Towards an Institution-Independent Concept of Constitutional Review

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What is constitutional review? Although the question itself does not connote any institutional contexts, traditional literature has typically defined it as "the power/practice of courts to evaluate and determine the conformity of political acts with the constitution." As a result, the concept and practice of constitutional review has been largely equated to one led by courts. Unfortunately, such synonymization overshadows the empirical reality of non-judicial bodies serving central reviewing roles in major democracies such as the Netherlands, Finland, and Japan. By viewing constitutional review as a functional concept, from the institutional design perspective, this Article questions that scholarly tendency and proposes a working definition of constitutional review as an institution-independent concept. This approach in turn encompasses institutional diversity inherently embedded into the practice of constitutional review. Anchored by such a vision, the Article attempts to demonstrate key implications and values for conceptualizing constitutional review independently from institutions and actors. Referring to concrete examples from different countries, it categorizes and juxtaposes existing constitutional review models led by various institutions on the same spectrum (treating

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court-led review models as only one such category). Using a few countries as an example, the Article also preliminarily discusses how and where to institutionalize the practice of constitutional review so as to design an optimal review mechanism for countries. In conclusion, the Article calls for a new research direction to establish the general literature on constitutional review that reflects the institution-independent concept.

INTRODUCTION

Viewing constitutional review as the bedrock of modern constitutionalism, most constitutional law scholars have come to a virtual consensus that it has increasingly emerged as a de facto global norm.[1] While only thirty-eight percent of all constitutions existing in the world effectively established court-led constitutional review mechanisms in 1951, the number drastically increased to as much as eighty-three percent by 2011.[2] Per Ginsburg, "158 out of 191 constitutional systems include[d] some formal provision for constitutional review" anchored by courts.[3] In light of this statistical reality, it is no surprise that relevant literature has essentially synonymized constitutional review with judicial review, both as a concept and as a practice. For instance, in an empirical study examining the adoption of constitutional review at the global level, Ginsburg and Versteeg explicitly exclude from their statistical analysis any review systems governed by

1. *See generally* Tom Ginsburg, *The Global Spread of Constitutional Review*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 81 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira eds., 2008); Tom Ginsburg & Zachary Elkins, *Ancillary Powers of Constitutional Courts*, 87 TEX. L. REV. 1431, 1431–34 (2009); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMPAR. L. 707, 707–18 (2001) [hereinafter Gardbaum, *Commonwealth*]; Stephen Gardbaum, *Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn from Sale?)*, 62 AM. J. COMPAR. L. 613 (2014) [hereinafter Gardbaum, *Legislative Supremacy*]; Miguel Schor, *Mapping Comparative Judicial Review*, 7 WASH. U. GLOBAL STUD. L. REV. 257, 261–70 (2008); Doreen Lustig & J.H.H. Weiler, *Judicial Review in the Contemporary World – Retrospective and Prospective*, 16 INT'L J. CONST. L. 315, 321–25 (2018).

2. Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 J.L. ECON. & ORG. 587, 587 (2014). They exclude from the statistics (1) constitutions not explicitly providing for judicial review (e.g., the United States and Australia), (2) constitutions vesting the review power outside the judiciary (e.g., China and Equatorial Guinea), and (3) states allowing courts to engage in judicial review only under restricted conditions (e.g., the United Kingdom and the Netherlands). *Id.* at 600–02. Thus, the number of states adopting some form of constitutional review (albeit not necessarily meeting the definition proposed by this Article) is likely higher than what is indicated here.

3. Ginsburg, *supra* note 1, at 81. Mere constitutionalization of constitutional review by courts does not automatically translate into the embodiment of court-led models in reality, as evident in the example of Japan discussed in this Article. But the prevalence of judicial supremacy (i.e., court-led models) has been linked to the increasing adoption of U.S. and Kelsenian review models. *E.g.*, STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE 2–7 (2013) (noting "a massive switch from legislative to judicial supremacy in many parts of the world between 1945 and the late 1970s"). Thus, this Article posits that constitutionalization of constitutional review by court generally signals the acceptance of the vision towards court-led models.

non-court bodies.[4] In another study, Ginsburg defines constitutional review as "the power of courts to strike down incompatible legislation and administrative action" and consequently focuses his analysis on constitutional review models led by courts.[5] In articulating five key variables of constitutional review, Craig uses the term "constitutional review," yet focuses specifically on the review conducted by courts.[6] And in a normative study making the case for constitutional review in representative democracy, Kyritsis regards constitutional review as a key element to fulfill the court's checks-and-balances function *vis-à-vis* political branches.[7]

However, while the prevalence of court-led constitutional review is an undeniable reality, this particular design does not fully articulate the concept and the practice of constitutional review. Institutions outside courts can and have played a *leading* (and in some cases, exclusive) role in conducting constitutional review in some societies, effectively rendering secondary the courts' reviewing role. In fact, the Netherlands explicitly proscribes judicial review of parliamentary statutes under Article 120 of its Constitution and vests the power of ex ante constitutional review primarily in the *Raad van State* (Council of State).[8] Finland, largely adhering to the tradition of legislative supremacy, has vested the de facto supreme power of constitutional review in the legislature's Constitutional Law Committee.[9] Japan, while constitutionalizing a court-led review model, has embraced the historical dominance of the Cabinet Legislation Bureau (CLB), an executive body that is regarded as a "quasi-constitutional court" holding de facto supreme power of constitutional review in the face of a passive judiciary.[10] Estonia, through its Constitution, has established the independent institution of the Chancellor of Justice and granted it the power of conducting both ex ante and ex post constitutional review, in close

4. Ginsburg & Versteeg, *supra* note 2, at 601–02.

5. Ginsburg, *supra* note 1, at 81.

6. Paul Craig, *Constitutional and Non-Constitutional Review*, 54 CURRENT LEGAL PROBS. 147 (2001).

7. Dimitrios Kyritsis, *Constitutional Review in Representative Democracy*, 32 OXFORD J. LEGAL STUD. 297 (2012).

8. GW. [CONSTITUTION] Aug. 24, 1815, art. 120 (Neth.); *see also* Jurgen C.A. de Poorter, *Constitutional Review in the Netherlands: A Joint Responsibility*, 9 UTRECHT L. REV. 89 (2013).

9. *See* Juha Lavapuro, Tuomas Ojanen & Martin Scheinin, *Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review*, 9 INT'L J. CONST. L. 505, 510–12 (2011).

10. Shinichi Nishikawa, *Naikaku Hosei Kyoku Toha Ikanaru Kancho-ka* [What Is the Cabinet Legislation Bureau?], 12 KAOSU TO ROGOSU 6, 23 (1998).

coordination with the Constitutional Review Chamber of the Supreme Court.[11]

Importantly, these countries are typically considered major democracies[12] that provide effective protection for fundamental rights[13] and adhere to the rule of law.[14] Thus, the status of these countries calls into question the presumption that the concept and practice of constitutional review necessarily belongs to the courts. Drawing from country examples and approaching constitutional review from a functionalist perspective, this Article argues for a concept of constitutional review that is independent from specific institutions or actors.[15] An institution-independent concept of constitutional review is in turn capable of accounting for institutional diversity inherently embedded into the practice of constitutional review.

Embracing such a vision, this Article defines constitutional review as *authoritative practices premised on second-order reasoning, conducted by actors independent from ones engaged in first-order decisions, to evaluate and determine the conformity of political acts with the constitution*.[16] Here, the Article makes a conscious distinction

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11. PÕHISEADUS [PS] [CONSTITUTION] Mar. 7, 1992, Ch. XII (Est.); *see also* Nancy Maveety & Vello Pettai, *Government Lawyers and Non-Judicial Constitutional Review in Estonia*, 57 EUR.-ASIA STUD. 93 (2005).

12. As an indication, the Democracy Index 2020 ranks Finland 6th, the Netherlands 9th, Japan as 21st, and Estonia as 27th in the world out of 167 countries included in the analysis (with the first three considered as "full democracy"). *See* ECON. INTEL. UNIT, DEMOCRACY INDEX 2020: IN SICKNESS AND IN HEALTH?, 8–13 (2021), https://www.eiu.com/n/campaigns/democracy-index-2020/ [https://perma.cc/R9M2-PQJ7].

13. For instance, Freedom House ranks Finland as 1st, the Netherlands 5th, Japan 13th, and Estonia 18th in its index measuring people's access to political rights and civil liberties in 210 countries and territories. *Countries and Territories*, FREEDOM HOUSE https://freedomhouse.org/countries/freedom-world/scores?sort=desc&order=Total%20Score%20and%20Status [https://perma.cc/QFJ6-N6HV] (last visited Apr. 24, 2023). World Justice Project Rule of Law Index ranks Finland 3rd, the Netherlands 7th, Estonia 10th, and Japan 19th out of 128 countries for protection of fundamental rights. *WJP Rule of Law Index*, WORLD JUST. PROJECT, https://worldjusticeproject.org/rule-of-law-index/global/2020/Fundamental%20Rights/ [perma.cc/DN7X-Y82G] (last visited Apr. 24, 2023).

14. World Justice Project Rule of Law Index ranks Finland 3rd, the Netherlands 5th, Estonia 10th, and Japan 15th out of 128 countries for the overall rule of law score, https://worldjusticeproject.org/rule-of-law-index/global/2020/ [https://perma.cc/K3YH-HRTS] (last visited June 28, 2021).

15. To be clear, the Article recognizes the institution-*dependent* nature of constitutional review *as a practice*: After all, it is a practice/power that must be exercised by certain institutions and actors.

16. The phrase "political acts" is used here to mean actions and decisions of executive and legislative branches in a broad sense.

between constitutional *review* and an *interpretation* of the constitutionality of political actions and decisions. Constitutional review is inherently anchored by three key criteria: (1) the *power* to validate and push back on first-order decisions (i.e., the authority to determine the fate of actions and decisions of executive and legislative branches on constitutional grounds);[17] (2) the use of *second-order reasoning* (i.e., a second "sober" look at first-order decisions to ascertain their constitutional legitimacy or authenticity rather than their political desirability); and (3) the *independent* review of first-order decisions (i.e., reviewing political actions and decisions in a way that is insulated from executive and legislative branches' interests and agendas). Acts that fall short of these core components constitute not constitutional review but rather an interpretation of the constitutionality of political decisions and actions, which obviously is a more ubiquitous practice within and beyond state institutions. After all, private citizens, academic experts, lawyers, the media, government officials, and legislators regularly discuss and interpret the constitutionality of political acts "all the time."[18] But it bears emphasis that such an interpretation rarely manifests itself as constitutional *review*.[19] The underlying aim for

17. The "push-back" power can entail different forms such as requiring the reconsideration/revision, declaring the (in)validity, and/or striking down first-order decisions. The power referred to here must be sufficient to prompt (but not necessarily to de jure require) subsequent decisions in most cases on the part of drafters (e.g., to drop, amend, or appeal if applicable).

18. Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 847 (2002); *see also infra* notes 49–50 and accompanying text.

19. In this regard, the U.S. Office of Legal Counsel perhaps represents a "borderline" institution that is engaged in both constitutional *interpretation* and *review*; the Office has allegedly sought to balance its ambivalent roles (1) as an attorney to serve the best interests of its "clients" and (2) as an authoritative advisor that strives for dispassionate constitutional analysis independently from the clients' immediate interests and agendas, which could manifest in constitutional *interpretation* and *review*, respectively. *See* Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 682–83, 720–22, 726–28, 734–39 (2005); Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 459, 486, 500–05 (1993). *See generally* Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303 (2000). In any case, it bears emphasis that the OLC's influence through its supposed constitutional *review* is largely contained within the executive branch, given the presidential system employed in the United States. In fact, Tushnet identifies "great skepticism about the seriousness with which the OLC's constitutional comments are taken by members of Congress." Mark Tushnet, *Non-Judicial Review*, 40 HARV. J. ON LEGIS. 453, 471 n.102 (2003) (citing Lund, *supra* note 19, at 466–67). The proposed definition captures relevant institutions' engagement with constitutional matters in more of a continuum ranging from a broader framework of constitutional *interpretation* to a more narrowly defined

conceptualizing constitutional review in this fashion is to revisit and reframe a question often taken for granted in relevant studies: What is constitutional review?

Accordingly, the Article argues that (1) constitutional review *as a concept* in itself does not and should not connote any institutional contexts, (2) the *concept* of constitutional review inherently encompasses institutional multiplicity in the *practice* of constitutional review (i.e., the concept paves the way for exploring constitutional review mechanisms beyond courts), and (3) the institution-independent concept significantly impacts the way that the existing literature has articulated both the concept and the practice of constitutional review. Specifically, the institution-independent concept, together with the proposed definition, sheds new light on how and where to institutionalize the practice of constitutional review (with court-led models as merely one such option).

Before concluding the introduction, two clarifications are warranted. First, this Article recognizes that the general idea of conceptualizing constitutional review as independent from institutions is not entirely novel, having been insinuated by a handful of scholars.[20] Second, the Article acknowledges that separate literature on constitutional *interpretation* by non-court bodies exists.[21] However, crucial differences between constitutional review and constitutional interpretation should be emphasized. The former necessitates three core criteria of the proposed definition: the power to push back on first-order decisions, the use of second-order reasoning, and the independent review of first-order decisions, none of which is a prerequisite under the latter. In other words, the literature in this area does not necessarily engage with constitutional review as defined in this Article.[22] Furthermore, as

framework of constitutional *review*. Accordingly, it does not rule out the possibility that institutions' engagement with constitutional matters embodies both constitutional interpretation and review.

20. *See generally* Robert Justin Lipkin, *The New Majoritarianism*, 69 CIN. L. REV. 107 (2000); CHRISTOPHER F. ZURN, DELIBERATIVE DEMOCRACY AND THE INSTITUTIONS OF JUDICIAL REVIEW (2007).

21. *See generally* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Bruce G. Peabody, *Nonjudicial Constitutional Interpretation, Authoritative Settlement, and a New Agenda for Research*, 16 CONST. COMMENT. 63 (1999); Whittington, *supra* note 18; Tushnet, *supra* note 19; Michael J. Gerhardt, *The Constitution Outside the Courts*, 51 DRAKE L. REV. 775, 776 (2003).

22. In fact, all but TUSHNET, *supra* note 21, consistently use the term "constitutional interpretation," but not once the term "constitutional review." Tushnet uses "constitutional review" extensively in *Non-Judicial Review*. *See generally* Tushnet, *supra* note 19. But further research is warranted to examine whether the mechanisms that he refers to, such as the

the literature on constitutional interpretation by non-court bodies is largely grounded in the U.S. context,[23] typically considered a court-led review model,[24] it mainly represents counter-responses to the traditionally court-centric scholarship by stressing either complementary[25] or co-equal[26] roles of constitutional interpretation outside courts.

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constitutional points of order in the U.S. Senate and the Office of Legal Counsel in the U.S. Department of Justice sufficiently meet the definition of constitutional review proposed in this Article. For the Article's view on the Office of Legal Counsel, see *supra* note 19.

23. All sources cited in *supra* notes 19 and 21, and *infra* notes 26, 52, 54, 173, and 223 are primarily situated within the U.S. context.

24. The relevant literature usually identifies the United States as embodying a court-led review model. *See, e.g.*, Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 963–64 (2004) (acknowledging despite his argument for a people-centered review model that "by the 1980s . . . acceptance of judicial supremacy seemed to become the norm" in the United States); GARDBAUM, *supra* note 3, at 4 (recognizing the United States as embodying the first court-led review model). Scholars engaged in debates on strong and weak forms of judicial review typically identify the United States as epitomizing a strong form of judicial review in which constitutional review by the court serves as the final word (unless the legislature amends the constitution). *E.g.*, Walter Sinnott-Armstrong, *Weak and Strong Judicial Review*, 22 LAW & PHIL. 381, 381 (2003); MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 21 (2008); Rosalind Dixon, *The Core Case for Weak-Form Judicial Review*, 38 CARDOZO L. REV. 2193, 2194 (2017). Some scholars have situated their analysis beyond the framework of this court-led review mechanism. Tushnet criticizes judicial constitutional review to the extent of advocating its abolition. *See generally* TUSHNET, *supra* note 21; Mark Tushnet, *Abolishing Judicial Review*, 27 CONST. COMMENT. 581 (2011). Some scholars have argued for installing a system of legislative override in the U.S. context. *E.g.*, ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 96–119 (1997); Robert Justin Lipkin, *Which Constitution—Who Decides*, 28 CARDOZO L. REV. 1055 (2006); Kenneth Ward, *Legislative Supremacy*, 4 WASH. U. JURIS. REV. 325 (2012).

25. In this literature, scholars typically emphasize the ubiquity and importance of constitutional *interpretation* outside courts from the empirical perspective. But they also acknowledge the court's important (or leading) *reviewing* role. For instance, Whittington recognizes that "[j]udicial review is an institutional and historical reality, regardless of any academic critiques directed against it." Whittington, *supra* note 18, at 848. Gerhardt notes that "no other institution seems to speak so regularly about constitutional matters as does the Court." Gerhardt, *supra* note 21, at 776. Similarly, despite his criticisms against the court-led model, Tushnet does recognize the "strong tradition of judicial review" in the United States. TUSHNET, *supra* note 21, at 6.

26. The call for the co-equal roles is usually normative, anchored by the framework of departmentalism. *See infra* notes 223–229 and accompanying text for more details. From the empirical perspective, departmentalists also recognize an important role played by the court in constitutional review in the U.S. context. *E.g.*, Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 220 (1994) (noting that "[i]t has become fashionable in modern times . . . to point the finger ominously at the Supreme Court as the true lawgiver"); Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 371 (1994) (arguing that

Thus, their criticisms against a court-led review model notwithstanding, scholars in this literature generally recognize the important (if not leading) role that the court actually plays in conducting constitutional review in the U.S. context.[27] In contrast, this Article's primary interest lies in identifying and examining constitutional review mechanisms from different countries in which various institutions (including but not limited to courts) have played *leading* roles in the review process.

The rest of the Article is organized as follows. First, it refers to the literature on the studies of constitutional review to point out and problematize the court-centered conception; it then proposes and justifies an institution-independent definition of constitutional review. Second, it shows key institutional implications for embracing the institution-independent concept of constitutional review by categorizing constitutional review models. It introduces five models of constitutional review: court-led, legislature-led, executive-led, co-equal, and non-government branch-led. Third, from the institutional design and normative perspectives, it discusses hypothetical reform options that derive from the proposed concept for countries such as the United States. In conclusion, it calls for a new research direction to further develop the general literature of constitutional review.

I. TOWARDS AN INSTITUTION-INDEPENDENT CONCEPT OF CONSTITUTIONAL REVIEW

A. Contemporary Scholarly Tendencies

So, what is constitutional review? Albeit seemingly a straightforward question, relevant literature instead reveals more complexity in addressing it precisely. The problem is that, as demonstrated below, the term "constitutional review" has been utilized in various ways and ascribed different meanings, rendering it an elusive concept. In fact,

"[u]nfortunately, in an age when judicial supremacy is taken for granted, constitutional interpretation too often becomes the exclusive preserve of the judiciary"); Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning*, 67 LAW & CONTEMP. PROBS. 105, 107–08, 128–30 (2004) (mentioning that "the Court seems to be succeeding in its expansion of judicial power," at 107, and also that "the courts should continue to play a special, though not exclusive, interpretive role, particularly with regard to the protection of constitutional rights" at 129).

27. *See supra* notes 23–26 and accompanying text. Also, executive-led and legislature-led review models "have not attracted serious political support." Whittington, *supra* note 18, at 782.

Craig cautions that "the meaning and incidence of constitutional review within legal systems differ markedly."[28]

Some scholars make a conscious decision to situate constitutional review within the framework centered around courts and judges. For instance, Ginsburg and Versteeg conceptualize constitutional review as "*the formal power of a local court or court-like body to set aside or strike legislation for incompatibility with the national constitution*,"[29] thereby consciously excluding any review systems led by non-court bodies from their analysis.[30] They emphasize that "[t]he key factor for us is that the institution be staffed by judges or justices without significant executive or legislative representation."[31] The logic follows that "if the body is primarily staffed with executive or legislative officials, we do not consider it a court,"[32] thereby removing from consideration any constitutional review conducted primarily by non-court bodies or non-judicial officials.

Other scholars use the term for the purpose of comparative studies. In a study examining constitutional courts in East Asia, Ginsburg utilizes the term "constitutional review" to distinguish between two review mechanisms: "Technically, there is a distinction between judicial review, in which ordinary judges play the role of constitutional check, and constitutional review, in which the function is given to specialized judges or political actors."[33] Nonetheless, he continues to state that "[t]his study uses the terms interchangeably."[34] Ferejohn[35] and Stone Sweet[36] make a similar distinction between the two terms when comparing judicial review in the United States and constitutional review in Europe. Paulson consistently uses the term "constitutional review" throughout his article to compare the review mechanisms in the United States and Austria while presuming the court-centric

28. Craig, *supra* note 6, at 175.

29. Ginsburg & Versteeg, *supra* note 2, at 589.

30. *See id.* at 600–02; *see also supra* note 2 and accompanying text.

31. *Id.* at 601.

32. *Id.* at 602.

33. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 15 (2003).

34. *Id.*

35. John E. Ferejohn, *Constitutional Review in the Global Context*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 49, 49 (2002).

36. Alec Stone Sweet, *Why Europe Rejected American Judicial Review: And Why It May Not Matter*, 101 MICH. L. REV. 2744, 2745 (2003).

concept of constitutional review.[37] In contrast, Sadurski uses the term "constitutional review" in a more interchangeable way with the term "judicial review" in his comparative study of the American and European review models.[38]

The term "constitutional review" has also been used to distinguish between different types of judicial review. For instance, in the context of the United Kingdom, Kavanagh refers to constitutional review as the review of legislation for conformity with the European Convention on Human Rights and consciously separates it from judicial review of administrative acts and procedures.[39] Similarly, when clarifying their definition of constitutional review, Ginsburg and Versteeg explain that "[c]onstitutional review is technically a subcategory of judicial review, which also includes review of administrative action for conformity with a statute or the constitution, although the terms are often used interchangeably in the literature."[40] By interchangeably using such terms as judicial review, constitutional review, and constitutional judicial review, Gyorfi emphasizes that his article "focuses exclusively on the judicial review of legislation, and does not make any claims about the judicial review of executive actions."[41] Meanwhile, Rosenkranz stresses that constitutional review entails not only "judicial review of legislative action" but also "judicial review of executive action."[42]

Two conspicuous tendencies emerge from the above literature: (1) the concept of constitutional review is elusive and multidimensional, and (2) the terms "constitutional review" and "judicial review" are generally regarded as synonymous and interchangeable.

The corollary to this synonymization is that scholars, as Ginsburg and Versteeg noted above,[43] have typically defined constitutional

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37. Stanley L. Paulson, *Constitutional Review in the United States and Austria: Notes on the Beginnings*, 16 RATIO JURIS 223, 224 (2003).

38. Wojciech Sadurski, *Constitutional Review in Europe and in the United States: Influences, Paradoxes, and Convergence*, *in* THE AMERICAN EXCEPTIONALISM REVISITED 79 (Marcello Fantoni & Leonardo Morlino eds., 2015).

39. Aileen Kavanagh, *Constitutional Review, the Courts, and Democratic Scepticism*, 62 CURRENT LEGAL PROBS. 102, 106 (2009).

40. Ginsburg & Versteeg, *supra* note 2, at 589 n.1.

41. Tamas Gyorfi, *Between Common Law Constitutionalism and Procedural Democracy*, 33 OXFORD J. LEGAL STUD. 317, 318 n.5 (2013).

42. Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1248 (2010).

43. *See supra* notes 29–32 and accompanying text. In another study, Ginsburg defines constitutional review as "the power of courts to strike down incompatible legislation and administrative action" and uses the two terms interchangeably. Ginsburg, *supra* note 1, at 81.

review from a court-centric perspective.[44] For Vanberg, constitutional review connotes "the power of judicial bodies to set aside ordinary legislative or administrative acts if judges conclude that they conflict with the constitution."[45] Dyevre articulates constitutional review as "the practice of allowing judges to reverse the choices of democratically elected officials."[46] In Robertson's conception, constitutional review is "a process by which one institution, commonly called a constitutional court, has the constitutional authority to decide whether statutes or other decrees created by the rule-making institutions identified by the constitution are valid given the terms of the constitution."[47]

Some differences notwithstanding, the general conception of constitutional review comes to light accordingly. Constitutional review is either a process, a practice, or a power: (1) to evaluate and decide on the constitutionality of political acts; (2) based upon the constitution; (3) which is exercised by courts and judges. Very few would dispute the first two points; this is the essence of constitutional review. But instead of presuming the third point as an indispensable component, this Article argues that constitutional review *as a concept* in itself does not and should not connote any institutional contexts. As evident from the concrete examples of non-court bodies exercising constitutional review in major democracies such as the Netherlands, Finland, Japan, and Estonia, constitutional review *as a practice* inherently entails institutional multiplicity. In short, the concept of constitutional review must be articulated in an institution-independent way, so that it substantively accounts for institutional multiplicity in the practice of constitutional review.

44. Aside from the definitions introduced here, the literature articulating the definition of constitutional review remains rather thin, which perhaps implies how deeply the court-centric concept of constitutional review has been presumed in the relevant literature.

45. GEORG VANBERG, THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY 1 (2005). Vanberg uses the terms "constitutional review" and "judicial review" almost interchangeably in his book but does make a conscious distinction in a few cases such as when referring to "the power of constitutional review in a 'European model' that differs in important respects from the 'American model' of judicial review." *Id.* at 77.

46. Arthur Dyevre, *Technocracy and Distrust: Revisiting the Rationale for Constitutional Review*, 13 INT'L J. CONST. L. 30, 30 (2015).

47. DAVID ROBERTSON, THE JUDGE AS POLITICAL THEORIST: CONTEMPORARY CONSTITUTIONAL REVIEW 5 (2010).

B. Institution-Independent Concept of Constitutional Review

Literature highlighting constitutional *interpretation* outside courts, and thus questioning court-centric scholarship, certainly exists, albeit largely grounded in the U.S. context.[48] From the empirical perspective, American scholars in this literature typically emphasize the ubiquitous nature of non-judicial constitutional interpretation: Whittington, for instance, argues that extrajudicial constitutional interpretation takes place "all the time,"[49] as non-judicial stakeholders such as private citizens, academic experts, lawyers, the media, government officials, and legislators are all regularly engaged in constitutional interpretations in one way or another.[50] Indeed, courts themselves have recognized the importance of constitutional interpretation by non-judicial bodies through judicial doctrines (e.g., the American political question doctrine).[51] Katyal thus stresses that "the current degree of legislative influence over judicial decision-making should not be underestimated."[52] For Tushnet, "non-judicial constitutional review is simply a fact of life, a characteristic of reasonably stable constitutional systems."[53] Strauss importantly notes that "[m]any executive branch interpretations of the Constitution will not be reviewed in court" for one reason or another (e.g., the lack of standing and insufficient incentives to sue), thereby rendering the executive branch's interpretation the de facto final word of the government.[54] Given this context, Pillard points out the recent academic trends among constitutional law scholars to shift away from the judiciary-centered framework for constitutional discourse and increasingly highlight the important role of political branches, to complement or even rival the judiciary in addressing constitutional matters.[55]

The contribution of this literature to the study of constitutional review should be fully acknowledged, as it importantly underscores the roles of non-court bodies in addressing constitutional controversies. It is worth reiterating, however, that (1) this literature is primarily concerned with constitutional *interpretation*, thus not necessarily with

48. *See supra* notes 21–27 and accompanying text.

49. Whittington, *supra* note 18, at 847.

50. *Id.* at 781.

51. *Id.*

52. Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1355 (2001).

53. Tushnet, *supra* note 19, at 490.

54. David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 115 (1993).

55. Pillard, *supra* note 19, at 676.

constitutional *review*,[56] and (2) it is largely situated in the U.S. context[57] which allegedly epitomizes a court-led review model.[58] In contrast, this Article repositions constitutional review by courts in a larger framework, juxtaposing constitutional review models led by various institutions on the same spectrum.

In this regard, a few scholars engage more directly with an institution-independent concept of constitutional review.[59] For instance, while recognizing the values of constitutional review conducted by the court, Lipkin essentially argues that constitutional review on its face is impartial on institutions: "Conceptually, constitutional review entails re-examining majoritarian decisions to determine whether upon reflection they cohere with the legitimacy conditions of that polity. It does not entail the additional institutional arrangement that the judiciary should engage in this process."[60] The logic follows that "[c]onstitutional review insists that someone or some institution engage in the process of reviewing the authenticity of a particular law," which is "independent of the question of judicial review."[61] Crucial to Lipkin's understanding of constitutional review is the concept of second-order reasoning and decision, which is conspicuously overlooked in traditional definitions. Lipkin defines first-order decisions as "the activity of doing,"[62] as in "what legislators do in resolving problems of society,"[63] and second-order decisions as the activity of reviewing, as in "what judges do in attempting to answer the question of the legitimacy or authenticity of the solutions."[64] Accordingly, he emphasizes that constitutional review must embody "an important difference between doing and reviewing."[65] In other words, constitutional review

56. *See supra* note 22 and accompanying text.

57. *See supra* note 23 and accompanying text.

58. *See supra* note 24 and accompanying text.

59. Although not mentioned in this section, Chinese scholars also tend to conceptualize constitutional review as detached from courts. *See, e.g.*, Guobin Zhu, *Constitutional Review in China: An Unaccomplished Project or a Mirage?*, 43 SUFFOLK U. L. REV. 625, 626 (2010) (questioning the conventional claim that China lacks a constitutional review mechanism, Zhu identifies two main institutionally neutral functions of constitutional review as (1) assuring compliance of legislation with the Constitution and (2) resolving disputes among government branches, and argues that the constitutional review mechanism actually exists in China (i.e., the legislature-led model)).

60. Lipkin, *supra* note 20, at 152.

61. *Id.*

62. *Id.* at 150.

63. *Id.*

64. *Id.*

65. *Id.* at 149.

"provides the government and the people with a chance to take a second look at or have a second thought about their conduct—as expressed through laws and other official action—in order to ascertain whether this conduct comports with prevailing constitutional meanings and traditions."[66]

For Zurn, institutions conducting constitutional review must ensure (1) internal coherence of legal norms, (2) authoritative settlement, (3) independence from political branches, (4) sufficient power to meaningfully intervene in political processes, (5) jurisdictionally limited scope so as not to disrupt deliberative democratic processes, and (6) openness to a range of information and reasons prior to reaching decisions.[67] Emphasizing the distinction between the function and the institution of constitutional review, Zurn argues that "we ought to understand and justify the function of *constitutional review* before we can adequately answer the design question of whether that function should be realized through the *institutions* of judicial review."[68] Therefore, Zurn finds it plausible, at least at the conceptual level, that constitutional review "could take place in the legislature, in the executive, in an independent constitutional court, and so on."[69]

C. Definition of Constitutional Review

Despite clearly embracing an institution-independent concept of constitutional review, both Lipkin and Zurn do not articulate an exact definition. Lipkin repeatedly insinuates what he means by "constitutional review," as discussed above.[70] But a broadly defined concept of constitutional review (e.g., "re-examining majoritarian decisions to determine whether upon reflection they cohere with the legitimacy conditions of that polity"[71]) blurs the importance of the second-order reasoning and decisions that he emphasizes, as well as the scope of *constitutional* review. Zurn defines *judicial* constitutional review as the court's "authority to review national ordinary law and the actions of national officials for their consistency with the Constitution."[72] And he appears to rely on this definition for articulating the concept of

66. Robert Justin Lipkin, *What's Wrong with Judicial Supremacy? What's Right About Judicial Review?*, 14 WIDENER L. REV. 1, 46 (2008).

67. ZURN, *supra* note 20, at 265–72.

68. *Id.* at 29.

69. *Id.* at 119.

70. *See supra* notes 60–66 and accompanying text.

71. Lipkin, *supra* note 20, at 152.

72. ZURN, s*upra* note 20, at 27.

constitutional review by detaching it from the court-specific context. Unfortunately, this general definition does not explicitly incorporate the six core elements that Zurn highlights above. In particular, independence from political branches and sufficient power to meaningfully intervene in political processes[73] are critical elements to be captured in a definition.

Given this context, and inspired partially by the literature introduced above, this Article defines constitutional review as *authoritative practices premised on second-order reasoning, conducted by actors independent from ones engaged in first-order decisions, to evaluate and determine the conformity of political acts with the constitution*.[74] This definition articulates three key criteria that constitute the essence of an institution-independent concept of constitutional review: (1) that the review embodies an authoritative act of evaluating and determining the constitutionality of political actions and decisions (i.e., constituting sufficient power to validate and push back on first-order decisions on constitutional grounds),[75] (2) that the review represents second-order reasoning and subsequent decisions (i.e., the review to examine the constitutional legitimacy or authenticity of first-order decisions rather than their political desirability), and (3) that the second-order reasoning and decisions are independent from the first-order reasoning and decisions (i.e., insulating reviewers exercising second-order reasoning from interests and agendas of drafters engaged in first-order decisions). The logic follows that institutions or actors that do not or cannot (1) effectively distinguish themselves from first-order reasoning and decisions and (2) authoritatively and independently validate or invalidate first-order decisions are not engaged in a practice of constitutional review, but rather in an interpretation of the constitutionality of political actions and decisions.

Against this background, a key question is who would sufficiently meet the criteria set forth in the proposed definition. Given their independent nature, one can reasonably suppose that court-led and non-government branch-led review models such as an ombudsperson's office model found in Estonia would in theory meet the criteria

73. *Id.* at 269–70.

74. The distinction between first-order and second-order reasoning in this definition is largely inspired by Lipkin's work referred to above. *See supra* notes 62–66 and accompanying text.

75. To reiterate, the "push-back" power can entail different forms such as requiring the reconsideration/revision of, declaring the (in)validity of, and/or striking down first-order decisions. The power referred to here must be sufficient to prompt *in effect* (but not necessarily to de jure require) subsequent decisions in most cases on the part of drafters (e.g., to drop, amend, or appeal if applicable).

with relative ease, although some controversies certainly remain.[76] The challenge for models centered around political branches lies in securing a sufficient degree of independence and exercising second-order reasoning when reviewing first-order decisions. As elaborated later, certain non-judicial bodies appear to have largely met such criteria.[77] For instance, the Cabinet Legislation Bureau in Japan, a technocratic entity mostly made up of elite bureaucrats seconded from line ministries and agencies, is known for its non-partisan, independent, and meticulous review as well as for its strict adherence to its own precedent.[78] Accordingly, the Bureau's highest priority lies in upholding the principle of constitutionalism, not in tailoring its constitutional review to the needs of each cabinet, at times frustrating cabinet ministers, parliamentarians, and even prime ministers.[79] In Finland, the

76. Some scholars have questioned the degree of the court's insulation from external influences. *See infra* note 106 and accompanying text. For the ombudsperson's office model in Estonia, see *infra* notes 272–301 and accompanying text.

77. For the Cabinet Legislation Bureau in Japan, see *infra* notes 184–215 and accompanying text; for the Constitutional Law Committee in Finland, see *infra* notes 141–163 and accompanying text.

78. *See* Nishikawa, *supra* note 10, at 8 (describing the historically independent nature of the Bureau); SHINICHI NISHIKAWA, RIPPŌ NO CHŪSŪ SHIRAREZARU KANCHŌ: NAIKAKU HŌSEIKYOKU [CORE OF LAW-MAKING, AN UNKNOWN GOVERNMENT OFFICE: CABINET LEGISLATION BUREAU] 27, 77–78, 121–22 (2000) [hereinafter NISHIKAWA, RIPPŌ NO CHŪSŪ] (stating that the Bureau does not modify its constitutional interpretation regardless of who is in power, mentioning that officials charged with the review work are seconded from line ministries and agencies, and describing the Bureau's strict adherence to its own precedent to maintain consistency in its review work); Takeshi Nakano, *Naikaku Hōseikyoku no Inshō to Kōhōgaku no Kadai* [Impressions of Cabinet Legislation Bureau and Duty of Public Law Studies], 61 HOKKAIDO L. REV. 183, 192 (2011) (stating that multiple layers of review by third parties (i.e., the Bureau's officials) ensure a high level of objectivity in draft statutes); MASAHIRO SAKATA, SEIFU NO KENPŌ KAISHAKU [GOVERNMENT'S CONSTITUTIONAL INTERPRETATION] 319 (2013) [hereinafter SAKATA, SEIFU] (noting that the Bureau has been insulated from the interests of line ministries and agencies precisely because of its longtime tradition of secondment); MASAHIRO SAKATA, "HŌ NO BANNIN" NAIKAKU HŌSEIKYOKU NO KYŌJI – KAISHAKU KAIKEN GA YURUSARENAI RIYŪ ["GUARDIAN OF LAW" DIGNITY OF CABINET LEGISLATION BUREAU – REASONS WHY CHANGES IN THE OFFICIAL INTERPRETATION [OF ARTICLE 9] OF THE CONSTITUTION ARE UNACCEPTABLE] 35 (2014) [hereinafter SAKATA, "HŌ NO BANNIN"] (stating that a review session for one draft takes at least half a day with a potential conclusion requiring a complete revision); SHINICHI NISHIKAWA, KOREDE WAKATTA! NAIKAKU HŌSEIKYOKU [NOW I UNDERSTAND! THE CABINET LEGISLATION BUREAU] 92–94 (2013) [hereinafter NISHIKAWA, KOREDE WAKATTA!] (describing that the Bureau's meticulousness goes as far as debating whether to include a comma in a certain provision).

79. *See* SAKATA, "HŌ NO BANNIN," *supra* note 78, at 189 (emphasizing that the concept of constitutionalism would not function unless each cabinet works within the constitutional framework and thus that a government in power at a certain time cannot change the constitutional interpretation in the pursuit of its own agenda); Richard J. Samuels, *Politics, Security*

Constitutional Law Committee ensures (1) political balance by including parliamentarians (many with legal background) from majority and opposition parties, (2) balance in perspectives by hearing opinions from constitutional law scholars, and (3) a focus only on the constitutionality of bills under review, not their substance.[80] A customary norm in the law-making process provides an additional protection for the Committee, as it deems any political pressures exerted on the Committee as "inappropriate."[81] Given such a structural mechanism and also a shift in reasoning from political to legal,[82] the Committee enjoys "a special status and respect for its integrity and its nonpartisan, nonpolitical approach."[83]

D. Justifications for the Proposed Definition of Constitutional Review

The overall justification of this definition derives from a functionalist perspective: As evident from country examples and conceptual perspectives, constitutional review as a function could operate in theory irrespective of reviewing bodies, *so long as* it substantively fulfills the core requirements of the proposed definition. From this perspective, the proposed definition accomplishes a few important points for the purpose of the Article and beyond.

Policy, and Japan's Cabinet Legislation Bureau: Who Elected These Guys, Anyway? (Japan Pol'y Rsch. Inst., Working Paper No. 99, 2004) (on file with author) (describing examples of prime ministers and politicians expressing their frustration with and yet mostly acquiescing to the Bureau); NISHIKAWA, RIPPŌ NO CHŪSŪ, *supra* note 78, at 58–60 (referring to criticisms by politicians and the media to the Bureau for virtually monopolizing constitutional interpretation). The Bureau is not always invincible, as evident in the historic Cabinet Decision in 2014 which effectively and forcibly overturned a long-standing Bureau interpretation of Article 9 that used to prohibit the exercise of collective self-defense. *See generally* Hajime Yamamoto, *Interpretation of the Pacifist Article of the Constitution by the Bureau of Cabinet Legislation: A New Source of Constitutional Law?*, 26 WASH. INT'L L.J. 99 (2017); NISHIKAWA, KOREDE WAKATTA!, *supra* note 78, at 63–74; SAKATA, "HŌ NO BANNIN," *supra* note 78, at 122–74. But the 2014 Cabinet Decision notwithstanding, it appears that the Bureau has continued to conduct constitutional *review* in an impartial manner. *See infra* note 221 and accompanying text.

80. Lavapuro, Ojanen & Scheinin, *supra* note 9, at 511; Jaakko Husa, *Locking in Constitutionality Control in Finland*, 16 EUR. CONST. L. REV. 249, 253–54 (2020).

81. Tuomas Ojanen, *EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament*, 52 SCANDINAVIAN STUD. L. 203, 205 n.7 (2007).

82. Kaarlo Tuori, *Judicial Constitutional Review as a Last Resort*, *in* THE LEGAL PROTECTION OF HUMAN RIGHTS: SCEPTICAL ESSAYS 365, 380 (Tom Campbell, K.D. Ewing & Adam Tomkins eds., 2011).

83. Ojanen, *supra* note 81, at 205 n.7.

First, framing the concept of constitutional review in a broad and encompassing manner opens up intriguing research questions and debates from multiple perspectives. For instance, what is constitutional review for? What are key implications (if any) for states in embracing the institution-independent concept of constitutional review? Who could or should play the leading role and why? The list of questions can go on and on. The underlying aim of the proposed definition is to trigger and engage with these questions in a more institutionally encompassing and impartial way, rather than in institution-specific contexts.

Second, given its broad framework, the proposed definition effectively articulates the multidimensionality of constitutional review. For instance, in terms of institutional arrangements, constitutional review could entail an inter-branch review (as conventionally envisioned), an intra-branch review (as in the cases of Finland and Japan), or a non-government branch review (as in the cases of the Netherlands and Estonia). Also, as the definition remains silent on the scope and timing of review, it encompasses ex ante and ex post reviews in abstract processes and concrete cases. Furthermore, the definition effectively accounts for law and culture perspectives (e.g., gaps between law in books and law in action), as local contexts and environments strongly influence how the concept and practice of constitutional review are manifested on the ground.[84] Japan is a case in point: Its Constitution is silent on the Bureau's review role but explicitly vests such a review power in the judiciary.[85] Yet the Bureau has, in reality, enjoyed an extremely powerful and prestigious status as a "quasi-constitutional court" due to its meticulous ex ante review,[86] whereas the judiciary has been extremely passive in exercising its de jure authority to address constitutional controversies.[87] Incorporating such local contexts, the proposed definition identifies not only the Supreme Court but also the Bureau as institutions of constitutional review. In short, narrowly framed definitions cannot articulate the multidimensionality

84. For law and culture perspectives, see, for example, Sally Engle Merry, *Law, Culture, and Cultural Appropriation*, 10 YALE J.L. & HUMANITIES 575 (1998); Austin Sarat & Thomas R. Kearns, *The Cultural Lives of Law*, *in* LAW IN THE DOMAINS OF CULTURE 1 (Austin Sarat & Thomas R. Kearns eds., 2000); Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMANITIES 35 (2001); Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839 (2011).

85. NIHON-KOKU KENPŌ [CONSTITUTION] Nov. 3, 1946, art. 81 (Japan).

86. Nishikawa, *supra* note 10, at 23.

87. *See generally* David S. Law, *Why Has Judicial Review Failed in Japan?*, 88 WASH. U. L. REV. 1425 (2011); Shigenori Matsui, *Why Is the Japanese Supreme Court So Conservative?*, 88 WASH. U. L. REV. 1375 (2011).

of constitutional review that inherently entails intricacy and fluidity in real-world implementations.

Third, the proposed definition provocatively regards constitutional review models led by various actors as being comparable on the same spectrum. To be clear, it certainly does not negate the legitimacy of court-led review models: After all, their statistical prevalence in the world is undeniable.[88] Rather, an important question that the proposed definition poses in this regard is whether the nature and effect of constitutional review led by various institutions are so inherently different from each other that they cannot or should not be compared on the same general spectrum of "constitutional review." The level of democratic maturity,[89] the effective protection of fundamental rights,[90] and the substantial adherence to the rule of law principle[91] observed in countries such as the Netherlands, Finland, and Japan should sufficiently warrant such juxtaposition. A key implication in the real world is that the proposed definition together with the institution-independent concept provides more design options for countries that (1) are reform-minded, (2) are struggling to stabilize a court-led review model, (3) have little to no tradition of a court-led review mechanism, or (4) have yet to engage with the practice of constitutional review systematically and substantively.

With these justifications of the proposed definition in mind, the subsequent Part unpacks an institutional design implication of the institution-independent concept of constitutional review by categorizing various review models, juxtaposing them on the same spectrum, and discussing what such categorization would mean for countries in practice.

II. INSTITUTIONAL DESIGN IMPLICATIONS FOR EMBRACING AN INSTITUTION-INDEPENDENT CONCEPT OF CONSTITUTIONAL REVIEW

A. Categorization of Constitutional Review Models

Through categorization, this Section raises a few important points for the study of constitutional review. First, it demonstrates that the practice of constitutional review indeed goes beyond courts,

88. Ginsburg & Versteeg, *supra* note 2, at 587.

89. *See* ECON. INTEL. UNIT, *supra* note 12, at 8–13.

90. *See* Freedom House and WORLD JUST. PROJECT, *supra* note 13.

91. *See* WORLD JUST. PROJECT, *supra* note 14.

thereby suggesting the need for the development of a more comprehensive taxonomy of constitutional review in future research. Dividing the categories up by which institution leads is a constructive way to develop such a taxonomy; in practice, countries vary in their implementation of constitutional review by assigning leading responsibility to different types of institutions. Second, it prompts intriguing design questions by illuminating a wider range of options for states in their pursuit of adopting the "right" model. Third, given each model's weaknesses and challenges, it argues that there is no such thing as a perfect constitutional review model. With these points in mind, this section proposes the following five main categories: court-led, legislature-led, co-equal, executive-led, and non-government branch-led models.

Four clarifications should be mentioned at the outset. First, this section focuses primarily on *empirically grounded* salient institutional arrangements. It thus does not intend to cover all existing models nor more theoretical ones, such as the people-centered review model.[92] This is not to suggest that those models should or could not be part of the overall taxonomy. Second, the word "lead" or "led" is the key in this categorization, as this Article is interested in identifying *leading* review models in different societies. It certainly does not deny *complementary* roles of other entities assisting leading authorities in such

92. For the literature on people-centered review models, see, for example, Kramer, *supra* note 24, at 967–1001. *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); Larry Kramer, Response, *The People Themselves: Popular Constitutionalism and Judicial Review*, 81 CHI.-KENT L. REV. 1173 (2006). This Article substantially agrees with scholars pointing out the ambiguous nature of the concept of popular constitutionalism. *See, e.g.*, Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 490, 496–97 (2018). *See generally* Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005) (reviewing KRAMER, *supra* note 92); Alon Harel & Adam Shinar, *Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review*, 10 INT'L J. CONST. L. 950, 954–56 (2012); Dale Carpenter, *Judicial Supremacy and Its Discontents*, 20 CONST. COMMENT. 405, 432 (2003). From the institutional design perspective, popular constitutionalism appears to overlap greatly with legislative supremacy (legislature-led models) and departmentalism (co-equal models), which obscures the merit of considering it as a distinct model. *See generally* Kramer, *supra* note 92. Thus, albeit certainly an intriguing review model with further refinement, this Article finds it difficult to envision how it can be implemented in practice in a way that meets the proposed definition of constitutional review. For a more comprehensive overview of constitutional review models including people-led ones, see generally Kazuo Fukuda, Institution-Independent Design Prospects for Conducting Constitutional Review: Case of Lao People's Democratic Republic (2023) (Ph.D. dissertation, Indiana University) (on file with author).

review models.[93] Importantly, this Section also construes the word "lead" in a more de facto, rather than de jure, sense in the cases of Japan (an executive-led model) and Estonia (an independent watchdog-led model), so as to incorporate reviewing bodies that are not necessarily constitutionally expected to—but in practice do—play a leading review role. This analysis takes into account that law in action is as—if not more—important as law in books. Third, given that literature rarely articulates institutional design options for constitutional review in an institutionally holistic manner, models introduced in this Section essentially derive from the interpretive supremacy literature and country-specific literature.[94] Lastly, as the detailed assessment of each model is beyond the scope of the Article, this Section focuses more on review models centered around non-judicial bodies which remain under-studied.[95]

1. Court-Led Models

Despite some definitional challenges,[96] the basic tenets of court-led models of constitutional review are that the court serves as the final arbiter over constitutional disputes and that its decisions are binding on other branches and different levels of the government, unless such decisions are modified through constitutional amendments or

93. The Office of Legal Counsel may represent one such example when it engages in constitutional *review*. However, such entities play more of a *complementary*, rather than *leading*, role and are thus likely subsumed under one of the models discussed in this Section.

94. The interpretive supremacy literature is not primarily concerned with the question of what the viable institutional design options are for a constitutional review mechanism: It rather tackles the question of whose constitutional interpretation shall prevail. Nonetheless, this Article values rich debates accumulated in the literature to shed light on institutional strengths and weaknesses of each model. For the overview, see Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401 (1986); Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 391–92 (1997). Three review models (court-led, legislature-led, and co-equal) correspond to three competing approaches discussed in the interpretive supremacy literature: judicial supremacy, legislative supremacy, and departmentalism, respectively. For more details, see Murphy, *supra* note 94; Gant, *supra* note 94, at 366–89. Two other models (executive-led and non-government branch-led) largely draw from the experiences of Japan, the Netherlands, and Estonia.

95. For a more comprehensive overview of constitutional review models including people-led ones, see Fukuda, *supra* note 92.

96. *See, e.g.*, Fallon, *supra* note 92, at 497–507; Stephen Gardbaum, *What Is Judicial Supremacy?*, *in* COMPARATIVE CONSTITUTIONAL THEORY: RESEARCH HANDBOOKS IN COMPARATIVE CONSTITUTIONAL LAW SERIES 21–44 (Gary Jacobsohn & Miguel Schor eds., 2018) (for discussions of different definitions of judicial supremacy).

subsequent decisions.[97] As for justifications, courts are said to be apolitical, majoritarian-resistant, and insulated: In other words, "a neutral umpire shielded from the passion of political life."[98] As a "forum of principle,"[99] the court, through its constitutional review power, anchors the core of the checks-and-balances principle and serves as the crucial countervailing power against otherwise more powerful political branches.[100]

Advocates of court-led models also stress the settlement function of law and the importance of one entity holding binding interpretive authority which essentially enables that entity to put an end to constitutional controversies.[101] The court must be that entity, they argue, because it is the only institution that is based upon relative insulation from political influences, adherence to precedents, mandatory, rights-based/counter-majoritarian, and individual (rather than discretionary, majoritarian, and collective) process, and established doctrines and procedures to form opinions.[102] These characteristics render "the courts an ideal forum for ensuring that the Constitution is upheld."[103]

These institutional strengths are often considered a double-edged sword: Court-led models are criticized precisely because of their (1) counter-majoritarian nature, which lacks political accountability and democratic legitimacy, (2) suspect institutional suitability for addressing individual cases that hold larger implications for general

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97. *See, e.g.*, Gant, *supra* note 94, at 367; Erwin Chemerinsky, *In Defense of Judicial Supremacy*, 58 WM. & MARY L. REV. 1459, 1459 (2017); Frank I. Michelman, *On Regulating Practices with Theories Drawn from Them: A Case of Justice as Fairness*, 37 NOMOS: AM. SOC'Y POL. LEGAL PHIL. 309, 325–26 (1995); Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CALIF. L. REV. 1045, 1046–49 (2004). Court-led models certainly do not embody judicial exclusivity in conducting constitutional review. *See* Whittington, *supra* note 18, at 781–82.

98. Gant, *supra* note 94, at 391.

99. RONALD DWORKIN, A MATTER OF PRINCIPLE 33–71 (1985). Notably, Dworkin uses the expression "forum of principle" throughout the entire book.

100. *See* Gant, *supra* note 94, at 391; DIMITRIOS KYRITSIS, WHERE OUR PROTECTION LIES: SEPARATION OF POWERS AND CONSTITUTIONAL REVIEW 126 (2017); Peter C. Ordeshook, *Some Rules of Constitutional Design*, 10 SOC. PHIL. & POL'Y 198, 218–20 (1993).

101. *See generally* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371–81 (1997) [hereinafter Alexander & Schauer, *On Extrajudicial Constitutional Interpretation*]; Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 457, 467–73 (2000) [hereinafter Alexander & Schauer, *Defending Judicial Supremacy*].

102. *See generally* Jonathan R. Siegel, *The Institutional Case for Judicial Review*, 97 IOWA L. REV. 1147 (2012); Alexander & Schauer, *Defending Judicial Supremacy*, *supra* note 101, at 473–82; Chemerinsky, *supra* note 97, at 1462–76.

103. Chemerinsky, *supra* note 97, at 1468.

issues of rights, and (3) risk of the judicial sovereignty in the Hobbesian sense (i.e., the "guarding the guardian" question of how to ensure that complete monopoly of review power by the judiciary effectively takes into account the will of the governed and protects the interests of the governed).[104] Furthermore, critics find court-led models' institutional strengths overstated because they argue that (1) courts have constantly reversed and modified their constitutional interpretations,[105] (2) courts are not as counter-majoritarian and politically insulated as advocates claim them to be,[106] (3) courts do not put an end to constitutional controversies even when they rule on them,[107] and (4) courts base their decisions on the majority rule as a result of negotiations, tactics, and bargains taking place among judges.[108]

As clarified earlier, this Article does not intend to supplant the rich literature on the institutional design of court-led review models.[109] Court-led models are undoubtedly the most studied and the most commonly adopted ones across the globe: After all, the statistic that more than eighty-three percent of all existing constitutions have established

104. *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1378–98 (2006) [hereinafter Waldron, *The Core of the Case*]; Jeremy Waldron, *Judicial Review and Judicial Supremacy* 13–24 (N.Y.U. Sch. L. Pub. L. Working Paper, Paper No. 14–57, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2510550 [https://perma.cc/8APW-C64L].

105. Murphy, *supra* note 94, at 408; Whittington, *supra* note 18, at 803.

106. *See, e.g.*, Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369 (1992) (arguing that the Supreme Court hardly withstood political winds when congressional hostility towards the Court existed, forcing it to either take a deferential stance or issue opinions along congressional preferences); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009) (arguing that court decisions do not depart significantly from the median of public opinion, thereby largely respecting the will of the people); Adam S. Chilton & Mila Versteeg, *Courts' Limited Ability to Protect Constitutional Rights*, 85 U. CHI. L. REV. 293 (2018) (arguing that courts do not provide effective protection for constitutional rights as they tend to avoid conflicts with political branches and thus side with majoritarian preferences); *see also* Kramer, *supra* note 24, at 970–71.

107. Whittington, *supra* note 18, at 799–800; *see also* Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751, 753 (1989).

108. Whittington, *supra* note 18, at 817; RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY 38 (2007).

109. For the overview of these review models, see, for example, Mauro Cappelletti, *Judicial Review in Comparative Perspective*, 58 CALIF. L. REV. 1017, 1034–50 (1970); Ferejohn, *supra* note 35; Stone Sweet, *supra* note 36; ROBERTSON, *supra* note 47; MARK TUSHNET, ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW 48–56 (2014); Cheryl Saunders, *Constitutional Review in Asia: A Comparative Perspective*, *in* CONSTITUTIONAL COURTS IN ASIA: A COMPARATIVE PERSPECTIVE 32 (Albert H. Y. Chen & Andrew Harding eds., 2018).

a judicial constitutional review mechanism speaks for itself.[110] With that mentioned, this Section divides them into three sub-categories: the U.S. model, the Kelsenian model, and hybrid models of the two.[111]

The first model originated in the United States[112] and approaches constitutional review as a continuation of ordinary legal practices,[113] thereby typically diffusing the review power across different layers of judicial courts or concentrating it in a supreme court. As a key characteristic, this model is usually limited to the ex post review of concrete cases.[114] The U.S. model is practiced in some parts of Latin America, Scandinavia, and former British colonies in Africa and Asia.[115] A key design concern with the U.S. model lies in that, given the limited scope of review, it could leave constitutionally suspect legislation intact until it is challenged in concrete cases.[116]

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110. Ginsburg & Versteeg, *supra* note 2, at 587; *see also* Kyritsis, *supra* note 7.

111. Some precaution is warranted in this sub-categorization: A closer analysis of countries adopting court-led models reveals much more complexity involved in reality. Ginsburg, for instance, shows that institutional variations do exist in terms of the degree of access and the scope of review. *See* GINSBURG, *supra* note 33, at 6–8. Similarly, Comella points out that countries such as "Ireland and Greece have systems of constitutional review that cannot be easily classified." Victor Ferreres Comella, *The European Model of Constitutional Review of Legislation: Toward Decentralization?*, 2 INT'L J. CONST. L. 461, 462 (2004). Given this context, da Silva warns against "reducing the myriad of experiences of other countries" to these two sub-categories. Virgílio Afonso da Silva, *Beyond Europe and the United States: The Wide World of Judicial Review*, *in* COMPARATIVE JUDICIAL REVIEW 318, 323 (Erin F. Delaney & Rosalind Dixon eds., 2018). With that in mind, however, as a first step towards a more comprehensive taxonomy, this Article argues that three sub-categories as broadly defined here would accommodate most variations. For the comparative analysis of the U.S. and Kelsenian models, see, for example, Cappelletti, *supra* note 109. *See generally* Gustavo Fernandes de Andrade, *Comparative Constitutional Law: Judicial Review*, 3 U. PA. J. CONST. L. 977 (2001); Ferejohn, *supra* note 35; Sadurski, *supra* note 38; TUSHNET, *supra* note 109.

112. "Constitutional review originated in the American colonial charters and state constitutions, which were used by colonial judges to disapply laws even before the establishment of the federal government." Ginsburg & Versteeg, *supra* note 2, at 590 (citing Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 933 & n.171 (2003)); *see also* SCOTT DOUGLAS GERBER, A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY 1606–1787 (2011).

113. TUSHNET, *supra* note 109, at 49.

114. *See* da Silva, *supra* note 111, at 321; Cappelletti, *supra* note 109, at 1037; Ginsburg & Versteeg, *supra* note 2, at 591.

115. Albert H. Y. Chen, *Constitutional Courts in Asia: Western Origins and Asian Practice*, *in* CONSTITUTIONAL COURTS IN ASIA, *supra* note 109, at 1, 3, 6; Comella, *supra* note 111, at 462.

116. For criticisms of this limited scope of review under the U.S. model, see, for example, Brianne J. Gorod, *The Collateral Consequences of Ex Post Judicial Review*, 88 WASH. L.

The second model can often be traced back to jurist Hans Kelsen's proposal for establishing a constitutional court under the 1920 Austrian Constitution[117] and considers constitutional review as entailing both political and legislative functions, thus separating those functions from ordinary courts and concentrating the review power in a single constitutional court.[118] This model typically ensures more diverse backgrounds in judges (incorporating academic scholars and politicians in addition to career judges)[119] and also enjoys a much wider scope of review (i.e., review of draft and existing statutes in abstract and/or concrete manners). The Kelsenian model has been adopted increasingly around the world in recent years, to the extent that it is now considered "a global phenomenon."[120] In Europe alone, eighteen of the twenty-seven European Union member states follow the Kelsenian model.[121] A key design concern with the Kelsenian model is that it almost inevitably necessitates a major structural overhaul of the preexisting governing mechanism and potentially creates jurisdictional tension between the constitutional court and judicial courts.[122]

The hybrid model represents constitutional review mechanisms that fall in between these two models. It typically manifests in the

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REV. 903, 906, 909–10 (2013) (arguing that ex post constitutional review poses a major issue in the lawmaking process, as lawmakers would not enact multiple laws to cover the same areas under the assumption that existing laws are constitutional and already regulate such areas effectively).

117. For more details on Kelsen's conception of constitutional review, see generally Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 J. POL. 183 (1942).

118. Chen, *supra* note 115, at 3–4.

119. ROBERTSON, *supra* note 47, at 12. Foreign judges are also increasingly involved in national constitutional courts, as in Bosnia-Herzegovina and Kosovo. *See, e.g.*, Rosalind Dixon & Vicki Jackson, *Hybrid Constitutional Courts: Foreign Judges on National Constitutional Courts*, 57 COLUM. J. TRANSNAT'L L. 283, 287–88 (2019).

120. Chen, *supra* note 115, at 6. Ginsburg and Versteeg also note that "whereas the decentralized US model used to be dominant, the specialized constitutional court is slightly more popular today." Ginsburg & Versteeg, *supra* note 2, at 592.

121. Chen, *supra* note 115, at 5.

122. This is not an exclusively theoretical concern. In fact, it is alleged that in the early years, the Federal Constitutional Court of Germany and supreme courts of different jurisdictions "repeatedly clashed over whether the supreme courts could make [judgments] when a lower court referred a constitutional question to the FCC" via its supreme court. Katherine Glenn Bass & Sujit Choudhry, *Constitutional Review in New Democracies* 3 (Ctr. Const. Transitions N.Y.U. School L., Briefing Paper No. 40, 2013), https://constitutionnet.org/sites/default/files/dri-bp-40_en_constitutional_review_in_new_democracies_2013-09.pdf [https://perma.cc/NG9T-H526]. Similarly in Cambodia, courts allegedly "have not referred issues of constitutionality of laws to the [Constitutional Council]." Chen, *supra* note 115, at 16.

form of ordinary courts being entrusted with concrete review and constitutional courts with abstract review, as exemplified in Portugal[123] and Latin American countries such as Colombia[124] and Peru.[125] Beyond that, variations do exist in this sub-category. In Brazil, all ordinary courts conduct the ex post review in concrete cases, whereas the Supreme Court is the only body to review enacted legislation in abstract.[126] In The Gambia, Ghana, Guinea-Bissau, and Sierra Leone, supreme courts function more as constitutional courts in that they hold exclusive original jurisdiction over all constitutional matters in concrete cases.[127] A key design concern is whether a hybrid model (i.e., ones in Portugal and Latin American countries) is conducive to solidifying a constitutional order or a hierarchy of norms in a country, despite dispersing review authority over two different courts in charge of two separate reviews.

2. Legislature-Led Models

Legislature-led models allow the legislature to exercise the ultimate authority over constitutional review.[128] In the contemporary world, the idea of absolute legislative supremacy, in which the court plays little to no role in constitutional review, has allegedly waned even in the prototypical United Kingdom.[129]

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123. Da Silva, *supra* note 111, at 318.

124. Juan Carlos Rodríguez-Raga, *Strategic Deference in the Colombian Constitutional Court, 1992–2006*, *in* COURTS IN LATIN AMERICA 81, 82–83 (Gretchen Helmke & Julio Rios-Figueroa eds., 2011).

125. Domingo García Belaunde, *Judicial Review in Peru: Its Origins, Development and Present Situation*, 45 DUQ. L. REV. 577, 591–93 (2007). Comella also notes similar hybrid models found in other Latin American countries such as Ecuador, Bolivia, and Colombia. *See* VICTOR FERRERES COMELLA, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE 5 (2009).

126. Keith S. Rosenn, *Procedural Protection of Constitutional Rights in Brazil*, 59 AM. J. COMPAR. L. 1009, 1010–13 (2011); da Silva, *supra* note 111, at 318.

127. INT'L IDEA, JUDICIAL REVIEW SYSTEMS IN WEST AFRICA: A COMPARATIVE ANALYSIS 53 (2016), https://www.idea.int/sites/default/files/publications/judicial-review-systems-in-west-africa.pdf [https://perma.cc/W2NX-5K8G]. In The Gambia, the ex ante review can be allegedly activated "as a consultative procedure during the law-making process, in which experts drawn from the judiciary, academia and the professional bar give non-binding opinions on the constitutional implications of bills of law before enactment." *Id.* at 97.

128. Gant, *supra* note 94, at 373–74.

129. *See* Vernon Bogdanor, *Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty*, 32 OXFORD J. LEGAL STUD. 179, 182 (2012) (arguing that "Parliament's sovereignty was in fact limited by the European Communities Act 1972, and that, while

Justifications of legislature-led models are primarily centered around intrinsic values of democracy. The underlying rationale is that "[i]nsofar as the Constitution should remain a living document of, and for, the people, arguably the branch of government thought most responsive to the people ought to serve as the ultimate interpreter of the ultimate guide for governing our polity."[130] Furthermore, relevant literature has pointed out that (1) the electoral motive could actually incentivize legislators to develop policies and laws consistent with justice,[131] (2) the democratically elected legislature embodies a more appropriate forum to discuss and address constitutional rights issues precisely because such issues are always contested,[132] and (3) while "[i]t is extremely rare in legislatures for a rogue vote to carry the day,"[133] "a single and somewhat eccentric view can be crucial within a judicial vote."[134]

Legislature-led models (or models led by political branches in general) are often criticized for their politically expedient nature, which could at times lead to constitutionally suspect policies and legislation: "[I]f not for the federal courts, what is to stop Congress or the President from enacting a law that is unconstitutional but politically expedient? . . . Often there is no one—other than the courts—to deter wrongdoing and compensate those injured by constitutional violations."[135] In other words, precisely because of its democratically elected nature, the legislature can be subject to pressures from the public in a way that prioritizes policies and legislation preferred by powerful interest groups with the potential risk of violating constitutional principles and undermining minority rights.[136] Furthermore, the checks-and-balances principle problematizes "a kind of 'double counting'" in which the legislature would unilaterally charge itself with both law-making and review tasks without facing any effective checks.[137] The issues of time and substantive constraints are also pointed out:

Parliament may still be the dominant institution in the British political system, it is no longer legally omnipotent").

130. Gant, *supra* note 94, at 374.

131. Mark Tushnet, *Against Judicial Review* 10 (Harv. L. Sch. Pub. L. & Legal Theory Working Paper Series Paper No. 09-20, 2009) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1368857 [https://perma.cc/3FME-W6RR].

132. *Id.* at 14–15; Lipkin, *supra* note 66, at 26; BELLAMY, *supra* note 108, at 20–26; Waldron, *The Core of the Case*, *supra* note 104, at 1369–71.

133. BELLAMY, *supra* note 108, at 38.

134. *Id.*

135. Chemerinsky, *supra* note 97, at 1464.

136. *See* DWORKIN, *supra* note 99, at 24–28.

137. Gant, *supra* note 94, at 391.

"The executive and legislative processes provide neither time for interpreters to study and debate underlying constitutional issues nor a setting that encourages dispassionate, coherent, consistent, and systematic analysis."[138]

From an empirical perspective, it appears that legislature-led models have lost their attractiveness as the once-dominant governing mechanism in the world despite their theoretical and normative appeal.[139] Coupled with the global expansion of judicial power, the fall of legislature-led models is substantially attributed to the legislature's inability to provide effective checks on the increasingly powerful executive branch.[140]

However, one notable legislature-led model is found in Finland, where the Constitutional Law Committee is vested the de facto supreme power to conduct ex ante constitutional review of draft statutes.[141] Established in 1906,[142] the Committee is entirely composed of parliamentarians (seventeen members, many with legal backgrounds) from both government and opposition parties, thus ensuring a bipartisan institution.[143] In fact, Mikael Koillinen, a Committee Counsel, notes that members are assigned by the plenary session in a unanimous manner in order to ensure political consensus of the membership.[144] Furthermore, the Committee's review is considered "non-political quasi-judicial" because (1) its opinions are by nature legal, reflecting experts' views, (2) it adheres to its own precedents, and (3) its review is only concerned with the constitutionality of bills under review, not with their substance, thereby minimizing the prospect of party politics

138. Murphy, *supra* note 94, at 407.

139. *See* Gardbaum, *Commonwealth*, *supra* note 1, at 713–15.

140. Gardbaum, *Legislative Supremacy*, *supra* note 1, at 630–38.

141. *See* Lavapuro, Ojanen & Scheinin, *supra* note 9, at 510–12.

142. Husa, *supra* note 80, at 265. Allegedly, the substantive practice of constitutional review by a specialized committee began as early as 1882 under the Legal Affairs Committee which was renamed the Constitutional Law Committee under the 1906 Parliament Act. *Id.*

143. *See* Lavapuro, Ojanen & Scheinin, *supra* note 9, at 511. The Constitution of Finland stipulates that "[t]he Constitutional Law Committee . . . shall have at least seventeen members." SUOMEN PERUSTUSLAKI [CONSTITUTION] Mar. 1, 2000, sec. 35, para. 2 (Fin.). In the current parliamentary term (2019–2023), educational backgrounds of Committee members are so diverse that members with legal backgrounds do not appear to hold the majority status.For more details, see Constitutional Law Committee, PARLIAMENT FIN., https://www.eduskunta.fi/EN/valiokunnat/perustuslakivaliokunta/Pages/default.aspx [https://perma.cc/9F5Q-YD29].

144. E-mail from Mikael Koillinen, Comm. Couns., Const. L. Comm., Parliament of Fin., to Kazuo Fukuda, Ph.D., Maurer School of Law, Indiana Univ. (Aug. 7, 2022, 4:26 PM) (on file with author).

within the Committee.[145] When informally translated, the Committee's opinions still read as if they are indeed judicial opinions based on a dispassionate analysis of the law or action under review. They make frequent references to the Committee's precedents as well as constitutional texts and principles, thereby clearly separating the Committee's review from a mere review of the (un)desirability of first-order decisions.[146] In this regard, Koillinen emphasizes that the "Committee has over 100 years of history as non-political organ, and no MP wants to be the first one to ruin this history."[147]

Importantly, the Committee's review is not part of the standard procedure and is usually proposed by the executive branch (the principal law drafter in Finland) when it submits bills to the Parliament.[148] If not proposed by the executive branch, the Parliament's plenary session (based upon a proposal by the Speaker's Council) or parliamentary committees can request the Committee's review, which ensures that constitutionally suspect legislation is subject to constitutional

145. Husa, *supra* note 80, at 254.

146. As an indication of the quasi-judicial nature of the Committee's opinions, see *Utlåtande GrUU 37/2022 rd* [Statement GrUU 37/2022 rd], PARLIAMENT FIN., https://www.eduskunta.fi/SV/vaski/Lausunto/Sidor/GrUU_37+2022.aspx [https://perma.cc/4D4S-43JP] (in which the Committee finds constitutional violations in the proposed amendment for the Border Guard Act). It makes numerous references to constitutional texts and principles as well as the Committee's own precedents. It even attaches a dissenting opinion in the end of the opinion. *Id.*

147. Koillinen, *supra* note 144.

148. Tuori, *supra* note 82, at 380. Regarding the Finnish system, the Organisation for Economic Co-operation and Development (OECD) notes that "[t]he parliament has an independent right to submit legislative proposals, but in practice, most enacted legislation is based on government proposals." *The Development of New Regulations,* OECD, https://www.oecd.org/gov/regulatory-policy/45054846.htm [https://perma.cc/NPK5-FW23]. Similarly, Mikael Koillinen, a counsel for the Constitutional Law Committee, stated that "[while] roughly [200–300] government proposals are handled a year, usually *no more than one motion* made by representative[s] is accepted and adopted as an Act *during [the] entire election term.*" E-mail from Mikael Koillinen, Comm. Couns., Const. L. Comm., Parliament of Fin., to Kazuo Fukuda, Ph.D., Maurer School of Law, Indiana Univ. (Sept. 4, 2022, 3:15 PM) (emphasis added) (on file with author). The Ministry of Justice and the Parliament of Finland also confirm that the executive branch is the principal law drafter in Finland. *See Legislative Drafting Process Guide*, FINLEX, http://lainvalmistelu.finlex.fi/en/ [https://perma.cc/E4Q9-R8XH] (the law-drafting process guide prepared by the Ministry of Justice); *Law Drafting*, PARLIAMENT FIN., https://www.eduskunta.fi/EN/naineduskuntatoimii/kirjasto/aineistot/yhteiskunta/Kansalaisvaikuttamisen_tietopaketti/Pages/Lainvalmistelu.aspx [https://perma.cc/EVP3-NU3T] (the information on law-drafting provided by the Parliament).

review prior to its adoption.[149] Despite the procedurally passive nature, it is noted that (1) "it is not uncommon that the committee finds a government bill to be unconstitutional in one or more respects"[150]; (2) "[i]f the unconstitutionality is significant . . . the Bill is withdrawn and the government has to think of another way to proceed"[151]; and (3) "[t]he views of the Committee enjoy strong authority, and they are generally treated as binding on Parliament and other authorities."[152] Allegedly, the Committee's opinions carry an authoritative weight to the extent that "[t]he Committee's statements have gradually gained increasing weight as sources of law and precedents, and they are now seen as comparable to interpretations issued by the highest courts."[153] Koillinen also stresses that "[n]o speaker [of the Parliament] has ever tried to ignore legally binding opinion of the committee."[154] In short, the Committee is clearly not a mere rubber-stamp institution and does possess the "push-back" authority to provide an effective check against its own branch and the government.

For instance, Government Bill 169/2016 proposed to entitle unemployed immigrants integration assistance instead of unemployment assistance. In its Opinion 55/2016, the Committee found that the creation of a parallel system for immigrants in itself would not violate the constitution, but that the resultant effect of such a proposal (i.e., integration assistance granting unemployed immigrants less than unemployment assistance would for other unemployed people) would violate Section 6 of the Constitution prohibiting discrimination.[155] In 2017, the government submitted legislative proposals that would

149. PAULINA TALLROTH, VEM VAKAR ÖVER VÅRA RÄTTIGHETER? DE FINSKA INSTITUTIONERNA OCH DISKUSSIONEN OM EN FÖRFATTNINGSDOMSTOL [WHO SAFEGUARDS OUR RIGHTS? THE FINNISH INSTITUTIONS AND THE DISCUSSION ABOUT A CONSTITUTIONAL COURT] 29–30 (2012). Furthermore, the Chancellor of Justice in Finland ensures that draft statutes developed by the executive branch conform to the Constitutional Law Committee's previous opinions and decisions. In case any doubt remains, it is alleged that "the Chancellor of Justice often requests the relevant Ministry to note in the proposal that the Constitutional Law Committee's opinion should be sought." *Id.* at 20.

150. Lavapuro, Ojanen & Scheinin, *supra* note 9, at 511.

151. Husa, *supra* note 80, at 254.

152. Ojanen, *supra* note 81, at 205.

153. TALLROTH, *supra* note 149, at 28.

154. Koillinen, *supra* note 144.

155. Laura Kirvesniemi, Milka Sormunen & Tuomas Ojanen, *Developments in Finnish Constitutional Law*, *in* 2016 GLOBAL REVIEW OF CONSTITUTIONAL LAW 62, 64 (Richard Albert et al. eds., 2017); *see also Committee's Opinion GrUU 55/2016 rd*, EDUSKUNTA RIKSDAGEN [PARLIAMENT FIN.] (Sept. 5, 2021, 2:04 PM), https://www.eduskunta.fi/SV/vaski/Lausunto/Sidor/GrUU_55+2016.aspx [https://perma.cc/YG32-3WNV].

reform the healthcare and social services system in Finland in such a way that (1) regional governments (to be newly established under the proposal) would be responsible for healthcare and social services instead of local municipalities under the existing mechanism, (2) individuals would choose their preferred providers for such services, and (3) such freedom of choice would result in corporatization of public services. In Opinion 26/2017, the Constitutional Law Committee concluded that the proposed freedom-of-choice model would, *inter alia*, not guarantee equal treatment of people in accordance with the Constitution.[156] Given this Opinion as well as the one in 2018, the Government of Finland revised its legislative proposals in multiple rounds and finally had the proposals adopted by Parliament in 2021.[157]

Ex ante constitutional review in Finland is not an endeavor exclusively undertaken by the Committee. As an additional assurance mechanism to cement the Committee's non-political nature, the Committee selects and invites constitutional and public law experts on a case-by-case basis. According to Koillinen, "there are 10-20 constitutional and public law professors in Finland," of whom about three to six are invited to each case.[158] Appointed as civil servants, three committee counsels (including Koillinen) "try to form the best group of experts available in every case and propose them to the committee which makes the formal decision on experts."[159] Despite holding no official status, these experts exert considerable influence in the Committee's review process: In fact, the Committee typically "abides by their view," especially when their opinions are unanimous.[160] If their opinions are split, the Committee is said to exercise its own discretion to decide on a matter with the assistance of committee counsels, who strive to suggest mutually agreeable constitutional solutions.[161] Detached from ordinary politics that legislators engage with, these

156. Milka Sormunen, Laura Kirvesniemi & Tuomas Ojanen, *The State of Liberal Democracy*, *in* 2017 GLOBAL REVIEW OF CONSTITUTIONAL LAW 88, 90–91 (Richard Albert et al. eds., 2018); *see also Committee's Opinion GrUU 26/2017 rd*, EDUSKUNTA RIKSDAGEN [PARLIAMENT FIN.] (Sept. 5, 2021, 7:12 PM), https://www.eduskunta.fi/SV/vaski/Lausunto/Sidor/GrUU_26+2017.aspx [https://perma.cc/629S-24VG].

157. *See Government Proposal for Health and Social Services Reform and Related Legislation Adopted by Parliament*, FIN. MINISTRY INTERIOR (June 24, 2012, 1:26 PM), https://intermin.fi/en/-/1271139/government-proposal-for-health-and-social-services-reform-and-related-legislation-adopted-by-parliament [https://perma.cc/GV73-CJSK].

158. Koillinen, *supra* note 144.

159. *Id.*

160. Tuori, *supra* note 82, at 380. For more details on experts, see, for example, TALLROTH, *supra* note 149, at 27–40; *see also* Koillinen, *supra* note 144.

161. Voitto Saario, *Control of the Constitutionality of Laws in Finland*, 12 AM. J. COMPAR. L. 194, 198 (1963); *see also* Koillinen, *supra* note 144.

experts seek to ensure the consistent use of second-order reasoning within the Committee.

It appears that the introduction of ex post constitutional review by the court (through the 2000 constitutional amendment) has not substantively threatened the legislature-led review model in Finland, as Section 106 of the Constitution circumscribes review by the court only in cases of "manifest conflict" between parliamentary statutes and the Constitution.[162] In fact, Finnish scholars note that the courts have invoked Section 106 only in a handful of cases and have thus continued to "play[] a minor role in terms of safeguarding the constitutionality of parliamentary Acts."[163] In any case, the introduction of constitutional review by courts certainly broadened the scope of review beyond the traditional ex ante review of draft statutes and established additional safeguards in Finland.

Maintaining independence and resisting political (or generally external) pressures may be a perpetual design concern for the legislature-led model given where it is located. In Finland, the Constitutional Law Committee appears to have insulated itself substantially from such pressures. However, Husa notes (without concrete examples) that "the Committee is becoming a gradually more politicised arena" and that "the role of outside experts that is based on constitutional custom is conceived as more problematic, with experts accused of offering politically flavoured views on constitutional law."[164] Reviewers in this model may have to uphold even higher standards than judges in playing their non-political and independent review role precisely because they work within an overall framework that is highly political. Any hint of them pursuing first-order reasoning could undermine their integrity, reputation, and authority within and beyond political branches. Tallroth notes that "[i]f a statement of the Committee for some reason gives one an uncomfortable feeling, it is easy to suspect political motives in the legal work."[165]

Another legislature-led model worth briefly mentioning is the House of Federation in Ethiopia. The model is based upon an upper house of the Parliament *in its entirety*, which, as a representative organ,

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162. Lavapuro, Ojanen & Scheinin, *supra* note 9, at 518.

163. Husa, *supra* note 80, at 253. Koillinen, *supra* note 144, also argues that there have been around twenty such cases in the last two decades:

> Courts do not have powers to [strike] down laws, they have only power to give primacy to the provision in the Constitution in concrete case. In other words, they do not apply the unconstitutional law. Law stays still valid and is possibly applicable in other cases. Usually law is, however, changed afterwards in the normal law-making process.

164. Husa, *supra* note 80, at 273.

165. TALLROTH, *supra* note 149, at 38.

gathers together all ethnic groups in the country and is constitutionally vested the supreme authority over constitutional review "at the exclusion of the judiciary."[166] Similar to the Finnish model, the House's review work is supported by a group of experts called the Council of Constitutional Inquiry (CCI). Composed of eleven members (the chief justice and the deputy of the Federal Supreme Court, three parliamentarians from the House, and six legal experts appointed by the President of Ethiopia upon the lower house's recommendation), the CCI plays an important advisory role assisting the review work of the House by examining constitutional disputes and the constitutionality of statutes (referred by courts, parties to disputes, or the House) and submitting its recommendations to the House.[167] Within thirty days of receiving the CCI's opinions,[168] the House is expected to decide on constitutional matters by a majority vote.[169] However, a major design flaw in Ethiopia's model is that both the House and the CCI are effectively "part-time institutions," as they do not meet often enough (twice a year and four times a year, respectively) to effectively perform their important task of constitutional review.[170] Furthermore, while some certainly recognize the legitimacy of constitutional review by the House and the CCI,[171] many scholars have questioned whether the review by these institutions substantively represents independent second-order reasoning and judgments.[172] Thus, while the idea of a

166. Chi Mgbako et al., *Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and its Impact on Human Rights*, 32 FORDHAM INT'L L.J. 259, 259 (2008); ETHIOPIAN CONSTITUTION Aug. 21, 1995, arts. 62(1), 83. Article 62(2) of the Ethiopian Constitution establishes the Council of Constitutional Inquiry whose structure and function are articulated in articles 82–84. *Id.*

167. Assefa Fiseha, *Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HOF)*, 1 MIZAN L. REV. 1, 14 (2007); K. I. Vibhute, *Non-Judicial Review in Ethiopia: Constitutional Paradigm, Premise and Precinct*, 22 AFR. J. INT'L & COMPAR. L. 120, 125 (2014).

168. ETHIOPIAN CONSTITUTION Aug. 21, 1995, art. 83(2).

169. Yonatan Tesfaye Fessha, *Judicial Review and Democracy: A Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review*, 14 AFR. J. INT'L & COMPAR. L. 53, 74 (2006).

170. Mgbako et al., *supra* note 166, at 292.

171. *See, e.g.*, Fiseha, *supra* note 167, at 1 (noting that "despite institutional and pragmatic challenges, the [House] has over the years evolved as a legitimate body for the settlement of disputes at least as far as issues of high political and constitutional significance are concerned").

172. *See, e.g.*, Fessha, *supra* note 169, at 77–79 (pointing out that members of the House typically hold other positions in different levels of governments); Mgbako et al., *supra* note 166, at 284–89 (arguing that given the influence by the ruling party and the executive branch, the House "is not likely to rule against the government when adjudicating

legislature-led model which is based upon an entire house serving as an adjudicatory body with the support of a council made up of legal and political experts is certainly an intriguing design option, some precaution is warranted as to whether this model sufficiently meets the proposed definition of constitutional review within and beyond the Ethiopian context.

3. Executive-Led Models

To be clear at the outset, research conducted for this Article did not identify any constitutions that explicitly vest the *supreme* constitutional review power in the executive branch today. And unsurprisingly, "the notion of pure executive supremacy has yet to find an exponent among academicians."[173] With this context in mind, this Section refers to the experience of the Cabinet Legislation Bureau (CLB) in Japan as an example of a de facto executive-led review model.[174] As mentioned earlier, the Constitution of Japan explicitly vests the review power in the judiciary. However, the court has been extremely passive in exercising its review power, and the CLB has instead served largely as a quasi-constitutional court in practice.[175]

Executive-led models could be justified because of the practical necessity of constitutional review by the executive branch. For one, "[m]any executive branch interpretations of the Constitution will not be reviewed in court" for one reason or another (e.g., the lack of standing and insufficient incentives to sue), thereby leaving the executive branch's interpretation as the de facto final word of the

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constitutional disputes."); Tsegaye Beru & Kirk W. Junker, *Constitutional Review and Customary Dispute Resolution by the People in the Ethiopian Legal System*, 43 N.C. J. INT'L L. 1, 40–44 (2018) (noting that "the [House] and CCI are political instruments of the ruling party.").

173. Gant, *supra* note 94, at 380. To be clear, various scholars have discussed constitutional review/interpretation by the executive branch in general. *See generally* John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 LAW & CONTEMP. PROBS. 293 (1993); Geoffrey P. Miller, *The President's Power of Interpretation: Implications of a Unified Theory of Constitutional Law*, 56 LAW & CONTEMP. PROBS. 35 (1993); Lund, *supra* note 19; Strauss, *supra* note 54; Paulsen, *supra* note 26; Moss, *supra* note 19; Pillard, *supra* note 19; Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010); Zachary S. Price, *Reliance on Executive Constitutional Interpretation*, 100 B.U. L. REV. 197 (2020).

174. For more details on the CLB, see generally Kazuo Fukuda & Adam P. Liff, *A Fourth Model of Constitutional Review? De Facto Executive Supremacy*, 21 WASH. U. GLOBAL STUD. L. REV. 211; Fukuda, *supra* note 92.

175. Nishikawa, *supra* note 10, at 23.

governmental interpretation.[176] This is in line with the CLB's experience as noted by a former director general: "The court pursues ex-post facto judgments, and it does take time to a certain degree. . . . Given this circumstance, officials at the Legislation Bureau all feel the need to avoid any suspicion over the constitutionality at the drafting stage."[177] The ex ante review by the executive branch is especially critical in parliamentary democracies such as Japan where the executive branch drafts a majority of statutes,[178] thereby effectively preventing the adoption of constitutionally suspect statues. Furthermore, constitutional review by the executive branch "could be a counterweight both to a monopoly over constitutional meaning in the hands of judicial elites that is stunted by the courts' limited practical capacities, and to a politics of raw competition among self-promoting interests divorced from the public-regarding underpinning our fundamental law provides."[179]

Criticisms raised for legislature-led models (e.g., the politically expedient nature, "double counting," and time and substantive constraints) certainly apply to executive-led models as well.[180] Similarly, ensuring a sufficient degree of independence and exercising the second-order reasoning against its own decisions poses a major design challenge for models led by political branches.[181] For this reason, critics argued that "[i]t is a rare person and a rare institution that on its own can reliably abide by second-order constraints on its first-order policy preferences."[182] A key concern particular to executive-led models (or specifically to the CLB) is that it is virtually a *bureaucrats-led* review model, which raises questions over its political and democratic legitimacy. Another issue with executive-led models is that the scope of review is typically restricted to the ex ante review of statutes drafted

176. Strauss, *supra* note 54, at 115.

177. SAKATA, "HŌ NO BANNIN," *supra* note 78, at 53.

178. For example, for ordinary sessions of the Diet from 2013 to 2020, the Cabinet prepared and put forward 81 percent of all enacted bills (490 adopted out of 565 submitted). *See Kako no Hōritsu-an no Teishutsu Seiritsu Kensū Ichiran* [*List of Number of Submitted/Enacted Statutes in the Past*], CABINET LEGIS. BUREAU, https://www.clb.go.jp/recent-laws/number/ [https://perma.cc/R3GH-MTEX].

179. Pillard, *supra* note 19, at 679.

180. *See supra* notes 135–138 and accompanying text.

181. It appears that Japan's CLB and Finland's Constitutional Law Committee are structurally and culturally designed to substantially withstand such a challenge. For the CLB, see also *supra* notes 184–215 and accompanying text; for the Committee, see *supra* notes 141–163 and accompanying text.

182. *See* Alexander & Solum, *supra* note 92, at 1635.

by the executive branch. A former CLB director general emphasizes the need to coordinate with the judiciary in this regard:

> Unfortunately, the Legislation Bureau can examine only draft statutes . . . and one can't deny that some laws [once enacted] may be suspected for their constitutionality [over time]. But the Legislation Bureau cannot take the lead and modify them in accordance with the contemporary society . . . this is where we need to rely on the judiciary's judgment.[183]

Against all odds, however, the CLB appears to embody an executive-led review model largely in line with the proposed definition of constitutional review. Established in 1885 as the Legislation Bureau,[184] the CLB is composed of around eighty members working in four different departments.[185] Remarkably, *all* high-ranking CLB officials with actual decision-making authority are seconded from line ministries and agencies (including some prosecutors and judges).[186] Typically, seconded personnel are individually, not collectively, responsible for the CLB's review work related to their original agency,[187] join the CLB with roughly twenty years of experience, and return to their ministry after about five years.[188] Importantly, except for judges and prosecutors, most seconded personnel are *not* legal experts who have passed the bar exam and practice law. In fact, many of these seconded career bureaucrats take a crash course on legal matters after taking up their CLB post.[189]

Despite being an executive agency, the CLB has been referred to as "a primary constitutional review forum"[190] and "a quasi-constitutional court,"[191] as the CLB has been customarily vested with "a de facto veto power [over draft statutes]" developed by the executive

183. SAKATA, "HŌ NO BANNIN," *supra* note 78, at 52.

184. Iwao Sato, *Iken Shinsa-Sei to Naikaku Hōsei-Kyoku* [*The Cabinet Legislation Bureau and the Restricted Judicial Review in Japan: A Comparative Socio-Legal Study*], 56 SHAKAI KAGAKU KENKYU [J. SOC. SCI.] 81, 85 (2005).

185. NISHIKAWA, KOREDE WAKATTA!, *supra* note 78, at 28.

186. *Id.*

187. SAKATA, "HŌ NO BANNIN," *supra* note 78, at 32.

188. NISHIKAWA, KOREDE WAKATTA!, *supra* note 78, at 28–29.

189. NISHIKAWA, RIPPO NO CHŪSŪ, *supra* note 78, at 78.

190. Hideo Hiraoka, *Seifu ni okeru Naikaku Hōuseikyoku no Yakuwari* [*The Role of the Cabinet Legislation Bureau in the Government*], 46 HOKKAIDO L. REV. 343, 351 (1996) (quoting TAKAYOSHI IGARASHI & OGAWA AKIO, GIKAI – KANRYOU SHIHAI WO KOETE [PARLIAMENT – MOVING BEYOND BUREAUCRATIC CONTROL] 72 (1995)).

191. Nishikawa, *supra* note 10, at 23.

branch.[192] The CLB is in effect a centralized screening house for the executive branch as it reviews all statues drafted by line ministries and agencies,[193] thus being responsible for more than eighty percent of all enacted bills in Japan.[194] Importantly, it is the executive branch that has drafted almost all politically sensitive and constitutionally controversial bills in Japan.[195] Given that, in its entire history, the Supreme Court has struck down only nine statutes as unconstitutional in eleven court cases,[196] the ex ante review conducted by the CLB has played a central reviewing role in the lawmaking process of Japan.

The CLB has set itself apart from the rest of the executive branch allegedly due to non-political and quasi-judicial approaches taken by the Bureau.[197] First, what anchors the CLB's review work is the underlying philosophy of constitutionalism. Sakata, former CLB Director General, stresses that a state would not function unless each cabinet works within the constitutional framework;[198] in other words, a government in power cannot change the constitutional interpretation in the pursuit of its own agenda. The CLB's determination not to tailor its constitutional review to the needs of the government has led a former Supreme Court chief justice to make an official remark that "strict constitutional review by the Cabinet Legislation Bureau has consequently lessened the number of statutes that would be suspected for their constitutionality."[199] This remark speaks volumes about the Bureau's effectiveness in providing safeguards against its own branch. To indicate the degree of the Bureau's political insularity, former Prime Minister Yasuhiro Nakasone once "asked rhetorically: 'How

192. NISHIKAWA, RIPPO NO CHŪSŪ, *supra* note 78, at 22.

193. NISHIKAWA, KOREDE WAKATTA!, *supra* note 78, at 87.

194. *See* CABINET LEGIS. BUREAU, *supra* note 178.

195. SAKATA, SEIFU, *supra* note 78, at 2.

196. Yamamoto notes ten such cases. Yamamoto, *supra* note 79, at 109. In May 2022, the Supreme Court ruled yet another statute (the 1947 Justices Review Act) unconstitutional, thus increasing the total count to nine statutes in eleven cases. For English sources on this latest case, see, for example, *Japan Top Court Rules Expats Inability to Vote on Justices Unconstitutional*, KYODO NEWS (May 25, 2022, 11:30 PM), https://english.kyodonews.net/news/2022/05/afbce1da11f9-top-court-rules-expats-inability-to-vote-on-justices-unconstitutional.html [https://perma.cc/5RQM-XAMZ].

197. CLB's comments were not made publicly available unless requested under the Act on Access to Information Held by Administrative Organs. Thus, assertions about the CLB's review work introduced in this Article are based on observations by former CLB officials such as Sakata, Nakano, and Hiraoka and longtime CLB researchers such as Nishikawa. For an example of CLB's comments on draft statutes, see NISHIKAWA, KOREDE WAKATTA!, *supra* note 78, at 100.

198. SAKATA, "HŌ NO BANNIN," *supra* note 78, at 189.

199. Sato, *supra* note 184, at 83.

long should the Prime Minister (be) treated like a subordinate to the (Cabinet Legislation) Bureau?'"[200] Former Prime Minister Taro Aso also expressed his frustration with the CLB: "[T]alking as if the CLB Director General was almighty is the best example of how acquiescent everyone is to the rule of bureaucrats."[201] These statements illustrate well the CLB's "push-back" authority and effective checks against its own branch.

Second, independence and objectivity are key principles of the CLB's review work. In fact, the CLB's work consists of muti-layered reviews in which multiple third parties (CLB officials), some of whom do not hold any direct stake in draft statutes, review the drafts reviewed by other CLB officials at different levels (counsellors, department heads, deputy director general, and director general).[202] Nakano, a scholar seconded to the CLB, has observed that such a review system has inevitably enhanced the level of objectivity embedded in the drafts.[203] Interestingly, Sakata considers that the Bureau has been insulated from the interests of line ministries and agencies precisely because of its longtime tradition of secondment: Freed from concerns over promotion and office politics, secondment from different executive bodies allegedly creates an environment that effectively resists the pursuit of ministry-specific interests and benefits as well as so-called "turf-minded bureaucracy."[204]

Third, the CLB is known for its meticulous review of draft statutes (with constitutional review being part of the review). Nakano observed during his time at the CLB that counsellors oftentimes spend night and day questioning law drafters in an exhaustive manner about the details of draft statutes and picking apart the drafts at times.[205] It was also not rare for it to take more than a few weeks before counsellors finally considered a draft "worth a look" in its entirety.[206] This meticulousness contributed to the CLB earning legitimacy and trust from line ministries and agencies to the extent that makes the latter acquiesce that "if that is how the Cabinet Legislation Bureau interprets it, then we have no other choice than to follow it."[207]

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200. Samuels, *supra* note 79 (quoting Yasuhiro Nakasone, *Jieitai wo Tokihanate* [*Unleash the Self-Defense Force*], 288 VOICE 54 (2001)).

201. Samuels, *supra* note 79.

202. Nakano, *supra* note 78, at 2076.

203. *Id.*

204. SAKATA, SEIFU, *supra* note 78, at 319.

205. Nakano, *supra* note 78, at 2074–75.

206. *Id.* at 2075.

207. NISHIKAWA, RIPPO NO CHŪSŪ, *supra* note 78, at 20.

Fourth, the CLB consistently relies upon legal logic for its review work. Sakata, a former CLB Director General, notes that "debates on laws are about the issue of logic . . . . If the logic is irrelevant or off the point, no one would take us seriously. But as the government prepares itself for deliberations at the Diet, it must rely on such logic that would convince a majority of citizens."[208] Similarly, Hiraoka, a former CLB counsellor, stresses that "the most important element is the logicality . . . it would not be allowed that [any draft statutes] deviate from the [established] logic."[209] In other words, the substance of draft statutes reflecting first-order policy preferences is secondary to the CLB's review work.[210] Nishikawa, perhaps the most prominent researcher on the CLB, notes that "only ones that survive the battle of [the CLB's] logic versus [law drafters'] logic are adopted as policy proposals; thus it runs the risk of prioritizing theoretical logic over the substance [of draft statutes]."[211]

Finally, the CLB is known for strictly adhering to its own precedent, which reinforces the importance of legal logic. As Nishikawa mentions, "because the CLB does not modify its logic over time, it respects its own precedents derived from the review and interpretation work to the maximum extent possible."[212] In other words, it is "inconceivable that juniors would overturn seniors' interpretation from decades ago, as it would constitute a change in the logic."[213] It follows that consideration of changes in the contemporary society is secondary to the Bureau's work.[214] This strict adherence to precedent, coupled with the consistent use of legal logic, has enabled CLB officials to

208. SAKATA, "HŌ NO BANNIN," *supra* note 78, at 45.

209. Hiraoka, *supra* note 190, at 357.

210. *Id.* at 348.

211. NISHIKAWA, RIPPO NO CHŪSŪ, *supra* note 78, at 119.

212. *Id.* at 121.

213. *Id.* Japanese culture generally upholds hierarchical interpersonal relationships in various societal settings. *Kouhai* (a "junior" who newly joins a certain entity) is expected to respect and honor *senpai* (a "senior" whose affiliation with that entity precedes that of a "junior"). Juniors and seniors do not necessarily have direct relationships, but their relationships are formed through this institutional context. For more details on the *senpai-kouhai* culture in Japan, see, for example, Koji Sano, *The Study of the Senpai-Kouhai Culture in Junior High Schools in Japan*, 6 SOC. INSIGHT 59 (2014) (finding through survey data that the hierarchical *senpai-kouhai* culture remains robust and salient in the contemporary Japanese society in the context of educational settings); YUNG H. PARK, BUREAUCRATS AND MINISTERS IN CONTEMPORARY JAPANESE GOVERNMENT 48–54 (1986) (illuminating the complex effect of the *senpai-kouhai* dynamics in establishing relationships and devising strategies among bureaucrats and politicians).

214. NISHIKAWA, RIPPO NO CHŪSŪ, *supra* note 78, at 122.

exercise second-order reasoning and make second-order decisions accordingly.

By strictly adhering to this non-political, quasi-judicial approach, the CLB's track record has been impeccable:

> [W]ith the sole exception of the *Overseas Voters Case*, every statute ever struck down by [the Supreme Court] as unconstitutional . . . was (1) reviewed by the *pre-war* LB, *not* its post-1952 successor; (2) developed during the Occupation period in which the LB was temporarily abolished; and/or (3) proposed by Japan's legislature, not the executive branch.[215]

Still, it is a perpetual challenge to design a review body within the executive branch in a way that it withstands political winds even when key policy matters are at stake for political leadership. The CLB showed the fragility of this model in one such instance: Despite a series of attempts to resist, the CLB did eventually succumb to political pressure in a historic 2014 Cabinet Decision in which then Prime Minister Shinzo Abe forcibly overturned a long-standing CLB interpretation of Article 9 that prohibited the exercise of collective self-defense.[216] Since 1972, the CLB had interpreted Article 9 of the Constitution as not permitting the exercise of collective self-defense (i.e., the right to use force to aid an ally under attack), given that it would exceed the minimum force necessary to defend the country.[217] Yet, Abe and other advocates insisted that the exercise of collective self-defense is crucial to address growing security concerns in the region and bolster concerted deterrence efforts with allies.[218] Anchored by such concerns, this Decision now allows Japan to "constitutionally . . . use the minimum necessary force when . . . the armed attack on the foreign country threatens Japan's survival and poses a clear danger to fundamentally overturn people's right to life, liberty and pursuit of happiness."[219] Thus, as powerful as it is usually

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215. Fukuda & Liff, *supra* note 174, at 227. "After Imperial Japan's defeat in World War II (1945), the (U.S.-led) Supreme Commander for the Allied Powers (SCAP) pursued a wholesale overhaul and democratization of Japan's wartime political system, including the formal abolishment . . . of the LB in February 1948." *Id.* at 223. "Four months after the Allied Occupation ended in April 1952, Japan's newly-sovereign democratic government resurrected the LB." *Id.* at 224.

216. For details on the Decision, see, for example, Yamamoto, *supra* note 79; Adam P. Liff, *Policy by Other Means: Collective Self-Defense and the Politics of Japan's Postwar Constitutional Reinterpretations*, 24 ASIA POL'Y 139 (2017).

217. Yamamoto, *supra* note 79, at 100, 112.

218. Liff, *supra* note 216, at 155–59.

219. Yamamoto, *supra* note 79, at 114.

conceived to be, the CLB is certainly not "invincible." However, while details regarding the CLB's review work are not readily available publicly,[220] there is no clear indication that the 2014 Cabinet Decision has substantively changed the relations between the CLB and the rest of the executive branch. In fact, it has been reported that the CLB pushed back on a draft statute in 2019 suspecting its constitutionality *despite* it being a priority for a then cabinet minister.[221] A Japan scholar also speculates that "conditions on [the exercise of collective self-defense] remained so strict that, if circumstances persist, doubts remain as to whether Japan will ever actually exercise its newly 'constitutional' right."[222]

4. Co-Equal Models

Co-equal models operate under the premise that all three branches are, as indicated in the above three models, capable of conducting constitutional review in a way that fulfills the core elements of the proposed definition. Unlike other models discussed in this Part, however, co-equal models as a principle are opposed to pre-determining at the outset which institution(s) to be vested a leading review role. Viewing it as normatively infeasible and undesirable for a single branch to take the lead over the entire space of constitutional law, advocates of co-equal models commonly argue that constitutions and/or constitutional norms (unless indicated otherwise) grant all branches the equal authoritative status in addressing constitutional matters.[223]

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220. In principle, the CLB has not disclosed its opinions on draft statutes publicly. SAKATA, SEIFU, *supra* note 78, at 323–24. For an example of the CLB's comments on a draft statute obtained under the Act on Access to Information Held by Administrative Organs, see NISHIKAWA, KOREDE WAKATTA!, *supra* note 78, at 100.

221. *See Katayama Satsuki Chihō Sōsei Tantō-shō no Kanban Seisaku ga Anshō ni Sūpāshiti Kōsō Kanren Hōan* [*Regional Revitalization Minister Satsuki Katayama's Signature Policy Hits a Deadlock Bill Related to Super City Concept*], SANKEI NEWS (Mar. 21, 2019, 6:17 PM), https://www.sankei.com/article/20190321-4N7H63FHMJKM7G2ASN6AVJ5C7E/ [https://perma.cc/AD5P-D3G3] (noting that Satsuki Katayama, then Minister of State for the Promotion of Overcoming Population Decline and Vitalizing Local Economy in Japan, has struggled to move forward with her draft law proposal given the CLB's concern over its constitutionality).

222. Liff, *supra* note 216, at 155.

223. *See, e.g.*, Paulsen, *supra* note 26, at 221–36; Gant, *supra* note 94, at 383–84; Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 106 (1998); Gary Lawson, *Interpretive Equality as a Structural Imperative (or "Pucker Up and Settle This!")*, 20 CONST. COMMENT. 379, 382–83 (2003); David W. Tyler, *Clarifying Departmentalism: How the Framers' Vision of Judicial and Presidential Review Makes the Case for Deductive Judicial Supremacy*, 50 WM. & MARY L. REV. 2215, 2249–51 (2009).

Co-equal models have been categorized into three sub-models and thus justified in three different ways. The fundamental tenet of the *divided* co-equal model argues that each branch is granted interpretive authority within its constitutionally stipulated jurisdiction, so as to maximize institutional comparative advantages of each branch.[224] The *overlapping* co-equal model argues that each branch addresses constitutional issues individually regardless of the areas of concerns or positions taken by other branches,[225] as "each branch is bound by the Constitution (or its own vision of the Constitution) but not by another branch's interpretation of the Constitution."[226] Advocates of the *functional* co-equal model typically recognize the "special, though not exclusive, interpretive" role of the courts[227] and argue that independent constitutional interpretation by political branches based on functional considerations can be useful "in the absence of judicial resolution,"[228] so long as such interpretation is effectively limited and context-dependent.[229]

Despite these varied justifications, co-equal models have faced common criticisms over their workability. For instance, both divided and overlapping models are said to face the potential issue of interpretive anarchy that results from multiple authorities involved in constitutional review.[230] Even if branches could work out boundary issues, critics question how different branches can move forward when they do not reach any agreement on a mutually workable solution.[231] Relatedly, critics have emphasized the importance of closure in constitutional conflicts: "In times of conflict, society needs relative closure concerning a conflict over the constitutional permissibility of a bill or governmental policy."[232] For these reasons, critics are united in their argument that the supreme interpretive authority must be delegated to some specific institution so as to eventually settle constitutional

224. Alexander & Solum, *supra* note 92, at 1610.

225. *Id.* at 1613.

226. Harel & Shinar, *supra* note 92, at 957.

227. Johnsen, *supra* note 26, at 129. For this reason, the functional co-equal model might in effect only represent a sub-category of court-led models in practice. *See id.* at 122–23.

228. *Id.* at 115.

229. *Id.* at 108–09. Others give more space and authority for constitutional interpretation by political branches. *See, e.g.*, Eisgruber, *supra* note 26, at 353–55, 363–64.

230. Alexander & Solum, *supra* note 92, at 1611–13.

231. *Id.* at 1612.

232. Lipkin, *supra* note 20, at 139.

controversies.[233] Furthermore, from methodological and analytical perspectives, a key challenge in identifying co-equal models lies in how to objectively discern the term "co-equal."

The research conducted for this Article did not identify any specific countries constitutionalizing co-equal models in a de jure sense. Thus, co-equal models likely represent more theoretical and normative arguments at this point. Nonetheless, these models might be viable in reality: As Fallon concisely articulates, institutional arrangements over the review power in most countries probably entail "a mixture of judicial supremacist, departmentalist, and popular constitutionalist elements."[234] One potential example is the type of review model found in countries such as Canada, New Zealand, and the United Kingdom (although it is admittedly difficult to fully discuss these countries' experiences under the label of co-equal review models, as the question remains as to whether institutions other than courts have in fact conducted constitutional review as defined in this Article). Typically examined under the labels of "the new Commonwealth Model" and a "*weak-form* judicial review," these countries are said to embody a new prospect for a constitutional review mechanism that falls somewhere in between the traditional dichotomy of court-led and legislature-led models.[235] Unlike in Finland, the introduction of constitutional review by court appears to have challenged the traditional principle of legislative supremacy in Canada, New Zealand, and the United Kingdom, even though the relevant literature remains

233. For literature discussing the importance of finality and settlement, see, for example, Alexander & Schauer, *Defending Judicial Supremacy*, *supra* note 101, at 481–82; Alexander & Schauer, *On Extrajudicial Constitutional Interpretation*, *supra* note 101, at 1371–76; Gant, *supra* note 94, at 400–42; JEFFREY GOLDSWORTHY, THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY 261–62 (2001); Daniel A. Farber, *The Importance of Being Final*, 20 CONST. COMMENT. 359, 365–368 (2003); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1029 (2004); Waldron, *The Core of the Case*, *supra* note 104, at 1369–72; BELLAMY, *supra* note 108, at 20–26; Edward Rubin, *Judicial Review and the Right to Resist*, 97 GEO. L.J. 61, 97–98 (2008).

234. Fallon, *supra* note 92, at 491.

235. For more details on "the new Commonwealth Model," see generally Gardbaum, *Commonwealth*, *supra* note 1. For more details on "*weak-form* judicial review," see generally TUSHNET, *supra* note 24. For debates on the *weak-form* judicial review, see, for example, Sinnott-Armstrong, *supra* note 24; Gardbaum, *supra* note 3, at 47–76; Dixon, *supra* note 24. For discussions on the distinction between strong-form and weak-form review, see, for example, Aileen Kavanagh, *What's So Weak About "Weak-Form Review"? The Case of the UK Human Rights Act 1998*, 13 INT'L J. CONST. L. 1008 (2015); Stephen Gardbaum, *What's So Weak About "Weak-Form Review"? A Reply to Aileen Kavanagh*, 13 INT'L J. CONST. L. 1040 (2015).

inconclusive on the degree of such power shifts.[236] Traditionally, these countries upheld the notion of legislative supremacy but have granted the court the power to conduct constitutional review since the 1980s through their bills of rights, given contemporary societal needs to ensure effective protection of fundamental rights.[237] In Canada, for instance, it is a "*weak-form* judicial review" in a sense that the inclusion of the so-called "notwithstanding" clause (i.e., a legislative override) in the bill of rights has kept a certain degree of legislative supremacy intact but enabled inter-branch dialogues.[238] The court in Canada is now given this role to ensure that statutes conform to the Bill of Rights, whereas the parliament likely faces the political burden of justifying the use of legislative override against judicial opinions based on the second-order reasoning.[239]

In short, the adoption of a bill of rights in these countries has in effect obscured which institution has a leading review role, which is pre-determined under the above three models. Depending on how the weak-form judicial review will manifest itself *vis-à-vis* other branches in the future, it could in theory lead to more balanced review powers shared across branches (assuming that non-court bodies are capable of conducting constitutional *review* in these countries). In any case, the introduction of judicial constitutional review in these countries led to this possibility of establishing a relative inter-branch equilibrium. If all branches operate under the principle of mutual respect, it is

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236. *E.g.*, Mark Tushet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813 (2003) (arguing that weak-form judicial review could eventually return to judicial or legislative supremacy); Janet Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, 69 MOD. L. REV. 7 (2006) (observing varying degrees of power shifts in the United Kingdom, Canada, New Zealand, and Australia); Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8 INT'L J. CONST. L. 167 (2010) (assessing that U.K. and New Zealand models have worked reasonably well thus far, but not the Canadian model, in terms of balancing judicial and legislative power); Kavanagh, *supra* note 235, at 1029 (noting the general prevalence of court rulings and the legislature's reluctance to invoke the "last word" power in the United Kingdom).

237. Gardbaum, *Legislative Supremacy*, *supra* note 1, at 615.

238. Section 33 of the 1982 Canadian Charter of Rights stipulates that for renewable five-year periods, "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, C 11 (U.K.). In other words, as Tushnet articulates, a legislature in Canada at provincial and national levels "can make a statute effective notwithstanding the fact that, without an override, the statute would violate rights protected by the charter" in Section 2 or Sections 7 to 15. TUSHNET, *supra* note 24, at 34.

239. *See* Gardbaum, *Commonwealth*, *supra* note 1, at 719–38, for examples of Canada, New Zealand, and the United Kingdom.

plausible that the practice of constitutional review remains in a largely shared space with occasional push-and-pull destabilizing the delicate equilibrium in one way or another.

5. Non-Government Branch-Led Models

Non-government branch-led models depart from the above four review models in that they represent endeavors to vest the review authority in independent actors who themselves do not belong to a particular government branch. The underlying justification for these models may be that constitutional review as a practice warrants a leading role by institutions that are more distant from and less involved in government activities, so as to dispassionately assess and determine constitutionality. After all, this Article has defined constitutional review as authoritative practices premised on second-order reasoning, conducted by actors independent from ones engaged in first-order decisions, to evaluate and determine the conformity of political acts with the constitution. Arguably, no one could fulfil this definition better than independent actors outside the three traditional branches who are able to give a sober second look at first-order decisions independently. In this sense, the essence of justifications for these models significantly overlaps with those for court-led review models, especially in terms of the emphasis placed upon independence and second-order reasoning. Non-government branch-led models only take a further step of detaching the practice of constitutional review away from three branches (albeit to varying degrees) and embedding it in a more independent and non-political framework.

With this overall context in mind, non-government branch-led models draw from the experiences of the *Raad van State* (the Council of State) in the Netherlands and the Chancellor of Justice in Estonia.[240] To be clear, the Chancellor of Justice does not hold the supreme review authority in Estonia: The Constitution of Estonia explicitly stipulates

240. These are not the only non-government branch-led models. In fact, the Council on Legislation (*Lagrådet*) in Sweden is yet another intriguing example: The Council is composed of current and former justices seconded from the Supreme Court and Supreme Administrative Court and conducts constitutional review of draft statutes developed by the executive branch (and sometimes by legislative committees) as an independent advisory body. For more details, see, for example, Joakim Nergelius, *Judicial Review in Swedish Law – A Critical Analysis*, 27 NORDISK TIDSSKRIFT FOR MENNESKERETTIGHETER [NORDIC J. HUM. RTS.] 142 (2009); Thomas Bull, *Judges without a Court – Judicial Preview in Sweden*, *in* THE LEGAL PROTECTION OF HUMAN RIGHTS, *supra* note 82, at 392, 392–409; Serkan Yolcu, *East Nordic Model of Pre-Enactment Constitutional Review: Comparative Evidence from Finland and Sweden*, 26 EUR. PUB. L. 505 (2020).

that the Supreme Court is "the court of constitutional review"[241] and shall declare "invalid any law or other legislation or administrative decision that is in conflict with the letter and spirit of the Constitution."[242] Thus, Estonia represents a court-led model in a de jure sense. However, as seen shortly, the Chancellor of Justice has played a central reviewing role alongside the Constitutional Review Chamber of the Supreme Court. Given the difference in the institutional nature, this Part of the Article further divides non-government branch-led models into two groups: one that remains closely associated with the government (an independent advisor-led model in the Netherlands) and one that gives power more directly to the people (independent watchdog-led model in Estonia).

a. Independent Advisor-Led Model

In terms of the practice of constitutional review, the Netherlands presents an intriguing case as the last major democracy in the world without judicial constitutional review. In the Netherlands, judicial constitutional review of parliamentary statutes is explicitly proscribed under Article 120 of the Constitution, thereby effectively leaving the constitutionality of statutes passed by the parliament intact.[243] Proscription of judicial constitutional review holds a long history, tracing back its origin to the 1848 constitutional amendment.[244] Thus, it has effectively removed the judiciary out of the picture at the outset. To be clear, given the Netherlands' monist approach, courts are vested with the power to "review the compatibility of national legal norms, including acts of parliament, with international law, which is of a superior rank in the hierarchy of norms,"[245] thereby enabling a rights-based review by courts (with international conventions that the Netherlands has ratified as the basis). But everything else that does not concern international law, such as the state governing mechanism as

241. PÕHISEADUS [PS][CONSTITUTION] Mar. 7, 1992, art. 149 (Est.).

242. *Id.* art. 152.

243. GW. [CONSTITUTION] art. 120 (Neth.). Political branches have attempted to reconsider the bar on judicial constitutional review of parliamentary statutes several times, with the most promising one being the so-called Halsema Proposal tabled in 2002. However, given the complex procedures for amending the Constitution in the Netherlands, it is speculated that the prohibition of judicial review of parliamentary statutes remains intact for the foreseeable future. For more details, see Gerhard van der Schyff, *The Prohibition on Constitutional Review by the Judiciary in the Netherlands in Critical Perspective: The Case and Roadmap for Reform*, 21 GERMAN L.J. 884, 884–90 (2020).

244. Van der Schyff, *supra* note 243, at 884.

245. *Id.* at 890.

well as unratified treaties, falls outside the court's jurisdiction. Given this context, van der Schyff notes that proscription of judicial constitutional review "has become one of the mainstays of the Dutch constitutional order, having survived numerous constitutional revisions since 1848."[246]

Proscription of judicial constitutional review does not mean that statutes are not reviewed for their conformity with the Constitution at any point in the law-making process. In fact, the Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*) acknowledges the important role of the ex ante review conducted by the *Raad van State* (the Council of State):

> The Dutch Constitution prohibits the courts from reviewing the constitutionality of Acts of Parliament . . . . This does not mean that this type of legislation is at no point reviewed in the light of the Constitution. This is in fact done during the preparatory stage by the bodies involved in enacting legislation (the Council of State in its advisory role, and the legislature, in other words, the government and both Houses of Parliament). It is first and foremost the responsibility of these bodies to ensure that no legislation is passed that is in conflict with the Constitution.[247]

In this context, the Council of State plays a central role in conducting constitutional review in the Netherlands. In fact, Jurgen C.A. de Poorter, a former Council Adviser at the Council of State, notes:

> Although there is no possibility for a constitutional review in the Netherlands, there is a system whereby bills are presented to the Advisory Division of the Council of State in order to obtain the Advisory Division's advice on the bill before it is submitted to the Second Chamber . . . . The Advisory Division determines the constitutionality of the bill.[248]

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246. Gerhard van der Schyff, *Constitutional Review by the Judiciary in the Netherlands: A Bridge Too Far?*, 11 GERMAN L.J. 275, 276 (2010).

247. *The Ban on Constitutional Review*, HOGE RAAD DER NEDERLANDEN [SUP. CT. NETHS.], https://www.hogeraad.nl/english/the-ban-on/ [https://perma.cc/QY7A-S55Y].

248. De Poorter, *supra* note 8, at 92. Notably, a report by the Venice Commission states that "[a]n issue that has been raised by several interlocutors is the absence of constitutional review in the Netherlands . . . . In practice, it is the Advisory Division of the Council of State that provides a priori advice on the constitutionality of bills." Venice Comm'n, *The Netherlands Opinion on the Legal Protection of Citizens*, 128th Sess., Opinion No. 1031 (Oct. 18, 2021), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-

As the Council of State itself states, it is an independent state organ: "Like the House of Representatives and the Senate, the Netherlands Court of Audit and the National Ombudsman, the Council is one of the High Councils of State. These are bodies regulated by the Constitution, which may carry out their tasks independently of the government."[249] The vice-president (the King is the symbolic President) and members of the Council are recommended by the Council itself[250] and appointed "on the nomination of Our Minister of the Interior and Kingdom Relations, in consultation with Our Minister of Justice."[251] The Council is composed of no more than ten members[252] and roughly eighty State Councillors.[253] In terms of their qualifications, "[m]embers and State Councillors are appointed on the basis of their expertise and experience in legislative, administrative or judicial matters. They are drawn from the ranks of academia, public administration, the judiciary and government."[254] The Council of State is also supported by about 630 staff—half of them are lawyers.[255]

The Council holds two primary functions: as an advisory body (the Advisory Division) and as an administrative court (the Administrative Jurisdiction Division).[256] Through its Advisory Division, the Council conducts the ex ante review of all draft statutes developed by

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AD(2021)031-e [https://perma.cc/U7MT-P6G8]. Similarly, see Mentko Nap, *Advisory Opinions of the Dutch Council of State as Contributions to a Constitutional Dialogue*, *in* EUROPEAN YEARBOOK OF CONSTITUTIONAL LAW 2021 at 225 (Jurgen de Poorter et al. eds., 2022) (arguing that "[t]he Council's opinions are especially relevant since, absent the possibility of courts reviewing the constitutionality of acts of parliament, they are the next best thing to urge the Dutch legislature to respect the national Constitution").

249. *The Council of State*, RAAD VAN STATE, https://www.raadvanstate.nl/talen/artikel/ [https://perma.cc/C3YY-4AV7].

250. *Id.*

251. Wet op de Raad van State [Council of State Act], 22 April 2010, sec. 8(2) (Neth.).

252. *Id.* at sec. 1(1).

253. *The Council of State*, *supra* note 249. In a de jure sense, members and State Councillors appear to hold the identical status. Wet op de Raad van State, *supra* note 251, at sec. 9 ("[i]n discharging their duties the State Councillors have the powers of a member of the Council. . ."). For a complete list of members and state councillors, see *Leden en staatsraden* [*Members and Councils of State*], RAAD VAN STATE, https://www.raadvanstate.nl/overrvs/organisatie/leden-staatsraden/ [https://perma.cc/W6ZP-4ZTF]. Currently, fifteen members and State Councillors are listed under the Advisory Division. *See Afdeling Advisering* [*Advisory Department*], RAAD VAN STATE, https://www.raadvanstate.nl/overrvs/organisatie/afdeling-advisering/ [https://perma.cc/U6MN-ADXT].

254. *The Council of State*, *supra* note 249.

255. *Id.*

256. Venice Comm'n, *supra* note 248, at 24. For more details on the structure of the Council of State, see also *The Council of State*, *supra* note 249.

the executive branch (a principal law-drafter in the country) and also bills introduced by parliamentarians.[257] This important review work is enshrined in the Constitution: "The Council of State or a division of the Council shall be consulted on Bills and draft orders in council as well as proposals for the approval of treaties by the States General."[258]

In terms of the Council's independence, the Constitution of the Netherlands secures a life tenure for members of the Council (albeit the retirement age has been set at seventy years of age).[259] Furthermore, the Council of State Act prohibits any membership of public offices and bodies that would compromise their impartiality and independence and requires that members publicly disclose any positions held other than their office.[260] Such bases enable the Council to perform its tasks "independently of the government."[261]

In terms of the Council of State's push-back authority, scholars have argued that while not legally binding,[262] opinions by the Council of State are generally well-respected and often sought after by both the executive and the legislature whenever facing constitutional controversies.[263] The House of Representatives also mentions that "[t]he advice from the Council of State is followed by a response from the

257. Venice Comm'n, *supra* note 248, at 17–18. The Dutch government notes that "Members of the House of Representatives may also introduce a bill, which they will then be responsible for defending. In most cases, however, the first step towards new legislation will be taken by one or more ministers, depending on the scope of the issue." *See How an Act Becomes Law*, OVERHEID.NL, https://www.overheid.nl/english/about-the-dutch-government/what-government-does/how-an-act-becomes-law [https://perma.cc/9KG2-TNTR]; *see also How a Bill Becomes Law*, TWEEDE KAMER DER STATEN-GENERAL [HOUSE OF REPRESENTATIVES OF THE NETHERLANDS], https://www.houseofrepresentatives.nl/how-parliament-works/how-bill-becomes-law [https://perma.cc/N4NT-XWRW] (indicating that the government leads the law-making process). The Advisory Division consists of four sections dealing with different areas of law: Section I (general affairs, home affairs and kingdom relations, education, culture, and science), Section II (foreign affairs, defense, justice, and security), Section III (finance, social affairs and employment, health, welfare, and sport), and Section IV (economic affairs and climate, infrastructure and water management, agriculture, nature, and food quality). *See Secties [Sections],* RAAD VAN State , https://www.raadvanstate.nl/over-rvs/organisatie/afdeling-advisering/secties/ [https://perma.cc/8DAD-7S26].

258. GW. [CONSTITUTION] Aug. 24, 1815, art. 73 (Neth.).

259. *Id.* art. 74. The author thanks Gerhard van der Schyff for pointing out the retirement age set forth under section 3(1b) of Council of State Act.

260. Änderung des Gesetzes über den Staatsrat [Amendment of the Council of State Act], 22 April 2010, sec. 5 (Neth.).

261. *The Council of State*, *supra* note 249.

262. De Poorter, *supra* note 8, at 92.

263. MENTOKO NAP, CONSTITUTIONELE TOETSING DOOR DE RAAD VAN STATE [CONSTITUTIONAL REVIEW BY THE COUNCIL OF STATE] 1 (2021).

minister and by an amendment of the text, if necessary," thereby confirming that the Council's opinions necessitate a follow-up by law drafters at least in the form of responses, if not always revisions.[264] The Council of State itself notes that if it holds any doubts about draft statutes, "the dictum will recommend against introducing the Bill or promulgating the order in council, or it may recommend waiting until substantial amendments have been made. In such cases, the proposed legislation is returned to the Cabinet."[265]

A key design concern with this independent advisor-led review model in the Dutch context is the degree of authority attached to the advisor. De Poorter points out an inevitable dilemma for the Council of State: Without a binding authority vested upon it, the Council must strike "a delicate balance . . . between, on the one hand, what a sincere conviction about the meaning of the Constitution demands in a certain case and, on the other, the receptivity of the addressee (the Government and, in the background, possibly the legislature) for an unwelcome message."[266] Another concern is that unlike the Cabinet Legislation Bureau in Japan and the Constitutional Law Committee in Finland, the Council of State advises on the substance of draft statutes, thereby not necessarily detaching itself from the first-order reasoning and decisions.[267] For instance, the Council clearly mentions in its recent opinion on the new Code of Criminal Procedure that it:

> [E]ndorses the importance of this modernization . . . [as] [t]he current code is outdated and has become inaccessible due to the many successive amendments. . . . The content of the Code will also be brought up to date by codifying case law on a number of subjects and by facilitating a (further) digitization of the criminal process.[268]

These two concerns could render the independent advisor-led model a "borderline" institution that is engaged in both constitutional review and constitutional interpretation, similar to the U.S. Office of

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264. *See How a Bill Becomes Law*, TWEEDE KAMER DER STATEN-GENERAL [SECOND CHAMBER STS. GEN.], https://www.houseofrepresentatives.nl/how-parliament-works/how-bill-becomes-law [https://perma.cc/N4NT-XWRW].

265. *The Council of State*, *supra* note 249.

266. De Poorter, *supra* note 8, at 92–93.

267. For the CLB in Japan, see *supra* notes 208–211 and accompanying text; for the Constitutional Law Committee in Finland, see *supra* notes 145–146 and accompanying text.

268. *Vaststelling van het nieuwe Wetboek van Strafvordering* [*Adoption of the New Code of Criminal Procedure*], RAAD VAN STATE (Mar. 30, 2022), https://www.raadvanstate.nl/adviezen/@125095/w16-21-0105-ii/ [https://perma.cc/D34X-LPVG].

Legal Counsel.[269] This may be a country-specific concern, considering the way the Council of State is structured. Constitutional designers could overcome the first concern by granting an independent advisor a more robust authority *vis-à-vis* advisees. What is required in this regard may not be necessarily a de jure authority but rather a customary norm that is authoritative enough to bind state authorities. For instance, their status could be designed similarly to that of constitutional law scholars advising the Constitutional Law Committee in Finland, in that "advisees" (i.e., the government and the legislature) are generally deferential to their opinions, thereby recognizing their *leading* role in the practice of constitutional review.[270] In fact, at least one Dutch scholar appears to support such a design in the Dutch context as well:

> The fact that Article 73(1) of the Constitution of the Netherlands speaks of the 'hearing' of (horen van) and not of 'advising' by (adviseren door) the Council of State could indicate that a special meaning must be given to the Council's advice, in the sense that it cannot be readily deviated from and that at least such a deviation must be supported by sufficient grounds.[271]

As for the second concern, it would be highly desirable from the design perspective that there is a clear institutional separation between the review of the desirability and feasibility of first-order decisions and the review of the constitutional legitimacy and authenticity. Constitutional review must entail the consistent use of the second-order reasoning.

b. Independent Watchdog-Led Model

Compared to the independent advisor-led review model exemplified in the Netherlands, an independent watchdog-led review model as found in Estonia makes a conscious effort to detach the practice of constitutional review from the three traditional branches to the extent that it is no longer to be construed as the exclusive enterprise of the latter.

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269. *See supra* note 19 and accompanying text.

270. Recall that the Constitutional Law Committee in Finland typically abides by the views of constitutional law scholars. *See supra* note 160 and accompanying text.

271. *See* de Poorter, *supra* note 8, at 93.

Originally established in 1938 but formally revived in 1993,[272] the Chancellor of Justice in Estonia is an independent entity that is appointed by the legislature for a term of seven years upon the proposal of the President of the Republic.[273] The Office of the Chancellor of Justice is divided into seven departments and is composed of roughly thirty-five advisors including the Deputy Chancellor and the Chancellor.[274] The Chancellor of Justice Act stipulates that:

> A person with higher education who has been employed as a judge, notary, sworn advocate or teacher at an institution of higher education for at least three years or who has been employed in other public service for at least three years may be appointed as an adviser to the Chancellor of Justice.[275]

Brief biographies of advisers indicate that a majority of them are experienced legal experts who primarily worked for the government as legal advisors or practiced as lawyers.[276] The current Chancellor of Justice, Ülle Madise, is a prominent legal expert in Estonia, having served as an adviser to the minister of Justice, the Constitutional Committee of the Parliament, and the president of the Republic of Estonia.[277]

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272. After the original establishment in 1938, the Chancellor of Justice was abolished in 1940 under the Soviet occupation. But the institution reportedly maintained its continuity in the period of 1944–1981 under the Estonian exile government led by Artur Mägi, one of the drafters of the 1938 Constitution. Upon Estonia's independence in 1991, the 1992 Constitution revived the Office of the Chancellor of Justice. The Chancellor of Justice resumed its role in its current form in January 1993. *See* CHANCELLOR OF JUST., THE ANNUAL REPORT: 2003–2004 OF THE CHANCELLOR OF JUSTICE OF ESTONIA 13 (2003), https://www.oiguskantsler.ee/sites/default/files/annual_report_of_the_chancellor_of_justice_2003.pdf. [https://perma.cc/7L8V-QU8V].

273. PÕHISEADUS [PS][CONSTITUTION] Mar. 7, 1992, art. 140 (Est.). The first three Chancellors (Eerik-Juhan Truuväli, Allar Jõks, and Indrek Teder) held office for only one term. *See Former Chancellor of Justice*, OIGUSKANTSLER CHANCELLOR JUST, https://www.oiguskantsler.ee/en/former-chancellor-justices (last visited Mar. 5, 2023). The current Chancellor of Justice, Ülle Madise became, the first to renew her term, serving in her capacity from 2015–2029. *See Õigskantsler Ülle Madise*, ÕIGUSKANTSLER CHANCELLOR JUST., https://www.oiguskantsler.ee/en/prof-dr-%C3%BClle-madise [https://perma.cc/JY8R-ZM46].

274. Based on the list of advisors at the Office of the Chancellor of Justice. *See Personnel*, OIGUSKANTSLER CHANCELLOR JUST., https://www.oiguskantsler.ee/en/personnel-0 [https://perma.cc/3SBW-MKAR].

275. Chancellor of Justice Act, sec. 38, cl. 3 (Est.).

276. *See Personnel*, ÕIGUSKANTSLER CHANCELLOR JUST., https://www.oiguskantsler.ee/en/personnel-0 [https://perma.cc/AYY5-XTN7].

277. For more details on her educational and professional backgrounds, see *Õigskantsler Ülle Madise*, *supra* note 273.

The Constitution of Estonia grants the Chancellor a significant role in ensuring the conformity of statutes with the Constitution. For example, as "an independent official":[278]

> If the Chancellor of Justice finds that legislation passed by the legislative or executive powers or by a local government is in conflict with the Constitution or a law, he or she shall propose to the body which passed the legislation to bring the legislation into conformity with the Constitution or the law within twenty days.[279]

Article 142 also grants the Chancellor the power to "propose to the Supreme Court to declare the legislation invalid" in the case that political branches fail to address his concerns within twenty days.[280] Under this overall constitutional framework, the Chancellor conducts both ex ante and ex post constitutional review on his/her own initiative or by citizens' petitions.[281] To facilitate this broad mandate, the Chancellor of Justice Act mandates laws passed by political branches to be sent to the Chancellor for review.[282]

Independence of the Chancellor of Justice is constitutionally and statutorily ensured in several ways: the removal from office enabled only by a court judgment,[283] the oath requirement to perform his or her duties "in an impartial manner"[284] as well as the prohibition of

278. PÕHISEADUS [PS][CONSTITUTION] Mar. 7, 1992, art. 139 (Est.).

279. *Id.* art. 142. The *Riigikogu* (Parliament of Estonia) notes that "[a]cts can be initiated by a member, a faction or a committee of the Riigikogu and the Government of the Republic" and that "[a] large percentage of bills is initiated by the Government." *Legislative Work*, RIIGKOGU, https://www.riigikogu.ee/en/introduction-and-history/riigikogu-tasks-organisation-work/what-does-riigikogu/legislative-work/ [https://perma.cc/8LS5-HHWQ].

280. PÕHISEADUS [PS][CONSTITUTION] Mar. 7, 1992, art. 142 (Est.).

281. Maveety & Pettai, *supra* note 11, at 99; Chancellor of Justice Act § 15 (1999) (Est.). Most of the Chancellor's work related to constitutional review is activated by individual petitions. *E.g.*, CHANCELLOR OF JUST., 2015–2016 OVERVIEW OF THE CHANCELLOR OF JUSTICE ACTIVITIES 54–57 (2016), https://www.oiguskantsler.ee/sites/default/files/Annual%20Report%202015-2016.pdf [https://perma.cc/7P69-C8E7] (reporting 117 cases of constitutional review initiated by petitions as opposed to 8 cases assessed on the Chancellor's own initiative in 2015). Also, the Chancellor appears to focus more on the ex post review of existing statutes. *Id.* at 54 (reporting 165 cases of the ex post review as opposed to 37 cases of the ex ante review of draft legislation and other documents in 2015). The general public can submit a petition to the Chancellor on draft legislation, but the ex ante review triggered by individual petitions is allegedly a "rare practice." *See* E-mail from Kertti Pilvik, Head of International Relations and Organizational Development at the Office of the Chancellor of Justice, to Kazuo Fukuda, Ph.D., Maurer School of Law, Indiana Univ. (June 3, 2021, 3:17 AM) (on file with author).

282. Maveety & Pettai, *supra* note 11, at 99.

283. PÕHISEADUS [PS][CONSTITUTION] Mar. 7, 1992, art. 140 (Est.).

284. Chancellor of Justice Act § 7(1) (Est.).

holding a government position, participating in activities of political parties, becoming a board member of a company, and engaging in enterprises.[285] Also, the fact that the Chancellor of Justice, acting as a national human rights institution, has received an "A" status in line with the Paris Principles[286] attests to the level of independence that the Chancellor enjoys in reality. The Chancellors themselves have repeatedly stressed the importance of the institution's independent status and checks-and-balances role. For instance, Allar Jõks, the second Chancellor of Justice, emphasized that "[t]he Estonian Chancellor of Justice's institution is not part of the legislative, executive or judicial power, it is not a political or a law enforcement institution."[287] In another work, Jõks also argues that "[o]ur democracy continues to need a system of checks and balances – constitutional review institutions that would stand somewhat aside from the Big Game and be ready and able to show a red light when necessary."[288]

The "push-back" authority of the Chancellor of Justice *vis-à-vis* political branches as well as its leading review role are unquestionable from the statistical perspective: In the period of 1993–2007, about ninety-five percent of the Chancellor's proposals on constitutionally suspect legislation (365 out of 386 proposals) were addressed by political branches without objections; four percent were enforced by the Supreme Court and one percent (only two proposals) were ruled by the Court as unjustified. In the same period, the Court adjudicated 187 constitutional cases and struck down relevant statutes as unconstitutional in seventy-five cases.[289] Furthermore, the Chancellor of Justice has served as effective safeguards for people's fundamental rights. For instance, in 2016, the Chancellor of Justice found the Parental Benefit Act unconstitutional on her own initiative under the constitutional principle of equal treatment, as "the Act treats recipients of parental benefit unjustifiably unequally depending on when they earned the

285. *Id.* § 12(1).

286. The 2018 amendment to the Chancellor of Justice Act designated the Office of the Chancellor of Justice as a national human rights institution responsible for protecting and promoting people's fundamental rights. *See* CHANCELLOR OF JUST., ANNUAL REPORT: CHANCELLOR'S YEAR IN REVIEW (2019), https://www.oiguskantsler.ee/annual-report-2019/new-tasks [https://perma.cc/T6YG-G5F4]. For the accreditation status and process, see *Accreditation,* GANHRI, https://ganhri.org/accreditation/ [https://perma.cc/NH5F-QKCV]. Amongst others, the Paris Principles require a national human rights institution to be independent in terms of its legal status, membership, operations, policy, and finance. *See Paris Principles*, GANHRI, https://ganhri.org/paris-principles/ [https://perma.cc/Q2XL-LW8M].

287. CHANCELLOR OF JUST., *supra* note 272, at 13.

288. Allar Jõks, *The Chancellor of Justice's Role in Protecting the Constitution and Balancing the Legislature's Activity*, 13 JURIDICA INT'L 14, 21 (2007).

289. *Id.* at 16.

income based on which the parental benefit was reduced."[290] The Chancellor subsequently proposed to the legislature to revise concerned provisions of the Act. The latter agreed with and incorporated the Chancellor's proposal when drafting the Family Benefits Acts that combined the Parental Benefit Act with two other statutes, and the Family Benefits Act was adopted in June 2016.[291] In 2017, the Chancellor questioned the constitutionality of the procedure established under the Social Welfare Act for procuring aid devices for people with disabilities, as the cost for such devices was up to ten times higher for people living in social welfare institutions than those living at home.[292] The legislature agreed with the Chancellor's opinion and adopted an amendment to the Act in November 2018, thereby removing the discriminatory basis for determining the cost for aid devices.[293]

From the design perspective, the Chancellor of Justice presents a highly desirable if not ideal form of a non-government branch-led review model. In a sense, it embodies "a complete package": an independent constitutional institution exercising both ex ante and ex post reviews in abstract and concrete cases, backed with the real, considerable, authority to enforce corrective measures. It is highly accessible and time-efficient. Submission of applications is free of charge.[294] People can choose from a number of ways to file their complaints, such as the website, mailing, phone, and email, in different languages.[295] People can even submit their applications orally with the help of an advisor at the Office of the Chancellor of Justice, not only in the capital but also in other cities.[296] Importantly, people can expect to hear back from the Chancellor of Justice within a year for the most part: For example, the Chancellor opened 1,465 cases in 2014, of which "1308

290. CHANCELLOR OF JUST., 2015–2016 OVERVIEW OF THE CHANCELLOR OF JUSTICE ACTIVITIES 47–48 (Margus Puusepp trans., 2016).

291. *Id.* at 48.

292. *See* CHANCELLOR OF JUST., ANNUAL REPORT 2017–2018 (2018), https://www.oiguskantsler.ee/annual-report-2018/equal-treatment [https://perma.cc/B6EX-E4WP].

293. *See* CHANCELLOR OF JUST., ANNUAL REPORT: CHANCELLOR'S YEAR IN REVIEW 2018–2019 (2019), https://www.oiguskantsler.ee/annual-report-2019/social-security [https://perma.cc/3VFS-UBBZ].

294. CHANCELLOR OF JUST., CHANCELLOR OF JUSTICE OF THE REPUBLIC OF ESTONIA: GUARDIAN OF CONSTITUTIONALITY, PROTECTOR OF FUNDAMENTAL RIGHTS AND FREEDOMS, SETTLER OF DISCRIMINATION DISPUTES 8 (2006), https://www.digar.ee/arhiiv/en/download/21935 [https://perma.cc/SE5W-3NYT].

295. *See Application to the Chancellor of Justice*, ÕIGUSKANTSLER CHANCELLOR OF JUST., https://www.oiguskantsler.ee/en/application-to-the-chancellor-of-justice [https://perma.cc/4ULE-Y7B8].

296. CHANCELLOR OF JUST., *supra* note 294, at 8–9.

of the cases had been completed and 157 cases were still being investigated [as of January 19, 2015]."[297]

Such ideal characteristics notwithstanding, a key design concern is that whether or not an ombudsperson-led review model could serve as a substantive and effective check on political branches largely depends upon the Chancellor of Justice's personal qualities and how the Chancellor perceives her/his mandates. For instance, it has been argued that much of the anticipated active role "had remained underdeveloped under Truuväli," the first Chancellor of Justice under the current constitution, whereas Jõks, the second Chancellor, "gain[ed] a much greater public profile than his predecessor."[298] In fact, to discuss the level of activeness in making the Office accessible to the general public, the number of petitions filed by the public to the Office of the Chancellor of Justice reached as many as 2,352 in 2004, the fourth year of Jõks' term, as opposed to the highest number of petitions during the Truuväli's term being 1,049 in 1999.[299] The Office of the Chancellor of Justice has openly acknowledged that "the activity of the Chancellor of Justice is also influenced by his or her character, previous experience, reputation and main values."[300] In the Estonian context, however, the Office assesses that "these differences in personal characteristics have not been so large and decisive."[301] In this regard, it bears emphasis that the Constitution of Estonia virtually established a system of dual, independent constitutional review by the Chancellor of Justice *and* the Supreme Court, thereby further mitigating political influences in the review process and mutually ensuring the functioning of independent review. It is nonetheless a crucial design concern in a general sense: After all, it is a "one-person independent constitutional institution," as the Office of the Chancellor of Justice phrases it.[302] For better or worse, the fate of this model largely depends upon "one

297. CHANCELLOR OF JUST., 2014 OVERVIEW OF THE CHANCELLOR OF JUSTICE ACTIVITIES 77 (2015), https://www.oiguskantsler.ee/sites/default/files/annual_report_2014.pdf [https://perma.cc/2M7P-YTNF].

298. Maveety & Pettai, *supra* note 11, at 101.

299. CHANCELLOR OF JUST., 2008 OVERVIEW OF THE CHANCELLOR 26 (2009). This Article would not deny that other factors might have contributed to this difference. With that in mind, however, the number of petitions filed under Truuväli remained fairly low, increasing only by 400, from 619 in 1994 to 1,026 in 2000—whereas the number jumped to 1,516 in 2001, the first year under Jõks, and steadily increased during the Jõks' term, averaging more than 2,000 petitions in the second half of his term. *Id.*

300. E-mail from Kertti Pilvik, *supra* note 281.

301. *Id.*

302. *See Application to the Chancellor of Justice*, *supra* note 295.

person" unless accompanied by yet another independent watchdog as in the case of Estonia.

B. Discussion: Preliminary Thoughts on Institutional Design Implications

Thus far, this Article has argued for conceptualizing constitutional review in an institution-independent way, proposed a definition of constitutional review to reflect such a conception, and introduced an institutional implication for the institution-independent concept of constitutional review by categorizing review models into five groups. With these in mind, this Section discusses institutional design implications for states in practice by referring to design and normative considerations.

1. Design Considerations

The institution-independent concept and the proposed definition of constitutional review would properly frame the discourse on where and how to institutionalize constitutional review, rather than presuming that it must be the court and the court alone to conduct constitutional review. This is a critical point for any states that already have some form of a constitutional review mechanism in place, but especially for "blank canvas" states such as Vietnam and Laos that have yet to officially engage with the practice of constitutional review.

Typical of communist states which resist institutional control over popularly elected branches, the Constitution of Vietnam upholds the notion of legislative supremacy in which the National Assembly is vested the power to review the constitutionality of political acts and decisions, whereas such review power is not explicitly stipulated for the judiciary.[303] And yet law in books has not translated into law in action: "The Vietnamese system of constitutional protection has remained dormant for many years."[304] In fact, "[t]he National Assembly and the Prime Minister have never struck down any legal documents on constitutional grounds. The National Assembly's Standing Committee has never interpreted the Constitution."[305] Given this context, the idea of transplanting court-based constitutional review was on the verge of being realized as part of a constitutional amendment in 2013,

303. Son Ngoc Bui, *The Discourse of Constitutional Review in Vietnam*, 9 J. COMPAR. L. 191, 199 (2014).

304. *Id.* at 200.

305. *Id.*

despite the longtime tradition of legislative supremacy in Vietnam. In fact, the draft constitutional amendment circulated to the general public is said to have proposed "a constitutional council which was institutionally independent from the legislature but could only have advisory power."[306] Extensive discussions within the society notwithstanding, political leadership eventually considered it premature to adopt a court-led constitutional review mechanism. Categories of review models introduced in the previous section could expand design considerations in Vietnam. For instance, one of the rationales leading to the eventual decision not to pursue a constitutional review mechanism in the 2013 constitutional amendment was that "as the National Assembly is established in the Constitution as the supreme body of state power, a constitutional review body cannot be created."[307]

Then, instead of presuming that it must be the court that conducts constitutional review, Vietnam could perhaps explore the prospect of adopting a legislature-led review model akin to the Finnish model. The experience of the Constitutional Law Committee importantly informs that the concept of constitutional review does not necessarily jeopardize legislative supremacy. By activating its constitutional power to review the constitutionality of political actions and decisions, a Constitutional Law Committee-like body could ensure that (1) constitutionally suspect legislation is subject to review, thereby keeping the government's power in check and upholding the constitutional order, and (2) people's constitutional rights are properly protected.

The Constitution of Laos similarly stipulates that the National Assembly has the right and duty "[t]o cancel the legislation of other sectors which contradict with the constitution and laws"[308] and that the National Assembly's Standing Committee has the right and duty "[t]o interpret and explain the provisions of the Constitution and the laws."[309] Nevertheless, the National Assembly (or all branches for that matter) has yet to systematically and substantively engage with the practice of constitutional review ever since the country was established in 1975.[310] A legislature-led review model is certainly a viable option

306. Son Ngoc Bui, *Why Do Countries Decide Not to Adopt Constitutional Review? The Case of Vietnam*, *in* CONSTITUTIONAL COURTS IN ASIA, *supra* note 109, at 335, 340.

307. *Id.* at 344.

308. LAOS CONST. Aug. 14, 1991, art. 53, cl. 20.

309. *Id.* art. 56, cl. 2.

310. A number of high-ranking officials have confirmed this point in Zoom interviews conducted in January–March 2022, including, but not limited to, Ket Kiettisak (former Vice Minister of Justice), Ketsana Phommachanh (Vice Minister of Justice), and Bounkhouang

in the Lao context, given that the notion of legislative supremacy is constitutionalized.[311] An executive-led review model may be another intriguing design option. In Laos, the executive branch drafts a majority of laws. It was responsible for developing 128 out of 163 laws published by the Lao Official Gazette as of May 2022, whereas the National Assembly drafted only eight laws that directly concern its own mandates.[312] More importantly, the executive branch is responsible for reviewing *all* draft statutes, except for ones drafted by the legislature.[313] The logic follows that the executive branch as a principal law drafter *and* reviewer of the land should "avoid any suspicion over the constitutionality at the drafting stage"[314] and "constitutional interpretation cannot be left up to each ministry or agency but rather needs to be unified [within the executive branch]."[315] In short, the establishment of a review body within the executive branch may be a logical course of action in Laos to ensure the constitutionality of draft laws and alleviate burdens otherwise imposed on the National Assembly which allegedly "faces many constraints in terms of being able to function as an effective representative Assembly."[316]

The institution-independent concept and the proposed definition of constitutional review also provides a useful forum for reform-minded states that already have some form of a review mechanism in place. For instance, the Commission of the Constitution at the House of Representatives in Japan has debated, as recently as in 2013, prospects for reforming a constitutional review mechanism, such as the establishment of a constitutional court, a department specialized for constitutional review within the Supreme Court, or a constitutional law committee in the National Diet (with the specific reference made to the Constitutional Law Committee in Finland).[317] What is intriguing in

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Thavisak (Vice President of People's Supreme Court). For more details, see Fukuda, *supra* note 92, at 177–79.

311. The constitution of Laos designates the National Assembly as "the highest power organization of the State." LAOS CONST. Aug. 14, 1991, art. 52.

312. Based on the number of laws listed in the Lao Official Gazette. For more details, see *Ministry of Justice*, LAO OFF. GAZETTE, http://laoofficialgazette.gov.la/index.php?r=site/index [https://perma.cc/B97K-LEXD].

313. Law on Making Legislation, art. 41 (Laos).

314. SAKATA, "HŌ NO BANNIN," *supra* note 78, at 53.

315. *Id.* at 28.

316. RICHARD SLATER & KHAMLOUANG KEOKA, TRENDS IN THE GOVERNANCE SECTOR OF THE LAO PDR 17 (2012).

317. SECRETARIAT FOR COMM'N CONST. HOUSE REPRESENTATIVES, KENPO NI KANSURU OMONA RONTEN (DAI 6 SHOU SIHOU) NI KANSURU SANKOU SHIRYOU [REFERENCE ON MAIN

this regard is that the Commission of the Constitution at the House of Representatives discussed the prospect of establishing a legislative review body akin to the Constitutional Law Committee in Finland *despite* the Constitution of Japan explicitly vesting the review power in the court.[318] In its discussions, the Commission raised its concern over judicial passivism; in fact, members opined that the judiciary has not sufficiently fulfilled its constitutional review role, as it has been passive in determining the constitutionality of constitutionally suspect legislation and striking it down.[319] Should Japan ever decide to establish a Constitutional Law Committee-like review body in the legislature, it may represent a first-ever example of a co-equal review model, as all three branches would be equipped with their own review body (the Cabinet Legislation Bureau, a Constitutional Law Committee, and courts). As mentioned earlier, co-equal models inherently face the potential issue of the interpretive anarchy that results from multiple authorities involved in constitutional review.[320] However, in the Japanese context, it may effectively address such an issue by sharing the understanding that the judiciary holds the "final word" authority. Under this overall framework, one can reasonably expect that a relative equilibrium and inter-branch dialogue will be maintained; courts in Japan follow the U.S. model and conduct only ex post review in concrete cases, whereas the CLB and a Constitutional Law Committee-like body conduct ex ante review of draft statutes.

In the Netherlands, the so-called Halsema Proposal, the 2002 constitutional amendment proposal to reconsider the bar on judicial constitutional review and introduce the U.S. review model, allegedly lapsed in 2018.[321] However, in the same year, the State Commission on the Parliamentary System, tasked to study the country's parliamentary system, proposed in its report the establishment of a constitutional court.[322] Regardless of whether it is the U.S. or Kelsenian model, the adoption of a court-based review mechanism will address the long-term issue in the Netherlands: the lack of ex post review in concrete cases. In other words, it would represent a review model led by an

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DISCUSSION POINTS REGARDING THE CONSTITUTION (CHAPTER 6 JUDICIARY)] 1–9 (2013), https://www.shugiin.go.jp/Internet/itdb_kenpou.nsf/html/kenpou/shukenshi081.pdf/$File/shukenshi081.pdf [https://perma.cc/L392-QAEP].

318. NIHON-KOKU KENPŌ [CONSTITUTION], May 3, 1947, art. 81 (Japan).

319. SECRETARIAT FOR COMM'N CONST. HOUSE REPRESENTATIVES, *supra* note 317, at 2.

320. Alexander & Solum, *supra* note 92, at 1611–13.

321. *See* van der Schyff, *supra* note 243, at 884.

322. *Id.* at 889. *See generally* W.L. Valk, *Constitutional Review and the Current Practice in the Netherlands*, 4 MUNICH SOC. SCI. REV. 37 (2021) (assessing the State Commission's proposal to establish a constitutional court).

independent actor for the ex ante review (i.e., the Council of State) and the court for the ex post review. In this regard, the Netherlands could further strengthen the ex ante review process by, for instance, detaching the constitutional review work from the Advisory Division of the Council of State and solidifying the independent and authoritative review function under a separate review body located either in the executive (e.g., the Cabinet Legislation Bureau in Japan), the legislature (e.g., the Constitutional Law Committee in Finland), or an ombudsperson's office (e.g., the Chancellor of Justice in Estonia). Main concerns with the Advisory Division are that (1) although its opinions are generally well-respected and often sought after,[323] it "only gives advice and thus does not issue binding judgments"[324] and (2) it advises on the substance of draft statutes.[325] Either of these three design options could issue authoritative and dispassionate opinions to fully establish the ex ante review process, and work closely with either a constitutional court or ordinary courts. This could give rise to a clear division of labor between the review by the Council's Advisory Division of the desirability and feasibility of first-order decisions and the review by a review body of the constitutional legitimacy and authenticity of such decisions.

The point here is that the institution-independent concept of constitutional review provides countries with more design options and serves as a useful forum to ponder how best to address constitutional controversies in society. To be clear, this Article certainly recognizes the institutional legitimacy and strengths of court-led models and does not advocate for abolishing such models. Nor does this Article intend to endorse particular design options for the countries mentioned above.

Rather, the underlying aim of arguing for the institution-independent concept of constitutional review is to "free" the practice of constitutional review from the court-specific framework and suggest reassessing the question of how and where to institutionalize constitutional review in a more institutionally impartial way. As demonstrated in this Section, approaching these questions from an institutionally independent perspective may present opportunities, for example, for "blank canvas" states to explore all viable design options and for reform-minded states to reevaluate their existing review models (i.e., most likely court-led ones) and consider other options to further strengthen the review mechanism.

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323. NAP, *supra* note 263, at 1.

324. De Poorter, *supra* note 8, at 92.

325. For an example of the Council's Advisory Division advising on the substance of draft statutes, see *supra* note 268 and accompanying text.

In short, the institution-independent concept of constitutional review helps policymakers and other stakeholders to go beyond the traditional framework largely centered around the court and revisit the question of how best to optimize a constitutional review mechanism in a way that is conducive to local conditions and contexts.

2. Normative Considerations

One obvious normative question that derives from the proposed institution-independent concept of constitutional review is whether all these review models described earlier should be juxtaposed on the same spectrum (i.e., whether they are all capable of performing the functions of constitutional review to a satisfying degree, whether non-judicial bodies and actors should engage with the practice of constitutional review, and whether it should belong to the province of the court). To reiterate the view of this Article on these normative questions, that major democracies such as the Netherlands, Finland, and Japan have historically solidified the rule of law traditions and protected people's fundamental rights without engaging with court-led review mechanisms either actively or at all should not be understated.[326] In this regard, Dahl similarly argues:

> No one has shown that countries like the Netherlands and New Zealand, which lack judicial review, or Norway and Sweden, where it is exercised rarely and in highly restrained fashion, or Switzerland, where it can be applied only to cantonal legislation, are less democratic than the United States, nor, I think, could one reasonably do so.[327]

Of course, certain review models are fundamentally different from each other in terms of the institutional nature and the types of review conducted. For instance, a critical difference between the court and executive agencies is that the former is an adjudicatory entity, and the latter is not in terms of their engagement with constitutional review. That does not automatically mean, however, that court-led review models and executive-led review models should not be juxtaposed on the same spectrum. Recall that in the case of the CLB in Japan, a former Supreme Court chief justice officially acknowledged that meticulous review by the Bureau has effectively minimized the

326. Recall that Finland, the Netherlands, and Japan have been ranked consistently highly in various surveys of democracies. *See supra* notes 12–14.

327. ROBERT DAHL, DEMOCRACY AND ITS CRITICS 189 (1989).

adoption of constitutionally suspect legislation.[328] Given that (1) the executive branch drafts more than eighty percent of all enacted bills in Japan,[329] (2) the Supreme Court has struck down only nine statutes as unconstitutional in eleven court cases,[330] and (3) most if not all of these statutes were drafted by the Diet (thus not going through the Bureau's review),[331] the CLB has undoubtedly played a leading role in Japan in ensuring the conformity of political acts with the constitution.

In other words, various review models have rivaled each other to the extent that a more thorough analysis is certainly warranted on the question of whether all these review models should be juxtaposed on the same spectrum. Furthermore, as evident from the aforementioned weaknesses and challenges of each model, it should be stressed that there is no such thing as a perfect model of constitutional review. In fact, BeVier once mentioned that "'Nirvana,' the situation in which we get the right institutional actor to reach the right outcome every time, is, unfortunately, not an option. A perfect, reliable institutional actor does not exist."[332] In other words, even court-led models that have been most widely adopted across the world have suffered from institutional flaws and challenges (or so critics have argued) and thus faced the need to repeatedly defend its legitimacy and value as an effective review mechanism. In this sense, who is better or more suitable than others in playing a leading role in constitutional review is a straightforward and yet perhaps perennial question for constitutional law scholars and policymakers to address. As Adams and van der Schyff articulate it succinctly, "[s]imply put, which institutions are entrusted with the power of constitutional review is a question that has different answers for different societies."[333] From the design perspective, it would mean that regardless of whichever form of a constitutional review model countries have adopted or will adopt, they must

328. *See supra* note 199 and accompanying text.

329. *See* CABINET LEGIS. BUREAU, *supra* note 178.

330. *See supra* note 196 and accompanying text.

331. Of these nine statutes struck down, only one was definitely drafted by the executive. However, Sato speculates that the CLB's review was not as thorough as it usually is, given the fact that this statute was enacted in 1947 when the SCAP was considering abolishing the CLB (in fact, it was temporarily abolished in 1948). Sato, *supra* note 184, at 89. Perhaps for this reason, Nishikawa argues that "there have been no statutes reviewed by the Cabinet Legislation Bureau that have been struck down as unconstitutional ever since the first ordinary session in the post-war." NISHIKAWA, RIPPO NO CHŪSŪ, *supra* note 78, at 23.

332. Lillian R. BeVier, *Religion in Congress and the Courts: Issues of Institutional Competence*, 22 HARV. J.L. & PUB. POL'Y 59, 63 (1998).

333. Maurice Adams & Gerhard van der Schyff, *Constitutional Review by the Judiciary in the Netherlands: A Matter of Politics, Democracy or Compensating Strategy?*, 66 HEIDELBERG J. INT'L L. 399, 413 (2006).

acknowledge such challenges and design their review mechanism in a way that it sufficiently meets the proposed definition of constitutional review and reasonably addresses inherent issues of that particular model discussed above.

CONCLUSION: TOWARDS THE GENERAL LITERATURE ON STUDY OF CONSTITUTIONAL REVIEW

This Article sought to solidify the *concept* of constitutional review in a way that is detached from particular institutions and actors by proposing a working definition to operationalize such a concept: *authoritative practices premised on second-order reasoning, conducted by actors independent from ones engaged in first-order decisions, to evaluate and determine the conformity of political acts with the constitution*. Subsequently, translating the definition into practice, this Article embarked on a preliminary categorization of existing constitutional review models and discussed what these review models would mean for countries in practice.

Through such discussions, this Article sought to demonstrate that the values and needs of conceptualizing constitutional review in an institutionally independent manner are undeniable. In concluding, this Article argues that the proposed definition of constitutional review ultimately paves the way for developing the general literature on the study of constitutional review. The categorization of institutional arrangements merely constitutes part of such literature. In fact, researchers can revisit, for example, the history and also the purposes of constitutional review from the institution-independent perspective that have been predominantly shaped around the court.[334] In this respect, without reinventing the wheel, the general literature on constitutional

334. For the history of (judicial) constitutional review, see, for example, Prakash & Yoo, *supra* note 112; GERBER, *supra* note 112, at 1606–1787. For the purposes of (judicial) constitutional review, one group of scholars emphasize legitimacy enhancement. *See, e.g.*, Charles Black, *The Building Work of Judicial Review*, *in* MODERN CONSTITUTIONAL THEORY: A READER 215–16 (John H. Garvey, T. Alexander Aleinikoff & Daniel A. Farber eds., 5th ed. 2004); Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 LAW & PHIL. 327, 362–68 (1990). Others discuss the function of settlement. *See, e.g.*, Alexander & Schauer, *On Extrajudicial Constitutional Interpretation*, *supra* note 101, at 1371–81; Alexander & Schauer, *Defending Judicial Supremacy*, *supra* note 101, at 457, 467–73; Waldron, *The Core of the Case*, *supra* note 104, at 1369; BELLAMY, *supra* note 108, at 4. Scholars also refer to the purpose of constitutional review as embodying the separation of powers principle. *See generally* DWORKIN, *supra* note 99. Constitutional review also provides safeguards for enjoyment and realization of fundamental rights. *See, e.g.*, Chemerinsky, *supra* note 97, at 1463–67; Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1695–99 (2008).

review could build upon the existing literature that has articulated important design areas such as accessibility, timing and scope of review, membership, qualifications, appointments, terms, structure and size of reviewing institutions, and accountability mechanisms.[335] The central task for the general literature on constitutional review is to steer the existing literature towards more institution-independent directions, thereby shifting away from the traditional framework developed around courts and judges.

In this regard, the institution-independent concept of constitutional review simply multiplies the prospects for comparative analysis. As articulated earlier, to take the timing of review as an example, researchers can pursue both qualitative and quantitative studies on (1) the ex ante review conducted by different institutions, (2) the ex post review by these institutions, (3) the ex ante review by non-court bodies against the one by courts, and (4) systems combining the ex ante review by non-court bodies and the ex post review by courts against systems with only courts conducting both reviews. Similarly, setting the timing of review aside, scholars can delve into institutional strengths and weaknesses by studying, for instance, the review by the legislature against the executive, political branches against courts, government bodies against independent actors, and ordinary legislative houses against more specialized and independent legislative bodies. The list of possibilities can go on and on.

In short, the institution-independent concept of constitutional review in itself embodies much scholarly potential from various perspectives. Discussions in this Article only represent part of larger efforts needed towards establishing the general literature on constitutional review, which can be only consolidated with further research. Thus, in conclusion, this Article calls for a new research direction so as to capture the essence of constitutional review in a more institution-independent sense.

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335. *E.g.*, Herman Schwartz, *The New East European Constitutional Courts*, 13 MICH. J. INT'L L. 741 (1992) (comparing constitutional courts in Eastern Europe and the U.S. Supreme Court in such areas as subject matter jurisdiction, justiciability/standing, and appointments and terms of judges); Jaakko Husa, *Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective*, 48 AM. J. COMPAR. L. 345 (2000) (comparing constitutional review mechanisms in Scandinavia over the timing of review, types of review (abstract and concrete), and basis for review); Craig, *supra* note 6 (comparing different court systems over types of review (abstract and concrete as well as individual challenge), timing of review, types of statutes to be challenged, and standard/basis of review); GINSBURG, *supra* note 33, at 36–48 (introducing such design consideration as accessibility to review, types of review (abstract and concrete), legal effects of review, appointment and accountability mechanisms, term length, and size of reviewing institutions).