Process Review as Panacea: A Critique of Process Review Advocacy in the European Union

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# Abstract

This paper responds to the trend of process review advocacy in EU academic literature. It offers a critical assessment of process review, broadly defined as idea that the Court ought to focus on the process by which decisions are made when conducting its review of a given measure. The paper explores John Hart Ely’s theory of process review, developed in the context of the US Supreme Court, and how this has influenced the EU’s own process review advocates. It seeks to add value to this literature by engaging with the extensive critique of Ely’s theory. In doing so, it argues that process review may fail to live up to the expectations placed upon it, both in terms of the *outcomes* of review and its *legitimacy*.

# Introduction

Process review has been the subject of much attention in journals across Europe in recent years.[[1]](#footnote-2) There is an increasing trend in the literature to advocate that the Court of Justice ought to conduct judicial review of decision-making processes in a range of areas. It is the intention of this paper to offer a critical response to this development, highlighting the many issues that exist with process review.

Process review advocacy emerges in a range of contexts and there is much variation in how it is conceived. For some, process review can infuse judicial review with “greater force”,[[2]](#footnote-3) for others, it could form part of a “doctrine of deference” for the Court.[[3]](#footnote-4) For some process review should be used to escape substantive forms of review,[[4]](#footnote-5) for others it is seen as supplementary to substantive review.[[5]](#footnote-6) For some, process review should fulfil criterion of “deliberation and democratic legitimacy”,[[6]](#footnote-7) for others it can be used to discover “protectionist or discriminatory intentions” in Member State measures,[[7]](#footnote-8) and for others still, it “may contribute to a more rational law-making”.[[8]](#footnote-9)

Despite the fact that process review receives strikingly broad approval in the literature, there is clearly great variation in how it is conceived in terms of types and purposes . This paper attempts to capture this broad phenomenon under the banner of “process review”, despite the many varying names - process-oriented review, semi procedural review, procedural proportionality - that have been used for the concept.[[9]](#footnote-10) All can be captured under the broad idea that the Court ought to focus on the process by which decisions are made when conducting its review of a given measure.[[10]](#footnote-11)

The tendency towards process review finds inspiration in many places, including some political and judicial developments which have placed emphasis on decision-making procedures in recent years.[[11]](#footnote-12) In the literature, much inspiration is taken from theory of process review developed for the US Supreme Court in the 1980s. John Hart Ely argued that judges should conduct “representation-reinforcing review” of legislation which would not determine substantive values, but would rather ensure the process by which decisions were made met certain standards.[[12]](#footnote-13)

Ely’s theory has enjoyed a renaissance in the European Union in recent years, acting as a clear influence on the recent trend of process review advocacy. It is the intention of this paper to engage with the extensive critique that followed. Overall, Ely’s theory places too much reliance on the process-substance distinction. As a result, it fails to meet the expectations placed on it by Ely, both in terms of outcomes and legitimacy. These issues are explored in the first section

Following this, the trend of process review advocacy in the European Union is examined. In particular, there are two key areas in which such advocacy is evident; i) review of Union legislation for compliance with the principles of subsidiarity and proportionality, ii) review of Member State measures for compliance with the Treaties’ free movement prohibitions. The specific constitutional dynamics of these contexts and the expectations placed on process review by its advocates are explored in the second section.

The third section explores how advocates of process review expect it to shift the standard of review, and thus change *outcomes*. A survey of the case law in both contexts shows that where the Court has regard to procedural elements, it does not have the impact desired by process review advocates. The standard of review appears to remain at the same level suggesting that process review may not change the *outcomes* of judicial review.

The *legitimacy* claims made for process review are explored in the fourth section of the paper. The claim that process review is more legitimate because it is less intensive than substantive review is undermined by its failure to shift the outcomes of review. But there are also more ambitious claims made for process review, that it can be legitimate through improvement of decision-making processes. For advocates of process review of Union legislation, this takes the form of rationalising the process, encouraging certain standards of quality law-making. For others, process review can help to ensure that Member State processes are sufficiently democratic in terms of deliberation. This paper casts doubt on the extent to which these ideals of legislative improvement are feasible or desirable in the context of the Union.

Overall, this paper takes a critical stance towards the concept of process review. It is not intended to engage with the problems that process review advocates are intending to solve. Rather, in response to the broadly positive perception of the concept in the literature, this paper questions the ability of process review to satisfy the significant expectations which are placed upon it.

# Ely’s Theory of Process Review and its Critique

This paper focuses on the trend of process review advocacy in the European Union. But before delving into that literature, it first explores the process review theory of John Hart Ely, developed in the 1980s in relation to the US Supreme Court. The influence of Ely’s theory on process review advocates in the EU is clear.[[13]](#footnote-14) This section outlines the theoretical ideas that Ely proposed in justification of process review. It also engages extensively with the critique of Ely’s theory, drawing useful insights which are then applied to the EU’s own process review advocates in later sections.

## Ely’s Theory of Process Review

In constitutional law, a persistent debate on the legitimacy of judicial review of legislation has taken place for many years. On the one hand, some argue that judicial review is necessary, often arguing for its value in protecting vulnerable minorities from the “tyranny of the majority”.[[14]](#footnote-15) On the other hand, many argue that judicial review is unjustifiable on the basis that there is no evidence that judges are better at protecting the most vulnerable members of society, and that their power cannot be justified in democratic terms.[[15]](#footnote-16)

Ely’s contribution to this debate attempted to carve out a middle ground.[[16]](#footnote-17) He agreed with advocates of judicial review that some form of judicial control of legislative decision was necessary. However, he disagreed with the idea that judges should substitute their substantive values for those of the legislature. He developed his theory in the context of the US Supreme Court and drew on the third footnote of the *Carolene Products* case.[[17]](#footnote-18) This famous footnote was much theorised in the literature and Ely argued that it captured the correct type of judicial review that the Supreme Court should undertake. While it is inappropriate for the Court to displace the substantive values that emerge in the legislative process, it does have a role to protect that process where it is malfunctioning. Such malfunctions emerge in two broad scenarios:

“(1) the in’s are choking off the channels of political change to ensure they will stay in and the out’s will stay out, or

(2) though no one is actually denied a voice or a vote, an effective majority, with the necessary and understandable cooperation of its representatives, is systematically advantaging itself at the expense of one or more minorities whose reciprocal support it does not need and thereby effectively denying them the protection afforded other groups by a representative system”[[18]](#footnote-19)

In contrast to substantive judicial review, Ely offered his theory as a *value-free* form of adjudication. He argues that process review does not suffer from the same issues as substantive review because in contrast to a “value-oriented” approach, it is “process-oriented”.[[19]](#footnote-20) Under the latter approach, judges do not need to *impose values* on to the legislative process and thus, in contrast to substantive review, process review does not “involve the making of policy”.[[20]](#footnote-21) As a result, process review is “supportive of... the American system of representative democracy”.[[21]](#footnote-22)

## Critique of Ely’s Theory of Process Review

Ely’s theory has had a clear influence on the recent trend of process review advocacy in the Union. Less evident in this trend is an engagement with the extensive response to Ely’s theory. A key contribution of this paper is engaging with the critique of Ely’s theory, and applying it to process review in the Union context. Overall, this critique of process review casts doubts on the extent to which the theory can live up to the expectations placed on it by its advocates, both in terms of the *outcomes* of review, and its *legitimacy*.[[22]](#footnote-23)

### The Outcomes of Process Review

First, we can note that a theory of process review may not necessarily lead to a change in the *outcomes* of judicial review. Ely claimed that substantive review was inappropriate for courts to conduct due to its displacement of values determined by the democratic legislature. In contrast to substantive review, process review would *restrain* the US Supreme Court to instead focus on correcting malfunctions in the legislative process.[[23]](#footnote-24)

However, Ely’s theory failed to account for the difficulty in distinguishing between issues of process and substance.[[24]](#footnote-25) Legal language is malleable and it is possible to frame the same decision in terms that are more or less procedural.[[25]](#footnote-26) Thus, the lack of a clear division between process and substance suggests that “limiting” judges to procedural language only may fail to act as a restraint on their interpretations, in contrast to Ely’s intention.

This point about the malleability of procedural language is ironically proved by Ely’s theory itself. Ely made the empirical claim that the US constitution was “overwhelmingly” dedicated to concerns of process and structure.[[26]](#footnote-27) To prove this, his argument goes through provisions of the US constitution and the US bill of rights to highlight their procedural nature. In doing so, Ely highlights the ability of procedural language to be stretched to cover a range of provisions which could also be considered as substantive.[[27]](#footnote-28)

This attempt by Ely to frame the constitution as devoted almost entirely to process and structure was the subject of strong critique. Tribe notes that many of the constitution’s key commitments have a “stubbornly substantive character”.[[28]](#footnote-29) Given the range of these values, Tribe considers it “puzzling” that anyone could argue that the constitution is predominantly concerned with process.[[29]](#footnote-30)

To take one example, Ely’s theory seeks to protect certain “groups” in the legislative process, such as homosexuals or African Americans. However, as Tribe points out, “one cannot speak of “groups” as though society were objectively subdivided along lines that are just there to be discerned”.[[30]](#footnote-31) In fact, any issue with the mis-treatment of homosexuals, for example, springs not from a disagreement about “legislative classification”, but rather “with the judgments that lie behind the stereotype”.[[31]](#footnote-32) Thus, phrasing this matter as procedural does not remove the contested substantive value decision that lies behind it.

The consequence of this, as shown by Posner, is that procedural language will fail to limit what the US Supreme Court is able to do. This is because, as Ely shows, almost any matter can be phrased in procedural terms. The constitution contains a “plenitude of vague constitutional provisions” which allow for a range of theories to be extrapolated from it.[[32]](#footnote-33) Posner’s point is that, contrary to its claims, Ely’s theory would not act as any restraint on the US Supreme Court judges:

“They can do, in fact, *anything* - abolish capital punishment, force the states to allow homosexual marriage, force them to extend the franchise to non residents and maybe even to aliens- all in the name of the Constitution's participation-oriented, representation-reinforcing theme”[[33]](#footnote-34)

The key point to take away from this, which we will draw on in the later critique of process review advocacy in the Union, is that a focus on procedure in judicial reasoning may not necessarily lead to the desired outcomes. In Ely’s case, he argued that process review would place restraint on judges, but his own theory goes to prove that procedural language is malleable, and that Courts may use it to make a wide range of decisions.

### The Legitimacy of Process Review

Following on from this point, the response to Ely’s theory also allows us to draw insights about the legitimacy of process review. Ely argued against substantive review on the basis that it illegitimately allowed the judiciary to displace the values expressed by the democratically elected legislature. By contrast, Ely argued for the legitimacy of process review on the basis that it could serve as a form of “value-free” adjudication. He argued that the latter is more legitimate because it has an objective basis and does not require moral judgment or “the making of policy”.[[34]](#footnote-35)

However, as Komesar argued, reacting to political process “does not free the judiciary from having to make societal decisions and, therefore, basic value judgments”.[[35]](#footnote-36) Indeed, Ely built his theory on the idea that it was not appropriate for judges to engage in philosophical issues.[[36]](#footnote-37) But in reality, US Supreme Court judges cannot avoid moral reasoning “through noncontroversial inferences from the Constitution’s democratic structure”.[[37]](#footnote-38)

Ultimately, simple allusion to process is insufficient to act as a justification for Ely’s theory. As Tribe argued:

“The process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of *substantive* rights and values”[[38]](#footnote-39)

Ely simply replaced a series of substantive morality judgments with his particular moral commitment to “an egalitarian democracy”.[[39]](#footnote-40) This point can also be taken further to argue that process review may have troubling implications for legitimacy. Owing to the malleability of procedural language, judges may be drawn to use it tactically in order to make decisions appear more legitimate. This may lead to a situation where process review actually masks the fact that courts are undertaking value judgments. As Tribe argues, the process vision is attractive to judges because it “permits courts to perceive and portray themselves as servants of democracy even as they strike down the actions of supposedly democratic governments”.[[40]](#footnote-41) As such, it might be expected that the “care and humility” of judges may be undermined if they are “persuaded that much judicial activism is simply a corollary of democracy”.[[41]](#footnote-42)

Thus, according to this critique, Ely’s theory fails on its own terms, mainly owing to its over-reliance on the process-substance distinction. For the purpose of analysing process review advocacy in the Union, this brings two valuable insights; i) process review may not lead to the *outcomes* that its advocates desire, ii) process review may not live up to the *legitimacy* claims made for it.

It is worth bearing mind, of course, that the Union offers a very different context to the domestic constitution of the United States. Despite this, Ely’s theory has had a significant influence on the advocacy of process review in the Union. Next, we will consider the contexts for which process review has been proposed in the Union, noting the different constitutional dynamics to the context of Ely’s theory and the expectations of process review advocates.

# Process Review Advocacy in the European Union

Under the influence of Ely’s theory,[[42]](#footnote-43) and in response to certain developments in the Union, process review advocacy has emerged in two contexts of EU law. The first is the review of Union legislation for compliance with the principles of proportionality and subsidiarity. The second is the review of Member State measures for the compliance with the Treaty’s free movement prohibitions, with a focus on the proportionality justification of *prima facie* breaches. These two contexts are explored because they are those in which process review advocacy is strongest in Union academic literature.[[43]](#footnote-44)

As will be seen, both contexts perceive a problem with the Court’s current actions and attempt to use process review to shift the standard of review. However, each seeks to do so in opposite directions, an early signal that process review is malleable and can be used in different ways and for different purposes.

## Court of Justice Review of Union Legislation for Compliance with Proportionality and Subsidiarity

In analysing our first context, it is necessary to consider the different constitutional dynamics at play. Process review of the Union legislature has some clear distinctions from the context of Ely’s theory, which was centred on rights protection according to the US constitution. This context instead concerns the fidelity of the Union legislature to the competence principles outlined in the Treaties.

The court-legislature dynamics differ somewhat in this context. Ely’s analysis begins from the starting point that it may be illegitimate for the Court to conduct substantive review owing to the comparatively greater legitimacy claim of the legislature.[[44]](#footnote-45) In the EU context, the well-rehearsed debates about the “democratic deficit” temper the legislature’s claim of comparative legitimacy in relation to the Court.[[45]](#footnote-46)

The Court has historically played a very limited role in the enforcement of the principles of proportionality and subsidiarity, and this lack of intensity in review has contributed to the phenomenon of “competence creep”.[[46]](#footnote-47) As Weatherill described the issue, the Court presents a vague formula necessary for compliance with the principles of proportionality and subsidiarity. In response to this, the EU legislature adopts vague vocabulary to show that it complies with the principles. In this vein, the Court has been criticised for “poor enforcement”[[47]](#footnote-48) of proportionality, and for interpreting subsidiarity so as to allow the legislature “unlimited permission to act”.[[48]](#footnote-49)

This limited enforcement by the Court has significant consequences for the balance “between Union harmonization and Member State autonomy”.[[49]](#footnote-50) In response to these issues, some scholars have turned to process review as a way to correct the Court’s perceived failings. With this advocacy of process review comes certain expectations about how it would impact on the *outcomes* of review, and its *legitimacy*.

### The Expectations of Advocates of Process Review of Union Legislation

Advocates envisage a certain type of process review to be applied to the Union legislature, broadly conforming to the idea of a review of the *rationality* of the process. This has been summarised as the ideal that decision-making should conform to “principles of proper lawmaking”.[[50]](#footnote-51) As part of this, courts may assess the legislature’s compliance with “the duty to certify facts; a duty to make a prognosis; a duty to weigh conflicting interests; an observation duty regarding effect; and a duty to rectify faults”.[[51]](#footnote-52)

In this vein, regulatory reforms in the Union, such as the Better Regulation initiative and the uniform requirement of Impact Assessment Reports, are seen as essential.[[52]](#footnote-53) Lenaerts argues that a combination of *ex ante* legislative assessment and *ex post* judicial review may contribute to “more rational law-making”.[[53]](#footnote-54) In the context of subsidiarity, it was expected that the “early warning mechanism”, and the requirement that the Commission must justify its legislation when challenged by national parliaments, could also aid the Court in conducting process review.[[54]](#footnote-55)

It is envisaged that if the Court were to focus on process this would have certain impacts on the *outcomes* of its review. There is a clear belief in this literature that the current standard of judicial deference in relation to subsidiarity and proportionality can be intensified through a focus on the legislative procedure. It has been variously said that process review can “increase[] judicial scrutiny, [[55]](#footnote-56) lead to an “increase in the intensity of review”[[56]](#footnote-57) and infuse judicial review with “greater force”.[[57]](#footnote-58)

Ultimately, it is argued that through the adoption of this form of rationalising process review, the Court would improve the compliance of EU legislation with the Treaty’s competence principles.[[58]](#footnote-59) Oberg argues that the more stringent review offered by process review will “enable the Court to better protect Member State autonomy against the risk of illegitimate EU centralisation”.[[59]](#footnote-60) There is thus a belief that process review can impact on the outcomes of judicial review to help to achieve this broader goal.

Despite the intensification of standard, process review would retain more *legitimacy* than a pure substantive review, according to its advocates. Strong substantive review is seen as illegitimate for the Court to conduct.[[60]](#footnote-61) In this way, this literature follows Ely in viewing process review as a “middle-way solution” between full substantive review and complete deference.[[61]](#footnote-62) It leaves more room for substantive choices than pure substantive review, but still enables the Court to act, providing for a “golden mean”.[[62]](#footnote-63) As Lenaerts comments, process review means the Court does not replace the “substantive choices made by the EU political institutions with their own”, but nor is it an example of “judicial surrender”.[[63]](#footnote-64)

In addition to this, there is also an underlying ideal that the process review will *improve* the legislative process. The Union legislature will be aware that its future actions are subject to review and need to comply with certain standards of rationality. This will have the effect of “promoting a broader culture of proof, evidence and rationality in policymaking”.[[64]](#footnote-65) Overall, this ensures that the EU legislature will have more “evidence-based justification” for the use of its discretion.[[65]](#footnote-66)

## Court of Justice Review of Member State Measures for Compliance with Free Movement Prohibitions

The second context explored in this paper concerns review of Member State measures for compliance with free movement law and thus also has distinct features compared to the context of Ely’s theory. Free movement prohibitions have been interpreted broadly resulting in a large number of Member State measures being found as *prima facie* breaches ofinternal market law.[[66]](#footnote-67) In terms of legitimacy, the Court must strike a balance between allowing Member State autonomy, on the one hand, and enforcing the Internal Market as agreed to by the Member States, on the other.[[67]](#footnote-68)

Where a Member State tries to justify its *prima facie* breach of free movement rules on the basis of a legitimate aim,[[68]](#footnote-69) the Court adopts strict scrutiny in testing the proportionality of the measure. The Court often stresses that justifications are exceptions “to be interpreted strictly”[[69]](#footnote-70) and ought not be “extended any further than is necessary*”.*[[70]](#footnote-71) Therefore, where a *prima facie* breach is found, the burden of proof is on the Member State to justify its measure.[[71]](#footnote-72)

The breadth of free movement prohibitions, particularly Art. 34 TFEU, has been heavily discussed in past literature.[[72]](#footnote-73) More recently, greater attention has been placed on the issue of justification. This has manifested itself in a number of forms, with some focusing on fundamental rights,[[73]](#footnote-74) the principle of identity,[[74]](#footnote-75) or a more general analysis of when and how the Court defers to Member States.[[75]](#footnote-76) As part of this focus on justification, process review emerges as a method to offer a more deferential standard to Member State measures. As in the first context, this proposal of process review as a solution comes with certain expectations about the legitimacy of its use and how it will impact on the outcomes of judicial review.

### The Expectations of Advocates of Process Review for Member State Measures

There is more variation in the types of process review in this context compared to the literature on the Union legislature. One example comes from De Witte, who suggests that legislation could be assessed on the basis of “legislative transparency”.[[76]](#footnote-77) This would involve review in order to determine whether the Member State is genuinely pursuing the aim that it claims to be pursuing. This “criterion of legislative intent”[[77]](#footnote-78) would not call into question the policy aims of Member States, but rather ensure that the legislation is genuine and non-protectionist.

Another type of process review suggested in the literature is scrutiny of the deliberation of Member States in order to determine whether deference is owed. For example, Gerards argues that “doubts may exist as to the actual democratic legitimacy of legislatures”[[78]](#footnote-79) and their processes ought to be reviewed in order to determine whether the deference is owed. Harbo argues that a light standard should only be given if the democratic process is genuine. On this account, the Court should look for “proof of participation by representatives in the decision-making process” and evidence that the sides are listening to each other in search of a better outcome.[[79]](#footnote-80)

However, for all types of process review offered in this area, there is a common desire that it be used to shift the *outcomes* of judicial review in the direction of greater deference. For example, De Witte contrasts substantive proportionality review, which is “highly prescriptive of the substance of acceptable national measures” with process review which is “more respectful of normative policy aims”.[[80]](#footnote-81) Process review has been described as a way to “secure judicial deference”,[[81]](#footnote-82) or as capable of being part of a “doctrine of deference” for the Court.[[82]](#footnote-83)

In this way, its advocates believe that process review will change the *outcomes* of review, by minimising the amount of Member State decisions that the Court strikes down. On this view, such deference is necessary because greater Member State autonomy is desirable, particularly on key moral, cultural and ethical issues.[[83]](#footnote-84)

De Witte argues that each Member State has a legitimate political forum through which important social values are articulated and negotiated.[[84]](#footnote-85) Such values reflect the individual and the society’s sense of self and the norms that are generated should not be subject to a cost-benefit analysis. The issue is that the standard proportionality test focuses not on the internal reasonableness of the measure, but rather on the measure’s relationship to and effect on external policy choices and actors, making it inappropriate in certain areas that are sensitive to Member States. The essential ethical issues faced by a society are thus transferred “from the national democratic arena to the transnational judiciary”.[[85]](#footnote-86) On this argument, the Court ought to respect the right of “strong democratic institutions on the national level” to express their policy choices.[[86]](#footnote-87)

On this account, offering greater deference to substantive choices is a more appropriate position for the Court to take. Newdick states that the Court is “wholly unsuited” to making substantive decisions.[[87]](#footnote-88) Gerards argues that key value judgments should normally be made by the legislature or executive “given their democratic legitimacy and their instruments and equipment to assess and balance social, economic and political interests.”[[88]](#footnote-89) In this way, a focus on process is more *legitimate* than the Court’s current substantive focus. Having examined both contexts, the final two sections assess the extent to which the expectations of process review advocates are realised in practice, both in terms of *outcomes* and *legitimacy*.

# The *Outcomes* of Process Review in the European Union

This section critiques the expectation that a focus on process can help to shift the standard, and thus the *outcomes*, of judicial review. In the two contexts of the paper, something of a dissonance emerges in the advocacy of process review. Both literatures argue for a shift in the standard of review but do so in *opposite* directions. In the Union context, process review is proposed as a way to *increase* the intensity of review. In the Member State context, it is proposed as way to *lessen* the intensity of review.

Following Ely, this apparent dissonance could be defended on the basis that process review offers a “mid-point” between the excesses of a pure substantive review and the weakness of a light-touch review. However, it would not accord with reality to *bind* process review to a particular standard. As we will see in this section, the intensity of review can vary greatly *within* process review. With this point in mind, the dissonance between the two contexts suggests that process review has become something of a panacea that can act as “all things to all people”; it is expected to solve a range of problems in varying ways. Those dissatisfied with how the Court is adopting a light-touch standard for Union legislation latch on to the potential for procedural standards to offer more intensity. Those dissatisfied with the Court’s intense enforcement of the internal market can latch onto process as a way to offer more room for substantive values.

This faith placed in process review emerges from the promise of the process-substance distinction and its ideal of leaving substantive decision-making to the legislature. But as we have seen, owing to its lack of clarity, this distinction may fail to live up to this promise. This difficulty in shifting judicial outcomes is exacerbated by the interpretive discretion available to the Court in the above contexts.[[89]](#footnote-90)

As in Ely’s theory, which concerned the interpretation of the broadly framed provisions of the US constitution, the Court here is interpreting the broad principles of proportionality and subsidiarity. For such principles, it is necessary to abandon the ideal of classical legal scholarship, that legal interpretation is syllogistic and a court faced with facts will follow its route of reasoning to the outcomes.[[90]](#footnote-91) Due to the “massive delegation” of power that the Treaty founders entrusted the Court with, it must balance sensitive political issues in determining decisions.[[91]](#footnote-92) When the Court is faced with balancing rights, interests and freedoms, judicial law-making is inevitable.[[92]](#footnote-93)

Thus, the choice of how a court frames its decision may relate to its perceived legitimacy. For any court to respond to a case is to “take a side”, and at the same time it wants to retain the ideal of neutrality. Therefore, it may choose to frame its decision in a way that maximises its legitimacy.[[93]](#footnote-94) It should thus be recognised that “legal reasoning” is often a matter of how a court “frames” its decision, rather than how it arrived at it.[[94]](#footnote-95) This is not to dismiss the value of argumentation frameworks such as proportionality, which offer some structure to the way courts approach an issue. However, it is clear that there is much discretion both in the decision that a court can reach and the way that it can choose to frame that decision. In this way, the context of a decision may be important, and a court may adapt its reasoning in any given case with institutional strategy in mind.[[95]](#footnote-96)

On this basis, the paper is sceptical of the extent to which greater use of procedural language in Court judgments will have an impact on outcomes. As we have seen, procedural language is malleable, and the same issue can be phrased in more or less procedural terms. The remainder of this section looks at the case law of the Court and how the use of process review affects the standard of review that it conducts. It is evident that in both contexts, a greater use of procedural language does not appear to shift the standard of review and thus does not appear to change outcomes in the way desired by process review advocates.

## The Case Law on Process Review of Union Measures for Compliance with the Principles of Subsidiarity and Proportionality

In the Union context, there is a clear trend towards the increased use of procedural language in Court judgments. This is partially in response to the growing use of impact assessment reports(IARs) for Union measures.[[96]](#footnote-97) The literature is united in its encouragement of the use of IARs by the Court, in line with its broader goal of rationalising the Union legislative process.

IARs are now regularly cited by the Court in its review of the principles of subsidiarity and proportionality. However, despite the increased use of procedural language, there is no evidence that this is affecting the standard of review to which the Union legislature is subject. This is evident in a number of recent cases. Overall, i) the Court does not enforce the need for an IAR, ii) it is reluctant to entertain challenges to the content of IARs, and iii) it generally uses the content of IARs as a way to *support* the decision of the legislature.[[97]](#footnote-98)

First, it should be noted that the existence of IARs is not a hard, legal requirement. In *Afton Chemical*, the Court confirmed that the “[t]he Commission’s impact assessment was not binding on either the Parliament or the Council”[[98]](#footnote-99) and the Parliament was not obliged to carry out its own when changing proposals. The Court has since confirmed that “the EU legislature remains free to adopt measures other than those which were the subject of [an] impact assessment”.[[99]](#footnote-100)

Second, the Court has generally not been responsive to claims of errors in IARs. In *Estonia v Parliament and Council*, Estonia claimed that the Commission had made an error in its IAR by taking into account only quantitative data.[[100]](#footnote-101) In response, the Commission stated that the IAR was conducted using the appropriate procedure. The Court did not directly address this procedural complaint of Estonia and conducted a limited proportionality assessment accepting the legislature’s view on the matter.[[101]](#footnote-102)

Often, in response to such challenges to content, the Court will not scrutinise the claims in any depth. For example, in *Pillbox 38*, part of the proportionality challenge to the Tobacco Products Directive alleged that the legislature had based its limitation on nicotine levels in E-cigarettes on an incorrect scientific premise.[[102]](#footnote-103) In response to this, the Court did not scrutinise the evidential basis of the decision, but was satisfied that “the EU legislature balanced the various interests” based on scientific studies.[[103]](#footnote-104) This suggests that the Court will use the existence of IARs as proof of the compliance of the legislation, instead of inspecting the evidential basis.

Third, this gives the overall impression that IARs are mainly used as a way to *support*, rather than challenge, the decision of the legislature. The Court uses the evidence in IARs to dismiss claims that the legislation may breach proportionality or subsidiarity. For example, in *Philip Morris*, in response to a claim that the ban on tobacco with a characterising flavour was disproportionate due to its negative economic and social consequences, the Court relied on the IAR’s expectation that the prohibition would result in a decrease in cigarette consumption. As such, this supported a finding that the EU legislature weighed up the economic consequences with the goal of achieving a high level of human health.[[104]](#footnote-105)

Thus, for the most part, it appears that the Court is using IARs to show that the legislature has dealt with the issue of proportionality, without interrogating the contents of the report. In response, process review advocates have been critical of the Court’s approach in cases such as *Philip Morris*, for being “equally deferential” as the previous case law. [[105]](#footnote-106) Much of the Court’s review is limited to the existence of certain procedural requirements “without engaging in a detailed assessment of the way in which these procedures have effectively been undertaken”.[[106]](#footnote-107) Harvey describes a possible trend, where the IAR’s findings are “accepted by the Court without any degree of scrutiny whatsoever, whereas applicants appear to be precluded from challenging the methodology or findings of such assessments”.[[107]](#footnote-108)

In this context, process review is proposed by its advocates in the hope that it will intensify the standard of review and contribute to the overarching goal of a better division of competence between the Union and its member states. However, the case law suggests that a focus on procedure does not necessarily intensify the standard of the Court’s review, and thus process review may fail to live up to the expectations placed on it in terms of outcomes.

## The Case Law on Process Review of Member State Measures for Compliance with Free Movement Prohibitions

As in the context of the Union legislature, advocates of process review in the Member State context have certain expectations that a focus on process will shift the Court’s standard of review. Although the types of review proposed vary, all offer a method of process review that aims to lead to more deference to Member State choices.

In the literature, this has at times led to a conflation of the idea of process review with the idea of deferential review generally. For example, Nic Shuibhne and Maci describe how, in relation to Member State laws on gambling, “a more procedural than substantive proportionality review tends to be applied” due to national sensitivities.[[108]](#footnote-109) However, while there is deference in the gambling case law, some of the cases referenced do not focus on procedural elements and instead conduct a light-touch substantive review.[[109]](#footnote-110)

For example, in *Schindler* the Court established significant discretion for the Member States to regulate the practice of gambling. Its particular damaging consequences justify national authorities “having a *sufficient degree of latitude* to determine what is required” in light of that society’s own social and cultural features.[[110]](#footnote-111)

In outlining this deferential standard, the Court had no recourse to elements of the procedure of Member States. Instead, it simply conducted review with less intensity than the normal proportionality test. As Cuyvers and Van Den Bogaert have noted, “a general margin of appreciation” is granted to the Member States in the area of gambling,[[111]](#footnote-112) with limited enforcement of the necessity limb of the proportionality test.[[112]](#footnote-113) Thus, this area displays a deferential standard of review, but not on the basis of a focus on procedural elements.

Similarly, De Witte describes the *Omega* case as displaying a “more procedural approach” because it did not result in close scrutiny of whether a less restrictive measure would have been possible. However, this case did not concern procedural elements and was conducted with a light-touch substantive review. Once again, this conflates process review with a deferential form of review.[[113]](#footnote-114) In fact, when the Court has regard to procedural elements in the case law, it has often done so in line with its more traditional intensive standard of review.[[114]](#footnote-115)

Process review can be associated with strong requirements of evidence in free movement law. Cases such as *Bressol* display the high levels of evidence that Member States must show in order to comply with proportionality.[[115]](#footnote-116) In this case, the French Community of Belgium limited the number of medical students from France on the basis that they would leave the territory to find work elsewhere after study, with a consequent public health risk due to the lack of medical practitioners. In response, the Court stated that the justification required “objective, detailed analysis, supported by figures…capable of demonstrating, with solid and consistent data, that there are genuine risks to public health”.[[116]](#footnote-117) The level of detail required was later described as setting “a heavy, almost insurmountable burden of proof”.[[117]](#footnote-118) In the opinion of the *Bressol* case, AG Sharpston focused on the decision’s evidential basis, stating that the measure “was introduced on the basis of rather patchy information”. Further,

“[t]he specific material that would lead a prudent legislator legitimately to conclude that a specific burgeoning problem needed to be nipped in the bud…was simply not to hand and/or not examined *when the decree was enacted*”[[118]](#footnote-119)

This shows how the strong burden of proof required for evidence can be used to focus on the decision-making process, resulting in an intensive standard of process review. For an example of this type of review in a judgment, we can look to *Commission v Austria (Heavy Lorries)*[[119]](#footnote-120) to display how the Court may place obligations of consideration in the *adoption* of measures. Austrian authorities banned the use of the “Brenner Corridor” motorway for certain categories of lorries at certain times in order to improve air quality. The Court accepted the legitimate aim of environmental protection but found the way it was pursued to be disproportionate:

“*before* adopting a measure so radicalas a total traffic ban on a section of motorway constituting a vital route of communication between certain Member States, the Austrian authorities were *under a duty to examine* carefully the possibility of using measures less restrictive of freedom of movement…

…it has not been conclusively established in this case that the Austrian authorities, in *preparing* the contested regulation, *sufficiently studied the question* whether the aim of reducing pollutant emissions could be achieved by other means less restrictive of the freedom of movement”.[[120]](#footnote-121)

The language of the Court clearly suggests that it is the failings of the Member State in its consideration of the measure that led to this finding of incompatibility. Austria renewed its attempt to introduce the travel ban, having “carefully examined the possibility of taking alternative measures that were less restrictive of the free movement of goods”.[[121]](#footnote-122) However, the Court once again found the measure to be incompatible, concluding in procedural terms, that an alternative speed limit policy “was not sufficiently *taken into account*”.[[122]](#footnote-123) These cases show that process review can place onerous requirements of consideration on decision-making.

It is of course possible for the Court to use procedural forms of review in a more deferential way. Indeed, the Court at times seems to have adopted forms of review closer to De Witte’s “legislative transparency” formulation, checking to see whether the process of a Member State shows that its aim is genuinely being pursued. In *Finalarte*, the Court stated it would gather the intention of the legislature, “from the political debates preceding the adoption of a law or from the statement of the grounds on which it was adopted.[[123]](#footnote-124) In *Commission v Poland* (*Genetically Modified Organisms*), the Court focused on determining the intent of the measure, and whether Poland’s GMO ban genuinely relied upon “religious and ethical objectives” as its true purpose.[[124]](#footnote-125)

In theory, this type of review could ensure the good intentions of Member States without intruding into their substantive policy choices, though neither of the above cases appear to offer such a light-touch standard. Further, we should be sceptical about the extent to which this type of review might collapse into substantive assessment of the rationality and evidence base of the decision-making process. The Court may find insufficient evidence of a genuine pursuit of the objective in question. This was seen in *Commission v United Kingdom (Newcastle Disease*),[[125]](#footnote-126) which concerned British government restrictions on the import of poultry products from mainland Europe following the outbreak of a highly infectious viral disease. Reasons counting against the UK in the proportionality assessment included its failure to inform the Commission of the measure and insufficient evidence of pre-legislative consideration. Thus, the court concluded that it “did not form part of a seriously considered health policy”.[[126]](#footnote-127)

Overall, we can question whether process review will live up to the expectations placed on it by its advocates. We can at times wonder whether it is simply a matter of re-phrasing the language used in review. This is most obvious in the *Commission v Austria* cases, discussed above. The Court used procedural language, but it was arguably the substance of the measure to which it objected. The Court may have felt that this corridor was too important to cross-Europe trade and the gains for the environment were not sufficient for the damage to the internal market.[[127]](#footnote-128) However, it was phrased in terms of lack of consideration of an alternative policy. As Shapiro notes, a decision-maker “who must choose the best rule… has no discretion”.[[128]](#footnote-129)

In this vein, we can also note the importance of the context of decisions in the internal market and how this can lead to tactical reasoning from the Court. For example, in *Commission v Italy (Trailers)*, the Court conducted “an exceptionally benevolent proportionality review”.[[129]](#footnote-130) Nic Shuibhne and Maci argue that this standard of review was used for “instrumental” reasons in the case, as it accompanied an expansion of the scope of Art 34 TFEU.[[130]](#footnote-131) This goes to show that context and tactical reasoning may at times play a more significant role than the language the Court uses to make the decision.

Overall, in both contexts, there is limited evidence that a shift from substantive to procedural language in the Court’s reasoning has an impact on the *outcomes* of review. This aligns with the argument that in the interpretation of broad principles such as subsidiarity and proportionality, there is a lack of textual constraint on the judges. Thus, the Court has wide discretion in how it chooses to frame its reasoning, and a change in language will not necessarily result in a change of outcomes.

# The *Legitimacy* of Process Review in the European Union

In the final substantive section, we move on to the legitimacy claims made for process review. As we have seen in the Member State context above, there is an argument that a focus on process is more legitimate because it offers a less intensive standard of review than a focus on substance. This paper argues that this particular claim to legitimacy is limited by the fact that issues of process collapse into substance and that it is thus very possible for process review to be conducted in an intensive manner. In this way, it may be inappropriate to argue that process review is generally more legitimate than substantive review, because to do so equates the focus of judicial language with the standard of review.

Beyond this type of argument is a more ambitious set of legitimacy claims based around the idea that process review can *improve* the legislative process in some way. In this vein, there *is* evidence that it is possible for the Court to influence and alter the legislative process through judicial review. As Stone Sweet has shown, judicial review has “feedback effects” on the legislative process.[[131]](#footnote-132) Legislatures become aware of judicial review and this impacts on their future behaviour.[[132]](#footnote-133) Placing specific requirements on the legislative process will lead to more “direct” feedback effects, suggesting to the legislature that its behaviour will be observed and that this may affect the legality of a measure. In this way, legislators could come to act “in the shadow” of process review.[[133]](#footnote-134)

This issue has been particularly noted in the area of proportionality. In many domestic constitutions, the use of proportionality in the creation of laws has been encouraged by the judiciary.[[134]](#footnote-135) Courts act as pedagogues, infusing their argumentation frameworks into the operations of the legislature. As Stone Sweet and Mathews have observed; “courts may expand and contract the discretion they grant to lawmakers, at the suitability or necessity stage, when it is not confident that it has anything to teach them”.[[135]](#footnote-136)

With this in mind, it is clear that there is potential for the Court to influence national and European decision-makers through a greater focus on process. In the two contexts discussed in this paper, two broad ideals of improvement emerge. For the advocates in relation to the Union legislature, there is a focus on *rationalisation* of the legislative process. For the advocates in relation to Member State measures, some focus on ensuring the *democratic legitimacy* of the legislative process.

## Process Review and Rationalisation of Decision-Making Processes

A recurring theme of the literature in the Union context is the desire for process review to *rationalise* the legislative process, with the Court being encouraged to serve a “rationality enhancement function”.[[136]](#footnote-137) On this view, an increase in accountability of the EU legislature can foster legitimacy:

“By enforcing standards of rational decision-making and requiring EU action to be more accountable, the Court promotes the social legitimacy of the EU system of governance as a whole”.[[137]](#footnote-138)

It is worth noting that this idea of rationalising the legislative process has a strong liberal underpinning, viewing legislation as an interference with the autonomy of the individual.[[138]](#footnote-139) Meuwese and Popelier advocate for courts to ensure procedural rationality with the aim of “the protection of individuals against arbitrary government intervention”.[[139]](#footnote-140) An earlier advocate of procedural rationality sees it as a response to the State’s growth in powers over the course of the 20th century. On this view, in “the constitutional state, which sees itself as liberal, the citizens would like to be bothered by the legislative branch as little as possible.[[140]](#footnote-141)

To an extent, this “rationalisation” literature carries a strain of Ely’s desire for “value-free adjudication”.[[141]](#footnote-142) It is based on an ideal that the Court must ensure that political will does not lead to irrational decision-making. Tushnet was critical of this view of the legislature, noting that it attempted to make the “lawmaking process more rational”, and thus for “legislatures to act more like courts”.[[142]](#footnote-143) In doing so, this view moves away from the more traditional notion that “legislatures are creatures of political will”, as opposed to courts who are “instruments of reason”.[[143]](#footnote-144)

However, even this framing risks falling into the trap of suggesting that the political will represents irrationality, and more technocratic forms of governance, such as a depoliticised legislative process, represent “rationality”. In fact, it is arguable that such de-politicisation can itself be irrational, resulting in a “sham technocracy”.[[144]](#footnote-145) As Davies has argued, EU law can impact on the quality of life of individuals in ways that “cannot be quantified, priced or sold”, and the ability to conduct cost-benefit analyses goes “beyond the capacity of expertise, and certainty of economics”.[[145]](#footnote-146) The attempt to govern based on ideals of rationality, particularly economic rationality, may have some profoundly irrational outcomes at the expense of non-market goals.[[146]](#footnote-147)

In the Union context, this drive for rationalisation of the legislative process could be described as part of the broader trend of “constitutional legalism”, which “seeks to circumvent politics” through appeal to higher values in law.[[147]](#footnote-148) Whereas often such values are substantive, the procedural theorists find such values in process.[[148]](#footnote-149) This ideal aligns with a technocratic view of what Europe ought to be. As Wilkinson describes, there is a view of “economic constitutionalism”, which seeks a Union that is “individualist, rationalist and based on a rule of law that protects against the arbitrary exercise of public power”.[[149]](#footnote-150) On this view, the European project acts as a “rational and efficient administration that would ultimately dispense with the messiness, brutality, and particularism of politics”.[[150]](#footnote-151)

The advocacy of procedural rationality review of Union legislation accords with this particular view of what the Union ought to be. This is one choice amongst many as to how the Union could develop and would inevitably come at the expense of other values. The continuing attempt to move the Union towards “rationality” shifts the dial away from reforms to help the Union better reflect political will.[[151]](#footnote-152) Some may argue that, in the modern Union, this takes us away from more pressing questions about the ability of democratic forces to shape the direction that Europe takes.[[152]](#footnote-153) However, rationality is not the only vision for process improvement. There is also the potential for process review to improve the *democratic legitimacy* of decision-making processes.

## Process Review and the Democratisation of Future Legislative Processes

In the context of Member State measures in the internal market, some advocates argue that the Court could defer where it has ensured that decision-making processes reach certain standards of democracy. As discussed in the second section, Harbo and Gerards advocate for review to ensure that the democratic process is genuine and of sufficient quality, including examining debates and ensuring participation by representatives. In this way, the Court can defer to Member States, but only where there is a democratically legitimate process.[[153]](#footnote-154)

We can critique this idea on a number of grounds; i) it frames the judicial task as one of protection of democracy masking the fact that it is counter-majoritarian, ii) courts may have questionable capacity and expertise in this area, iii) the Court of Justice may have limited desire to protect ideals of democracy, and iv) it may be inappropriate for the Court to intervene in domestic democratic processes.

The first point is one made in relation to Ely’s theory. Presenting courts with the idea that they are merely servants of democracy when they strike down the decisions of the legislature may encourage less restraint. Instead of being faced with the “counter-majoritarian difficulty”,[[154]](#footnote-155) the Court may view its role as one of protecting representative democracy. As Schütze has argued, framing Court of Justice review as serving democracy comes with a “serious danger of camouflaging counter-majoritarian judicial decisions as exercises in democratic governance”.[[155]](#footnote-156)

This has particularly troubling implications for the Member State context, as it suggests that this may mask the intensity of the Court’s standard of review. There is the potential for procedural language to form part of the Court’s tactical use of reasoning. With the conflation of deferential review with procedural review, it may be that a focus on procedure is seen as more appropriate for the Court. In this sense, the Court may utilise procedure as a “veneer” to make a finding of illegality seem more acceptable.[[156]](#footnote-157)

Second, we can question the capacity and expertise of judges in this area. Judges are institutionally limited in terms of their investigative resources.[[157]](#footnote-158) In the internal market context, the Court may rely on the submission of referring courts or relevant parties. There is thus a lack of clarity over the capacity of the Court to determine whether the legislative process in question was sufficiently democratic. Indeed, this is not just a question of capacity, but also expertise. Even presuming the Court had access to all relevant documents and information, there is still the difficult question of *understanding* how the process works in practice. As Posner notes, judges have expertise in some aspects of procedure, at the “level of trials and hearings”, but we can doubt the extent to which judges have knowledge of the “design of political institutions”.[[158]](#footnote-159) Without this knowledge, for the Court to judge the sufficiency and quality of the democratic process seems to pose certain risks. This is exacerbated by the fact that ideas of deliberation are often based on an idealised account of what the legislatures ought to do and may not reflect its work in reality.[[159]](#footnote-160)

Third, even if the Court *could* enforce such an ideal of democratic legitimacy, it seems unlikely that it would undertake this task given its history as an institution.[[160]](#footnote-161) While the Court has occasionally used the principle to support greater powers for the European Parliament,[[161]](#footnote-162) democracy has rarely been at the centre of its judgments. As Ritleng has argued, the principle of democracy is often entirely absent from judgments where one might expect it to play a role. He argues that the Court has a certain conception of democracy:

“according to which independent bodies, owing to their insulation from politics and electoral concerns and their technical expertise, are better able to fulfil certain tasks and will gain democratic legitimacy thanks to the effectiveness of their actions”.[[162]](#footnote-163)

Such a technocratic conception is far removed from Harbo’s idealised account of deliberation and representation. The idea that democracy is going to be *improved* by a Court that has shown limited regard for democracy, either national or European, is questionable. Democracy has played such a minimal part in the Court’s reasoning that it seems unlikely that the Court would, not only start mentioning democracy in free movement cases, but rather start orientating their entire proportionality reasoning around democracy.

Finally, even if the Court *could* and *was willing* to review democracy at the national level, there remains the question of whether this would be an appropriate task for it to undertake. As Bar-Siman-Tov notes, “the idea that courts will determine the validity of legislation based on the adequacy of lawmaking procedures is highly controversial”.[[163]](#footnote-164) This sensitivity arose in the *HS2* case of the UK Supreme Court[[164]](#footnote-165) in relation to the Court of Justice’s requirement that domestic courts must assess “the entire legislative process” to determine whether it is sufficiently democratic and thus in compliance with the Environmental Impact Assessment Directive.[[165]](#footnote-166) In response, the UK Court argued that it is inappropriate for courts to “supervise the *internal* proceedings of the national legislature”.[[166]](#footnote-167)

Indeed, with the “feedback effects” of such review, it may be questioned whether the Court determining when the legislative process is of sufficient quality may end up offering less autonomy to Member State decision-makers, contrary to the desire of process review advocates in this area. In fact, top-down procedural requirements from the Court may place greater limits, constraining Member State decision-makers as they act “in the shadow” of the requirements of the Court.[[167]](#footnote-168) It can be questioned whether the democratic nature of the process might be limited by such legal obligations.

# Conclusion

This paper offers a critical response to the trend of process review advocacy in Union literature. It argues that process review may fail to live up to the expectations placed on it, both in terms of the *outcomes* of review and its *legitimacy*. While academia can influence the way that judges think and how they reason in decisions,[[168]](#footnote-169) far too much is expected of process review. This is not least because of the fluidity of the process-substance distinction, and the malleability of legal language generally, especially in the context of the broad interpretive powers of the Court.

Process review has emerged as something of a “panacea” with a range of different, and potentially contradictory, expectations placed upon it. From this range of purposes, perhaps the most realistic and achievable goal is further rationalisation of decision-making processes. However, it must be recognised that such rationalisation is accompanied by de-politicisation and judicialisation. This is one normative choice amongst many, and as such will come at the expense of other values.

For those who seek alternative normative directions, it is suggested that process review may offer the wrong route. In this vein, Loughlin’s comment on the misplaced focus of public lawyers in Britain may be informative. He used the story of the man who, instead of looking for the keys in the dark corner where he dropped them, looks underneath the lamppost because there was more light there.[[169]](#footnote-170) This paper suggests for those with more ambitious goals - to create more normative room for Member States to pursue non-market goals, or to genuinely improve decision-making processes to reflect political will - the inquiry into process review is misplaced. If broad ambitions are held, meaningful change will not emerge from trying, and often failing, to tweak judicial formulas. If we want real reform of process, we must imagine and encourage political reforms of that process, rather than asking that the courts change it for us.

1. \* Lecturer in Law at the University of Liverpool. The author is grateful to Thomas Horsley, Michael Dougan, Patricia Popelier, Stephanie Reynolds, Katy Sowery, Adam Tucker, Michelle Finck and Christophe Hillion for comments on earlier drafts. This is a pre-copyedited, author-produced version of an article accepted for publication in European Law Review following peer review. The definitive published version will be available online on Westlaw UK or from Thomson Reuters DocDel service in June 2020

 See for example: K. Lenaerts, "The European Court of Justice and Process-Oriented Review', (2012) 31 Y.E.L. 3; J. Oberg, “The rise of the procedural paradigm: judicial review of EU legislation in vertical competence disputes”, (2017) 13 Eur. Const. Law Rev. 248; J. Gerards, “Pluralism, Deference and the Margin of Appreciation Doctrine” (2011) 17 E.J.L. 80; T.I. Harbo, “Introducing Procedural Proportionality Review in European Law”, 30 L.J.I.L. (2017), 25; A. Meuwese and P. Popelier, “Legal Implications of Better Regulation: A Special Issue” (2011) 17 E.P.L 455; D. Harvey, “Towards Process-Oriented Proportionality Review in the European Union” (2017) 23 E.P.L. 93. A. Alemanno, “The Emergence of the Evidence-Based Judicial Reflex: A Response to Bar-Siman-Tov’s Semiprocedural Review” (2013) 1 T. & P.L. 327; I. Bar-Siman-Tov “Semiprocedural Judicial Review”, (2012) 6 Leg. 271; X. Groussot and S. Bogjević, “Subsidiarity as a procedural safeguard of federalism” in L. Azoulai (ed.) *The question of competence in the European Union* (Oxford: OUP, 2014), p. 245; F. De Witte. “Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law” (2013) 50 C.M.L. Rev. 1545. [↑](#footnote-ref-2)
2. Oberg “The Procedural Paradigm” above, 278. [↑](#footnote-ref-3)
3. Gerards “The Margin of Appreciation Doctrine” above, 115 [↑](#footnote-ref-4)
4. Harbo “Introducing Procedural Proportionality Review” above, 35. [↑](#footnote-ref-5)
5. Meuwese and Popelier “Better Regulation” above, 464. [↑](#footnote-ref-6)
6. Harbo “Introducing Procedural Proportionality Review” above, 36. [↑](#footnote-ref-7)
7. De Witte “Sex, Drugs and EU Law” above, 1571 [↑](#footnote-ref-8)
8. Lenaerts “Process-Oriented Review” above, 9. [↑](#footnote-ref-9)
9. For “process-oriented review”, see Lenaerts above. For “procedural proportionality”, see Harbo “Introducing Procedural Proportionality Review” above. For “semiprocedural review”, see Bar-Siman-Tov “Semiprocedural Judicial Review” above. [↑](#footnote-ref-10)
10. In this sense, this article is focused on the review of the adoption “legislative” or “general” decisions as opposed to the implementation and enforcement of those decisions. There are a number of cases in the EU context focused on the implementation of measures in the Internal Market. See, for example, See also *Aklagaren v Mickelson* (C-142/05 ) EU:C:2009:336. *Greenham and Abel* (Case C-95/01*)* EU:C:2004:71. See also, *Commission v France* (C-24/00) EU:C:2004:70, *Commission v Spain (*C-88/07) EU:C:2009:123; *Nationale Road* (C-219/07) EU:C:2008:353. For comment, see Spaventa, “Leaving Keck behind? The free movement of goods after the rulings in Commission v Italy and Mickelson and Roos” (2009) 35 E.L. Rev. 914. [↑](#footnote-ref-11)
11. See section *infra*, “Process Review Advocacy in the European Union”, for specific developments in each context. [↑](#footnote-ref-12)
12. J. H. Ely, *Democracy and Distrust* (Harvard University Press, 1980). See also, J. H. Ely, “Toward a Representation-reinforcing Mode of Judicial Review” (1978) 37 Maryland Law Review 451. [↑](#footnote-ref-13)
13. See *infra,* note 42. [↑](#footnote-ref-14)
14. See for example, R. Dworkin, Freedom’s Law: The Moral Reading of the American Constitution (Harvard University Press, 1996); Allan, “In Defence of the Common Law Constitution” (2009) 22 C.J.L.J. 187. [↑](#footnote-ref-15)
15. See, J. Waldron, “The Core of the Case Against Judicial Review” (2006) 115 Yale Law Journal 1346. J. Waldron *Law and Disagreement* (OUP, 1999), R. Bellamy, *Political Constitutionalism* (CUP, 2007); J.A.G. Griffith, “The Political Constitution” (1979) 42 M.L.R. 1. [↑](#footnote-ref-16)
16. Specifically, Ely placed his theory as a choice between “interpretivism” and “non-interpretivism”. Interpretivists held the view that only norms stated or clearly implicit in the US constitution should be enforced, and non-interpretivists held the view that a broader set of norms, beyond those explicit in the constitution, should be enforced. Ely viewed interpretivism as leaving insufficient room for judges to intervene, and non-interpretivism as offering too much room for judges to disapply decisions of the legislature. The two sides can thus be seen as broadly comparable to the pro- and anti-judicial review arguments that continue to this day. Ely sought a middle ground view in contrast to his contemporaries who argued that a choice must be made either way. See Ely “Representation-reinforcing” above, 451, citing L. Tribe *American Constitutional Law* (Foundation Press, 1978). [↑](#footnote-ref-17)
17. United States v Carolene Products Co. 304 U.S. 144 (1938). [↑](#footnote-ref-18)
18. Ely “Representation-reinforcing” above, 486. [↑](#footnote-ref-19)
19. Ely *Democracy and Distrust* above, pp. 73-74. This comment comes in relation to the focus of the Warren Court. [↑](#footnote-ref-20)
20. Ely *Democracy and Distrust*  above, p. 104. [↑](#footnote-ref-21)
21. Ely “Representation-reinforcing” above, 485. [↑](#footnote-ref-22)
22. See: R. Posner, “Democracy and Distrust Revisited” (1991) 77 Virginia Law Review 641; L. Tribe, “The Puzzling Persistence of Process-Based Constitutional Theories” (1980) 89 The Yale Law Journal 1063; M. Tushnet, “Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional” (1980) 89 The Yale Law Journal 1037; J. Koffler, “Constitutional Catarrh: Democracy and Distrust, by John Hart Ely” 1 Pace L. Rev. (1981), 403; Brest. “The Substance of Process”, (1980) 42 Ohio State Law Journal 131. A. Chandler, “Globalization and Distrust”, (2005) 115 Yale Law Journal 1193. N. Komesar, “A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society” (1988) 86 Michigan Law Review 657. [↑](#footnote-ref-23)
23. Ely “Representation-reinforcing” above, 486. [↑](#footnote-ref-24)
24. Komesar “A Job for the Judges”, above, 666: The process-substance splits “imagines that judicial review can take place without judicial value judgments”. [↑](#footnote-ref-25)
25. See section *infra*: “The *Outcomes* of Process Review in the European Union” [↑](#footnote-ref-26)
26. Ely “Representation-reinforcing” above, 470. [↑](#footnote-ref-27)
27. Ely “Representation-reinforcing” above, 475: This covers a wide range of provisions, with Ely recognising that for some “process and value seem to have been intertwined”. See the Obligations of Contracts Clause, U.S. CONST. art. I, § 10, cl. 1. [↑](#footnote-ref-28)
28. See Tribe “Puzzling Persistence” above, 1065. [↑](#footnote-ref-29)
29. See Tribe “Puzzling Persistence” above, 1067: “What is puzzling is that anyone can say, in the face of this reality, that the Constitution is or should be predominantly concerned with *process* and *not* substance.” [↑](#footnote-ref-30)
30. See Tribe “Puzzling Persistence” above, 1074. [↑](#footnote-ref-31)
31. See Tribe “Puzzling Persistence” above, 1075. [↑](#footnote-ref-32)
32. Posner “Democracy and Distrust Revisited” above, 649. [↑](#footnote-ref-33)
33. Posner “Democracy and Distrust Revisited” above. [↑](#footnote-ref-34)
34. Ely *Democracy and Distrust* above, p. 104. [↑](#footnote-ref-35)
35. Komesar “A Job for the Judges” above, p.666. See also, R. Schütze, “Judicial majoritarianism revisited: "we, the other court"?”, 43 E.L. Rev. (2018), 269, 275: “the process-substance distinction for judicial review is nonetheless an unworkable one”. [↑](#footnote-ref-36)
36. Ely *Democracy and Distrust* above, p. 58. [↑](#footnote-ref-37)
37. S.A. Barber and J.E. Fleming, *Constitutional Interpretation: The Basic Questions* (OUP, 2007), p. 132. [↑](#footnote-ref-38)
38. Tribe “Puzzling Persistence” above, 1064. Emphasis added. [↑](#footnote-ref-39)
39. Chandler “Globalization and Distrust” above, 1228. [↑](#footnote-ref-40)
40. Tribe “Puzzling Persistence” above, 1063. [↑](#footnote-ref-41)
41. Tribe “Puzzling Persistence” above, 1080. [↑](#footnote-ref-42)
42. The influence of Ely is clear from the repeated citation of his work in the EU process review literature. Lenaerts “Process-Oriented Review” above, 2, opens his article with a discussion of Ely’s theory of “structuralism” and argues that, in a similar way, “the ECJ has also striven to develop guiding principles which aim to improve the way in which the political institutions of the EU adopt their decisions”. See Gerards, “The Margin of Appreciation Doctrine” above, 119: “It certainly seems possible to adapt this theory to the situation of the European courts so as to provide them with some guidance as to the determination of their level of review. In particular, Ely’s two main indications should be supplemented with an indication concerning fundamental individual rights such as human dignity or personal autonomy and core constitutional objectives”. Harvey discusses Ely’s “locus classicus” *Democracy and Distrust* and asks, “whether such a procedural approach to judicial review (particularly in those proportionality cases where fundamental rights are not a predominant issue) is well-suited to the EU system of policymaking”, “Towards Process-Oriented Proportionality Review” above, 114-5. See citation in Alemanno “Judicial Reflex” above, 328; Bar-Siman-Tov citation, “semiprocedural judicial review” above, 288. Oberg “The procedural paradigm”, cites Ely and the Carolene products footnote at 279 for the point “the Court of Justice is responsible for policing the system of political and institutional safeguards that the EU political process ordinarily rely on to resolve most problems”. See also Groussot and Bogjević “Procedural Safeguard” above, 251. [↑](#footnote-ref-43)
43. See note 1 above for the long list of articles that refer to these two contexts. There are, of course, examples of procedural review taking place outside of these two contexts. For example, Union measures in the area of merger control (Case T-5/02 *Tetra Laval* EU:T:2002:264) and risk regulation (Case T-13/99 *Pfizer* EU:T:2002:209). See also the decision in Case C-62/14 *Gauweiler* EU:C:2015:400 which used a focus on process as part of its review of a decision of the European Central Bank. Further, the Court has also conducted a review of Member State process based on certain Directives. See the Environmental Impact Assessment Directive(Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment Text with EEA relevance (OJ 2014 L 124/1), *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10 ) EU:C:2012:560. See also, Data Protection Directive (95/46/EC (OJ 1995 L281/31), *Commission v Hungary* (Case C-288/12) EU:C:2014:237 [↑](#footnote-ref-44)
44. Ely “Representation-reinforcing” above, 487. [↑](#footnote-ref-45)
45. See, for example, A. Follesdal and S. Hix, “Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik”, (2006) 44 J.Com.Mar.St. 533. [↑](#footnote-ref-46)
46. Note: This phenomenon relates to the principle of conferral as well as principles of proportionality and subsidiarity. However, this paper limits its analysis to the latter two principles as these are the two for which process review has been proposed. [↑](#footnote-ref-47)
47. Oberg “The procedural paradigm” above, 254. This “poor enforcement” is part of a failure to protect “the distribution of competences between the Member States and the Union”, 251. [↑](#footnote-ref-48)
48. C. Ritzer et al., “How to sharpen a dull sword – the principle of subsidiarity and its control”, (2006) 7 G.L.J. 733. See also D. Wyatt, “Could a “yellow card” for national parliaments strengthen judicial and political policing of subsidiarity?”, (2006) 2 Croatian Yearbook of European Law and Policy 1, 11 arguing that British American Tobacco “seems designed to minimize any possibility of substantive review and create an irrebuttable presumption that the objectives of internal market measures can be better achieved at Community level rather than national level.” [↑](#footnote-ref-49)
49. Groussot and Bogjević “Procedural Safeguard for Federalism” above, p. 245. See also, Weatherill “Drafting Guide” above, 850; [↑](#footnote-ref-50)
50. A. Meuwese and P. Popelier “Legal Implications of Better Regulation: A Special Issue” (2011) 17 European Public Law 455, 459. [↑](#footnote-ref-51)
51. U. Karpen, “On the State of Legislation Studies in Europe”, (2005) 7 European Journal of Law Reform 59, 61. [↑](#footnote-ref-52)
52. See, Mandelkern Report “Better Regulation” February 2001 published 13 November 2001: “White Paper on European Governance (Com(2001) 428 Final); Council and European Parliament in the “Inter-Institutional Agreement on Better Lawmaking”. (2003) (OJ EU 2003, C 321). [↑](#footnote-ref-53)
53. Lenaerts “Process-Oriented Review” above, 9. [↑](#footnote-ref-54)
54. On this point, Weatherill “Drafting Guide” above, argued that the new early warning mechanism could lead to “more intensive ex post control by the Court”, 853. On this point, see G.A. Bermann, ‘The Lisbon Treaty: The Irish “No”. National Parliaments and Subsidiarity: An Outsider’s View’ (2008) 4 *European Constitutional Law Review* 453, Groussot and Bogjević “Procedural Safeguard” above, 241. See generally, S. Weatherill, “Competence creep and competence control”, (2004) 23 Y.E.L., 1; I. Cooper, “The watchdogs of subsidiarity: National parliaments and the logic of arguing in the EU”, (2006) 44 J.Com.Mar.St. 283. 1. P. Kiiver, *The National Parliaments in the European Union* (Kluwer Law International, 2006). [↑](#footnote-ref-55)
55. Groussot and Bogjević “Procedural Safeguard” above, 244. [↑](#footnote-ref-56)
56. Lenaerts “Process-Oriented Review” above, 15 [↑](#footnote-ref-57)
57. Oberg “The procedural paradigm” above, 280 [↑](#footnote-ref-58)
58. Meuwese and Popelier “Better Regulation” above, 458. [↑](#footnote-ref-59)
59. Oberg “The procedural paradigm” above, 279. [↑](#footnote-ref-60)
60. Lenaerts “Process-Oriented Review” above, 15. See also Oberg “The procedural paradigm” above, 252: The Court would “go beyond its legitimacy and competence” in conducting substantive review because it involves “assessing open-ended political, economic and social issues [↑](#footnote-ref-61)
61. Oberg “The procedural paradigm” above, 264. [↑](#footnote-ref-62)
62. P. Popelier, “Preliminary Comments on the Role of Courts as Regulatory Watchdogs”, (2012) 6 Leg. 257, 260 Note: Popelier’s golden mean relates to the context of the European Court of Human Rights but makes the same point regarding the role of process review as acting between light-touch and intensive substantive review. [↑](#footnote-ref-63)
63. Lenaerts “Process-Oriented Review” above, 16. [↑](#footnote-ref-64)
64. Alemanno, “Judicial Reflex” above, 338. [↑](#footnote-ref-65)
65. Oberg “The Procedural Paradigm” above, 277. [↑](#footnote-ref-66)
66. This breadth can be seen, for example, in the Court of Justice’s interpretation of Art. 34 TFEU in *Cassis De Dijon (*120/78) EU:C:1979:42 and *Procureur du Roi v Benoît and Gustave Dassonville (*8/74) EU:C:1974:82. It is also evident in the expansion of Art. 56 TFEU to include not only freedom to *provide* but also freedom to *receive* services. See See *Luisi and Carbone* v *Ministero del Tesoro (*282/82 and 26/83) EU:C:1984:35. As Weatherill comments: “The location of the most vigorous activity in the shaping of the law of the *internal market* is the Court. Over an extended period, it has actively developed the law of the *internal market* in such a way that it is impossible to get a true sense of the impact of EU law on national regulatory autonomy without a secure grasp of the case law.” S. Weatherill *The Internal market as a Legal Concept* (Oxford University Press, 2017), p. 31. [↑](#footnote-ref-67)
67. As Barnard comments, each measure remaining in place means another barrier to free movement, but “every failed justification is another nail in the coffin of its legislative autonomy” in C. Barnard “Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected?” in C. Barnard and O. Odudu (eds.) *The Outer Limits of European Union Law,* 2009, p.273. [↑](#footnote-ref-68)
68. For example, in the free movement of goods, Art. 36 TFEU outlines the circumstances through which a Member State can justify a measure. Measures can also be justified through any “compelling interest” as long as the measure is indistinctly applicable to imported and domestic goods; See, *Cassis De Dijon (*120/78) EU:C:1979:42 at [8]. [↑](#footnote-ref-69)
69. *Commission v Denmark (*C-192/01) EU:C:2003:492. Emphasis added. [↑](#footnote-ref-70)
70. *Campus Oil* (72/83) EU:C:1984:256. It should be made clear at this point that the Court does not always apply an intensive standard in the review of Member State measures. The case law on justification of free movement prohibitions is varied and features many instances where the Court explicitly defers to the choices of Member States. See, for example, *Omega* (C-36/02) EU:C:2004:614, *Sayn Wittgenstein* (C-208/09) EU:C:2010:806. Besselink, “Case C-208/09, Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien” (2012) 49 C.M.L. Rev. 671. See also Zglinski, “The rise of deference: The margin of appreciation and decentralized judicial review in EU free movement law” (2018) 55 C.M.L. Rev. 1341. [↑](#footnote-ref-71)
71. *Commission v Italy (*C‑110/05) EU:C:2009:66 at [66]. However, this paragraph also stresses that “such a burden cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions”. A measure will be deemed disproportionate if it fails to amass evidence in support of it. See *Lindman* (C-42/02) EU:C:2003:613 at [25]. See also, *Commission v Austria* (C-147/03) EU:C:2005:427 at [63]. *Scotch Whisky Association and Others (*C-333/14) EU:C:2015:845. See further,Nic Shuibhne and Maci ‘Proving Public Interest: The Grown Impact of Evidence in Free Movement Case Law” (2013) 50 C.M.L. Rev. 965. [↑](#footnote-ref-72)
72. White, “In Search of the Limits to Art. 30 of the EEC Treaty‟ (1989) 26 C.M.L. Rev. 235; Maduro, ”Reforming the Market of the State? Article 30 and the European Constitution: Economic Freedom and Political Rights”, (1997) 3 E.L.J. 55; T. Horsley, “Anyone for Keck?‟ Case Comment” (2009) 46 C.M.L. Rev. 2008. [↑](#footnote-ref-73)
73. Reynolds, “Explaining the constitutional drivers behind a perceived judicial preference for free movement over fundamental rights” (2016) 53 C.M.L. Rev. 643. [↑](#footnote-ref-74)
74. Guastaferro, “Coupling National Identity with Subsidiarity Concerns in National Parliaments' Reasoned Opinions” (2014) 21 Maastricht J. Eur. & Comp. L. 320 [↑](#footnote-ref-75)
75. Zglinski, “The rise of deference: The margin of appreciation and decentralized judicial review in EU free movement law” (2018) 55 C.M.L. Rev.1341. [↑](#footnote-ref-76)
76. De Witte “Sex, Drugs and EU Law” above, 1573. [↑](#footnote-ref-77)
77. De Witte “Sex, Drugs and EU Law” above, 1576. [↑](#footnote-ref-78)
78. Gerards ““The Margin of Appreciation Doctrine” above, 118. [↑](#footnote-ref-79)
79. Harbo “Introducing Procedural Proportionality Review” above, 36. This should involve: “an examination of the debate which has taken place” including “reading the minutes from the debate or the more extensive travail preparatoire to the measure.” Although he is in fact one of the few process review advocates not to cite Ely, Harbo’s theory of court review based on around representation suggest he is at least implicitly, or indirectly, inspired by Ely’s theory. [↑](#footnote-ref-80)
80. De Witte “Sex, Drugs and EU Law” above, 1567. [↑](#footnote-ref-81)
81. Harbo “Introducing Procedural Proportionality Review” above, 32. [↑](#footnote-ref-82)
82. Gerards “The Margin of Appreciation Doctrine” above*,* 115. [↑](#footnote-ref-83)
83. Broadly, there are three overlapping categories evident in the literature: moral and ethical, cultural and historical, and redistributive. Many argue that moral and ethical decisions ought to be shown deference. For example, De Witte “Sex, Drugs and EU Law”, above, suggests “morally and ethically contentious goods”(1566). Another set of cases which are deemed to warrant deference are those “concerned with deeply embedded values of historical/cultural and societal nature”(Harbo “Introducing Procedural Proportionality Review” above, 37 and De Witte “Sex, Drugs and EU Law” above, 1568, where he supports deference for “redistributive or cultural” matters.) There is also suggestion that redistributive matters should be offered more deference. So, for example, Harbo argues that measures such as those under review in *Laval un Partneri, (*Case C-341/05) EU:C:2007:809 and *Commission v UK* (Case C-308/14) EU:C:2016:436, ought to be shown deference because they relate to “important elements of respective member states’ welfare regimes”. Newdick argues that the Court in individual cases may damage the communal ethic expressed through the national decision in favour of protection of the individual. Newdick, “Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity” (2018) 43 C.M.L.Rev. 1645. See also De Witte “Sex, Drugs and EU Law” above, 1570 on the “communitarian blindspot” in this area. [↑](#footnote-ref-84)
84. De Witte “Sex, Drugs and EU Law” above, 1547. [↑](#footnote-ref-85)
85. De Witte “Sex, Drugs and EU Law” above, 1569. See also, his argument that this creates a normative bias in favour of transnationally mobile individuals, damaging the communal ethic of the national society. [↑](#footnote-ref-86)
86. Harbo “Introducing Procedural Proportionality Review” above, 47. [↑](#footnote-ref-87)
87. Newdick “Corroding Social Solidarity” above, 652 [↑](#footnote-ref-88)
88. Gerards “The Margin of Appreciation Doctrine” above, 118. [↑](#footnote-ref-89)
89. See, M. Shapiro, “The European Court of Justice”, in P. Craig and G. de Burca (eds.), *The Evolution of EU Law* (Oxford: Oxford University Press, 1999) 323: “the more general the text, the more discretion to the interpreter” [↑](#footnote-ref-90)
90. Realist methodology has been described as a “revolt” against classical legal thought, which saw judicial decisions as “the outcome of reasoning from a finite set of determinate principles”, see (Note) “’Round and ’Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship”, (1982) 95 H.L.R. 1669, 1670 [↑](#footnote-ref-91)
91. A. Stone Sweet and J. Matthews, “Proportionality Balancing and Global Constitutionalism”, (2008) 47 Colum. J. Transnat'l L. 72, 85. [↑](#footnote-ref-92)
92. Stone Sweet, *The Judicial Construction of Europe* (Oxford: OUP, 2004), 10: “In balancing situations, judges are most clearly exposed as policymakers”. According to Stone Sweet and Matthews, “Proportionality Balancing” above, 87. Proportionality balancing cannot be disassociated from lawmaking, but the courts are faced no other choice with the powers that have been delegated to them. [↑](#footnote-ref-93)
93. Stone Sweet and Matthews “Proportionality Balancing” above, 80. [↑](#footnote-ref-94)
94. Stone Sweet and Matthews “Proportionality Balancing” above, 88. [↑](#footnote-ref-95)
95. For a practical example, see N. Nic Shuibhne and M. Maci ‘Proving Public Interest: The Growing Impact of Evidence in Free Movement Case Law” (2013) 50 C.M.L. Rev. 965, explored later in this section. [↑](#footnote-ref-96)
96. See section *infra*: “Court of Justice for Review of Union Legislation for Compliance with Proportionality and Subsidiarity”. [↑](#footnote-ref-97)
97. There is one exception to this general rule in the case of *Spain v Council* (C-310/04) EU:C:2006:521, a case in which the lack of an IAR supported the Court’s finding that the Union measure was disproportionate. However, there are some key aspects of the case which set it apart from general harmonisation cases. At challenge in the case was a specific figure of 35% aid set aside for cotton farmers. It is easier for the Court to challenge a specific figure that the legislature has calculated, as opposed to a more general policy. It is also notable that the issue of “competence creep” tends to focus on Art. 114 TFEU and Art. 352 TFEU, with less concern for CAP measures. In any case, the scrutiny of process evident in *Spain v Council* is absent from the cases that have since followed. [↑](#footnote-ref-98)
98. *Afton Chemical (*C-343/09) EU:C:2010:419 at [57]. [↑](#footnote-ref-99)
99. *Pillbox 38* (C-477/14) EU:C:2016:732 at [65]. [↑](#footnote-ref-100)
100. *Estonia v Parliament and Council* (C-508/13) EU:C:2015:403 at [20]. [↑](#footnote-ref-101)
101. *Estonia v Parliament and Council* at [32-40], For comment, see Harvey, “Towards Process-Oriented Proportionality Review” above, 93. [↑](#footnote-ref-102)
102. *Pillbox 38* EU:C:2016:732 at [88]. Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products. [↑](#footnote-ref-103)
103. *Pillbox 38* EU:C:2016:732 at [96]. [↑](#footnote-ref-104)
104. *Philip Morris Brands and Others* (C-547/14) EU:C:2016:325 at [189-190]. See further, *Slovakia v Council (*C-643/15) EU:C:2017:631 at [240], [267]; *Pillbox 38* EU:C:2016:732 at [129]. *Poland v Parliament and Council* (C-358/14) EU:C:2016:323, at [101]. [↑](#footnote-ref-105)
105. Oberg “The procedural paradigm” above, 250. See also, W. Vandenbruwaene “Multi-tiered political questions: The ECJ's Mandate in Enforcing Subsidiarity”, (2012) 6 Leg. 321, 342, describing *Vodafone (*C-58/08) EU:C:2010:321, as adopting the findings of the legislature “without scrutinizing their merit”. [↑](#footnote-ref-106)
106. R. Van Gestel and M. Menting “Ex Ante Evaluation and Alternatives to Legislation: Going Dutch?” (2011) 32 Stat.L.R. 209, 218. [↑](#footnote-ref-107)
107. Harvey “Towards Process-Oriented Proportionality Review” above, 120. [↑](#footnote-ref-108)
108. Nic Shuibhne and Maci “Evidence” above, 988. [↑](#footnote-ref-109)
109. It should be pointed out that there is some gambling case law which incorporates procedural elements. For example, *Gambelli and Others* (Case C-243/01) EU:C:2003:597 considered the context of Italy’s gambling regulation, including the fact that it was expanding betting and gaming at the national level. However, the general reference to gambling cases as procedural because they are deferential is a conflation that ought to be avoided. [↑](#footnote-ref-110)
110. *Her Majesty’s Customs and Excise v Schindler* (C-275/92) EU:C:1994:119 at [60]. [↑](#footnote-ref-111)
111. S. Van den Bogaert and A. Cuyvers, “Money for nothing: The case law of the EU Court of Justice on the regulation of gambling”, (2011) 48 C.M.L. Rev. 1175, 1208: Thus “the key argument that the same effect could be reached with less restrictive measures is made irrelevant”. [↑](#footnote-ref-112)
112. Van den Bogaert and Cuyvers “Money for Nothing above, 1208. This contrasts with the general standard of review, where an intense application of the less restrictive measure test can result in the Court dictating policy to Member States, see De Witte “Sex, Drugs and EU Law” above, 1568. [↑](#footnote-ref-113)
113. *Omega* (C-36/02) EU:C:2004:614. See De Witte “Sex, Drugs and EU Law” above, 1571 [↑](#footnote-ref-114)
114. It should be noted that the Court is far from consistent in having regard to procedural elements. In fact, in *Scotch Whisky*, the Court explicitly excludes the idea that review should only be conducted on the basis of information available during the decision-making process. In assessing evidence, it is not only that available to the Member State at the time the measure was passed that could be considered by the Court, but also all information available at the date of the ruling. See, *Scotch Whiskey* (C-333/14) EU:C:2015:845 at [65]. [↑](#footnote-ref-115)
115. *Bressol* (C-73/08*)* EU:C:2010:181. [↑](#footnote-ref-116)
116. Ibid at [71]. [↑](#footnote-ref-117)
117. Van den Bogaert and Cuyvers above, 1206. *Bressol* EU:C:2010:181 at [72-81], stated that this analysis should include: the maximum number of students that can be trained on relevant courses, the number of graduates who must establish themselves in the French Community to ensure adequate public health services, the impact of non-resident students on the pursuit of ensuring availability of professionals within the French Community, the possibility that residents may choose not to work in Belgium after their studies and, finally, the possibility that persons who have not studied in the French Community may establish themselves as professionals there. This list only concerns the need to prove that there is a risk to public health in the first place. There is also a need to prove that the legislation in question is appropriate for protecting the objective of public health and whether it could be achieved by less restrictive measures. [↑](#footnote-ref-118)
118. Opinion of Advocate General Sharpston in *Bressol*, EU:C:2009:396 at [103]. [↑](#footnote-ref-119)
119. *Commission v Austria* (C-320/03) EU:C:2005:684. [↑](#footnote-ref-120)
120. *Commission v Austria* [87-89]. Emphasis added [↑](#footnote-ref-121)
121. *Commission v Austria* [87-89]. [↑](#footnote-ref-122)
122. *Commission v Austria* (C-28/09) EU:C:2011:854 at [148]. [↑](#footnote-ref-123)
123. *Finalarte and Others* (C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98) EU:C:2001:564 at [40]. Such information is not conclusive, but it may constitute an “indication of the aim of that law”. [↑](#footnote-ref-124)
124. *Commission* v *Poland (Genetically modified organisms)* (C-165/08) EU:C:2009:473 at [52]. [↑](#footnote-ref-125)
125. *Commission v United Kingdom (Newcastle Disease*) (40/82) EU:C:1984:33. [↑](#footnote-ref-126)
126. *Newcastle Disease* at [38]. By way of comparison, the Court looked at an earlier ban adopted by Great Britain that was “thoroughly prepared by an elaborate report of a committee of experts, by various studies and by prolonged discussion among veterinary experts”. [↑](#footnote-ref-127)
127. C. Hilson, “Going Local? EU Law, Localism and Climate Change” (2008) 33 E.L. Rev. 194. [↑](#footnote-ref-128)
128. M. Shapiro, “The Giving Reasons Requirement”, The University of Chicago Legal Forum (1992), 179, 188. See also at 210: The difference between "did not give good enough reasons" and "did not adopt a good enough policy is non-existent in many instances”. [↑](#footnote-ref-129)
129. *Commission v Italy (*C‑110/05) EU:C:2009:66. Nic Shuibhne and Maci “Evidence” above, 995 [↑](#footnote-ref-130)
130. Nic Shuibhne and Maci “Evidence” above, 996 [↑](#footnote-ref-131)
131. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP, 2000); [↑](#footnote-ref-132)
132. Stone Sweet *Governing with Judges* above, p.202. See, A. Woodhouse “With Great Power, Comes No Responsibility? The “Political Exception” to Duties of Sincere Cooperation for National Parliaments” (2017) 54 C.M.L.Rev. 443. [↑](#footnote-ref-133)
133. Stone Sweet *Governing with Judges* above. [↑](#footnote-ref-134)
134. Stone Sweet *Governing with Judges* above. [↑](#footnote-ref-135)
135. Stone Sweet and Mathews “Proportionality Balancing” above, 163. [↑](#footnote-ref-136)
136. Alemanno “Judicial Reflex” above, 333. Lenaerts “Process-Oriented Review” above, ex-post JR “may contribute to a more rational law-making”, 9. Harvey “Towards Process-Oriented Proportionality Review” above, 117: “courts can indeed contribute to enhancing the rationality of law-making”. [↑](#footnote-ref-137)
137. Oberg “The procedural paradigm” above, 261. [↑](#footnote-ref-138)
138. U. Karpen, “On the State of Legislation Studies in Europe”, (2006) 8 E.J.L.R. 59, evidently writing prior to the 2008 financial crisis, describes the “consensus that the end of the age of planning euphoria has arrived, that budget consolidation and personnel reduction are the order of the day, that many tasks of the state must be privatized”. [↑](#footnote-ref-139)
139. Meuwese and Popelier “Better Regulation” above, 461. [↑](#footnote-ref-140)
140. Karpen “Legislation Studies” above, 61. [↑](#footnote-ref-141)
141. Ely *Democracy and Distrust* above, pp. 73-74. [↑](#footnote-ref-142)
142. Tushnet “Darkness on the Edge of Town” above, 1060. [↑](#footnote-ref-143)
143. Tushnet “Darkness on the Edge of Town” above, 1060. [↑](#footnote-ref-144)
144. G. Davies, ”Democracy and Legitimacy in the Shadow of Purposive Competence”, (2015) 21 E.L.J. 2 [↑](#footnote-ref-145)
145. Davies “Democracy and Legitimacy” above, 3. [↑](#footnote-ref-146)
146. Davies “Democracy and Legitimacy” above, 3. See also De Witte “Sex, Drugs and EU Law”, above. [↑](#footnote-ref-147)
147. M. Loughlin *The Idea of Public Law* (Oxford: OUP, 2003), p. 52. [↑](#footnote-ref-148)
148. Chandler “Globalization and Distrust” above, 1228: Ely’s particular commitment is to “to an egalitarian democracy”. [↑](#footnote-ref-149)
149. M. Wilkinson, “Political Constitutionalism and the European Union”, (2013) 76 M.L.R. 191, 217. [↑](#footnote-ref-150)
150. Wilkinson “Political Constitutionalism” above, 212 [↑](#footnote-ref-151)
151. Wilkinson “Political Constitutionalism” above, 207: “The constitution of a polity depends on a negotiation of the productive(or destructive) tensions between politics and law, power and authority, materialism and idealism, fact and norm” [↑](#footnote-ref-152)
152. See Bartl, “Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political” (2015) 21 E.L.J. 569. [↑](#footnote-ref-153)
153. See Section *infra*, “The Expectations of Advocates of Process Review for Member State Measures”. [↑](#footnote-ref-154)
154. See, A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed., Yale University Press, 1986). [↑](#footnote-ref-155)
155. R. Schütze, “Judicial majoritarianism revisited: "we, the other court"?”, (2018) 43 E.L. Rev. 269 [↑](#footnote-ref-156)
156. Schütze “The Other Court” above, 279. [↑](#footnote-ref-157)
157. Komesar “A Job for the Judges” above, 697. [↑](#footnote-ref-158)
158. Posner “Democracy and Distrust Revisited” above , 650. [↑](#footnote-ref-159)
159. Komesar “A Job for the Judges” above, 679, argues that “Governmental failure to deliberate seems an unworkable sufficient condition for judicial review. Very little governmental action is the product of removed, neutral, public-interest deliberation. Failure of these conditions would suggest that virtually all such actions would be candidates for serious judicial scrutiny” [↑](#footnote-ref-160)
160. D. Ritleng, “Does the European Court of Justice Take Democracy Seriously? Some Thoughts about the *Macro-Financial Assistance* case”, (2016) 53 C.M.L. Rev. 11. [↑](#footnote-ref-161)
161. See for example, *Greece* v *Council* (C-204/86) EU:C:1988:450; *Parliament* v *Council (*C-65/93) EU:C:1995:91; *Roquette Freres* ***(***138/79**)** EU:C:1980:249. [↑](#footnote-ref-162)
162. Ritleng “Democracy” above, 32. [↑](#footnote-ref-163)
163. I. Bar-Siman-Tov, ‘The Puzzling Resistance to Judicial Review of the Legislative Process’ (2011) 91 *Boston University Law Review* 1915, 1918. [↑](#footnote-ref-164)
164. R (on the application of HS2 Action Alliance Limited) v The Secretary of State for Transport and another [2014] UKSC3. [↑](#footnote-ref-165)
165. Council Directive 97/11/EC (now amended). See *Boxus* (C‑128/09, C‑129/09, C‑130/09, C‑131/09, C‑134/09 and C‑135/09) EU:C:2011:667 at [48]. See also *WWF and Others* (C-435/97) EU:C:1999:418, *Linster,* (C-287/98) EU:C:2000:468, *Solvay and Others* (C-182/10) EU:C:2012:82, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others* (C-43/10 ) EU:C:2012:560. [↑](#footnote-ref-166)
166. R (on the application of HS2 Action Alliance Limited) v The Secretary of State for Transport and another [2014] UKSC3, at [110]. It should be noted that this decision may in fact be illegal under the UK on the basis of its incompatibility with “fundamental and enshrined” principles the Bill of Rights at [206]. [↑](#footnote-ref-167)
167. Stone Sweet (2000) above, p.202. [↑](#footnote-ref-168)
168. R. Posner How Judges Think (Harvard University Press, 2008). See also, R. Van Gestel and H.W. Micklitz, “Why Methods Matter in European Legal Scholarship” (2014) 20 E.L.J. 292. [↑](#footnote-ref-169)
169. Loughlin “The Idea of Public Law” above, 3, citing C. Taylor “The Diversity of Goods” in *Philosophical Papers, vol. 2: Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985) 230, 241, and his story about “a passer-by coming to the assistance of a drunk who is stumbling around late at night looking for his key under a street lamp. After searching unsuccessfully for some time, the passer-by asks the drunk if he can remember precisely where he dropped it. ‘Over there’, answers the drunk, pointing to a dark corner. ‘Then why are we searching for it here?’ ‘Because’, the drunk replies, ‘there’s much more light here’”. [↑](#footnote-ref-170)