A FOURTH MODEL OF CONSTITUTIONAL REVIEW? DE FACTO EXECUTIVE SUPREMACY

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ABSTRACT

Scholarship engaging the controversial question of whose interpretation of the constitution shall prevail has focused on three models: judicial supremacy, legislative supremacy, and departmentalism. Of late, the literature has centered on questions regarding the authority and/or status of the judiciary. This study argues that this important debate has neglected the prospect of a fourth model of constitutional review: de facto executive supremacy. To make its case, it examines Japan's Cabinet Legislation Bureau—an executive branch-based institution that has acted as Japan's de facto supreme interpreter of the constitution and draft statutes—despite the existence of a judicial branch explicitly empowered constitutionally to do so. Supplemented by comparative analysis with France's Conseil d'État and the U.S.' Office of Legal Counsel, this article emphasizes the role of executive institutions in the law-making process in both theory and practice and discusses potential implications of considering de facto executive supremacy as a legitimate model.

KEY WORDS

executive branch, constitutional review, constitutions, judicial politics, Japan

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INTRODUCTION

In 1986, Walter F. Murphy famously posed a provocative question — "who shall interpret the constitution?"—and proposed three possible answers (models): judicial supremacy, legislative supremacy, and departmentalism.[1] In the four decades since, "who shall interpret the constitution?" and "whose interpretation shall prevail?" have been central organizing questions for major debates in constitutional law and political science. Over the years, the model of judicial supremacy has attracted the most attention: after all, as Ginsburg and Versteeg note, more than 80 percent of existing constitutions have explicitly established a judicial review mechanism (without including such states as the United States and Australia whose constitutions do not make explicit references to judicial review),[2] and, allegedly, such mechanisms, once adopted, have never been abolished.[3] Yet do these three prevailing models sufficiently capture the theoretical and real-world possibilities for constitutional review?[4]

This article argues that scholars should consider a fourth model of constitutional review: *de facto executive supremacy*. To be clear, this suggestion that scholars seriously consider such a model is *not* part of a normative claim, but a dispassionately analytical one based on observation of real-world cases. Nor is it an assertion that executive supremacy exists in a "pure," de jure sense. In fact, this article takes no

[1] *See generally* Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401 (1986).

[2] Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 J. L. ECON. & ORG. 587, 587 (2014). The mere existence of judicial review in a certain society does not necessarily mean it upholds the principle of judicial supremacy. *See, e.g.,* Whittington, *infra* note 29, at 778, 784–85. However, scholars have argued that judicial supremacy has become increasingly prevalent globally, as more countries adopt U.S. or European style courts-led review mechanisms that effectively subordinate the legislature to the courts. *See, e.g.,* STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE 2–7 (2013); Miguel Schor, *Mapping Comparative Judicial Review*, 7 WASH. U. GLOBAL STUD. L. REV. 257, 259–70. Thus, the constitutionalization of a judicial review mechanism generally signals the acceptance of judicial supremacy. But as in the case of Japan, mere constitutionalization does not necessarily guarantee judicial supremacy in reality.

[3] Mark Tushnet, *Against Judicial Review* 16 (Harvard Law Sch., Pub. Law & Legal Theory, Research Paper Series, Working Paper, No. 09-20, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1368857.

[4] This article consciously uses the term "constitutional review" throughout this article to stress an important distinction between constitutional review and *judicial* review; as far as constitutional review is concerned, the latter is a category of the former and the two terms should not be used interchangeably. After all, if defined simply as the assessment of the constitutionality of statutes as well as the affirmation of constitutional meanings, constitutional review conducted outside the judiciary is ubiquitous. Highlighting this distinction is important for precision and accuracy in the interpretive supremacy debate. *See, e.g.,* Mark Tushnet, *Non-Judicial Review*, 40 HARV. J. ON LEGIS. 453 (2003).

issue with Gant's argument that "the notion of pure executive supremacy has yet to find an exponent among academicians."[5] Rather, it uses the case of Japan to highlight that de facto executive supremacy is not only an empirical reality, but one which warrants further consideration from scholars interested in the fundamental questions of "who shall interpret?" and "whose interpretation shall prevail?"

Though historically modeled on the French *Conseil d'État*, the modern (post-World War II) version of Japan's Cabinet Legislation Bureau (hereafter, CLB) has charted a remarkable path since its resurrection after Japan regained its sovereignty with the end of the U.S.-led post-war Occupation in 1952. Part of the Cabinet and staffed mostly by career bureaucrats seconded from various executive-based ministries, rather than independent judges, it has enjoyed extraordinary authority to determine the constitutionality of draft legislation developed by line ministries and agencies.[6] Yet it remains conspicuously under-examined in related literatures in constitutional law and political science.[7] That the CLB has not received much attention is especially remarkable in light of its preeminent role shaping major legislation and policies in Japan, and in determining their constitutionality in the world's third-largest economy.

With an emphasis on the interpretation of the constitution and also the constitutional review of draft statutes conducted by this executive agency, this article uses Japan's CLB to argue that scholars should revisit the questions of "who shall interpret the Constitution" and "whose interpretation shall prevail?" In particular, it asks whether scholars should rethink the overwhelming centrality of the judiciary in scholarship engaging these questions. In addition to shedding light on (1) the importance of incorporating the missing perspective of de facto executive supremacy into debates about the "whose interpretation shall prevail?" question, this study also highlights (2) the need to critically

[5] Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 380 (1997). Gant refers extensively to the work of Michael Stokes Paulsen when discussing the model of executive supremacy, but it is clear from his argument that Paulsen advocates for a departmentalist approach: "The power to interpret law is not the sole province of the judiciary; rather, it is a divided, *shared* power not delegated to any one branch but ancillary to the functions of all of them within the spheres of their enumerated powers." *Id.* (quoting Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L. J. 217, 221 (1994)).

[6] For the overview of the CLB, see generally Richard J. Samuels, *Politics, Security Policy, and Japan's Cabinet Legislation Bureau: Who Elected These Guys, Anyway?*, JAPAN POLICY RESEARCH INSTITUTE WORKING PAPER NO. 99 (2004); SHINICHI NISHIKAWA, SHIRAREZARU KANCHOU: NAIKAKU HOUSEIKYOKU [AN UNKNOWN GOVERNMENT OFFICE: CABINET LEGISLATION BUREAU] 78 (2000).

[7] For the literature available on the CLB, see, for example, *supra* note 6 and *infra* notes 36–42.

examine possible gaps between law in books and law in action, (3) the empirical, normative, and design implications for the executive-led constitutional review, and (4) a new perspective on the debate surrounding constitutional review by non-judicial bodies.

This article is organized as follows: Section I reviews relevant literatures that motivate the study, with a particular emphasis on highlighting how the three prevailing models do not articulate satisfactorily the possibility of the executive branch serving as the final interpretive authority in constitutional review. Next, Section II illustrates this model primarily through an analysis of Japan's CLB. After introducing the CLB's form and function, this section highlights its central role in constitutional interpretation in Japan. Comparing the CLB with ostensibly similar executive bodies generally more familiar to scholars outside Japan—France's *Conseil d'État*[8] and the United States' Office of Legal Counsel—Section III puts a spotlight on the existence and legal/political significance of constitutional review by non-judicial, executive bodies. The penultimate section, Section IV, discusses possible theoretical implications of a fourth model of de facto executive supremacy and suggests several avenues for future research. The final section concludes.

I. WHOSE INTERPRETATION SHALL PREVAIL? THREE COMPETING MODELS OF CONSTITUTIONAL REVIEW

The existing literature engaging the question of "whose interpretation shall prevail?" has traditionally focused on three competing models: judicial supremacy, legislative supremacy, and departmentalism. What follows is an overview of the core arguments of each. This brief summary cannot possibly do justice to the rich academic debates in constitutional law and political science concerning the validity, strengths, and weaknesses of each model—and such a fulsome critical review is beyond this article's scope. Rather, the following overview intends only to place this study's call for consideration of a "fourth model" in conversation

[8] The relationship between the *Conseil d'État* and the executive branch is complicated. The *Conseil* simultaneously serves as both (1) legal advisor for the executive branch and (2) the supreme court for administrative justice. Nevertheless, Bernard Ducamin, former Secretary General of *Conseil d'État*, notes that "The *Conseil d'Etat* is a consultative organ for the Government. It is a part of the Executive branch." Bernard Ducamin & William Dale, *The Role of the Conseil d'Etat in Drafting Legislation*, 30 INT'L & COMP. L. Q. 882, 885 (1981). Accordingly, this article focuses on the *Conseil d'État*'s advisory role and treats it as part of the executive branch (albeit a highly independent one), while also recognizing the complexity of the relationship.

with the three existing models and, in doing so, to make the case that the literature has overlooked de facto executive supremacy as a legitimate model.[9]

A. Judicial Supremacy

The first major model basically argues that in exercising its power of judicial review the judiciary is the final interpretive authority of the constitution and its meanings.[10] As such, other branches are obliged to obey and follow the judiciary's decisions, interpretations, logics, and reasoning.[11] As noted earlier, though some scholars have criticized judicial review as being in inherent tension with democracy,[12] the notion of judicial supremacy is a core feature of constitutional review in most societies. In the United States it is now so firmly entrenched that reportedly "[n]o public official has questioned judicial supremacy since Edwin Meese received a drubbing for doing so in 1984."[13] In fact, though the mechanism of judicial review has evolved over time, the concept of judicial supremacy itself has remained as a central feature of the U.S. judicial system.[14] Its legitimacy and justification primarily derive from (1) "[a] practical need for an umpire"[15] that settles and unifies constitutional meanings within a state; (2) time and institutional

[9] Some scholars note an important role played by the executive branch in constitutional review. *See, e.g.,* David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO. L. REV. 113 (1993); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005); David Kenny & Conor Casey, *Shadow Constitutional Review: The Dark Side of Pre-Enactment Political Review in Ireland and Japan*, 18 INT'L. J. CONST. L. 51 (2020). However, they generally do not situate their arguments within the interpretive supremacy debate, nor do they identify the executive branch as offering an alternative model to the three prevailing models.

[10] *See, e.g.,* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1359 (1997); Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 455 (2000); Dale Carpenter, *Judicial Supremacy and Its Discontents*, 20 CONST. COMMENT. 405, 405 (2003). *See generally* Daniel A. Farber, *The Importance of Being Final*, 20 CONST. COMMENT. 359, 360-364 (2003); Erwin Chemerinsky, *In Defense of Judicial Supremacy*, 58 WM. & MARY L. REV. 1459, 1459 (2017).

[11] Gant, *supra* note 5, at 367.

[12] *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (1962); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346, 1391–93 (2006); Tushnet, *supra* note 3, at 11–14. *See generally* Lino A. Graglia, *Rethinking Judicial Supremacy*, 31 CONST. COMMENT. 381 (2016).

[13] LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 228 (2004). For a historical overview of judicial supremacy in the U.S., see, for example, Wallace Mendelson, *Sectional Politics and the Rise of Judicial Supremacy*, 9 J. POL. 255 (1947); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998).

[14] Robert J. Harris, *Judicial Review: Vagaries and Varieties*, 38 J. POL. 173, 207 (1976).

[15] Murphy, *supra* note 1, at 407.

constraints on the part of the executive and the legislature that do not allow for "dispassionate, coherent, consistent, and systematic analysis"[16] of constitutional issues; (3) "constitutionalism's objective of protecting individual liberty by limiting government"[17]; and (4) the role of the judiciary as a check on executive and legislature power.[18]

B. Legislative Supremacy

This second model argues that the legislature's constitutional interpretation should be final and should prevail over that of the other branches.[19] Proponents of legislative supremacy contend 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."[20] Generally speaking, scholars allow that legislative supremacy inherently necessitates some cooperation between the legislature and the judiciary. However, there is a spectrum of different views.[21] In the words of Larry Kramer, legislative supremacy (or popular constitutionalism) essentially "means insisting that the Supreme Court is our servant and not our master: a servant whose seriousness and knowledge deserves much deference, but who is ultimately supposed to yield to our judgments about what the Constitution means and not the reverse."[22] Despite the normative appeal

[16] *Id.*
[17] *Id.* at 408.
[18] Gant, *supra* note 5, at 391.
[19] *Id.* at 373–74. Also, *see generally* RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY (2007); JEFFREY GOLDSWORTHY, THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY (2001).
[20] Gant, *supra* note 5, at 374.
[21] For instance, the "strong" legislative supremacy sees little or no significant role for the courts. Generally speaking, they contend that the legislature "is able to enact or repeal any law whatsoever, and that the courts have no authority to judge statutes invalid for violating either moral or legal principles of any kind. Consequently, there are no fundamental constitutional laws that Parliament cannot change, other than the doctrine of parliamentary sovereignty itself." GOLDSWORTHY, *supra* note 19, at 1. In contrast, the "weak" legislative supremacy regards the court as more of a "relational agent" that holds some degree of discretionary power when facing unclear legislative intents and commands, rather than playing little or no significant role. Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 CASE W. RES. L. REV. 1129, 1142 (1992). To be clear, Correia is primarily concerned with the principle of legislative supremacy in statutory interpretation from the policy-making perspective (i.e., "courts should respect and apply policy decisions of the legislature"). Correia, *supra* note 21, at 1132. Nonetheless, the conception of the court's role as a "relational agent" presented in Correia's work is a useful and easily translatable metaphor for the concept of legislative supremacy in the context of constitutional review.
[22] KRAMER, *supra* note 13, at 248. Kramer does not necessarily advocate for legislative supremacy, as he considers the people themselves to be the ultimate arbiter of constitutional matters.

embedded in the idea of legislative supremacy for some, empirically speaking, in recent years it has lost much of the status and appeal that it used to enjoy as the once-dominant governing mechanism. Most states have shifted to a constitutional review mechanism centered on the courts (the U.S. or Kelsenian model).[23]

Though arguments vary among scholars, advocates of judicial and legislative supremacy do not necessarily call for the elimination of constitutional review by other branches. There are exceptions, however. For example, Mark Tushnet criticizes judicial review to the extent of advocating the abolition of judicial review in favor of legislative supremacy.[24] More common are less categorical views like that of Larry Alexander and Frederick Schauer, who are strong proponents of judicial supremacy but do not argue that the power of constitutional review should be exclusive to the judiciary. Rather, they contend that political branches should obey judicial interpretations given the judiciary's settlement function of law.[25] Alternatively, Stephen Gardbaum considers the concepts of judicial and legislative supremacy to exist on a continuum. This conceptualization allows for the co-existence of constitutional review by multiple branches, while retaining a degree of legislative supremacy. [26] Similarly, Larry Kramer recognizes the legitimacy of judicial review but rejects judicial supremacy as an appropriate approach to constitutional interpretation.[27] Much of the debate centers on the question of which branch should be regarded as

But because the legislature is seen as the most "democratic" branch, the quote here is highly relevant and applicable to discussions about legislative supremacy. Both legal supremacy and popular constitutionalism essentially argue for judicial subordination to the legislature or the people, respectively.

[23] *See generally* 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. COMP. L. 613 (2014).

[24] *See generally* Mark Tushnet, *Abolishing Judicial Review*, 27 CONST. COMMENT. 581 (2011). Waldron does not necessarily argue for the abolition of judicial review, but has clearly argued that "judicial review of legislation is inappropriate as a mode of final decisionmaking in a free and democratic society." Waldron, *supra* note 12, at 1348.

[25] Alexander & Schauer, *supra* note 10, at 1359–62.

[26] *See generally* Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001); Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8 INT'L. J. CONST. L. 167 (2010). Gardbaum argues that the "New Commonwealth Model of Constitutionalism" essentially represents a "middle ground" between judicial and legislative supremacy models by introducing a weak form of judicial review in states that traditionally uphold the latter.

[27] Larry D. Kramer, *Response*, 81 CHI.-KENT L. REV. 1173, 1180 (2006) (arguing that "I am not opposed to judicial review, and it's important to realize that. My goal is simpler: to shear off judicial supremacy from judicial review and thus restore a true departmental system. Judges have a useful and sensible voice when it comes to questions of constitutionality.").

the *final* authority when interpreting the constitution and its meanings; not whether the others lack legitimacy.

C. Departmentalism

Unlike the two models above, the third major model—departmentalism—essentially "refrains from anointing any one branch as 'supreme' interpreter, and instead asserts equality, or 'coordinacy,' among two or more departments. It holds that all of the branches, or 'departments,' of the federal government co-exist, equal in their capacity and authority to interpret the Constitution."[28] Considered by political scientist Keith Whittington to be "[t]he most significant historical and theoretical alternative to judicial supremacy," [29] supporters of departmentalism argue it is superior for several reasons:

> "(1) many problems, such as those involving immigration, foreign policy, and national defense, do not lend themselves to judicial resolution; (2) judges often defer to Congress; and (3) even in situations amenable to judicial resolution, the general pattern of acceptance of courts' interpretations has 'been broken enough for tradition to supply a shaky basis for judicial supremacy.'"[30]

One issue highlighted by critics of departmentalism, however, is its inherent indeterminism about who should serve as the final interpretive authority when different branches—whose interpretive authorities are supposedly co-equal—disagree.[31]

[28] Gant, *supra* note 5, at 383–84. *See also* Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 351–355 (1994); Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105, 108–09, 121 (2004).

[29] Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N. C. L. REV. 773, 782–83 (2002).

[30] Gant, *supra* note 5, at 384–85. The original quotation for the third reason is from Murphy, *supra* note 1, at 413.

[31] Edward Rubin, *Judicial Review and the Right to Resist*, 97 GEO. L.J. 61, 113 (2008).

E. Toward a Missing (Fourth) Model: De Facto Executive Supremacy

To date, scholarly debate regarding the "whose interpretation shall prevail?" question has primarily centered on the three aforementioned models. In recent years, judicial supremacy represents the dominant current in the scholarly literature—an idea with which this article takes no general issue. Indeed, even in Japan—the motivating case central to this study—the Constitution's Article 81 clearly stipulates that "[t]he Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act."[32] In other words, Japan's own 1947 Constitution—which, incidentally, has never been amended—appears to have unequivocally answered the "whose interpretation shall prevail?" question in favor of judicial supremacy.

Yet, when one moves beyond theory and analysis of constitutional texts themselves to examine how constitutional review is actually exercised *in practice*, the Japanese case reveals an extremely important and largely unexamined, fourth model: de facto executive supremacy. Though executive supremacy does not exist in a pure, de jure sense, the role of Japan's Cabinet Legislation Bureau—and the remarkable passivity of its judiciary despite what is written into the constitution—exposes an empirical puzzle and observable gap between law in books (de jure) and law in action (de facto). To be sure, several constitutional law scholars have already examined constitutional review by non-judicial bodies.[33] Yet scholarship specifically analyzing prospects for, much less the empirical reality of, executive-led constitutional review—for example, the important role bureaucrats play in the law-making process in some parliamentary systems (e.g., Japan) where the executive branch conducts substantial statutory development—remains sparse. For example, a seminal recent study analyzing non-judicial institutions and which examines the constitutionality of draft statutes mentions the Japanese case, but refers only to Japan's *legislature-based* bureaus.[34] In other words, it overlooks the executive-based institution that matters much more for constitutional review in practice: Japan's Cabinet-based CLB. In

[32] Nihonkoku Kenpō [Kenpō] [Constitution], art. 81 (Japan).

[33] *See, e.g.,* Murphy, *supra* note 1; Alexander & Schauer, *On Extrajudicial Constitutional Interpretation*, *supra* note 10; Alexander & Schauer, *Defending Judicial Supremacy: A Reply*, *supra* note 10; Gant, *supra* note 5; Bruce G. Peabody, *Nonjudicial Constitutional Interpretation, Authoritative Settlement, and a New Agenda for Research*, 16 CONST. COMMENT. 63 (1999); Whittington, *supra* note 29; MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Tushnet, *supra* note 4.

[34] MARK TUSHNET, ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW 47 (2014).

short, the important role played by Japan's executive branch in constitutional review has been overlooked in the theoretical and non-case-specific literature, including even the sub-literature focused specifically on constitutional review by non-judicial bodies.

Moreover, the relatively small *case-specific* literature in Japanese and English also does not directly engage the questions central to this study. Studies of the CLB by political scientists generally focus on important but specific national security-related questions—e.g., the CLB's role defining the government's official interpretation of the Article 9 "peace clause" of Japan's (never-revised) Constitution, and/or the dynamics (and frictions) between politicians and the CLB. For example, Richard Samuels' landmark 2004 study examines how Japan's prime ministers, their advisors, or rank-and-file Diet members have intermittently challenged the CLB's constitutional and statutory interpretations on national security matters.[35] A historic 2014 Cabinet Decision that effectively overturned a long-standing CLB interpretation of Article 9 that effectively prohibited the United Nations Charter-sanctioned exercise of collective self-defense prompted more analysis by political scientists on related questions.[36] On the other hand, legal scholars typically assess the significance of CLB influence for questions related to judicial review (judicial passivism) in Japan. For example, David Law,[37] Junichi Satoh,[38] Iwao Sato,[39] Yasuo Hasebe,[40] and Shigenori Matsui[41] all examine the general reluctance of Japan's judiciary to exercise its constitutionally-sanctioned power of judicial review. They attribute the judiciary's disinclination partially to the CLB's meticulous ex-ante statutory review, which effectively assures the courts of the unassailable

[35] *See* Samuels, *supra* note 6.

[36] *See, e.g.,* 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. REV. 99 (2017); 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).

[37] David S. Law, *Why Has Judicial Review Failed in Japan?*, 88 WASH. U. L. REV. 1425, 1456 (2011). Law expresses skepticism about the substantive effect of the CLB's ex-ante review on judicial passivism, but he nonetheless acknowledges that "the CLB is undoubtedly an important part of the political ecosystem within which the [Supreme Court of Japan] operates."

[38] Junichi Satoh, *Judicial Review in Japan: An Overview of the Case Law and an Examination of Trends in the Japanese Supreme Court's Constitutional Oversight*, 41 LOY. L.A. L. REV. 603, 609-623 (2008).

[39] Iwao Sato, *The Cabinet Legislation Bureau and the Restricted Judicial Review in Japan: A Comparative Socio-Legal Study*, 56 SHAKAI KAGAKU KENKYU [J. SOC. SCI.] 81, 81-83, 99-104 (2005).

[40] Yasuo Hasebe, *Constitutional Borrowing and Political Theory*, 1 INT'L. J. CONST. L. 224, 234 (2003); Yasuo Hasebe, *The Supreme Court of Japan: Its Adjudication on Electoral Systems and Economic Freedoms*, 5 INT'L. J. CONST. L. 296, 297-300 (2007).

[41] Shigenori Matsui, *Why Is the Japanese Supreme Court So Conservative?*, 88 WASH. U. L. REV. 1375 (2011).

quality of executive branch-initiated statutes subsequently passed by the National Diet (parliament). Shinichi Nishikawa even refers to the CLB as a "quasi-constitutional court" because of what he sees as its exercise of de facto judicial review power through its comprehensive ex-ante statutory review.[42] Nevertheless, none of these studies on Japan's CLB place it in direct conversation with, much less suggest that it represents a clear alternative model to the three models introduced above or in a manner intended to engage the "who prevails?" question.

II. JAPAN'S CABINET LEGISLATION BUREAU: A CASE OF DE FACTO EXECUTIVE SUPREMACY

Since its rebirth after Japan regained full sovereignty following the U.S. Occupation (1945-1952), the executive branch-based Cabinet Legislation Bureau (CLB; 内閣法制局) has enjoyed extraordinary authority to determine the constitutionality of draft legislation developed by executive agencies.[43] Its central role in constitutional review in Japan *in practice* is particularly striking for at least two reasons: First, Japan's 1947 Constitution stipulates that "[t]he whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law. No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power"[44] and that "[t]he Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act."[45] Second, Japan's Constitution *does not even mention the CLB*. Given the central role of the latter and the relative passivity of the former, Japan thus powerfully illustrates the importance of differentiating theory (and constitutional text) from practice in engaging the "who shall interpret?" question.

Contrary to the explicit stipulations found in Japan's Constitution, many experts consider the CLB as its de facto guardian,[46] while Japan's Supreme Court "often plays a somewhat secondary role in determining

[42] Shinichi Nishikawa, *Naikaku Hoseikyoku Toha Ikanaru Kanchoka [What Is the Cabinet Legislation Bureau?]*, 12 KAOSU TO ROGOSU 6, 23 (1998).

[43] *Id.* at 24–25 (noting that "despite the lack of statutes regulating the work of the CLB, the executive branch cannot move one step forward without the approval of the CLB in reality"). Interestingly, Nishikawa also states that the pre-war CLB was even more powerful because "the legislative power of the Imperial Diet was extremely restricted and many matters were addressed by edicts based upon the imperial prerogative which were reviewed by the Legislation Bureau." *Id.* at 8.

[44] NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 76 (Japan).

[45] *Id.* at art. 81.

[46] *See, e.g.,* Nishikawa, *supra* note 42, at 23.

the constitutionality of government acts."[47] This reality has provocative implications for scholarship engaging various questions of interest to experts on constitutional law and judicial and comparative politics—from issues of constitutionality to checks and balances between the executive and the judicial and/or legislative branches. In the context of the present study, however, of greatest interest is the CLB's compelling exemplification of a fourth possible answer to the "who prevails?" question: de facto supremacy of the executive branch.

A. A Brief History of Japan's CLB

The roots of Japan's contemporary CLB can be traced back to 1885, when the Meiji-era government established the Legislation Bureau (LB; 法制局) concomitantly with Japan's first-ever cabinet system.[48] Japan's leaders modeled the LB upon France's *Conseil d'État* (Council of State), which was similarly situated in the executive branch (see next section for comparative analysis).[49] Under the 1889 Meiji Constitution, "the LB was assigned a direct link to the Imperial institution, and throughout the prewar and wartime periods, the Director General of the LB was, together with the Chief Cabinet Secretary, one of the two top officials in the Cabinet hierarchy."[50] Throughout the 65 years the Meiji Constitution was in force (1890-1945), no Japanese court ever reviewed the constitutionality of ordinary legislation or other decisions developed by political branches.[51]

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,[52] including the formal abolishment (廃止) of the LB in February 1948. The LB's extraordinary influence during the war had led SCAP officials to identify it as the "number two target for 'democratization'"—just below the influential Home Ministry.[53] SCAP judged the LB to be "excessively

[47] Satoh, *supra* note 38, at 604–05.

[48] Sato, *supra* note 39, at 85; Prime Minister's Office of Japan, *Naikaku Seido no Gaiyou* [Overview of the Cabinet System], https://www.kantei.go.jp/jp/seido/index.html (last visited Dec. 23, 2019).

[49] Law, *supra* note 37, at 1454; Sato, *supra* note 39, at 86; Samuels, *supra* note 6.

[50] Samuels, *supra* note 6.

[51] Mitsuo Kobayakawa, *Judicial Review in Japan*, *in* COMPARATIVE STUDIES ON THE JUDICIAL REVIEW SYSTEM IN EAST AND SOUTHEAST ASIA. PUBLIC LAW IN EAST AND SOUTHEAST ASIA, V. 1, 13 (Yong Zhang ed., 1997).

[52] John W. Masland, *Post-War Government and Politics of Japan*, 9 J. POL. 565, 565 (1947).

[53] Samuels, *supra* note 6.

formalistic, argumentative, and reactionary";[54] even undemocratic.[55] In a February 11 note, the Occupation authorities accused the LB of having "engaged in undemocratic activities for a long time" (長い間非民主的慣行).[56]

Four months after the Allied Occupation ended in April 1952, Japan's newly-sovereign democratic government resurrected the LB.[57] The 1952 Act for Establishment of Legislation Bureau (法制局設置法) placed the LB in the Cabinet and stipulated that the latter would also nominate the LB's director-general.[58] In 1962, Japan's leaders added "Cabinet" (内閣) to the LB's formal name to clearly differentiate it from the Diet-based legislation bureaus in both houses (議院法制局).[59] The renamed CLB establishment law was last amended in 1969.[60]

B. Japan's CLB Today: Form and Function

Today, Japan's CLB has roughly 75-80 members working in four different departments.[61] Remarkably, the roughly two-dozen high-ranking CLB officials (counsellors; 参事官, and above) with actual decision-making authority are all seconded from line ministries and agencies.[62] Typically, seconded personnel are individually, not collectively, responsible for CLB work related to their original agency,[63]

[54] Sato, *supra* note 39, at 87.

[55] Nishikawa, *supra* note 42, at 9.

[56] Shinichi Nishikawa, *Naikaku Houseikyoku – Sono Seidoteki Kenryoku he no Sekkin [Cabinet Legislation Bureau – Closer Examination of Its Institutional Authority]*, 65 SEIKEI RONSOU 185, 190 (1997).

[57] Masayoshi Mitsuda, *Houritsuan no Kenpou Tekigousei Shinsa ni taisuru Naikaku Houseikyoku no Kinou to Mondaisei [CLB's Functions and Problems on Constitutional Review of Draft Statutes]*, 17 KOMAZAWA WOMEN'S U. FAC. J. 257, 259 (2010). *See also* Houseikyoku Secchiho [Act for Establishment of Legislation Bureau], Law No. 252 of 1952 (Japan), https://www.shugiin.go.jp/Internet/itdb_housei.nsf/html/houritsu/01319520731252.htm (last visited May 30, 2021).

[58] *Id*.

[59] Mitsuda, *supra* note 57, at 259. *See also* Naikaku Houseikyoku Secchiho [Act for Establishment of Cabinet Legislation Bureau], Law No. 77 of 1969, https://www.shugiin.go.jp/internet/itdb_housei.nsf/html/houritsu/04019620416077.htm (Japan).

[60] See the National Diet Library's database for the list of amendments to the Act for Establishment of Cabinet Legislation Bureau, https://hourei.ndl.go.jp/simple/detail?lawId=0000045083&current=-1 (last visited May 30, 2021). For the texts of the CLB's Establishment Law (in Japanese), see e-Gov administered by the Ministry of Internal Affairs and Communications: https://elaws.e-gov.go.jp/search/elawsSearch/elaws_search/lsg0500/detail?lawId=327AC0000000252 (last visited Dec. 23, 2019).

[61] NISHIKAWA, *supra* note 6, at 74; SHINICHI NISHIKAWA, KOREDE WAKATTA! NAIKAKU HOUSEIKYOKU [NOW I UNDERSTAND! THE CABINET LEGISLATION BUREAU] 28 (2013).

[62] NISHIKAWA, *supra* note 61.

[63] MASAHIRO SAKATA, "HOU NO BANNIN" NAIKAKU HOUSEIKYOKU NO KYOUJI – KAISHAKU KAIKEN GA YURUSARENAI RIYUU ["GUARDIAN OF LAW" DIGNITY OF CABINET LEGISLATION BUREAU – REASONS WHY CHANGES IN THE OFFICIAL INTERPRETATION [OF ARTICLE 9] OF THE CONSTITUTION ARE UNACCEPTABLE] 32 (2014).

join the CLB with roughly 20 years of experience, and return to their ministry after about five years.[64] Some 'outstanding personnel' remain at the CLB for longer.[65] Usually, each ministry seconds two or three civil servants. A few specific ministries (e.g., the Ministries of Defense and Environment) do not deploy officials to the CLB because of the set quota that has been customarily filled by the same ministries and agencies over the years, thereby leaving little space for newly established ones.[66] Two or three senior officials are sent from the court system (including the Supreme Court). The Public Prosecutor's Office also seconds two to three prosecutors, who work part-time (兼任).[67] Except for these few 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.[68]

The CLB Director-General (DG) is an individual with immense influence in Japan's government. For instance, although the DG does not enjoy voting rights at Cabinet meetings, he/she is the only career bureaucrat authorized to attend Cabinet meetings on a regular basis.[69] This unique status is but one indicator of the prestige afforded to the CLB.[70] The DG typically comes from one of a select subset of ministries and is usually elevated to the top post only after serving as deputy DG. A major exception occurred in 2013, when the prime minister personally appointed a Ministry of Foreign Affairs official as DG—a move widely seen as motivated by the prime minister's desire to realize a particular "reinterpretation" of Article 9.[71] Because the CLB typically adheres strictly to a principle of *precedentism* (前例主義) in order to stay

[64] NISHIKAWA, *supra* note 61, at 28–29.
[65] *Id.* at 34.
[66] *Id.* at 29.
[67] Nishikawa, *supra* note 56, at 194–209.
[68] NISHIKAWA, *supra* note 6, at 78.
[69] Samuels, *supra* note 6; NISHIKAWA, *supra* note 61, at 23–27. Additionally, according to Cabinet meeting minutes from 2019, attendees typically include the prime minister, cabinet ministers, three deputy chief cabinet secretaries, and the CLB DG. For more details, see Prime Minister's Office of Japan, *Kakugi [Cabinet Meetings]*, http://www.kantei.go.jp/jp/kakugi/ (last visited Sept. 29, 2019).
[70] *See also* NISHIKAWA, *supra* note 6, at 27–30 (arguing that Japan's two most powerful bureaus have been the Ministry of Finance's Budget Bureau and the CLB, and that even bureaucrats from the Budget Bureau are highly deferential to the CLB when seeking the latter's approval of draft policies and statutes).
[71] Liff, *supra* note 36, at 159. Until then, the DG had always come from the Ministries of Justice, Finance, Economy, Trade and Industry, Agriculture, Forestry and Fisheries, or Home Affairs [now called Internal Affairs and Communications]. NISHIKAWA, *supra* note 61, at 20 tbl.1-1. *See also* NISHIKAWA, *supra* note 6, at 85.

politically neutral[72] and to maintain its authority, which is not constitutionally prescribed and therefore is subject, theoretically, to challenge by line ministries and political leaders,[73] this move was deeply controversial.

Officially, the CLB has two basic mandates: (1) "opinion-giving work" –"[g]iving opinions on legal issues to the Prime Minister and to individual ministers as well as to the Cabinet as a whole and (2) "examination work" –"[e]xamining legislative bills, draft Cabinet orders, and draft treaties that are to be brought before Cabinet meetings."[74] To avoid conflicting interpretations, the CLB "unifies" (一元的に解釈；政府統一見解) the Japanese government's official interpretation of the Constitution.[75] As one former DG explains, "Statutory interpretation is primarily left up to line ministries and agencies in charge of implementing certain statutes…However, constitutional interpretation cannot be left up to each ministry or agency but rather needs to be unified under the Cabinet within which the Cabinet Legislation Bureau plays a central role in making the interpretation."[76]

The CLB has a significant workload given the executive branch's central role in law-making in Japan. For example, for ordinary sessions of the Diet from 2013 to 2019, the Cabinet prepared and put forward 75-85-percent of all enacted bills.[77] The success rate of Cabinet-prepared bills is also much higher than those the Diet prepares. For instance, between 2013 and 2019, roughly 90-percent of all Cabinet-proposed bills became law, whereas only 10 to 30 percent of legislature-initiated bills ultimately passed.[78] In other words, draft laws that the CLB has approved are virtually invincible, as such drafts are (1) generally approved by the

[72] AKIRA NAKAMURA, SENGO SEIJI IN YURETA KENPOU KYU JYOU [CONSTITUTION'S ARTICLE 9 SWAYED BY POST-WAR POLITICS] 38 (2009).

[73] SAKATA, *supra* note 63, at 44–46 (discussing that despite the theoretical possibility of being subject to challenge by line ministries and political leaders, the CLB has yet to face any such challenges given the Bureau's logical reasoning and thinking applied to the review and subsequent comments).

[74] Cabinet Legis. Bureau, *About Us*, https://www.clb.go.jp/english/about/ (last visited May 30, 2021).

[75] Sakata uses the term "一元的に解釈" ("unitarily interpret"), whereas others such as Nishikawa and Oishi use the term "政府統一見解" ("unified governmental view"). In any case, they all emphasize a central role that the CLB plays in unifying the government's official interpretation of the Constitution. *See* SAKATA, *supra* note 63, at 28; NISHIKAWA, *supra* note 6, at 24; Oishi Makoto, *Naikaku Housei Kyoku no Kokusei Chitsujyo Keisei Kinou [Cabinet Legislation Bureau's Function to Shape Orderly State Affairs]*, 6 KOUKYOU SEISAKU KENKYUU [J. PUB. POL'Y STUD.] 7, 7, 10–15 (2006).

[76] SAKATA, *supra* note 63, at 28.

[77] Cabinet Legis. Bureau, *Kako no Houritsuan no Teishutu/Seiritsu Kensuu Ichiran [List of Number of Submitted/Enacted Statutes in the Past]*, https://www.clb.go.jp/recent-laws/number/ (last visited May 30, 2021).

[78] *Id.*

Cabinet and tabled at Diet sessions; (2) almost certain (and far more likely than Diet-initiated bills) to be enacted by the legislature; and (3) once enacted, extremely unlikely to be struck down by the courts as unconstitutional.

In deference to the courts, the CLB does note that "the interpretation of law ultimately is determined through court rulings. Within the executive branch, however, the interpretation of law becomes unified through the opinion-giving work of the Bureau."[79] The CLB is thus charged with scrutinizing the constitutionality of all draft statutes introduced by the Cabinet or relevant ministries, Cabinet draft orders, and treaties *before* they are tabled in Cabinet meetings and, if approved, eventually passed onto the Diet. Given the CLB's reputation for adhering to precedentism and meticulously scrutinizing all draft laws and treaties, line ministries and agencies exercise significant preventive self-restraint. They are well aware that the CLB is unlikely to accept any drafts introducing novel interpretations of the constitution.[80] Importantly, although the CLB's opinions and interpretations are not legally binding, in practice they are generally considered authoritative.[81] The CLB's track record is extraordinary: since the modern LB/CLB was reborn in 1952, only *one* statute (the 1998 amendment to the Public Office Election Act in the 2005 *Overseas Voters Case*) that it has reviewed in advance has ever been struck down by the courts on constitutional grounds.[82]

This empirical record demonstrates that Japan's judiciary has been extremely passive in striking down statutes. It also reveals another remarkable takeaway: with the sole exception of the aforementioned *Overseas Voters Case*, every statute ever struck down by Japanese courts as unconstitutional since the creation of Japan's Cabinet system in 1885 was (1) reviewed by the *pre-war* Legislation Bureau, *not* its post-1952 successor; (2) developed during the Occupation period, during which the LB was abolished for several years; and/or (3) proposed by Japan's legislature, not the executive branch (for reference, see the appendix).[83]

C. Controversy in Japan Concerning the CLB's Role and Power

[79] Cabinet Legis. Bureau, *supra* note 74.
[80] NISHIKAWA, *supra* note 6, at 124–29.
[81] SAKATA, *supra* note 63, at 45.
[82] *See* the Appendix.
[83] *Id.*

This brief survey of Japan's Constitution and the CLB's role demonstrates a conspicuous gap between law in books and law in action. As noted above, Japan's Constitution stipulates that "[t]he whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law. No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power."[84] It further notes that the Diet is "the highest organ of State power" and "the sole law-making organ of the State."[85] Furthermore, *both houses of the Diet also have their own legislation bureau*. And yet, in practice Japan's executive branch has served not only as the primary "lawmaker" but also, through the CLB, as the de facto final interpreter of the Constitution and draft statutes. This state of affairs, which appears to deviate significantly from constitutional and statutory texts, has attracted controversy among scholars, politicians (within and outside the Cabinet), and commentators. For example, Japanese politicians and scholars have questioned whether the CLB's influence violates the principle of separation of powers vis-à-vis the judiciary and/or the legislature[86] and whether it is acting as a "constitutional court without any legal basis."[87] Somewhat paradoxically, the CLB has also been criticized within Japan as both too insulated from *and* too susceptible to political influence—especially on national security matters.[88]

Regardless of specific critiques within Japan, an extensive discussion of which is beyond the scope of this study, the empirical record clearly demonstrates that the CLB is a remarkably powerful body which, despite not even being mentioned in the Constitution and being composed of unelected bureaucrats, is nevertheless shown remarkable deference in practice by the courts, the legislature, and both bureaucrats and elected officials in the executive branch. As a concrete manifestation of this point: a former Supreme Court chief justice has acknowledged in an official setting that the Supreme Court has little need to carry out strict judicial review due partly to the CLB's meticulous ex-ante constitutional review.[89] CLB-reviewed statutes are all-but-guaranteed to be passed by the Diet and carry virtually invincible status post-enactment—i.e., the

[84] NIHONKOKU KENPŌ [KENPŌ], *supra* note 32.
[85] *Id.* at art. 41.
[86] *See* Samuels, *supra* note 6; NISHIKAWA, *supra* note 42, at 23.
[87] Jun Iio, *Ima no Arikata wa Seiji no Dynamism wo Ubatteiru [The Way It Is Today Has Deprived Political Dynamism]* in TOKUSHU 'KENPOU NO BANNIN' NAIKAKU HOUSEI KYOKU WO KAIBOUSURU, [SPECIAL VOLUME: ANATOMIZING CABINET LEGISLATION BUREAU ('GUARDIAN OF THE CONSTITUTION')] 119 (2003).
[88] Samuels, *supra* note 6.
[89] Sato, *supra* note 39, at 83.

courts are extremely unlikely to overturn them. Meanwhile, the CLB's interpretive authority has, with a few exceptions related to national security,[90] generally withstood political pressures, up to and including from the highest levels (prime ministers and cabinet ministers).[91] In sum, the form and function of Japan's CLB in practice evinces de facto executive supremacy in constitutional review as a viable model deserving scholars' further consideration.

III. COMPARATIVE ANALYSIS

Though Japan's CLB has some unique characteristics, ex-ante constitutional review by executive agencies is also found in other countries. To further illustrate the prospects for major theoretical contributions from more extensive comparative analysis of bodies engaged in executive-based constitutional review, this section provides a brief overview of two similarly situated executive institutions found in political systems that are both very different from Japan's, and from each other's: the *Conseil d'État* in France (a parliamentary system) and the Office of Legal Counsel, located within the Department of Justice of the United States (a presidential system).

A. France's Conseil d'État

The *Conseil d'État* (Council of State) provides an example of a body in a non-judicial branch of government that conducts ex-ante constitutional review; somewhat similar to that exercised by Japan's CLB. (This is hardly coincidental; Japan's Meiji-era leaders modeled the CLB's pre-war (1885) predecessor on the *Conseil d'État*.)[92] In fact, judicial review was largely absent from France until the 1970s. Though the Constitution of the Fifth Republic established the *Conseil constitutionnel* (Constitutional Council) in 1958, its constitutional

[90] The most notable one is the controversial 2014 Cabinet Decision which effectively overturned a long-standing CLB interpretation of Article 9 "peace clause" that prohibited the exercise of collective self-defense. *See supra* note 36. *See also infra* notes 128–29.

[91] In fact, the CLB has frustrated leading politicians to the extent that former Prime Minister Yasuhiro Nakasone, for example, "asked rhetorically [in December 2001]: 'How long should the Prime Minister (be) treated like a subordinate to the (Cabinet Legislation) Bureau? The relationship should be changed as a matter of independence and self-respect.'" *See* Samuels, *supra* note 6 (quoting from Yasuhiro Nakasone, *Jieitai wo Tokihanate [Unleash the Self-Defense Force]*, 288 VOICE 54 (2001)).

[92] Yamamoto, *supra* note 36, at 109.

review power was severely restricted and limited to draft laws specifically referred to it by the President, the Prime Minister, the President of the National Assembly, or the President of the Senate.[93] Nevertheless, in the years since, and especially after a 2008 constitutional amendment, the *Conseil constitutionnel* has gained greater authority to review both bills awaiting promulgation and "the entire statute book"—a change scholars argue has "put the Council in a different class as a veto-player."[94]

The *Conseil d'État*'s role in constitutional review has a longer legacy. Established in 1799 to provide legal advice to Napoleon,[95] the *Conseil d'État* has engaged in constitutional review at least since the Second French Empire (1852-1870).[96] It has two primary functions: to serve as both legal advisor for the executive branch and as the supreme court for administrative justice.[97] The *Conseil d'État*, over which France's prime minister presides, dwarfs Japan's CLB in terms of human resources: it is composed of 300 members, 75 of whom are assigned tasks similar to those of CLB personnel.[98] Though they are not judges in a strict judicial sense—most were formally trained at the *Ecole Nationale d'Administration* (ENA) to become civil servants and thus gain their legal expertise once entering into the *Conseil d'État*—its members exert considerable influence in legislative development.[99] Once drafted by line ministries

[93] F.L. Morton, *Judicial Review in France: A Comparative Analysis*, 36 AM. J. COMP. L. 89, 91 (1988).

[94] Arthur Dyevre, *Filtered Constitutional Review and the Reconfiguration of Inter-Judicial Relations*, 61 AM. J. COMP. L. 729, 731 (2013). The restriction on a priori review of draft statutes (i.e., ordinary legislation) by the *Conseil constitutionnel* remains unchanged under the 2008 amendment. In other words, unless questioned by constitutionally designated officials, such statutes could be enacted only with the review by the *Conseil d'État*'s review but not the *Conseil constitutionnel*. Yoshitaka Nakamura, *France Kenpouin No Kaikaku [Reform of the French Conseil constitutionnel]*, 342 RITSUMEI HOUGAKU 807, 812–13 (2012).

[95] Ducamin & Dale, *supra* note 8, at 883.

[96] Kousuke Okumura, *The Administrative Departments of the Conseil d'État as Interpreters of the Constitution in France*, RESEARCH AND LEGISLATIVE REFERENCE BUREAU, NATIONAL DIET LIBRARY. THE REFERENCE NO. 783 87, 99 (2016). At http://www.dl.ndl.go.jp/view/download/digidepo_9957300_po_078305.pdf?contentNo=1&alternativeNo= (referring to Laurent Fonbaustier, *Le rôle preventif du Conseil d'État: Les origines de l'article 39 alinéa 2 de la constitution de 1958* in AUX ORIGINES DU CONTROLE DE CONSTITUTIONNALITE XVIIIEME-XXEME SIECLE 153 (Domonique Chagnollaud, ed., 2003)).

[97] Louis M. Aucoin, *Judicial Review in France: Access of the Individual Under French and European Community Law in the Aftermath of France's Rejection of Bicentennial Reform*, 15 B. C. INT'L & COMP. L. REV. 443, 444 (1992).

[98] Jean Massot, *Legislative Drafting in France: The Role of the Conseil D'Etat*, 22 STAT. L. REV. 96, 97 (2001).

[99] *See* Ducamin & Dale, *supra* note 8, at 896 n.11 (noting that "not all these new recruits have a thorough legal training. But their duties at the *Conseil*, especially during their first four years, serve to fill up the blanks quickly."). *See also* Susan Rose-Ackerman & Thomas Perroud, *Policymaking and Public Law in France: Public Participation, Agency Independence, and Impact Assessment*, 19

and agencies, each draft statute is referred to the *Conseil d'État* and registered as a file. A file is then assigned to a *Conseil* member serving as a rapporteur who examines the draft and is vested with the discretionary power to revise it where necessary "depending on the study he makes of the matter, the ideas he has, and the manner in which he expresses himself in the drafting."[100] In other words, a rapporteur "literally bears the fate of the file in his hands,"[101] as "the rapporteur recommends either that the bill be discharged or further considered."[102]

Article 39 of France's Constitution mandates that the *Conseil d'État* review all draft laws originating in the executive branch before they can be considered in the Council of Ministers. Furthermore, a 2008 constitutional amendment enables presidents of the National Assembly and the Senate to also seek its opinions on draft laws developed by the legislative branch.[103] Given that more than 80 percent of French laws originate in the executive branch[104] and the *Conseil d'État* reviews roughly 130 bills, 800 decrees and 300 non-statutory texts annually,[105] this executive entity plays a major role in France's law-making process.

1. Similarities and Differences with Japan's CLB

Key similarities between the cases of France and Japan include that: (1) the *Conseil d'État* and CLB both play a central role in the law-making process; (2) the executive branch typically leads legislative development; (3) courts in both countries have historically played a subordinate (or negligible) role in constitutional review (though the *Conseil constitutionnel* has certainly gained greater review authority in recent years), which in turn necessitated thorough review by another branch; (4) a constitutional or statutory mandate stipulates that all draft laws

COLUM. J. EUR. L. 225, 239–40 (2013) (discussing that more than 80 percent of officials at the *Conseil d'État* are graduates from the *Ecole Nationale d'Administration* and that members of the *Conseil* follow careers that are distinct from judges as they are typically seconded to line ministries and agencies as well as the private sector to gain practical experience on the ground).

[100] Ducamin & Dale, *supra* note 8, at 890.

[101] *Id*.

[102] Massot, *supra* note 98, at 98.

[103] Okumura, *supra* note 96, at 93.

[104] Tsuyoshi Koga et al., *Parliaments of USA, UK, Germany and France: An Overview (2010)*, RESEARCH AND LEGISLATIVE REFERENCE BUREAU, NATIONAL DIET LIBRARY 1, 52 (2010), http://www.ndl.go.jp/jp/diet/publication/document/2010/200901b.pdf; Miyuki Takazawa, *How Many Bills Have Been Introduced to and Passed by the Parliament in Japan, US, UK, Germany and France?*, RESEARCH AND LEGISLATIVE REFERENCE BUREAU, NATIONAL DIET LIBRARY 1 (Dec. 20, 2016), https://dl.ndl.go.jp/view/download/digidepo_10229024_po_079104.pdf?contentNo=1.

[105] *Advising*, CONSEIL D'ÉTAT, https://www.conseil-etat.fr/en/advising (last visited Sept. 10, 2018).

developed by the executive branch must be reviewed by the *Conseil d'État*/CLB for constitutionality and consistency with existing statutes; (5) opinions and interpretations given by both institutions are not legally binding but are generally treated as authoritative; and (6) that most staff working at both institutions are not judicial professionals in a strict sense but rather career civil servants who acquire their legal skills primarily through the on-the-job training.

Despite these remarkable similarities, the *Conseil d'État* and CLB also manifest important differences. First, France's Constitution explicitly stipulates the *Conseil d'État*'s existence, mandate, and role in the law-making process: as a legal advisor to the executive branch and a compulsory reviewer of all draft statutes developed by executive agencies. In contrast, Japan's Constitution does not even mention the CLB. Accordingly, the latter's constitutionality, legitimacy, and independence are heavily contested among Japanese politicians and scholars alike, especially as it concerns implications for the separation of powers.[106] Second, while *Conseil d'État* and CLB opinions are both authoritative but not legally binding, the degree of the authority has been treated differently. In France the executive branch essentially has three options after the *Conseil d'État* completes its review: "either (i) adopt the text of the Conseil d'Etat, (ii) adopt its original draft or (iii) abandon the matter."[107] In contrast, in Japan—and despite political and scholarly concerns about the CLB's constitutionality and legitimacy—the CLB's opinions are in practice construed as binding to such an extent that law drafters exercise significant self-restraint in pursuit of CLB approval.[108] This state of affairs leads some scholars to consider this process as "the de facto final constitutional review of draft legislation on behalf of the Supreme Court."[109]

Finally, statutes scrutinized by the *Conseil d'État* and CLB take different paths upon their enactment. In France, the *Conseil constitutionnel* has become increasingly active in exercising its judicial review authority, despite the *Conseil d'État*'s strict ex-ante review. For example, in 2010 the *Conseil constitutionnel* struck down statutes in 24 of 83 total cases brought to its attention (29 percent); in 2011 it struck down statutes in 45 out of 127 total cases (35 percent).[110] In contrast,

[106] *See* Nishikawa, *supra* note 42, at 23–25; Samuels, *supra* note 6.
[107] Massot, *supra* note 98, at 100.
[108] NISHIKAWA, *supra* note 6, at 124–27.
[109] *Id.* at 124.
[110] Nakamura, *supra* note 94, at 838.

Japan's Supreme Court rarely exercises its constitutionally stipulated judicial review authority. As of 2017, it has ruled only ten cases involving eight statutes as unconstitutional.[111] As noted earlier, of these ten cases, only one statute (the Public Office Election Act in the Overseas Voters Case) had previously been subject to CLB review. Statutes under question in the other nine cases either originated from the Diet (rather than the executive branch), or were originally enacted before the modern bureau was established in 1952; i.e., those statutes were enacted either before the end of World War II (1885-1945) or during the postwar (1945-1952) Occupation.[112] In other words, and as noted above, only one statute reviewed ex ante by Japan's postwar CLB has ever been struck down by the courts.

B. The U.S. Office of Legal Counsel

The U.S. Department of Justice's Office of Legal Counsel (OLC) is another example of an executive body which engages in extrajudicial interpretation. Established in 1932, the OLC (renamed as such in 1953) plays the role of the chief legal advisor within the executive branch: it screens all draft legislation concerning constitutionality, provides legal advice to the President and all executive agencies, and writes legal opinions on constitutional and statutory issues.[113] In practice, however, the OLC is often unable to screen all draft bills at every stage given short time frames (often a few days) and its small number of personnel (roughly 25 lawyers); the OLC instead pays closer attention to draft bills when they reach the stage of whether the President should sign or veto a bill adopted by both houses of Congress.[114] The OLC's opinions on the constitutionality of draft statutes are sent to relevant congressional committees for consideration via the Office of Management and Budget, which compiles comments from all relevant executive agencies. Some scholars have argued, however, that "the OMB sometimes omits the OLC's constitutional comments from its letter."[115]

[111] Yamamoto, *supra* note 36, at 109.

[112] For more details, see the Appendix.

[113] *See* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1451, 1458–60 (2010). *See generally* Tushnet, *supra* note 4, at 468–79. For the year of the OLC's establishment, see John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 376 (1993).

[114] Tushnet, *supra* note 4, at 470 (discussing the issue of time constraints for the OLC). *See also* Morrison, *supra* note 113, at 1460 (mentioning that "[t]oday, OLC is a fairly small office of about two dozen lawyers").

[115] *Id.* at 471.

Given its expansive role, the U.S.' OLC is another example of a powerful and influential executive-based player with a role in constitutional review. Its opinions reportedly "comprise the largest body of official interpretation of the Constitution and statutes outside the volumes of the federal court reporters." [116] Accordingly, it has traditionally enjoyed immense prestige, and has even been a stepping stone to the Supreme Court for some former directors. [117] While executive agencies are not required to submit legal questions to the OLC, its legal advice, once provided, is considered binding within the executive branch—unless the Attorney General or the President asserts otherwise.[118] Furthermore, as not everything the OLC reviews ends up in the courts, its opinions often serve as de facto final government opinion concerning constitutional and statutory interpretation.[119]

In terms of legal opinions, the OLC inevitably faces a dilemma because of its institutional status as an executive agency. Some argue that the OLC's opinions should be viewed by all three branches and the general public as "fair, neutral, and well-reasoned."[120] On the other hand, it also functions as the chief legal advisor to the President, the Attorney General, and all relevant agencies in the executive branch. As such, some scholars argue it has "a role with the potential to lead to inappropriately politicized advice-giving."[121] For these reasons, the OLC often finds itself in a difficult position: facing pressure to maintain integrity and legitimacy vis-à-vis other stakeholders while also taking into account the interests of the President and/or the executive branch as a whole. To avoid being seen as politically influenced, the OLC often relies upon past legal opinions. Indeed, between 1977 and 2010 only 67 (six percent) of 1,191 past opinions were later modified (38; three percent) or overruled (29; two percent).[122] These data reveal a remarkable degree of stability and consistency in OLC opinion over time and across administrations of both major political parties.

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[116] McGinnis, *supra* note 113, at 376.

[117] *Id*. at 422 n.178 (referring to Justice Rehnquist and Justice Scalia formerly serving as the head of the OLC).

[118] Morrison, *supra* note 113, at 1455–56.

[119] *Id.* at 1451.

[120] Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1311 (2000).

[121] Rachel Ward Saltzman, *Executive Power and the Office of Legal Counsel*, YALE L. & POL'Y REV. 439, 442 (2010).

[122] Morrison, *supra* note 113, at 1480–81.

2. Similarities and Differences with Japan's CLB

The OLC example evinces several intriguing parallels with Japan's CLB. The OLC also plays a dual role as both a legal advisor to the executive branch and a reviewer of draft laws—two roles inevitably in tension and which both the OLC and CLB must carefully reconcile in order to maintain their legitimacy and integrity. The OLC's central role in constitutional review of draft bills is also similar to that of the CLB, and both the OLC's and CLB's opinions, once issued, are considered to be de facto binding across the executive branch. Finally, both bodies generally adhere strictly to precedents.

Nevertheless, the OLC and Japan's CLB also have important differences. Perhaps most obviously, the CLB exerts greater influence than the OLC in significant part because in Japan's parliamentary system most draft laws originate in the executive branch. In contrast, in the U.S. presidential system law-making power is vested exclusively in Congress.[123] Consequently, the OLC's influence is largely contained within the executive branch. In fact, referring to the work by Nelson Lund, Tushnet identifies "great skepticism about the seriousness with which the OLC's constitutional comments are taken by members of Congress."[124] Second, unlike Japan's CLB, when the OLC develops legal opinions it is generally considered to be relatively deferential to the interests of the President, the Attorney General, and other executive agencies.[125] Third, the OLC takes a more collegial approach vis-à-vis other agencies within the executive branch, such as modifying previous opinions in a way to facilitate inter-agency negotiations.[126] Fourth, the OLC's legal opinions are far more susceptible to direct political influence after the fact, since they can be overturned directly by the President or the Attorney General. For example, after President Obama signed an executive order in January 2009, the OLC reassessed and eventually withdrew its 2002 Torture Memorandum authorizing controversial interrogation techniques against terrorists (e.g., waterboarding).[127]

In contrast, despite its status as a Cabinet bureau, the CLB's opinions and interpretations have generally been remarkably insulated from

[123] Takazawa, *supra* note 104, at 58.
[124] Tushnet, *supra* note 4, at 471 n.102 (referring to Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 466–67 (1993)).
[125] Saltzman, *supra* note 121, at 449.
[126] Morrison, *supra* note 113, at 1481-1491.
[127] *Id.* at 1451-1452, 1510, 1515-1516.

political influence, even at the highest level.[128] A few exceptions exist, of course, especially as it concerns effective interpretations of the Constitution's Article 9 "peace clause." Yet even in national security matters, even the most ambitious and forward-leaning prime ministers have been severely constrained by CLB interpretation and precedent. For example, the CLB's interpretation on the unconstitutionality of Japan exercising its (UN Charter-sanctioned) right of collective self-defense withstood significant criticism from prime ministers and other cabinet ministers for decades until a 2014 Cabinet Decision *partially* overturned it.[129] Even so, the eventual official "reinterpretation" fell far short of the prime minister's wishes.[130]

C. Wrap-up

The cases of France's *Conseil d'État* and the U.S. Office of Legal Counsel demonstrate that constitutional review by an executive body is not unique to Japan. Despite important differences with Japan's CLB, numerous similarities evincing significant influence of the executive branch in constitutional review also exist. Most importantly in the context of this study, both the *Conseil d'État* and the OLC have enjoyed considerable prestige and authority in interpreting the constitution and reviewing the constitutionality of draft statutes—at times providing the government's de facto final word. As Tushnet notes, "non-judicial constitutional review is simply a fact of life, a characteristic of reasonably stable constitutional systems."[131]

And yet this comparative analysis also reveals a crucial difference between the French and U.S. cases on the one hand and the Japanese case on the other: the French and U.S. judiciaries have both actively exercised their judicial review power—thus counter-balancing the executive-based *Conseil d'État* and OLC, respectively. In contrast, judicial passivism in Japan leaves the CLB's interpretations and opinions as the de facto final governmental interpretation in most cases.

IV. DISCUSSION: PRELIMINARY THOUGHTS ON A FOURTH MODEL (DE FACTO EXECUTIVE SUPREMACY)

[128] For an example to show the level of the CLB's insulation from politics, see *supra* note 91.
[129] Yamamoto, *supra* note 36, at 112.
[130] Liff, *supra* note 36, at 155, 160–65.
[131] Tushnet, *supra* note 4, at 490.

This section discusses several implications of this study's findings, especially as it concerns prospects for incorporating the de facto executive supremacy model into the analytical framework of constitutional review employed by scholars, and avenues for future research.

From both theoretical and empirical perspectives, the analysis above reveals the importance of scholars' being on the lookout for the gap between law in books and law in action. In Japan's case, the distinction between what is written in the constitution and how constitutional review actually manifests in the real world is striking. Viewing law as both constitutive and reflective of social and cultural life in particular national contexts [132] may expose still more instances of CLB-like executive agencies reifying the de facto executive supremacy in other countries. In any case, further examination of the prospects for this "fourth model" could shift debates about the "whose interpretation shall prevail" question (relatively) away from today's conventionally judiciary-centered discourse to consideration of the possibility of constitutional review as a technocratic, rather than judicial, task. Accordingly, the idea of a fourth model challenges scholars to consider the provocative question of whether actors in the executive branch (e.g., bureaucrats) may in some contexts be better positioned than judges and/or legislators to act as the de facto final government authority to interpret the constitution and assess the constitutionality of statutes. Though this normative question is well beyond the scope of this particular study, it seems to present an avenue ripe for future research and debate.

A. Procedural Considerations

From a procedural perspective, one of the key implications for pursuing executive supremacy lies in the temporal aspect. Executive supremacy, due to its temporally and procedurally constrained role in the law-making process, inevitably focuses attention on constitutional review of draft statutes developed by the executive branch *before* deliberations in the legislature commence.[133] In other words, assessments

[132] For more details on the law and culture literature, see, for example, LAWRENCE ROSEN, LAW AS CULTURE: AN INVITATION (2006); CLIFFORD GEERTZ, LOCAL KNOWLEDGE (1983).

[133] For a comparative analysis of the *ex-ante* and *ex-post* reviews in the context of judicial review, see, for example, Dalston G. Ward & Matthew Gabel, *Judicial Review Timing and Legislative Posturing: Reconsidering the Moral Hazard Problem*, 81 J. POL. 681 (2019) (discussing the dilemma over the timing of review to influence legislators' behaviors).

of the constitutionality of existing statutes (or any draft statutes developed by the legislature) seem inherently out of its reach. Here it is worth reiterating that ex-ante constitutional review of the sort observed in Japan is not completely outside the norm. Indeed, owing to longstanding skepticism of judicial review, France did not even allow the *Conseil constitutionnel* to review the constitutionality of statutes post-promulgation until a 2008 constitutional amendment provided for ex-post review.[134] In the Netherlands, as far as parliamentary statutes are concerned, there is no prospect for constitutional review by courts as Section 120 of the Constitution explicitly prohibits judicial review of parliamentary acts, thereby upholding the principle of legislative supremacy even today. Thus, the ex-ante constitutional review by the *Raad van State* (Council of State) and the legislature serves as the only opportunity in the Netherlands to ensure the constitutionality of draft statues developed by both executive and legislative branches.[135]

In the United States, some scholars have pointed out major flaws in the existing ex-post judicial review and called for an ex-ante judicial review system. Brianne J. Gorod, for instance, argues that an ex-ante judicial review could function as a nondisruptive, corrective mechanism to forestall constitutional issues arising from the ex-post review. The latter could generate a sense of uncertainty over the state of the existing laws and leave a substantial hole for the legislature to fill reactively rather than proactively, especially if a major statute serving as an umbrella framework for other statutes is struck down as unconstitutional.[136]

However, this study's analysis raises questions about whether the viability of an executive supremacy model may be contingent upon several antecedent conditions: (1) an executive branch with the authority to introduce draft bills and which functions as the primary law-maker for a wide array of statutes; (2) a legislature willing and able in many cases to approve executive-drafted statutes without significant revisions; and (3) a judiciary either unable or unwilling to actively exercise its judicial review power. Constitutional review in Japan *in practice* basically meets these conditions, and thus offers a compelling illustration of de facto executive supremacy in action.

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[134] Alec Stone Sweet, *The Constitutional Council and the Transformation of the Republic*, 79 YALE L. SCH. FAC. SCHOLARSHIP SERIES 1, 1 (2008).

[135] Jurgen C. A. de Poorter, *Constitutional Review in the Netherlands: A Joint Responsibility*, 9 UTRECHT L. REV. 89, 89, 92–93 (2013).

[136] Brianne J. Gorod, *The Collateral Consequences of Ex Post Judicial Review*, 88 WASH. L. REV. 903, 909–10, 937–42 (2013).

B. Design Considerations

From a design perspective, the case of Japan's CLB also raises several intriguing questions about conventional scholarly assumptions concerning constitutional review. For instance, it may provide a useful reference for states with little to no tradition of constitutional review to explore the possibility of a review mechanism in the executive branch, rather than presuming the inevitable (or preferable) supremacy of the judiciary and/or the legislature. In certain contexts, practical concerns may frustrate efforts to establish a system of constitutional review based upon the existing models. What if the existing judicial review mechanism does not function as constitutionally designed, thereby failing to uphold the de jure notion of judicial supremacy? Constitutional guarantees of judicial independence alone have not always ensured effective implementation of the judicial review mechanism. [137] Independent judicial review is also predicated upon stable political competition, a moderate judiciary, and the existence of political parties that are both risk-averse and concerned with future gains.[138] In such cases, are legislative supremacy and departmentalism the only viable alternatives? Japan's experience suggests not. Theoretically, at least, in some parliamentary systems a CLB-like institution may help ensure that constitutional interpretations are centralized and unified across and within the executive branch, and that draft statues are consistent with constitutional principles and existing statutes. By preventing the enactment of statutes of dubious constitutionality, such an arrangement could help stabilize constitutional order in some societies.

Despite some potential strengths of de facto executive supremacy in the event of a weak or passive judiciary, concerns about implications for the separation of powers are undoubtedly valid (Indeed, they manifest in contemporary debates in Japan). Absent robust norms to the contrary, de facto executive supremacy could risk the emergence of an executive branch that monopolizes the law-making process and undermines the

[137] *See generally* Erik S. Herron & Kirk A. Randazzo, *The Relationship Between Independence and Judicial Review in Post-Communist Courts*, 65 J. POL. 422 (2003) (arguing in the context of the post-communist Eastern Europe that the likelihood of courts exercising their judicial review power is affected by other factors such as economic conditions, the power of the executive branch, and characteristics of litigants and legal issues).

[138] *See generally* Matthew C. Stephenson, *'When the Devil Turns…': The Political Foundations of Independent Judicial Review*, 32 J. LEG. STUD. 59 (2003).

authorities of other branches of government.[139] Excessive executive power could lead to irresponsible policymaking behavior and/or the pursuit of short-term interests that may not necessarily benefit the society in the long-term.[140] In order to withstand such criticisms and assert itself as a legitimate alternative form of constitutional review, an executive agency conducting constitutional review would need to demonstrate its capability and capacity to vigorously and substantively, rather than figuratively or symbolically, review the constitutionality of statutes developed by the executive itself.

How might this work? Japan's CLB illustrates some possibilities, especially as it concerns (1) the need to secure a high degree of political insulation and independence from other executive agencies. In this regard, a CLB-like institution's location may be crucial to ensuring that it enjoys a status distinct from other executive agencies. Also likely to be important: (2) executive agencies' recognition of and deference to the interpretive and review authority of a CLB-like institution; (3) the ability and willingness of professional bureaucrats to develop sufficient expertise and play a central role in the law-making process without fear or favor vis-a-vis their home ministries/agencies; (4) the existence of some basis (e.g., internal precedents and guiding principles) for interpretation and review that stabilizes the work of a CLB-like institution; and (5) the enabling environment (especially from the procedural perspective) that allows thorough review (e.g. stipulation of clear review process and sufficient time guaranteed for the review).

C. Normative Considerations

From a normative perspective the inevitable question is: *should* de facto executive supremacy be considered alongside the other three models as a legitimate alternative (or complementary) model of constitutional review? This dispassionately analytical article takes no position on this immensely important question. It is entirely possible that the CLB evolved into its current form only because of unique historical,

[139] Indeed, scholars such as Kenny & Casey find ex-ante constitutional review by the executive branch highly problematic for this precise reason, as such review "operates in an opaque and secretive manner, insulated from parliamentary and public scrutiny, and ultimately alienating the Constitution and rights issues from politics." (Kenny & Casey, s*upra* note 9, at 77.)

[140] *See generally* George A. Krause & Benjamin F. Melusky, *Concentrated Powers: Unilateral Executive Authority and Fiscal Policymaking in the American States*, 74 J. POL. 98, 110 (2012) (arguing that "the optimal solution [to mitigate excessive executive power] is to design executive institutions with shared or overlapping powers that are diffuse across multiple institutions").

institutional, and/or political circumstances, which may have enabled/necessitated de facto executive supremacy. Circumstances worth considering include: the CLB's effectively 130-year history; a constitution that emphasizes judicial review but which was drafted by an occupying (mostly American) force with an explicit "democratizing" imperative; and a relatively passive judiciary. Regardless, any would-be advocates of de facto executive supremacy should consider various normative questions, including questions roughly analogous to those often addressed to judicial supremacists: e.g., in a democracy, why should unelected bureaucrats serve as the supreme interpreter of the constitution and statutes? One counter-argument may be that because the heads of line ministries/agencies—and the head of the cabinet (prime minister)—are usually democratically elected representatives (at least in the context of Japan and other parliamentary systems), these elected figures can function effectively as a check and balance. Yet this argument would, ironically, raise concerns about political manipulation of the law-making process. Though Japan's CLB has proven remarkably resilient against political influence, especially as it concerns national security matters, there have been exceptions. In short, scholars should acknowledge that the concept of de facto executive supremacy raises legitimate concerns and questions that deserve significant debate before it should (normatively) be considered a legitimate model for constitutional review.

CONCLUSION

In answering the "who interprets the constitution?" and "whose interpretation shall prevail" questions foundational to large literatures in both constitutional law and political science, the scholarship on constitutional review has generally focused on three competing models: judicial supremacy, legislative supremacy, and departmentalism. The former two schools argue that the buck should stop with the judiciary or the legislature, respectively, while not necessarily excluding other branches in the process. The latter, in contrast, essentially treats each branch as, in the words of political scientist Keith Whittington, "an equal authority to interpret the Constitution in the context of conducting its duties… [because] each branch of government has its own, non-overlapping set of interpretive responsibilities."[141]

[141] Whittington, *supra* note 29, at 783.

What this massive and important debate has generally overlooked heretofore, however, is the prospect of a fourth model: de facto executive supremacy. The theoretical literature has also neglected a particularly compelling real-world case that suggests its viability: Japan's Cabinet Legislation Bureau, at least under some conditions. Indeed, for 70 years Japan's postwar CLB has exercised extraordinary influence over constitutional review in the world's third largest economy. Throughout this period, it has acted as the de facto supreme interpreter of the constitution and draft statutes, *despite the existence of a court explicitly empowered by Japan's Constitution to do so*.

By introducing Japan's CLB to this important interdisciplinary literature, emphasizing the distinction between law in books and law in action, and comparing the CLB with France's *Conseil d'État* and the U.S. Office of Legal Counsel, this article highlights the important role executive institutions can play in the law-making process in both theory and practice, discusses several preliminary implications of de facto executive supremacy as a "fourth" model of constitutional review, and calls on scholars to continue the debate. Several potentially fruitful avenues for future research related to the "whose interpretation shall prevail?" question, in particular, are to broaden the conventional scope of analysis in the study of constitutional review as a whole, and to conduct more theoretical, empirical, and normative research specifically on the prospects for de facto executive supremacy as a fourth model.

APPENDIX: LIST OF STATUTES STRUCK DOWN BY COURT[142],[143],[144],[145]

No.	Court Case	Date of Ruling	Statute in Contention	Court Opinion	CLB's Involvement
1	*Parricide Case*	April 4, 1973	Article 200, Penal Code disproportionately imposing the death penalty or life imprisonment for parricide in contrast to regular homicide which could be as low as 3-year imprisonment	Violation of equality protected under Article 14 of the Constitution	Most likely yes. As this particular Article was enacted in 1907, it was most likely reviewed by the prewar Legislation Bureau.
2	*Pharmaceutical Act Case*	April 30, 1975	Second and Fourth Provisions of Article 6, Pharmaceutical Act; "the proper distance requirement for obtaining a permit to operate a new pharmacy or drug store under the Pharmaceutical Act was a rational means to achieve an important public interest"[146]	Violation of the freedom to choose an occupation protected under Article 22 of the Constitution	No. The Pharmaceutical Act itself was drafted by the Cabinet (the executive), the parts in contention (Second and Fourth Provisions of Article 6) were added by the legislature, thereby not going through the CLB's review.

[142] Matsui, *supra* note 41, at 1388-1392.
[143] Koji Tonami, *Judicial Review in Japan and Its Problems*, 33 WASEDA BULLETIN OF COMP. L. 1, 6 (2015).
[144] Sato, *supra* note 39, at 89–90 (discussing the point further, see especially Table 2 on page 90).
[145] Colin P. A. Jones, *Legitimacy-Based Discrimination and the Development of the Judicial Power in Japan as Seen through Two Supreme Court Cases*, 9 U. PA. E. ASIA L. REV. 99, 103-120 (2014).
[146] Matsui, *supra* note 41, at 1389.

3	First *Reapportionment Case*	April 14, 1976	Apportionment provisions of Public Office Election Act; and "gross disparity between overrepresented and underrepresented election districts" in December 1972 House of Representatives Election	Ruling it unconstitutional under Article 14 (the right to equality) but not invalidating the election results	No. The Act was a *giin rippou* 議員立法: a legislature-initiated statute.
4	Second *Reapportionment Case*,	July 17, 1985	Same but in December 1983 House of Representatives Election	Same court opinion	No. The Act was a *giin rippou* 議員立法: a legislature-initiated statute.
5	*Forest Act Case*	April 22, 1987	Article 186, Forest Act "which precluded a division claim of a jointly owned forest unless the claimant had more than half of the share of the forest"[147]	Infringement of the property rights protected under Article 29 of the Constitution	No The Act was a *giin rippou* 議員立法: a legislature-initiated statute.
6	*Postal Act Case*	September 11, 2002	Article 68 restricting the government's liability in the case of mishandling email by a postal office Article 73 restricting who can claim for the damage	The government's immunity as a violation of the right to seek damages from the government under Article 17 of the Constitution	Questionable. Even though the statue was drafted by the cabinet/executive, Iwao Sato speculates that the CLB's review wasn't as thorough as it usually is, given the fact that this statute was enacted in 1947 when the SCAP was considering

[147] *Id.*

					abolishing the CLB (in fact it was temporarily abolished in 1948).[148]
7	*Overseas Voters Case*	September 14, 2005	Public Office Election Act excluding overseas voters from voting in national elections	Violation of the right to vote under Article 15 of the Constitution	Yes. The Act was originally a *giin rippou* 議員立法: a legislature-initiated statute.[149] But subsequent amendments made to the Act were drafted by the executive branch.[150]
8	*Illegitimate Children Nationality Discrimination Case*	June 4, 2008	First Provision of Article 3, Nationality Act not recognizing the Japanese nationality of an illegitimate child born to a foreign mother and a Japanese father until the parents got married	Violation of the right to equality under Article 14 of the Constitution	Questionable. The Act was enacted in 1950 when the CLB was temporarily abolished. But Masayoshi Mitsuda argues that the statute did go through the CLB's review.[151]

[148] Sato, *supra* note 39, at 89.

[149] Osaka Bar Ass'n, *Giin Rippou no Arikata [The Way Legislature-Initiated Statutes Should Be]*, https://www.osakaben.or.jp/web/03_speak/iken_backnum/iken890127.php, (last updated Jan. 27, 1998).

[150] Mitsuda, *supra* note 57, at 259.

[151] *Id.* at 264.

9	*Illegitimate Children Inheritance Case*	September 4, 2013	Article 900(iv) of Civil Code granting illegitimate children only half of inheritance that is accorded to legitimate children	Violation of the right to equality under Article 14	Questionable. Just like the Postal Act, this particular Article was enacted in 1947 when the SCAP was considering abolishing the CLB (in fact it was temporarily abolished in 1948). Thus it's possible that the CLB's review wasn't as thorough as it usually is.
10	*Women's Remarriage Case*	December 16, 2015	Article 733 of Civil Code prohibiting women from getting remarried for 6 months after their divorce	Violation of the right to equality under Article 14 and gender equality under Article 24	Most Likely Yes. But the concerned Article was originally enacted in 1896.