**Shadow Constitutional Review: The Dark Side of Pre-Enactment Political Review in Ireland and Japan**

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**Introduction**

In recent years political constitutionalism has become a topic of increasing interest to scholars of comparative constitutional law.[[3]](#footnote-3) One aspect of political constitutionalism which has received considerable attention is the presentation of various examples of parliamentary and executive-led pre-enactment constitutional/political review as a supplement for – or an alternative to – judicial review.[[4]](#footnote-4) This expression of political constitutionalism has been variously suggested as a measure to compliment “weak form” judicial review; [[5]](#footnote-5) to involve the political branches in a more active way in “strong form” review and perhaps to temper its effects;[[6]](#footnote-6) or as a primary mechanism of vindicating constitutional norms, in a pure form of political and non-judicial constitutionalism.[[7]](#footnote-7) Accounts in public law scholarship frequently suggest that pre-enactment review by the political branches instantiates several normative benefits: enhancing government accountability by subjecting their decisions to constitutional or rights-based scrutiny internally through executive and/or parliamentary/public scrutiny; encouraging the political branches and the public to be more rights-conscious; and cohering democratic self-governance with constitutional or rights commitments more effectively than reliance on judicial review alone.

In practice, however, the realisation of these benefits has proved more difficult. Achieving these benefits appears contingent on the broader political culture and institutional framework of the system pre-enactment review is embedded. Pre-enactment review in many systems represents only a rough approximation of the ideal-type political review found in the theoretical accounts, though well-implemented variants can provide important benefits.

However, the reality of pre-enactment constitutional review is more diverse even than this, and the full implications of its different forms and instantiations have not yet been teased out in the literature. Indeed, the experience of certain systems, which have not received great attention, suggest there is a darker side to pre-enactment review that has been under-explored. In this article, we consider the possibility that not only may pre-enactment review fail to achieve the full benefits of ideal-type accounts, but that it can, in certain contexts, have serious negative consequences that ironically cut against many of the normative benefits with which it is associated.

This article proceeds in three parts. In part I, we provide an overview of the concept of pre-enactment political review based on existing comparative and theoretical accounts, outlining an ideal-type account of pre-enactment review and the benefits associated with it. We then consider briefly the varying success of pre-enactment review in Canada, New Zealand, and the United Kingdom. These examples illustrate the process falling short, to varying degrees, of the ideal-type account, which provides crucial contrast to the accounts that follow in part II.

In part II, we consider two under-examined and older examples of pre-enactment review: the Cabinet Legislation Bureau in Japan and the Attorney General in Ireland. The Japanese practice has not been fully examined in the context of the debate on pre-enactment review and political constitutionalism. The Irish practice has hardly received any attention at all, even in Irish legal scholarship. Each case illustrates the dark side of pre-enactment constitutional review. Each process is only scantly grounded in constitutional text but has come to take on huge importance in the constitutional order. Each is characterised by opacity and secrecy and has little or no substantive parliamentary or public involvement. Each has the potential to undermine aspects of the formal institution of judicial review. Each has the potential to impact negatively on the broader politico-legal culture.

These examples suggest that not only may pre-enactment review fail to achieve the full benefits of the ideal-type, it can also have negative consequences for the constitutional order which run directly contrary to the goals of political constitutionalism. We term this distinctive instantiation of pre-enactment review ‘shadow constitutional review’. In part III, we discuss the key features and problems of this type of pre-enactment review. We do not argue that this makes the case against pre-enactment review or political constitutionalism *per se*. Instead, we think it shows that this facet of political constitutionalism is a more complex phenomenon than might appear from the dominant accounts. We hope this account of shadow constitutional review can enrich comparative debate about the possibilities and pitfalls of political constitutionalism and its expression through pre-enactment political review.

1. **Political Constitutionalism and Pre-enactment Constitutional Review: Promise and Problems**

Promised benefits of political constitutionalism

The concept of pre-enactment constitutional/political review involves the political branches of government – the executive and/or legislative branch – assessing the interaction of proposed legislation or policy with fundamental constitutional or statutory commitments.[[8]](#footnote-8) Political pre-enactment review has several possible advantages in an ideal-type account.

First, several commentators have suggested that pre-enactment helps ensures that the political branches think and act in a more rights-conscious way when considering policy proposals.[[9]](#footnote-9) With increased rights-consciousness amongst the political branches, inadvertent breaches of these norms created by information inadequacy will be much less likely. Pre-enactment review achieves this by structurally dispersing responsibility for rights review amongst all the branches of government. Dispersing responsibility for evaluating the justification of legislation from a rights perspective also has “the potential to offer more robust protection for rights” than relying on judicial review alone because courts can typically check only a fraction of legislative activity.[[10]](#footnote-10)

Secondly, pre-enactment review can provide for broader constitutional scrutiny of proposed political action, involving politicians and potentially the public in a discourse about how constitutional norms and the exigencies of politics should interact. Questions of constitutional compliance are not reducible to purely legalistic considerations, but also inevitably require political considerations to be taken into account.[[11]](#footnote-11) The different perspectives of the political branches and the public can allow for more viewpoints and perspectives on rights and constitutionalism to enter the discourse, rather than relying on judicial reasoning and rhetoric alone.[[12]](#footnote-12) Those unenthusiastic about legal constitutionalism often contend that courts have a tendency to confront morally- and politically-infused constitutional issues in legalistic terms, reluctant to entertain the kinds of reasons and arguments that reasonable people would consider “indispensable for rational and responsible lawmaking.”[[13]](#footnote-13) For proponents of political constitutionalism, legislative reasoning is preferable as it is not “constrained by existing texts, doctrines, or precedents.”[[14]](#footnote-14) They also argue that it makes little sense to pretend judges have “superior or exclusive insights”[[15]](#footnote-15) to the deeply contested questions at the heart of constitutional review, and that those question to not admit of accurate legalistic answers.

Thirdly, political review is also said to be a better way to cohere democratic self-governance with constitutional commitments, providing a means for greater popular engagement with shaping the scope and substance of rights and constitutional commitments.[[16]](#footnote-16) Instead of constitutional rights and values being the sole preserve of judges and elite lawyers with formal legal training, they become something that a self-governing body politic can and should participate in and shape through the contestation and deliberation of democratic politics.

Finally, pre-enactment review may be more “collaborative” than ex-post override of court decisions by the political branches,[[17]](#footnote-17) allowing the political branches to assess these questions before a judgment has been rendered and they are left to have to face off somewhat adversarially against the judicial branch. In a more prosaic vein, it could be said pre-enactment review can act as a form of insurance against the risks of subsequent judicial review, making bills more “litigation proof” and avoiding the political embarrassment and disruption costs that might come with judicial invalidation or rebuke.

In an ideal model, pre-enactment political review offers the means to mediate between judicial supremacy and legislative supremacy – a constitutional Third Way.[[18]](#footnote-18) While this account makes a convincing case for its adoption, the reality of pre-enactment political review is murkier than this ideal. In reality, some of these benefits are illusory or absent.

Common failings in implementing pre-enactment review

Political constitutionalism and pre-enactment political review have been implemented in many constitutional systems, and in practice, have failed to fully live up to the promise of the theory. Here, we examine briefly the common failings of this institution in Canada, New Zealand, and the UK, which have introduced this type of review alongside some institution of judicial review.[[19]](#footnote-19) These failings will serve as a necessary contrast to the systems discussed in part II, that are problematic in a deeper way.

In Canada, the Minister for Justice has a statutory obligation to examine every Bill introduced to the House of Commons by the government, and “to ascertain whether any of the provisions…are inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms*”. Following review, the Minister “shall report any such inconsistency to the House of Commons at the first convenient opportunity.”[[20]](#footnote-20) The original expectation of those adopting pre-enactment review appeared to be that this process would spur a rigorous internal evaluation of proposed legislation by the executive and a willingness to reconsider or revise bills in the event of an inconsistency by the cabinet, under scrutiny by a parliament with the “capacity” and “inclination” parliament to evaluate bills from rights perspective.[[21]](#footnote-21) However, in practice the Canadian experience of pre-enactment review has been characterised by features which only weakly match the values associated with political constitutionalism, including relatively low levels of parliamentary engagement with rights issues and the emergence of a highly juridical form of executive review.

While the process of internal executive review is now systemic and has changed the “political environment in which policies are conceptualised and drafted”,[[22]](#footnote-22) it has done very little to facilitate robust engagement, scrutiny, or review of Charter issues by parliament.[[23]](#footnote-23) The secretive nature of the internal review process makes it difficult for parliament to second guess or challenge the executive’s determination on compatibility as too lax or conservative.[[24]](#footnote-24) There is also no sufficiently specialised and well-resourced committee dedicated to constitutional issues.[[25]](#footnote-25) Parliament thus remains “on the periphery”.[[26]](#footnote-26) This might improve somewhat on foot of the introduction of a Bill aimed at amending the reporting duties of the Minister for Justice, making it mandatory to publish statements about *consistency*, not merely conclusions of *inconsistency.*[[27]](#footnote-27)

The Canadian example also shows little evidence of escaping the limitations associated with judicial reasoning. Although the executive has a specified role over constitutional review at the pre-enactment stage, it largely accepts judicial interpretation of Chartercommitments. Canadian pre-enactment review is dominated by the “advice and influence of government lawyers who systematically assess bills… based on their interpretation of relevant jurisprudence.”[[28]](#footnote-28)

New Zealand was the first jurisdiction to borrow the Canadian practice of political rights review, and displays similar failings. Under the New Zealand Bill of Rights Act (“NZBORA”), rights would be protected by a mixture of political pre-enactment review and limited post-enactment judicial review. Section 7 of the NZBORA requires that the Attorney-General advise parliament when bills are not consistent with its provisions. The Attorney General certifies the bill’s compatibility or outline reasons for its incompatibility under the reporting requirement of s.7. Parliamentary scrutiny can follow after a bill’s formal introduction to parliament. The government has since 2003 chosen to make available the advice provided to the Attorney-General on draft bills.[[29]](#footnote-29)

The combination of tiers of executive review, the s.7 reporting requirement, and the frequent publication of legal advice for bills considered consistent with the NZBORA for wider scrutiny all help ensure that rights implications are taken into serious account during the drafting process. Moreover, the s.7 reporting requirement and the government’s willingness to publicly disclose the legal basis for its assessments also helps facilitate greater transparency and deliberation on rights issues than if the process were highly confidential and secretive.

However, in practice the efficacy of New Zealand’s system of pre-enactment review has been questioned. The fact that parliament has legislated in the face of an adverse section 7 reports 90% of the time has led some commentators to assert that the impact of the Bill of Rights on parliamentary behavior “is so minimal in nature as to be almost irrelevant”.[[30]](#footnote-30) These lopsided figures are partly explained by the fact that if the executive enjoys a reliable majority then it can invariably whip its party deputies to vote in line with a bill, regardless of its rights implications.[[31]](#footnote-31) Additionally, factors such as unicameralism and a lack of a strong parliamentary committee system may narrow the space for parliamentary contestation or review of executive policies which might implicate rights adversely.[[32]](#footnote-32)

Like Canada, the process for evaluating bills by executive branch lawyers is court-mimicking, having been described as “highly legalistic” and involves Government lawyers basing their “assessments on interpretation of relevant jurisprudence and on expectations of what courts might say.”[[33]](#footnote-33)

In the UK, under section 19 of the Human Rights Act 1998, a Minister is obliged to make a statement accompanying every bill her department sponsors as to its rights compliance. The process involves collaboration between the sponsoring departments’ legal and policy advisors with legal officers in the Attorney General’s Office, Cabinet’s Legislation Committee (“CLC”), and Ministry of Justice.[[34]](#footnote-34) Before clearing any bill for parliamentary scrutiny, CLC guidelines require that any bill must first be exposed to a “frank assessment”[[35]](#footnote-35) of human rights considerations.[[36]](#footnote-36) After this review is complete, bills are subject to further review by parliament, and when introduced may be accompanied not only by a statement of compliance but by a human rights memorandum complete with a “fuller statement of reasons” for compliance.[[37]](#footnote-37)

An innovative and significant institutional feature of the UK’s approach to pre-enactment scrutiny is a permanent Joint Committee on Human Rights, which must report to Parliament on the human rights implications of any bill. The Committee is non-partisan and free from executive domination; is exclusively dedicated to and specialized in human rights issues; and is well-resourced and has access to its own full-time legal advisors.[[38]](#footnote-38) The Committee’s work has been praised; Aileen Kavanagh notes that the work of the Committee has become a settled part of the UK human rights landscape, earning an “excellent reputation for the quality” of its reports.[[39]](#footnote-39) Some suggest the robust scrutiny of the Committee and increased engagement by parliamentarians with its work has led to heightened executive interest in ameliorating the likelihood of a negative Committee report in the first instance.[[40]](#footnote-40)

However, though arguably a more positive example than Canada and New Zealand, certain core failings are still evident in the UK example. The legal advice on bills places very heavy focus on legal interpretations of relevant jurisprudence.[[41]](#footnote-41) Westminster-style systems invariably have significant executive dominance of the legislative process,[[42]](#footnote-42) and so the direct impact of committee deliberations on legislative outputs has remained “underwhelming” for some commentators.[[43]](#footnote-43)

The foregoing analysis suggests several things. First, when measured against the yardstick of its purported benefits, the success to which pre-enactment review has been implemented has varied in these systems. Secondly, the success of the process in achieving these benefits appears to turn not only on questions of implementation but on broader political culture as well as the institutional framework in which it is embedded.[[44]](#footnote-44) Thirdly, the same failings seem to occur to different extents in all these systems: failure to break free of the judicial viewpoint and method; failure to develop a distinctive parliamentary discourse on rights;[[45]](#footnote-45) and mixed success in empowering parliament on rights questions and increasing transparency.

**II. Japan and Ireland and the dark side of political constitutionalism**

In this section, we examine two cases – Japan and Ireland – that suggest much deeper problems with pre-enactment review. These jurisdictions each have a hugely influential, highly secretive form of pre-enactment review by an adjunct of the executive that developed informally alongside strong-form judicial review. These examples have not been considered in detail in the literature on political constitutionalism. Perhaps this is because these practices predate recent focus on this topic in the context of New Commonwealth Constitutionalism. Perhaps it is because the jurisdictions themselves have not had a great deal of critical analysis of the role of pre-enactment review that might bring the practices to the attention of scholars. The Irish example is particularly underexplored. Whatever the reason for these examples being largely overlooked to date, we think they add an important dimension to this discussion and deserve proper consideration.

Japan’s Cabinet Legislation Bureau

The Cabinet Legislation Bureau (“CLB”) is charged with conducting the pre-enactment review of legislation in Japan,[[46]](#footnote-46) and is a key advisory organ to the government over legal and constitutional affairs. The Bureau consists of a director-general, a deputy director-general, and four departments, as well as the General Affairs Office. Each department consists of a department director and 5 or 6 councilors, along with a staff of several clerical assistants.[[47]](#footnote-47) The councilors within the review departments “represent the heart of the legislative review process” and are assigned to the Cabinet Legislation Bureau from other ministries and agencies and include judges and prosecutors.[[48]](#footnote-48) Membership of the CLB is regarded as a demanding and elite appointment (usually for three years) and a key step on the career path of top-flight government lawyers.[[49]](#footnote-49)

The institution has two formal tasks: to provide opinions to the Prime Minister and the Cabinet on legal issues; and to examine drafts of all bills, regulations, Cabinet orders, and treaties for consistency with the constitution and legal precedents. The pre-enactment review undertaken by the CLB is said to take the form of meticulous examination of every bill proposed for constitutionality.[[50]](#footnote-50) The CLB's systemic pre-enactment review is partly motivated out of a desire 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.”[[51]](#footnote-51) While the CLB’s systemic form of pre-enactment review has no basis in constitutional text, it has become a core feature of constitutional practice and the political force of its interpretations is considerable.[[52]](#footnote-52) Its substantial influence has at times attracted political controversy precisely because of the fact the constitution mentions nothing about its advisory role.[[53]](#footnote-53)

Given that the CLB is regarded as a “far more influential arbiter of the law than the Supreme Court”[[54]](#footnote-54) it is no surprise that its work heavily shapes executive policymaking. Determinations of the CLB are said to be generally regarded as binding by the executive branch despite no clear constitutional basis for such a claim.[[55]](#footnote-55) It has been said that executive officials are generally more anxious visiting the CLB to “present and defend draft legislation than they are visiting the Minister of Finance to present and defend budget requests”.[[56]](#footnote-56) The CLB is, in effect, the gatekeeper of executive action in the Japanese legal order.

A high-profile example of the CLB’s influence over important constitutional and political questions can be seen in its role over interpretation of Article 9 of the Japanese Constitution, the war renunciation clause. Article 9(1) provides: “Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.” Article 9(2) prohibits war potential: “In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.” Early CLB interpretation of these provisions stipulated that Japan had a right to self-defense and to maintain defence forces for this limited purpose.[[57]](#footnote-57) The CLB additionally advised that Article 9 prohibited the deployment of Japanese personnel overseas in a combat capacity, or for the purposes of collective self-defense.[[58]](#footnote-58)

The CLB’s interpretations of Article 9 have faced occasional, intense political critique, with some conservative voices calling for it to alter its position, which constituted a rigid fetter on Japanese foreign policy. The CLB traditionally resisted such calls, robustly adhering to what it considered the correct approach to constitutional interpretation. In the words of one former Director General, this involved accepting that the “law should be interpreted objectively, with only one meaning, and correctly” and the “Executive branch must never change it indiscriminately”.[[59]](#footnote-59) Despite controversy and disquiet over the CLB’s interpretation, it was broadly complied with and “acknowledged by every government for close to sixty years.”[[60]](#footnote-60) This adherence offers a good example of how CLB interpretations become “enshrined as—and legitimated by— precedent” and can act as a “powerful brake on major policy change” even in areas of acute political sensitivity such as national security.[[61]](#footnote-61) CLB opinions effectively become Japanese *law*.

The immense influence of the CLB’s interpretations—and their political importance— is also seen in the controversy which emerged over recent attempts by the executive to reinterpret the scope of Article 9 contrary to longstanding precedent. The Liberal Democratic Party and Prime Minister Shinzo Abe have long sought to alter Article 9’s prohibition on collective self-defense. Aware that it would be politically difficult to attempt a constitutional amendment of Article 9 through the formal amendment procedure of outlined by Article 96, the Cabinet shifted its efforts to modifying the constitutional interpretation prohibiting the right of collective self-defense consistently articulated by the CLB.[[62]](#footnote-62) To this end, the government established an ad hocadvisory committee to advise on the possibility of a new interpretation. In 2014 this committee, the Advisory Panel on Reconstruction of the Legal Basis for Security, submitted a report to the government supporting reinterpretation of Article 9.[[63]](#footnote-63) Around the same time, the Prime Minister controversially appointed a new head of the CLB widely regarded as sympathetic to the government’s stance on departing from established CLB precedent.[[64]](#footnote-64)

Although the CLB eventually sanctioned the cabinet’s new interpretation, this was viewed by many as a rare instance where intense political pressure exerted by the executive helped nullify bureaucratic reluctance to alter long-standing precedent. Indeed, the decision of the Abe government to abandon CLB precedent and effectively impose its own more expansive constitutional reinterpretation was unprecedented. In the words of one observer, the actions of the executive represented a dramatic break from constitutional convention, and a subversion of the “established framework for interpreting the constitution” which in his opinion “set a dangerous precedent.”[[65]](#footnote-65) While not expressing a view on the cogency or otherwise of this reinterpretation, we suggest this strident assessment along with similarly vocal responses from large segments of the Japanese legal community[[66]](#footnote-66) underscores two things. First, it shows the prestige and immense influence wielded by the CLB over constitutional interpretation, and the scarcity of open political challenge to its interpretive authority. The ultimate interpretative authority in Japanese constitutionalism has typically not “lain with bodies possessed of political constraints drawn from electoral legitimacy or authority”; the “dominant actors have proven to be an obscure bureaucratic body” staffed by elite lawyers.[[67]](#footnote-67) Secondly, it raises the possibility—discussed further below—that the authority and respect afforded to this institution could be exploited by the executive. If it could manage to control or significantly influence the process, it could afford legitimacy to executive actions that might be constitutionally questionable or be used to circumvent the formal amendment process.[[68]](#footnote-68)

The fact that the CLB has emerged as a review body with a *de facto* monopoly on interpreting the constitution has also had significant effects on the legislature given the fused nature of executive-parliamentary relations and the fact the vast majority of laws issue from the cabinet. A CLB interpretation helps the executive collateralize a particular course of action, shoring up its policy positions, and enabling them to dismiss changed they dislike as “unacceptable to the CLB”.[[69]](#footnote-69) The high degree of secrecy permeating the review process, and the fact that disclosure of CLB opinions is not a matter of course, inhibits the Diet’s ability to contest or second guess the constitutional positions of the executive.

Controversy has also stemmed from the possible relationship between the CLB and the Supreme Court of Japan’s high degree of judicial deference. Japan’s formal constitutional arrangement include strong-form judicial review.[[70]](#footnote-70) Despite having this authority, the Supreme Court has consistently acted in a highly deferential manner toward the political branches, being described as amongst the most conservative and cautious in the world.[[71]](#footnote-71) Since its establishment over six decades ago, the Court has struck down a handful of laws on constitutional grounds, and mostly these were private members bills sponsored by members of the Diet and not the government.[[72]](#footnote-72)

The work of the CLB has been singled out as a potential factor influencing the Japanese Supreme Court’s reluctance to declare laws unconstitutional, on the basis that it has “largely… subsumed”[[73]](#footnote-73) the oversight role assigned for the Court. One argument is that the CLB “reviews government legislation so carefully prior to enactment that the SCJ is highly unlikely to find constitutional flaws in the final product”. Some commentators suggest that this is an idealistic explanation, and attribute the Court’s behavior to more prosaic factors, such as the nature of the ties between the CLB and senior judiciary, enhancing “the CLB‘s ability to anticipate what the courts will find acceptable.” It may even be the case that members of the Supreme Court have found themselves in the awkward position of deciding upon the constitutionality of legislation that “they had previously reviewed and approved as members of the CLB.”[[74]](#footnote-74)

Others go further and suggest that the Supreme Court is “politically influenced” by the prior involvement of the CLB and that the Court is ultimately “taking political cues” from their *ex-ante* determinations. One commentator suggests that the Court’s deference to these interpretations rises to a level that undermines its “constitutional independence from the political branches.”[[75]](#footnote-75) Law disputes this, citing interviews with former Supreme Court judges and clerks disclaiming the influence of the CLB on judicial decision making, and suggesting the Court’s deference derives from a hierarchical and institutionally conservative judicial bureaucracy.[[76]](#footnote-76) Other scholars have highlighted that the deferential outlook of the Japanese judiciary has undoubtedly been shaped by the long-standing political dominance of the conservative LDP party, through its ability to staff the superior courts with appointees unlikely to break the mold of judicial nonintervention.[[77]](#footnote-77) This is certainly a plausible account. Notwithstanding this, the potentially considerably influence CLB interpretations have on judicial deference is a recurring theme in Japanese constitutional literature,[[78]](#footnote-78) and has even been noted by other Supreme Court judges.[[79]](#footnote-79) Though we can perhaps never know the complex causal relationships at play, the fact that the CLB potentially plays a role in this is significant.

Japan’s form of political pre-enactment review is interesting for several reasons. Despite having no textual basis in the constitution, it has grown to play a strikingly influential role in Japanese constitutional culture. It has been associated with several distorting effects on its constitutional system: garnering a very sizeable role over executive policy formulation; potentially limiting parliament’s ability to contest or second-guess executive determinations on constitutionality; potentially being subject to misuse by the executive; and perhaps disempowering the courts from exercising its constitutionally allocated authority to review state action. This form of pre-enactment review seems to facilitate an unelected and secretive bureaucratic subset of the executive branch—using tools of professional legal craft and expertise—to garner considerable and controversial influence over the functions of the elected branches and the judiciary. In return, it is unclear whether this process has ensured the range of normative benefits associated with the ideal-type account, though it may, as discussed below, have the effect of keeping the Japanese state well within constitutional boundaries. The Japanese experience highlights how political review can in certain circumstances have broad effects on the constitutional order, some of which can cut contrary to the goals associated with political constitutionalism.

The Irish Attorney General’s Office

Ireland has a textually entrenched system of strong-form judicial review, with *ex post* review and a limited, rarely-used mechanism for pre-enactment judicial review.[[80]](#footnote-80) This is accompanied by a mostly non-textual system of pre-enactment political review by the Attorney General (AG). Despite its very significant influence and unusual features, it has not featured in comparative discussions of pre-enactment review, and is a neglected topic even amongst Irish constitutional scholars.

The Constitution provides that the AG is “the adviser of the Government in matters of law and legal opinion”.[[81]](#footnote-81) While said to be independent of government, the AG is very much the government’s—and not the parliament’s—advisor. The AG has a close relationship with the government, sitting in Cabinet meetings and appointed by/serving at the pleasure of the government.[[82]](#footnote-82) The AG is usually an eminent lawyer that was a member of, or has some political affiliation with, one of the parties in government.[[83]](#footnote-83) The Attorney General acts a centralised provider of legal advice for the Cabinet, government departments, and some core state agencies, on all areas of law.[[84]](#footnote-84)

The Advisory Counsel group in the AG’s Office is responsible for the provision of legal advice. It has five sub-groups, that have a focus on particular specialised areas of law,[[85]](#footnote-85) each staffed by 5-6 civil servants known as Advisory Counsel, who are generally former practicing lawyers of some years’ experience. All legislation and any policy proposal generated by government that has “any substantive constitutional or legal dimension” will be sent to the AG’s Office for advice,[[86]](#footnote-86) and the AG remains involved in an advisory capacity throughout the formulation of policy and the drafting and passage of legislation by government. Ireland is a Westminster-style parliamentary system that has, even by the standards of such systems, an unusual level of executive dominance in the lawmaking process. Save in unusual circumstances of minority government, very few laws are passed that have not originated from, and been strictly controlled in parliament by, government. Therefore almost all policymaking and lawmaking is done under the influence of the Attorney’s advice.

How this advice on constitutional issues is formulated is shrouded in secrecy, as the detailed internal workings of the office are not discussed publicly, and have been the subject of limited academic enquiry.[[87]](#footnote-87) When advice is requested, a permanent advisory counsel (overseen generally by a senior member of the advisory counsel staff) researches the constitutional issues raised and helps the AG in preparation of advice. Any matter that is “legally significant or novel, politically important, sensitive or financially valuable” must be brought directly to the attention of the Attorney General. Independent barristers are commonly employed to write opinions and give advice on particularly difficult or contested points of law to aid the AG. Timelines for the provision of advice are often tight.[[88]](#footnote-88)

Again, the practice of the AG in presenting advice to Cabinet is not publicly discussed, and it seems that the practice varies. The AG will consider preparatory work by internal and external lawyers, form an opinion in consultation with these advisors, and prepare materials for government on foot of this. It is not clear that there is any set form for how the advice is presented. Sometimes, advice will be incorporated into a policy memo or proposal that comes before Cabinet; sometimes, advice is given *viva voce* at Cabinet meetings. With major and specific constitutional issues, the Attorney General may prepare a formal memorandum of advice for Cabinet. These can vary in length, detail, and focus depending on the preference of the particular government, the preference of the Attorney, the exigencies of the situation, etc. We can infer that advice on constitutionality generally contains an assessment of the probability of a particular bill being invalidated by the courts on constitutional grounds, having regard to the prevailing law and outlook of the courts.[[89]](#footnote-89) Based on the AG’s advice, the government will make decisions about what policies and enactments to pursue.

It seems that the AG advice is not dissimilar to what practitioners would give clients in constitutional matters, albeit somewhat more abstract. This is unsurprising, in that Attorneys General have always been practicing barristers; the advisory counsel are former practicing lawyers; and practicing barristers are regularly brought in to assist with constitutional advice. But the effect is that the advice is court-mimicking, narrowly focussed on the judiciary and the likelihood of legislation being invalidated in judicial review. There is little evidence that the AG tries to consider issues of constitutionality in a less tactical, broader way, or encourages the political branches to form independent or distinct constitutional interpretations by virtue of their institutional role.

Theadvice of the AG is almost never published. The *fact* of the advice – that the AG has advised that some policy is constitutional or not – is often disclosed if the policy (or the failure to pursue it) is politically controversial and questioned in parliament. Detailed reasoning or written advice is not released for parliamentarians to assess and scrutinise. The reason for this secrecy seems largely a matter of convention. The advice is subject to legal privilege, and so cannot be part of compelled disclosure in respect of court cases. Given that the AG often represents the State in important litigation and advises on same, this is sometimes necessary. But this privilege can be waived, and the litigious disadvantage of publishing advice to Cabinet on legislation is not very significant. The contemporary rationale for secrecy relates to the confidentiality of cabinet meetings: since discussions held at cabinet meetings are, under the Constitution, confidential,[[90]](#footnote-90) the advice of the Attorney, which is used at cabinet meetings and influences decisions, cannot be published without breaching this confidentiality.[[91]](#footnote-91) There is very little basis for this assertion.[[92]](#footnote-92) Moreover, the AG’s advice has been published whenever it has suited the government to do so.[[93]](#footnote-93) Most recently, in January 2018, a summary of the AG’s advice on the constitutional effects of removing or replacing Ireland’s constitutional prohibition on abortion was released by the government.[[94]](#footnote-94) Even then, the Taoiseach described this action – inaccurately – as being unprecedented.[[95]](#footnote-95)

This great reluctance to publish the AG’s advice fits with a general inclination for government in Ireland to be “cagey and secretive”.[[96]](#footnote-96) This secrecy has several effects, perhaps the most significant of which is that that parliamentarians and the public cannot assess the quality of AG’s advice or the sincerity of government’s stated reliance on it, or form their own views based on it.

The Attorney General has long been held to act independently of government. But scepticism is often expressed about the true independence of the office. One Supreme Court judge noted that the manner in which the AG is appointed and terminated suggested that “he must be presumed to be acting with at least the tacit consent of the Government”.[[97]](#footnote-97) Bradley called the AG is a “political creature” because to “distinguish the political from the legal in this context is almost impossible”.[[98]](#footnote-98) Some acknowledge and defend the reality that the Attorney General must be a creature of politics to some degree, because the AG and government must have a close working relationship and have some similar outlook to government.[[99]](#footnote-99) But this raises the concern that the AG’s advice could be in some sense partisan, or could be portrayed by the government in a manner most politically convenient to it, with the AG’s acquiescence.[[100]](#footnote-100)

Governments have long relied on the advice of the Attorney General to justify something done or not done. In recent years this seems to have become more frequent and more prominent, and the government has generally refused to publish the advice. Three high-profile examples merit discussion: same-sex marriage, property rights, and abortion.

In 2006 the issue of same-sex marriage was gaining traction. In response to calls for legislative reform, the Minister for Justice said that the government could not legislate for same-sex marriage as advice of the AG was that any such legislation would be unconstitutional and a constitutional referendum would be required.[[101]](#footnote-101) This position was challenged by some commentators arguing that there was nothing in the constitution precluding parliament from introducing same-sex marriage through legislation.[[102]](#footnote-102) Despite the contestability of the government’s position, the government stood behind its undisclosed legal advice and maintained its definitive position that constitutional change was necessary.

The government that held office from 2011-2016 declined to pursue several policies it apparently strongly wished to pursue on the basis that it had been advised by the AG that the proposed measures violated constitutional property rights. This included nullification of upward only rent reviews in existing commercial leases;[[103]](#footnote-103) allowing the Central Bank to cap mortgage interest rates; and a variety of other measures related to the housing and homelessness crisis such as protecting tenants from evictions and regulating “vulture funds” that bought property during the crash. One of the relevant ministers stated, after the term of the government, that many measures he had wished to pursue to ease an emerging housing crisis were frustrated by constitutional property rights.[[104]](#footnote-104) However, since these measures were never introduced, constitutional property rights did not stop these measures; the AG’s *advice* about property rights did. In each of these cases, the views of the Attorney were questioned in some quarters as to their correctness.[[105]](#footnote-105) Property rights in the Irish Constitution are highly qualified in the interests of the common good. Moreover, the courts did not, during the period following Ireland’s financial crisis, invalidate even measures that had severe restrictions on property rights that were taken to alleviate the problems the country faced. This suggests that the AG’s advice was conservative.

During the life of the same government, various groups called on the government to legislate for an exception to Ireland’s strict abortion laws for cases where infants would not live for any substantial period outside the womb. It was the advice of the Attorney General that this would be unconstitutional by virtue of Ireland’s constitutional protection for the right to life of the unborn. The government cited this advice as a reason for not including this in legislation on abortion passed in 2013, and for voting down a private member’s bill on the subject in 2015.[[106]](#footnote-106) The minority government that followed it used the same advice to vote down another private members bill in 2016. The advice was never published.

The extent of the government’s reliance on this advice is problematic in several respects. First, during the 2015 debate about the abortion exemption, a minster suggested that the government *could not* introduce any legislation if the AG had advised that it was unconstitutional; i.e. that the AG’s advice binds government. This was also suggested in respect of the property rights measures. But nothing in the Constitution gives the AG power to fetter government action, nor suggest that AG’s advice determines constitutionality.[[107]](#footnote-107) The Cabinet has essentially ceded its role, turning informal provision of advice into binding constitutional review. Secondly, because constitutional law is rarely clear cut, the advice given by the Attorney General is highly qualified.[[108]](#footnote-108) Despite this, the government presents the matters as if settled by the AG with clear, decisive pronouncements. With the advice kept secret, there is no way to dispute this.

Thirdly, and relatedly, there is no way of knowing if the government is conveying the nature of the advice correctly, or if the government is using the Attorney General as a political and rhetorical tool to explain and excuse inaction. This could happen if the AG’s advice is qualified, but is put across as clear and certain, or if the AG, because of his or her close relationship with government, could allow the government’s agenda and desires to “unconsciously distort his judgment”.[[109]](#footnote-109) There is a risk that constitutional law becomes a “pretext for legislative inaction”.[[110]](#footnote-110) There is no direct evidence of this phenomenon in Ireland, but with the advice of the AG kept secret, this would be hard to detect.[[111]](#footnote-111)

Finally, this has the effect of binding the entire parliament to the advice of one person. Legislators do not have good access to independent legal advice on the constitutionality of bills. In practice, unless there is a minority government, the government uses the parliamentary whip to control a majority of votes to only pass legislation of which it approves.[[112]](#footnote-112) If the government uncritically accepts the advice of the AG, and feels it can never depart from it, the advice of one person – known in detail to only about 15 members of parliament who comprise the Cabinet – decides all matters of constitutionality in the political process.

All this adds up the AG having, potentially, an extraordinarily powerful position. As Bradley puts it, ironically this officer, supposedly independent of the Cabinet, may be “the most influential of all those who sit around the cabinet table”, with influence that permeates the legal system.[[113]](#footnote-113)

**III. Shadow Constitutional Review: the dark side of political constitutionalism**

When measured against the yardstick of its purported benefits, the diverse experience of the systems canvassed in part I suggests that pre-enactment review frequently fails to achieve the full benefits of the ideal-type. All jurisdictions fall short in terms of creating room for full and free moral and political deliberation over rights norms by the political branches, with court-mimicking approaches increasing in the influence of government lawyers and working to reduce the risk of adverse court findings. Parliament’s supposed role protecting rights through subjecting government assessments to scrutiny and pressure is at best modestly achieved. The process does not alter the balance of power between parliament and the executive so as to enable the former to “marshal sufficient power to force government to justify or modify” adverse decisions on rights.[[114]](#footnote-114)

The Japanese and Irish examples, however, are of a different sort, and highlight ways pre-enactment political review can veer far further from the ideal-type account and even its functional approximations in Canada, New Zealand, and the UK. These cases constitute a distinctive form of political constitutional review, characterised by high levels of executive/bureaucratic control; opacity and secrecy; disempowering of parliament; potentially allowing for abuse by the executive; and generating consequences contrary to the goals of political constitutionalism. We call this phenomenon ‘shadow constitutionalreview’*,* where the political review process effectively becomes a parallel and opaque mirror of judicial review.

This term is apt because in each case, pre-enactment review has effectively created an alternative system of constitutional review which may even hamper aspects of the judicial review process, but lacks the democratic legitimacy and other potential advantages of political review. Shadow constitutional review of this sort can distort the functioning of actors in the constitutional order and alienate the constitution and rights issues from the politicians and the people.

Several key features stand out in Ireland and Japan’s form of pre-enactment review, though they differ in extent and specifics in each place:

1. a system of advice, with scant textual basis in the constitution, provided by an advisory adjunct of the executive;
2. an absence of transparency in the process of the review and in the substance, norms and standards governing it;
3. limited disclosure to the public of the legal justification for asserting compliance or non-compliance of a policy measure with the constitution;
4. a consequently minimal role for parliamentary or public contestation or scrutiny of executive review of constitutionality;
5. a high degree of court-mimicking in the provision of advice, and the uncertainty over whether the advisors shape or posit a new interpretation that would anticipate a change in or markedly diverge from court precedent;
6. the possibility of the executive considering itself entirely bound by the advice, despite no such clear constitutional restriction on executive action;
7. alternatively, the possibility of the executive claiming to be bound by independent legal advice while actually manipulating the process to achieve questionable ends; and
8. a risk that the process distorts the institution of judicial review.

These factors combine to cause several significant potential problems which we will now discuss. There may be other instances of shadow review in other jurisdictions. It would be a worthwhile and interesting project to consider how formal and judicial/quasi-judicial systems of abstract, *ex ante* review might play a similar role and to consider questions of their legitimacy, but this must await another occasion.[[115]](#footnote-115) Also, to be clear, not all of these features might be necessary for shadow constitutional review to exist. If several of these features combine to create a parallel review process that lacks parliamentary and public engagement; concentrates power in the executive or bureaucrats; and actively cuts against the values that underlie political constitutionalism, then shadow review may be said to exist.

Alienating the constitution from politics

The Irish and Japanese examples show how, counterintuitively, certain forms of political constitutionalism can have the effect of alienating the constitution from politics rather than increasing political engagement. First, both systems appear to be doctrinal or court-mimicking, showing little indication of developing a distinctive vision of the constitution, focussing on predicting court behaviour. Advice is legalistic and tactical rather than a discussion of broad constitutional values, giving less scope for development of a distinctive vision of the constitution and its role. This approach is unlikely to produce the deep political engagement with the constitution that optimistic accounts of political constitutionalism suggest.

Of course, we have seen that this is true of many other systems with pre-enactment review.[[116]](#footnote-116) But the Irish and Japanese examples go further. In Japan, the advice of the CLB is not published, though it may occasionally be shown to the Diet if there is controversy on the matter. In Ireland, the advice is almost never published or shown to parliamentarians, even when this is a matter of public concern and dispute. These processes then, not only fail to empower parliament and the public to have a better or more effective debate on constitutionality but in fact make it *less* likely that such a debate will happen. That the government in each country will tend to simply stand behind the advice and assert they are bound by it, alongside the reality of executive control of the legislature, likely stifles development of a culture of parliamentary engagement with constitutional values and rights. This variant of political constitutional review, far from empowering parliament, detracts from parliament’s role in making constitutional decisions. It does this with little if any express constitutional authorisation for the wielding of this power by unelected adjuncts of the executive. Since this practice and its secrecy are conventional rather than constitutionally mandated, there is no reason that the Irish or Japanese system could not change and substantially improve its process by rendering it far more transparent and engaging with parliament. But there is also little reason to expect such a cultural change.

Finally, this phenomenon manifests publicly through the constitution being most regularly cited as a reason not to act. This generally obstructionist character—which will be discussed in the next section—could have an effect on how the constitution is perceived by the public. The constitution might be seen as a disempowering force: not a repository of rights and values and foundation for governance and state action, but as an *obstacle* to collective action. This may further alienate the public from the constitution.

Obstruction and Policy Distortion

The effect of shadow review in our examples is predominantly negative, serving mainly as an additional veto point to stopping legislation and policy, rather than enabling it or encouraging it. Since the advice is apparently considered to be binding on the executive in each place, advice that some measure is unconstitutional will likely be the end of a policy. Since the advice is lawyerly and court-mimicking, it is likely to err on the side of caution in hard or borderline cases. Its lawyerly nature may also perpetuate the idea of a constitutional law as an expertise that provides of technical answers, which may promote stricter adherence to advice. In Ireland and Japan, it is clear that this advice does stop policies being pursued. In Ireland in particular there is evidence of the AG’s advice being overly conservative, preventing the government from pursuing policies that were, at the very least, *arguably* constitutional and which (at least in the case of property rights restrictions) the government strongly wished to pursue.

It has long been noted that judicial review – particularly strong form review – will change the legislative process and its outputs. Tushnet calls this phenomenon “policy distortion”, where the heavy incorporation by the political branches of judicially-articulated constitutional norms into the lawmaking process supplants “legislative consideration of other arguably more important matters”.[[117]](#footnote-117) Shadow review exacerbates policy distortion.[[118]](#footnote-118) The Irish and Japanese examples are particularly problematic insofar as it is hard to describe the distortion as self-limitation: the legislature does not make the decision, nor really does the executive. The limitation is seemingly[[119]](#footnote-119) imposed by the executive’s legal advisers, who—with little basis in the constitutional text—have taken on an authoritative and central role in the policymaking process.

It is hard to blame this policy distortion on the courts. In each case, the extent of policy distortion seems out of line with the way that the courts handle constitutional questions. As has been noted, the Japanese courts are highly deferential and almost never invalidate legislation. It seems unlikely that the CLB is so perfect in fulfilment of its functions that no laws it has caused to be altered or abandoned would not have passed muster in their original form in front of these non-interventionist courts. It seems likely that policy distortion here is more attributable to the CLB than the court. The Irish courts have been are notably deferential to legislative judgment. The last 25 years – the period during which the distorting effect of the AG’s advice seems to have become more pronounced – are widely agreed to have been a time when the courts have been loath to intervene and invalidate laws, particularly in controversial or contested areas.[[120]](#footnote-120) In this light, the apparent advice of the AG that various contested constitutional matters are clear cut and very likely to result in invalidation of law seems at odds with the actual approach of the courts. This policy distortion comes not from the courts, but from the pre-enactment review process.

A contrary view would be that shadow review, as described here, is actually highly effective in keeping the political branches away from constitutionally suspect action.[[121]](#footnote-121) Moreover, it might be said, constitutionalism is in essence negative, biased toward protecting individual interests to the cost of pursuing collective interests, and invariably going to distort and obstruct policy. It is certainly a credible view, and the line between constitutional compliance and policy distortion is fluid and debatable. However, the non-textual nature of Japanese and Irish review exacerbates the risk that this is an excessive or improper check; there is some evidence in each system that the results are too conservative; and from the perspective of political constitutionalism, binding state action to a greater degree than necessary is a fault in legal constitutionalism that it is attempting to address. We would therefore maintain that shadow review in these case goes somewhat beyond effective constitutional restraint.

Distorting judicial review

Shadow review also risks allowing an informal, political review process to distort and undermine a formal process of judicial review. While this is obviously of no concern to projects of political constitutionalism that seek to replace courts, it raises greater concerns for those who seek to make it a supplement to judicial oversight. It can happen in two ways: by influencing a subsequent judicial challenge in the case of advice that a law is constitutional; or by denying courts the chance to determine constitutional issues in the case of advice that a law is unconstitutional. The former is a concern in Japan; the latter is a concern in Ireland.

The fact that an esteemed body connected to the executive has endorsed a law’s constitutionality could distort court judgment on that question. This has never been raised in Ireland but it has been suggested in Japan. Samuels for example writes that “Japanese courts rarely question a CLB judgment… a century of practice and its enabling legislation gives the CLB authority to make suchjudgments binding ex ante. Consequently, in practice, the CLB has been a far more influential arbiter of the law than theSupreme Court.”[[122]](#footnote-122) This would be of great concern in respect of the controversial reinterpretation of Article 9, discussed above, if the CLB’s endorsement would lead to judicial acquiescence.

The idea of that the SCJ might be influenced by the CLB is controversial, however. It was firmly and clearly denied by judges and clerks interviewed by Professor Law. One Justice deemed it “too extreme” to say that the SCJ hesitates to strike down laws simply because they have been reviewed by the CLB, while another “stated more bluntly that the CLB‘s views carry “no influence” with the Court.”[[123]](#footnote-123) It is difficult to know what weight should be given to judges’ descriptions of their own practice; they may not wish to admit in interviews that the CLB is influential, or they may be subconsciously influenced by the CLB’s status even though they deny it even to themselves.[[124]](#footnote-124) The truth of this matter is difficult to establish. That conflicting views exist suggests at least that this is a risk of shadow review.

If shadow review is obstructive of legalisation and policy in practice, then obviously such legislation and policy is never passed and never reviewed by the courts. Borderline constitutional questions, instead of being subject to judicial pronouncement, are resolved in this informal, non-judicial process, and we are denied precedents and potential “collaboration” between courts and the political branches in respect of legislative sequels.[[125]](#footnote-125) Shadow review declares the game over before it has begun, and this distorts the role of the judiciary and judicial review.

This is probably not of great concern in Japan; even if given the chance to review such laws, the SCJ is unlikely to find laws to be unconstitutionality with any regularity. In Ireland, however, it is a problem. Constitutional law is developed in response to the cases presented. If the AG’s advice results in a policy never being pursued, the courts are denied the chance to weigh in on that issue. These issues are likely to be some of the most important, contested constitutional questions. If advice is based on misapprehensions of the courts’ outlook or incorrect readings of precedent, the courts are not given a chance to correct these or reconsider the case law in these areas.

There has been an increasingly strong reliance on the Attorney General’s advice at the same time that there has been a marked decrease in use of the pre-enactment judicial review procedure in Article 26.[[126]](#footnote-126) If the President requests it, the Supreme Court will consider the constitutionality of any bill before the president signs it. The last such reference was decided in 2005; no bills have been referred in the thirteen years since despite many controversial bills being passed. The reference is a robust procedure; in the thirteen years leading up to the last reference, seven such references were made, and four resulted in the law being held to be invalid.[[127]](#footnote-127) There are several reasons that the procedure may have become disfavoured,[[128]](#footnote-128) but it might be that the faith placed in pre-enactment review has effectively superseded the courts’ role in screening legislation.[[129]](#footnote-129) In this way, it possible that shadow review, while mimicking and mirroring the judicial method, can erode and detract from the judicial process.

A political tool of executive dominance/manipulation?

Pre-enactment constitutional review is potentially a useful tool of executive governance, in helping guide deliberation on rights and reducing the likelihood of adverse outcomes in judicial review. However, we suggest that shadow review can also operate in a manner which facilitates executive dominance, in three ways. First, it can provide a way for the executive to signal to other actors that it is subjugated to the constitution while it dominates the political system in practice. Secondly, it can be used by the executive as a way of avoiding accountability for political action or inaction. Thirdly, it could be manipulated by the executive in order to attempt to achieve constitutionally questionable ends or informally change the Constitution. These phenomena are difficult or impossible to observe or prove. We limit ourselves here to suggesting that conditions in Ireland and Japan could allow for these practices and do not make any claim that they are observable or take place in these jurisdictions.

Pre-enactment review can provide the executive with “legalistic credibility”, a form of “reputation building using the institutions of formal legal analysis”.[[130]](#footnote-130) It could be used as a form of institutional signalling by the executive to various groups­—the electorate, elites, civil society, political opponents—that it takes seriously its constitutional commitments.

In Ireland and Japan, political power in the state is structurally concentratedin the executive, given its generally fused relationship with parliament. Showing submission to constitutional constraints by publicly showing it is bound by legal advice could be an important way to bolster faith in the executive. This is premised on the idea that the advisor is neutral and politically disinterested, and that legal reasoning or advising is a specialist expertise can be severed from politics, both of which are highly contestable in practice.[[131]](#footnote-131)

Binding oneself to legal advice on constitutionality does narrow discretion in some instances—occasionally a policy option will be taken off the table—but it offers the prospect of gaining political credibility for the executive in general, and protecting political judgments and agendas from critiques that constitutional norms are not complied with. The perception may be that having undergone robust and detached scrutiny for compliance with constitutional norms, policy is beyond constitutional reproach. Lack of disclosure of detailed information about the constitutional advice that is a feature of shadow review may undermine the ability of external actors to second guess the executive’s conclusions on constitutionality and hamper any constitutional scrutiny from these quarters.[[132]](#footnote-132) Shadow review might then tend to allow the executive to maintain dominance over the political system more effectively.

We have for the most part assumed that the actors in a system of shadow review act in good faith and believe in their articulated reasons for acting in certain ways. The possibility that they might not raises the suggestion that shadow review can be a tool of executive manipulation of the political process. If disclosure of advice is limited, the executive could cynically use legal advice as a rhetoric tool: rather than sincerely taking the advice as a serious injunction to action, the government might *claim* to be bound by advice that they should not act when in fact they merely do not want to act. Without ability to independently assess the advice, it is hard to contradict this claim. Reliance on constitutional advice could shift political blame for inaction from the government to the constitution or the advisors for tying the hands of political actors. This could be done with the cooperation of the advisory body, which, given its close relationship with the executive, might be disposed to give advice favourable to the executive’s purpose. Or, more plausibly, this could be done by the executive presenting qualified advice as absolute, exaggerating doubts and equivocations, knowing the advice will not be open to full scrutiny by opponents.

It should be stressed that there is no evidence of this occurring in Ireland or Japan. However, such evidence would be unlikely to become apparent even if it did occur, so we cannot be easily dismiss this as a possible consequence of shadow review.

Finally, there is the possibility that the executive could manipulate or control the shadow review process in order to achieve constitutionally questionable ends. This could be an informal example of what Landau terms “abusive constitutionalism”[[133]](#footnote-133)—where constitutional change mechanisms are used to erode the constitutional order—or part of an attempt to make courts engage in what Landau and Dixon term “abusive judicial review”—where courts actively assist in this erosion.[[134]](#footnote-134) This could happen with the assent or acquiescence of the court, but would be particularly insidious in instances where the courts might be influenced by the conclusion of the shadow review process, as some claim to be the case in Japan. While passing no judgment on the propriety of the reinterpretation of Article 9, this example perhaps illustrates the possibility of such action in the Japanese case.[[135]](#footnote-135)

**Conclusion**

The Irish and Japanese examples both provide a cautionary tale of how pre-enactment constitutional review can take on problematic characteristics that have not been fully explored in the literature. The process in both countries—despite having no strong textual basis in the constitution—developed over time to become highly consequential in the constitutional order, and cause results that are antithetical to the goals of political constitutionalism.

The comparative overview in part I illustrates that the goals of political constitutionalism envisaged in its ideal form can fail to be realised in its imperfect realisations in various common law systems. All jurisdictions appear to fall short in terms of creating room for full and free moral and political deliberation over rights norms, and in attempting to alter the balance of power between parliament and the executive to enable robust scrutiny of government decisions implicating constitutional values. However, these are relatively minor problems when contrasted to the jurisdictions considered in part II. Ireland and Japan show that pre-enactment constitutional review can have much more problematic instantiations that we have called ‘shadow constitutional review’, and these have effects contrary to the benefits associated with ideal-type accounts. Whereas these accounts associate pre-enactment constitutional review with promoting accountability, transparency and facilitating full and free debate over rights and values between the political branches and the public, shadow constitutional review operates in an opaque and secretive manner, insulated from parliamentary and public scrutiny, and ultimately alienating the constitution and rights issues from politics. It is open to executive misuse, and risks undermining the institution of judicial review.

To be clear, we do not think that the Irish and Japanese examples of shadow constitutional review make a case against political constitutionalism or pre-enactment political review *per se* (though these examples and the general failings of pre-enactment review discussed here could form the basis of such an argument). Rather, we think they add a layer of complexity and nuance to the phenomenon. Pre-enactment constitutional review is not, as it might initially seem, a recent phenomenon associated with New Commonwealth Constitutionalism, introduced by design and with set features and predictable consequences. It can be older, be more informal in its development, and can grow to have unexpected and unusual effects that are antithetical to the ones supposed in ideal-type accounts. As we consider the rise of political constitutionalism – and its expression through pre-enactment political review as an alternative or supplement to judicial review – these examples provide a richer and more complex view of how it can operate in practice and the broader consequences it can have in a constitutional system. An appreciation of this complexity adds to our understanding of the possibilities, pitfalls, and limitations of this facet of political constitutionalism.

1. Assistant Professor, Trinity College Dublin School of Law. [↑](#footnote-ref-1)
2. PhD Candidate, Trinity College Dublin School of Law. [↑](#footnote-ref-2)
3. Broadly speaking, political constitutionalism “stands for the proposition that the limits on governmental power inherent in the concept of constitutionalism…and especially those that are expressed in terms of individual rights and liberties, are or should be predominantly political in nature and enforced through the ordinary mechanisms of Madisonian-style structural constraints and, especially, through electoral accountability”. STEPHEN GARDBAUM, NEW COMMONWEALTH MODEL OF CONSTITTIONALISM: THEORY AND PRACTICE 22 (2013) [↑](#footnote-ref-3)
4. Janet L. Hiebert, *Parliamentary Bills of Rights: An Alternative Model*, 69 MOD. L. REV. 1, 7 (2006). [↑](#footnote-ref-4)
5. *See* Tom Hickey, *The Republican Virtues of the 'New Commonwealth Model of Constitutionalism*, 14 INT’L . J. CONST. L. 794-816 (2016). [↑](#footnote-ref-5)
6. *See* JANET HIEBERT, CHARTER CONFLICT: WHAT IS PARLIAMENTS ROLE? (2002); *See also* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2000). [↑](#footnote-ref-6)
7. *See* RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM*:* A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OFDEMOCRACY (2009). [↑](#footnote-ref-7)
8. Hiebert, *supra* note 3, at12. [↑](#footnote-ref-8)
9. Gardbaum, *supra* note 1, at77-82. [↑](#footnote-ref-9)
10. Janet L. Hiebert, *New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?,* 82 TEX. L. R. 1963, 1986 (2004). [↑](#footnote-ref-10)
11. *See* Julie Jai, *Policy,* *Politics and Law: Changing Relationships in Light of the Charter*, 9 Nat’l J. Const. L. 1, 17 (1997–8); [omitted] [↑](#footnote-ref-11)
12. *See* KENT ROACH, THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOUGE (2001). [↑](#footnote-ref-12)
13. Jeremy Waldron, *Representative Law Making*, 89 B.U. L. REV. 335, 340 (2009). [↑](#footnote-ref-13)
14. Jeremy Waldron*, Judges as Moral Reasoners*, 7 INT’L. J. CONST. L. 2, 9 (2009). [↑](#footnote-ref-14)
15. Hiebert, *supra* note 16, at 1987. [↑](#footnote-ref-15)
16. Gardbaum, *supra* note 1, at 69. *See* also [omitted] [↑](#footnote-ref-16)
17. Aileen Kavanagh, *The Lure and Limits of Dialogue*, 66 U. TORONTO L.J. 83 (2016). [↑](#footnote-ref-17)
18. Gardbaum, *supra* note 1, at 52. [↑](#footnote-ref-18)
19. Obviously, there are many other examples that might be considered. For example, Australia has an interesting and seemingly robust pre-enactment review system in place, but does not have judicial review in the same way as the other countries discussed; *see* George Williams and Daniel Reynolds, *The Operation and Impact of Australia’s Parliamentary Scrutiny Regime for Human Rights* 41 MONASH. U. L. Rev. 470 (2015). Other systems of formal *ex ante* review such as France and Finland are also of interest. *See* respectively Susan Rose-Ackerman, Thomas Perroud, *Policymaking and Public Law in France: Public Participation, Agency Independence, and Impact Assessment*, 19 COLUM. J. EUR. L. 225(2013) andJuha Lavapuro, Tuomas Ojanen, and Martin Scheinin, *Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review*, 9 INT’L. J. CONST. L. 505 (2011). However, to keep the comparison stable and serve as useful contrast to our later examples, we have selected those system that have non-judicial pre-enactment review, and that have broadly similar models of governance and some institution of judicial review. These other examples are worthy of exploration on another occasion. [↑](#footnote-ref-19)
20. Department of Justice Act § 4 (1985). [↑](#footnote-ref-20)
21. Hiebert, *supra* note 5, at 7. [↑](#footnote-ref-21)
22. *Id*. at 12. [↑](#footnote-ref-22)
23. Hiebert, *supra* note 16, at 1971. [↑](#footnote-ref-23)
24. Janet L. Hiebert, *Rights-Vetting in New Zealand and Canada: Similar Idea, Different Outcomes*, 3 NZJPIL

63, 75 (2005). [↑](#footnote-ref-24)
25. Hiebert, supra note 16, at 1971. [↑](#footnote-ref-25)
26. Hiebert, *supra* note 5, at 12. [↑](#footnote-ref-26)
27. § 72 of Bill C-51 imposes an additional statutory duty on the executive not only to report on inconsistencies to parliament, but to issue a publicly available statement outlining “the key considerations that inform the review of a proposed bill for consistency with the Canadian Charter of Rights and Freedoms.” These ‘Charter Statements’ are designed to highlight rights and freedoms that are potentially engaged by a Bill and to provide a “brief explanation of the nature of any engagement, in light of the measures being proposed.” [↑](#footnote-ref-27)
28. Hiebert, *supra* note 3, at 19. [↑](#footnote-ref-28)
29. Gardbaum, *supra* note 1, at 133-134. Copies of the advice are *available at* <https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/advice/>. [↑](#footnote-ref-29)
30. Andrew Geddis, *Comparative Irrelevance of the NZBORA to Legislative Practice*  43 NZ. U. L. Rev.465, 471 (2009). [↑](#footnote-ref-30)
31. JANET HIEBERT & JAMES KELLY, PARLIAMENTARY BILLS OF RIGHTS: THE EXPERIENCE OF NEW ZEALAND AND THE UNITED KINGDOM 10 (2015). [↑](#footnote-ref-31)
32. *Id.* at 401- 402. [↑](#footnote-ref-32)
33. Hiebert, *supra* note 3, at 27. [↑](#footnote-ref-33)
34. The Parliamentary Business and Legislation Committee are the screening body who clear any bill for inclusion in the government’s legislative programme. Internal and external legal advisors may be used. PARLIAMENTARY BUSINESS AND LEGISLATION SECRETARIAT, GUIDE TO MAKING LEGISLATION, 115 (2017). [↑](#footnote-ref-34)
35. *Id.* at 114. [↑](#footnote-ref-35)
36. CABINET OFFICE CONSTITUTION SECRETARIAT, HUMAN RIGHTS ACT 1998*:* GUIDANCE FOR DEPARTMENTSpara 36 (2000). [↑](#footnote-ref-36)
37. Gardbaum, *supra* note 1, at 165. [↑](#footnote-ref-37)
38. The Chair of the Committee is a senior member of the leading opposition party and 6 out of 12 seats on the Committee are filled from the opposition benches. Information *available at* <<http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/membership/>>. [↑](#footnote-ref-38)
39. Aileen Kavanagh, *Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog*, *in* PARLIAMENT AND HUMAN RIGHTS*:* REDRESSING THE DEMOCRATIC DEFICIT 115, 117 (Hunt, Hooper and Yowell eds., 2014). [↑](#footnote-ref-39)
40. *Id*. at 137. [↑](#footnote-ref-40)
41. Hiebert, *supra* note 3, at 23. [↑](#footnote-ref-41)
42. Gardbaum, *supra* note 1, at 193. [↑](#footnote-ref-42)
43. Aileen Kavanagh, *supra* note 80, at 134. [↑](#footnote-ref-43)
44. It seems that success is contingent on many factors: political party cohesiveness; unicameral or bicameralism; institutional closeness between parliament and the executive; the degree of political concern over the risk of judicial sanction all play a role. Hiebert & Kelly, *supra* note 61, at 401- 402. [↑](#footnote-ref-44)
45. Rosalind Dixon, *The Core Case for Weak-Form Judicial Revie*w, 38 CARDOZO. L. REV. 2193, 2230 (2017). [↑](#footnote-ref-45)
46. Hajime Yamamoto, *Interpretation of the Pacifist Article of the Constitution by the Bureau of Cabinet Legislation: A New Source of Constitutional Law*, 22 WASH. INT’L. J. 108-109 (2017). [↑](#footnote-ref-46)
47. Mamoru Seki, *The Drafting Process for Cabinet Bills*, 19 Law Japan 168, 183 (1986). [↑](#footnote-ref-47)
48. *Id*. [↑](#footnote-ref-48)
49. David S. Law, *Why Has Judicial Review Failed in Japan?*, 88 WASH. U. L. REV. 1425, 1454 (2011). (Internal footnotes omitted). [↑](#footnote-ref-49)
50. Yasuo Hasabe, *The Supreme Court of Japan: Its Adjudication on Electoral Systems and Economic Freedoms*, 5 INT’L. J. CONST. L. (2007) 296–307, 298. [↑](#footnote-ref-50)
51. Jun-ichi Satoh, *Judicial Review in Japan: An Overview of the Case Law and an Examination of Trends in the Japanese Supreme Court's Constitutional Oversight*, 41 LOY. L. A. L. REV. 603, 605 (2008). [↑](#footnote-ref-51)
52. Craig Martin, *The Legitimacy of Informal Constitutional Amendment and the Reinterpretation of Japan's War Powers*, 40 FORDHAM INT’L. L. J. 427, 496(2017). [↑](#footnote-ref-52)
53. Satoh, *supra* note 99, at 624. However, its status has never been judicially impugned. [↑](#footnote-ref-53)
54. RICHARD J. SAMUELS, POLITICS, SECURITY POLICY*,* AND JAPAN’S CABINET LEGISLATION BUREAU: WHO ELECTED THESE GUYS ANYWAY? JAPAN POLICY RESEARCH INSTITUTE WORKING PAPER NO. 99, 3 (2004). [↑](#footnote-ref-54)
55. *Id.* at 1. [↑](#footnote-ref-55)
56. *Id.* at 2-3. [↑](#footnote-ref-56)
57. Jeffery Richter, *Japan’s “Reinterpretation” of Article 9: A Pyrrhic Victory for American Foreign Policy?,* 101 IOWA L. REV. 1223, 1239- 1240 (2016). [↑](#footnote-ref-57)
58. *Id.*  [↑](#footnote-ref-58)
59. Navraj Singh Ghaleigh*, Neither Legal Nor Political? Bureaucratic Constitutionalism in Japanese Law*, 26 K. L. J.193, 205 (2015). (Internal footnotes omitted). [↑](#footnote-ref-59)
60. Martin, *supra* note 100, at 501. [↑](#footnote-ref-60)
61. Samuels, *supra* note 102, at 3. [↑](#footnote-ref-61)
62. Hajime Yamamoto, *Interpretation of the Pacifist Article of the Constitution by the Bureau of Cabinet Legislation: A New Source of Constitutional Law*, 22 WASH. INT’L. L. J. 99, 111 (2017). [↑](#footnote-ref-62)
63. The Committee comprised of a “group of experts in fields from international relations and diplomacy to international law, but nonetheless contained few lawyers, and only one constitutional scholar. It was argued in the media that members of the panel were primarily selected for their hawkish views on national security.” Martin, *supra* note 100, at 475. (Internal footnotes omitted) [↑](#footnote-ref-63)
64. Yasuo Hasabe, *The End of Constitutional Pacifism?*, 26 WASH. INT’L. L. J. 125, 128 (2016). [↑](#footnote-ref-64)
65. Richter, *supra* note 106, at 1257. [↑](#footnote-ref-65)
66. Yamamoto, *supra* note 113, at 114. [↑](#footnote-ref-66)
67. Ghaleigh, *supra* note 109, at 212. [↑](#footnote-ref-67)
68. Richter, *supra* note 106, at 1257. [↑](#footnote-ref-68)
69. Samuels, *supra* note 102, at 3. [↑](#footnote-ref-69)
70. *See* JAPAN CONST., art 81 (1946). [↑](#footnote-ref-70)
71. *See generally* Law, *supra* note 95. [↑](#footnote-ref-71)
72. Hasabe, *supra* note 97, at 307. [↑](#footnote-ref-72)
73. Satoh, *supra* note 99, at 624. [↑](#footnote-ref-73)
74. Law, *supra* note 95, at 1454. [↑](#footnote-ref-74)
75. Satoh, supra note 99, at 625. For a detailed analysis of judicial independence in Japan *see* J. MARK RAMSEYER and ERIC B. RAMUSEN, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN (2003). [↑](#footnote-ref-75)
76. Law, *supra* note 95, at 1454-6. [↑](#footnote-ref-76)
77. Shigenori Matsui, *Why Is the Japanese Supreme Court So Conservative*?, 88 WASH. U. L. REV. 1375, 1405 (2011). [↑](#footnote-ref-77)
78. John O. Haley, *Constitutional Adjudication in Japan: Context, Structures, and Values,* 88 WASH. U. L. REV1467, 1477 (2011). [↑](#footnote-ref-78)
79. Koji Miyakawa, *Inside the Supreme Court of Japan- From the Perspective of a Former Justice*, 15 APLPJ 196, 203 (2014). [↑](#footnote-ref-79)
80. The (non-executive) President may refer the bill to the Supreme Court to test its constitutionality before signing it. Article 26, Constitution of Ireland. [↑](#footnote-ref-80)
81. *See* Ireland Const., art. 30.1 & 30.4 (1937). This is essentially the only constitutional basis for the AG’s role in pre-enactment review. [↑](#footnote-ref-81)
82. He or she is formally appointed by the President, but the nomination is made by the government, and the President has no discretion to refuse to make the appointment. [↑](#footnote-ref-82)
83. JAMES CASEY, THE IRISH LAW OFFICERS53 (1996). [↑](#footnote-ref-83)
84. Some of the bigger departments have internal legal advisors that provide more routine advice, and liaise with the Attorney General’s Office for more important points of law. [↑](#footnote-ref-84)
85. *See* E. SULLIVAN, REVIEW OF THE OFFICE OF THE ATTORNEY GENERAL (2006). [↑](#footnote-ref-85)
86. DEPARTMENT OF THE TAOISEACH, CABINET HANDBOOK 32 (2006). [↑](#footnote-ref-86)
87. Outside of James Casey, *THE LAW OFFICERS* there has been no detailed study of the operation of the advisory function. [↑](#footnote-ref-87)
88. E. Sullivan*, supra* note 145, at 7-21. [↑](#footnote-ref-88)
89. Casey, *supra* note 143,110-112. [↑](#footnote-ref-89)
90. In 1997, the Constitution was amended to secure and clarify the right of cabinet confidentiality, which had been practiced by convention and upheld by judicial decision. *See* Ireland Const., art. 28.4.3 (1937). [↑](#footnote-ref-90)
91. Harry McGee, *Abortion will not be revisited in the lifetime of Government, says Rabbitte*, *Irish Times*, Jul. 15, 2013, *available at* <https://www.irishtimes.com/news/politics/abortion-will-not-be-revisited-during-lifetime-of-government-says-rabbitte-1.1463567>. [↑](#footnote-ref-91)
92. The Attorney General, though sitting at cabinet meetings, is not a member of the government and his or her views are not subject to confidentiality in the way that cabinet members are. If disclosing the AG’s advice is *per se* a breach of confidentiality—on the theory that the advice influences the thinking of cabinet ministers—then even the broad nature of the advice should not be revealed, but this is regularly done. [↑](#footnote-ref-92)
93. The AG’s advice on the effect of constitutional changes was published in 1983 and 1995 to bolster the government’s position. Past governments have also sent letters of advice to the opposition and read large portions of the advice into the parliamentary record. Casey, *supra* note 143, at120-126, 140. [↑](#footnote-ref-93)
94. A copy of the advice is *available at* <https://www.irishtimes.com/news/politics/full-text-of-attorney-general-s-advice-on-repeal-of-eighth-amendment-1.3374141>. [↑](#footnote-ref-94)
95. Dáil Debates, Vol. 964, No 4, (January 30 2018) *available at* <https://beta.oireachtas.ie/en/debates/debate/dail/2018-01-30/>. [↑](#footnote-ref-95)
96. Basil Chubb, *The Political Role of the Media in Contemporary Ireland*, *in* COMMUNICATION AND COMMUNITY IN IRELAND 79 (Brian Farrell ed., 1994). [↑](#footnote-ref-96)
97. Attorney General v Hamilton, [1993] 2 I.R. 250, 282. [↑](#footnote-ref-97)
98. Conleth Bradley, *The ‘Political’ Role of the Attorney General?* 6 BAR. REV. 486, 487 (2001). Casey notes the “peculiar—even anomalous” position of the AG as being outside of government but being “quasi-ministerial”. Casey, *supra* note 143, at56-57. [↑](#footnote-ref-98)
99. John Kelly, who was AG and a hugely respected constitutional scholar, noted the AG has to be broadly of one mind with government in order for the relationship to work. Casey, *supra* 143, at 57-58. [↑](#footnote-ref-99)
100. *Id.* at 60-65. [↑](#footnote-ref-100)
101. The Minister also suggested the referendum would be divisive and might not succeed. O’Brien, C., *Lenihan rules out ‘divisive’ referendum on gay marriage*,Irish Times, Dec 5, 2007. [↑](#footnote-ref-101)
102. Katherine Zappone, *In Pursuit of Marriage Equality in Ireland: A Narrative and Theoretical Reflection*, 10 The Equal Rights Review 115 (2013). [↑](#footnote-ref-102)
103. Legislation to introduce this measure was published, but then abandoned, with the stated reason that the Attorney had advised that it was not constitutional. An overview of this advice is *available at* <http://www.justice.ie/en/JELR/Pages/SP13000346>. [↑](#footnote-ref-103)
104. Kitty Holland, *Kelly says Constitution blocked attempts to tackle housing crisis*, Irish TimesMarch 3,  2016, *available at* <https://www.irishtimes.com/news/social-affairs/kelly-says-constitution-blocked-attempts-to-tackle-housing-crisis-1.2593962>. [↑](#footnote-ref-104)
105. #  Caroline O’Doherty, *Experts challenge Alan Kelly's claim housing action would breach the Constitution*, Irish ExaminerApril 16, 2016, *available at* <https://www.irishexaminer.com/ireland/experts-challenge-alan-kellys-claim-housing-action-would-breach-the-constitution-392630.html>.

 [↑](#footnote-ref-105)
106. Taoiseach Enda Kenny “ruled out accepting the legislation, having received an opinion from Attorney General Máire Whelan that it was unconstitutional. He said the AG’s advice would not be published, in line with precedent.” *See* Michael O’Regan, *Government defeats Daly’s abortion Bill with big majority*, Irish TimesFeb 102015, *available at* <http://www.irishtimes.com/news/politics/oireachtas/government-defeats-daly-s-abortion-bill-with-big-majority-1.2099035>. [↑](#footnote-ref-106)
107. As Casey puts it, “government can hardly be *obliged* to accept the Attorney General’s advice on any matter, though to do so would appear to be the normal course.” Casey, *supra* note 143, at 134. Casey also notes minor examples where government rejected advice to the effect that they could not act a certain way in a non-constitutional matter. [↑](#footnote-ref-107)
108. *Id.* at 119-120. In January 2018, the Taoiseach appeared to acknowledge that AG’s advice is generally equivocal, informing parliament that “[l]egal advice inevitably argues from a position of ‘on the one hand, on the other hand’ and gives different sets of opinions.” Dáil Debates, Vol. 964 No. 4., Jan 30 2018, *available at* <https://beta.oireachtas.ie/en/debates/debate/dail/2018-01-30/>. [↑](#footnote-ref-108)
109. Casey, *supra* note 143, at 70. [↑](#footnote-ref-109)
110. Eoin Daly, *Reappraising Judicial Supremacy in the Irish Constitutional Tradition*, *in* JUDGES, POLITICS AND THE IRISH CONTITUTION 44 (Hickey, Callihane and Gallen eds., 2017). [↑](#footnote-ref-110)
111. One recent incident shows the potential for this problem. The government suggested that removing religious discrimination from school admissions could not be done because of legal advice suggesting that the measure would be unconstitutional. However, when an NGO published a conflicting legal opinion from three constitutional scholars saying that such a measure likely would be constitutional, the government clarified that it had not, in fact, received advice from the Attorney General. The government did not explain what had happened in this instance, but this illustrates how a government might use legal advice as a political tool in a manner not justified by the advice itself. *See* RTE News, *Legal experts contradict Taoiseach on school admissions*, RTÉ News, Jun. 22, 2016, *available at* <https://www.rte.ie/news/2016/0622/797272-schools-admission/>. [↑](#footnote-ref-111)
112. When there is a minority government, it is in principle possible to have amendments to bills or private members’ bills that run contrary to AG’s constitutional advice, but this is extraordinarily rare. *See* Casey, *supra* note 143, at125 for the only known example. [↑](#footnote-ref-112)
113. Bradley, *supra* note 168, at 486. [↑](#footnote-ref-113)
114. Janet L. Hiebert, *Governing Like Judges?*, *in* THE LEGAL PROTECTION OF HUMAN RIGHTS: SCEPTICAL ESSAYS 60 (Campbell, Ewing, Tomkins eds., 2011). [↑](#footnote-ref-114)
115. For a useful discussion of the different rationales and potential legitimacy problems attributed to abstract and concrete judicial review s*ee* WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNISTS IN EASTERN EUROPE 91-100(2005). Ireland would make for a good study for this purpose (alongside other systems that provide for this mechanism such as France, Portugal, Chile and Romania), as it has a formal *ex ante* judicial review process that has fallen out of favour, perhaps, as suggested below, because it is overshadowed by informal executive review. [↑](#footnote-ref-115)
116. A worthwhile question for future research would be whether the abstract nature of pre-enactment review – necessarily taking place without knowledge of how the law or policy will work in practice – is doomed to fall into broad legalistic reasoning if it is not to be unevidenced speculation about outcomes. If this were so, it would pose a serious challenge to political constitutionalism. [↑](#footnote-ref-116)
117. Mark Tushnet, *Policy Distortion and Democratic Deliberation: Comparative Illumination of the Countermajoritarian Difficulty* 94 MICH. L. REV. 245, 247 (1995); cf Alec Stone Sweet, *Constitutional Courts and Parliamentary Democracy* 25(1) WEST EUROPEAN POLITICS77, 94 (2002). [↑](#footnote-ref-117)
118. Indeed, the general trend for review to be court-mimicking suggests that political constitutionalism more generally may have this problem, as it introduces the outlooks and methods of courts into the policy-making process and focuses that process on judicial roadblocks. [↑](#footnote-ref-118)
119. This is true if the executive in each place does feel found by the legal advice, as it claims. If this is opportunistic misrepresentation, then the issue is the executive imposing limits on the legislature with disingenuous arguments about legal limitations. This is discussed in more detail below. [↑](#footnote-ref-119)
120. *See* [omitted]. [↑](#footnote-ref-120)
121. We are grateful to an anonymous review for highlighting this point. [↑](#footnote-ref-121)
122. Samuels, *supra* note 102, at 3. [↑](#footnote-ref-122)
123. Law, *supra* note 95, at 1456. [↑](#footnote-ref-123)
124. This is known as the critical self-consciousness problem. *See* [omitted] [↑](#footnote-ref-124)
125. Kavanagh, *supra* note 33, at 83. [↑](#footnote-ref-125)
126. For a useful overview *see* Joseph Jaconelli, *Reference of Bills to the Supreme Court - A Comparative Perspective*, 18 Irish Jurist (N.S.) 322 (1983). [↑](#footnote-ref-126)
127. *See* [omitted]. [↑](#footnote-ref-127)
128. It is conducted in the abstract; if approved, legislation is immune from any subsequent review; and to must be conducted in a very short time frame. It may be that case-by-case determinations, with the possibility of future challenge, are thought preferable. [↑](#footnote-ref-128)
129. The Attorney General sits on the Council of State, the consultative body that assists the President in deciding whether or not to invoke Article 26. It is also possible that the Presidency may be institutionally ill-equipped to effectively second guess the constitutional assessment of the Office of Attorney General and its sizeable bureaucratic apparatus. [↑](#footnote-ref-129)
130. Daphna Renan, *The Law President’s Make*, 103 VA. L. REV. 805, 818 (2017). [↑](#footnote-ref-130)
131. *Id.* at 830-831. *See* *generally* [omitted] [↑](#footnote-ref-131)
132. Disclosure of advice could help to defend an executive policy, and it may be that no real constitutional issue arises on any reasonable interpretation. However, as Renan notes, disclosure can also create “controversy, distract from other priorities, or put…policies at risk” if the constitutional assessment is more contestable. *Id.* at 852. [↑](#footnote-ref-132)
133. David Landau, *Abusive Constitutionalism* 47 U.C. Davis L. Rev. 189 (2013). Though the Irish case may have less scope for use of shadow review to manipulate the judicial process, there is at least one controversial example of the Irish government using the Attorney General’s to attempt to sway voters in a constitutional change referendum on divorce, relying on the idea that the Attorney was giving impartial legal advice. *See* DAVID GWYNN MORGAN, THE SEPARATION OF POWERS IN THE IRISH CONSTITUTION 201 (1996). While not suggesting that this was *per se* improper, it might indicate how the process could be misused. [↑](#footnote-ref-133)
134. David Landau & Rosalind Dixon, *Abusive Judicial Review*, Paper presented at ICON-S Conference (Hong Kong, June 27, 2018). [↑](#footnote-ref-134)
135. *See generally* Martin, *supra* note 100. [↑](#footnote-ref-135)