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**MANDATORY PRE-ENACTMENT REVIEW OF
LEGISLATION; OR SHOULD ONLY ONE GOVERNMENT
BRANCH BE RESPONSIBLE FOR THE PROTECTION OF
RIGHTS IN THE UNITED STATES?**

LAWS 526: Comparative Constitutionalism

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Abstract

This paper focuses on pre-enactment review of legislation as a constitutional tool for the protection of recognised rights. The paper first makes the distinction between strong- and weak-form judicial review, in order to analyse how pre-enactment review can be practiced within each constitutional model. Two countries are first looked at to illustrate the two models: the United States for strong-form review, and New Zealand for weak-form review. The absence of any formal pre-enactment review in the United States is noted, and evaluated through a more in-depth assessment of congressional practice. This observation leads to the main proposal of the paper: that pre-enactment review should be made mandatory in the United States.

A comparative assessment is then made in order to discuss the proposal. The relevant constitutional practices in Australia, Canada and Japan are outlined. These comparative assessments are used to further delineate the appropriate form that mandatory pre-enactment review of legislation could take in the United States.

Key Words

Pre-enactment review; proposed legislation; United States

I Introduction

A core feature of any constitutional democracy is undoubtedly the protection of certain fundamental rights. The decision lies not in whether to uphold these protected rights, but in the way this should be done. Largely, it comes down to resolving how governmental power should be organised and to what extent each branch of government should be accountable for making rights-based determinations. This is a question of institutional design.

Judicial review of legislation, and in particular the assessment of its relative merits and shortcomings, has been the focus of ongoing academic debate within the question of institutional organisation.¹ The practice of judicial review itself has been connected with constitutional or judicial supremacy, whereas it has traditionally been rejected by the opposing arrangement of parliamentary sovereignty or legislative supremacy.

Judicial review now exists in two models: strong- or weak-form.² This paper is predicated on the distinction between the two. Strong-form judicial review refers to the traditional conception that is adhered to in systems of constitutional or judicial supremacy. As the name might suggest, strong-form review empowers the judiciary with the general authority to determine issues of constitutional interpretation.³ This judicial determination is overriding and final as it relates to the other governmental branches.

Weak-form judicial review, by contrast, was more recently contrived and is the concept that is now linked to systems of legislative or parliamentary sovereignty.⁴ Weak-form review does generally accept the judicial power to evaluate legislation and determine its conformity with constitutional provisions; the difference is that this judicial review power is diluted, since an ordinary legislative majority can displace any such determinations under weak-form review.⁵ Thus, weak-form judicial review is compatible with

¹ See R Fallon ‘The Core of an Uneasy Case for Judicial Review’ (2008) 121 HLR 1693 and M Kumm ‘Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review’ (2007) 1 EJLS No. 2.

² See M Tushnet “Alternative forms of Judicial Review” (2003) 101 Mich. L. Rev.

³ At 2784.

⁴ At 2784; and see generally P Hogg *Constitutional Law of Canada* (5th ed, Thomson/Carswell, Scarborough, Ontario, 2007).

⁵ M Tushnet, above n 2, at 2786.

parliamentary sovereignty, as the power of the final word rests with the legislative branch of government under each of these doctrines.

The focus of this paper is not the practice of judicial review itself; rather, the analysis is directed toward a mechanism for rights protection that is found within certain constitutional systems: the pre-enactment political review of legislation. This refers to the *ex ante* review of proposed legislation undertaken by one or both of the legislative or executive branches of government, as distinct from the *ex post* rights review that can be carried out by the judicial branch.

The paper will explore the exercise of political review of legislation, with particular regard to how it differs within the distinct constitutional models of weak- and strong-form judicial review. It will be noted that weak-form jurisdictions tend to incorporate political rights review as a core constitutional feature, while strong-form review instead assigns the responsibility of rights protection primarily to the judicial branch. Despite this general trend, certain strong-form review jurisdictions do incorporate some formal political rights review of proposed legislation. There is, however, a distinct omission of any formal pre-enactment review in the most prominent system of strong-form judicial review: the United States. This paper explores and challenges this omission, by ultimately proposing that some political pre-enactment review ought to be made mandatory in the United States. This suggestion will be evaluated through a discussion of the ways in which pre-enactment review can be implemented, by way of comparison with other jurisdictions, and, in particular, what impact this may have on the current United States constitutional culture.

Part II will assess the key features of strong-form judicial review, using the United States to illustrate how judicial review can regulate constitutional practice and to discuss how the doctrine has faced criticism. Part III addresses weak-form judicial review, and its key feature of pre-enactment review, before assessing New Zealand's constitutional framework to demonstrate how it can be institutionalised. Part IV outlines the main issue to be discussed: the absence of formal pre-enactment review in the United States Congress. This is introduced by analysing United States congressional practice, both current and historical, as well as looking at the recent 'Constitutional Authority Statement' requirement. Part V advances the proposal that pre-enactment review of legislation should be made mandatory in the United States. Section A of Part V looks at whether this is *prima facie* a viable proposal for the United States while also canvassing the potential arguments against such a requirement. Section B of Part V further evaluates

this proposal, by considering, in turn, how pre-enactment review is implemented in Australia, Canada and Japan. Part VI discusses and summarises the preceding evaluation, to ascertain how the pre-enactment proposal could be advanced. Part VII consists of a final conclusion to the paper.

II Strong-form Judicial Review

A An Overview

Strong-form judicial review is the constitutional model that is often aligned with constitutional or judicial supremacy. It was first established in the United States, in direct rejection of the system of parliamentary sovereignty, which otherwise prevailed at the time.⁶ Strong-form review imposes constitutional limits on the legislature by means of a codified bill of rights, which the courts will enforce.⁷

Under strong-form review, the judiciary has “a wide-ranging power” to review legislation for bill of rights consistency, with the authority to invalidate statutes that infringe its provisions.⁸ The courts’ constitutional interpretations are authoritative and binding on the other branches, at least in the “short to medium run”.⁹ Judicial interpretations are not seen as absolutely binding since they can be overturned by subsequent constitutional amendment or later rejected by the courts themselves, signalling a change in constitutional doctrine.¹⁰ Thus, strong-form review “effectively gives exclusive voice to the highest court” in relation constitutional interpretation.¹¹

Judicial review is considered by some to be a key constitutional check by the judiciary on the powers of the other branches of government¹² and even a precondition of the legitimacy of law.¹³ The doctrine insists that courts function well as “forum[s] of

⁶ See S Gardbaum *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, Cambridge, 2013), at 3.

⁷ See M Tushnet “New Forms of Judicial Review and the Persistence of Rights – And Democracy – Based Worries (2003) 38 Wake Forest L. Rev. 813.

⁸ At 814; And S Gardbaum, above n 6, at 2.

⁹ M Tushnet, above n 2, at 2784.

¹⁰ At 2784.

¹¹ S Gardbaum, above n 6, at 62.

¹² See C Montesquieu *The Spirit of Laws* (G Bell & Sons, Ltd, London, 1914).

¹³ See M Kumm, above n 1, at 1; and R Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Harvard University Press, Cambridge, 1996) at 123.

principle” to protect against the under-enforcement of rights.¹⁴ The courts’ power to exercise this form of review is either established by the constitutional document of a country, often with a requirement for judges to strike down irreconcilable legislation,¹⁵ or it can originate from the courts themselves.¹⁶

B The United States

The oldest example of strong judicial review is found in the United States, where the supreme law Constitution governs. The United States Constitution does not explicitly establish the power of judicial review, but the Supreme Court is accepted as the institution with overarching and final authority on issues of constitutionality.¹⁷ Strong judicial review means the judiciary has not only the power to interpret legislation to be consistent with the Constitution, but has the ability to strike down any legislation as unconstitutional. Such determinations are final in the short-term: binding unless there is some constitutional amendment or development of judicial doctrine to displace the judicial resolution.¹⁸ In practice, judicial review of legislation is exercised relatively frequently to invalidate unconstitutional laws in the United States, when compared with other strong-form jurisdictions.¹⁹

C Criticisms of Strong-form Judicial Review

Despite strong judicial review being of longstanding practice within countless constitutional systems,²⁰ distinct opposition to the doctrine can easily be identified. It is said that “[t]he central problem with strong-form judicial review is not that rights-based judicial review has no value or cannot be justified at all, but that it is too strong”.²¹ Fierce criticism of the doctrine has been made; Jeremy Waldron has argued against strong judicial review based on the reasoning that rights are not necessarily any better protected by the judiciary than they would be by democratic legislatures, and that judicial review itself is democratically illegitimate.²² Strong judicial review has been seen as representing

¹⁴ R Dworkin *A Matter of Principle* (Harvard University Press, Cambridge, 1985) at 69-71.

¹⁵ See M Tushnet, above n 2, at 2784.

¹⁶ For example, the United States Constitution contains no explicit grant of judicial review power, but it was inferred by CJ Marshall in *William Marbury v James Madison* 5 US 137 (1803).

¹⁷ See *William Marbury v James Madison* 5 US 137 (1803) at 177.

¹⁸ M Tushnet, above n 2, at 2784.

¹⁹ This is discussed further in Part V of this paper. See also J Husa “Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective” (2000) 48 AJCL 345 at 365.

²⁰ See S Gardbaum, above n 6, at 4-5 (for a discussion of countries that have adopted a model where “legislative power is legally limited and courts are empowered to enforce these limits”).

²¹ S Gardbaum, above n 6, at 61.

²² See J Waldron “The Core of the Case Against Judicial Review” (2006) 115 Yale LJ 1346.

a departure from democratic decision-making, which carries a heavy burden of justification. The core legitimacy concern with judicial review has been summed up by the phrase “the counter-majoritarian difficulty”.²³ This phrase embodies the notion that when unelected judges declare a legislative act unconstitutional “it thwarts the will of representatives of the actual people of the here and now”²⁴ so it undermines the will of the majority. Criticism has also been based on mistrust of the judicial branch; it is said that strong judicial review makes it possible for “reckless courts to interfere needlessly with policy choices democratic majorities should be allowed to make.”²⁵ This is where strong judicial review succumbs to criticism as compared to its weak form, which is seen as a means to protect against the under-enforcement of rights that is a lesser departure from democratic decision-making.²⁶ Even within Waldron’s criticisms of judicial review, he has distinguished the two strands and expressed that only strong judicial review is the “target of his critique”.²⁷ These critiques have especially been made of the United States’ constitutional system, where, in practice, the judiciary has exercised somewhat extensive strike-down of legislation.

These criticisms of strong-form review perhaps did, at least in part, contribute to the development of weak-form judicial review as an alternative constitutional model.²⁸

III Weak-Form Judicial Review

A An Overview

Of the two mutually exclusive strands of judicial review, the weak-form version is the newer conception.²⁹ It was first developed with the enactment of the Canadian Bill of Rights Act 1960 and has since been incorporated into several jurisdictions worldwide. Weak-form review has become a feature especially within jurisdictions of parliamentary or legislative sovereignty, since the traditional ‘Westminster model’ of sovereignty is no longer ‘available’.³⁰

²³ See A Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed, Yale University Press, 1986), at 16-17.

²⁴ At 16-17.

²⁵ M Tushnet, above n 7, at 814.

²⁶ See S Gardbaum, above n 6, at 61-62.

²⁷ J Waldron, above n 22, at 1354.

²⁸ See M Tushnet, above n 2.

²⁹ See P Hogg, above n 4; for additional developments see New Zealand Bill of Rights Act 1990; and Human Rights Act 1998 (UK).

³⁰ See M Tushnet, above n 2.

Weak judicial review recognises the “benefits of *both* legislative and judicial reasoning in terms of their contributions to rights deliberation and protection against under-enforcement, but within an institutional structure that affords the power of the final word to the former.”³¹ Weak judicial review may still involve some form of judicial oversight of legislation, but the enforcement of judicial interpretation is more limited. The courts cannot necessarily strike down rights-inconsistent legislation, and judicial decisions are ultimately subject to legislative override powers.

The legislature has final authority, while the judiciary serves as a ‘checking point’ with an interpretative, alerting and informing function with respect to rights issues.³² Weak-form review does not narrow the scope of judicial review;³³ rather, it recognises that, despite a judicial determination of rights-inconsistency, the legislature has overriding authority on such issues and may displace any judicial determination by an ordinary legislative majority.³⁴ Weak-form review has responded to the concern that strong judicial review allows courts with little or no democratic mandate to displace decisions taken by institutions with greater democratic mandate.³⁵ Instead, it shares responsibility for the protection of rights between the government branches.

B A Key Feature: Pre-enactment Review of Legislation

A key aspect of weak-form judicial review is pre-enactment review of legislation. This is the mandatory, political rights review of proposed statutes. This is a non-judicial technique of rights protection, which is designed to “build into the legislative process itself a counter against any tendency towards under-enforcement of rights in legislative outputs”.³⁶ It requires “both of the elective branches of government to engage in rights review of a proposed statute before and during the bill’s legislative process”.³⁷ Pre-enactment review has developed within weak-form judicial review to counter traditional concerns about legislative or majoritarian supremacy. These concerns are addressed by ensuring that both the executive (in proposing bills) and the legislature (in considering

³¹ S Gardbaum, above n 6, at 64.

³² S Gardbaum, above n 6, at 64.

³³ M Tushnet, above n 2, at 2786.

³⁴ At 2786.

³⁵ At 2786.

³⁶ S Gardbaum, above n 6, at 132.

³⁷ At 25.

and enacting bills) remain attentive to protected rights, so that “specific rights concerns are identified and aired during the legislative process”.³⁸

Pre-enactment review refers to the *ex ante* review of proposed legislation by the legislative or executive branch. It creates an internal responsibility for rights protection, as opposed to the external, more indirect, and *ex post* technique of rights protection provided for by the judicial review of legislation. It is important to note that the pre-enactment review referred to in this paper relates only to the review of proposed legislation by a political, rather than judicial organ of the state. An example of *ex ante* review of legislation by a judicial body might be the former practice of the French *conseil constitutionnel*, which had the authority to review parliamentary statutes after their adoption, but before promulgation, upon referral by elected politicians.³⁹ The *conseil constitutionnel* now, however, also has jurisdiction to conduct *ex post* review of the constitutionality of enacted legislation. The status of the *conseil constitutionnel* as a judicial organ is largely unsettled,⁴⁰ however, as one of the only constitutional courts with a jurisdiction that is not limited to *ex post* review of legislation, its arrangement is certainly an exceptional one. This paper will not assess such an institution, but will focus instead on the inclusion, or not, of the political *ex ante* review of legislation within constitutional organisations.

C New Zealand

Perhaps the best example of weak-form review is provided by New Zealand, where Parliamentary sovereignty is well-established,⁴¹ while the judiciary retains an interpretative function with regard to the rights review of legislation, rather than a final override authority.

NZBORA is said to house the “basic building blocks” of New Zealand’s constitution.⁴² It is an ordinary statute, despite the initial proposals for a supreme, entrenched bill of rights with constitutional status.⁴³ The Act proposes to “affirm, protect and promote human

³⁸ At 26.

³⁹ A Stone Sweet “The Politics of Constitutional Review in France and Europe” (January 2007) 5 *ICON* 69 at 71.

⁴⁰ See A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press, 2000) at 92-126.

⁴¹ See the New Zealand Bill of Rights Act 1990 [NZBORA].

⁴² G Palmer and M Palmer *Bridled Power: New Zealand Government Under MMP* (3rd ed, Oxford University Press, Auckland, 1997) at 264.

⁴³ See G Palmer “A Bill of Rights for New Zealand: A White Paper” [1985] *AJHR* A6.

rights and fundamental freedoms” and to “affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights”.⁴⁴

Although NZBORA applies to acts done by the legislature, executive and judiciary,⁴⁵ it restricts judicial power so that no court has the power to invalidate, impliedly repeal, revoke, or treat as ineffective any legislation that is inconsistent with the Act.⁴⁶ This adheres to the basic premise of weak-form judicial review: subordination of judicial authority to legislative override powers. New Zealand courts are directed to interpret all legislation consistently with protected rights, while the legislature retains the legal power of the final word so that any judicial decision is ultimately subject to the will of an ordinary legislative majority.

NZBORA has also formalised pre-enactment review to enhance the protection of recognised rights. The Act sought to “put obstacles in the way of the executive when it is framing its legislative proposals” and ensures that “legislation conforms to basic principles, important standards, and real legal tests”.⁴⁷ New Zealand’s techniques of pre-enactment review include section 7 Attorney-General ‘vetting’ and select committee scrutiny of proposed legislation.

1 Attorney-General Reporting

Section 7 of NZBORA requires the Attorney-General to report to the House when proposed legislation appears to be inconsistent with the Act.⁴⁸ The Attorney-General’s report is based on matters of law, rather than political judgment; it aims to generate constructive debate of NZBORA issues in the House, and to ensure that the House is aware of any inconsistency between a bill and NZBORA so that it can “give proper consideration to proposed legislation in that light”.⁴⁹ Overall, the reporting requirement under s 7 recognises the standing of NZBORA in the development of government policy.

Section 7 has resulted in numerous procedural requirements being formulated to achieve adequate consideration of NZBORA issues during both policy development and

⁴⁴ NZBORA 1990, preamble.

⁴⁵ NZBORA, s 3(a).

⁴⁶ NZBORA, s 4.

⁴⁷ G Palmer "New Zealand Bill of Rights Bill: Third Reading" (21 August 1990) 510 NZPD 3760.

⁴⁸ NZBORA, s 7.

⁴⁹ *Westco Lagen v Attorney-General* [2001] 1 NZLR 40 (HC) at [95] per McGechan J.

legislative drafting.⁵⁰ First, as part of the s 7 “vetting” process, independent executive review is undertaken either by the Ministry of Justice⁵¹ or the Crown Law Office.⁵² Where an inconsistency with rights is identified, the Attorney-General is advised and this advice is usually later made available to the public.⁵³ On this advice, the Attorney-General decides whether a report is required.⁵⁴ Any report must stipulate which provision appears to be inconsistent with NZBORA and detail the nature of that inconsistency.⁵⁵ This report “can then be one of the issues debated by the House and considered by the Select Committee”.⁵⁶

The Attorney-General’s s 7 duty arises only once, at the introduction of a Bill;⁵⁷ and there is no subsequent reporting duty if a Bill is amended, for example, after a select committee report or in the case of a supplementary order paper.⁵⁸ In addition to these limitations, although the reporting function is designed as an ‘obstacle’ to legislature enactment,⁵⁹ s 7 does not preclude the legislature passing NZBORA-inconsistent legislation. Rather, it makes certain that any legislative action inconsistent with NZBORA is knowingly undertaken: a powerful political tool that “can be a potent weapon”.⁶⁰ This non-binding nature of Attorney-General reports is further reiterated by the direction to members that a s 7 report outlining NZBORA inconsistencies “simply draws them to members’ attention” and “does not prevent the House from agreeing to such provisions.”⁶¹ Little or no indication is given by Parliament as to whether the dismissal or termination of a bill is ultimately directly linked to NZBORA inconsistencies identified by the Attorney-General’s report.

⁵⁰ See A Butler “Strengthening the BOR” (2000) 31 VUWLR 129, at 145; and P Rishworth et al. *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003), at 196.

⁵¹ For non-Justice Bills.

⁵² For Bills within the Justice portfolio.

⁵³ See Hon David Parker *The Attorney-General’s Reporting Function under Section 7 of the New Zealand Bill of Rights Act 1990* (Ministry of Justice, available at www.justice.govt.nz).

⁵⁴ The Attorney-General makes a report only where a bill appears inconsistent with the Bill of Rights, per NZBORA s 7.

⁵⁵ Standing Orders of the House of Representatives 2011, SO 262.

⁵⁶ *Easton v Governor-General* [2012] NZHC 206, at [24] per Mallon J.

⁵⁷ NZBORA, s 7.

⁵⁸ *Boscawen v Attorney-General* [2009] NZCA 12 at [46].

⁵⁹ See G Palmer, above n 43.

⁶⁰ G Palmer and M Palmer, above n 42, at 272.

⁶¹ *Effective House Membership: A Guide for Members of Parliament* (Office of the Clerk of the House of Representatives, 2011) at 33 (available at www.parliament.nz); Standing Orders of the House of Representatives 2011, SO 262

Since the requirement was introduced in 1990, 59 Attorney-General reports under s 7 have been produced. Of these, 28 related to Government Bills, while 31 reported NZBORA inconsistencies with regard to non-government bills. In 2011, only one Attorney-General report was tabled, which related to the right to an effective remedy.⁶² The government bill in question proposed an amendment to the Prisoners' and Victims' Claims Act 2005. In the report, Attorney General Chris Finlayson states that he finds it "surprising" that a previous Attorney-General under opposition government "declined to issue a section 7 report" on the legislation now enacted.⁶³ Finlayson goes on to state that s 7 reports "are not designed to be politically convenient or appease the executive" and that "the Attorney-General has a law officer duty to report to Parliament on legislative provisions which may be inconsistent with the New Zealand Bill of Rights Act 1990."⁶⁴ Following the s 7 report of inconsistency with NZBORA, the 2011 bill was terminated after its introduction,⁶⁵ with no reading of the bill taking place in the House and without any Select Committee referral. Since the 2011 Attorney-General report, only one other bill has had a report for inconsistency,⁶⁶ while no reports were tabled in 2013.

Chris Finlayson, as the current Attorney-General, has spoken generally about his role in advising Parliament under s 7 NZBORA.⁶⁷ In the interview, Finlayson revealed that upon receiving advice on a bill from the Crown Law Office or Ministry of Justice, he will not just "tick off" what is given to him by the officials;⁶⁸ he will often write his own draft for the report or heavily rewrite the advice he has received. Finlayson also states that he regrets that the reporting function over the years "hasn't always been observed," citing the examples of the Foreshore and Seabed Act 2004 and the Electoral Finance Bill 2007, neither of which received s 7 reports. Finlayson adds that, on occasion, there is an early Bill of Rights inconsistency identified at the executive stage of legislative development, before any official s 7 report is submitted. This inconsistency can be made into an early

⁶² Based on the Prisoners' and Victims' Claims (Redirecting Prisoner Compensation) Amendment Bill 2011. Report available at <http://www.parliament.nz/resource/0000175160>.

⁶³ Prisoners' and Victims' Claims (Redirecting Prisoner Compensation) Amendment Bill s 7 report, at cl 4.

⁶⁴ At cl 5.

⁶⁵ The bill was introduced on 13/10/2011 and terminated/discharged on 3/12/2012.

⁶⁶ Lobbying Disclosure Bill 2012, a non-government bill which was also terminated, this time following Select Committee recommendation.

⁶⁷ See the recorded video interview with Chris Finlayson. Interview available at: <http://www.youtube.com/watch?v=Ba8VxZ6DZas>.

⁶⁸ Video interview, C Finlayson (at 2:08).

report, and circulated among legislators to “cause the legislation itself to be amended” so that it is NZBORA compliant.⁶⁹

The mandatory reporting function under s 7 NZBORA thus establishes transparency and a degree of accountability within the legislative process. It creates a responsibility for the legislative and executive branches to ensure that rights are upheld. The understanding created is that only when there are significant political imperatives should Parliament legislate adverse to a s 7 report.⁷⁰

2 *The Select Committee Process*

The select committee process provides an additional pre-enactment rights review mechanism. Select committees work on behalf of the House, enabling Parliament to examine in more detail any issues that arise from the introduction of a bill. Select committee members are urged to “consider bill of rights issues as a routine aspect of good committee practice.”⁷¹ Such consideration may involve following up on s 7 reports by hearing evidence or receiving advice from the Attorney-General or officials. The committee can also invite submitters to comment on any Bill of Rights implications of proposed legislation.⁷² The committee then reports on the bill to the House, often recommending amendments.⁷³

Both select committee scrutiny and s 7 reports facilitate the political consideration of rights issues and promote debate of bills in the House of Representatives. Such an extent of pre-enactment review of proposed legislation is arguably essential in systems of weak-form judicial review. Judicial power in New Zealand is limited to interpreting legislation consistently with the statutory bill of rights, with no definitive power to declare legislation invalid for its inconsistency with NZBORA.⁷⁴ Pre-enactment review thus can provide the crucial requirement for an authoritative rights review of legislation in weak-form systems.

⁶⁹ Video interview, C Finlayson (at 3:35).

⁷⁰ Although, the review practice under s 7 has been criticised: see for example A Geddis ‘The Comparative Irrelevance of the NZBORA to Legislative Practice’ (2009) NZULR 465 at 477.

⁷¹ “Effective Select Committee Membership – A guide for Members of Parliament” (Office of the Clerk of the House of Representatives) 2011 at 26.

⁷² At 26.

⁷³ Standing Orders of the House of Representatives 2011, SO 287-292.

⁷⁴ Although, this view has been challenged. See *Taylor v NZ Poultry Board* [1984] 1 NZLR 394 at 398 per Cooke J.

There is generally no legal consequence should the political branch choose to disregard advice or recommendations proposed through the course of the pre-enactment review of legislation. The review procedure does, however, appropriately establish a certain amount of political accountability for the consideration and protection of fundamental rights as part of the legislative process.

IV The Issue: No Pre-enactment Review in the United States

Despite the general trend of pre-enactment review largely being developed in weak-form jurisdictions, political rights review is now also a fundamental part of many, if not most, countries that adhere to the strong-form review model.⁷⁵ It is an accepted principle that more than one government branch has the duty to ensure that fundamental rights are protected; in fact, it is now perceived as a ‘shared’ duty, to ensure that legislation complies with existing, protected rights.⁷⁶ Thus, political review of legislation has become mandatory in a large number of constitutional democracies, regardless of which constitutional model is adhered to. In spite of the current widespread acceptance and implementation of pre-enactment review, a notable absence of any mechanism for pre-enactment review of legislation prevails in the United States. This will be discussed in the following sections of this paper.

A The United States Congress

While the United States judiciary conducts extensive ex post rights review of legislation, there is currently very little formal role for members of Congress to undertake rights review of proposed legislation during legislative enactment. The absence of political rights review can be assessed with regard to the historical developments of constitutional interpretation in the United States.

The constitutional Framers did not originally explicitly direct the members of Congress to deliberate over matters of constitutionality; it is nonetheless now accepted that “each of the three branches (not just the judiciary) were presumed to be obliged to uphold, interpret, and explicate the Constitution.”⁷⁷ There were early debates in Congress over the constitutionality of issues⁷⁸ and any suggestions that questions of constitutionality of

⁷⁵ This is discussed in Part V of this paper.

⁷⁶ See generally H Volokh “Constitutional Authority Statements in Congress” (2013) 65 FLR 173.

⁷⁷ R Feingold “The Obligation of Members of Congress to Consider Constitutionality While Deliberating and Voting: The Deficiencies of House Rule XII and a Proposed Rule for the United States Senate” (2013) Vand. L Rev at 109-110.

⁷⁸ See E Hickok, *The Framers’ Understanding of Constitutional Deliberation in Congress*, 21 GA L Review, 217 (1986).

legislation should be left to the judiciary were “quickly shouted down”.⁷⁹ The responsibilities of the judiciary and Congress were co-equal in determining matters of constitutionality, and the legislative and executive branches had to “determine in the first instance the extent of their own powers”.⁸⁰ The courts even deferred to legislative judgments on a law’s constitutionality when themselves conducting legislative review.⁸¹ However, congressional interpretation of the United States Constitution has since suffered a marked decline.

With no express legal requirement for members of Congress to undertake constitutional interpretation, other than each member’s oath of office to adhere to the Constitution,⁸² in practice “the balance in constitutional interpretation has shifted heavily toward the courts over the past two hundred years”.⁸³ This shift has been ascribed in part to institutional pressures, and in part to political convenience.⁸⁴ The criticism is that members of Congress now lack interest in the constitutionality of measures on which they cast votes.⁸⁵ Senators have reportedly responded to questions of constitutionality with “I’ll leave that to the courts”⁸⁶ and the legislature’s attitude to such questions has even been summarised as: “That’s not my job.”⁸⁷ The judiciary is thus seen to be acting somewhat solitarily in conducting substantial and definitive rights review of legislation.

This practice raises the issue of whether it is appropriate for only one branch of government in the United States to undertake any sort of rights review of legislation, or whether such review ought to be undertaken and shared between government branches. Notably, the United States currently lacks any requirement for the legislative branch to undertake, as a matter of course, the review of proposed legislation for constitutional compatibility. Instead, any constitutional review of legislation is deferred to the judicial branches, to be undertaken ex post enactment.

⁷⁹ D Currie “Prolegomena for a Sampler: Extrajudicial Interpretation of the Constitution 1789-1861, in N Deavins and K Whittington (eds) *Congress and the Constitution* (Duke University Press, 2005) at 18.

⁸⁰ At 19-20.

⁸¹ See R Feingold, above n 77, at 111.

⁸² See US Constitution, art VI, § 3.

⁸³ H Volokh, above n 76, at 181.

⁸⁴ A Mikva “How Well Does Congress Support and Defend the Constitution?” (1983) 61 NCLLR 587, at 588.

⁸⁵ R Feingold, above n 77 at 103.

⁸⁶ At 103.

⁸⁷ At 103.

B The ‘Constitutional Authority Statement’ Requirement

With the recognition that perhaps constitutional interpretation should not take place solely in the courts, a “sea change” was recently called for within the United States legislative branch to amend the way the House of Representatives operates.⁸⁸ The change seeks to challenge this total deference to the judiciary on questions of constitutionality, so that the legislative branch has some role in constitutional interpretation, for an overall “closer adherence to the United States Constitution.”⁸⁹ This change is closely linked to the issue of the United States Congress currently practising little or no political pre-enactment review of legislation.

In 2011, a new rule was instituted in the United States House of Representatives to require members of Congress who introduce bills or resolutions to provide “a statement citing as specifically as practicable the power or powers granted in the Constitution to enact it”.⁹⁰ The statement is known as a Constitutional Authority Statement (CAS). The CAS rule was intended to “inform and provide the basis for debate” and to demonstrate that Congress understands its constitutional obligation “to stay within the role established therein for the legislative branch.”⁹¹

The 2011 rule appears to be the first explicit requirement for members of Congress to justify the constitutionality of their actions.⁹² It has been seen as a “simple and straightforward monitoring mechanism” to guarantee that government officials act within their proper authority.⁹³ The main argument against the rule is that it changes nothing. The rule does not require substantial rights review, as members need only give some constitutional justification for the proposed legislation overall. The substance of the rule has been described as “decidedly benign”⁹⁴ and the rule itself dismissed as “symbolic”⁹⁵ and “trivial”.⁹⁶ Critics have attacked the rule’s limited capacity, rather than its content; attesting even that the rule ought to be strengthened.⁹⁷

⁸⁸ See R Feingold, above n 77, at 101.

⁸⁹ At 101.

⁹⁰ House Rule XII 7(c)(1) (112th Cong.).

⁹¹ J Boehner, Memorandum, “New Constitutional Authority Requirement for Introduced Legislation” (December 2010).

⁹² See R Feingold, above n 77, at 109.

⁹³ H Volokh, above n 76, at 4.

⁹⁴ H Volokh, above n 76, at 3-4.

⁹⁵ See R Feingold, above n 77, at 106.

⁹⁶ At 106.

⁹⁷ See H Volokh, above n 76.

Despite some condemnation of the rule, the required statements are “suddenly flowing through Congress at the rate of several hundred per month”.⁹⁸ The rule has even generated discourse in the House on specific pieces of legislation.⁹⁹ CAS’s have thus been deemed to be useful tools to increase congressional deliberations about the Constitution.¹⁰⁰ In the light of this increased congressional activity, it may be said that the rule does represent an interesting and long-unprecedented movement toward having more constitutional discourse in Congress once again.

V The Proposal: Mandatory Pre-enactment Review in the United States

Having identified an absence of political pre-enactment review of legislation in the United States, and having analysed the recent introduction of the CAS requirement that is aimed at informing members of Congress on matters of constitutionality and promoting congressional debate, this paper will now explore the proposal of making some pre-enactment review of legislation mandatory in the United States.

The assessment will initially be directed toward establishing whether mandatory pre-enactment review is a viable consideration for the United States. This will be looked at in the light of the United States model of constitutionalism, and will go on to canvass the potential arguments that might surface against such a proposition. Subsequently, the use of pre-enactment review in certain other jurisdictions will be assessed, in order to further inform the proposal being made for the United States.

A Assessing the Viability of Pre-enactment Review in the United States

It is important to determine whether there is *prima facie* some legal preclusion to the mandatory pre-enactment review of legislation in the United States. Such an obstacle could, for example, relate to an aspect of the United States Constitution itself or it could arise as a result of the strong-form judicial review model that the United States adheres to. These factors will be briefly examined, before considering what other arguments may surface against the proposition.

As ascertained in Part IV of this paper, pre-enactment review of legislation previously took place in Congress as a matter of course.¹⁰¹ The reason it no longer occurs is due to a

⁹⁸ H Volokh, above n 76, at 2.

⁹⁹ R Feingold, above n 77, at 106.

¹⁰⁰ H Volokh, above n 76, at 5.

¹⁰¹ See Part IV above; and R Feingold, above n 77, at 109-114.

cultural, rather than legal, shift. The accepted practice is now for the judiciary to be the primary, and almost always sole, institution to undertake rights review of legislation in the United States. Members of Congress must undertake the oath to “support and defend” as well as “bear true faith and allegiance” to the Constitution.¹⁰² Furthermore, no member of Congress can vote or introduce a bill until he or she has taken this oath.¹⁰³ There has been no legal change to limit Congress’s authority to interpret the Constitution during the process of legislative enactment. From this brief analysis alone, it is sufficiently affirmed that pre-enactment review is not legally precluded in the United States; it has previously, and still can occur during the legislative process without representing a divergence from the Constitution or necessarily transgressing the practice of strong-form judicial review.

The question then becomes: is there some cultural bar to making pre-enactment review of legislation mandatory in the United States? By virtue of being a cultural, rather than legal, barrier to the proposal, any such impediments would actually not prevent pre-enactment review being made a requirement for the United States Congress. It would, however, be more challenging and less fruitful if the proposal were met with disdain by any number of individuals or organisations, or otherwise too reluctantly executed by members of Congress. It is therefore important to consider what, if any, cultural resistance there could be that would impact the implementation of mandatory pre-enactment review of legislation.

One cultural impediment to mandatory pre-enactment review in the United States could be the concern that Congress is unsuited or unable to sufficiently carry out the constitutional rights review of legislation. Similar apprehension has recently been voiced with regard to the capacity of members of Congress to produce the required Constitutional Authority Statements.¹⁰⁴ The proposal might otherwise be opposed based on arguments that members of Congress lack the requisite expertise or resources to adequately carry out a sufficient pre-enactment analysis of constitutionality.¹⁰⁵ Or the concern might be that such a review requirement would prove too costly and time consuming for members of Congress. Again, similar arguments have been made against the requirement for Constitutional Authority Statements.¹⁰⁶ Finally, with regard to Congress’s suitability to conduct such review, it may be said that a pre-enactment review

¹⁰² US oath of office set by statute (5 U.S.C. 3331), enacted by Congress.

¹⁰³ US law (2 U.S.C. 21, 25).

¹⁰⁴ See H Volokh, above n 76, at 188.

¹⁰⁵ At 191.

¹⁰⁶ See H Volokh, above n 76.

requirement is unnecessarily burdensome, formalised and bureaucratic, especially for the already pressured institution.¹⁰⁷

The second, and most significant, cultural impediment could be the perceived threat that introducing mandatory pre-enactment review would have an untoward impact on the overall United States constitutional framework. This perceived threat essentially boils down to the current, very insistent notion that the judiciary is the appropriate institution in the United States to conduct the constitutional rights review of legislation.¹⁰⁸ This standpoint is familiar within constitutional discourse; as Stephen Gardbaum states, “the terms legislative and judicial supremacy thus describe not only which institution has the final word on any constitutional issue, but also which institution is primarily entrusted with the tasks of declaring and protecting citizens’ rights and liberties.”¹⁰⁹ Accordingly, the United States judiciary as the final arbiter of constitutional concerns has also been allocated the primary responsibility for ensuring that legislation complies with the Constitution. This is inherent in the strong-form judicial review model. The acceptance of this allocation of power is reiterated in the attitudes of members of Congress and Senators, who have stated that it is the Supreme Court’s job to determine the matter of constitutionality of legislation, and not theirs.¹¹⁰ So even within Congress itself, there is a large deference to the courts on issues where the constitutionality of legislation is questioned. Closely related to this, the concern becomes whether mandatory pre-enactment review would in some way influence the current United States’ constitutional dynamic in a way that would amount to a shift in the allocation of power between these institutions. Although the legislature retains the legal authority to conduct the pre-enactment review of proposed legislation, the legal culture has developed in such a way that this is not openly exercised nor expected within the legislative process. If pre-enactment review were made mandatory, it can be fathomed that, to some extent, the judiciary would be seen to be relieved of a duty. This refers to the accepted judicial responsibility in being the sole analyst to review legislation for rights compliance. Instead, pursuant to the proposal, the rights review responsibility may at least become a shared duty as between the two government branches, if not, as even more so the responsibility of the legislature.

¹⁰⁷ R Feingold, above n 77 at 112.

¹⁰⁸ At 103.

¹⁰⁹ S Gardbaum, above n 6, at 7.

¹¹⁰ R Feingold, above n 77, at 103.

These assertions against making the pre-enactment review of legislation mandatory in the United States can only be fully evaluated by garnering some understanding of how the proposal could finally be instituted in the United States. This paper advances the argument that such cultural impediments to mandatory pre-enactment review can be overcome by the way in which the mandatory political review of legislation is implemented. Both concerns, as regarding Congress's capacity to conduct such review and the impact that the review requirement could have on the United States constitutional dynamic, can be addressed by the particular way that pre-enactment review is required in Congress. The remainder of this paper will address this point: namely, how the proposal should be implemented in the United States. This evaluation will be informed by the practice of other jurisdictions, which will help to illustrate and discuss the possibilities for this proposal in the United States.

B Pre-enactment Review in Other Jurisdictions

One of the main possible reasons for resistance to the mandatory pre-enactment review in the United States has been identified as the concern of its impact on the constitutional structure overall.¹¹¹ In particular, the impact it might have on the courts' extensive powers to review and strike down legislation on the grounds of constitutionality. It is appropriate to look at other jurisdictions where the constitutional dynamic is such that some pre-enactment review of legislation is required but also where the judiciary is authorised to review and strike down rights-inconsistent laws. Such an analysis will be useful to ascertain the ways in which pre-enactment review has formed within other constitutions, especially where strong-form judicial review can operate within the constitutional practice.¹¹² It is essential to make this comparative consideration in order to critically analyse how the current proposal might be realised and, ultimately, to draw a conclusion as to the viability and propriety of pre-enactment review within the United States constitution.

The constitutional operation of three other jurisdictions will be examined. The countries to be assessed are Australia, Canada and Japan. These jurisdictions were selected firstly, since each has its own mode for implementing the pre-enactment review requirement. Some of these mechanisms were recently introduced, while others have longer been incorporated as key constitutional features. These review mechanisms will be identified and discussed, and can ideally provide a range of possible ways that the proposal could

¹¹¹ See H Volokh, above n 76.

¹¹² This can be contrasted to pre-enactment review within New Zealand as discussed in Part III, since New Zealand courts do not have the power to overturn legislation that is 'unconstitutional'.

be executed for the United States. Furthermore, these jurisdictions were chosen because of the diverse role that pre-enactment review of legislation has in each. The diversity of pre-enactment review methods will be used to inform and illustrate the impact that certain mechanisms of pre-enactment review can have on a country's constitution, in order to then relate this back to the reservations regarding its impact on the United States constitutional dynamic.

The analysis will be made first by introducing the constitutional practice of each country, with a particular focus on the constitutional model adhered to and how the mandatory pre-enactment review is exercised. On this basis, each jurisdiction will be assessed with regard to the proposal being made for the United States. Particular regard will be had to those features that could be used in the United States to mitigate any initial concerns about the implementation of the proposal. It is important that any pre-enactment review requirement introduced in the United States would result in the least constitutional disruption possible.

A brief overview will now be given as to each country's relevance for the present proposal, before the more in depth assessment is made of each, which will help to garner a more concrete illustration as to how mandatory pre-enactment review of legislation could best be implemented in the United States.

Firstly, Australia has recently introduced legislation that requires political review of proposed legislation within the existing overarching strong-form review framework. Australia's constitutional operation is significant, due to the new legislative framework that provides for the political protection of human rights that was enacted in 2011. A big part of this is the political pre-enactment review of legislation, as well as the establishment of a committee for human rights matters. This framework has been established despite Australia having no bill of rights or other general human rights instruments enshrined in domestic legislation. This new framework represents a shift in Australia's traditional focus on legal constitutionalism. Parliament now has responsibility for the protection and consideration of human rights where, previously, the judiciary have largely taken responsibility for the rights review of legislation. This recent introduction of political responsibility for the protection of rights will be assessed in terms of how well the requirements have been received in Australia's constitutional practice, and where it may relate to the proposal for the United States.

Canada has long implemented pre-enactment review of legislation, while incorporating a judicial power that exceeds what is normally accepted in weak-form review jurisdictions. Despite its close geographical proximity to the United States, Canada has been one of the leading countries in developing weak-form judicial review. A key component of this development has continued to be its requirement for pre-enactment review of legislation. Throughout, Canada has retained a political reporting requirement as to the compatibility of proposed legislation with protected rights. It is interesting to assess how pre-enactment review has influenced Canada's constitution overall, also having regard to its interaction with the judicial strike-down power, which was later enacted. The current proposal for the United States will be considered with regard to Canada's longstanding practice of pre-enactment review of legislation.

Finally, Japan's constitutional framework will be assessed. In this case, strong-form review authority is established by the Constitution, but is said to be 'a failure' in practice. This claim will be assessed, in particular because the 'failure' of strong judicial review has been attributed to the body that is charged with conducting the pre-enactment review of legislation in Japan: the Cabinet Legislation Bureau (CLB). The role and responsibility of the CLB in reviewing legislation for constitutional compliance will be looked at in order to evaluate the Japanese constitutional dynamic overall. This assessment is particularly relevant for considering the current proposal for the United States; since a key area of concern is what possible impact the mandatory pre-enactment review in Congress may have on the operation of other United States government organs.

Following the analysis of each jurisdiction, a summary will be made that will outline specifically what features should be included, should pre-enactment review of legislation be made mandatory in the United States.

1 Australia

Australia has recently adopted a new legislative framework for the protection of human rights. In lieu of a court-focused model, the legislation has developed Parliament's role, by introducing mechanisms for the mandatory political pre-enactment rights review of legislation. These developments will be assessed in terms of the specific mechanisms adopted, with a view to ascertaining how a similar shift to political responsibility for constitutional rights protection might be invoked in the United States.

The Constitution of the Commonwealth of Australia of 1900 is an entrenched, supreme law document. Like the United States, Australia is a federal state that adheres to the

strong-form model of judicial review; the Australian High Court has a general authority to determine what the Constitution means, and it produces constitutional interpretations that are binding on the legislative and executive branches of government.¹¹³ The Constitution does not, however, explicitly authorise courts to exercise judicial review, much like its counterpart in the United States.¹¹⁴ The source of judicial review in Australia remains contested,¹¹⁵ while its legitimacy is well established and goes largely unquestioned.¹¹⁶ The High Court of Australia has even often referred to the United States decision of *Marbury v. Madison*¹¹⁷ when seeking to establish the basis for judicial review.¹¹⁸ The accepted view among constitutional scholars is that, from the Constitution's introduction, courts possessed "the right to declare that a law of the Commonwealth or of a state is void by reason of transgressing the Constitution."¹¹⁹

Australia is also a unique jurisdiction, since it is the only democratic nation without a national Bill of Rights, human rights statute, or any general human rights law.¹²⁰ Certain provisions within the Constitution itself are said to confer some express rights,¹²¹ and others have been interpreted to confer implied freedoms.¹²² A right as referred to here is some legal, moral or social claim to which individuals are entitled; whereas a freedom is properly having no government restraint or control over certain actions. As a result of this statutory absence, Australia does not have a large legal body of work in the field of individual rights.¹²³ The recommendation to adopt a human rights act at the national level was recently rejected by the government,¹²⁴ as it was said that such legislation would be 'divisive.'¹²⁵ Instead, a new national 'human rights framework' was proposed,¹²⁶ at the centre of which are two core mechanisms that require the pre-enactment review of legislation by the executive and legislative branches. The 2011 Human Rights

¹¹³ K Foley "Australian Judicial Review" 6 Wash. U. Glob. Stud. L. Rev. 281 (2007), at 281.

¹¹⁴ S Gardbaum, above n 6, at 204.

¹¹⁵ K Foley, above n 113, at 286.

¹¹⁶ At 285.

¹¹⁷ *William Marbury v James Madison* 5 US 137 (1803).

¹¹⁸ K Foley, above n 113, at 288.

¹¹⁹ At 288.

¹²⁰ At 288.

¹²¹ At 285.

¹²² At 285.

¹²³ At 285.

¹²⁴ G Williams and L Burton "Australia's Exclusive Parliamentary Model of Rights Protection" (2012) 34(1) Stat. L R 58 at 70.

¹²⁵ At 71.

¹²⁶ At 71.

(Parliamentary Scrutiny) Act (the Act) was introduced as a key part of the new framework, which has given federal Parliament the responsibility for the protection of human rights. These new obligations show a clear movement toward featuring more political pre-enactment review of legislation in Australia's constitutional practice. The first of the two pre-enactment review mechanisms recently introduced can be found in Part 3 of the Act;¹²⁷ this requires that bills and legislative instruments be accompanied by a Statement of Compatibility (SOC) as to their compliance with a number of specified international human rights conventions.¹²⁸ The second mechanism is the establishment by the Act of the Parliamentary Joint Committee on Human Rights (PJCHR). The PJCHR can examine claims as to legislative compatibility with human rights and other human rights matters.¹²⁹ A brief overview of each of the Australian developments will be made, in order to consider how a similar constitutional shift could occur in the United States.

The Act states that a member of Parliament proposing to introduce a Bill must "cause a statement of compatibility to be prepared in respect of that Bill"¹³⁰ and cause it to be "presented to the House."¹³¹ Although the SOC will "ordinarily form part of the explanatory memorandum for the Bill,"¹³² there is no specific requirement as to when the SOC must be presented, so the statement may be issued at a later stage, for example after debate has begun or after the bill has been introduced.¹³³ This can be contrasted with New Zealand's section 7 NZBORA reporting requirement, which specifies that, where a bill appears to be NZBORA-inconsistent, the Attorney-General must report on a bill's compatibility when the bill is introduced into the House.¹³⁴

The SOC must include an assessment of whether the Bill is compatible with human rights;¹³⁵ but beyond this, the level of detail that is expected of the statement is unclear. It has been observed that it "might amount to a lengthy analysis of the bill in light of the relevant human rights standards. Or, it might still amount to no more than a 'yes, the bill is compatible' or 'no, the bill is not compatible.'"¹³⁶ There is no requirement for the

¹²⁷ Act, ss 8 & 9.

¹²⁸ Human Rights (Parliamentary Scrutiny) Act 2011 (Australia), s 8(3).

¹²⁹ Human Rights (Parliamentary Scrutiny) Act 2011, s 7.

¹³⁰ Human Rights (Parliamentary Scrutiny) Act 2011, s 8(1).

¹³¹ Human Rights (Parliamentary Scrutiny) Act 2011, s8(2).

¹³² Human Rights (Parliamentary Scrutiny) Act 2011, Explanatory Memorandum.

¹³³ G Williams and L Burton, above n 124, at 75.

¹³⁴ NZBORA, s 7.

¹³⁵ Human Rights (Parliamentary Scrutiny) Act 2011, s 8(3).

¹³⁶ G Williams and L Burton, above n 124, at 75.

report to contain the reasons for finding a bill compatible or incompatible;¹³⁷ nor is there a test or criteria set out, either in the Act or explanatory memorandum, to determine even when a protected right has been infringed by the proposed legislation.

A useful analysis can be made by comparing the legislative SOC requirement with the equivalent requirements found in two of Australia's states, ACT and Victoria. The ACT Human Rights Act requires a similar process;¹³⁸ under which, the ACT government has been criticised for providing only a conclusion of whether or not a bill is consistent with human rights, without giving any reasons in support of that conclusion. By contrast, the Victorian requirement is that the statement must detail 'how' a bill is compatible with protected rights,¹³⁹ so more detailed statements have been produced under that requirement. In this regard, the SOC requirement is closer to the similar ACT provision, since a mere conclusion of compatibility could, *prima facie*, satisfy the legislation. The Explanatory Memorandum to the Act does, however, indicate that SOC's should entail more than just a conclusion on a bill's compatibility with rights; they are "intended to be succinct assessments aimed at informing parliamentary debate and containing a level of analysis that is proportionate to the impact of the proposed legislation on human rights".¹⁴⁰ No human rights are expressly set out in the Act against which the assessments are to be made, but the term 'human rights' is said to involve the rights and freedoms set by the seven international instruments referred to within the Act.¹⁴¹

Such an equivocal statutory requirement ultimately leaves room for political discretion in determining how in-depth the produced statement will be. This may appropriately ease the bureaucratic burden on parliamentarians, in having to produce a compatibility statement for each bill that is introduced into Parliament. For example, a simple statement of compatibility might be suitable where the bill is clearly compatible with protected rights, and no further debate or discussion on the matter is needed or can be foreseen at the bill's introduction. That principle might also be said to be reflected in the NZBORA reporting requirement, in that no s 7 report is necessary where the Attorney-General is satisfied that the bill complies with NZBORA rights. In the United States, one of the main reasons attributed to the shift of responsibility for constitutional interpretation toward the judiciary is, in fact, the increased institutional and political pressures on the

¹³⁷ At 75.

¹³⁸ Australia Capital Territory Human Rights Act 2004, s 37.

¹³⁹ Victorian Charter of Human Rights and Responsibilities Act 2006, s 28.

¹⁴⁰ Human Rights (Parliamentary Scrutiny) Act 2011, Explanatory Memorandum.

¹⁴¹ Human Rights (Parliamentary Scrutiny) Act 2011, s 3.

political branches; including the growing demands on legislators' time.¹⁴² Bearing this in mind, a pre-enactment review provision that commands an in-depth analysis and report of consistency for every bill that is introduced may be perceived as an unnecessarily burdensome and costly requirement for legislators, and therefore received with contempt. In this sense, a more discretionary pre-enactment reporting requirement, such as the Australian SOC provision, might be more suited to the United States political culture, and better received by the members of Congress themselves.

The Australian SOC has limited legal effect in that it is not binding on any tribunal or court¹⁴³ and failure to comply with the SOC requirement does not affect the validity, operation or enforcement of any Bill that does nonetheless become an Act.¹⁴⁴ It has been suggested that SOC's may be taken into account by courts along with other extrinsic material used when making a decision,¹⁴⁵ but there is no requirement on the judiciary to do so. Some commentators have said that a SOC stating that a bill is compatible with human rights is "an invitation (if not a direction) to courts to interpret (the subsequent) legislation consistently (with human rights)."¹⁴⁶ However, others have attributed a lesser role to the SOC's in judicial decision-making: determining that, like any other extrinsic material, the deliberation and interpretation included within an SOC cannot trump the literal meaning of the text.¹⁴⁷ A similar stance to the latter ought to be considered, should any constitutional report become mandatory in the United States. Given the predominant role of the judiciary in conducting constitutional review, prior political reports on the constitutionality of legislation should not have the effect of legally limiting the courts' scope in conducting judicial review. Any such limits may represent an improper transfer of constitutional powers. Instead, the pre-enactment review of legislation is better considered as having the role of informing judicial decision-making, without having a binding legal effect. The impact of pre-enactment review on the exercise of judicial review will be further discussed in the context of Canadian and Japanese constitutional practice.

The limited legal scope of the SOC is appropriate as a mechanism for the pre-enactment political review of legislation in Australia. Prior to the recent enactments, there was no

¹⁴² See R Feingold, above n 77, at 109.

¹⁴³ Human Rights (Parliamentary Scrutiny) Act 2011, s 8(4)

¹⁴⁴ Human Rights (Parliamentary Scrutiny) Act 2011, s8(5).

¹⁴⁵ G Williams and L Burton, above n 124, at 77.

¹⁴⁶ At 77.

¹⁴⁷ At 77.

overt judicial deference to legislative determinations of constitutionality, since the judiciary determines “for itself any facts on which constitutional validity depends.”¹⁴⁸ This was held to be because “the federal government does not argue for a presumption of constitutionality”¹⁴⁹ as no legislative findings on issues of constitutionality were made or included in legislation. With the recent changes, some presumption of constitutionality may be more readily accepted in Australian constitutional practice,¹⁵⁰ however, this ought not necessarily limit the courts’ power of judicial review of legislation.

The recently introduced SOC requirement might not develop a coherent dialogue between the courts and Parliament, but, significantly, it may succeed in creating “a dialogue between the executive, the Parliament, and ultimately the people by requiring Parliament to reveal and justify rights infringements.”¹⁵¹ Even where only a conclusion is drawn as to a bill’s compatibility with human rights, potential breaches are at least being considered and acknowledged by the political branches before the legislation is passed. To a certain extent, the SOC requirement increases political pressure during the pre-enactment stages of law making; promoting the aim of generating rights-consistent laws and creating a general awareness of the compatibility of legislation with protected rights. Again, a similar effect may be desirable in the United States; to generally promote congressional debate as to the constitutionality of bills, without legally limiting the judiciary’s ex post review role.

Part 2 of the Australian Act establishes the Parliamentary Joint Committee on Human Rights (PJCHR). The PJCHR consists of ten members, five from the Senate and five members from the House of Representatives.¹⁵² The role of the PJCHR is to examine Bills, legislative instruments and Acts for compatibility with human rights, and report to both Houses of Parliament on that issue.¹⁵³ The Committee is also charged with inquiring into any human rights related matter that is referred to it by the Attorney-General, and again reporting to both Houses of Parliament on that matter; this role takes the Committee’s function beyond that of legislative scrutiny. The Committee has a range of

¹⁴⁸ A Mason “The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience,” (1986). 16 Fed L Rev. 1 at 6.

¹⁴⁹ At 6-7.

¹⁵⁰ See H Burmester “The Presumption of Constitutionality” 13 FED. L. REV. 277 (1983) (for a discussion of the presumption of constitutionality in Australia).

¹⁵¹ G Williams and L Burton, above n 124, at 78.

¹⁵² Human Rights (Parliamentary Scrutiny) Act 2011, s 5(1).

¹⁵³ Human Rights (Parliamentary Scrutiny) Act 2011, s 7.

powers in order to fulfil its functions, including the ability to hold public hearings and examine witnesses.¹⁵⁴

The powers granted to the PJCHR enable the committee to rigorously scrutinise new and existing legislation against a broad range of human rights standards. This raises the political cost of ignoring or neglecting those standards.¹⁵⁵ However, with the low level of acceptance of such international human rights standards as a suitable measure against national legislation, and no actual requirement that a PJCHR report must be produced before legislation is passed, it is uncertain that the powers conferred will necessarily have a great impact in practice.¹⁵⁶ Without the necessary use of international human rights standards in the United States (since legislation there would be analysed against the rights enshrined in the Constitution), the establishment of a specialist committee to consider the impact of proposed legislation on protected rights is certainly viable. Such a committee might alleviate some of the institutional pressures otherwise felt by individual members of Congress should such review be made mandatory¹⁵⁷ and abate concerns that Congress itself may not have the requisite constitutional expertise to conduct pre-enactment review of legislation.¹⁵⁸

Since no rights-protection role is specifically allocated to the judiciary, the Australian Parliament is said to have exclusive responsibility for the protection of human rights under this new ‘human rights framework’, without any threat of judicial challenge or review.¹⁵⁹ Consequently, Australia now has somewhat of an ‘exclusive parliamentary model’ for pre-enactment rights protection. This model is more absolute, as opposed to the commonly adopted ‘parliamentary rights model’ that still leaves room for some judicial responsibility for rights protection.¹⁶⁰ Despite the judiciary not having an exclusive and specific review responsibility under the new legislative rights framework, the courts retain the right of judicial review and the mechanisms established under the recent legislation do not legally limit judicial decision-making. Perhaps the United States, with its current deference to judicial rights protection, would benefit from something more akin to an explicit ‘parliamentary rights model,’ with provision also for the courts’ role in constitutional interpretation. This idea will be further explored with regard to

¹⁵⁴ Resolution to Establish the Parliamentary Joint Committee on Human Rights, 13 March 2012.

¹⁵⁵ G Williams and L Burton, above n 124, at 79.

¹⁵⁶ At 79.

¹⁵⁷ R Feingold, above n 77, at 109.

¹⁵⁸ See H Volokh, above n 76, at 191.

¹⁵⁹ G Williams and L Burton, above n 124, at 59.

¹⁶⁰ At 159.

Canada's constitution; to assess whether, in practice, the courts' discernable role has influenced the exercise of pre-enactment review by the political branches.

Overall, Australia's new statutory framework is helpful to demonstrate how a constitutional shift might be achieved, so that the pre-enactment review of legislation becomes an important step to ensuring rights-compliant legislation. The new framework focuses on the role of the political branches, without legally limiting the courts' authority to conduct judicial review. These constitutional developments are particularly useful when considering whether a similar transformation could be made in the United States, so that the political branches could become responsible for some constitutional pre-enactment 'check' of legislation, without affecting the overarching model of strong-form judicial review.

2 *Canada*

Although Canada conforms overall to the weak-form judicial review model, the country has developed a legal culture that is somewhat close to strong judicial review, with the courts having a power to invalidate legislation that is inconsistent with protected rights. It is the retention of this judicial power that may be helpful to inform the issue of whether pre-enactment review can serve to complement, rather than intrude on, current judicial review practice in the United States.

Canada has been described as the "pioneer" in institutionalising weak-form judicial review.¹⁶¹ Twice, the country has enacted laws that pre-dated weak-form developments in other jurisdictions, which have affixed both mandatory political pre-enactment review and some judicial power of rights protection within the country's constitutional design, while overarching Parliamentary sovereignty is maintained. Canada does have many of the features of constitutional supremacy: an entrenched, supreme law bill of rights that is enforced by the courts, and a judiciary that is empowered to strike down inconsistent statutes. However, one important right is acknowledged within Canada's constitution to keep the country within the realm of weak-form judicial review: the judiciary does not have the absolute power of the final word; instead, this power is granted to an ordinary majority of the legislature.¹⁶² Already, this may represent too much of a divergence for an entirely pertinent comparison to the United States.

¹⁶¹ S Gardbaum, above n 6, at 97.

¹⁶² Canadian Charter of Rights and Freedoms 1982, s 33.

Importantly, Canada has also cemented its status of adhering to the weak-form judicial review model by its provision for the pre-enactment review of legislation. The 1960 Canadian statutory Bill of Rights first established a reporting requirement so that the federal minister of justice reviewed all proposed legislation in the light of the Bill of Rights.¹⁶³ The Bill of Rights has not been repealed and is still in effect, however, the Canadian Charter of 1982 has effectively superseded the Bill of Rights so that it is now relatively rarely used. The Canadian Charter of Rights and Freedoms 1982 amended the Canadian Constitution.¹⁶⁴ The Charter is entrenched and is part of the supreme law of Canada,¹⁶⁵ against which any inconsistent law has no effect, and it applies to the legislatures and governments on both the federal and provincial levels.¹⁶⁶ The same reporting obligation on the minister of justice was not included in the Charter, however a similar reporting duty to that in the Bill of Rights was included in the 1985 amendment to the Department of Justice Act. Thus, the Canadian Minister of Justice must now certify that all bills have been assessed in light of the Charter, and report any inconsistencies to the House of Commons. This statutory reporting requirement has created an obligation similar to that of the Attorney-General's under s 7 of NZBORA. The introduction of reporting requirements was seen as "a new political commitment for government to alert parliament about its intentions and actions with respect to how legislation affects rights."¹⁶⁷ This recognises that political accountability is a key factor to ensuring that protected rights are respected.

In contrast to the exercise of New Zealand's section 7 reporting requirement, the Canadian Justice Minister has never made a report of inconsistency. The lack of reporting has not been pinned on the political rights review of legislation being inadequate. Some commentators have been critical of the practice overall, saying that the influence on policy development has led to "overly cautious" legislating.¹⁶⁸ The absence of reports has also been explained by the process that takes place before the report is made, which requires that proposed legislation is amended so that the minister of justice is satisfied that the bill put forward will likely satisfy a Charter rights challenge. This comes down to the executive review that has developed from the pre-enactment review requirements; there is a prevailing assumption that legislation deemed to be patently inconsistent with

¹⁶³ Canadian Bill of Rights 1960 (CBOR), s 3.

¹⁶⁴ The Canadian Charter was enacted as Part 1 of the Constitution Act of 1982.

¹⁶⁵ Constitution Act, s52 (Canada).

¹⁶⁶ Constitution Act, s 32 (Canada); compare to the CBOR (which has only federal application).

¹⁶⁷ J Hiebert "Interpreting a Bill of Rights: The Importance of Legislative Rights Review" (2005) 35 B J Pol S 235 at 253.

¹⁶⁸ At 248.

the Charter should be amended or withdrawn prior to the justice minister's report.¹⁶⁹ It is helpful to consider how the mandatory pre-enactment review of legislation can impact legislative practices more broadly, even before any challenge of rights-compatibility is formally asserted. This has the effect of ensuring that the executive and legislative branches seriously consider protected rights before introducing any draft legislation, with the promise of an adverse report should any proposed legislation be manifestly inconsistent with rights.

Interestingly, the Canadian Charter explicitly allows a judicial power of invalidation for laws that are inconsistent with protected rights.¹⁷⁰ This power goes beyond that which is normally granted to the judiciary under a weak-form review model;¹⁷¹ and it is more akin to the extent of judicial authority that is generally found in a strong-form review jurisdiction.¹⁷² The judicial power cannot be altogether classed as "strong-form," since the Canadian Charter also reiterates parliamentary sovereignty with section 33, which allows Parliament to override any judicial declarations of incompatibility. The Canadian judiciary's power therefore does not satisfy the 'strong-form review' requirement that judicial invalidation be binding at least in the short to medium run.¹⁷³

Significantly, it has been said that since the Charter was introduced, granting courts the authority to declare legislation invalid, the pre-enactment review of legislation has become more robust in Canada as compared to when the judiciary lacked this power under the Bill of Rights.¹⁷⁴ Initially, it is reported that there was resistance to the advice that bills ought to be amended in order to redress likely Charter violations; however, following the invalidation of statutes by the Supreme Court, political charter review practice has increased in salience and legitimacy.¹⁷⁵ It is difficult to draw more of a connection than this between judicial strike-down action and the pre-enactment political review of legislation, but at the very least it shows that the political branches might take a more serious stance on having to ensure that all legislation is rights-compliant where the

¹⁶⁹ J Hiebert *Charter Conflicts: What is Parliament's Role?* (McGill-Queen's University Press, 2002, Montreal) at 7-19, 195.

¹⁷⁰ J Hiebert, above n 172 ("Interpreting a Bill of Rights: The Importance of Legislative Rights Review") at 248.

¹⁷¹ For example, in both New Zealand and the United Kingdom, the courts can declare legislation to be rights-inconsistent, but cannot invalidate the legislation as a result.

¹⁷² For example, judicial power in Australia and the United States (the power to invalidate legislation).

¹⁷³ See M Tushnet, above n 2, at 2784.

¹⁷⁴ J Hiebert, above n 167, at 248.

¹⁷⁵ J Hiebert, above n 169, at 7-19.

judiciary can strike-down rights-inconsistent laws. A similar attitude could develop in the United States with the introduction of some mandatory pre-enactment legislative review. Congress currently defers any constitutional review obligations on to the judiciary; if an explicit review responsibility were reserved for Congress in the pre-enactment review stages, the political branches could more earnestly fulfil this role, especially where there is the added possibility of judicial strike-down for any unconstitutional laws enacted. Furthermore, since the judiciary has the power of the final word in the United States, in contrast to Canada where the legislature can go back and override any judicial decisions, there may be more political incentive in the United States for Congress to ensure that enacted legislation does ab initio comply with protected rights.

Despite being a weak-form jurisdiction, Canada's provision for pre-enactment review that is accompanied by strong judicial review practices provides a good background against which to consider the mandatory pre-enactment review of legislation in the United States. Not only can pre-enactment review be undertaken without influencing the extent to which the judiciary can act on its own constitutional interpretations as against legislation, but also the existence of this strong judicial review power might serve to enhance any pre-enactment review practice that is undertaken by the political branches.

3 *Japan*

Japan's constitutional culture appears to be akin to the weak-form model, despite having a Constitution that establishes a strong-form review system. Claims have been made that the Japanese judiciary's role to determine the constitutionality of legislation has been stifled by the exercise of pre-enactment review of legislation.¹⁷⁶ Japan's constitutional practice will be analysed, with a focus on the practice of pre-enactment review there, in order to discuss how this could influence the pre-enactment review proposal for the United States.

The Japanese Constitution of 1946 is one of the world's oldest functioning constitutions. It has endured despite the Constitution's formation being deemed an "unnatural event" due, in part, to the fact that it was drafted primarily in English while the country was under occupation.¹⁷⁷ Although the circumstances surrounding its drafting make the

¹⁷⁶ J Satoh "Judicial Review in Japan: An Overview of the Case Law and an Examination of Trends in the Japanese Supreme Court's Constitutional Oversight" (2008) 41 Loy LA L Rev 603, at 605.

¹⁷⁷ See S Hamano "Incomplete Revolutions and not so Alien Transplants: The Japanese Constitution and Human Rights" (1999) 1 U PA J Const. L 415.

Constitution an “odd case,”¹⁷⁸ Japan’s constitutional arrangement overall can be said to conform to the traditional constitutional model of strong-form judicial review. The Constitution grants the Supreme Court the status of “the court of last resort”¹⁷⁹ with the broad power “to determine the constitutionality of any law, order, regulation, or official act.”¹⁸⁰ The Supreme Court then delegates this power of *ex post* constitutional review to the inferior courts.¹⁸¹

It can be said that Japan’s strong-form review status is true in theory, but is not soundly reflected in constitutional practice. The Supreme Court has a policy of extreme deference to the legislative and executive branches and has upheld the constitutionality of most government actions that are contested before it.¹⁸² In fact, judicial review has been characterised there as “a failure in more than one sense”¹⁸³ and the court has even been said to play a “somewhat secondary role” in determining the constitutionality of legislation.¹⁸⁴

The courts will review the constitutionality of legislative actions, but there is little chance that such actions will actually be struck down by the judiciary.¹⁸⁵ The reason for this deference remains disputed,¹⁸⁶ but the Court has certainly garnered the reputation of being “the most conservative and cautious in the world” with regard to its exercise of judicial review.¹⁸⁷ Since its establishment over six decades ago, the Japanese Supreme Court has struck down few laws on constitutional grounds, especially when compared to its counterparts in other jurisdictions.¹⁸⁸ Although the Japanese Constitution itself authorises strong-form judicial review (which represents a step further than the United States Constitution, where the courts themselves asserted that such authority exists¹⁸⁹), it can be said that Japan has developed a constitutional practice that is more familiar to a culture of weak-form judicial review, where the judiciary will not strike down rights-

¹⁷⁸ At 415.

¹⁷⁹ Kenpo (Constitution), article 81 (Japan).

¹⁸⁰ Kenpo (Constitution), article 81 (Japan).

¹⁸¹ Kenpo (Constitution), article 77(3) (“the Supreme Court may delegate the power to make rules for inferior courts to such courts”) (Japan).

¹⁸² J Satoh above n 176, at 624.

¹⁸³ D Law “Why has judicial review failed in Japan?” 88 Wash U L Rev 1425, at 1426.

¹⁸⁴ J Satoh, above n 176 at 604.

¹⁸⁵ At 606.

¹⁸⁶ See D Law, above n 183.

¹⁸⁷ At 1426.

¹⁸⁸ At 1426.

¹⁸⁹ *William Marbury v James Madison* 5 US 137 (1803).

inconsistent legislation. The judiciary retains final authority on matters of constitutionalism in Japan, overriding that of the legislative and executive branches. However, the pre-enactment review of legislation is a key feature of Japan's constitutional practice, and may impact on the frequency that the judiciary will actually exercise the ex post constitutional review of laws, as it has the power to do.

Some commentators have directly attributed the Court's passive approach reviewing legislation to the existence and workings of the Cabinet Legislation Bureau (CLB).¹⁹⁰ The CLB is charged with conducting the pre-enactment review of legislation in Japan, which it does through reports of constitutionality for proposed legislation. It is an institution made up of senior bureaucrats, who are sent to serve there after having some fifteen to twenty years' experience in other Japanese government ministries or agencies.¹⁹¹ The CLB was originally modelled on the French *Conseil d'Etat* and set up as the key advisory organ to the government.¹⁹² The institution has two formal tasks: the first is to provide opinions to the Prime Minister and the Cabinet on legal issues; the second is to examine drafts of all bills, regulations, Cabinet orders, and treaties for consistency with the constitution and legal precedents.¹⁹³ The CLB has thus been referred to as the Prime Minister's "in-house lawyer" and as providing a "check" on Diet legislation.¹⁹⁴ The pre-enactment review undertaken by the CLB takes the form of an exhaustive and authoritative legal assessment of all proposed policies, which results in the issuing of "unified government interpretations."¹⁹⁵ The CLB's opinions have a significant legal influence within the country's constitution.¹⁹⁶ The propriety of the CLB's involvement in substantial political issues is controversial, since the Japanese Constitution itself does not make provision for the CLB's advisory role. The Supreme Court has, however, held that the pre-enactment review of legislation by the CLB is not in violation of the Constitution.¹⁹⁷

It has been acknowledged that the views of the CLB are not legally binding, but they are accepted as authoritative and cannot be easily overturned by politicians in the course of

¹⁹⁰ D Law, above n 183, at 1454.

¹⁹¹ See R Samuels "Politics, Security Policy, and Japan's Cabinet Legislation Bureau: Who Elected These Guys, Anyway?" (March 2004, Japan Policy Research Institute Working Paper, No. 99).

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ J Satoh, above n 176, at 605.

¹⁹⁷ J Satoh, above n 176, at 605.

legislative enactment.¹⁹⁸ The CLB review is therefore a mechanism to ensure that legislative and executive acts are in compliance with the Constitution, and the institution can declare legislation unconstitutional during its pre-enactment review. While the CLB might be seen as authoritative during the *ex ante* review of legislation, the extent of the impact that the institution has on the other branches of government, for example on the judiciary's *ex post* review role, has been questioned.

The purpose of the CLB, it is said, is to “avoid the type of legal confusion seen in the United States when legislative decisions are found to be unconstitutional by courts after their enactment.”¹⁹⁹ This appears to indicate that judicial findings of unconstitutionality are undesirable, only leading to confusion and inconsistency. However, strong judicial review that allows for the invalidation of unconstitutional legislation has long been accepted as an important check on legislative power within strong-form jurisdictions.²⁰⁰ Further to this, the CLB's influence has been heralded as the reason for the Japanese Supreme Court's reluctance to declare laws unconstitutional, since “the oversight role originally designed for the Court in the Constitution has largely been subsumed by the Cabinet Legislation Bureau.”²⁰¹ The practice has been criticised since “the fact that the CLB serves as the highest interpretive authority on the Constitution is itself a violation of the Constitution.”²⁰² The apparent judicial reluctance to determine the constitutionality of laws has also raised questions concerning the judiciary's independence, namely, whether the courts can properly be considered as being free from undue political influence.²⁰³

It is important to look at why the CLB is seen to have such a wide influence within Japan's constitution. Extensive academic discussion of this topic has already developed.²⁰⁴ One argument is that pre-enactment review by the CLB is so effective and thorough that the judiciary is unlikely to find constitutional flaws in final legislation.²⁰⁵ However, this reasoning has been dismissed as “unduly optimistic” since the CLB cannot

¹⁹⁸ See R Samuels, above n 191.

¹⁹⁹ J Satoh, above n 176, at 605.

²⁰⁰ See M Tushnet, above n 2.

²⁰¹ J Satoh, above n 176, at 624.

²⁰² Kan Naoto (leader of Japan's largest opposition party), *Bungei Shunjû*, July 1999, at 174 (in R Samuels, above n 191).

²⁰³ S Hamano, above n 177, at 443.

²⁰⁴ This discussion cannot be fully developed here, and will be addressed only to the extent that it may impact on the pre-enactment review proposal for the United States. However, see generally J Satoh, above n 176; R Samuels, above n 191; and S Hamano, above n 177.

²⁰⁵ D Law, above n 183, at 1454.

be said to be better at screening legislation for constitutional infringements than other review institutions elsewhere.²⁰⁶ The more likely suggestion has been made that the nature of the ties between the CLB and the judiciary has impacted on the influence that the CLB is seen to have on judicial practice.²⁰⁷ Since the CLB is made up of elite senior bureaucrats, most of whom have expertise in legal matters,²⁰⁸ it already differs in nature from where pre-enactment review is conducted exclusively by the political branch of government, within an institution made up only of political representatives. Some bureaucratic influence is often expected within pre-enactment review elsewhere, in the form of legal advice on matters of constitutionality or rights compliance.²⁰⁹ However, this is largely distinct to the position in Japan, by virtue of the CLB's ex ante review being seen as binding and authoritative as it regards the political branches of government.²¹⁰ Bureaucratic involvement in other jurisdictions is usually limited to technical and legal advice on legislation, which the political branches are often at liberty to disregard.²¹¹ The CLB bureaucrats are, in fact, closer in governmental standing to apolitical members of the judiciary, who have binding authority over the legislative branch of government, than to politicians. This is echoed in the fact that former members of the CLB are often appointed as judges of the Supreme Court, even without having prior judicial experience.²¹² As a result, members of the judiciary have "no doubt" found themselves having to determine the constitutionality of legislation that they themselves had previously reviewed and approved when serving on the CLB.²¹³ This at least has some bearing on whether the judiciary can be accurately perceived as a final, independent check on the political branch.

Although the CLB is charged with the pre-enactment review of legislation, both its bureaucratic membership and its influential and highly legalistic constitutional role can be distinguished from how ex ante legislative review is conducted in countless other jurisdictions. The CLB goes further than providing politicians with advice on proposed legislation in order for the legislators to make informed conclusions on rights; instead, the decisions conferred by the CLB are conceived as being binding on legislators, amounting to a final authoritative review of the legislative proposals. This also leaves little room for

²⁰⁶ At 1455.

²⁰⁷ At 1454-55.

²⁰⁸ At 1454.

²⁰⁹ For example, where the New Zealand Attorney-General receives advice prior to creating a s 7 report.

²¹⁰ R Samuels, above n 191 (on the difficulty of overturning a CLB opinion in Japan).

²¹¹ See the above examples of New Zealand and Australia in Parts III and V respectively.

²¹² D Law, above n 183, at 1454.

²¹³ At 1454-1455.

later judicial decisions to challenge the constitutionality of legislation that has already been assessed by the CLB.

Given the importance of independent judicial review of legislation in the United States as an ex post mechanism for rights protection, a similar form of pre-enactment review to the CLB's authority in Japan would not be appropriate. In order to avoid limiting the United States judiciary's constitutional role, a more political, rather than bureaucratic, focus would be suitable. Pre-enactment review should also not amount to legal determinations made binding on politicians and legislative developers. It should aim to inform politicians on rights-based analyses of proposed bills, and to encourage legislative debate and consideration of rights issues throughout the enactment process.

This analysis of Japan's constitutional practice can be used to illustrate the sort of pre-enactment review that might legitimise concerns as to why pre-enactment review may not be suited to the United States. It is important to identify that pre-enactment review need not necessarily take the same form as in Japan. Against the background of the other jurisdictions assessed, it can be seen that mandatory pre-enactment review of legislation could amount to little more than establishing a political incentive to openly legislate in accordance with protected rights.

VI Discussion: The Possibility for Pre-enactment Review in the United States

The preceding discussion of pre-enactment review in the jurisdictions of Australia, Canada and Japan is intended to guide how the mandatory pre-enactment review of legislation could be implemented in the United States. The discussion focused on the features of each country's constitutional framework. It was particularly directed to what form pre-enactment review of legislation can take, and in what ways it can interact with other governmental operations, in order to best inform the proposal being made for the United States.

The paper will now briefly discuss and summarise the sort of mandatory political review of legislation that should be considered for the United States.

Firstly, it is now a widely accepted principle that not only one government branch is responsible for the protection of fundamental rights. In most constitutional systems, the judiciary has long been accepted as the body that will conduct legislative review on an ex post basis, as needed. It is now also accepted that, regardless of the scope of subsequent

judicial review, Congress, or the legislative organ of the state in general, should have some interpretive responsibility to also ensure the protection of rights.²¹⁴ This has led to the formalisation of this responsibility across jurisdictions worldwide. Explicit requirements have been introduced, in the form of pre-enactment review, making it mandatory for the political branches of government to undertake some ex ante rights review of proposed legislation. A ‘shared responsibility’ between the political and judicial branches is now acknowledged as appropriate for the protection of fundamental rights.²¹⁵

It is concerning that the United States has incorporated no such pre-enactment review requirement into its constitutional practice. In earlier constitutional practice, Congress did undertake constitutional interpretation when considering bills, without any explicit requirement to do so.²¹⁶ However, this practice has dwindled over the years, so that now almost no constitutional interpretation or rights consideration openly occurs in Congress before the enactment of legislation. Since ex post review in the United States is firmly the responsibility of the courts, and only the courts, legislators currently have no role in constitutional interpretation.

United States constitutional practice is now somewhat of an exception, since the widely accepted ‘shared responsibility’ notion is nowhere to be found. In fact, the attitude of legislators is currently paradoxical, with constitutional interpretation being brushed off as being the job of the courts.²¹⁷ Even the recent CAS requirement in Congress has not gone far enough in making it clear that members of Congress have a duty to take into account the constitutionality of the measures on which they vote. Instead, this has imposed a minimal requirement for members of Congress to assert the source of their legislative authority, without having to have any real regard for the constitutionality of the bill that they are introducing.²¹⁸

This paper’s suggested resolution is to explicitly require more of United States legislators, so that Congress must openly undertake some rights review of legislation before it is enacted. The main concern with this sort of suggestion is that it might be perceived as having too much of an impact on the constitutional culture overall where, it

²¹⁴ See H Volokh, above n 76.

²¹⁵ See S Gardbaum, above n 6.

²¹⁶ R Feingold, above n 77 at 110.

²¹⁷ At 103.

²¹⁸ See H Volokh, above n 76.

may be asserted, there is nothing fundamentally wrong with the status quo. Some constitutional discussion perhaps does already take place to a degree in Congress, but this is not sufficient if it only occurs behind closed doors. Some political accountability must be established.²¹⁹

Along with the acceptance that Congress has some responsibility for the consideration and protection of rights, it is important to recognise that pre-enactment review need not inhibit or in any way limit the operation of any government branch. It can act simply as a mechanism to facilitate the open discussion of constitutional issues within the legislature and to create some political accountability for the protection of rights. The mandatory pre-enactment review of legislation can be instituted in a number of ways, depending on the constitutional system in question. It is for this reason that concerns regarding the impact of such review can be looked at in the light of pre-enactment review in other jurisdictions, to form an idea of how it may be best instituted in the United States.

It is essential to first make clear that the sort of pre-enactment review instituted in Japan, of a more bureaucratic and legally binding nature, should be avoided in the United States, should some mandatory review be introduced. The Japanese constitutional culture that has developed focuses on *ex ante* review of legislation, which, due to substantial political pressure and the high level of influence between institutions, is largely accepted as the final, authoritative interpretation of constitutional rights.

In order to retain complete judicial independence on matters of constitutionality in the United States, as well as adhere firmly to the doctrine of strong-form judicial review, it is important that the right balance is struck between a pre-enactment review requirement that is robust enough so that it will be considered sincerely and complied with by Congress, but will still not have too great an impact on any other existing government operations.

Aspects of both the Australian and Canadian models of pre-enactment review serve as good exemplars for the United States. The new model of rights protection in Australia demonstrates how pre-enactment review of legislation can be introduced, without involving substantial constitutional upheaval or disruption. The Canadian model, with some similar processes to New Zealand, also involves aspects of pre-enactment review that can inform and strengthen a possible constitutional model for the United States.

²¹⁹ This is partly also due to the importance of holding the legislative branch politically accountable for all legislation enacted.

One pre-enactment review mechanism in particular should be introduced into the United States legislative process, so that the political rights review of proposed legislation becomes mandatory. This is a new rule requiring a report of constitutionality to be made upon every bill's introduction into Congress, which contains an assessment of whether the bill is compatible with the rights and freedoms enshrined in the Constitution. This requirement should be implemented in addition to the current CAS that is required when a bill is first presented.

This paper proposes that the new rule be largely based on the Australian requirement of a 'Statement of Compatibility,'²²⁰ with a few necessary modifications. First, like the NZBORA s 7 requirement,²²¹ it should be specified that the report must be presented upon the bill's introduction into Congress. This is in order to adequately promote and facilitate constitutional discussion from the beginning of the legislative process. The report should be drafted and presented by somebody other than the member of Congress proposing the legislation, who is nonetheless a part of the political, rather than judicial, branch of government. This might be executed similarly to the report required under the Canadian Charter, which requires the Minister of Justice to report as to a bill's compliance with Charter rights and freedoms.²²² The proposed report should contain an assessment of the bill in the light of the rights and freedoms guaranteed by the United States Constitution. Like the Australian requirement, this assessment need not always be exhaustive, but should contain 'a level of analysis that is proportionate to the [constitutional] impact of the proposed legislation.'²²³ This is to prevent the requirement from being perceived as overly burdensome on legislators, especially in the case of a bill that plainly complies with the constitution. The report should be informed by draft submissions as to the bill's constitutionality, created both by legal and constitutional specialists as well as individual members of Congress, where appropriate. In order to fulfil this requirement, the bill should be circulated prior to its formal introduction into Congress.²²⁴

²²⁰ As required under Human Rights (Parliamentary Scrutiny) Act 2011 (Australia), s 8(3).

²²¹ NZBORA, s 7.

²²² Canadian Charter of Rights and Freedoms 1982.

²²³ Modified from the Human Rights (Parliamentary Scrutiny) Act 2011 (Australia), Explanatory Memorandum.

²²⁴ Similar to what can occur in New Zealand, see Part III above.

The new rule should also contain some direct reference to the United States constitution, in order to enhance its legitimacy and standing as an important new requirement for the legislative process. This could be achieved by the text of the rule relating directly, for example, to the oath of office that each member of Congress must undertake.²²⁵ This entails members of Congress pledging to “support and defend” and “bear true faith and allegiance” to the Constitution. Such wording could be directly incorporated into the new rule. This could reiterate the notion that, as legislators, each member of Congress has a constitutional duty to ensure that any legislation enacted complies with the Constitution. Similar reasoning was given for introducing the requirement of Constitutional Authority Statements.²²⁶ However, this idea should be taken further by actually including this constitutional reference within any new pre-enactment rule. This would reinforce that it is expected that members of Congress consider the constitutionality of all legislative proposals before they are enacted.

Additionally, in order to receive proper and thorough advice as to the bill’s constitutional compliance, a specialist committee could be established to scrutinise proposed legislation for this purpose. After deliberation, this committee would be able to submit their considerations to be included within the report of constitutionality. This advice would be of a legalistic nature, but it is essential that it serve only to inform legislative debate, without compelling members of Congress to abide by any recommendations made. The formation of the committee could be modelled on the PJCHR in Australia,²²⁷ in that it could properly consist of a small number of members from each the United States Senate and House of Representatives.

Finally, the report presented should not be legally binding on Congress. It should only serve to bring to light any potential issues of constitutionality, so that these can be debated and possibly remedied before the legislation is enacted. There ought to be no legal ramifications should Congress choose to disregard any or all issues that are brought to light by the constitutionality report. In such a case, the bill itself perhaps could detail why the majority in Congress thinks that the legislation is constitutional. The reporting function ought to create only political accountability, so that congressional action in conflict with a report could result only in political ramifications. Furthermore, the validity

²²⁵ United States Congress Oath of office (current wording) see above, Part V.

²²⁶ J Boehner, Memorandum, “New Constitutional Authority Requirement for Introduced Legislation” (December 2010).

²²⁷ Human Rights (Parliamentary Scrutiny) Act 2011, s 5.

of any legislation later enacted should not be affected by any constitutional report that has been presented to Congress.²²⁸

It is important to clarify that the constitutionality report should not be seen as legally binding on any branch of government. Not only the legislature, but also the judiciary should not be legally bound to uphold the advice in the report. It should form a part of the legislative process only: recognised as a tool to enhance legislative debate over bills in Congress. Should the judiciary be charged with determining the constitutionality of legislation that has received a legislative constitutionality report, perhaps at most, courts could see the report properly as an extrinsic aid to legislative interpretation, along with other parliamentary materials.²²⁹ No more weight than this should be attributed to the political reports in the courts. Even its consideration as an extrinsic material will depend on the direct influence that the report is perceived to have on the enacted legislation.

Overall, this proposal aims to amend the cultural perspective that has developed in the United States: that members of Congress do not have a responsibility to conduct constitutional interpretation when enacting legislation. This has manifested due to political and institutional pressures, and has resulted in little or no constitutional engagement in Congress during policy development and legislative enactment. This pre-enactment review requirement would ensure that due regard can be had to constitutional rights and freedoms during the legislative process in the United States, and that any issues of constitutionality will be brought to light as soon as a bill is introduced into Congress. This requirement also aims to ensure that the congressional consideration of these rights would not amount to a burdensome or overly bureaucratic task, so that the constitutional development could be well received into the existing legislative process.

VII Conclusion

There is ultimately discretion in deciding the way in which government power should be institutionalised within every legal jurisdiction. Of utmost importance within the choice that is available is the determination of how existing rights will be protected. This amounts to determining the responsibilities of each of the government branches. This paper has demonstrated the importance of ensuring that more than one government branch has the responsibility for protecting previously recognised rights. It ought to be a shared duty as between government institutions, in order for rights to be upheld to the fullest extent.

²²⁸ A similar provision can be found in the Human Rights (Parliamentary Scrutiny) Act 2011, s 9.

²²⁹ See G Williams and L Burton, above n 124, at 77.

Some trends may develop within different constitutional models that influence how the government powers and duties are typically allocated; this was made evident through the discussion of strong- and weak-form judicial review as alternative constitutional models. Overall, strong-form judicial review tends to focus on the responsibility of the judiciary in the protection of rights; whereas weak-form review jurisdictions generally include more provision for the legislative and executive branches to conduct some rights review during the legislative stages of law making. These trends do not, however, dictate that only these government branches should be burdened with all the responsibility for rights-protection. It is due to this fact that the proposal for mandatory pre-enactment review in the United States could be considered and discussed throughout this paper.

The absence of any formal pre-enactment review in the United States Congress is concerning, and not brought about solely due to the jurisdiction's adherence to strong-form judicial review. It is for this reason that the analysis of other strong-form review jurisdictions could provide invaluable insight to inform the suggestion to make some form of pre-enactment review mandatory in the United States.

The pre-enactment review procedure suggested for the United States admittedly does not propose to address and resolve all the criticisms that have been made of current constitutional practices. The proposal was developed throughout the paper as a mechanism that will at least shape the way in which members of Congress are perceived to conduct themselves throughout the legislative process, in particular when considering the constitutionality of legislation. Without any formal requirement, Congress has been deemed to not consider at all the constitutionality of proposed legislation, before it is voted on in the House. The aim of the proposal as it has been developed is not to radically alter the United States constitutional practice, nor to displace the considerable deference that is granted to the judicial branch to make determinations of constitutionality. Rather, the proposal takes aspects from other jurisdictions that incorporate some mandatory pre-enactment review processes, in order to advance a procedure that may enhance the legislative process in the United States. This procedure would ensure that legislators do at least always openly consider the constitutionality of proposed legislation.

Should such a procedure for pre-enactment review be adopted, this paper strongly advances the argument that it should be designed to have minimal impact on the overall constitutional working in the United States. There may, of course, be some other, flow-on effects of such a requirement being introduced into Congress. However, the overall

structure of the United States' strong-form judicial review constitutional model need not be displaced.

The suggested pre-enactment political review process would go a long way toward enhancing the existing legislative process in the United States Congress and, vitally, to ensuring that there is an additional, ex ante check of proposed legislation to help safeguard protected rights.

Bibliography

A Cases

1 New Zealand

Boscawen v Attorney-General [2009] NZCA 12.

Easton v Governor-General [2012] NZHC 206.

Taylor v NZ Poultry Board [1984] 1 NZLR 394.

Westco Lagen v Attorney-General [2001] 1 NZLR 40 (HC).

2 United States

William Marbury v James Madison 5 US 137 (1803).

B Legislation

1 New Zealand

New Zealand Bill of Rights Act 1990.

2 Australia

Australia Capital Territory Human Rights Act 2004.

Human Rights (Parliamentary Scrutiny) Act 2011.

Victorian Charter of Human Rights and Responsibilities Act 2006.

3 United Kingdom

Human Rights Act 1998.

4 Canada

Canadian Bill of Rights 1960.

Canadian Charter of Rights and Freedoms 1982.

5 Japan

Kenpo (Constitution).

C Texts

A Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed, Yale University Press, 1986).

N Deavins and K Whittington (eds) *Congress and the Constitution* (Duke University Press, 2005).

- R Dworkin *A Matter of Principle* (Harvard University Press, Cambridge, 1985).
- R Dworkin *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, Cambridge, 1996).
- S Gardbaum *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, Cambridge, 2013).
- J Hiebert *Charter Conflicts: What is Parliament's Role?* (McGill-Queen's University Press, 2002, Montreal).
- P Hogg *Constitutional Law of Canada* (5th ed, Thomson/Carswell, Scarborough, Ont, 2007).
- C Montesquieu *The Spirit of Laws* (G Bell & Sons, Ltd, London, 1914).
- G Palmer and M Palmer *Bridled Power: New Zealand Government Under MMP* (3rd ed, Oxford University Press, Auckland, 1997).
- P Rishworth et al. *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003).
- A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press, 2000)

D Journal Articles

- A Butler "Strengthening the BOR" (2000) 31 VUWLR 129.
- H Burmester "The Presumption of Constitutionality" 13 FED. L. REV. 277 (1983).
- R Fallon 'The Core of an Uneasy Case for Judicial Review' (2008) 121 HLR 1693.
- R Feingold "The Obligation of Members of Congress to Consider Constitutionality While Deliberating and Voting: The Deficiencies of House Rule XII and a Proposed Rule for the United States Senate" (2013) Vand L Rev.
- K Foley "Australian Judicial Review" 6 Wash. U. Glob. Stud. L. Rev. 281 (2007).
- A Geddis "The Comparative Irrelevance of the NZBORA to Legislative Practice" (2009) NZULR 465.
- S Hamano "Incomplete Revolutions and not so Alien Transplants: The Japanese Constitution and Human Rights" (1999) 1 U PA J Const. L 415.
- J Hiebert "Interpreting a Bill of Rights: The Importance of Legislative Rights Review" (2005) 35 B J Pol S 235.
- J Husa "Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective" (2000) 48 AJCL 345.
- E Hickok "The Framers' Understanding of Constitutional Deliberation in Congress" (1986) 21 GA L Review 217.
- M Kumm 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review' (2007) 1 EJLS 2.

D Law “Why has judicial review failed in Japan?” 88 Wash U L Rev 1425.

A Mason “The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience,” (1986). 16 Fed L Rev. 1

A Mikva “How Well Does Congress Support and Defend the Constitution?” (1983) 61 NCLLR 587.

G Palmer "A Bill of Rights for New Zealand: A White Paper" [1985] AJHR A6.

J Satoh “Judicial Review in Japan: An Overview of the Case Law and an Examination of Trends in the Japanese Supreme Court's Constitutional Oversight” (2008) 41 Loy LA L Rev 603.

A Stone Sweet “The Politics of Constitutional Review in France and Europe” (January 2007) 5 ICON 69 at 71.

M Tushnet “Alternative forms of Judicial Review” (2003) 101 Mich. L. Rev. 2781.

M Tushnet “New Forms of Judicial Review and the Persistence of Rights – And Democracy – Based Worries (2003) 38 Wake Forest L. Rev. 813.

H Volokh “Constitutional Authority Statements in Congress” (2013) 65 FLR 173.

J Waldron “The Core of the Case Against Judicial Review” (2006) 115 Yale LJ 1346.

G Williams and L Burton “Australia’s Exclusive Parliamentary Model of Rights Protection” (2012) 34(1) Stat. L R 58.

E Papers and Reports

J Boehner, Memorandum, “New Constitutional Authority Requirement for Introduced Legislation” (December 2010) (US).

G Palmer "New Zealand Bill of Rights Bill: Third Reading" (21 August 1990) 510 NZPD 3760.

Hon David Parker *The Attorney-General's Reporting Function under Section 7 of the New Zealand Bill of Rights Act 1990* (Ministry of Justice, available at www.justice.govt.nz).

R Samuels “Politics, Security Policy, and Japan’s Cabinet Legislation Bureau: Who Elected These Guys, Anyway?” (March 2004, Japan Policy Research Institute Working Paper, No. 99).

Effective House Membership: A Guide for Members of Parliament (Office of the Clerk of the House of Representatives, 2011) at 33 (available at www.parliament.nz).