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Non-Judicial Review

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ESSAY

NON-JUDICIAL REVIEW

Mark Tushnet*

Professor Mark Tushnet challenges the view that democratic constitutionalism requires courts to dominate constitutional review. He provides three diverse examples of non-judicial institutions involved in constitutional review and examines the institutional incentives to get the analysis "right." Through these examples, Professor Tushnet argues that non-judicial actors may perform constitutional review that is accurate, effective, and capable of gaining public acceptance. Professor Tushnet recommends that scholars conduct further research into non-judicial review to determine whether ultimately more or less judicial review is necessary in constitutional democracies.

If nothing else, familiarity leads us to assume that constitutional review must occur in courts and that non-judicial actors—politicians, said in a disparaging tone of voice—would fail to do a decent job of constitutional review were they given the chance. Courts are said to be distinctively the forum of principle, the legislature and executive the forum of politics. While politics serves a necessary function, constitutionalism requires constraints on politics that politics itself cannot supply. Courts, on the other hand, are said to perform a function of constitutional settlement that is most effective without interference from non-judicial actors engaged in constitutional review.

These familiar ideas can be challenged on a number of grounds. The political question doctrine, for example, is commonly understood as a doctrine that identifies constitutional issues as to which political constraints on political actors are thought more likely to produce conformity to constitutional norms than would judicial review. A number of non-judicial institutions around the world are involved in the process of con-

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1 "Constitutional review" in this Essay means the assessment of policy proposals with an eye to their consistency with constitutional norms, performed by actors relatively close to taking binding legal action.


4 For an elaboration, see Mark Tushnet, Taking the Constitution Away from the Courts 1, 16, 104-08 (1999).
stitutional review, without apparently undermining public acceptance of controversial settlements and with seemingly decent performance. Human rights commissions, for example, are often given authority to investigate alleged constitutional violations and sometimes have the power to bring enforcement actions. Ombuds-offices investigate similar allegations and publicize the outcomes. In Estonia, the Legal Chancellor is charged with monitoring enacted laws and is directed to propose new legislation to eliminate any constitutional defect; if such legislation is not adopted, the Legal Chancellor is to bring an action in the constitutional court challenging the statute's constitutionality.

These institutions are, however, quasi-judicial bureaucracies whose mission is to monitor constitutional compliance. Precisely because these institutions resemble courts, their operations may not shed much light on fundamental questions about non-judicial constitutional review. In this Essay, a different set of practices of non-judicial constitutional review will be examined which involve constitutional review conducted by elected officials (or their direct subordinates). The contrasts with judicial behavior are largely implicit: the incentives and structures for judges and quasi-judicial bureaucrats who interpret constitutional norms are briefly identified and compared with those of non-judicial actors. A judge has a disinterested desire to interpret the Constitution correctly according to some normative theory she or he holds. Other interests include advancing public policy goals—namely, ensuring effective government performance—to the extent compatible with the judge's normative interpretive theory, developing a reputation as a good judge among some real or imagined reference group, being an important player in the nation's consti-


6 For an overview, see HUMAN RIGHTS COMMISSIONS AND OMBUDSMAN OFFICES: NATIONAL EXPERIENCES THROUGHOUT THE WORLD (Kamal Hossain ed., 2000).


8 There is a sense that law faculty members and students, newspaper editorialists, and even ordinary citizens perform constitutional review, but in this Essay, only the activities of people close to the formal law-making process are explored.


10 Alternatively, as the judge would put it, according to the correct normative theory of the Constitution. Likewise, some non-judicial officials also share this interest—a professional and bureaucratic interest in providing disinterested constitutional interpretation.

11 The reference group may be contemporary—the judge's social circle, or contemporary legal academics—or future, as when a judge is concerned with making a place in history. See Schauer, supra note 9, at 628–30. For a study of reputation as an intriguing incentive because of its obvious, though implicit, self-referentiality, see generally Richard A. Posner, CARDozo: A STudy In REPutATION (1990).
tutional order, and getting the job done while leaving adequate time for leisure. What the judge does not have is an interest in satisfying the demands of some constituency in a position to affect the judge's tenure in the job.

In examining constitutional review by non-judicial officials, this Essay will highlight the effects that different institutional structures and, in particular, different incentives have on the officials' performance, with an eye to comparing the effectiveness of non-judicial constitutional review with that of judicial constitutional review. Each Part of the Essay describes a single practice of non-judicial constitutional review: the use of constitutional points of order in the United States Senate, the constitutional clearance practice of the Office of Legal Counsel in the United States Department of Justice, and the ministerial obligation under the British Human Rights Act 1998 to make a statement regarding the consistency of proposed legislation with the Act.

Why should non-judicial actors take the task of constitutional review seriously? With Human Rights Commissions, ideological commitments and bureaucratic missions presumably provide the answer. One might wonder, however, about the incentives of electoral actors and their subordinates to do so. In particular, would elected officials resist pressure from their constituencies to pursue some policy arguably inconsistent with constitutional requirements? Each Part examines some incentive-based structural questions about the ability of these non-judicial actors to perform constitutional review well: in the case of Senate procedure, the possibility of strategic deployment of constitutional objections; in the case of the Office of Legal Counsel, the possibility of institutional bias independent of particular policy preferences; and in the case of the Human Rights Act 1998, the ability of non-judicial actors to exploit ambiguities in statutory and constitutional texts to support results they desire as a

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12 This interest gives judges an incentive to develop balancing tests whose results cannot be readily known until the judges themselves perform the balancing. As discussed infra, constitutional provisions interpreted to require balancing may be reasonably well-enforced by non-judicial officials. See infra text accompanying notes 84-89.

13 See Posner, supra note 9, at 1.

14 Elected judges do have electoral interests of this sort, and a judge who desires promotion to some other position—whether elevation to a different judicial post or appointment to a non-judicial one—can be responsive indirectly to the electoral interests of the appointing official. See Schauer, supra note 9, at 631-33. For a study of judicial responsiveness to administrative discipline, see generally J. Mark Ramseyer, The Puzzling (In)dependence of Courts: A Comparative Approach, 23 J. LEGAL STUD. 721 (1994).

15 Because the aim is to investigate the incentives, structures, and performance of non-judicial constitutional review, this Essay does not explore the normative literature on the practice, which in general defends its propriety. See, e.g., Frank H. Easterbrook, Presidential Review, 40 CASE W. RES. L. REV. 905 (1990); Paul Brest, The Conscientious Legislator’s Guide to Constitutional Interpretation, 27 STAN. L. REV. 585 (1975); Randolph D. Moss, Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel, 52 ADMIN. L. REV. 1303, 1304 n.1 (2000) (providing citations to most of the relevant normative literature).
matter of policy preference. With respect to each structural question, this Essay will suggest that the problems do not significantly differ from those associated with common judicial review. The conclusion identifies what might be truly distinctive about judicial constitutional review and suggests that the necessary comparative judgment about the relative ability of courts and non-judicial actors to perform constitutional review is harder than our familiar understandings would have it.

I. THE CONSTITUTIONAL POINT OF ORDER IN THE UNITED STATES SENATE

A United States senator may raise a point of order regarding any bill under consideration. Ordinarily the Senate’s presiding officer initially rules on points of order, with the possibility of appeal to the Senate as a whole. Senate precedent establishes, however, that points of order addressing the constitutionality of bills are automatically referred to the Senate for disposition by a roll call vote recording the votes of each senator. Points of order are nondebatable under standard rules of parliamentary procedure. Ordinarily, senators therefore have to discuss the constitutional questions raised by the point of order before a senator raises it. Of course, a senator can lay out a constitutional argument prior to formally raising a constitutional point of order. In addition, Senate practice gives the presiding officer discretion to allow debate on a point of order, and one precedent indicates that constitutional points of order are debatable. Further, the Senate, invoking its ordinary procedures for regulating debate, can adopt a rule authorizing and specifying the conditions for debate on a constitutional point of order. Debate on the merits of the constitutional issue is therefore possible both before and after the point is raised.

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16 See Comm. on Rules & Admin., Standing Rules of the Senate, S. Doc. No. 106-15, at Rule XX (2000) (addressing questions of order). A point of order is a claim that a Senate rule is being violated. If sustained, the debate moves to another subject.


20 See, e.g., 131 Cong. Rec. S14,613 (daily ed. Nov. 1, 1985) (statement of Sen. Rudman (R-N.H.)). Senator Warren Rudman, after being recognized, opened his comments with the statement, “Mr. President, today I shall raise a point of order challenging the constitutionality” of a pending amendment. Id. After outlining the constitutional objection to the amendment, he formally raised the constitutional point of order. Id.


22 See Riddick & Frumin, supra note 18, at 987.

23 See, e.g., 139 Cong. Rec. 19,750 (1993) (the Presiding Officer indicating that “[d]ebate on a constitutional point of order is limited to 1 hour equally divided and controlled in the usual form”).
An important preliminary observation is that formal constitutional points of order are rare. Obviously, constitutional questions can be raised in the ordinary course of debate on the merits of proposals, as they were, extensively, in connection with recently enacted campaign finance legislation. In such discussions, the integration of constitutional concerns and policy questions is present on the surface of the discussions. In contrast, the constitutional point of order at least purports to separate constitutional questions from policy ones.

Fewer than ten constitutional points of order have been raised since 1970. One involved an objection to a proposed constitutional amendment that would have provided for representation of the District of Columbia in Congress. Senator Orrin Hatch (R-Utah) argued that the constitutional amendment would itself be unconstitutional because it would deprive other states of their equal representation in the Senate without their consent, contrary to the limitation built into Article V of the Constitution. Other senators disagreed that the proposed amendment would in fact contravene the requirement of equal representation, and after some procedural confusion was resolved, the Senate rejected the point of order and approved the resolution submitting the proposed amendment to the states for ratification. Another point of order raised an objection to an appropriations bill as violative of the Origination Clause's requirement that "[b]ills for raising Revenue shall originate in the House of Representa-

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24 Constitutional issues are more often discussed in committee hearings, sometimes with testimony from constitutional "experts." See, e.g., The Judicial Nomination and Confirmation Process Before the Senate Comm. on the Judiciary, 107th Cong., S-HRG. 107-463 (2001). In the hearings, however, the discussions are not dispositive because no votes are taken, as they are when a point of order is raised, and hearings are more obviously scripted than the discussions on the Senate floor. In addition, senators on the floor speak by themselves, with staff participating only in helping the senator prepare for the discussion. The point-of-order practice therefore provides a cleaner opportunity for assessing senators' performance than does the discussion of constitutional issues at the committee level.


26 For additional discussion, see infra text accompanying notes 60-64.

27 Research assistant Rachel Lebezko Priester located references to these motions in secondary literature, and the authors are cited with the relevant pages referenced in the Congressional Record.


30 The procedural confusion led to a substantive debate over Senator Hatch's argument before he formally raised the point of order. The Senate first voted to table the point of order by a vote of sixty-five to thirty-two, and then voted in favor of submitting the proposed amendment to the states by a vote of sixty-seven to thirty-two. See 124 CONG. REC. 27,249 (1978).
tives.” The point of order was withdrawn when another senator pointed out that, under Senate custom, appropriations bills did not have to originate in the House.

The other constitutional points of order raised various objections. Senators raised individual rights claims through constitutional points of order on bills that would ban federal financing of abortions for federal prisoners, that would impose tax liabilities for already completed transactions, and that would enact a new federal ban on flag-burning in the face of a Supreme Court decision holding anti-flag-burning statutes unconstitutional. Other constitutional points of order rested on separation of powers concerns, particularly that proposed legislation would violate the legislature’s prerogatives. For example, a senator objected to provisions of the Civil Rights Act of 1991 that would, in his view, make the legislative branch subject to review by executive and judicial authorities. Another senator objected that public financing of presidential elections would violate the constitutional requirement that federal expenditures be made through appropriations statutes. Finally, an extensive debate occurred when a constitutional point of order was raised in 1984 against a proposal to authorize the President to veto particular items in appropriations bills.

Plainly, many bills and enacted statutes raise constitutional questions that are never subject to a constitutional point of order. Senators have no obligation to use the procedure. This points to an important and obvious difference between senatorial and judicial consideration of constitutional questions: subject only to justiciability questions, courts must address constitutional questions litigants present to them, while senators have no obligation to raise a constitutional point of order. Conceding, then, that the constitutional point of order is not a substitute for judicial review, the quality of the senators’ discussions when they do deal with constitutional points of order will next be examined.

32 See Tiefer, supra note 21, at 507 n.107.
37 See Ross, supra note 33, at 361 n.198.
38 See Fisher, supra note 18, at 719-22.
39 Senators may well discuss constitutional questions in other forums, such as hearings at which they take testimony about a proposal’s constitutionality. Only the constitutional point of order, however, requires each senator to take a recorded, formal position on a
Debates on constitutional points of order contain several elements, the proportions varying with the subject matter and the political context. First, senators discuss whether a proposal is constitutional by referring to relevant judicial decisions. For example, Senator Warren Rudman (R-N.H.) relied on Supreme Court decisions about the government’s responsibility for medical care of prisoners to explain his constitutional objection to a proposal that would deny the Federal Bureau of Prisons the authority to pay for federal prisoners’ abortions.40

Second, senators supplement their use of court decisions by invoking the constitutional principles they believe underlie those decisions. Senator Slade Gorton (R-Wash.), objecting to a provision making tax increases retroactive, cited court decisions casting constitutional doubt on such increases.41 Senator James Sasser (D-Tenn.) responded that “the Supreme Court has already ruled,” referring to another set of decisions.42 Returning to the debate, Senator Gorton then elaborated on the underlying principle: a retroactive statute is unconstitutional when it is “harsh and oppressive . . . when it is imposed without notice, that is to say when it is imposed retroactively beyond the date in which the Congress and the President have given notice that they intend to pass a tax.”43

Third, senators rely directly on the Constitution and basic constitutional principles without drawing in any significant way on court decisions. In a constitutional point of order debate raised against a proposal to enact a line-item veto, one senator mentioned the then-recent Chadha decision,44 saying that the line-item veto was “merely a variation on the same constitutionally impermissible theme.”45 That, however, was a rare reference to the courts in the debate. Far more often, senators referred to “the simple language of the U.S. Constitution”46 and invoked general separation-of-powers principles.47

Finally, senators discuss whether they should even make their own independent judgments about the constitutionality of the proposals. In a sense, these debates are about whether a constitutional point of order is itself out of order. A supporter of the line-item veto proposal, for example, said, “I want to pass this amendment, send it to the House, have them pass it, have the President sign it, and let the Supreme Court decide

question of constitutional interpretation. See supra note 24.

42 139 CONG. REC. S19,752 (1993).
43 Id. at 19,757.
45 130 CONG. REC. S10,855 (1984) (statement of Sen. Mark Hatfield (R-Or.)).
46 See, e.g., id. at S10,857 (statement of Sen. Pete Domenici (R-N.M.)).
47 See, e.g., id. at S10,858 (statement of Sen. John Stennis (D-Miss.)).
whether it is constitutional to do this." More often, and not surprisingly, senators assert their constitutional responsibility to interpret the Constitution on their own, sometimes referring to the oath of office they take to uphold the Constitution. Perhaps the most dramatic example of touting independent senatorial responsibility was Senator Jesse Helms's (R-N.C.) position on the constitutionality of denying federal funding for abortions obtained by federal prisoners. Senator Helms argued in part that Supreme Court precedent supported the constitutionality of the proposal, but he also asserted indirectly, but reasonably clearly, that the proposal was constitutional because the Supreme Court's basic abortion decisions lacked an adequate constitutional foundation.

The constitutional arguments made in these debates are usually quite truncated. They contain few quotations from cases or even the Constitution, and, of course, no citations. They are, after all, debates and not judicial opinions. In some ways, too, the debates are telegraphic, with senators making shorthand allusions to more elaborate arguments they do not develop fully. Taking these considerations into account, however, it seems that nearly all the debates contain the skeletons of decent constitutional arguments, and sometimes there is even a bit of flesh on the bones. Although there are no transcripts of the discussions at the closed conferences of Supreme Court Justices, evidence from notes the Justices take suggests that the Senate discussions of constitutional questions differ less than one might expect from the actual face-to-face discussions the Justices have. If Conference discussions set the standard for assessing when deliberation is sufficient—rather than, for example, published Su-

48 Id. at S10,861 (statement of Sen. Alan Dixon (D-III.)). The Supreme Court eventually held a different Line Item Veto Act unconstitutional more than a decade later. See Clinton v. City of New York, 547 U.S. 417 (1998). An interesting variant on the argument that constitutionality should be addressed by courts occurred in the 1990 debate on adopting a constitutional amendment on flag-burning. At the time of the Senate debate, the House of Representatives had already failed to adopt a constitutional amendment by the required supermajority. The Senate proceeded to consider adopting the amendment nonetheless. Senator Dale Bumpers (D-Ark.) proposed an amendment that would have enacted another anti-flag-burning statute. Senator Pete Wilson raised a constitutional point of order. 136 CONG. REC. S 15,548-49 (daily ed.1990). In response, Senator Bumpers said, "[t]hat is not really a decision . . . for us to make," because, in light of the failure of all other efforts, his statute was "[t]he only thing in the world [that has] a chance of getting before the Supreme Court." Id. at S15,549. The Senate upheld the point of order by a vote of fifty-one to forty-eight and proceeded to consider the constitutional amendment. Id.


50 See 131 CONG. REC. 30,244 (1985) ("I hope that Congress, and certainly the Senate, will not this day embark on a misinterpretation of the Constitution of the United States.").

51 For a compilation of the notes, see The Supreme Court in Conference (1940-1985): The Private Discussions Behind Nearly 300 Supreme Court Decisions (Del Dickson ed., 2001). See also Louis Michael Seidman, Eavesdropping on the Justices, 5 GREEN BAG 2D 117 (2001) (book review) (emphasizing the apparently truncated nature of Conference discussions).
A skeptic might suggest, however, that these debates on constitutional points of order are no more than sideshows to the main stage: the consideration of the policy wisdom of the proposals before the Senate. The correspondence between votes on constitutional points of order and votes on the merits is extremely close. The Senate accepted the point of order made against the proposed line-item veto by a vote of fifty-six to thirty-four, but, as Louis Fisher notes, the constitutional point of order “was the simplest way to defeat an amendment [the majority] opposed on policy grounds.” Professor Stephen Ross’s analysis of the votes on the abortion-funding point of order is similar. The Senate was equally divided over whether to adopt the amendment limiting federal funding of abortions for federal prisoners, which meant that the amendment remained on the table. The constitutional point of order was raised. A motion to table that point of order was defeated by one vote. Ross notes that “[e]ven though the vote on the motion to table represented a vote on the merits and the point of order vote supposedly involved constitutionality, of the Senators participating in both votes, only two . . . switched their votes between the two motions.” The amendment’s supporters saw the handwriting on the wall, with one saying “my thought is it is well to vitiate the yeas and nays. We have had a clear vote, though it is disappointing to me.” The supporters allowed the amendment to be defeated on a voice vote.

The constitutional point of order’s distinctive function is to allow senators to put aside their views on the policy-wisdom of the proposal at hand and to focus solely on its constitutionality. No procedural rule can guarantee that senators will in fact deal solely with the constitutional questions. The correspondence between senators’ positions on constitutional points of order and their positions on the merits suggests that the constitutional point of order does not in fact narrow the range of matters sena-

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52 Professor Beth Garrett suggests that, just as the Justices exchange letters that flesh out their conference positions, so senators also distribute “Dear Colleagues” letters at times. Memorandum to Mark Tushnet (Feb. 11, 2002) (on file with author). To that extent, the analogy between floor debates and Conference discussions might be strengthened.

53 In oral comments on an earlier version of this Essay, Professor Frederick Schauer reported the preliminary results of a study of Senators’ views on campaign finance reform. According to Schauer, every senator who favored campaign finance reform believed it to be constitutional while every senator who thought reform bad policy also believed reform to be unconstitutional.

54 Fisher, supra note 18, at 721.

55 See Ross, supra note 33, at 360 n.195.

56 Id.

57 Id.

58 Id. at 360.

59 131 CONG. REC. 30,247 (1985) (statement of Sen. William Armstrong (R-Colo.)).

60 See Ross, supra note 33, at 360.
tors think about before they vote. It seems as if the constitutional analysis senators engage in actually does no independent work. Senators take the position on the constitutional point of order that matches their position on the merits, and they do so because of their views on the merits.

The suggestion, then, is that senators' votes on constitutional points of order simply reflect, without change, their views on the policy questions raised by the underlying proposals. This suggestion might be bolstered by two related observations. Senators rarely raise constitutional points of order even though many proposals could certainly be the subject of such points. Senators also advert to constitutional questions in ordinary debate without raising constitutional points of order.

Why, then, use the constitutional point of order when policy grounds would arguably suffice? The answer might be something like this: the appearance of identity between policy views and constitutional ones is misleading. Actually, some senators believe that the proposal is unwise as a matter of public policy. They also believe that their constituents mistakenly believe that the proposal is a good one. The senators therefore fear adverse electoral consequences from voting according to their policy views. The senators believe as well, however, that their constituents will not punish them electorally for voting against a proposal that they believe to be unconstitutional.

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61 One might note in response that at least sometimes the constitutional analysis drives the policy views. The testing points would be issues that do not raise serious constitutional questions; a senator who objects to one of these collateral provisions demonstrates that policy is his or her primary concern.

62 It might be worth pointing out, however, that some political scientists believe that judges act in precisely this way as well. The so-called attitudinal model they favor holds that the correspondence between Justices' views on the proper interpretation of the Constitution and their views on the policy wisdom of the matters they consider is also quite close. For a presentation of the attitudinal model, see Jeffrey Alan Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model (1992).

63 A senator may raise a point of order only after being recognized, and the senators controlling debate on a particular proposal may refuse to recognize a senator who they know would raise a point of order they do not want to address. See Robert's Rules of Order, supra note 17, at art. I, § 3. It may be that senatorial norms require, or at least generally induce, a senator to notify the senators controlling debate of what they intend to do after being recognized. See Riddick, supra note 18, at 1091.

64 Professors Elizabeth Garrett and Adrian Vermeule invoke John Elster's idea of "the civilizing force of hypocrisy" to explain how constitutional arguments might have weight independent of a legislator's policy views:

Even a wholly self-interested legislator cannot afford to take positions in constitutional argument that are too transparently favorable to his own interests. So legislators who want to invest in credibility will have to adjust their positions to disfavor or disguise their own interests to some degree.

Why might senators think that voting to uphold a constitutional point of order will insulate them from electoral harm? Consider two possibilities: *timing* and *responsibility*. Professor Nelson Lund’s brief discussion of Congress’s adoption of a flag-burning statute illustrates the timing explanation. Congress had before it two proposals, a statute (largely supported by Democrats) that sought to conform a prohibition of flag-burning to the Supreme Court’s invalidation of a Texas flag-burning statute, and a constitutional amendment (largely supported by Republicans) that would have specifically authorized adoption of flag-burning legislation. By adopting the statute, senators deferred consideration of the constitutional amendment. The deferral would have been permanent had the Supreme Court upheld the new federal statute, but even a temporary deferral might be valuable for senators opposed to anti-flag-burning legislation but facing public demand that something be done. Deferral would be “a delaying tactic meant to divert attention away from a constitutional amendment until after popular interest in the matter subsided.” Professor Lund finds support for this explanation from the votes of senators who purported to support a statute but voted against the constitutional amendment.

The reason that timing might matter in this way needs elaboration. Electoral retaliation is always delayed until the next election. On Lund’s account, the risk of electoral retaliation evaporates because senators believe that voters’ preferences will change: voters who wanted an enforceable flag-burning statute in 1989 would care more about other things by 1990 or 1992, when they would consider whether to re-elect a senator who voted for the statute but against the constitutional amendment.

There are, however, several difficulties with the timing explanation. References to the desirability of letting things cool off pervade the arguments favoring the adoption of an anti-flag-burning statute over amend-
Lund's language seems to suggest that a senator who voted for the statute simply to defer consideration of the constitutional amendment somehow behaved insincerely, but it is hard to see why. Those senators, it might be said, voted in a way that assured the implementation of their constituents' long-term preferences rather than of their passing preferences. That senators would gauge the intensity of preferences, it might further be said, was one of the reasons the Framers gave senators six-year terms of office.

There is another reason to discount the timing explanation for the Senate votes in the flag-burning controversy. Notably, the timing explanation does not, by itself, explain why a senator would vote to reject the constitutional point of order and adopt a statute the senator believed would be held unconstitutional. The length of time between the vote on the constitutional point of order and the next election is the same no matter how the senator votes. What seems to matter is that the senator might be able to say to constituents, "I tried to get you a flag-burning statute, but the Supreme Court wouldn't let me." The possibility that the senator will also have to explain a vote against a constitutional amendment that would have authorized a flag-burning statute complicates the picture. The senator's response actually assumes that the constituents continue to desire the adoption of an enforceable flag-burning statute. The senator's challenger can point out that, by voting against the constitu-

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71 See Goldstein, supra note 66, at 168–69 (collecting such statements).
72 See, e.g., Lund, supra note 65, at 472–73 n.77 (referring to "a political strategy aimed at derailing a constitutional amendment that would have authorized statutory protection of the Flag").
73 Perhaps alternatively, they implemented those of their constituents' preferences that are important enough to remain salient over a long term. That is, the constituents may still care about adopting a statute banning flag-burning, but over time that preference becomes less significant relative to other issues on the constituents' agenda.
74 For a discussion of the Senate, see The Federalist No. 63 (Edward M. Earle ed., 1976).
75 Further, the timing explanation does not respond to the staggered nature of Senate elections and the possibility of difference among senators based on how imminently they face an election campaign, particularly for legislation that cannot be timed for an election year.
tional amendment, the senator did not try as hard as he or she could have to get constituents the flag-burning statute they wanted.

Perhaps the complication actually explains how the timing explanation works. The senator may not be able to explain to constituents why the existing Constitution—the one invoked in the constitutional point of order—makes it impossible to enact an enforceable flag-burning statute. The senator might, however, be able to explain to constituents why it would be a bad thing to amend the Constitution to authorize such a statute.

In the flag-burning case, senators were presented with two distinct questions: should they adopt a flag-burning statute if consistent with the First Amendment, and should they adopt a constitutional amendment that would ensure the constitutionality of flag-burning statutes. Lund treats these two questions as a single one about the desirability, as a matter of public policy, of having an enforceable flag-burning statute. They are not.

A senator who sincerely wanted a flag-burning statute might think that obtaining one by means of amending the Constitution would leave the nation worse off than it would be without a flag-burning statute. The senator’s concern might be two-fold. An apparently narrow constitutional amendment directed solely at authorizing flag-burning statutes might be taken by future Congresses and Supreme Courts as expressing a broader policy about the basic principles of free expression, thereby authorizing larger incursions on free expression than the senator believes appropriate. The senator might also be concerned about setting a precedent—not about free expression—but about amending the Constitution. The senator might believe that proponents of unwise constitutional amendments (as the senator sees the proposals) would be emboldened were the Constitution amended to authorize flag-burning statutes. The cost of forgoing an enforceable flag-burning statute after constitutional amendment might be lower than the costs associated with amending the Constitution. Making sense of the timing explanation requires consideration of the possibility that a proposal will be made to amend the Constitution at the moment that the constitutional point of order is raised.

The responsibility explanation for invoking the Constitution rather than policy is that the constitutional point of order allows senators to shift responsibility for the proposal’s defeat from themselves to the Constitution. Senator David Boren’s (D-Okla.) statements in the line-item veto debate illustrate how the responsibility explanation might work.

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76 Lund, supra note 65, at 472–73.
78 The model for this concern would be the Eleventh Amendment, which the Supreme Court has interpreted to express a basic principle of state immunity from suit that goes well beyond the Amendment’s express terms. For decisions articulating this understanding of the Amendment’s deeper meaning, see, for example, Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), and Alden v. Maine, 527 U.S. 706 (1999).
Many opponents of the line-item veto statute thought it was bad policy. Senator Boren, a former governor who had exercised a line-item veto over his state's budget, clearly did not.\textsuperscript{79} He expressed his willingness to co-sponsor a constitutional amendment creating a line-item veto power. But, he said, "as much as I favor the line-item veto, I feel I have no choice but to vote that it does not comply with the Constitution of the United States."\textsuperscript{80} This sense of compulsion makes the Constitution, and not the senator, responsible for the proposal's defeat.

Interestingly, Justice Anthony Kennedy alluded to precisely the same responsibility-shifting function of the Constitution in the Supreme Court's initial flag-burning decision.\textsuperscript{81} Justice Kennedy voted with the five-justice majority to find unconstitutional a state's ban on flag-burning as a means of political protest. He observed, "[s]ometimes we must make decisions we do not like" because "the law and the Constitution, as we see them, compel the result."\textsuperscript{82} Justice Kennedy suggested as well that this effort to shift responsibility can never be entirely successful: when "we are presented with a clear and simple statute to be judged against a pure command of the Constitution . . . , [t]he outcome can be laid at no door but ours."\textsuperscript{83} Precisely the same thing could be said about senators who attempt to shift responsibility for the defeat of a proposal their constituents favor from themselves to the Constitution: the constituents could still lay responsibility at the senators' doors.

To the extent that electoral constitutional responsibility is attenuated, why might senators take the Constitution seriously? To answer that question, reasons for senators' preferences must be examined. Political scientists' studies of legislative behavior suggest that legislators seek to develop what they personally believe to be good public policy within the constraints imposed by their constituents' desires.\textsuperscript{84} That is, legislators want to do good as they see it, but they also want to be reelected.

The first thing to note is that a senator might hold a personal belief that good public policy includes compliance with the Constitution. That is, she might think that no policy is a good one that violates what the senator believes to be constitutional requirements. Senators with such a

\textsuperscript{79} 130 CONG. REC. 10,863 (1984).
\textsuperscript{80} 130 CONG. REC. 10,863 (1984). Professor Robert Goldstein quotes an aide to a Democratic senator who offered a somewhat weaker version of the responsibility explanation, distinguishing between a desirable statute—"a good thing"—and a constitutional amendment that would "screw[ ] around with a fundamental principle of the democratic system." GOLDSTEIN, supra note 66, at 181–82.
\textsuperscript{81} TEXAS v. JOHNSON, 491 U.S. 397 (1989).
\textsuperscript{82} Id. at 420–21 (Kennedy, J., concurring).
\textsuperscript{83} Id.
\textsuperscript{84} The classic study is RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES (1973), arguing that members of Congress pursue the goals of reelection, power within Congress, and good public policy. More recently, two authors confirmed the importance of reelection and public policy while down-playing the importance of power within Congress. STEVEN S. SMITH & CHRISTOPHER J. DEERING, COMMITTEES IN CONGRESS (1990).
belief take the Constitution seriously just because they take their role in making good public policy seriously, and the problems they may have with their constituents over their personal constitutional views are no different from the problems they may have over ordinary policy questions.

In addition, a senator may gain some freedom to act on his personal constitutional views by delivering the pork to his constituency, building up a reservoir of good will that leads constituents to accept the senator’s rejection on constitutional grounds of a policy the constituents favor. As a senator gains seniority, even constituents who vigorously disagree with the senator’s constitutional views might be willing to swallow their objections so as to preserve the advantages they gain from the member’s seniority.

Finally, constituents themselves may think that complying with the Constitution is a component of good public policy. Such constituents may agree with the senator’s constitutional views or may defer to the senator’s judgment about what the Constitution requires. In either case, these constituents provide electoral support for the senator.

These considerations suggest why senators’ electoral incentives do not necessarily lead senators to ignore their own considered constitutional views when voting on a constitutional point of order. Possibility is not necessity, of course, and the coincidence between constitutional positions and policy positions might be suspicious. It may be wrong, though, to see votes on constitutional points of order as politically expedient reflections of underlying policy views. One might instead see the votes on the constitutional points of order as reflecting considered constitutional judgments, influenced but not dictated by policy views.

Consider the following theory of constitutional interpretation. The Constitution should be interpreted in light of text, original understanding, accumulated precedent, and fundamental principle. Often, and particularly in the most contentious cases, those sources will not conclusively establish that a proposal (or enacted statute) is constitutional or unconstitutional. If they do not, one can properly resolve the constitutional question by taking into account whether the proposal or statute would improve the functioning of the government as an ongoing operation. Sometimes senators holding this theory of constitutional interpretation will find themselves in precisely this situation of interpretive openness. When they do, the coincidence between their policy views and their votes on a constitutional point of order indicates a fully responsible exercise of the senators’ duty

85 To be clear, here “pork” refers not simply to direct material benefits to the constituency but more generally to actions consistent with the constituency’s policy preferences.
86 Obviously this account cannot explain senators’ votes with respect to amending the Constitution but only their votes on constitutional points of order against legislative proposals, which are necessarily predicated on the existing Constitution.
87 Whether senators actually hold this theory is debateable but the theory appears to be something reasonably common-sensical, and one that a senator might well adopt.
to vote on the constitutional point of order solely with reference to their theoretically informed view of the proposal's constitutionality.

Finally, it seems worth emphasizing that the constitutional theory described is a perfectly respectable one that judges could hold as well. 88 In a sense, then, the Senate's practice on constitutional points of order might support the proposition that non-judicial constitutional review can be little different from judicial constitutional review—if judicial review is understood in a specific way and if senators in fact adopt the theory of constitutional interpretation that could justify the apparent congruence between policy views and votes on constitutional points of order.

Additionally, senators' incentives may be less mysterious than judges'. To the extent that practice on constitutional points of order can inform judgment, senators stack up reasonably well in comparison to judges, in part because one can understand how senators' incentives might actually lead them to take the Constitution seriously. The limited scope of the practice of the constitutional point of order may be important here as well: politicians who do reasonably well when they occasionally face up to constitutional questions directly might not do as well were they to confront such questions routinely.

II. BILL CLEARANCES AT THE OFFICE OF LEGAL COUNSEL

The Office of Legal Counsel (“OLC”) in the United States Department of Justice reviews legislative proposals for constitutionality as the executive branch’s legal advisor, acting by delegation from the Attorney General. 89 The OLC is headed by an Assistant Attorney General nominated by the President and confirmed by the Senate. 90 The office staff includes

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88 Of course, it is not the only reasonable theory of constitutional interpretation. One could believe that proposals or statutes are (necessarily) constitutional when the standard sources for interpreting the Constitution run out, in the sense that they do not conclusively establish the proposals' or statutes' unconstitutionality. Judge Frank Easterbrook has expressly taken that position. See Frank Easterbrook, Alternatives to Originalism, 19 HARV. J. L. & PUB. POL. 479 (1996).

89 See 28 C.F.R. § 0.25(a) (1999) (assigning the OLC duties of preparing formal and informal opinions and giving legal advice to governmental agencies); Office of Legal Counsel, Mission Statement, at http://www.usdoj.gov/olc/index.html (last visited Apr. 14, 2003). The OLC also plays a role in developing an administration's posture in litigation, a matter discussed elsewhere in the scholarly literature. See, e.g., Dawn E. Johnsen, Presidential Non-Enforcement of Constitutionally Objectionable Statutes, 63 LAW & CONTEMP. PROBS. 61 (2000). In addition to published materials, this Part relies on: Telephone Interview with Randolph Moss, Former Attorney General, OLC (Jan. 21, 2001); Interview with Cornelia Pillard, Former Deputy, OLC (Sept. 21, 2001); Telephone Interview with Martin Lederman, Attorney Advisor, OLC (July 9, 2001).

90 The degree to which the Assistant Attorney General in charge of the OLC regards himself (no women have held the position as of yet) as an essential part of the President's policy team has varied, as has the President's interest in making constitutional law an important component of his policy agenda. DOUGLAS W. KMIEC, THE ATTORNEY GENERAL'S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT (1992), describes Kmiec's service in
several deputies, one of whom has primary responsibility for bill comments. All the deputies are political appointees. The staff lawyers are a combination of young attorneys, including those drawn to serve a particular administration—but who sometimes stay with the Office for at least a few years after the administration they joined has departed—and career civil servants who provide long-term institutional memory.

The bill clearance process, which is only one part of the OLC’s role as chief constitutional advisor to the executive branch, involves an attempt to screen all legislative proposals for constitutionality. Typically, as bills arrive, a deputy assigns the bill to a staff lawyer, sometimes on the basis of the lawyer’s expertise, but sometimes simply because the lawyer is available to do the analysis. The assignment may also include some guidance about the administration’s initial reaction to the proposal, and the staff attorney and a deputy may interact as the comment develops.

Assignments based on expertise are not always possible or accurate. There are two relevant kinds of expertise. A lawyer can be an expert in some substantive statutory area, such as pension law or employment law, or the lawyer can be an expert about some general constitutional area, such as religious freedom or economic liberty. Assigning a bill to a staff lawyer based on subject matter may have no relationship to the lawyer’s constitutional expertise. The more common practice of assigning a bill based on constitutional expertise, however, may be equally problematic. A proposal may raise red flags with respect to one constitutional question that, on analysis, turns out to be insubstantial, while containing in its de-

the OLC in an administration that did take constitutional law to be an important element in its policy agenda. Kmiec’s account is from the perspective of one who saw himself playing a large role on the constitutional policy team. For an overview of the more general question of the Attorney General’s role as neutral expositor of law or political adviser, see Moss, supra note 15, at 1308–09.

91 The description, infra, of OLC’s organization and operation is based upon the interviews cited, supra note 89.

92 In this respect the OLC differs from the Office of the Solicitor General, where one deputy is understood to be the “political” deputy, while the others are career attorneys. At least two deputies have served across administrations headed by presidents from different parties: Mary C. Lawton, who served from 1972 to 1979, and Larry L. Simms, who served from 1979 to 1985. More recently, however, all the deputies have been political appointees rather than career government lawyers. One reason for the difference in staffing patterns between the OLC and the Solicitor General’s office is that the Solicitor General centralizes the administration’s litigation in the Supreme Court (and authorizes appeals to courts of appeals), whereas departmental and agency general counsels and the White House Counsel’s Office are alternatives to the OLC for advice to executive departments and agencies. People from those departments might avoid asking the OLC for advice if they are not confident that its management is in tune with the administration’s agenda.


94 A staff lawyer may process between five and ten bills a week while Congress is in session.
tails, an entirely different and more substantial constitutional question with which another staff lawyer may be more familiar.95

In theory, the OLC should clear proposals at every stage, from introduction to modification in committee to amendment on the floor. Often, however, the legislative process moves too quickly for the OLC to offer its views on every new development. In practical terms, bills and occasional committee modifications are all that the OLC can actually consider,96 except for the possibility of screening bills when they reach the President's desk for signature or veto. Turn-around times are typically short, ranging from hours to a few days, with a seven-day deadline being unusually long.97 In the vast majority of cases, the OLC concludes that the bill raises no constitutional concerns, and indicates that it will have no comment on the bill.98 Of the remainder, bills likely to move through the legislative process receive more attention than proposals that are not likely to advance.99

As a matter of form, the OLC considers the constitutionality of a bill before deciding whether to recommend that the President veto the bill if it is adopted by both houses of Congress. After the staff lawyer responsible for a bill comes to a conclusion and drafts a comment, a deputy assistant attorney general examines and approves the comment. That comment is then sent to the Department's Office of Legislative Affairs ("OLA"), which has responsibility for advancing the administration's legislative agenda.100 That Office, in turn, compiles the constitutional comments from the OLC and policy-based comments from other components of the Department of Justice, such as the Civil Rights Division or the Criminal Division, whose activities would be affected by the bill. The OLA writes a letter to the Office of Management and Budget ("OMB"), which, after receiving comments from all affected departments, compiles and trans-

95 Collegial interactions within the Office obviously alleviate this difficulty, but time pressures may limit the extent to which such interactions occur.
96 The OLC can process modifications made in committee if the committee staff members are willing to continue to notify and work with the Department of Justice regarding significant developments. The OLC also occasionally has the opportunity to comment on floor amendments, depending on the pace of the legislative process and the importance the OLC and the Office of Legislative Affairs ("OLA") attach to the floor amendment.
97 If more time is needed, the OLC can request that the OLA provide a more realistic assessment of when the proposal is likely to move forward in Congress, or, in extraordinary cases involving either an administration proposal or a bill submitted by someone with whom the administration has close ties, request that the OLA try to slow the legislative process down to enable the OLC to clear the bill.
98 Of course talented lawyers can always gin up constitutional challenges to any legislative proposal so that the no-comment decision then presumably rests on a judgment that the proposal raises no substantial constitutional questions.
99 For ease of administration, it might make sense for the OLA to identify for the OLC which bills are more likely to move, but no such screening occurs on a regular or formal basis.
mits the administration’s comments to the relevant congressional committees.101 The OMB letter is the only one that is released outside the administration, and the OMB sometimes omits the OLC’s constitutional comments from its letter.102

OLC comments aim to determine the constitutionality of legislative proposals on a blend of assumptions about constitutional interpretation, and the mix varies over time. Some administrations have distinctive agendas regarding the Constitution and its proper interpretation, and bill clearances will be shaped by those agendas. Other administrations accept Supreme Court doctrine as generally controlling.103 Even in the former case, however, the OLC’s professional orientation appears to be shaped in significant part by judicial doctrine. Professor Nina Pillard argues that the OLC’s reliance on judicial doctrine results from strategic calculation as well as professional orientation.104 The OLC can defend its judgments on constitutionality against challenges from policy-oriented members of the administration by pointing to the Supreme Court as the source of the OLC’s interpretation.105

The labels the OLC has developed to give its conclusions suggest its reliance on judicial doctrine. The weakest label for a proposal that raises constitutional questions is that the proposal raises a “litigation risk,” which means, roughly, that a reasonable judge might but probably would not find the proposal unconstitutional if adopted. Stronger labels are that the proposal raises “constitutional concerns” or “serious constitutional concerns.” Here a second element of constitutional interpretation can enter, with the OLC offering a constitutional perspective independent of that developed in Supreme Court opinions. Finally, the OLC may assert that the proposal if enacted, would be unconstitutional, which ordinarily amounts


102 See id. at 339 (“OMB cannot always be relied upon to fully divulge OLC’s legal thinking to Congress.”). Lund expresses great skepticism about the seriousness with which the OLC’s constitutional comments are taken by members of Congress. Lund, supra note 65, at 466-67. The concern of this Essay is with the OLC practice itself and not with its effects on enacted legislation.


[The Department of Justice] believe[s] that the constitutional structure obligates the executive branch to adhere to settled judicial doctrine that limits executive and legislative power. While the Supreme Court’s decisions interpreting the Constitution cannot simply be equated with the Constitution, we are mindful of the special role of the courts in the interpretation of the law of the Constitution.

Id.


105 See id.
to an OLC recommendation that the President veto the proposal if enacted in its present form.^

Each OLC label functions both as a prediction about possible future action, whether in courts or by the President, and as a marker in negotiations over the bill’s language and content. Either through the OLA or, with White House permission, by direct contact with a member of the congressional staff, OLC attorneys may suggest revisions that would achieve the drafter’s primary goals without presenting even a litigation risk. Of course, the more serious the OLC’s constitutional objections, the more leverage it has in these discussions because of the possibility of a veto recommendation.^

Of primary interest here, the OLC’s constitutional analysis occurs within an executive department by subordinate officials in an administration with its own political agenda. That the OLC is part of a specific administration means that the OLC’s constitutional comments might be affected by the administration’s interest in moving its agenda through Congress. That it is part of the executive branch means that the OLC typically defends the President’s prerogatives against what its attorneys see as threats to the presidency as an institution. Observers suggest that the latter effect is more substantial than the former.

Staff attorneys will usually know the administration’s position on major proposals important to the administration. The OLC will interact with the White House in developing the proposals to avoid constitutional difficulties. Sometimes, however, the staff attorneys drafting comments on a particular bill might not be aware that the administration has a position on the proposal. Even more often, the attorneys will rarely know whether a proposal comes from an ally of the administration or is being pushed by someone whose vote the administration needs on other issues. Finally, as a matter of interpretive methodology, courts have often said a great deal about substantive constitutional questions raised by legislative proposals. Judicial decisions as a source for constitutional interpretation thus may

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106 A provision the OLC regards as clearly unconstitutional may be embedded in omnibus legislation, and the OLC may think it inappropriate to recommend a veto of such a bill merely because it contains an unconstitutional provision. The OLC may then develop a statement for the President to issue when he signs the bill, in which the President will note the provision’s unconstitutionality and indicate that the administration will not treat it as binding. See, e.g., Kmiec, supra note 101, at 345–46 (noting that at signing statements, “it has fallen to [the OLC] to set forth in a draft signing statement how the unconstitutional feature will be handled”).

107 Lund argues that the OLC comments serve as veto threats, but that the credibility of the threats does not depend on the quality of the OLC’s arguments, primarily because members of Congress are accustomed to receiving OLC comments containing “very aggressive advocacy of the interests of OLC’s client.” Lund, supra note 65, at 466–67.

108 See Moss, supra note 15, at 1306 (arguing that “the executive branch lawyer should work within the framework and tradition of executive branch legal interpretation and seek ways to further the legal and policy goals of the administration he serves. He should do so, however, within the framework of the best view of the law and, in that sense should take the obligation neutrally to interpret the law as seriously as a court”).
weigh against the incumbent administration's policy positions.\textsuperscript{109} The OLC's bill comments may therefore be reasonably disinterested relative to the specific legislative agenda of the administration in office.\textsuperscript{110}

The OLC has good strategic reasons for being reasonably disinterested. As former Attorney General Randolph Moss observes, "Congress is less likely to take seriously a constitutional objection to proposed legislation if that objection, or the general approach of the Office is seen as policy—as opposed to legally—driven."\textsuperscript{111} An administration that seeks political cover by obtaining a statement from the OLC that some proposal is unconstitutional will hardly be helped if the perception becomes widespread that OLC comments simply use constitutional terminology as a way of advancing the administration's policy agenda. Yet, similar to the congruence between senators' constitutional and policy positions, principled constitutional analysis often leaves ample room for policy considerations.\textsuperscript{112} Where it does, OLC comments will be consistent with both existing doctrine and the administration's policy agenda.\textsuperscript{113}

The flag-burning episode illustrates how the OLC's legal analysis might conflict with an administration's legislative agenda.\textsuperscript{114} The OLC's position was that Supreme Court doctrine clearly indicated that no anti-flag-burning statute would be held constitutional.\textsuperscript{115} Therefore, the Bush Administration supported adopting a constitutional amendment.\textsuperscript{116} The OLC's stance may actually have weakened the Administration's position because it allowed opponents to make the argument that it was unwise to amend the Constitution.\textsuperscript{117}

\textsuperscript{109} Disinterestedness may be reinforced by the OLC's focus on determining constitutionality according to current judicial criteria, because the courts—depending on their composition—need not be assumed sympathetic to a particular Administration's legislative agenda.

\textsuperscript{110} The OLC may, of course, be disinterested when its analysis leads to a conclusion that an administration proposal is constitutional, but one can identify the independent effect of disinterestedness only by examining situations in which the OLC analysis conflicts with the administration's legislative program.

\textsuperscript{111} Moss, supra note 15, at 1311.

\textsuperscript{112} See supra text accompanying notes 86–88.

\textsuperscript{113} Cf. Moss, supra note 15, at 1327 ("The public may elect a President based, in part, on his view of the law, and that view should appropriately influence legal interpretation in that President's administration").

\textsuperscript{114} For another example, see Elizabeth Garrett, Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process, 65 U. Chi. L. Rev. 501, 536 n.134 (1998) (describing a decision by the first Bush Administration to forego changing the tax rate on capital gains by executive order, after receiving legal advice that such an action would be unconstitutional).

\textsuperscript{115} See Lund, supra note 65, at 469–70 (describing the OLC analysis and the Administration position).

\textsuperscript{116} See id.

\textsuperscript{117} One can perhaps locate a political motive for the Administration's position: decision-makers oriented to politics might have thought that Democrats would be more vulnerable the longer the issue persisted on the national agenda and that allowing Democrats to pursue an unconstitutional statutory remedy to be followed by consideration of a constitutional amendment would hurt Democrats. But see id. at 470 ("[T]he Bush administration had no obvious motive for overstating the vulnerability of the proposed bill to constitu-
The line-item veto controversy provides another example of how OLC legal analyses might conflict with an administration's agenda. The Reagan Administration believed that it could gain greater control over fiscal policy if the President had the power to veto specific items in appropriations bills. The Constitution provides that the President shall have the opportunity to sign or veto "[e]very Bill which shall have passed" both houses of Congress. Conservatives argued that the practice of packaging a large number of unrelated appropriations in a single statute transformed that statute from a single constitutional "Bill." They argued, each sub-unit within these larger packages was a "Bill" within the meaning of the Constitution, and therefore could be vetoed individually. However, Charles Cooper, the OLC head, concluded that the Constitution could not be read in this way. Thus, the OLC's legal analysis appeared to conflict with the Administration's policy agenda, supporting the proposition that the OLC can offer legal advice in a reasonably disinterested way.

Administration proposals are likely to be vetted by the OLC for constitutionality before they emerge in the public eye. The OLC's participation in drafting legislation allows it to trim away the most constitutionally problematic features, modifying legislative proposals—thereby altering the administration's initial (politically driven) agenda—in the service of a more disinterested view of the Constitution's requirements.

Yet, here too another complication arises. The OLC interacts with other elements in the Department of Justice, such as the Civil Rights Division; the "White House"; and other parts of the administration. As a proposal is reshaped in response to OLC concerns, those other institutions may contact the OLC and attempt to change the position the OLC has taken, either by directly changing the OLC's views or by downgrading an evaluation from "serious constitutional concern" to "litigation risk." The OLC sometimes resists these concerns, sometimes accommodates

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18 See Kmiec, supra note 101, at 353–59 (describing the issue and criticizing the OLC's position).
19 U.S. CONST. art. I, § 7, cl. 2.
21 Id.
23 As with the flag-burning controversy, one can offer a more political account, in which the Administration might not have been politically unhappy over being unable to exercise a line-item veto. By keeping the issue alive, the Administration was able to place responsibility for fiscal excess on Congress, and by having no line-item veto power, the Administration was not forced to take responsibility for particular appropriations decisions.
24 As Randolph Moss puts it, "On almost a daily basis, the Office of Legal Counsel works with its clients to refine and reconceptualize proposed executive branch initiatives in the face of legal constraints." Moss, supra note 15, at 1329. This "provides a means by which the executive branch lawyer can contribute to the ability of the popularly-elected President and his administration to achieve important policy goals." Id. at 1330.
them, and occasionally is persuaded on the merits that its initial evaluation was incorrect.

When embodied in concrete proposals, an administration’s agenda may raise few constitutional red flags within the OLC. In addition, many legislative proposals do no more than pose a “litigation risk,” in the OLC’s terms, and disinterested advice to that effect is likely to do little to impede the progress of an administration proposal. At the same time, modifying proposals to take into account the OLC’s constitutional concerns almost inevitably reduces the degree to which the proposal, if enacted, will advance the administration’s policy goals.

Students of the Canadian Charter of Rights have criticized the process of what they call Charter-proofing. That process involves action by the executive branch to modify its proposals in response to constitutional concerns expressed by the civil servants who vet legislation for compatibility with the Charter, but the modifications are more extensive than are strictly required by the Charter. Charter-proofing can be a problem when legally oriented civil servants advise policy-oriented cabinet members. Civil servants may be less attentive to the administration’s policy goals and the cabinet member may not realize that the civil servant is over-estimating the risk that the legislation will be held unconstitutional. The OLC’s organization, a combination of civil servants and legally trained political appointees, reduces the chance of distortion of the administration’s policy agenda. Nonetheless, it is likely that some degree of risk aversion remains and may adversely affect the shape of an administration’s legislative proposals.

Further, proposals adversely affecting the prerogatives of the presidency as an institution are different from other legislation. With respect to such

125 It therefore seems worth noting that the specific line-item veto proposal that Charles Cooper, former OLC head, addressed was raised initially outside the Reagan Administration, by its conservative allies. See PORK BARRELS AND PRINCIPLES, supra note 120.

126 Charter-proofing differs from the unexceptionable practice of attempting to draft legislation that is no more than minimally consistent with constitutional requirements. Charter-proofing is a practice of excessive risk-aversion among civil servants and parliamentarians, which takes the form of overestimating the risk that a court will declare a proposal unconstitutional and modifying it to reduce that risk to acceptable levels, again at the cost of the proposal’s policy goals. For a defense of Charter-proofing of this sort, see Kent Roach, The Attorney General and the Charter Revisited, 50 U. TORONTO L.J. 1, 16 (2000). For the same author’s use of the term in the sense of minimal compliance with the Charter, see Kent Roach, The Effects of the Canadian Charter of Rights on Criminal Justice, 33 ISR. L. REV. 607, 610 n.8 (1999). Professor Keith Ewing provides examples in which excessive risk-aversion may have led to the withdrawal of proposals, in one case because the civil servants suggested that legislation converting the British rail system back to public control would require an amount of compensation that the government was unwilling to provide. KEITH EWING, THE CASE FOR SOCIAL RIGHTS 19 (Apr. 12, 2001) (manuscript on file with author). Of course, in the case of withdrawn proposals one can always remain uncertain about the degree to which the government was committed to the proposal in the first place; constitutional objections may have provided a convenient excuse for withdrawing a proposal that was made primarily to satisfy some constituency rather than with an eye to enactment.
proposals, the OLC protects the presidency, not the incumbent President. 127

In fact, protecting the presidency sometimes means opposing the incumbent. 128 The incumbent may have a different view of the Constitution than the view taken by the OLC, 129 or the President may have political reasons for accepting—in exchange for what he regards as more important immediate policy goals—legislation the OLC regards as incursions on the office. 130 In short, the OLC provides advice that is more interested than disinterested when the presidency’s prerogatives are in question. 131

Judicial guidance on questions regarding the institutional presidency is less available than it is with respect to other constitutional questions. When courts have addressed such questions, the OLC has regularly given “cases unfavorable to executive branch prerogatives vis-à-vis Congress a far more limited reading than cases in other areas and, conversely, give[n] favorable cases a very broad reading.” 132

Because judicial interpretations provide less guidance here than in other areas, historic practice plays a more important role in interpretation. 133 The President may wish to give up some aspect of the presidency’s

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127 As always, the degree to which the OLC advances a view in defense of the institutions of the presidency in tension with the views of the incumbent administration will vary somewhat across administrations. In general, however, the career lawyers will defend the institution of the presidency and the deputies will offer resistance to varying degrees. See interviews cited supra note 89.

128 Obviously, opposing here means something like, “forcefully advocating an alternative position within the administration.”

129 A President who had been a senator, for example, might think that the institution of the presidency had fewer prerogatives against congressional investigation than the OLC might believe.

130 Negotiations over proposals can be particularly complex when the President’s prerogatives are at stake. Sometimes OLC’s constitutional analysis functions as a bargaining chip, but it may seem peculiar to all participants for the President to offer to accept something the OLC asserts is unconstitutional.

131 An analysis predicated on institutional interests is compatible with some aspects of fundamental constitutional theory. As Madison wrote in The Federalist, in a system of separation of powers, “[t]he interest of the man must be connected to the constitutional rights of the place.” The Federalist No. 51, at 322 (C. Rossiter ed., 1961). A President whose staff provides disinterested interpretation of the President’s powers will be at a disadvantage when Congress and the courts interpret the Constitution to advance their institutional interests.


133 Supreme Court Justices have sometimes observed that judicial interpretation of the Constitution in questions going to the division of power between the President and Congress depends on practice. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (“The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature.”); Dames & Moore v. Regan, 453 U.S. 654, 678 (1981) (relying, in part, on “a history of congressional acquiescence” to support the constitutionality of the practice of presidential settlement of claims against foreign governments); United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915) (asserting that “long-continued practice, known to and acquiesced in by Congress, would raise a presumption . . . of a recognized administrative power of the Executive . . . .”). Sometimes, however, Justices express doubt about the relevance of long-standing practice to constitutionality. See, e.g., Youngstown, 343 U.S. at 610 (Frankfurter, J., concurring) (“Deeply embedded
prerogatives for reasons of policy or principle. Because constitutional precedent is often set by the executive’s course of conduct in this area, relinquishing a constitutional position to gain some other policy advantage undermines the presidency in two ways. It directly sets a precedent about what counts as a permissible incursion on the presidency, and it demonstrates that the presidency can survive and continue to function after a particular prerogative has been limited. Thus, the OLC’s position as defender of the institution of the presidency may bring it into conflict with the policy objectives of the President it serves.

Professor Douglas Kmiec describes one example in which the conflict between the OLC’s defense of the presidency’s prerogatives clashed with the President’s political agenda. The Civil Service Reform Act of 1978 created a “Special Counsel” to receive and investigate complaints by federal employees who believed that they had suffered retaliation for disclosing government mismanagement. Under the Act, the presidentially appointed Special Counsel could only be removed by the President for “inefficiency, neglect of duty, or malfeasance in office.” In 1986, Congress began to consider revising the Act and expanding the Special Counsel’s authority by giving the Office of Special Counsel the power to sue executive branch agencies. The OLC objected to both the limitations on the President’s power to remove the Special Counsel and to the new litigating authority. The OLC regarded the Office of Special Counsel as a subordinate component of the executive branch subject to presidential direction and the presidency, not the courts, as the location for resolving disputes within the executive branch. For what Kmiec regards as politi-

traditional ways of conducting government cannot supplant the Constitution or legislation...”); Powell v. McCormack, 395 U.S. 486, 546–47 (1969) (“That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date.”). See also Walz v. Tax Comm’r of City of N.Y., 397 U.S. 664, 678 (1970) (“It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice... openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside.”).

134 See Kmiec, supra note 101, at 339 (“From OMB’s perspective, a constitutional question might need to be sacrificed or horse-traded for an administration policy goal. This, of course, is constitutional blasphemy to OLC, and it has, on occasion,... placed the President in the awkward position of later being presented with enacted legislation he could not, at least as a constitutional matter, accept.”).

135 See Kmiec, supra note 101, at 340–44. Kmiec’s account seems colored by his disdain for political considerations that, in other contexts at least, seem entirely defensible. Kmiec, supra note 90, at 60–63, provides a somewhat more restrained account.


137 Id.

138 See Kmiec, supra note 101, at 340–44.

139 Id.

140 For an argument supporting the proposal’s constitutionality and suggesting that the constitutional objections described here rest on aggressive readings of the relevant precedents, see Morton Rosenberg, Congress’s Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration’s Theory of the Unitary Executive, 57 Geo. Wash. L. Rev. 627 (1989).
cal reasons, the OMB “muffled” the OLC’s objections, and Congress adopted the new Whistleblower Protection Act of 1988, leaving the OLC “appalled.”¹⁴¹ In the end, the OLC’s views prevailed when President Reagan pocket-vetoed the legislation.¹⁴² Notably, the veto occurred during a presidential campaign, but President Reagan was not running for reelection and therefore did not bear any direct political costs arising from his failure to indicate earlier his—or the OLC’s—opposition to the legislation.

Despite anecdotal illustrations of the OLC’s effects, precise and systematic information about the OLC’s bill clearance practice is thin. Nevertheless, several conclusions seem justified. First, the OLC probably presents constitutional analyses as disinterested as those of the courts when it assesses proposals that OLC staff attorneys and deputies do not believe to be part of an incumbent administration’s legislative program. That class may be larger than one might initially think because those accustomed to thinking about legislative politics may assimilate proposals by administration allies with administration proposals, while OLC attorneys and even deputies will not. The fact that OLC staff attorneys are civil service bureaucrats weighs against the fact that they also serve particular administrations. Additionally, the disinterestedness of OLC analysis arises in part because the attorneys assess constitutionality with existing court decisions in mind.¹⁴³

Second, OLC analyses of core administration proposals will certainly be slanted to favor the administration’s position. The OLC will help shape the proposals to avoid severe litigation risks. It is important to note, however, the aim is to ensure that the legislation, if enacted, would survive constitutional attack, not to ensure that the legislation actually is constitutional according to a disinterested approach to constitutional interpretation.¹⁴⁴ Further, interactions between the OLC and other parts of the administration may affect the OLC’s constitutional evaluations. Courts do not engage in such interactions.

Third, OLC analyses of proposals that its attorneys believe will undermine presidential prerogatives aggressively support the presidency, again because of the OLC’s self-identified bureaucratic mission to defend the presidency’s prerogatives. As indicated earlier, the relevant constitutional law in this area is largely made by practice and much less so by judicial decision. This has two implications. There rarely exist independent criteria by which to assess whether the OLC’s position is “correct” in

¹⁴¹ Kmiec, supra note 101, at 342.
¹⁴² See id. at 343.
¹⁴³ As indicated above, the contribution of this factor to OLC disinterestedness may vary from one administration to another, depending on whether the administration has an agenda regarding the Constitution and its interpretation.
¹⁴⁴ That the most common evaluation expressing constitutional concern is phrased in terms of litigation risk may generate a cast of mind that operates to offset the pro-administration bias somewhat.
some ultimate sense. Nevertheless, the near-absence of judicial intervention renders difficult, if not impossible, a direct comparison of the OLC’s performance as an interpreter of the Constitution with that of the courts. All that may be said is that in this particular area the OLC has incentives that push it away from disinterestedness. 145

III. MINISTERIAL STATEMENTS OF COMPATIBILITY UNDER THE HUMAN RIGHTS ACT 1998

The British Human Rights Act 1998 makes many provisions of the European Convention on Human Rights enforceable in the British courts. 146 The creation of a form of judicial review in Great Britain has attracted the largest share of attention to the Act because of the tension between judicial review and traditions of parliamentary supremacy. The Act contains an interesting provision not directly connected to judicial review, which is the focus of this Essay’s attention here. Section 19 of the Act requires that a minister in charge of a legislative proposal “make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights (‘a statement of compatibility’); or . . . make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.” 147 The latter type of statement will be called an “inability statement.”

The point of these provisions is clear. Just as judges are supposed to interpret statutes to make them consistent with the Convention, ministers are supposed to submit bills to Parliament that are in their view, consistent with the Convention. The problem, as one supporter of the Human Rights Act puts it, is that “governments are rarely, if ever, prepared to own up to violating fundamental rights.” 148 How are the statements of compatibility supposed to make governments more likely to do that? 149

145 It seems worth noting that a more politically oriented OLC might be more disinterested because, on occasion, the incumbent administration’s political interests could offset to some extent the OLC’s bureaucratic commitment to protecting the office of the presidency. For example, imagine a situation in which a disinterested analyst would conclude that the President did not have a privilege to resist disclosure. A politically oriented decision-maker might conclude that political circumstances should lead the President to waive the privilege, when the OLC might seek to strengthen the privilege by resisting disclosure.


147 Id. These “statements of compatibility” or the inability to make such a statement “must be in writing and be published in such manner as the Minister making it considers appropriate.” Id. § 19 (2).


149 The Bill of Rights Act in New Zealand requires the Attorney General to report whenever a bill is proposed that appears to be inconsistent with the Bill of Rights. See Bill of Rights Act § 7 (1990) (New Zealand). It is thought that committing the task to the Attorney General will obtain a more politically disinterested view than that provided by a department’s minister because New Zealand’s Attorney General is conventionally inde-
The answer combines political and bureaucratic elements. The ministerial statement of compatibility itself can be brief, but members of Parliament might use the statement as a predicate for questions about the reasons the minister has for believing the legislative proposal to be compatible with the European Convention.  Further, a minister who introduces a proposal accompanied by an inability statement might be embarrassed at having to face charges of violating fundamental rights (where the proposal is thought to be incompatible with Convention rights) or of incompetence for being unable to do part of the job, that is, to determine compatibility.

Ministers will rely on their departments' civil servants, or on some general “Human Rights Act Compliance Unit,” to provide the detailed justifications that they can expect other members of Parliament to demand.  The civil servants charged with determining whether a minister can make a statement of compatibility will be committed to ensuring adherence to the European Convention because that is their job. As Francesca Klug indicates, the requirement “has the potential to get the slumbering beast of Whitehall moving in terms of humans rights scrutiny of policies and legislation in the way nothing else ever has.” She notes that civil servants have asserted that they already paid attention to the European Convention but she suggests that this is only out of concern for “risk management,” that is, simply to avoid having legislation found inconsistent with the independent of the government in power. For a discussion that touches on this aspect of the independence of Attorneys General in Canada, which has a similar convention, see Kent Roach, The Attorney General and the Charter Revisited, 50 U. TORONTO L. J. 1, 31–38 (2000).

See generally KLUG, supra note 148, at 171 (“Although this has got off to a slow start, it is hard to believe that even the more robotic tendency among backbenchers will not use this opportunity in time.”). The Parliament now has a Joint Committee on Human Rights, which has taken as part of its mission the examination of statements of compatibility, pursuant to its general authority to “consider . . . matters relating to human rights in the United Kingdom . . . [.]” Joint Committee on Human Rights, Home Page, at http://www.parliament.uk/commons/selcom/hrhome.htm (last visited Apr. 14, 2003) (describing the Committee’s mandate). The Joint Committee has eleven members, six of whom at present are members of the governing Labour Party. See id. Two members are Conservatives, two are Liberal Democrats, and one is a cross-bencher (that is, an independent). This composition may partially offset executive domination of the legislative process, and may help expose the reasons a minister has for making a statement of compatibility. For additional discussion of the Joint Committee’s role, see infra note 204.

The Lord Chancellor’s office has a Human Rights Unit, one of whose functions is “[i]mplementing the Human Rights Act 1998 and building a culture of rights and responsibilities . . . .” Human Rights Unit, at http://www.lcd.gov.uk/hract/unit.htm (last visited Mar. 20, 2003). For a discussion of the evolution of the Canadian Department of Justice as a centralized bureaucratic mechanism for oversight of compliance by all departments with Canada’s Charter of Rights, see generally James B. Kelly, Bureaucratic Activism and the Charter of Rights and Freedoms: The Department of Justice and Its Entry into the Centre of Government, 42 CANADIAN PUB. ADMIN. 476 (1999).

According to Grant Huscroft, in New Zealand, the Attorney General “accepts the advice tendered [by civil servants], word for word.” E-mail from Grant Huscroft, Professor, Univ. of Western Ontario, Office Held (Nov. 13, 2001) (on file with author).

KLUG, supra note 148, at 170 (referring to the British governmental bureaucracy as “Whitehall”).
European Convention by the European Court on Human Rights. The idea is that civil servants’ charge had been to ensure that ministers avoid the embarrassment of having legislation criticized by the European Court but that now the charge to civil servants is a positive one—to ensure that ministers can make accurate statements of compatibility.

Klug suggests that the requirement of statements of compatibility “has a farcical element,” because ministerial statements will become as routine “as a cry of ‘order, order,’ from the Speaker, making its value appear somewhat dubious.” The problem goes deeper than that, however. Accurate and sincere statements of compatibility and inability statements may both be so easy to issue that they may not place much constraint on a government’s ability to advance whatever legislative agenda it has. The reason that inability statements may be easy to make is that a statement that a minister is unable to make a statement of a proposal’s compatibility with the Convention is not a statement that the proposal is incompatible with the Convention. Actual incompatibility is, of course, one reason a minister might have to make an inability statement, but it is not the only reason. As Geoffrey Marshall points out, a minister can make an inability statement for a variety of other reasons—for example, because, in the minister’s view, there is insufficient time to determine whether it is possible to make a statement of compatibility, but there is a pressing need for the legislation. A minister might say, in effect, that the question of the proposal’s compatibility with the Convention is a quite difficult one, which the minister has been unable to resolve in the time available. Alternatively, the minister might refrain from making a statement of compatibility on the ground that the complex issues are better explored in debate in the House of Commons. Marshall suggests the possibility of ministers taking a position similar to that taken by some senators. The minister

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154 See id. at 170–71.
155 As the earlier discussion of Charter-proofing suggests, supra note 126, it is not clear that Klug’s description of the pre-Human Rights Act practice carries with it some critical sting, as she appears to think. It is likely that civil servants should advise ministers to develop policies that minimally comply with the Convention.
156 KLUG, supra note 148, at 170. A sampling of the Parliamentary Questions identified at the Human Rights Unit Web site, supra note 150, finds them almost uniformly boilerplate.
157 An additional difficulty, which the Section 19 procedure shares with judicial review, is that the very making of a statement of compatibility may lull potential opponents into believing that there is no basis in human rights law for challenging the legislation. For a comment to this effect, see HELEN FENWICK, CIVIL RIGHTS: NEW LABOUR, FREEDOM AND THE HUMAN RIGHTS ACT 345 (2000) (suggesting that the Regulation of Investigatory Powers Act 2000 “might not have been put before a Commons dominated by Labour MPs had [it] not been shrouded in human rights rhetoric and accompanied by a statement of [its] compatibility with the European Convention on Human Rights”).
160 Marshall, supra note 158, at 110.
might defend an inability statement by referring to the possibility of judicial consideration of compatibility after the proposal is adopted.\textsuperscript{161}

Inability statements may not have the political effect hoped for because they need not be public statements of the government's willingness to violate Convention rights. Further, with the stick of political discipline taken away, civil servants may have less power, and therefore less bureaucratic reason, to insist that only legislation that they can draft statements of compatibility for move forward.

Statements of compatibility may be easy to make as well. First, similar to bill clearance at the OLC, the largest portion of proposed legislation will raise no substantial questions under the Convention. Second, and more important, the Home Office has announced the sensible policy that the mere existence of arguments supporting the conclusion that a proposal is compatible with Convention rights is insufficient to justify issuing a statement of compatibility.\textsuperscript{162} Such a statement will be issued when "the balance of argument supports the view that the provisions are compatible" with Convention rights.\textsuperscript{163} The Convention simultaneously defines rights at a relatively high level of abstraction and incorporates in the definition of particular rights qualifications suggesting that rights are not violated when a government pursues valuable social objectives.\textsuperscript{164} Under such provisions it will not be difficult for a minister to conclude that the "balance of arguments" supports a statement of compatibility.\textsuperscript{165}

Third, and probably most important, the Human Rights Act directs that Convention rights are to be interpreted by referring to decisions by the European Court on Human Rights.\textsuperscript{166} That Court, in turn, has developed a doctrine of deference that gives nations a "margin of apprecia-

\textsuperscript{161} Id.
\textsuperscript{162} Hansard 83540 (statement of Home Minister Jack Straw, May 5, 1999), available at http://www.parliament.the-stationery-office.co.uk/pa/cm199899/cmhansrd/vo990505/text/90505w02.htm#90505w02.htm_sbd0.
\textsuperscript{163} Id.
\textsuperscript{164} For example, the guarantee of freedom of expression in Article Ten of the Convention for the Protection of Human Rights and Fundamental Freedom notes:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

\textsuperscript{165} See GROSZ ET AL., supra note 159, at 30 n.13 (noting that a statement of compatibility has been made even after a lower court found a particular provision incompatible with the Convention, when the government had appealed the lower court decision and had been "advised that the appeal is more likely than not to succeed").
tion" in their actions alleged to violate the Convention. The "margin of appreciation" doctrine gives civil servants even more space within which to find proposals compatible with Convention rights. The doctrine has two components. The first is ordinary deference to administrative or executive judgment. British human rights lawyers assert that British courts should not invoke this component of the "margin of appreciation" doctrine in applying the Human Rights Act. Whether or not courts should invoke this component, civil servants attempting to determine compatibility should not. It is simply incoherent for a civil servant to invoke a doctrine of deference to administrative discretion because the question for the civil servant is precisely whether to exercise discretion in a way that violates the Convention as the civil servant sees things.

The "margin of appreciation" doctrine's second component, however, can play a large role in the civil servant's deliberations. The European Court developed the doctrine because it recognized that it was an international court with authority to review legislation adopted by numerous states with distinctive cultures facing varying problems. The court felt these elements should be taken into account in determining whether a particular statute violates Convention rights. The civil servant determining whether a proposal is compatible with Convention rights can sensibly ask, "[d]oes this proposal lie within that portion of the margin of appreciation arising from distinctive national problems and characteristics?" Ministers and their governments always have good reasons, from

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168 See Michael Fordham & Thomas de la Mare, Identifying the Principles of Proportionality, in UNDERSTANDING HUMAN RIGHTS PRINCIPLES 27, 54 (Jeffrey Jowell & Jonathan Cooper eds., 2001) (describing the margin as "two-dimensional").

169 Id.

170 See, e.g., Rabinder Singh, Murray Hunt & Marie Demetriou, Current Topic: Is There a Role for the "Margin of Appreciation" in National Law After the Human Rights Act?, 4 EUR. HUM. RTS. L. REV. 16 (1999); Fordham & de la Mare, supra note 168, at 82 ("What the domestic judges should not do is to 'read-across' the 'margin of appreciation' as applied by the Strasbourg Court in individual cases."); KEIR STARMER, EUROPEAN HUMAN RIGHTS LAW: THE HUMAN RIGHTS ACT 1998 AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 190–91 (1999).

171 For a discussion of a parallel problem in United States constitutional law, see TUSCNET, supra note 4, at 1, 16, 104–08 (describing the position taken by the Clinton Administration regarding the proper standard for judicial review of a statute that required military officials to pursue a policy with which they disagreed).

172 See Handyside, supra note 167, at ¶ 753–54 ("By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the . . . 'necessity' of a 'restriction' . . . .").

173 Domestic courts cannot invoke the second component of the "margin of appreciation" doctrine in reviewing civil servants' and ministers' assessment of the nation's distinctive characteristics and problems because the courts are part of the overall domestic system for determining what the nation's distinctive characteristics and problems are. See STARMER, supra note 170, at 190. The possibility of a judicial declaration of invalidity might temper the civil servants' use of the "margin of appreciation" doctrine. This sort of
their own points of view, for proposing new legislation. A good lawyer will find it relatively easy to find in those reasons some distinctive national characteristics or problems that place the proposal within the margin of appreciation.\(^{174}\)

Examining several instances in which ministers made statements of compatibility reveals additional problems. The Human Rights Act 1998 had an effective date of October 2, 2000, but the British government announced that it would issue statements of compatibility even before that date.\(^{175}\) Two skeptics about the utility of statements of compatibility point to the rapid enactment of the Criminal Justice (Terrorism and Conspiracy) Act in 1998\(^{176}\) to show how politicians can “brush[ ] aside concerns about . . . patent breaches” of Convention rights.\(^{177}\) The Act was the government’s response to a terrorist bombing in Omagh, Northern Ireland, in August 1998.\(^{178}\) The provisions the critics questioned modified rules of evidence in terrorism cases.\(^{179}\) Senior police officers can be treated as expert witnesses who can give their opinion that a defendant is a member of a terrorist organization without providing direct evidence of membership, although such an opinion cannot be the sole basis for a conviction.\(^{180}\) In addition, a defendant’s guilt may be inferred from his or her failure to mention a material fact after being given the opportunity to consult a lawyer.\(^{181}\)

The European Court of Human Rights has held that legislation affecting an accused person’s right to remain silent may violate the Convention’s provisions guaranteeing a presumption of innocence and a fair trial.\(^{182}\) The Court assesses the impact of inferences from silence on the particular trial: “The Court must . . . concentrate its attention on the role

risk assessment would work in favor of stricter interpretation of Convention rights, in contrast to the kind of risk assessment Klug thinks inadequate. See supra text accompanying notes 154–157.

\(^{174}\) It is worth noting that this can be true even with respect to proposals to adopt legislation essentially identical to legislation of another nation held by the European Court to violate Convention rights. The European Court of Human Rights has held, however, that the margin of appreciation may be narrow indeed when “there is a general consensus in Europe about how particular issues are to be dealt with.” STARMER, supra note 170, at 189. In a narrow class of cases, this provides a real limit to a minister’s ability to make a statement of compatibility.


\(^{177}\) Id.

\(^{178}\) See id.


\(^{180}\) See id. at 884.


played by the inferences in the proceedings against the applicant and especially in his conviction." Under this sort of balancing test, applying the provisions of the Criminal Justice (Terrorism and Conspiracy) Act "may, at least under certain circumstances, contravene rights" under the Convention.

This does not mean that the legislation contemplates "patent breaches" of the Convention and that a statement of compatibility necessarily must "brush aside" such concerns. Drawing on concepts familiar in United States constitutional law, it can be said that the proposal, as applied, might be unconstitutional. The statement of compatibility, however, refers to the proposal's facial validity. Justices of the Supreme Court have engaged in heated discussions on the standard for determining when to strike down a statute as facially unconstitutional. United States v. Salerno appears to hold that, outside the context of free expression, a statute is unconstitutional on its face only if there are no circumstances under which it could be applied in a constitutionally acceptable manner. In contrast, other cases indicate that a statute might be unconstitutional on its face if it would be unconstitutional in a substantial number of applications, or in most of its applications. As the United States Supreme Court has said, facial invalidation is "strong medicine." It precludes the people from securing the benefits of the constitutionally permissible applications of a statute that is unconstitutional in only some applications.

Distinguishing between facial validity and "as applied" unconstitutionality clarifies why a minister might find it easy to make a statement of compatibility. It seems unreasonable to deny ministers the opportunity to make such statements merely because one can identify some circumstances under which applying the proposal would violate Convention rights. It follows that it then becomes easier to issue a statement of compatibility in the face of well-founded arguments that the proposal might be applied in a way that violates Convention rights. The minister can reasonably assert that the balance of arguments favor facial validity even though critics are unquestionably right in spinning out scenarios where the proposal would violate Convention rights.

183 id. at 61.
184 Walker, supra note 179, at 888.
185 United States v. Salerno, 481 U.S. 739, 745 (1987) ("[T]he challenger must establish that no set of circumstances exists under which the Act would be valid.").
186 See, e.g., Broadrick v. Oklahoma, 413 U.S. 601, 615–18 (1973) (discussing First Amendment overbreadth doctrine and concluding that challenged statute is not substantially overbroad and therefore is not unconstitutional on its face).
188 Broadrick, 413 U.S. at 613.
189 The Supreme Court of Canada examines whether a mandatory prison sentence violates the ban on cruel and unusual punishment in the Canadian Charter of Rights and Freedoms by asking whether the sentence would be "grossly disproportionate" not simply in...
The statement of compatibility issued in connection with another statute illustrates the way in which interaction between facial validity and the statement of compatibility might work to reduce the constraint imposed by requiring such a statement. The 1999 Immigration and Asylum Act gives ministers broad authority to transmit or receive personal information about asylum seekers and other immigrants to or from other nations.\textsuperscript{190} Article 8 of the European Convention creates a "right to respect for . . . private . . . life,"\textsuperscript{191} which has been interpreted to cover informational privacy.\textsuperscript{192} The authority given ministers might be exercised in a way that violates Article 8. The minister in charge of the legislation made a statement of compatibility, asserting that "those using the Act would not use or disclose information in a way which was incompatible with . . . Article 8 of the Convention."\textsuperscript{193} The minister avoided possible facial invalidity by making a commitment to principles of implementation. It would seem easy enough for a minister to assert, with respect to any proposed statute, that it would not be implemented in a manner that violated Convention rights.\textsuperscript{194} In United States constitutional law, a court’s narrowing interpretation may save a statute from judicial invalidation on overbreadth grounds.\textsuperscript{195} Nevertheless, some narrowing constructions may be unconstitutional for other reasons. Consider, for example, a construction to the effect that the statute does not criminalize any activity protected by the First Amendment. Such a statute would not be overbroad; indeed, it would create a defense perfectly congruent with the rights defendants have under the First Amendment. The statute as construed would, however, be unconstitutionally vague.\textsuperscript{196}


\textsuperscript{191}European Convention on Human Rights, supra note 164, art. 8.


\textsuperscript{193}Mountfield, supra note 190, at 23.

\textsuperscript{194}In some circumstances the minister could later issue binding guidance on enforcement, but it is doubtful that any assertions made in support of a statement of compatibility would themselves be binding.

\textsuperscript{195}See, e.g., Osborne v. Ohio, 495 U.S. 103 (1990) (holding, in part, that an Ohio anti-pornography statute, even if facially overbroad, survives a constitutional overbreadth challenge because the Ohio Supreme Court has construed it sufficiently narrowly).

\textsuperscript{196}Not surprisingly, it is difficult to come up with a citation supporting this precise proposition. The best, perhaps, is Bouie v. City of Columbia, 378 U.S. 347 (1964) (finding a South Carolina criminal trespass statute, which was facially narrow, to be overly vague as interpreted by the South Carolina Supreme Court and thus in violation of the Due Process Clause).
A ministerial practice allowing a statement of compatibility to be made despite a serious possibility that the statute would authorize many violations of Convention rights, when the statement is supplemented by representations about enforcement, cannot be a serious constraint on ministers. Civil servants will be asked to draft statements of compatibility and the enforcement representations rather than drafting statutes that avoid the underlying questions about rights violations. Just as the statutes would be written with an eye to substantive Convention rights, so the enforcement representations would be written with an eye to avoiding the equivalent of a vagueness challenge—in this context, a challenge that the statute and representations do not satisfy the Convention requirement that limitations on Convention rights be prescribed by law. 197

The process by which the 2001 Anti-Terrorist, Crime and Security Act was adopted illustrates yet another method by which statements of compatibility can be made without serious impact on the government's agenda. The European Convention on Human Rights allows governments to derogate from its requirements—that is, to eliminate their legal obligation to comply with the Convention—"[i]n time of war or other public emergency threatening the life of the nation . . . to the extent strictly required by the exigencies of the situation . . . " 198 The Human Rights Act allows ministers to announce a derogation in anticipation of introducing legislation inconsistent with Convention rights (and therefore otherwise incompatible with the Human Rights Act's requirements). 199

After the terrorist attacks in the United States on September 11, 2001, the Prime Minister Tony Blair's administration wanted to introduce legislation against terrorism. One of the proposed provisions would have authorized indefinite detention of some alleged foreign terrorists who, the government believed, could not be tried expeditiously, deported to a nation where they would be safe while restrained from continuing terrorist activities, or released in the United Kingdom. 200 Such indefinite detentions, the government agreed, would violate the Convention because detention in contemplation of deportation is permissible only where deportation would occur within a reasonably limited time. 201 On November 11, David Blunkett, the Home Secretary, issued an order derogating from the applicable provision of the European Convention. 202 The next day the government introduced its anti-terrorism legislation. Blunkett made a statement of compatibility, taking the position that, the government having derogated

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197 See Mountfield, supra note 190, at 23–24.
198 European Convention on Human Rights, supra note 164, art. 15.
200 See Mountfield, supra note 190, at 23–24.
from the Convention provision with which the bill’s provisions would be inconsistent, the legislation was now compatible with the Convention.\textsuperscript{203}

As the anti-terrorism bill quickly moved through Parliament, questions arose about other provisions in the bill. Some critics argued that the derogation itself should be subject to judicial review. The House of Lords adopted an amendment specifying that it would be, but the House of Commons removed the amendment, and the Act was adopted without a specific provision dealing with the reviewability of the derogation order.\textsuperscript{204} Still, the order might be reviewable under ordinary principles of administrative law because it was a minister’s act and not parliamentary legislation.\textsuperscript{205}

Suppose a court found the order unauthorized on the ground that terrorism had not yet been shown to pose a threat to the life of the United Kingdom, despite its proven threat to the United States. Presumably, the provision for indefinite detention would then be incompatible with the Convention, and a court would make a statement to that effect. How might the government respond? The government could then respond by modifying the statute.\textsuperscript{206} It might, on the other hand, take the position that

\textsuperscript{203} See Mountfield, supra note 190, at 23–24. It is worth noting that, given the public attention to the process, it seems unlikely that anything would have been different had the minister issued no derogation order and then made an inability statement.

\textsuperscript{204} Other aspects of the legislative process are worth noting. The Joint Parliamentary Committee heard evidence from the Home Secretary two days after the legislation was introduced and issued a report two days after the hearing, Joint Comm. on Human Rights, Second Report (2001), available at http://www.publications.parliament.uk/pa/jt200102/jtselect/jtrights/037/03702.htm. This report emphasized the Committee’s view that the government had not shown that an emergency existed threatening the life of the nation and that several provisions in the proposed legislation were incompatible with Convention rights. Using its standard locution, the Committee drew these “matter[s] to the attention of each House”: Id. para. 37. The government made some modifications in the bill, which was then the subject of another report by the Joint Committee a few weeks later, Joint Comm. on Human Rights, Fifth Report (2001), available at http://www.publications.parliament.uk/pa/jt200102/jtselect/jtrights/51/5102.htm. Again the government made a few modifications in the bill, which was then approved by the House of Commons. It faced more problems in the House of Lords, which rejected ten provisions in the bill, an extraordinary action. The bill was sent back to the House of Commons, which insisted on retaining the provisions. The legislation went back to the House of Lords, which acceded to the House of Commons on all but one of the provisions, a section extending hate-crime laws to cover religion. Its continued insistence on deleting that provision might have provoked a constitutional crisis by making it impossible for the government to get the legislation adopted promptly, but the government receded, withdrawing the provision and proposing to submit it separately. For the statement by the Home Secretary doing so, see http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmhansrd/vm01/1213/debtext/11213-36.htm. See generally Andrew Evans, Terror Bill Clears Lords, Press Ass’n, Dec. 11, 2001; Amanda Brown, Joe Churcher & Andrew Evans, New Setback as Peers Reject Religious Hatred Offence, Press Ass’n, Dec. 13, 2001; Ian Craig, Lords Pass Anti-Terror Law, Manchester Evening News, Dec. 14, 2001, at 4; Michael Zander, The Anti-terrorism Bill—What Happened?, 151 New L.J. 1880 (2001).

\textsuperscript{205} The Parliamentary Joint Committee asserts that “no court in this country will be able to decide whether the derogation is justified against the criteria of Article 15” of the Convention. Joint Comm. on Human Rights, Second Report, supra note 204, para. 30. For recent developments, see Mark Elliott, United Kingdom, 2 Int’l J. Con. L. 334 (2003).

\textsuperscript{206} The Human Rights Act authorizes the government to modify primary legislation on
the court erroneously exercised judicial review, or mistakenly found no threat to the life of the nation. This disagreement would not produce anything like action inconsistent with the court’s determination of the deroga-
tion’s invalidity because the Human Rights Act requires nothing in the face of a declaration of incompatibility. The government could leave the indefinite detention provisions in effect and face whatever public disap-
proval doing so might generate.

Having argued that ministers and civil servants will have little difficulty in making and drafting inability statements and statements of compatiblity, it is wrong to conclude that the Human Rights Act strategy for securing non-judicial enforcement of fundamental rights must fail. The reason is simple. The statements of compatibility are just that: statements that the proposal is in fact compatible with Convention rights. The arguments about how easy it may be to make such statements are not arguments that the statements are inaccurate. Ministers will, in fact, be complying with fundamental rights when they conclude that the balance of arguments support a statement of compatibility. The problem is not that ministers and civil servants will disingenuously evade their obligation to determine whether a proposal violates Convention rights. The problem, if there is one, is that the European Convention defines fundamental rights in a way that may be insufficient.

IV. Conclusion

This Essay helps illuminate several controversies. Professors Larry Alexander and Frederick Schauer have suggested that non-judicial constitutional review introduces a degree of uncertainty inconsistent with the idea of law, at least where non-judicial constitutional review supplements rather than displaces judicial review. According to Alexander and Schauer, it is the distinctive characteristic of law that decisions issuing from authori-
tative bodies settle conflicts, in the sense that they replace disagreement over what the right outcome is with a decision that, while perhaps wrong from some point of view, nonetheless introduces stability into a situation of conflict.

In the face of criticism they conceded that their case was, despite their earlier claims, empirical rather than conceptual. For Alexander and Schauer, the analysis turns on whether supplementing judicial constitu-

its own through a fast-track legislative procedure, or in the course of introducing legisla-
(showing the Minister’s power to alter primary legislation); id. at § 2(a) (fast-track proce-
dure).

See generally Alexander & Schauer, supra note 3.

Id.

Larry Alexander & Frederick Schauer, Defending Judicial Supremacy: A Reply, 17 CONST. COMM. 455, 464 (2000) ("[T]he empirical dimension is one that cannot be avoided.").
tional review with non-judicial constitutional review contributes in the long run to the stability of the rule of law. That, in turn, depends on the degree to which courts and non-judicial institutions adhere to relatively stable constitutional interpretations. They ask for a "careful examination" of the range of judicial variation "compared to the range of variation for the other branches." This Essay is hardly comprehensive, but it contributes something to that examination.

First, it shows that non-judicial constitutional review is simply a fact of life, a characteristic of reasonably stable constitutional systems. In the face of this fact, the only way to sustain Alexander and Schauer's arguments is to show that existing practices actually introduce more instability than they eliminate.

Second, examining non-judicial constitutional review shows that non-judicial institutions have incentives that provide some "insulation from political winds." Because courts are not fully insulated from those winds, and have other institutional characteristics that reduce the value of the settlements they impose, this Essay suggests that the empirical case against non-judicial constitutional review remains to be established.

As Alexander and Schauer point out, the real questions are comparative: how well do non-judicial and judicial institutions of constitutional review stack up against each other? Professors Elizabeth Garrett and Adrian Vermeule have implicitly endorsed such a comparative inquiry in their suggestions for enhancing Congress's capacity to evaluate the constitutionality of legislative proposals. Garrett and Vermeule describe a framework with several components: "constitutional impact statements," a professional staff office charged with constitutional review, and enhanced

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210 Id.
211 Id. at 476–77.
212 Id. at 476.
213 In their initial presentation, which argued that their inquiry was conceptual and not empirical, Alexander and Schauer argued briefly against the consideration by non-judicial institutions of constitutional questions prior to enactment of law. Alexander & Schauer, supra note 3, at 1384–85 ("[I]f the argument from authoritative settlement counsels the avoidance of constitutional dissonance, does this mean that a legislator does something improper in going beyond existing judicial decisions in the name of the Constitution? . . . Part of our answer to this question is, simply, yes."). Their later article does not address this question. Alexander & Schauer, supra note 209.
214 Alexander & Schauer, supra note 209, at 476.
215 In particular, courts, particularly supreme courts, must construct doctrine that is easily administrable by lower courts and other addressees of the courts' doctrines. Concerns about ease of administration may produce doctrine that is different from what would be done if one were concerned solely with the directly relevant constitutional interests. For a general discussion, see Richard H. Fallon, Jr., Implementing the Constitution (2001).
216 For related criticisms of Alexander and Schauer, see Keith E. Whittington, Extrajudicial Constitutional Interpretation: Three Objections and Responses, 80 N.C. L. Rev. 773, 788–808 (2002).
217 Alexander & Schauer, supra note 209, at 476.
points of order protected from rules thwarting their use. These proposals would support a "Thayerian Congress," that is, a Congress whose processes would support judicial deference to policy decisions that implicate constitutional values. Implicit in the argument for a Thayerian Congress is a comparison with what we might call a Thayerian Court, that is, one whose decisions deserve deference because of the Court's special characteristics. This Essay has highlighted the actual performance of non-judicial institutions in conducting constitutional review to bring out the dimensions along which those non-judicial institutions differ from actual courts, emphasizing in particular the incentives affecting non-judicial performance.

The activities examined suggest that non-judicial constitutional review may have different characteristics from judicial constitutional review. The Senate's constitutional point of order highlights that, unlike non-judicial institutions, courts have a general obligation to address questions litigants present to them, subject only to the relatively minor restrictions imposed by justiciability requirements. The OLC's bill-clearance practice shows that courts are likely to be marginally more disinterested in assessing the constitutional implications of the sitting administration's legislative program, and that courts may be substantially more disinterested in assessing the constitutionality of legislation affecting the President's prerogatives. The likely shape of statements of compatibility suggests that courts will do a better job in assessing constitutionality as applied in particular cases, unless (as is often the case) the most reasonable approach to constitutionality calls for balancing the competing interests implicated in the range of cases to which the statute applies.

218 Garrett & Vermeule, supra note 64, at 1277.
219 See id.
220 Garrett and Vermeule are sensitive to the important incentive issues implicated by non-judicial constitutional rules. Id. Indeed, they are more sensitive to incentive issues than are scholars of the judicial process, who have almost no real insight beyond the banal into the incentives affecting judges. See, e.g., Posner, supra note 9; Schauer, supra note 9.
221 As noted earlier, scaling up the Senate's limited practice might reduce its quality. See supra text accompanying notes 88-89.
222 Garrett and Vermeule's proposal for developing a parallel bill-clearance process in Congress, by means of "constitutional impact statements" developed by an office staffed by civil servants, might run into difficulty precisely because there is no equivalent to the administration in a Congress divided along party lines. This is particularly true if the partisan division is ideological and no party clearly dominates the legislative process. To adapt the formulation used by the Home Office in describing statements of compatibility, having a staff determine that the balance of reasons supports unconstitutionality would be particularly difficult.
223 Justiciability requirements often reduce courts' opportunities to address the constitutionality of such laws, however.
224 Courts sometimes adopt a rule-like rather than balancing approach because rules are the best way for courts to enforce constitutional values, given a variety of institutional limitations on judicial capacity. See generally Fallon, supra note 215. Where the courts use rules for institutional reasons rather than because rules best implement constitutional values, the case for judicial constitutional review is weaker relative to the case for non-
Non-judicial constitutional review stacks up against judicial constitutional review reasonably well. Non-judicial institutions can balance competing constitutional interests, and they do so because they have incentives guiding them toward balancing. Non-judicial institutions may do a reasonable job in assessing legislation that is not central to an administration’s policy agenda. Judicial constitutional review may be distinctively valuable when courts make only as-applied rulings invoking rules that the Constitution itself dictates, rather than balancing competing interests. As-applied rulings might be quite common, but the situations in which the Constitution generates rules rather than balancing tests seem far less so.

In the end, deeper commitments most likely drive scholars’ views on whether they think a constitutional democracy can persist with more non-judicial constitutional review and less judicial review. The discussion will be informed by knowing what happens when non-judicial institutions actually engage in constitutional review. Therefore, this Essay ends with the unsatisfying but always accurate observation that this is an area where we need more empirical investigation.

judicial constitutional review.

One could raise questions about the ability of courts to find unconstitutional central elements of an administration’s legislative agenda, based on the United States Supreme Court’s experience during the New Deal and the more general proposition supported by political scientists that the Supreme Court cannot hold out for long against a sustained consensus in the political branches favoring a set of policies. For a discussion, see generally Robert A. Dahl, Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker, 6 J. PUB. L. 279 (1957); Lee Epstein, Jack Knight, & Andrew D. Martin, The Supreme Court as a Strategic National Policy-Maker, 50 EMORY L.J. 583 (2001); Gerald N. Rosenberg, The Road Taken: Robert A. Dahl’s Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker, 50 EMORY L.J. 613 (2001).

The obvious candidate for exploration, beyond a more extensive examination of the OLC, is practice in Canadian government offices when the possibility of invoking Section 33 of the Charter of Rights to “override” a court decision arises. It has been said that, although Section 33 has not been invoked in response to controversial decisions regarding gay rights and tobacco advertising, more consideration was given to its use than the public record reveals. See Janet Heibert, Charter Conflicts: What is Parliament’s Role (2002). Finding out why there was consideration of using Section 33 and why it was not used would illuminate non-judicial constitutional decision-making in the shadow of judicial review. For a brief description of one important instance of non-use (and subsequent use) of Section 33, see Kent Roach, The Supreme Court on Trial: Judicial Activism or Democratic Dialogue 195–96, 199–200 (2001). See also Tsvi Kahana, The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter, 44 CANAD. PUB. ADMIN. 255 (2001).

Another area for research, suggested by Beth Garrett, is the practice of some state attorneys general and legislative drafting offices in rendering advice on the constitutionality of proposed state laws.