note 91, at 18; Jeremy Waldron, *Legislation and the Rule of Law*, 1 LEGISPRUDENCE 91, 106-07 (2007).

[98] LON L. FULLER, THE MORALITY OF LAW 33-94 (rev. ed. 1969).

[99] Andrei Marmor, *The Ideal of the Rule of Law*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 666, 666 n.1 (Dennis Patterson ed., 2d ed. 2010).

[100] FULLER, *supra* note 98, at 81-91.

[101] *Id.* at 79-80.

[102] *Id.*

[103] *See* Jon Elster, *Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751, 1765 (2003); Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 553-55 (2007).

[104] *Cf.* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 249 (2006) (suggesting, in a different context, that voting rules and bicameralism create a structural status-quo bias, which can promote stability).

[105] *Cf.* Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2071-73 (arguing that formalized procedures for agency rulemaking further rule-of-law ideals such as greater

Fuller comes closest to recognizing that formalized rules stipulating the manner and form for legislating can serve Rule-of-Law principles when he explains his belief that public promulgation is the only requirement of his desiderata that is not "condemned to remain largely a morality of aspiration and not of duty."[106] Fuller explains this belief in part by observing that "[a] written constitution may prescribe that no statute shall become law until it has been given a specified form of publication. If the courts have power to effectuate this provision, we may speak of a legal requirement for the making of law."[107]

In short, the rules that govern the legislative process serve vital functions in ensuring and promoting the Rule-of-Law ideal and some of its most important and widely-accepted principles.

Finally, recognition of the importance of the rules regulating the legislative process is not in tension with substantive conceptions of the Rule of Law. As several recent substantive formulations of the Rule of Law demonstrate, one can coherently reject thin conceptions of the Rule of Law in favor of thicker conceptions that include additional requirements relating to human rights or other substantive principles, while also recognizing the importance of procedural requirements on the legislative process.[108]

D. *Process and Democracy*

The rules that govern the legislative process are also important because they embody, and are designed to promote and protect, essential democratic values.[109] Relevant examples of these democratic values include majority rule, political equality, transparency and publicity, participation, procedural fairness, and deliberation.[110]

The rules that govern the legislative process, and particularly the rules regulating voting procedures, are designed to ensure that the laws produced by the legislature reflect the will of the majority of its members – and by implication, of the voters whom they represent.[111] In fact, both empirical studies and anecdotal evidence demonstrate how manipulation and violation of

predictability).

[106] FULLER, *supra* note 98, at 43.

[107] *Id.*

[108] Aharon Barak, *The Supreme Court, 2001 Term - Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 124-26, 130-31 (2002); Bedner, *supra* note 93, at 58-60; MARK D. AGRAST ET AL., THE WORLD JUSTICE PROJECT – RULE OF LAW INDEX™ 2010 2, 7-8, 11 (2010), *available at* http://worldjusticeproject.org/sites/default/files/WJP%20Rule%20of%20Law%20Index%202010_0.pdf.

[109] Bar-Siman-Tov, *supra* note 21, at 815; Jeremy Waldron, *Legislating with Integrity*, 72 FORDHAM L. REV. 373, 376, 379-85 (2003).

[110] Bar-Siman-Tov, *supra* note 21, at 815; Navot, *supra* note 17, at 216-23.

[111] Navot, *supra* note 17, at 217.

"even seemingly technical rules can [undermine] important objectives, such as ensuring that the will of the chamber rather than the will of its legislative officer is enacted into law."[112] The rules that govern the legislative process are also designed to ensure that each member is allowed to participate in the legislative process on equal and fair grounds.[113] Requirements such as bicameralism, discussion in committee, and three readings, as well as the rules that regulate discussion and require minimal periods of time between the several steps of the legislative process, are all designed to enable and promote debate and deliberation.[114] Other rules are designed to guarantee publicity, to promote a more transparent and accountable legislative process, and to provide citizens with an opportunity to both observe and participate in the process.[115] In these ways, the rules that govern the legislative process serve essential principles of procedural democracy.

There is a great body of work by democratic theorists that establishes the instrumental and intrinsic value of democratic procedures generally,[116] as well as important work focusing on the principles and rules that govern the legislative process in particular.[117] Sufficient historical evidence demonstrates that the Framers greatly valued these procedural democratic principles[118] and wanted the legislative process to be "a step-by-step, deliberate and deliberative process."[119] Recounting all of the arguments that establish the value of the fundamental principles of procedural democracy is therefore not required.

The relevant point here is to draw attention to the fact that part of the normative value of the rules governing the legislative process stems from the rules' importance in ensuring these fundamental principles of procedural democracy. Indeed, these "principles . . . explain why we have the rules of legislative process that we have, and . . . afford a basis for determining the [importance of] compliance with them."[120]

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[112] Bar-Siman-Tov, *supra* note 21, at 825; Monroe & Robinson, *supra* note 72, at 228-29.

[113] Navot, *supra* note 17, at 219-20, 222-23.

[114] *Cf.* Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 431-34 (2004) (discussing the rationales of the three-reading rule).

[115] *Id.* at 410-22; Navot, *supra* note 17, at 221-22.

[116] For a good overview of this literature, see David Estlund, *Democratic Theory*, *in* THE OXFORD HANDBOOK OF CONTEMPORARY PHILOSOPHY 208 (Frank Jackson & Michael Smith eds., 2006).

[117] *See, e.g.*, Jeremy Waldron, *supra* note 109; Jeremy Waldron, *Principles of Legislation*, *in* THE LEAST EXAMINED BRANCH, *supra* note 94, at 15.

[118] *See* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1558-63 (1988).

[119] Clinton v. City of New York, 524 U.S. 417, 439-40 (1998); INS v. Chadha, 462 U.S. 919, 947-51, 958-59 (1983).

[120] Waldron, *supra* note 109, at 376.

E. *The Importance of Process*

Legislation scholars have long observed and lamented the legal academe's general tendency to disregard the rules that govern the legislative process, either by overlooking them[121] or by seeing the rules as mere technicalities and "mindless proceduralism."[122] This Part has argued that legislative procedures and rules have vital practical and normative importance, emphasizing their importance for legislative outcomes, legitimacy, the Rule of Law, and essential procedural democratic values. In addition, other scholars have argued that these rules are crucial for the functioning of the legislature and for solving various collective-action problems facing a large multi-member body that must come to agreement.[123]

The great importance of the rules regulating the legislative process establishes my claim that the legislative process and its rules are no less deserving of judicial review than the outcomes of this process. Of course, this still does not establish the legitimacy of such judicial review. That is, one may fully recognize the importance of protecting the integrity of the legislative process but still deny that it is the legitimate role of courts to serve as protectors of this process. The next Part addresses this issue.

IV. THE IRONIES OF CONSTITUTIONAL THEORY

If constitutional theory is "an exercise in justification,"[124] constitutional theorists' favorite exercise seems to be developing justifications for judicial review.[125] This Part argues that some of the major arguments for substantive judicial review in constitutional theory turn out to be even more persuasive when used to justify JRLP. Moreover, some of the arguments against judicial review are mitigated when applied to judicial review of the legislative process.

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[121] Vermeule, *supra* note 114, at 362; c*f.* Elizabeth Garrett**,** *Legal Scholarship in the Age of Legislation*, 34 TULSA L.J. 679, 679 (1999) ("Notwithstanding the importance of the legislative process . . . the legal academy focuses very little of its attention on Congress and state legislatures.").

[122] Waldron, *supra* note 117, at 31. This attitude is beginning to change. Bar-Siman-Tov, *supra* note 21, at 809 ("After many years of largely neglecting the rules that govern the legislative process, legal scholars are increasingly realizing [the importance of] these rules.").

[123] Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717, 741-48 (2005); Waldron, *supra* note 117, at 28-29, 31.

[124] David A. Strauss, *What is Constitutional Theory?*, 87 CALIF. L. REV. 581, 582 (1999).

[125] Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 531 (1998) (beginning her article by asking her readers to "[h]onk if you are tired of constitutional theory" and describing how "contender after contender has stepped forward to try a hand" at justifying judicial review); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002) (arguing that, for decades, the problem of justifying judicial review has been the central obsession of constitutional theory).

Finally, some of the arguments raised by leading critics of judicial review can in fact serve as arguments in favor of judicial review of the legislative process. Given the plethora of scholarship dedicated to justifying judicial review, this Article does not purport to discuss all the existing justifications for substantive judicial review that are also applicable to JRLP. Rather, it only focuses on some of the most prominent examples.

A. Marbury v. Madison

Notwithstanding the criticisms it has attracted throughout the years, the centrality of *Marbury v. Madison* in discussions of judicial review cannot be denied.[126] *Marbury* "contains almost all the standard arguments in favor of instituting the judicial review of the constitutionality of laws – the same arguments that could be raised (and have been, historically) in all other circumstances."[127] It is, therefore, the natural place to begin.

1. Constitutional Supremacy Justifications

Marbury's main argument can be summarized as follows: (1) the Constitution is supreme law, superior to ordinary legislative acts;[128] (2) a legislative act, repugnant to the Constitution, is void;[129] and (3) courts may not enforce a legislative act repugnant to the Constitution.[130] Chief Justice Marshall argued that the purpose of creating a written Constitution was to create a government in which "[t]he powers of the legislature are defined, and limited"[131] and that judicial enforcement of "a law repugnant to the constitution" would undermine this purpose.[132] In a passage that some constitutional theorists regard as *Marbury*'s primary argument and as "[t]he classic, and . . . most powerful, argument for judicial review,"[133] Marshall argued that the idea that courts would enforce a legislative act repugnant to the Constitution

> would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual.

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[126] *See* Michel Troper, *Marshall, Kelsen, Barak and the Constitutionalist Fallacy*, 3 INT'L J. CONST. L. 24, 37-38 (2005).

[127] *Id.* at 24.

[128] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-77 (1803).

[129] *Id.* at 177.

[130] *Id.* at 177-78; Troper, *supra* note 126, at 26.

[131] *Marbury*, 5 U.S. (1 Cranch) at 176.

[132] *Id.* at 178.

[133] Erwin Chemerinsky, *Losing Faith: America Without Judicial Review?*, 98 MICH. L. REV. 1416, 1424 (2000) (reviewing MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999)).

> It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.[134]

To the extent that one accepts the argument that judicial enforcement of unconstitutional statutes undermines the very idea of a supreme written constitution – and of its primary purpose of limiting the legislature – this argument is particularly applicable to a statute enacted in violation of the constitutionally prescribed procedure. It is well established that the purpose of the Constitution's lawmaking provisions was to "prescribe and define" Congress's legislative power and to limit it to a specific procedure.[135] Indeed, the text, history, and purposes of these provisions "clearly [confirm] 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."[136]

In fact, the Supreme Court recognized, in dicta over a hundred years ago, the notion that "under a written constitution, no branch or department of the government is supreme" requires "the judicial department to determine . . . whether the powers of any branch of the government, and *even those of the legislature in the enactment of laws*, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void."[137] This idea, that the principles of constitutional supremacy and "constrained parliamentarianism" require courts to ensure that the legislature exercise all its powers, including in the legislative process, in accordance with the constitution, was central to the development of JRLP in several constitutional democracies.[138]

Moreover, while it is debatable whether substantive limits on the power of the legislature are an essential feature of all written constitutions and of constitutionalism, it is generally accepted that a constitution "will certainly contain . . . procedural prerequisites for valid ordinary lawmaking."[139] As

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[134] *Marbury*, 5 U.S. (1 Cranch) at 178.

[135] *E.g.*, Clinton v. City of New York, 524 U.S. 417, 438, 439-40, 446, 448-49 (1998); United States v. Munoz-Flores, 495 U.S. 385, 397 (1990); INS v. Chadha, 462 U.S. 919, 945 (1983).

[136] *Chadha*, 462 U.S. at 946-51. For a more detailed version of this argument, see Bar-Siman-Tov, *supra* note 5, at 376-77.

[137] Kilbourn v. Thompson, 103 U.S. 168, 199 (1880) (emphasis added); *see also* Powell v. McCormack, 395 U.S. 486, 506 (1969).

[138] *See* Bar-Siman-Tov, *supra* note 5, at 367, 371-72, 380.

[139] Frank I. Michelman, *Thirteen Easy Pieces*, 93 MICH. L. REV. 1297, 1301 & n.17 (1995) (reviewing RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995)).

Hans Kelsen has suggested, "regulations . . . that determine the legislative procedure" are necessarily "part of the material constitution."[140]

More importantly, Kelsen theorized that while a constitution may also limit the content of future statutes, the defining feature which establishes the superiority of the constitution is that it regulates the way in which statutes are created.[141] Indeed, Kelsen argued that the basis of the entire hierarchal structure of the legal order is that the creation of lower norms is regulated by higher norms and that any norm in the legal system "is valid because, and to the extent that, it had been created in a certain way, that is, in a way determined by another [higher] norm."[142] If one accepts this view, then judicial enforcement of a law enacted in violation of Article I, Section 7 would undermine the very idea of constitutional supremacy even more than enforcing a law that infringes upon freedom of speech.[143]

Marshall further argued that the Constitution is supreme and binding on the legislature because it represents the "original and supreme will" of the people, who as the real sovereign have "an original right" to organize their government and set the principles by which they will be governed.[144] This argument is particularly relevant to the Constitution's lawmaking provisions, in which the sovereign people delegated their original lawmaking power to their legislature and prescribed the specific procedure by which the legislature may exercise this power. Judicial review of the legislative process protects the people's right not to be governed by "laws" that were not really passed by their elected legislature and that were not enacted in accordance with the only procedure by which the people agreed to be bound.[145]

2. Rule-of-Law Justifications

Marshall's most direct invocation of Rule-of-Law principles occurred when he held that violations of vested legal rights should have a judicial remedy.[146] Marshall's justification for judicial review, however, is also often interpreted

[140] HANS KELSEN, PURE THEORY OF LAW 225 (Max Knight trans., 2005).

[141] *Id*. at 221-23; Troper, *supra* note 126, at 30.

[142] KELSEN, *supra* note 140, at 221.

[143] Admittedly, Kelsen suggests at certain points that the higher norm's regulation of the creation of the lower norm includes determining "the organ by whom and the procedure by which the lower norm is to be created," but it can also include determining the content, and determining the organ is the minimum that is required to ensure the hierarchy between the norms. *Id*. at 235. At other points, however, Kelsen suggests that the regulations that determine the legislative procedure are necessarily part of the material constitution, certainly more essential to the hierarchy of norms than regulations regarding content. *See id*. at 225.

[144] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

[145] Bar-Siman-Tov, *supra* note 5, at 383.

[146] *Marbury*, 5 U.S. (1 Cranch) at 163 ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

as resting on a Rule-of-Law argument. As one scholar argues, "Marshall['s] argument for judicial review is well known, as is [his] rule-of-law justification: Only the judiciary can impartially determine whether the elected branches have complied with constitutional limits on their authority."[147] Other scholars have also cited *Marbury* as a significant source for the strong association of the Rule of Law with judicial review in American constitutional theory.[148]

Regardless of whether *Marbury* is the source for such arguments, Rule-of-Law arguments of the sort associated with *Marbury* undeniably are prevalent in constitutional theorists' justifications for judicial review.[149] The Rule-of-Law justification can be summarized along the following lines: (1) the Rule-of-Law requires that the government conducts its activities in accordance to the law; (2) judicial review "is necessary (or at least extremely important) to maintaining a disinterested eye on the conduct and activities of government"; therefore (3) judicial review is central to the rule of law.[150]

This justification is particularly applicable to JRLP. As I explained in Part III.C, the argument that the Rule of Law entails the requirement that the legislative process be rule-governed rests on a relatively uncontested understanding of the Rule of Law – an understanding that is certainly no more contested than substantive conceptions that this ideal must also include a commitment for human rights.

Indeed, it seems that some leading Rule-of-Law theorists would more readily accept a Rule-of-Law justification for JRLP than for substantive judicial review. Joseph Raz's seminal account of the Rule of Law is particularly illustrative. Raz argues that one of the important principles that "can be derived from the basic idea of the rule of law" is that courts should have judicial review power over parliamentary legislation but only "a very limited review – merely to ensure conformity to the rule of law."[151] It is clear that Raz does not mean substantive judicial review, as he insists that the Rule of Law "is not to be confused with democracy, justice, equality, . . . human rights of any kind or respect for persons or for the dignity of man."[152] Instead, he argues that the type of judicial review required by the Rule-of-Law ideal is review power over the implementation of those Rule-of-Law principles which

[147] Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 503 (1996).

[148] Fallon, *supra* note 91, at 9 n.33.

[149] *See* Daniel B. Rodriguez et al., *The Rule of Law Unplugged*, 59 EMORY L.J. 1455, 1476-77 (2010).

[150] *Id.*; *cf.* Lawrence B. Solum, *A Law of Rules: A Critique and Reconstruction of Justice Scalia's View of the Rule of Law*, 01 APA NEWSLETTERS No. 2, 17 (2002), *available at* http://papers.ssrn.com/abstract =303575 ("Actions by government and government officials should be subject to general and public rules.").

[151] RAZ, *supra* note 95, at 214, 217.

[152] *Id.* at 211.

he enumerates. In particular, this should include the important principle that the enactment of particular laws should be rule-governed.[153]

Although the Rule-of-Law justification and the constitutional supremacy justification discussed in the previous section are often mentioned in tandem, there is an important difference between them. The Rule-of-Law justification does not rest on accepting the idea of constitutional supremacy, but rather on the acceptance of the Rule-of-Law principle that government must be subject to the law and may only wield its power according to the law. This distinction has two important implications. First, Rule-of-Law arguments can justify JRLP even in legal systems that lack a written constitution and in which courts lack the power of substantive judicial review. Second, in constitutional systems, the Rule-of-Law justification can legitimize judicial enforcement of both constitutional and subconstitutional rules that govern the legislative process. As Fredrick Schauer recognizes,

> If the commands of . . . the rule of law . . . demand that legislation be made according to law, then the full range of laws that constitute and constrain the legislative function would be within the purview of [the courts]. Courts might plausibly, therefore, be understood not only as enforcers of [constitutional rules] but also as enforcers of the process by which legislators are expected to follow their own rules . . . .[154]

Indeed, in countries in which courts have decided to enforce the subconstitutional rules that govern the legislative process, Rule-of-Law arguments have played a central role in the courts' decisions.[155]

3. Constitutional Basis and the Supremacy Clause

In addition to his general arguments, Marshall found support for judicial review in the "particular phraseology of the constitution."[156] Marshall relied, for example, on Article III, Section 2, which states, "The judicial Power shall extend to all Cases . . . arising under this Constitution," and on the oath

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[153] *Id.* at 217.

[154] Schauer, *supra* note 94, at 477-78.

[155] R. v. Mercure, [1988] 1 S.C.R. 234, 279 (Can.) ("I cannot accept that in a nation founded on the rule of law, a legislature is free to ignore the law in its constituent instrument prescribing the manner and form in which legislation must be enacted [even if that constituent instrument is not] an entrenched constitutional provision."); HCJ 5131/03 Litzman v. Knesset Speaker 59(1) PD 577 [2004] (Isr.), *translated in* 2004 ISR. L. REP. 363, 369 (2004) (holding that the scope of judicial review of the legislative process should be determined according to a proper "balance between the need to ensure the rule of law in the legislature and the need to respect the unique nature of the Knesset" and concluding that courts should enforce both constitutional and subconstitutional rules that govern the legislative process); Barak, *supra* note 108, at 131 ("The rule of law implies that [the legislature] must observe the rules that apply to [its] internal operations. As long as the [legislature] does not change them, its rules bind it as does any other legal norm.").

[156] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178-80 (1803).

imposed on judges to support the Constitution.[157] The judicial duty to support the Constitution and to adjudicate "all Cases" arising under it clearly applies to violations of the Constitution's lawmaking provisions as well. As I have argued in more detail elsewhere, the text, purpose, and original meaning of these provisions confirm that they were meant to be binding,[158] and nothing in the Constitution should be read as committing their enforcement to another branch.[159]

Most important for present purposes is Marshall's reliance on the Supremacy Clause, which states, in part, that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."[160] This argument remains central to debates about judicial review, with contemporary supporters of judicial review still arguing that "[t]he text, history, and structure of the Constitution confirm that the Supremacy Clause authorizes judicial review of federal statutes."[161] Bradford Clark summarizes the argument:

> Although the Clause requires . . . courts to follow "the supreme Law of the Land" over contrary state law, the Clause conditions the supremacy of federal statutes on their being "made in Pursuance" of the Constitution. Thus, the Clause constitutes an "express command for judges not only to prefer federal to state law," but also to prefer the Constitution to federal statutes. This means that, in deciding whether to follow state law or a contrary federal statute, courts must first resolve any challenges to the constitutionality of the federal statute at issue.[162]

If one accepts that the Supremacy Clause commands courts to examine whether statutes are "made in Pursuance" of the Constitution, this review should clearly include authority to determine compliance with the Constitution's procedural lawmaking requirements.

Indeed, some of the leading critics of *Marbury*'s reliance on the Supremacy Clause, including Alexander Bickel, largely base their criticisms on the argument that the phrase "made in Pursuance thereof" is more plausibly interpreted as *only* requiring enactment in accordance with the Constitution's procedural lawmaking requirements.[163]

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[157] U.S. CONST. art. III, § 2; *see also Marbury*, 5 U.S. (1 Cranch) at 178-80.

[158] *See* Bar-Siman-Tov, *supra* note 5, at 376-77.

[159] *Id.* at 376-78.

[160] U.S. CONST. art. VI, cl. 2; *Marbury*, 5 U.S. (1 Cranch) at 180.

[161] Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 92 (2003); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 902-13 (2003).

[162] Bradford R. Clark, *Unitary Judicial Review*, 72 GEO. WASH. L. REV. 319, 322 (2003) (footnotes omitted).

[163] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 9 (2d ed. 1986); William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 20; *cf.* John Harrison, *The Constitutional Origins and*

Defenders of *Marbury's* reliance on the Supremacy Clause have contested Bickel's argument that the Supremacy Clause relates *exclusively* to procedural requirements.[164] Even some of these scholars, however, conceded that the Clause also "undoubtedly incorporates the procedural [requirements] that Professor Bickel invoked."[165] In fact, in his earlier work, Bradford Clark himself stated that the phrase "Laws . . . *which shall be made in Pursuance thereof*" suggests that this Clause "is tied to compliance with federal lawmaking procedures."[166]

Interestingly, research about the original understanding of this Clause suggests that even at the time of ratification there were both judicial review supporters and skeptics who understood the Clause as establishing, at least, judicial enforcement of Article I, Section 7.[167]

In short, one can certainly argue that "'Pursuance' embodies the expectation of constitutional review, the substantive and not merely the procedural sufficiency of 'the Laws of the United States.'"[168] However, it is hard to see how one could claim that the Supremacy Clause authorizes substantive judicial review while denying that it also authorizes JRLP.

4. "The Very Essence of Judicial Duty"

Finally, Marshall also famously argued that judicial review is "of the very essence of judicial duty."[169] Summarized, the argument is that those who apply the law must determine what the law is, and therefore, when confronted with cases in which a law conflicts with the Constitution, courts must determine which of these conflicting norms governs the case.[170]

Kelsen similarly argued that "[s]ince [courts] are authorized to apply the statutes, they have to determine whether something whose subjective meaning is to be a statute has objectively this meaning; and it does have the objective meaning only if it conforms to the constitution."[171] Although Kelsen believed that the Constitution should vest judicial review power in the hands of a single constitutional court, he argued that "[i]f the constitution contains no provision concerning the question who is authorized to examine the constitutionality of

Implications of Judicial Review, 84 VA. L. REV. 333, 346 n.48 (1998).

[164] Clark, *supra* note 161, at 115-16.

[165] *Id.* at 115; *see also* Prakash & Yoo, *supra* note 161, at 903, 908-09.

[166] Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1334 (2001).

[167] Prakash & Yoo, *supra* note 161, at 956-57 (discussing the understanding of the Supremacy Clause in Pennsylvania's ratifying convention).

[168] Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567, 1570 (2008).

[169] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

[170] *Id.* at 177-78.

[171] KELSEN, *supra* note 140, at 272.

statutes, then the organs competent to apply statutes, that is, especially, the courts, have the power to perform this examination."[172]

This argument is also particularly applicable to JRLP. As one state supreme court held when establishing its authority to exercise JRLP,

> I hold the authority to inquire [into the enactment process] for the purpose of ascertaining whether the [Act] has a constitutional existence to be incident to all courts of general jurisdiction, and necessary for the protection of public rights and liberties . . . . Courts are bound to know the law, both statute and common. It is their province to determine whether a statute be law or not . . . . [I]t must be tried by the judges, who must inform themselves in any way they can . . . .[173]

In fact, the next section argues that this argument is most persuasive when justifying JRLP.

B. *Rule-of-Recognition Theories*[174]

After many years of shaping "much of the current debate in Anglo-American jurisprudence,"[175] H.L.A. Hart's "rule of recognition" idea is increasingly influencing debates in constitutional theory as well.[176] In the first sub-section I build upon Hart's theory to develop an argument for JRLP. In the second sub-section I turn to the leading existing rule-of-recognition constitutional theory and argue that it is most persuasive when applied to JRLP.

1. Judicial Review of the Legislative Process and the Recognition of Law

Hart argued that any legal system necessarily possesses a "rule of recognition" – a rule that sets out criteria for identifying the legal rules of the system.[177] The rule of recognition provides the system's test of legal validity: "To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system."[178] According to a dominant understanding of Hart's theory – which was reportedly accepted by Hart himself – the rule of recognition is "a duty-

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[172] *Id.*

[173] Fowler v. Peirce, 2 Cal. 165, 170-71 (1852), *overruled by* Sherman v. Story, 30 Cal. 253 (1866).

[174] This section builds upon and further develops some of the ideas I originally discussed much more briefly in Bar-Siman-Tov, *supra* note 5, at 360-61.

[175] Dorf, *supra* note 57, at 910.

[176] *See* Matthew D. Adler & Kenneth Einar Himma, *Introduction*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION xiii, xiii-xv (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

[177] H.L.A. HART, THE CONCEPT OF LAW 94-95, 100-10 (2d ed. 1994).

[178] *Id.* at 103.

imposing rule."[179] As Joseph Raz explains, "[T]he rule of recognition imposes an obligation on the law-applying officials to recognize and apply all and only those laws satisfying certain criteria of validity spelled out in the rule . . . ."[180]

In addition to the rule of recognition, Hart introduced two other rules that lie at the heart of a legal system. The "rule of change" confers the power to legislate – to create, alter, or abolish the legal rules of the system – typically by specifying the persons or institution authorized to legislate and the required procedure for legislating.[181] The "rule of adjudication" confers judicial powers – the authority to determine whether a certain legal rule has been violated in a particular case and usually also to impose sanctions in case of violation.[182] The rule identifies the individuals or bodies who are authorized to adjudicate and the procedure to be followed.[183]

The nuances and complications in Hart's theory have been the subject of much discussion in analytic jurisprudence.[184] This brief and necessarily simplistic sketch is all that is required, however, as background for developing an argument for JRLP. To clarify, I am not arguing that Hart himself would support JRLP. In fact, at least some statements in *The Concept of Law* may suggest that he would deny that his theory necessitates such judicial review.[185] Moreover, while Hart's theory was descriptive, I am not making a descriptive claim that any legal system must have JRLP. Rather, I am building upon Hart's conceptual framework and some of his arguments to develop the claim that the authority to exercise JRLP is inherent to adjudicative authority.

Hart noted that adjudication is necessarily related to the rule of recognition: "[t]his is so because, if courts are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules are."[186] The direct point Hart was making in this passage is that the rule of adjudication, which confers jurisdiction, constitutes at least part of the rule of recognition because it allows people to identify the legal rules of the system through the judgments of the courts.[187]

This passage, however, invites a different argument about the inescapable relation between adjudication and the authority to determine what the legal rules are: if the rule of adjudication empowers courts to apply legal rules to

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[179] *See* Scott J. Shapiro, *What Is the Rule of Recognition (and Does It Exist)?*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, *supra* note 176, at 235, 240 & n.20.

[180] RAZ, *supra* note 95, at 93.

[181] HART, *supra* note 177, at 95-96.

[182] *Id.* at 96-98.

[183] *Id.* at 97.

[184] For a discussion of these debates, see Shapiro, *supra* note 179, at 239-42 & n.29.

[185] HART, *supra* note 177, at 96 ("[T]he rules of recognition . . . need not refer to all the details of procedure involved in legislation.").

[186] *Id.* at 97.

[187] *Id.*

cases brought before them (to authoritatively determine whether a certain rule was violated in a particular case), and if the rule of recognition obligates them to apply only those rules satisfying the criteria of validity specified in that rule, then the courts' authority to adjudicate necessarily entails the authority and duty to determine the validity of the legal rules coming before them.[188]

Note that this argument about the judicial authority to determine the validity of statutes is not contingent upon the existence of a written constitution or upon arguments about the supremacy of such a constitution. This argument would suggest that courts in any legal system should have the authority to determine the validity of legislation in the sense of recognizing it as passing the criteria provided by the rule of recognition, and these criteria can theoretically refer to extraconstitutional and subconstitutional sources as well.[189]

Of course, the authority to determine validity in the rule-of-recognition sense need not necessarily translate into a full-blown authority of judicial review of legislation. Indeed, writing at a time in which the English legal system was still unqualifiedly characterized by the traditional British model of parliamentary supremacy, Hart suggested that in such a legal system, the ultimate criterion for the identification of law might simply be captured by the expression "what the Queen in Parliament enacts is law."[190] I argue, however, that the rule-of-recognition argument can support the claim that courts have JRLP authority even in a legal system without a written constitution and in which courts have no power to exercise substantive judicial review. Indeed, Hart's work lends support both to the argument that rules which specify the procedure for enactment are inevitable in any legal system and to the argument that such rules have vital importance for the identification of the law.

Hart argued that even in an imaginary society governed by an absolute monarch in which whatever the monarch orders is the law, there must be a way to distinguish the orders she wishes to have "official" status from her private utterances and orders to her household, which she does not wish to have "official" status of law.[191] Hence, even in such a simple legal system, where absolute lawmaking power is vested in a single person, ancillary rules will be adopted to specify the "manner and form" the monarch is to use when she legislates.[192] Of course, the need for secondary rules that specify the procedure

[188] Bar-Siman-Tov, *supra* note 5, at 360; *see also* Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1123-24 (2003).

[189] For a rule-of-recognition account of extraconstitutional limitations on the legislature, see generally Michael C. Dorf, *How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, *supra* note 176, at 69.

[190] HART, *supra* note 177, at 102, 106-07.

[191] *Id.* at 67-68.

[192] *Id.* at 68.

for legislating significantly increases in more sophisticated legal systems with multi-member legislatures and more complex procedures for producing law. Hart stated that every legal system – even one in which there is no written constitution and no substantive limits on the legislative power – must have "manner and form" rules that specify what the legislature must do to legislate.[193]

Hart explained that such rules are not "duty-imposing" rules, and he seemed to accept the argument that these rules should not be counted as "limits" on the sovereign's legislative powers since they do not limit the content of the legislative power.[194] He stated, however, that these rules "must be taken seriously if they are to serve their purpose," indicating that these rules' essential purpose is to allow the sovereign's subjects to recognize which of the sovereign's utterances is "law."[195] The relationship between the "manner and form" rules and the rule of recognition becomes clearer when Hart turns to discuss a legal system that does have a written constitution. Hart argued that constitutional provisions which specify "the form and manner of legislation," as well as the provisions that define the scope of the legislative power, "are parts of the rule conferring authority to legislate."[196] These provisions "vitally concern the courts, since they use such a rule as a criterion of the validity of purported legislative enactments coming before them."[197]

Hart raised these arguments in the context of rejecting Austin's doctrine of sovereignty and its claim that conceptually there could be no legal limitations on the sovereign's legislative power.[198] Indeed, the importance of these arguments in rejecting the view that the legislative process is a sphere of unfettered omnipotence in favor of the view that "law-making cannot be understood except as a rule-governed process" is well recognized.[199] Even more important for present purposes, however, is the implication of Hart's arguments as to the connection between the rules that govern the legislative process and the rule of recognition. These passages suggest that the rules which specify the procedure for legislating are of vital importance for the rule of recognition, for they provide at least some of the rule of recognition's criteria for identifying the legal rules of the system.[200]

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[193] *Id.* at 71; *cf. id.* at 95-96. A similar view is supported by Kelsen. *See* KELSEN, *supra* note 140, at 225.

[194] HART, *supra* note 177, at 68-69.

[195] *Id.* at 68.

[196] *Id.* at 68-69.

[197] *Id*. at 69; *see also* Jeremy Waldron, *Who Needs Rules of Recognition?*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, *supra* note 176, at 327, 340-41.

[198] HART, *supra* note 177, at 66-67.

[199] Waldron, *supra* note 109, at 375.

[200] Waldron, *supra* note 197, at 342. To clarify, this does not mean that all the constitutional and subconstitutional rules that govern the legislative process are necessarily part of the rule of recognition. In any legal system there will be room for interpretation for

These passages also seem to bring Hart very close to the "new view" of parliamentary sovereignty, which was already gaining popularity among British constitutional theorists around the time *The Concept of Law* was first published.[201] The "new view" scholars argued that the rules that prescribe the sovereign's composition and lawmaking procedures are "logically prior to the sovereign" and that these rules are "necessary for the identification of the sovereign and for the ascertainment of (its) will" in any legal system.[202] They argued therefore that procedural rules that govern the legislative process should not be viewed as limits on the will of the sovereign Parliament, but as "a necessary pre-condition to the validity of (its) acts."[203]

To be sure, the "new view" scholars focused on challenging Dicey's classic view of parliamentary sovereignty in English constitutional theory,[204] whereas Hart was mostly focused on challenging Austin's doctrine of sovereignty in legal philosophy.[205] It appears, however, that Hart largely accepted the "new view" scholars' views about the rules that govern the legislative process and their relation to parliamentary sovereignty.[206] This is significant because some of the leading "new view" scholars expressly argued that the logical consequence of their arguments is that even under the principle of parliamentary sovereignty, which prohibits substantive judicial review, courts must "have jurisdiction to question the validity of an alleged Act of Parliament on [procedural] grounds."[207] They argued that judicial examination of the enactment process is necessary for courts to determine the authenticity of a

determining which of these rules set necessary conditions for valid enactment, and only these rules will be part of the rule of recognition. The point here is merely that the rules that specify the procedural requirements for valid enactment are necessary for the courts' identification of the law.

[201] The "new view" of parliamentary sovereignty was most prominently introduced by W.I. Jennings and was already endorsed by other constitutional scholars, such as G. Marshall and R.F.V. Heuston, when the first edition of the *The Concept of Law* was published. For good overviews of the emergence of the "new view" of parliamentary sovereignty in constitutional theory, see PETER C. OLIVER, THE CONSTITUTION OF INDEPENDENCE: THE DEVELOPMENT OF CONSTITUTIONAL THEORY IN AUSTRALIA, CANADA, AND NEW ZEALAND 80-92 (2005); R. Elliot, *Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values*, 29 OSGOODE HALL L.J. 215, 222-30 (1991).

[202] Katherine Swinton, *Challenging the Validity of an Act of Parliament: The Effect of Enrolment and Parliamentary Privilege*, 14 OSGOODE HALL L.J. 345, 360-61 (1976).

[203] *Id.* at 361.

[204] Elliot, *supra* note 201, at 220-23.

[205] HART, *supra* note 177, at 66.

[206] *Id.* at 67-71, 149-52, 299.

[207] R.F.V. HEUSTON, ESSAYS IN CONSTITUTIONAL LAW 6-7 (1961); *see also* Bar-Siman-Tov, *supra* note 5, at 369-70.

putative Act and conceptualized such judicial review as an inquiry into whether Parliament has "spoken."[208]

Admittedly, all of the above is in tension with one passage in *The Concept of Law*. In discussing the relationship between the rule of recognition and the rules of change, Hart stated that there will plainly be "a very close connection" between the two and that the rule of recognition will "necessarily incorporate a reference to legislation."[209] He added, however, that the rule of recognition "need not refer to all the details of procedure involved in legislation. Usually some official certificate or official copy will, under the rules of recognition, be taken as a sufficient proof of due enactment."[210] I argue, however, that determining the procedural validity of legislation is not merely a factual question of "proof," and, therefore, the judicial need to recognize what constitutes valid law cannot be entirely resolved by "some official certificate." In fact, I argue that some of Hart's own arguments in later parts of *The Concept of Law* help to establish this claim.

In discussing the possibility of uncertainty in the rule of recognition, Hart conceded that even in a legal system "in which there is no written constitution specifying the competence of the supreme legislature," the formula "[w]hatever the Queen in Parliament enacts is law" will not always be an adequate expression of the ultimate criterion to identify law.[211] Hart acknowledged that, even in such a legal system, "doubts can arise as to [this criterion's] meaning or scope."[212] Importantly, he stated that "we can ask what is meant by 'enacted by Parliament' and when doubts arise they may be settled by the courts."[213]

Hart went on to examine some of the vexing questions relating to the English doctrine of parliamentary sovereignty, including the extent to which Parliament can alter and entrench the "manner and form" requirements for legislation.[214] Hart's conclusion is significant enough to present verbatim:

> It is quite possible that some of [these] questionable propositions . . . will one day be endorsed or rejected by a court called on to decide the matter. Then we shall have an answer . . . and that answer . . . will have a unique authoritative status among the answers which might be given. The courts

[208] Denis V. Cowen, *Legislature and Judiciary Reflections on the Constitutional Issues in South Africa: Part 2*, 16 MOD. L. REV. 273, 280 (1953); *see also* Swinton, *supra* note 202, at 360 (arguing that under the principle of parliamentary sovereignty courts must enforce any Act of Parliament, "but in so doing they have a duty to scrutinize the procedure of enactment to ensure that 'Parliament' has acted. This exercise is a necessity in any situation where the sovereign is not a single person.").

[209] HART, *supra* note 177, at 96.

[210] *Id.*

[211] *Id.* at 148.

[212] *Id.*

[213] *Id.*

[214] *Id.* at 149-52.

> will have made determinate at this point the ultimate rule by which valid law is identified. Here "the constitution is what the judges say it is" does *not* mean merely that particular decisions of supreme tribunals cannot be challenged . . . . [H]ere are courts exercising creative powers which settle the ultimate criteria by which the validity of . . . laws . . . must . . . be tested.[215]

This statement is astounding when we remember that Hart was discussing a legal system in which the legislature is sovereign and supreme and in which courts lack judicial review power.[216]

Two main arguments can be developed from these passages. First, Hart seemed to recognize an important and often overlooked aspect of determining the procedural validity of legislation: this determination does not merely entail a factual determination that the requirements for enactment were met. It also requires the interpretative task of determining what the requirements are and how the requirements may be satisfied.[217] Indeed, I have argued elsewhere that determining whether a bill has been properly enacted in compliance with the U.S. Constitution is not merely a factual inquiry, for it raises the interpretative "questions of what exactly are the procedural requirements set forth in Article I and what constitutes compliance with these requirements (for example, what constitutes 'passage')."[218] Hart's discussion in the passages above supports the claim that such interpretative questions of "what is meant by 'enacted by Parliament'" can arise even in legal systems that lack a written constitution which prescribes the procedure for enactment.[219]

Second, Hart seemed to realize that the authority to answer the question of "what is meant by 'enacted by Parliament'" entails "exercising creative powers," which settle the content of the ultimate criteria of validity itself.[220] The combination of these two arguments reveals the real consequence of courts relying on "some official certificate" of "due enactment" instead of determining the validity of legislation on their own. The consequence is that the courts cede to the legislative officers who prepare this official certificate not only the power to make the factual determination that all lawmaking requirements were met but also the power to determine the contents of the rule of change and, ultimately, of the rule of recognition itself.[221]

Finally, there is an even graver consequence to judicial acceptance of "some official certificate" in lieu of an independent judicial determination of the validity of legislation, which Hart seemed to overlook. When courts treat as

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[215] *Id*. at 152.

[216] Indeed, Hart himself realized that "[a]t first sight the spectacle seems paradoxical." *Id*.

[217] Bar-Siman-Tov, *supra* note 5, at 359.

[218] *Id*.

[219] HART, *supra* note 177, at 148.

[220] *Id*. at 148, 152.

[221] Bar-Siman-Tov, *supra* note 5, at 358-62.

valid "law" any document that bears this official certificate, they in fact give the certifying officers not only the power to determine the content of the rule of change but also the power to make law in violation of the rule of change.[222] That is, the fact that courts accept any document that bears the official certificate as "law" allows the certifying officers to produce such a document on their own, and this piece of paper that was never enacted by the legislature will be part of the valid laws of the legal system.[223] This argument may sound farfetched. There is at least one recent case, however, in which the legislative officers of Congress allegedly certified and presented to the President a bill that they knew was not enacted in the same form by both Houses of Congress – a requirement mandated by the Constitution.[224] Since the federal courts refuse to undertake an independent judicial examination of the procedural validity of legislation, even in "cases involving allegations that the presiding officers of Congress . . . conspired to violate the Constitution by enacting legislation that had not passed both the House and Senate,"[225] this "law" is now part of the legal system.

Thus, the rule-of-recognition argument for JRLP can be summarized as follows: adjudication entails the authority to determine whether legislation satisfies the validity criteria provided by the rule of recognition; the rule of recognition's validity criteria are provided, in turn, at least in part, by the rules that specify the procedure for legislating. Therefore, while resorting to these rules will not always be required, whenever there is doubt as to whether a certain statute was enacted by the legislature, courts should be authorized to determine compliance with those rules. This authority is not contingent upon the authority of constitutional judicial review or even on the existence of a constitution. Rather, since rules that specify the procedure for legislating are inevitable in any legal system and are vital for recognizing the law (which, in turn, is an inherent part of adjudication), the authority to adjudicate should entail the authority of JRLP in any legal system.

To clarify, I am not claiming that the rule-of-recognition argument necessitates the conclusion that JRLP must exist, as a descriptive matter, in any legal system. Rather, I argue that the rule-of-recognition argument can provide a basis for the authority for such judicial review in any legal system. The fact that courts in some countries, such as the U.S., abdicate their inherent authority and duty to examine the procedural validity of legislation is therefore not detrimental to my claim. On the contrary, my rule-of-recognition argument helps underscore the serious negative consequences of such judicial abdication.

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[222] *Id*. at 362-63.

[223] *Id.*

[224] *See id.*

[225] OneSimpleLoan v. U.S. Sec'y of Educ., 496 F.3d 197, 208 (2d Cir. 2007).

2. "Constitutional Existence Conditions"

The best example of a constitutional theory that develops a rule-of-recognition argument for judicial review in the American constitutional system is Adler and Dorf's "constitutional existence conditions" theory.[226] These scholars argue that many provisions of the Constitution are best understood as setting "existence conditions" – that is, as stating the necessary conditions that statutes must meet in order to be recognized as law.[227] While these provisions do not constitute the entire and ultimate rule of recognition in the American legal system,[228] they operate like the rule of recognition in the sense that they provide courts and other officials with criteria for identifying the system's legal rules.[229]

Adler and Dorf claim, "Once one acknowledges that courts have the duty to apply statutes,"[230] it becomes clear that judicial enforcement of constitutional provisions which state existence conditions is unavoidable:

> If (1) the judge is under a legal duty to take account of [statutes] in reaching her decisions, then (2) she is under a legal duty to determine whether putative [statutes], advanced by the parties, really do have legal force. Yet this entails (3) a legal duty to determine whether these putative [statutes] satisfy the existence conditions stated by relevant constitutional provisions.[231]

They argue, therefore, that even if *Marbury v. Madison* was overruled, judges would still have the inevitable legal duty to exercise judicial review, in the sense of determining whether a putative statute satisfied the "constitutional existence conditions" of legislation.[232]

If one accepts this argument for judicial review, the remaining question is which constitutional provisions set "existence conditions" – or more generally, what are the validity criteria under the American rule of recognition. Adler and Dorf are primarily interested in developing their argument into a justification of substantive judicial review. They "aim to dislodge the intuition that procedural mechanisms such as Article I, Section 7 are the only existence conditions, whereas substantive provisions such as the enumerated powers and individual rights clauses are [not]."[233]

Importantly, however, Adler and Dorf's argument begins from the recognition that "there is a certain intuitive logic" to consider the constitutional provision that identifies the procedure for legislating as setting forth existence

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[226] *See generally* Adler & Dorf, *supra* note 188.

[227] *Id.* at 1108-09, 1114, 1119.

[228] *See id*. at 1130 n.53, 1131-33.

[229] *Id.* at 1109 n.13.

[230] *Id.* at 1107.

[231] *Id.* at 1123-24.

[232] *Id*. at 1107-08, 1123-25.

[233] *Id*. at 1136.

conditions[234] and that this provision is the primary example of those provisions that "Americans intuitively understand as (partly) constituting the difference between law and nonlaw."[235] Moreover, they concede that even under the most minimalist rule of recognition, the bare minimum that the validity criterion in the U.S. must include is the premise that a "proposition constitutes a federal statute if and only if it satisfies the procedures for promulgating statutes set forth in the Constitution."[236]

Adler and Dorf reject this narrow approach, arguing instead that the validity criteria in the American system include "the rule of recognition itself, the Constitution, and all other rules derivative of these" and that "[w]hether a constitutional provision sets forth an existence condition for some type of law is itself a constitutional question."[237] Based on this approach, they go on to establish their claim that many provisions of the Constitution, including substantive provisions, state existence conditions.[238] Even under this approach, however, they agree that the provisions that define the mechanisms of lawmaking are among the "constitutional provisions that most clearly function as existence conditions."[239]

In short, notwithstanding their primary goal of establishing that substantive constitutional provisions constitute existence conditions, every step in Adler and Dorf's argument confirms that their argument for judicial review is most persuasive when applied to JRLP. To their credit, they readily admit that Article I, Section 7 is "the clearest case of a constitutional existence condition"[240] and that the courts' refusal to enforce this provision is hard to reconcile with their constitutional theory.[241]

The question of what constitutes the validity criteria in the U.S. is far from settled in the analytic jurisprudence and constitutional theory literature.[242] There seems to be significant support, however, for the premise that the validity criteria include, at the very least, the procedural requirements for lawmaking set out in the Constitution.[243] In fact, even some critics of a rule-

[234] *Id.* at 1114.

[235] *Id.* at 1129.

[236] *Id.* at 1131.

[237] *Id.* at 1136.

[238] *Id.* at 1136-71.

[239] *Id.* at 1136, 1145-50.

[240] *Id.* at 1172.

[241] *Id.*

[242] *See* Kent Greenawalt, *The Rule of Recognition and the Constitution*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, *supra* note 176, at 1, 1 (stating the difficulty of determining the rule of recognition for the U.S.).

[243] *See, e.g.*, Shapiro, *supra* note 179, at 240; Waldron, *supra* note 197, at 340-41; *cf.* Michelman, *supra* note 139, at 1300-01 (explaining that a constitution "functions as what H.L.A. Hart calls a rule of recognition" in the sense that it "sets conditions of validity for ordinary law" and that this "certainly" includes "procedural prerequisites for valid ordinary

of-recognition justification to constitutionalism base their objection in part on the argument that "[t]he rule-of-recognition notion justifies . . . constitutional provisions defining the [procedural] conditions for the enactment of valid national legislation . . . . But [it] hardly justifies the numerous substantive limitations on the national lawmaking power contained in [the Constitution] . . . ."[244]

In short, the rule-of-recognition argument provides a powerful reply to attacks on the legitimacy of judicial review. It suggests that debates about judicial review's legitimacy are misdirected because, legitimate or not, judicial review is simply an inevitable part of adjudication.[245] As Adler and Dorf claim, it is "impossible to take the entire Constitution away from the courts."[246] If one accepts this argument, then the resistance to JRLP becomes particularly puzzling because there is significant agreement – from Adler and Dorf to Klareman and Waldron – that the procedural requirements for lawmaking specified in the Constitution are inevitably part of the validity criteria in the U.S.

C. *Dialogue Theories*

Dialogue theories have become increasingly influential and widespread in constitutional theory in recent years.[247] Dialogue theorists argue that judicial review should not be viewed as an instance of unaccountable judges superseding the will of elected representatives but rather as part of an ongoing dialogue about the meaning of the Constitution in which all three branches of government and the general public participate.[248] This section argues that some of the major arguments underlying dialogue theories can in fact be used to underscore the claim that JRLP is more defensible than substantive judicial review.

One of the crucial arguments underlying the dialogue justification is that a judicial decision invalidating a statute is merely an invitation for reconsideration by the elected branches. By claiming that the political

lawmaking").

[244] Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 183 (1998).

[245] *Id.*

[246] Adler & Dorf, *supra* note 188, at 1107.

[247] Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOK. L. REV. 1109, 1109 (2006); Kent Roach, *Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience*, 40 TEX. INT'L L.J. 537, 537-38 (2005).

[248] While there are many versions of dialogue theories, this Article focuses on the theories that seek to undermine the countermajoritarian argument's assumption that judicial review trumps majority will. *E.g.*, Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); Peter W. Hogg & Allison Bushell, *The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter Isn't Such a Bad Thing After All)*, 35 OSGOODE HALL L.J. 75 (1997).

branches can respond to the judicial decisions with which they disagree, dialogue theorists seek to undermine the countermajoritarian argument's assumption that judicial review trumps majority will.[249] Some dialogue theorists focus on the ability of the legislature to respond to judicial invalidations of statutes[250] while others focus on the responses of the political process more broadly.[251] The important point, however, is that both the advocates and critics of dialogue theories agree that the dialogue argument is based on the legislature's (or the political process's) ability to respond to judicial invalidations.[252]

Substantive judicial review – at least in its American "strong-form" version where the Court's constitutional judgments are purportedly final and unrevisable[253] – poses a serious challenge to dialogue theory.[254] To be sure, American dialogue theorists argue that notwithstanding the Court's claim to finality,[255] the Court does not *really* have the final word on constitutional matters.[256] This argument, in brief, is that controversial constitutional decisions by the Court create a backlash from the public and the political branches, which eventually – through "the gradual attrition of the Justices, and through presidential appointment of successors" – pushes the Court to reverse its earlier decision and to "come into line with popular opinion."[257] Even the proponents of this claim, however, admit that it takes significant effort over a long time frame to reverse judicial decisions under this scheme. They further concede that in the meantime "majority will still is frustrated."[258] Moreover, empirical data suggest that even when Congress responds to judicial invalidations of legislation, the Court tends to get the final word on

[249] Bateup, *supra* note 247, at 1118-19.

[250] *See generally* Hogg & Bushell, *supra* note 248.

[251] Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1291-95 (2004).

[252] *See, e.g.*, Hogg & Bushell, *supra* note 248, at 79-80; Kent Roach, *Dialogic Judicial Review and its Critics*, 23 SUP. CT. L. REV. 49, 55-57 (2004); Luc B. Tremblay, *The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures*, 3 INT'L J. CONST. L. 617, 618, 623 (2005).

[253] Tushnet, *supra* note 38, at 817-18.

[254] Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section 5 Power*, 78 IND. L.J. 1, 30, 43 (2003) (arguing that the Court's increasing assertion of ultimate power to interpret the Constitution stifles inter-branch constitutional dialogue); Roach, *supra* note 252, at 55-56, 63-64 (arguing that under the American model, unlike the Canadian model, the legislature's ability to respond to judicial invalidations is very limited).

[255] *See, e.g.*, United States v. Morrison, 529 U.S. 598, 617 n.7 (2000); City of Boerne v. Flores, 521 U.S. 507, 519, 529 (1997); Cooper v. Aaron, 358 U.S. 1, 18 (1958).

[256] Friedman, *supra* note 248, at 643-48.

[257] Friedman, *supra* note 251, at 1291-95.

[258] *Id.* at 1293-94.

constitutional interpretation, thereby limiting the legislature's role to salvaging its policy objectives within the constitutional confines imposed by the Court.[259]

In contrast to strong-form substantive judicial review, JRLP is perfectly compatible with legislative reenactment of invalidated statutes. A distinctive feature of JRLP is that the judicial decision remands the invalidated statute to the legislature, which is entirely free to reenact the exact same legislation, provided that a proper legislative process is followed.[260] There is no claim to judicial finality or supremacy. Instead, the invitation for a "second legislative look" is inherent to this form of judicial review.[261] JRLP allows for faster, easier, and much more direct political response to judicial invalidations.[262] Moreover, JRLP provides more room for a legislative response that engages both policy and constitutional aspects of the legislation. Hence, to the extent that the legislature's ability (or the political process more broadly) to respond to judicial invalidations is what takes the sting out of the countermajoritarian difficulty, this argument is more persuasive as support for JRLP.

For some dialogue theorists the dialogue justification revolves entirely around the claim discussed above – that judicial invalidations of statutes "usually leave room for, and usually receive, a legislative response."[263] Other dialogue theorists argue further, justifying judicial review because it promotes constitutional dialogue outside the courts.[264] The argument is that judicial

[259] J. Mitchell Pickerill, *Congressional Responses to Judicial Review*, *in* CONGRESS AND THE CONSTITUTION 151, 161-65, 167-69 (Neal Devins & Keith E. Whittington eds., 2005).

[260] Linde, *supra* note 12, at 243.

[261] *See* Coenen, *supra* note 37, at 1582-84, 1587-92; Richard Neely, *Obsolete Statutes, Structural Due Process, and the Power of Courts to Demand a Second Legislative Look*, 131 U. PA. L. REV. 271, 277-78 (1982).

[262] Skeptics argue that the claim that judicial invalidations of statutes under JRLP are merely provisional overestimates the ease with which a legislature can revisit its earlier decisions. *See* Tushnet, *supra* note 22, at 2794-95; Mark Tushnet, *Subconstitutional Constitutional Law: Supplement, Sham, or Substitute?*, 42 WM. & MARY L. REV. 1871, 1872-75 (2001). It should be clarified, therefore, that the point here is merely that the legislature's ability to respond meaningfully to judicial invalidations is greater under JRLP than under (strong-form) substantive judicial review. This does not deny that reenactment may be costly and sometimes even politically unfeasible, regardless of the reason for judicial invalidation. Note, moreover, that different models of JRLP impose different levels of reenactment costs, as some enactment costs can be influenced by the degree of procedural demands that the invalidating judicial decision imposes. For example, a decision that remands the statute to Congress and permits Congress to re-pass it as long as the constitutional bicameralism requirement is met imposes significantly less reenactment costs than a decision that requires evidence of a high degree of deliberation and fact-finding in the legislative record. *Cf.* Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 49 (2008).

[263] Peter W. Hogg et al., Charter *Dialogue Revisited – or "Much Ado About Metaphors,"* 45 OSGOODE HALL L.J. 1, 7 (2007) (stating that this claim is their substantive thesis).

[264] Friedman, *supra* note 251, at 1290-91, 1295-97.

review not only leaves room for, but in fact encourages and facilitates, an extra-judicial debate about the Constitution's meaning.[265] For example, Barry Friedman argues 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."[266] According to Friedman, the Court plays a dual role in this dialogue: the role of "speaker" – declaring rights and "telling us what the Constitution means" – and the role of "shaper or facilitator."[267]

The problem is that under the current model of substantive judicial review, the Court is much more a speaker and shaper than a mere facilitator in the national conversation about constitutional meaning. This holds true even if we fully accept dialogue theorists' descriptive account that the Court does not have the final word. In contrast, under JRLP a court is neither a speaker nor a shaper, but rather merely and truly a facilitator of the dialogue. Under JRLP, the court expresses no view on the content of the legislation, with all the value and policy judgments it entails. The court leaves the debates about the proper meaning of the Constitution and about rights and policy entirely to the political branches and the public. Moreover, unlike semiprocedural judicial review the court does not even have to provide provisional substantive interpretation.[268]

At the same time, JRLP also has inherent features that may contribute to improving constitutional deliberations outside the courts.[269] By focusing on the process of legislation and enforcing rules whose purpose is to enable and encourage deliberation and participation, the court promotes dialogue within the political branches and the public.[270] Indeed, even new-governance

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[265] *Id.*

[266] *Id.* at 1295-96.

[267] Friedman, *supra* note 248, at 668; Friedman, *supra* note 251, at 1289, 1295-96.

[268] To clarify, I express no opinion on the question of whether the Court should play the central role in the national conversation about constitutional meaning, which the model of substantive judicial review currently gives the Court. Rather, my point is merely to emphasize that the judicial role under JRLP is much more modest than under substantive judicial review. Likewise, I express no opinion on the separate question regarding the impact of substantive judicial review on the incentives for constitutional deliberation outside the courts. On that question compare, for example, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 57-65 (1999) (arguing that judicial review weakens the incentives of elected politicians and the public to engage in serious constitutional deliberations), and James R. Rogers, Casting the Gimlet Eye on Judicial Review: Can Judicial Review Be Democratically Debilitating? (2009) (unpublished manuscript), *available at* http://www.indiana.edu/~demsus/docs/rogers.pdf (same), with J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM 3, 8-9, 23-24, 131, 145, 147 (2004) (arguing that judicial review encourages constitutional deliberation in Congress).

[269] Coenen, *supra* note 37, at 1583, 1868-69.

[270] William N. Eskridge, Jr. & John Ferejohn, *Constitutional Horticulture: Deliberation-Respecting Judicial Review*, 87 TEX. L. REV. 1273, 1296-97 (2009).

scholars, who are usually skeptical of courts, have recently argued that judicial review that focuses on the decision-making process of the other branches can be particularly useful in promoting dialogue outside the courts.[271] Hence, under JRLP, courts truly are merely facilitators of the dialogue about the meaning of the Constitution.

In short, the arguments underlying dialogue theory go a long way in rebutting claims that JRLP is more intrusive and disrespectful toward the legislature than substantive judicial review. They help to demonstrate that JRLP is particularly apt for enabling legislative response and that the judicial role under this type of judicial review is much more modest.

D. *Process Theories*

The resistance to JRLP is perhaps most puzzling given the centrality of process-based justifications for judicial review in constitutional theory. John Hart Ely's "representation-reinforcing" theory,[272] in particular, is arguably the most influential constitutional theory in the past few decades.[273]

Accepting the charge that substantive judicial review is countermajoritarian, and therefore prima facie incompatible with democratic theory,[274] Ely sought to develop an approach to judicial review that, "unlike its rival value-protecting approach, is not inconsistent with, but on the contrary (and quite by design) [is] entirely supportive of . . . representative democracy."[275] He argued that rather than dictating substantive results or protecting substantive constitutional values, courts should only intervene when the political process malfunctions.[276] Ely argued that judicial review that focuses on the political process, rather than substance, is not only more legitimate but also, "again in contradistinction to its rival, involves tasks that courts, as experts on process and . . . as political outsiders, can sensibly claim to be better qualified and situated to perform than political officials."[277] While Ely was interested in the

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[271] Joanne Scott & Susan Sturm, *Courts as Catalysts: Re-thinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565 (2007); *see also* Keren Azulay, Breaking the Wall: Toward a New Model of Constructive Deliberations 72-75 (November 2008) (unpublished J.S.D. dissertation, Columbia University), *available at* http://gradworks.umi.com/33/17/3317530.html.

[272] JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73-104 (1980).

[273] JOHN H. GARVEY ET AL., MODERN CONSTITUTIONAL THEORY: A READER 2 (5th ed. 2004) (observing that Ely's book is "probably the most influential book on constitutional law in the past few decades"). Even Ely's critics concede that "[f]ew, if any, books have had the impact on constitutional theory of John Hart Ely's *Democracy and Distrust*." Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 721 (1991).

[274] ELY, *supra* note 272, at 4-5, 7-8, 11-12.

[275] *Id.* at 88.

[276] *Id.* at 102-03.

[277] *Id* at 88.

political process more broadly, he indicated that his theory is concerned "with the process by which the laws that govern society are made."[278]

Based on this brief description of Ely's theory, the uninitiated reader might be tempted to conclude that Ely was advocating JRLP against substantive judicial review. Ely and most process theorists, however, do not advocate JRLP.[279] Instead, the majority use process-based theories to justify some version of substantive judicial review and to delineate the areas in which substantive judicial review is legitimate.[280] Generally speaking, process theorists try to define the categories of cases in which the political process is likely to be untrustworthy, and they argue that substantive judicial review is only legitimate in these cases.[281] They also typically seek to legitimize judicial protection of certain rights – including democracy-enforcing rights, such as voting rights and freedom of speech – while delegitimizing judicial enforcement of other constitutional rights.[282] Ely's theory was chiefly an effort to justify and reconcile the Warren Court's decisions under "a coherent theory of representative government"[283] and to provide a "constitutionally justified recipe for filling in the 'open texture' of the Free Speech, Due Process, and Equal Protection Clauses."[284]

The process theorists' arguments, however, are particularly applicable in justifying JRLP. In fact, the one premise from Ely's theory that seems to be most widely accepted is that correcting defects in the political process is a legitimate function of judicial review.[285] Indeed, many constitutional theorists, such as subsequent process theorists, public choice theorists, and civic republican theorists have adopted the premise that there are defects in the legislative process and that courts can and should cure such process failures.[286]

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[278] *Id.* at 74.

[279] Although there are, of course, rare but notable exceptions. *See, e.g.*, William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1301-02, 1317 (2005) (suggesting a process-theory that is mostly aimed at developing "a Constitution-based philosophy for interpreting the open-textured clauses of the First and Fourteenth Amendments," but also explaining that his process-theory requires, among other things, judicial enforcement of the rules of the political game, including the procedural rules governing lawmaking).

[280] Hamilton, *supra* note 4, at 501, 502-08; Goldfeld, *supra* note 32, at 395-98.

[281] *See* Dorf, *supra* note 57, at 895-97.

[282] *Id.* at 896-97.

[283] ELY, *supra* note 272, at 73-74.

[284] Eskridge, *supra* note 279, at 1284.

[285] Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV. 923, 931 (2001) ("Notwithstanding the judicial departures from and academic criticism of Ely's process theory, a premise of that theory has generally been accepted. Even though there has been debate over whether and how much activist judicial review can be justified outside the area of non-self-correcting defects in the political process, most have assumed that correcting such defects is a legitimate judicial function.").

[286] Hamilton, *supra* note 4, at 502-19.

Ironically, even Justice Scalia, perhaps the staunchest opponent of JRLP on the Court,[287] embraced this argument in service of justifying his textualist theory of interpretation.[288]

Admittedly, given its focus only on the enactment process, JRLP cannot, by itself, cure all of the broader political process maladies targeted by process theorists. However, to the extent that these process theorists advocate substantive judicial review for the correction of procedural pathologies in the enactment process, JRLP is a more direct (and therefore more promising and straightforward) means to handle with such defects.[289]

Furthermore, JRLP avoids many of the criticisms leveled against Ely and other process theorists. For one thing, much of the criticism Ely attracted was the result of his argument that courts should avoid protecting substantive values and individual liberties that are not directly process-related. Laurence Tribe famously argued, "One difficulty that immediately confronts process theories is the stubbornly substantive character of so many of the Constitution's most crucial commitments."[290] Or as William Eskridge put it, "[t]aking substance (liberty) out of the Constitution, or relegating it to the shadows as Ely does, is like taking God out of the Bible."[291] JRLP avoids this criticism because it does not entail rejection of judicial protection of fundamental rights and liberties. As courts that exercise JRLP demonstrate, this model can co-exist side-by-side with substantive judicial review.

Another major criticism of Ely's theory focuses on its blurry distinction between substance and process. One critic has argued that "under Dean Ely's expansive definition of 'process,' virtually every constitutional issue can be phrased in procedural terms that justify judicial review."[292] JRLP, on the other hand, draws a sharper (even if imperfect) distinction between judicial review that examines the content of legislation and judicial review that examines the procedures leading to enactment.[293] Moreover, the "process" in JRLP is

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[287] *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 876-77 (1998) (Scalia, J., dissenting); United States v. Munoz-Flores, 495 U.S. 385, 408-10 (1990) (Scalia, J., concurring).

[288] United States v. Taylor, 487 U.S. 326, 345-46 (1988) (Scalia, J., concurring); Bar-Siman-Tov, *supra* note 5, at 357.

[289] *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 117 (1991).

[290] Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1065 (1980).

[291] Eskridge, *supra* note 279, at 1291.

[292] Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1222 (1984).

[293] *Cf.* Hamilton, *supra* note 4, at 493 ("[There is] a sharp distinction between judicial review of legislative outcomes . . . and judicial review of the legislature's deliberative or policymaking process. The former requires invalidation of statutes producing unconstitutional results, while the latter . . . would also permit the invalidation of a statute where the legislative process in a particular instance was perceived to be unconstitutional

narrower and clearer: rather than referring to "the democratic process" or "the political process" more broadly, it refers only to the enactment process within the legislature. This process's borders are much more clearly-defined: from the initial introduction of a bill in one of the legislature's chambers to its signature by the President (or to Congressional override of the President's veto). The definition of what such "process" entails is also relatively clearer because it is specified in the written constitutional and subconstitutional rules that prescribe the requirements for valid enactment.

A similar common criticism relates to Ely's claim that he was advancing a value-neutral approach to judicial review. Critics have argued that procedural protections inevitably serve underlying values.[294] This Article embraces that criticism. It argues that part of the justification for JRLP is precisely that it protects essential democratic values. Note, however, that JRLP only requires the commitment to a relatively uncontested set of procedural democratic values.[295] In this regard it is markedly different from semiprocedural judicial review, which employs review of the enactment process in order to protect substantive values, thereby inevitably inviting the question of which substantive values the courts should promote through heightened procedural lawmaking requirements.[296] Because JRLP applies across the board, regardless of the legislation's content and the substantive values it represents or endangers, it largely avoids this problem.

Finally, critics raised concerns relating to the extent that process theories curb judicial discretion or merely provide a platform for judges to inject their own ideological preferences under the guise of a neutral approach to judicial review.[297] JRLP more easily curbs judicial discretion. No model of judicial review can be entirely objective and discretion-free, and JRLP is no exception. Indeed, as I stressed earlier, determining whether a certain bill was properly enacted into law is not merely a factual question. Often interpretative questions will be unavoidable.[298] Moreover, some rules that regulate the legislative process may require more interpretation than others.[299]

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regardless of the quality of the outcome.").

[294] Dorf, *supra* note 57, at 897.

[295] *See supra* Part III.D.

[296] *Cf.* Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2094 (2008) ("[S]ubconstitutionalism's legitimacy cannot really be established as a general matter; rather, this determination rests on the particular constitutional values and doctrines at issue.").

[297] *See* Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1045-57 (1980) (arguing that Ely's theory is indeterminate, leaves room for manipulation, and, consequently, cannot properly constrain judicial behavior); *cf.* Ortiz, *supra* note 273, at 722, 730-35 ("[T]he Court [often] invokes process theory . . . dishonestly in order to legitimate a wholly substantive approach.").

[298] *See supra* Part IV.B.1.

[299] *See, e.g.*, Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171,

Nevertheless, as a general matter, a model of judicial review that requires judges to examine whether a bill originated in the House, passed both chambers in the same form, or passed three readings, provides judges with less opportunity to instill their personal political views than a model requiring them to decide whether a certain law serves compelling interests, is cruel and unusual, infringes upon substantive due process, and so on.[300]

Thus, the irony should be clear by now: the most influential theory in American constitutional law bases the legitimacy of judicial review upon ensuring the proper functioning of "the process by which the laws that govern society are made."[301] The premise that courts are both justified and competent in correcting defects in the legislative process is widely employed in justifying substantive judicial review. Yet, there is significant reluctance to accept the model of judicial review most directly aimed at ensuring the integrity of the legislative process and correcting its defects.

E. *A Waldronian Case for Judicial Review*

The preceding arguments were primarily intended to challenge the prevalent view that rejects JRLP as illegitimate and takes substantive judicial review as given. This section turns to one of the leading critics of substantive judicial review, Jeremy Waldron. I claim that several of Waldron's arguments – including some of his leading arguments against judicial review – can in fact be developed into a justification for JRLP.

While other prominent critics of judicial review, such as Mark Tushnet, may also be candidates for developing such a claim,[302] Waldron's theory is particularly interesting for a number of reasons. Waldron is commonly regarded as one of the leading critics of judicial review[303] and one of the

1181-84, 1198-1203 (1993) (discussing the significant interpretive problems associated with the states' "item veto" rules).

[300] *Cf.* Linde, *supra* note 12, at 242 (arguing that most lawmaking rules are sufficiently concrete so that observers could relatively easily determine whether they were violated).

[301] ELY, *supra* note 272, at 74.

[302] Indeed, Mark Tushnet's scholarship is certainly interesting here as well. Tushnet's attitude toward due process of lawmaking and semiprocedural judicial review is complex, appearing to be somewhere between critical and ambivalent. To give but one interesting example: Tushnet has perhaps most prominently advanced the claim that judicial review has negative impact on the constitutional performance of legislatures (the so-called "judicial overhang effect"). *E.g.*, TUSHNET, *supra* note 268, at 57-65. In the context of criticizing semiprocedural judicial review and claiming that it may undermine the case for substantive judicial review, however, he strikingly argues that semiprocedural judicial review is "likely to *improve* the political branches' performance." Tushnet, *supra* note 262, at 1877. This merits greater study but is beyond the scope of this Article.

[303] *See, e.g.*, Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1696 (2008) (stating that "Jeremy Waldron's argument in *The Core of the Case Against Judicial Review*" is "the most profound challenge to judicial review that has achieved prominence in the law reviews").

foremost proponents of legislatures and legislative supremacy.[304] Furthermore, as one of the few thinkers active in both constitutional theory and academic jurisprudence,[305] he is, *inter alia*, a strong critic of H.L.A. Hart's rule of recognition theory[306] and of Rule-of-Law arguments in favor of judicial review.[307]

As a result, although Waldron never explicitly expressed his opinion about JRLP,[308] one might expect that he would object to this form of judicial review. In the following section, I explore some of Waldron's arguments and find that several actually support my arguments in favor of JRLP. In fact, some of Waldron's arguments would lend support for a more comprehensive model of JRLP than the one defended by this Article. In the last subsection, I build upon Waldron's rights-based argument against judicial review to develop a rights-based argument for JRLP.

1. The Rule-of-Recognition Argument

In Part IV.B I have built upon Hart's rule-of-recognition theory to develop an argument for JRLP.[309] In *Who Needs Rules of Recognition?* Waldron challenges Hart's rule-of-recognition theory itself.[310] His underlying arguments, however, lend support for some of my core claims. Part of my argument rests on the claim that the rules specifying procedure for legislating ("the rules of change" in Hart's terms) provide at least some of the rule of recognition's criteria for identifying valid law.[311] While criticizing Hart's theory, Waldron goes even further. He argues that the criteria of validity are provided *entirely* by the rules of change – so much so, that there is no need for a separate rule of recognition.[312]

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[304] James Allan, *The Paradox of Sovereignty:* Jackson *and the Hunt for a New Rule of Recognition?*, 18 K.L.J. 1, 21 & n.66 (2007).

[305] Dorf, *supra* note 57, at 878.

[306] *See generally* Waldron, *supra* note 197.

[307] Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1354 (2006) ("The . . . proposition . . . [that j]udicial review is just the subjection of the legislature to the rule of law . . . is precisely the contestation we are concerned with here."). *See generally* Waldron, *supra* note 97 (attacking substantive conceptions of the rule of law, including their claim that the rule of law requires judicial review of legislation).

[308] In some of his writings, Waldron has clarified that his attack on judicial review is primarily targeted at the strong-form version of rights-based judicial review practiced by American courts rather than some of the weaker versions of weak-form judicial review, such as the one practiced in the U.K. *See* Waldron, *supra* note 307, at 1354-55. To my knowledge, however, Waldron has never explicitly said his attack on judicial review does not apply to JRLP, nor did he ever endorse JRLP.

[309] *See supra* Part IV.B.1.

[310] Waldron, *supra* note 197, 327 ("I would like to ask what a rule of recognition actually is, what it does, and what it is good for.").

[311] *See supra* Part IV.B.1.

[312] Waldron, *supra* note 197, at 342 ("[T]he criteria of validity are given in the first

Waldron argues that "the constitutional clauses that authorize and limit the making of federal laws" should be viewed as part of the legal system's "fundamental secondary rules of *change*."[313] Strikingly, Waldron seems to base his argument that these constitutional clauses negate the need for a separate rule of recognition on the claim that the clauses provide all that *courts* need in order to recognize valid law:

> If we regard these provisions as part of the system's rule of change, then how should we think about the role of a rule of recognition? . . . [One possibility is] that, given the operation of the rule of change, there is no need for a rule of recognition . . . . [This possibility] is analogue of what I said . . . about wills and contracts. To recognize a valid will, all a court needs to do is apply the rule of change . . . . The court just runs through the checklist of valid procedures for this kind of legal change. . . . It does not need a separate rule of recognition. I personally do not see why this could not be a sufficient account of what is going on at the constitutional level also.[314]

Arguing further, Waldron states that Hart seems to agree with this claim and that "Hart is saying that the courts use a rule of change as a criterion of the legal validity of the norms that come before them."[315] Hence, in the process of attacking Hart's rule-of-recognition theory, Waldron has actually lent support to my rule-of-recognition argument for JRLP.

2. Legislating with Integrity

In *Who Needs Rules of Recognition?* Waldron focused on the constitutional requirements for lawmaking, whereas I have argued that the rule-of-recognition argument can also apply to judicial enforcement of subconstitutional and extraconstitutional procedural requirements for lawmaking.[316] Some of Waldron's other scholarship, however, suggests that he actually supports the view that Hart's secondary rules of change should be interpreted as including not only subconstitutional procedural rules but also unwritten procedural values and principles. In *Legislating with Integrity* Waldron argues that

> legal positivists maintain that law-making cannot be understood except as a rule-governed process . . . . I believe . . . [that t]he legislative process . . . ought to be understood not just in reference to the secondary rules that happen to constitute it and govern it, but also in reference to the . . . deeper values and principles that explain why the rule-governed

instance by the rule of change . . . . The rule of recognition gets its distinctive [and entire] content from the rule of change . . . .").

[313] *Id.* at 340.

[314] *Id.*

[315] *Id.* at 340-41.

[316] *See supra* Part IV.B.1.

> aspects of the process are important to us. Another way of putting this is to say that the *secondary* tier of a legal system – what Hart called the secondary rules – comprises not only rules but principles as well.[317]

Hence, Waldron's arguments in this passage provide support for models of JRLP that enforce formal rules as well as unwritten procedural values. Waldron's scholarship here would support an even more expansive version of JRLP than the one defended by this Article.

Legislating with Integrity also lends important support, however, for the more modest model of JRLP that focuses exclusively on the enforcement of formal (constitutional and subconstitutional) rules. According to Waldron, "[P]rinciples do not just *complement* the enacted rules. Their role is also to explain why we have the rules of legislative process that we have and to afford a basis for determining the proper mode of our compliance with them."[318] Indeed, *Legislating with Integrity* lends very strong support to my arguments in Part III about the importance of the rules that govern the legislative process, which stem in part from their important underlying democratic values and principles.[319]

In fact, *Legislating with Integrity* even lends some support to the claim that courts may also have a role to play in ensuring the integrity of the legislative process. Waldron argues that "[l]egislative integrity is not just a principle for legislators" and that "[t]he integrity of the legislative process can also be a concern for other actors in the legal system. I have in mind particularly the role of judges . . . . Judges have a duty to keep faith with the integrity of the legislative process too."[320] To clarify, Waldron certainly does not advocate JRLP in this passage. He clearly explains that he is referring to the role of courts in statutory interpretation.[321] Nevertheless, in the process of making his argument that courts should assume a modest role in statutory interpretation, Waldron raises strong arguments that lend support to my claim that the integrity of the legislative process is no less deserving of judicial protection than the outcomes of this process.

3. The Rule-of-Law Argument

I have argued that the Rule-of-Law ideal requires the idea that the legislative process be rule-governed and that this argument would support judicial enforcement of both constitutional and subconstitutional procedural rules.[322]

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[317] Waldron, *supra* note 109, at 375-76.

[318] *Id.* at 376.

[319] *See supra* Part III.D.

[320] Waldron, *supra* note 109, at 385.

[321] *Id.* In Waldron's view, the judicial duty "to keep faith with the integrity of the legislative process" would mean that courts should resist the "judicial temptation to try and 'clean up' the statutes they are presented with" and also limit their use of legislative history in statutory interpretation. *Id*. at 385-88.

[322] *See supra* Parts III.C., IV.A.2.

Waldron famously argued that the Rule of Law is "an essentially contested concept."[323] However, in later scholarship – in the context of criticizing substantive conceptions of the Rule of Law – Waldron has argued that the procedural rules that govern the legislative process are crucial for the Rule of Law and that this understanding "has been prominent in the rule-of-law tradition" since Aristotle.[324]

In fact, he argued that the Rule-of-Law ideal requires even more than compliance with constitutional and subconstitutional procedural rules, suggesting that "procedural virtues – legislative due process, if you like – are of the utmost importance for the rule of law."[325] Waldron argued that legislation that is, *inter alia*, "enacted in a rush, in a mostly empty chamber, without any proper provision for careful deliberation and debate . . . with a parliamentary majority . . . used to force closure motions in debate after debate" constitutes a violation of "legislative due process."[326] Such legislation, according to Waldron, is "in opposition to the rule of law."[327] Of course, Waldron does not go on to argue that courts should play any role in ensuring the legislature's compliance with this conception of the Rule of Law. However, if one would like to develop a Rule-of-Law justification for a model of judicial review that enforces "due deliberation" principles in addition to the formal procedural rules, this would be a primary source of support.

4. The Core of the Case Against Judicial Review

Even some arguments in Waldron's scholarship against judicial review may lend support for JRLP. In *The Core of the Case Against Judicial Review*, Waldron sets out some assumptions "to distinguish the core case . . . from non-core cases in which judicial review might be deemed appropriate as an anomalous provision to deal with special pathologies."[328] This includes the assumption that "the procedures for lawmaking are elaborate and responsible, and incorporate various safeguards, such as bicameralism, robust committee scrutiny, and multiple levels of consideration, debate, and voting."[329] The accompanying footnotes suggest that a legislature that fails miserably in following the requirements of "legislative due process" and "legislating with integrity" – as discussed above – may fall "outside the benefit of the argument developed in [Waldron's] Essay."[330]

[323] Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137, 153-64 (2002).

[324] Waldron, *supra* note 97, at 107.

[325] *Id.* at 107.

[326] *Id.* at 108.

[327] *Id.*

[328] Waldron, *supra* note 307, at 1359.

[329] *Id.* at 1361.

[330] *Id.* at 1361 nn.46, 47; Waldron, *supra* note 97, at 108; Jeremy Waldron, *Disagreement and Response*, 39 ISR. L. REV. 50, 63 n.44 (2006).

We should be careful not to read too much into these qualifications. Waldron clarifies that although his argument is conditioned on these assumptions, "it does not follow that judicial review of legislation is defensible whenever the assumptions fail," because there may be other arguments against judicial review that are not contingent upon these assumptions.[331] Nevertheless, if significant failures in following a proper legislative process may be a consideration for qualifying the case against substantive judicial review, perhaps they can also support the case for JRLP, which is a more direct means to deal with such process pathologies.

Another assumption that Waldron specifies is "that the institutions, procedures, and practices of legislation are kept under constant review" to ensure that they do not "derogate seriously from the ideal of political equality."[332] Here, Waldron is obviously referring to review by society as a whole rather than by courts.[333] This assumption, however, does lend support to the importance of external review for ensuring political equality in the legislative process. This brings us, finally, to Waldron's rights-based argument against judicial review in *Law and Disagreement*.[334]

5. A Rights-Based Justification for JRLP

In his influential rights-based argument against judicial review, Waldron argued, in brief, that judicial review infringes upon the people's "right to democratic participation" – that is, "a right to participate on equal terms in social decisions."[335] Waldron argued that "the right of having a share in the making of the laws" is the "right of rights."[336] This very right, which is at the core of the rights-based argument against judicial review, can also serve as the basis for developing a rights-based argument for JRLP.[337] While substantive judicial review purportedly violates this right, JRLP is aimed at protecting this right.

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[331] Waldron, *supra* note 307, at 1402.

[332] *Id.* at 1362, 1389.

[333] *Id.*

[334] JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

[335] *Id.* at 213.

[336] *Id.* at 232 (quoting WILLIAM COBBETT, ADVICE TO YOUNG MEN AND WOMEN, ADVICE TO A CITIZEN 255 (1829)).

[337] Some have already suggested that Waldron's right to participate can equally lend support for judicial review, but they have focused on substantive judicial review, arguing, for example, that "rights-based judicial review can be regarded as an alternative form of participatory democracy." Alon Harel, *Notes on Waldron's* Law and Disagreement*: Defending Judicial Review*, 39 ISR. L. REV. 13, 18 (2006); *see also* Ori Aronson, *Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts*, 43 U. MICH. J. L. REFORM 971, 983 (2010); Barak Medina, *Four Myths of Judicial Review: A Response to Richard Posner's Critique of Aharon Barak's Judicial Activism*, 49 HARV. INT'L L.J. ONLINE 1, 5-8 (2007), http://www.harvardilj.org/2007/08/online_49_medina/.

The key to developing a rights-based argument for JRLP is the understanding that the people's right "to participate on equal terms in social decisions" must also be protected in the legislative process itself. The people's right to have "a share in the making of the laws" can be diluted, and even completely undermined, if their elected representatives' ability to participate on equal terms in the legislative process is violated. Indeed, courts in countries exercising JRLP acknowledge this crucial point. The German Constitutional Court has held, for example, that "[t]he principle of formal equality, which has been developed by the Constitutional Court in its jurisprudence dealing with the right to vote" also requires that "each [Parliament] member participates equally in the legislative process."[338] The Israeli Supreme Court has similarly derived the "*principle of participation*, according to which each [legislator] has a right to participate in the legislative process" as a necessary implication of representative democracy and voters' rights to political equality and democratic participation.[339]

Admittedly, this argument is stronger in supporting those models of JRLP, such as the one adopted by the Israeli Supreme Court, in which courts directly enforce the principle of equal participation in the legislative process rather than merely enforcing the formal rules that govern this process.[340] Nevertheless, models of JRLP that are limited to enforcing the written rules governing lawmaking also protect the people's rights "to participate on equal terms in social decisions." This is because, as Part III.D elaborated, one of the important functions of these rules is ensuring legislators' ability to participate on equal grounds in the legislative process. Such rules, therefore, essentially protect the people's right of equal participation in the making of laws.

Ironically, the strongest support for developing such a rights-based justification for the enforcement of lawmaking rules may come from Waldron himself. In the context of arguing against judicial review, Waldron explicitly argued that individual citizens' right to be treated as equals in a decision-making process on matters that affect them also requires that their representatives in the legislature have a right to be treated as equals in the legislative process.[341] In other work, Waldron argued even more forcefully that only a combination of the system of elections and the procedures within the legislature "as a package" can satisfy the demands of political equality.[342] The rules of the legislative process, Waldron argued, are no less essential than

[338] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 13, 1989, 80 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE], 188 (218, 220) (Ger.), *translated in* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 174, 175-76 (2d ed. 1997).

[339] HCJ 4885/03 Isr. Poultry Farmers Ass'n v. Gov't of Isr. 59(2) PD 14, 46-48 [2004] (Isr.), *translated in* 2004 ISR. L. REP. 383, 414 (2004).

[340] *See id.* at 41-48.

[341] Waldron, *supra* note 307, at 1388.

[342] Waldron, *supra* note 117, at 30.

fair representation in the legislature and democratic enfranchisement, "in order to relate what happens in the legislature to the fair conditions of decision for a society whose ordinary members disagree with one another about the laws that they should be governed by."[343] Neither of them "does it by itself; it is the package that works."[344] This supports the argument that the people's rights to democratic participation and political equality should be protected not only by ensuring compliance with the rules that govern elections but also by enforcing the rules that govern the legislative process.

In sum, I am not arguing that Waldron would necessarily support JRLP. There may be good reason to believe he would not. However, this section has argued that several of Waldron's arguments can in fact lend strong support for developing the case *for* JRLP. Ironically, a Waldronian-based case for JRLP would appear to support the most far-reaching and controversial models of JRLP.

F. *The Irony Revealed*

This Article began with Calabresi's observation that the irony of the great debates in constitutional theory is that both sides have the same model of judicial review in mind – strong-form substantive judicial review that is focused on protecting individual rights. This Part revealed that there is another great irony in constitutional theory, particularly in American constitutional theory.

This Part examined several of the leading justifications for substantive judicial review – from *Marbury v. Madison* to some of today's most influential and in-vogue constitutional theories. It argued that each of these justifications is equally persuasive as a justification for JRLP, and most are actually stronger when applied to JRLP. It also demonstrated that the arguments raised by critics of these justifications – particularly criticisms of process theories – are significantly mitigated when JRLP is concerned. Finally, and perhaps most ironically, this Part claimed that some of the arguments raised by leading judicial review skeptics – from Bickel's criticism of *Marbury*'s reliance on the Supremacy Clause to Waldron's rights-based critique of judicial review – can actually lend support for the case for JRLP.

The next Part claims that the arguments in this Article achieve more than revealing a great irony in constitutional theory and challenging the prevalent position that JRLP is less legitimate than substantive judicial review. It claims that what emerges from these arguments is a basis for a theoretical foundation for JRLP.

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[343] *Id.* at 31.

[344] *Id.* at 30.

V. THE CASE FOR JUDICIAL REVIEW OF THE LEGISLATIVE PROCESS

The previous Part argued that JRLP is no less justifiable or defensible than substantive judicial review. This Part briefly demonstrates that the arguments in the previous sections can form the basis for an affirmative theoretical case for JRLP, which can stand on its own feet, independently of one's acceptance of substantive judicial review. These arguments establish the authority for JRLP, the importance of JRLP, and the legitimacy of such judicial review. They also provide at least a partial response to the two main objections to JRLP – the argument that judicial review should only be aimed at protecting individual rights and the argument that JRLP constitutes an illegitimate intrusion into the working of the legislature.

A. *Authority*

Part IV suggested that the authority for JRLP can be grounded in the Constitution itself. In particular, JRLP may be grounded upon the general constitutional provisions that are often interpreted as furnishing a constitutional basis for substantive judicial review – particularly the Supremacy Clause,[345] as well as the Constitution's lawmaking provisions.[346] Indeed, even under some of the most conventional modalities of constitutional argument – arguments based on the text, structure, purposes and original meaning of the Constitution – there is a relatively strong basis for judicial authority to enforce at least the constitutional requirements for valid enactment.[347]

More importantly, however, the rule-of-recognition argument developed above establishes the courts' authority to review the enactment process on their authority to adjudicate.[348] The authority to determine compliance with lawmaking rules is inherent in the courts' inevitable need to identify the law as part of their authority to apply statutes to the cases coming before them. The rule-of-recognition argument provides a source of authority that is not contingent upon the existence of a written constitution or on arguments about constitutional supremacy, and it can provide authority to enforce both constitutional and subconstitutional rules that specify the procedural requirements for enactment.[349]

B. *Importance*

JRLP is important because the legislative process and the rules that govern it have great practical and normative importance.[350] These rules are crucial, *inter*

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[345] *See supra* Part IV.A.3.

[346] *See id.*; *supra* Part IV.A.1.

[347] On the "modalities of constitutional argument," see PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-22 (1991).

[348] *See supra* Part IV.B.1.

[349] *Id.*

[350] *See supra* Part III.E.

alia, for legislative outcomes; for the legitimacy of the law and of the legislature; for the Rule-of-Law ideal; for the procedural aspects of democracy;[351] and, ultimately, for ensuring the people's rights for political equality and democratic participation.[352] Hence, the integrity of the legislative process and the rules that govern it warrant judicial protection.

In previous scholarship I examined Congress's capacity and incentives to enforce these important rules and concluded that Congress lacks both the capability and will to enforce these rules adequately on its own.[353] I argued that contrary to popular belief, the rules that restrict the legislative process are in fact an area in which political safeguards are particularly unreliable, and sometimes even create an incentive to violate the rules.[354] JRLP is therefore important because it serves an essential function that cannot be performed adequately by the legislature or the political process alone.

The function served by JRLP also cannot be achieved adequately through substantive judicial review. Substantive judicial review focuses on the outcomes of the legislative process and on the protection of individual liberties and substantive values. In contrast, by focusing on the integrity of the enactment process itself, JRLP ensures procedural democratic values and political or democratic rights.[355] JRLP therefore protects essential aspects of democracy, which are no less deserving of protection and which cannot be adequately guaranteed through substantive judicial review. Indeed, the Supreme Court of Israel has perhaps been most explicit in recognizing that the purpose of JRLP is the protection of the fundamental principles of procedural democracy, "without which (and without the principles of substantive democracy) democracy would not exist."[356]

Taken together, these arguments go a long way in challenging the argument that courts should not "waste" their limited institutional capital on protecting the integrity of the legislative process.

C. *Legitimacy*

The discussion in Part IV provided several arguments for establishing the justification for JRLP and for replying to claims that JRLP is objectionable or illegitimate.

The constitutional supremacy arguments suggest that judicial enforcement of the constitutional provisions that regulate enactment can be justified both through a Kelsenian hierarchy-of-norms theory and via the popular sovereignty

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[351] *Id.*

[352] *See id.*; *supra* Part IV.E.5.

[353] *See generally* Bar-Siman-Tov, *supra* note 21.

[354] *Id.* at 862-84 (summarizing the ways in which political safeguards actually provide incentives to disregard the procedural rules).

[355] *See supra* Part IV.E.5.

[356] HCJ 4885/03 Isr. Poultry Farmers Ass'n v. Gov't of Isr. 59(2) PD 14, 43 [2004] (Isr.), *translated in* 2004 ISR. L. REP. 383, 410-11 (2004).

argument developed above.[357] The Rule-of-Law arguments provide a promising basis for justifying judicial enforcement of both constitutional and subconstitutional rules that regulate lawmaking.[358] The constitutional supremacy and Rule-of-Law arguments also provide a basis for rebutting arguments that the legislative process is a sphere of legislative prerogative that should be regarded as immune from any external regulation.

The arguments about process theories and dialogue theories are particularly helpful for highlighting the features of JRLP crucial to defending such judicial review against claims that it violates the separation of powers and is disdainful to a co-equal branch. One important feature of JRLP is that it leaves the content of legislation entirely to the legislature. Process theories represent a widely-accepted belief that judicial review is less objectionable when courts merely serve as an external, independent referee that ensures that the rules of the game are observed, rather than participating in the game itself or dictating its outcomes.[359] Similarly, dialogue theories help to highlight the argument that judicial review is less intrusive when courts act as an impartial facilitator of the dialogue, rather than dictating the content for the political and societal dialogue about constitutional meaning, rights and policy.[360]

Hence, both theories help to demonstrate that judicial review focusing only on the process of enactment rather than its content should be viewed as more respectful and less intrusive toward the legislature. These theories also help to establish the claim that this type of judicial role is more legitimate and can be more easily justified based on the courts' expertise and institutional position among the three branches and in society.[361] Such a judicial role can also better maintain courts' reputations as impartial and independent institutions, which are above the ideological controversies of society – reputations which are the basis for their legitimacy.

Dialogue theories are also instrumental, of course, in emphasizing the strong and sensible intuition that judicial review is more defensible when the decision of the court is not final and the elected branches can respond to judicial invalidations.[362] Another important feature of JRLP is that judicial invalidations under JRLP are merely provisional. As we have seen, JRLP is particularly apt for enabling a meaningful legislative response that engages both policy and constitutional meaning.[363]

Finally, the rule-of-recognition argument developed above provides perhaps the most promising reply to claims that JRLP is objectionable or illegitimate. By arguing that judicial review is simply inevitable and inherent to

[357] *See supra* Part IV.A.1.

[358] *See supra* Parts III.C & IV.A.2.

[359] *See supra* Part IV.D.

[360] *See supra* Part IV.C.

[361] *See supra* Part IV.D.

[362] *See supra* Part IV.C.

[363] *Id.*

adjudication itself, this argument avoids the normative debates about the legitimacy of judicial review.[364] As Michael Klarman stated in discussing the rule-of-recognition conception of constitutionalism, "[I]t seems pointless to offer normative criticisms of the inevitable."[365] Moreover, unlike most justifications for judicial review, this concepetion provides an argument for judicial review that does not depend on comparative institutional competence arguments or instrumental and consequentialist arguments.[366]

The rule-of-recognition argument is also particularly promising, for it appeals to the strong intuition that a bill that was not enacted in accordance with the procedural requirements for valid enactment is simply not law.[367] When courts refuse to recognize a purported statute as validly enacted law, they do not strike down a "law." Rather, they ensure that only that which was truly enacted by the legislature is recognized and treated as law.[368] By determining legislative compliance with the procedural rules requisite to an expression of legislative will, courts do not undermine the will of the elected representatives of the people. Instead, they ensure that only true expressions of this will are enforced.[369] This also helps rebut claims that concerns about judicial review are "at their zenith when courts invalidate the work of the elected branches based on perceived deficiencies in the lawmaking process."[370]

This, of course, is only a brief sketch of the core of the theoretical case for JRLP. It does not purport to cover all the justifications for JRLP, nor does it purport to discuss completely all the arguments raised by its critics.[371] It does

[364] *See supra* Part IV.B.2.

[365] Klarman, *supra* note 244, at 183.

[366] *Cf.* Alon Harel & Tsvi Kahana, *The Easy Core Case for Judicial Review*, 2 J. LEGAL ANALYSIS 227, 227 (2010) (arguing that "instrumentalist justifications for judicial review are bound to fail and that an adequate defense of judicial review requires justifying it on non-instrumentalist grounds" that are inherent in the judicial process itself).

[367] *See supra* Part IV.B.2; Adler & Dorf, *supra* note 188, at 1129. This intuition was nicely captured in Editorial, *Not a Law; A Bill Passed by Only One House of Congress Just Doesn't Count.*, WASH. POST, Apr. 1, 2006, at A16 (describing a case in which a bill was enacted in violation of Article I, Section 7's requirement that the same bill be passed in identical form by both houses of Congress).

[368] Bar-Siman-Tov, *supra* note 5, at 384-85.

[369] *Id.*

[370] Staszewski, *supra* note 10, at 468.

[371] For scholarship more directly dedicated to discussing and responding to specific objections to JRLP or semiprocedural judicial review, see, for example, Coenen, *supra* note 66, at 2853-89; Coenen, *supra* note 37, at 1851-70; John Martinez, *Rational Legislating*, 34 STETSON L. REV. 547, 606-12 (2005); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 75-85 (1985); Goldfeld, *supra* note 32, at 412-20. For my own contributions, see generally Bar-Siman-Tov, *supra* note 5 (challenging many of these objections, including the separation-of-powers or lack-of-respect argument); Bar-Siman-Tov, *supra* note 21 (challenging the "political safeguards" types of arguments and the claim that Congress has the capacity and incentives to enforce the rules that regulate the enactment

establish, however, that courts have the authority to review the enactment process and that it is both legitimate and important for courts to exercise this inherent authority.

CONCLUSION

The prevalent view, one which takes substantive judicial review for granted while adamantly rejecting JRLP, is hard to sustain. Countering the orthodoxy in American constitutional law and theory, this Article argued that JRLP is no less important and, in fact, is more justifiable than substantive judicial review.

But beyond inviting supporters of substantive judicial review to reexamine their objection to JRLP, this Article also invites *critics* of judicial review to see how they might well favor JRLP for the very reasons they object to substantive judicial review. For uneasy supporters of JRLP, this Article provides a much needed theoretical foundation and justification. For staunch skeptics of courts and steadfast opponents of JRLP, it is, I hope, a respectful challenge.

process on its own).