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Assessing the Constitutionality of Legislation: Constitutional Review in Taiwan's Legislative Yuan

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ASSESSING THE CONSTITUTIONALITY OF LEGISLATION: CONSTITUTIONAL REVIEW IN TAIWAN'S LEGISLATIVE YUAN

This article examines the constitutional interpretative authority of Taiwan's Legislative Yuan, while incorporating international viewpoints on constitutional review primarily from the United Kingdom and United States. It contends that Taiwan possesses an over-reliance on legal constitutionalism and strong judicial review, which hinders Legislative Yuan interpretative authority. Author interviews from Legislative Yuan insiders demonstrate that lawmakers and staffers may not actively be thinking about the constitutionality of the bills they are presenting, and that they possess few, if any, official consultation options when seeking advice on constitutional questions. In essence, the interviews displayed clear evidence of judicial overhang. The article further argues that constitutional review by legislatures is an inherent good, and provides multiple avenues for the Legislative Yuan to increase their constitutional interpretative authority. It also calls for more nominations to Taiwan's Constitutional Court to be made from members of the Legislative Yuan, and for the Court to acknowledge (at some level) the legislature's interpretative authority. After all, democratic constitutional structures are dynamic, and Taiwan's governmental branches should work to bridge the divide between legal and political constitutionalism before the former becomes even more firmly entrenched.

Key words: constitutional review, interpretative authority, legal constitutionalism, political constitutionalism, legislative processes, Taiwan, United Kingdom, United States

Democracies often tinker with mechanisms of constitutional governance. One of the current topics debated regarding such mechanisms is how involved legislatures should be in the constitutional assessment of laws. While some jurisdictions display strong parliamentary authority with weak judicial review (*e.g.* UK), others incorporate strong judicial review with decreased legislative or parliamentary authority (*e.g.* USA). Yet no matter the governmental structure, it is now widely held that most legislatures have the capacity and authority to perform at least some constitutional review of bills and statutes, however limited or extensive.¹ As Vermeule states, '[c]onstitutional interpretation in representative legislatures must lie near the core of any account of democratic deliberation'.² Many jurisdictions have taken steps to address the legislature's capacity to interpret the constitution (*i.e.* by increasing constitutional deliberation), and also by assessing the fit of legislation with constitutions, statutes, and international conventions.³

¹ See generally, P Brest, 'The Conscientious Legislator's Guide to Constitutional Interpretation' (1975) 27 *Stanford Law Review* 585; WF Murphy, 'Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter' (1986) 48 *Review of Politics* 401; L Fisher, *Constitutional Dialogues: Interpretation As Political Process* (PUP, Princeton, 1988); B Ackerman, *We The People, Volume 1: Foundations* (HUP, Cambridge, 1993); M Tushnet, *Taking The Constitution Away From The Courts* (PUP, Princeton, 1999); J Waldron, *Law and Disagreement* (OUP, Oxford, 1999); J Waldron, *The Dignity of Legislation* (CUP, Cambridge, 1999); E Garrett & A Vermeule, 'Institutional Design of a Thayerian Congress' (2000-2001) 50 *Duke Law Journal* 1277; N Devins & L Fisher, *The Democratic Constitution* (OUP, Oxford, 2004); N Devins & KE Whittington, *Congress and the Constitution* (Duke University Press, Durham, 2005); J Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346; KE Whittington, *Political Foundations Of Judicial Supremacy* (PUP, Princeton, 2007); A Vermeule, *Mechanisms of Democracy* (OUP, Oxford, 2007); WN Eskridge, Jr. & J Ferejohn, *A Republic Of Statutes: The New American Constitution* (YUP, New Haven, 2010); JM Balkin, *Constitutional Redemption: Political Faith In an Unjust World* (HUP, Cambridge, 2011); HM Volokh, 'Constitutional Authority Statements in Congress' (2013) 65 *Florida Law Review* 177.

² Vermeule, 'Mechanisms', (note 1 above), p 217. He further notes, 'It is therefore crucial to ask whether and how Congress's interpretative and deliberative capacities can be improved' (217). This statement, especially in terms of improvement, could apply to any law-making body.

³ Two examples frequently consulted in this article are the Westminster Parliament and the US Congress. Westminster has established a Constitution Committee in the House of Lords, and also a Joint Committee on Human Rights, both of which have been recognised as successful. On a smaller level, the US House of Representatives established constitutional authority statements (CASs) in 2010, although these have been much less successful than the stronger steps taken at Westminster.

Underlying principles of constitutional review are questions of governance, especially in regard to legal and political constitutionalism,⁴ and how countries go about balancing such standards. Essentially the question becomes one of ‘precisely how the government should be held to account’,⁵ and where supremacy lies: with the legislature or the judiciary.⁶ Some jurisdictions put more faith in courts and judicial review, while others put more faith in governmental institutions and the political process, although ‘[q]uite sensibly, few countries put all of their eggs in one basket’.⁷

This article focuses on Taiwan, who may indeed have all of their eggs in one basket.⁸ Taiwan’s Constitutional Court (or, ‘Council of Grand Justices’) incorporates strong judicial review, and the legislature has limited formal mechanisms by which to assess the constitutionality of the bills and laws it scrutinizes. Although Taiwan officially operates on a Presidential system, in reality it is more of a hybrid between parliamentary and

⁴ Elliott & Thomas note that these ‘reflect two different views of how fundamental constitutional values should be upheld. The former puts its faith in the courts; the latter relies on the political process.’ (M Elliott & R Thomas, *Public Law*, (OUP, Oxford, 2011), p. 21; *See also* LeSeur and Caird’s definitions of political and legal constitutionalism, as found in: A Le Sueur & J Simson Caird, ‘The Lords Constitution Committee’, in A Horne, G Drewry & D Oliver, *Parliament And The Law*, (Hart, Oxford, 2013), p 282. The authors note: ‘Political constitutionalism claims that government power and law-making is and should be legitimised through Parliament. Legal constitutionalism sees courts, clearly articulated constitutional principles and legally enforceable rights as the keys to creating conditions under which public power is limited’.

⁵ Elliott & Thomas, *Ibid*, at 38.

⁶ R Bellamy, ‘Political constitutionalism and the Human Rights Act’ (2011) 9 *International Journal of Constitutional Law* at 86 at 89 (‘just as different forms of legal constitutionalism give greater or lesser weight to the legislature and popular sovereignty, in amending or deciding constitutional questions, so different forms of political constitutionalism have allowed greater or lesser degrees of judicial independence and discretion. Both kinds of constitutionalism allow for some balance, and there is nothing new in that. The crux is where supremacy lies—with the legislature, as political constitutionalists desire, or the judiciary, as legal constitutionalists wish, and how far judges make judicial deference to Parliament a central feature of their role’).

⁷ Elliott & Thomas, (note 4 above), p 21. Emphasis added.

⁸ As Ginsburg points out, Taiwan’s lower courts cannot review constitutional issues. The privilege of constitutional review is only carried by the Council of Grand Justices (T Ginsburg, *Judicial Review in New Democracies* (CUP, Cambridge, 2003), p 116).

presidential.⁹ Lately there have been calls to officially change the system to a Parliamentary model, but little movement on this has occurred.¹⁰ Nevertheless, Taiwan's Constitutional Court takes a firm position as the state's sole provider of highly centralised constitutional review,¹¹ and statistics back this up. From 1994-2013 the Court declared 95 acts, or more specifically provisions of particular acts, unconstitutional,¹² amounting to 39% of the constitutional challenges to laws and acts they have decided.¹³ To put this in perspective, in a span of two centuries (1803-2002), the US Supreme Court only declared 158 Congressional acts, or provisions of acts, unconstitutional.¹⁴ Thus, within two decades Taiwan's Constitutional Court has gone two-thirds of the way to what it took the US Supreme Court two centuries to achieve.¹⁵ Furthermore, challenging and striking legislative provisions does not appear to be abating: in 2013, the Constitutional Court declared eight laws, or provisions of laws, unconstitutional.¹⁶

This article contends Taiwan is too heavily focused on legal constitutionalism, thus hindering the constitutional assessment of bills travelling through the legislative process.

⁹ CF Lo, *The Legal Culture and System of Taiwan*, (Kluwer, Netherlands, 2006), p 4.

¹⁰ C Wang, 'DPP cautious on parliament model, but debate needed', *Taipei Times* (20 May 2014), available at <http://www.taipetimes.com/News/taiwan/archives/2014/05/20/2003590794>.

¹¹ See, Ginsburg (note 8 above), pp 115-144. See also CC Lin, 'The Birth and Rebirth of the Judicial Review in Taiwan – Its Establishment, Empowerment, and Evolvement' (2012) 7 *National Taiwan University Law Review* 157 at 198-209; See also Lee, *infra*, note 25.

¹² Institutum Iurisprudentiae Academia Sinica (IIAS), Taiwan Constitutional Court (TCC) Database (currently unpublished; forthcoming in 2015). Although, this comes with a significant proviso: 40 of the 95 acts declared unconstitutional from 1994-2013 were enacted (or, more accurately, went into effect) before the Legislature was fully democratically elected (1992).

¹³ *Ibid.* From 1994-2013, there were 244 cases regarding laws/acts before the court. The court ruled 131 (53.69%) constitutional, 95 (38.93%) unconstitutional, and 18 (7.38%) neither constitutional nor unconstitutional.

¹⁴ A 2002 Government Printing Office document tracks how many acts (and provisions) SCOTUS has struck down through 2002. It is available at <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002-10.pdf>.

¹⁵ However the Supreme Court total is only in relation to Acts of Congress. If this included acts of state legislatures, this figure would be much higher.

¹⁶ IIAS TCC Database, *supra* note 12. Also, there were only 24 petitions regarding such cases that year, which means that the court struck down laws 60% of the time.

This over-focus on legal constitutionalism was seen in my interviews with lawmakers and staffers of the Legislative Yuan, presented below. Though formal and practical barriers stand in the way, Taiwan's legislature possesses the necessary means by which to increase the institution's constitutional interpretative authority, should the body choose to do so. In fact, legislatures in democratic systems may well demand such an increase in authority.¹⁷

This paper unfolds in the following manner. First, it briefly discusses the complexities of comparing law-making systems, noting differences between Taiwan's constitutional structure and the other institutions consulted in this article. Next, it talks about constitutional review generally, and interpretive authority for legislatures specifically, focusing on the UK Parliament, the US Congress and other legislatures. Then, it incorporates an empirical component, using interview material obtained from Taiwanese Legislative Yuan insiders to address whether and how lawmakers and their staff think about and assess the constitutionality of the bills and laws they are drafting and voting on. Finally, the article offers proposals on how to enhance the interpretative authority of the Legislative Yuan, with the hope of striking more of a balance between legal and political constitutionalism.

Before this, however, a short note on the paper's comparative methodology is in order. At times this article incorporates methods and ideas from other jurisdictions, such as the US and UK. This is no accident. The standards and practices located in American law and constitutional review continue to have a large influence on Taiwanese adjudication.¹⁸

¹⁷ Vermeule, 'Mechanisms' (note 1 above), p 217.

¹⁸ Lo (note 9 above), p 3; LSL Liu, 'Judicial Review And Emerging Constitutionalism: The Uneasy Case For The Republic Of China On Taiwan' (1991) 39 *American Journal of Comparative Law* 509 at 511, 515-

Further, in the face of what many consider a stronger judiciary,¹⁹ Westminster has set up a Constitution Committee and a Joint Committee on Human Rights that have been extremely successful, and are widely acknowledged as vanguard models of legislative deliberation and authority in regard to constitutional issues.²⁰ While it is acknowledged that such legislatures operate in different constitutional structures,²¹ the main focus of this article is constitutional deliberation and review. All democratic legislatures can attempt to increase their constitutional interpretative authority, and Taiwan's is no different.²² Searching for ideas is a matter of legal borrowing, in which law and legal institutions have a rich history.²³ Such borrowing is certainly apparent in Taiwan's Legislative Yuan.²⁴ Taiwan borrows legal rules and statutes from across the globe—its legal system and constitutional review structure are a collection of various Japanese, US, and European (predominately German) customs.²⁵ Further, constitutional interpretative authority does not have to appear in statutory or constitutional (amendment) form—ideas

516; *See also* (forthcoming) N Chisolm, 'The Faces of Judicial Independence: Democratic versus Bureaucratic Accountability in Judicial Selection, Training, and Promotion in South Korea and Taiwan' (2014) *American Journal of Comparative Law*.

¹⁹ *See, infra*, notes 29 & 30.

²⁰ M De Visser, *Constitutional Review In Europe* (Hart, Oxford, 2014) pp 29-32, 83.

²¹ Taiwan's Legislative Yuan and the US Congress are based in presidential systems (in Taiwan's case, "semi-presidential" system is more accurate), while the Westminster Parliament is based on a parliamentary structure. Additionally, Congress and Westminster are bicameral, while the Legislative Yuan is unicameral.

²² Garrett & Vermeule, (note 1 above), at 1292 ('It seems indisputable that, on net, some congressional deliberation on constitutional questions is better than none at all. The real question is not whether deliberation is beneficial, but how much deliberation is optimal'.)

²³ A Watson, *Legal Transplants: An Approach To Comparative Law* (2nd ed, U of Georgia Press, Athens, 1993), p 107.

²⁴ During interviews I also asked insiders about legal borrowing regarding statutes. Many acknowledged such borrowing was commonplace in the Legislative Yuan, and the most frequent jurisdictions mentioned were (in no particular order) the US, UK, Germany and Japan.

²⁵ Lo (note 9 above), p 12; Ginsburg (note 8 above), p 108, 110; *see also* T Tetzlaff, 'Kelsen's Concept of Constitutional Review Accord in Europe and Asia: The Grand Justices in Taiwan' (2006) 1 *NTU Law Review* 75; *see also* (forthcoming) Chisolm, 'Faces of Judicial Independence'; *see also* CL Lee, 'A Comparative Study of Judicial Review Procedure Types—The Option of Constitutional Procedure System in Reform of The Constitutional Review of Taiwan' (2010) 5 *NTU Law Review* 73.

other legislatures have implemented in regard to the practice may fit well with the Legislative Yuan, or may motivate the Yuan to adopt similar or more innovative methods.

I. The Dynamic Nature of Constitutional Review

Maartje de Visser notes that '[d]eciding on the institutional arrangements to enforce the supremacy of a constitution is often regarded as a veritable evergreen of constitutional law'.²⁶ Indeed even in stable democracies constitutional arrangements appear to constantly be changing.²⁷ Questioning such arrangements is in fact part of the democratic process. Assessing whether a constitutional structure is properly working, however, is much more difficult to determine.

Examples regarding the dynamic nature of constitutional structures arise in the jurisdictions consulted in this article. The UK currently operates on a system based around parliamentary supremacy, and judges are not allowed to strike down acts of parliament.²⁸ Yet many believe judicial review and legal constitutionalism has strengthened in the UK since passage of the Human Rights Act 1998,²⁹ or has gotten

²⁶ de Visser (note 20 above), p 1.

²⁷ See generally D Oliver & C Fusaro, *How Constitutions Change: A Comparative Study* (Hart, Oxford, 2013). They note (p. 4):

Constitutions are commonly characterised by continuous structural development and in this respect they resemble living organisms – they are organic or evolutionary. They are a product of society; they reflect or respond to changes in society. Thus constitutions both change continuously, and may be changed continuously.

²⁸ Although courts can now issue 'statements of incompatibility' with statutes that violate the Human Rights Act 1998. Also, interestingly, Oliver notes that, '[t]he doctrine of parliamentary sovereignty began to develop in the seventeenth century, before democracy: the 'democratic' principle is therefore a post-rationalisation of parliamentary sovereignty' (D Oliver, 'Parliament and the Courts', in A Horne, G Drewry & D Oliver, *Parliament and the Law* (Hart, Oxford, 2013) p 315; See also, JAG Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review* 1.

²⁹ Bellamy (note 6 above) at 87; Elliott & Thomas (note 4 above), pp 38-41; D Oliver, 'United Kingdom', in Oliver & Fusaro (note 27 above), pp 350-352. Oliver notes the change in judicial terminology, from

stronger for other reasons.³⁰ During this period of constitutional change, or perhaps in response to it, the Westminster Parliament inserted mechanisms to increase their constitutional assessment procedures of pending legislation, adding two separate constitutional committees (one in the Commons³¹ and one in the Lords),³² and also adding a Joint Committee on Human Rights.³³ Ultimately, however, there remains little question that the Westminster Parliament ‘has the final say on the compatibility of its laws with the UK constitution’.³⁴

Conversely, in the US judicial review of statutes played no role in constitutional review until *Marbury v. Madison*.³⁵ Subsequent to this expansive decision, the Supreme Court refused to strike down an act of Congress for over half a century.³⁶ Yet nowadays it is common for the Court to strike down laws or specific provisions, as the powers of judicial review have been thoroughly strengthened. Congress has been much less successful implementing constitutional legislative scrutiny mechanisms, and this could be one reason why strong judicial review has expanded significantly throughout the

‘administrative’ law to ‘constitutional’ principles. She also states that ‘Griffith’s political constitution has been substantially “legalised”’. (*Ibid*, at 342).

³⁰ From an American perspective, see EF Delaney, ‘Judiciary Rising: Constitutional Change in the United Kingdom’ (2014) 108 *Northwestern University Law Review* 543.

³¹ House of Commons Political and Constitutional Reform Committee.

³² In regard to the HOL Constitution Committee, see A Le Sueur and JS Caird, ‘The House of Lords Select Committee on the Constitution’, in *Parliament and the Law*, (note 4 above), pp 281-308, see also de Visser, (note 20 above), pp 29-32.

³³ In regard to the JCHR, see M Hunt, ‘The Joint Committee on Human Rights’, in *Parliament and the Law* (note 4 above), pp 223-250.

³⁴ de Visser (note 20 above), p 83.

³⁵ 5 U.S. 137 (1803). According to Thayer, the Supreme Court did not strike down an act by a state legislature until 1814. In fact, Judges in Ohio were impeached in 1807 and 1808 for holding acts of the state legislature to be void. (JB Thayer, ‘The Origin and Scope of the American Doctrine of Constitutional Law’ (1893) 7 *Harvard Law Review* 129 at 134).

³⁶ See Government Printing Office, *Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States*, available at <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002-10.pdf>.

country's history.³⁷ Contrary to this judicial review uprising, during the past couple decades a wave of constitutional scholars have advocated that legislatures (and citizens, more generally) play an increased role in the constitutional assessment of laws.³⁸

However some scholars may disagree with America's constitutional structure being characterised as heavy on legal constitutionalism and strong judicial review. For example, Eskridge and Ferejohn contend the US is a largely 'a republic of statutes'.³⁹ They further argue the written constitution is becoming increasingly obsolete, and the Supreme Court 'does not have the legitimacy, the wisdom and the expertise, or the enforcement resources to generate important changes in the Constitution'.⁴⁰ Garrett and Vermeule also cite a long list of significant constitutional dimensions the Court leaves under Congressional surveillance, and therefore declines to review.⁴¹ Among these are: the procedural validity of constitutional amendments; the procedural validity of enacted statutes; the creation and validity of internal congressional rules; economic and social regulation; spending for the general welfare; delegation of rulemaking authority to Executive or agencies; division of war powers between Congress and the Executive; rules and regulations for the military; confirmations and impeachments; and enforcement of the 'Republican Form of Government' clause.⁴²

Other jurisdictions present contemporary examples of how constitutional review structures regularly fluctuate. In 2003 Belgium's *Cour d'arbitrage* gained powers to

³⁷ For comprehensive accounts on the rise of judicial supremacy, see, e.g. Whittington, 'Political Foundations' (note 1 above); B Friedman & EF Delaney, 'Becoming Supreme: The Federal Foundation of Judicial Supremacy' (2011) 111 *Columbia Law Review* 1137.

³⁸ See, *op. cit.*, note 1.

³⁹ Eskridge Jr. & Ferejohn (note 1 above).

⁴⁰ *Ibid.*, at 4.

⁴¹ See Garrett and Vermeule (note 1 above), at 1284-1285.

⁴² *Ibid.*

‘control whether statutes comply with all the fundamental rights and liberties laid down in the constitution’ and other legal principles;⁴³ France amended its constitution in 2008 to allow for increased judicial review of promulgated laws;⁴⁴ and controversially, Hungary has recently adopted a Fundamental Law that significantly curbs the powers of its constitutional court.⁴⁵ Other stable democracies such as Canada,⁴⁶ Germany,⁴⁷ and Switzerland⁴⁸ have experienced various levels of constitutional change over the past few decades, tinkering with structures to discover their ‘veritable evergreen’.⁴⁹ Such change, however, need not be dramatic. Minor adjustments to such constitutional mechanisms can also play a significant part in review.⁵⁰ After all, democracies are dynamic entities, and all-or-nothing review by one branch of government (or merely one governmental entity) is not how such review usually functions,⁵¹ and challenges the principles of democratic governance.

A. Legislative interpretative authority

We paint legislation up in these lurid shades in order to lend credibility to the idea of judicial review, and to silence what would otherwise be our embarrassment about the

⁴³ de Visser (note 20 above), p 57.

⁴⁴ *Ibid*, pp 60-61.

⁴⁵ *Ibid*, pp 74-75. Although de Visser notes this move has been heavily criticised both within Hungary and abroad.

⁴⁶ Oliver & Fusaro (note 27 above), pp 9-10. Canada’s Supreme Court has ‘created unwritten yet justiciable constitutional principles’, including ‘a provision that disallows the unilateral secession of a province’. And Canada’s Parliament has created legislation that allows the provinces veto power over some constitutional amendments.

⁴⁷ *Ibid*, p 145. Germany amended the federal system in 2006 and 2009, and made further constitutional amendments permitting the ratification of the Lisbon Treaty in 2009.

⁴⁸ *Ibid*, p 303. Switzerland’s third Constitution came into force on 1 January 2000, one hundred and twenty five years after their second constitution.

⁴⁹ de Visser (note 20 above), p 1.

⁵⁰ Vermeule (note 1 above), p 2 (‘The fact is that in most democratic polities, the basic constitutional arrangements are no longer up for grabs. ...small scale institutional design is all that is on offer’.)

⁵¹ Elliott and Thomas (note 4 above), p 20.

*democratic or ‘counter-majoritarian’ difficulties that judicial review is sometimes thought to achieve.*⁵²

Most theories of constitutionalism acknowledge the legislature’s interpretative authority, although such power varies by jurisdiction.⁵³ That being said, de Visser writes that the study of parliamentary constitutional interpretation is ‘still in its infancy’.⁵⁴ Parliamentary or congressional scrutiny of constitutional issues can arise or be supported because of many different rationales.⁵⁵ In some cases this stems from: a pledge by lawmakers upon taking office to uphold the constitution,⁵⁶ actively scrutinising the constitutionality of bills travelling through parliament (e.g. the Westminster Parliament’s Lords Constitution Committee), or even merely from the duty of enacting bills into laws.⁵⁷ Inevitably legislators are constitutional actors; but unfortunately, sometimes they are not viewed as constitutional reviewers.

Often the primary issue with enhanced constitutional scrutiny by legislatures is the complex interplay with the responsibilities of the judiciary.⁵⁸ This is especially true in jurisdictions employing strong judicial review and a reliance on legal constitutionalism.

⁵² Waldron, ‘Dignity of Legislation’ (note 1 above), p 2.

⁵³ Garrett and Vermeule (note 1 above), at 1306 (‘Normatively, most mainstream theories of constitutionalism deem congressional review for constitutionality to be an affirmative good, regardless of the scope of subsequent judicial review’.)

⁵⁴ de Visser (note 20 above), p 23. However, while this may be true in Europe, there appears to be a much wider body of work in US scholarship analysing this phenomenon. *See, op. cit.*, note 1.

⁵⁵ Besides, of course, parliamentary supremacy.

⁵⁶ Volokh (note 1 above), at 183-184; *See also* R Feingold, ‘Upholding an Oath to the Constitution: A Legislator’s Responsibilities’ (2006) *Wisconsin Law Review* 1.

⁵⁷ *Ibid*, at 182. de Visser also writes, ‘Parliament as a whole must work within constitutional limits when performing its functions. This notably entails that constitutional rules, principles and values are respected during the drafting and enactment of new statutes’. (de Visser (note 20 above), p 23).

⁵⁸ *See* GJ Jacobsohn, ‘An unconstitutional constitution? A comparative perspective’ (2006) 4 *International Journal of Constitutional Law* 460 at 463; *see also* BG Peabody, ‘Congressional Attitudes toward Constitutional Interpretation’, in Devins & Whittington (note 1 above), pp 40-42.

Here legislatures are more likely to be stymied by the judiciary⁵⁹ or impede themselves⁶⁰ for their constitutional review efforts, rather than be aided by the judiciary as to how improvement could be made or responsibilities shared. Nonetheless, for jurisdictions that continue to employ strong judicial review, the ‘countermajoritarian difficulty’ ominously lingers.⁶¹

Another issue is whether legislators feel the need for constitutional assessment of legislation and whether they perform adequately if such opportunities arise. Breast famously argues that ‘[o]ne can reasonably demand ... that the lawmaking process take explicit account of constitutional values threatened by pending legislation’.⁶² Compared to writings on the countermajoritarian difficulty,⁶³ there is a dearth of research regarding how legislators feel about constitutional assessment and how well they perform such duties; yet there is some. After comparing two Congressional surveys (one from 1959 and the other from 1999/2000), Peabody found that ‘Congress expresses a persistent and surprising interest in asserting a distinctive constitutional voice’.⁶⁴ Particularly important is the emergence of a new group of ‘joint constitutionalists’ in the 1999/2000 survey,

⁵⁹ See, e.g., *NFIB v. Sebelius*, where Chief Justice Roberts wrote, ‘Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. ... Our deference in matters of policy cannot, however, become abdication in matters of law.’ (*National Federation of Independent Business v Sebelius*, 567 U.S. ___ [2012], p. 6)

⁶⁰ de Visser notes that during parliamentary stages former members of the German Constitutional Court will often be invited determine how the current Constitutional Court will judge such legislation. This has led one former President of the German court to state: ‘This anticipation of a constitutional risk leads to risk-aversion and lack of innovation. Anticipatory obedience is harmful to the social imagination and tends to cripple the legislator’s delight in deciding’. (de Visser (note 20 above), p 35)

⁶¹ As Dawson notes, it is sometimes ‘bemoaned as “central obsession” of constitutional scholarship’. (EC Dawson, ‘Adjusting the Presumption of Constitutionality Based on Margin of Statutory Passage’ (2013) 16 *University of Pennsylvania Journal of Constitutional Law* 97 at 100).

⁶² Brest (note 1 above), at 588.

⁶³ See generally, AM Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed, YUP, New Haven, 1986), and the copious amounts of literature this work has spawned.

⁶⁴ Peabody (note 58 above), p 40. Yet the author goes onto note, ‘although it has somewhat conflicted and underdeveloped views about how to achieve this aspiration’.

who believe that ‘Congress and the courts should each interpret the Constitution conscientiously and independently, without necessarily deferring to the views of the other’.⁶⁵ Further, Tushnet has found Congressional interpretation of constitutional issues to be ‘reasonably good’,⁶⁶ and further notes it may be the case that the ‘imperfect congressional capacity to interpret the Constitution is nonetheless better than the perhaps more imperfect judicial capacity to do so’.⁶⁷ Yet many legislators and constitutional scholars continue to assert the case for judicial supremacy in regard to constitutional questions.⁶⁸ This is most often expressed in jurisdictions with strong judicial review, and could have much to do with the effects of judicial overhang.

B. Judicial overhang

One of the circumstances resulting from strong judicial review and an over-focus on legal constitutionalism is the development of judicial overhang. Coined by Mark Tushnet, this occurs when legislators give ultimate constitutional deference to the courts, believing they will correct statutory mistakes.⁶⁹ To some extent this development could promote disregard for the Constitution, as legislators and others may not ‘bother to interpret the

⁶⁵ *Ibid*, at 50.

⁶⁶ M Tushnet, ‘Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies’, in Devins & Whittington (note 1 above), pp 269-270.

⁶⁷ M Tushnet, ‘Is Congress Capable of Conscientious, Responsible Constitutional Interpretation?’ (2009) 89 *Boston University Law Review* 499 at 500.

⁶⁸ See, e.g., E Chemerinsky, ‘In Defense of Judicial Review: The Perils of Popular Constitutionalism’ (2004) *University of Illinois Law Review* 673; see also L Alexander & F Schauer, ‘On Extrajudicial Constitutional Interpretation’ (1997) 110 *Harvard Law Review* 1359 at 1377.

⁶⁹ Tushnet, ‘Taking the Constitution’ (note 1 above), p 57; Tushnet, ‘Weak Courts’ (note 1 above); See also Tushnet, ‘Is Congress Capable’ (note 68 above).

constitution at all, much less interpret it well'.⁷⁰ Ultimately Tushnet observes many pitfalls arising from this phenomenon.

Firstly, he states it promotes irresponsibility, in that legislators do not feel responsible for constitutional assessment,⁷¹ and lawmakers may simply defer to the judiciary on major constitutional issues. As will be seen below, this type of thinking was apparent in my interviews with Legislative Yuan members. Next, Tushnet believes it distorts legislation—if legislators focus too much on the Constitution inside the courts, they may produce unsatisfactory laws.⁷² Lawmakers should focus more on policy, not on Supreme Court or court-centred laws. The policy is the heart of the law, and that should not be discarded. Tushnet further contends judicial overhang distorts legislative discussion,⁷³ and could make lawmakers think in scrutiny levels (*i.e.*, strict scrutiny v. rational basis), and not in terms of fairness. He also notes that the US Executive Branch does a fair job of interpreting the constitution because of particular offices it houses, advocating that legislatures should try to develop these specialised offices as well.⁷⁴ Finally, Tushnet believes judicial overhang misleads legislators, in that they may think their constitutional

⁷⁰ Tushnet, 'Weak Courts' (note 1 above), p 81.

⁷¹ *Ibid.*

⁷² *Ibid.*, p 58. Emphasis in original.

⁷³ *Ibid.*, pp 60-63.

⁷⁴ *Ibid.*, pp 61-62. Tushnet uses the Office of Legal Counsel in the Department of Justice as an example here. Garrett & Vermeule suggested an Office of Constitutional Issues, where congresspersons and their staffs could consult the office if they had any questions in regard to constitutionality, and the office could also issue reports on thematic inquiries or specific pieces of legislation. (Garrett & Vermeule, note 1 above, at 1313-1319). Ackerman notes that the establishment of the Office of Legal Counsel and the White House Counsel 'have vastly increased [Executive] constitutional authority', although he heavily criticises the office. See B Ackerman, *The Decline and Fall of the American Republic* (HUP, Cambridge, 2010), p 68 ('Presidents can then publish these respectable looking opinions to give legal legitimacy to their power grabs—and with a speed that will allow the executive's understanding of the law to shape professional opinion long before the Supreme Court gets a chance to speak. Call this "executive constitutionalism"'). See also pp. 87-88, 95-110.

discussion should be similar to Supreme Court discussion.⁷⁵ Yet the Constitution's text and the court cases surrounding it are not the only source of constitutional rights (e.g. the right to privacy, not found in the US Constitution, has been advocated by the courts and also by the legislature). In fact, Tushnet argues that legislative discussion of the right to privacy 'gave a firmer basis to such rights than the Court's own decisions'.⁷⁶

Baxter takes the problems of judicial overhang further, noting that it 'is not just a problem of metrics for those who would determine Congress's capacity for constitutional interpretation. It is also, more important, a circumstance that likely prevents Congress from developing its capacity'.⁷⁷ He further notes that '[r]eference to constitutional issues and concerns is a necessary, but not sufficient, criterion for adequate constitutional analysis. Having "the Constitution and constitutionalism in mind" is not enough'.⁷⁸ Baxter's criticisms coincide with this article's main points: that Taiwan relies too heavily on judicial review, and this is stifling constitutional discussion and scrutiny in the Legislative Yuan.

C. Legislative Yuan interpretative authority & the dominance of Taiwan's Constitutional Court

Above I stated Taiwan exercises strong judicial review with weak parliamentary authority in regard to constitutional matters, and also noted that the Taiwanese standard

⁷⁵ *Ibid*, pp 63-65.

⁷⁶ *Ibid*, p 65.

⁷⁷ H Baxter, 'A Comment on Mark Tushnet's Some Notes on Congressional Capacity to Interpret the Constitution' (2009) 89 *Boston University Law Review* 511.

⁷⁸ *Ibid*, p 512.

of constitutional review has been heavily influenced by America's.⁷⁹ But critical structures of Taiwanese judicial review are much stronger than the US model.⁸⁰ As Lo points out, the system of constitutional review in Taiwan is more similar to Germany and Austria.⁸¹ For one, direct interpretive authority for constitutional matters is not located in the US Constitution; the Court established this power through one of their own decisions.⁸² Taiwan's Constitutional Court contains this authority in abundance, firmly delineated in the Constitution.⁸³ Further, Taiwan has a separate Constitutional Interpretation Procedure Act that details the procedures for interpretation of the constitution.⁸⁴ That law makes no mention of Legislative Yuan interpretive power, besides their right to petition the Constitutional Court under Article 5(iii) of the law.⁸⁵

Recall the earlier Elliott and Thomas quote on legal and political constitutionalism, that '[q]uite sensibly, few countries put all of their eggs in one basket'.⁸⁶ Contrary to such sensibility, it appears 'unequivocal' that Taiwan has allocated constitutional review exclusively among the fifteen staggered, fixed-term Justices of the Constitutional Court.⁸⁷

⁷⁹ *Op. cit.*, notes 11 & 19.

⁸⁰ Although some of these differences may be due to the fact that Taiwan is a civil law jurisdiction while the US is a common law system.

⁸¹ Lo (note 9 above), p 17. Although, even the German Constitutional Court was influenced by the American structure of constitutional review and the US Supreme Court (de Visser (note 20 above), p 64).

⁸² *Marbury v Madison*, 5 U.S. 137 [1803].

⁸³ *See, e.g.* articles 78, 171 & 173. (Art. 78: The Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretation of laws and orders; Art. 171: Laws that are in conflict with the Constitution shall be null and void. When doubt arises as to whether or not a law is in conflict with the Constitution, interpretation thereon shall be made by the Judicial Yuan; Art. 173: The Constitution shall be interpreted by the Judicial Yuan.)

⁸⁴ Constitutional Interpretation Procedure Act (1993).

⁸⁵ Sec. 5(iii) notes that: 'The grounds on which the petitions for interpretation of the Constitution may be made are as follows:...3. When one-third of the Legislators or more have doubt about the meanings of a constitutional provision governing their functions and duties, or question on the constitutionality of a statute at issue, and have therefor initiated a petition'.

⁸⁶ Elliott & Thomas (note 4 above), p 21. Emphasis added.

⁸⁷ J.Y. Interpretation No. 499 (24 Mar 2000), Holding, para. 8 ('It is, therefore, unequivocal that the Justices of the Judicial Yuan are charged with the power to interpret the Constitution and unify the interpretation of laws and statutes'.)

Though statutory and constitutional backing was already strong, throughout the years the Court significantly expanded its power through various decisions, providing further foundations by which judicial supremacy is exercised. Tom Ginsburg⁸⁸ and Chien-Chih Lin⁸⁹ offer impressively thorough accounts of how the court has expanded its reach, and Chien-Liang Lee interestingly grapples with many of the constitutional review dilemmas arising in Taiwan.⁹⁰ Ginsburg notes this was performed in three stages: (i) establishing supremacy over the ordinary courts;⁹¹ (ii) challenging governmental authority on administrative law matters,⁹² and (iii) by avoiding Council Law restrictions.⁹³ Further, writes Ginsburg, the Court decided to enhance enforcement of their decisions by providing dates for compliance: if such dates are not complied with, the law or regulation in question becomes null and void.⁹⁴ Conversely, Lin notes the Court expanded its power through two methods: (i) being regarded as a guardian of constitutional and human rights;

⁸⁸ Ginsburg (note 8 above), pp 134-157.

⁸⁹ CC Lin, 'The Birth and Rebirth of the Judicial Review in Taiwan – Its Establishment, Empowerment, and Evolvement' (2012) 7 *NTU Law Review* 157 at 198-209.

⁹⁰ Lee (note 11 above).

⁹¹ Ginsburg notes the Council 'unilaterally extended its purview to precedents of the Supreme and Administrative Courts' (Ginsburg (note 8 above) p 135). This occurred in J.Y. Interpretation No. 154 (29 Sept 1978). *See also* J.Y. Interpretation No's 177 (court made the decisions of the Constitutional Court binding on ordinary court retrial), 242 (first decision to declare a Supreme Court precedent unconstitutional), and 371 (expanded lower court and citizen access to the Court at earlier stages in the legal process).

⁹² Ginsburg notes that 'administrative law cases were the first substantive terrain in which the council challenged governmental authority'. (Ginsburg (note 8 above), p 140). *See also* J.Y. Interpretation No's 38 (asserting the power to review regulations), 137 (asserting power to review regulations made by executive agencies), 187 (providing citizens standing to sue the government), 201 (allowing citizens to appeal administrative hearings), 216 (deciding that the Ministry of Justice's opinions on the constitutionality of laws were not binding on the Court), and 394 (stating that rules made by the Ministry of the Interior were insufficient, and should be made by the Legislative Yuan).

⁹³ Ginsburg (note 8 above), pp 142-143. *See also* J.Y. Interpretation No's 165 (found Legislative Yuan could create a qualified speech immunity, even though this extended beyond the jurisdiction of the Council) and 175 (found Judicial Yuan could sponsor legislation in the Legislative Yuan).

⁹⁴ Ginsburg (note 8 above), pp 143-144. *See also* J.Y. Interpretation No's 188 (noting that unless otherwise specified, interpretations come into effect immediately); 365 (noting that the Civil Code regarding parental guardianship should be amended within two years).

and (ii) unabashedly expanding the scope and validity of their interpretations.⁹⁵ However, this power expansion certainly did not develop without backlash from Congress and the Executive.⁹⁶

One relatively recent interaction between the Court and the Legislative Yuan left the latter weakened and the former emboldened. In response to the 319 Presidential assassination attempt the KMT controlled legislature passed an act creating a commission to investigate the incident.⁹⁷ The law's constitutionality was questioned by other members of the Legislative Yuan, who petitioned the Court to examine the matter. The Justices found much of the law unconstitutional, thus gutting the 319 commission but upholding the legislature's investigatory powers.⁹⁸ In doing so, the Justices emphatically stated they 'will not be bound by the views held by petitioners or agencies concerned as to how the law should be applied'.⁹⁹ This passage is similar to the statements made in Interpretation No. 216, disregarding the views of Ministry of Justice attorneys on the constitutionality of legislation.¹⁰⁰ But this incident did not end there. KMT legislators were so upset with Interpretation No. 585 that in the following budget they deleted the 'specialty premiums' portion of the Justice's salaries.¹⁰¹ Members of the Legislative Yuan again petitioned the Court, and the Justices responded by declaring the salary deletions unconstitutional, asserting that 'no constitutional organ may delete or diminish

⁹⁵ Lin (note 89 above), at 199-206.

⁹⁶ *Ibid.*, at 206-210.

⁹⁷ The Act of the Special Commission on the Investigation of the Truth in Respect of the 319 Shooting.

⁹⁸ J.Y. Interpretation No. 585 (15 Dec 2004).

⁹⁹ *Ibid.*

¹⁰⁰ Interpretation No. 216 references Executive (Ministry of Justice) views on the constitutionality of laws and whether they should be taken into consideration. Unsurprisingly, the court found that 'Judicial administrations shall not put forth their own legal views and order judges to follow such views in the course of adjudication. If any legal views are presented, they are references for judges only and shall not bind judges in the course of adjudication'. (J.Y. Interpretation No. 216 (19 June 1987)).

¹⁰¹ The Justices salaries consist of a base salary, public expenses, and the specialty premiums.

the remuneration for a judge unless there is any ground for discipline'.¹⁰² Subsequently, the Legislative Yuan has been noticeably hesitant to challenge Constitutional Court authority.¹⁰³

That prominent exchange came during a period of rapid power expansion for the Court. In 1990 the Justices struck down a Temporary Provisions constitutional amendment,¹⁰⁴ and a decade later they controversially struck down another constitutional amendment on grounds of 'improper processes'.¹⁰⁵ The latter was perceived by some as revising, not interpreting, the constitution.¹⁰⁶ While such negation of constitutional amendments infrequently occurs in democracies, it certainly is not unheard of.¹⁰⁷ Revisions to the Constitution in 2005 gave the Justices power to adjudicate impeachments of the president¹⁰⁸ and to dissolve unconstitutional political parties,¹⁰⁹ two spectacular powers not normally provided to courts in liberal democracies.¹¹⁰ The Court also exerts a certain irresolute control over the political agenda in Taiwan, which scholars believe was gained in the late 1990s.¹¹¹

¹⁰² J.Y. Interpretation No. 601, Holding, para. 2.

¹⁰³ Although, others note there was an attitude change after J.Y. Interpretation NO. 530 (in relation to whether the Judicial Yuan may enact trial rules or supervisory regulations on their own)(*see* CT Lee, 'Taiwan's Legislators' Attitude toward Grand Justices Constitutional Interpretation' (2012) 37 *The Constitutional Review* 488).

¹⁰⁴ J.Y. Interpretation No. 261 (21 June 1990); Lin, note 89 above, at 203.

¹⁰⁵ J.Y. Interpretation No. 499 (2000).

¹⁰⁶ Lin (note 89 above), at 203.

¹⁰⁷ *See, e.g.* Jacobsohn (note 58 above), at 460.

¹⁰⁸ The motions have to begin in the Legislative Yuan.

¹⁰⁹ Lin (note 89 above), at 193. Article 5 of The Additional Articles of the Constitution of the Republic of China notes that, 'A political party shall be considered unconstitutional if its goals or activities endanger the existence of the Republic of China or the nation's free and democratic constitutional order'.

¹¹⁰ Although, Ginsburg and Elkins point out that courts in some liberal democracies, such as Germany, do have such powers. The authors go onto demonstrate that ancillary powers of constitutional courts (excluding, of course, judicial review) have risen dramatically since the early 20th century. (T Ginsburg & Z Elkins, 'Ancillary Powers of Constitutional Courts' (2009) 87 *TEXAS LAW REVIEW* 1431 at 1440, 1443).

¹¹¹ Tetzlaff (note 25 above), at 9; For a more complete description of how the Court's political power was attained, *see* Lin (note 89 above), at 186-192.

Some Constitutional Court interpretations forcefully (almost combatively) articulate the authority of the Constitutional Court.¹¹² Interpretation No. 185 notes that ‘interpretations of the Judicial Yuan *shall be binding upon every institution and person in the country*, and each institution shall abide by the meaning of these interpretations in handling relevant matters’.¹¹³ Interpretation No. 405 notes that Court interpretations are binding ‘*regardless of whether the Interpretations concern the meaning of the Constitution*, are solutions of disputes concerning the applicability of the Constitution or adjudication on the unconstitutionality of statutes’.¹¹⁴ These are audacious words for a Court that operates in a ‘constitutional democracy’,¹¹⁵ and incorporates such principles as ‘representative politics’, ‘accountability of politics’¹¹⁶ and ‘legislative autonomy’¹¹⁷ into their decisions. As the Court made clear in their decision on the unconstitutionality of the 1999 constitutional amendment, ‘not all parliamentary proceedings that are clearly and grossly flawed may take the pretext of being internal, self-regulatory matters and evade their legal consequences’.¹¹⁸ The meaning of ‘clearly and grossly flawed’, however, obviously comes down to the interpreter; in Taiwan, such discretion is solely in the purview of the Constitutional Court.

Yet recent events may provide some hope for non-judicial interpretation. In 2009 the Legislative Yuan enacted the ICCPR (International Covenant on Civil and Political Rights) and the ICESCR (International Covenant on Economic, Social and Cultural

¹¹² See note 88 above about the ‘unequivocal’ nature of their interpretative responsibilities.

¹¹³ J.Y. Interpretation No. 185 (27 Jan 1984), Holding, para 1. Emphasis added.

¹¹⁴ J.Y. Interpretation No. 405 (7 June 1996), Reasoning, para 1. Emphasis added.

¹¹⁵ J.Y. Interpretation No. 585 (15 Dec 2004), Holding 5, para 5.

¹¹⁶ *Ibid*, at Holding 2, para. 4.

¹¹⁷ J.Y. Interpretation No. 342 (8 April 1994), Holding, para 1. This decision notes that the Justices may intervene in legislative procedures if there is an ‘apparent violation’ of the constitution significant enough for them to do so. (Lo, note 9 above, p 27).

¹¹⁸ J.Y. Interpretation No. 499, Holding, para 12.

Rights).¹¹⁹ Surprisingly, judicial review enforcement of the covenants was lacking. Given the wide substantive nature of both covenants, their enactment may provide the Legislative Yuan and other non-judicial governmental entities with increased constitutional review authority. In particular, the implementing law notes that,

All levels of governmental institutions and agencies should review laws, regulations, directions and administrative measures within their functions according to the two Covenants. All laws, regulations, directions and administrative measures incompatible to the two Covenants should be amended within two years after the Act enters into force by new laws, law amendments, law abolitions and improved administrative measures.¹²⁰

The deadline for reviews by governmental agencies was December 2011, and a December 2012 report by a local NGO states that while some action by the executive has taken place, ‘the pace of review is clearly lagging behind, for which the executive and the legislature should bear joint responsibility’.¹²¹ The report goes on to single out the Legislative Yuan, explicitly noting its ‘agencies have not been checking for laws or administrative measures that violate the covenants’.¹²² While the Legislative Yuan still does not contain any official procedure by which the two covenants are assessed against pending legislation, remedying this situation is discussed in more detail below.

II. Legislative Yuan Insider Responses

¹¹⁹ Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (22 April 2009), Ministry of Justice, Laws and Regulations Database, *available at* <http://law.moj.gov.tw/eng/LawClass/LawAll.aspx?PCode=I0020028>. See WC Chang, ‘An Isolated Nation with Global-minded Citizens: Bottom-up Transnational Constitutionalism in Taiwan’ (2009) 4 *NTU Law Review* 203 at 211.

¹²⁰ Act to Implement ICCPR & ICESCR, note _ above, at Article 8 (2009).

¹²¹ Covenants Watch, Taiwan Human Rights Report Parallel Report on the Core Document Forming Part of the Reports, 50 (14 December 2012).

¹²² *Ibid*, at 51. However, the judiciary has increasingly referenced human rights laws more after the statutory ratification of the treaties (WC Chang, ‘The Convergence of Constitutions and International Human Rights: Taiwan and South Korea in Comparison’ (2011) 36 *North Carolina Journal of International Law and Commercial Regulation* 593 at 602).

To examine whether Legislative Yuan insiders are actively assessing the constitutionality of the bills they are drafting and voting on, I conducted interviews with Legislative Yuan insiders in the summer and autumn of 2013.¹²³ In all, I talked with 15 individuals:

- 8 Lawmakers
- 6 Legislative Assistants
- 1 Bureau Drafter

It is acknowledged that fifteen individuals is not a representative sample of the Legislative Yuan. However the answers came from a diverse group of individuals with significant institutional experience in Legislative Yuan law-making. Going directly to such insiders provided insight regarding to what extent the legislature assesses the constitutionality of prospective laws, and how legislators and staff were going about this.

In addition to others, I asked two important questions during the interviews:

1. When drafting or proposing legislation, do you think about whether the statute is constitutional?
2. If you do have questions regarding the constitutionality of a statute, who do you ask, and/or who resolves these matters?

The first question allows me to determine if legislators conscientiously assess constitutionality during the drafting process, while the second asks a more substantive question: where do legislators go with constitutional questions.

A. Thinking about constitutionality

Some insiders proclaimed to actively think about constitutionality. For instance, one legislator noted, ‘I have more concern on human rights, democracy, and the constitutional

¹²³ Most of these interviews were conducted in Chinese via an interpreter. Thus, the original answers have been twice translated from Chinese to English by research assistants, and I have assembled the most logical and accurate compilations of both translations. Should the original Chinese translations be desired, these can be proffered.

structure or concept of constitutionalism ... so when I propose a bill, I will specifically make sure these concerns are being observed.’¹²⁴ A couple assistants supported this notion, one adding, ‘we will find constitutional law or the Grand Judges’ interpretation to support our argument’,¹²⁵ while the other noted, ‘Yes, constitutionality is very fundamental, all the assistants and the experts take it into account’.¹²⁶

However what I tended to see more with this question was an assumed constitutionality, where insiders took for granted the constitutional content of their proposals. Surprisingly, one legislator stated, ‘Oh, it always has to be within our constitutional framework, yeah. – It’s not really that controversial. I mean our constitutional principles are quite clear’.¹²⁷ Given the rate at which the Constitutional Court has struck down legislation in recent years,¹²⁸ it was surprising to hear one assistant state that ‘it’s impossible for us to present unconstitutional bills...It’s common sense to know whether it’s constitutional or not while drafting’.¹²⁹ Further, another staffer noted that ‘Taiwan has a written law system and we strictly follow the levels of law, Constitutional Law, and other provisions. If the law or the authorizing law are unconstitutional, it will be considered a joke’.¹³⁰ Given the difficulty of assessing constitutionality in many cases, however, the disparaging of a particular proposal may not necessarily kill it or easily render it illegitimate. Finally, in connection with assumed constitutionality, one assistant stated, ‘yes, we certainly consider this. People working

¹²⁴ Interview with Legislative Yuan Member No.3 (LYM3) in Taipei, Taiwan (July 10, 2013).

¹²⁵ Interview with Legislative Yuan Assistant No.2 (LYASST2) in Taipei, Taiwan (October 22, 2013).

¹²⁶ Interview with Legislative Yuan Assistant No.4 (LYASST4) in Taipei, Taiwan (October 31, 2013).

¹²⁷ Interview with Legislative Yuan Member No.1 (LYM1) in Taipei, Taiwan (July 18, 2013). I believe that many within Taiwan, including academics, lawmakers, public officials, and others would agree that Taiwan’s constitutional principles are not necessarily ‘clear’.

¹²⁸ See IIAS TCC database (note 12 above).

¹²⁹ Interview with Legislative Yuan Assistant No.6 (LYASST6) in Taipei, Taiwan (October 9, 2013).

¹³⁰ Interview with Legislative Yuan Assistant No.3 (LYASST3) in Taipei, Taiwan (October 28, 2013).

here have legal backgrounds’,¹³¹ while a lawmaker noted ‘[d]ue to my background in politics, constitutional law, and administrative law, I have no difficulty concerning the constitutionality of laws’.¹³² Yet having a legal background and actively assessing the constitutionality of legislation are two quite separate things, and one is not necessarily predicated upon the other.

B. Where do offices go with constitutional questions?

Since the initial question focused on how lawmakers perceive themselves as complying with constitutional norms in the legislative and larger legal processes, the second question asked a more structural question in regard to constitutional issues: where legislators (and staff) can go with constitutional questions. A couple legislators noted they would consult colleagues, friends, and other acquaintances. One said ‘I will seek consultations with my friends in legal circles or even colleagues (at the Legislative Yuan). If necessary, we can seek aid from other experts, but we ourselves could make a sufficient argument,’¹³³ while another stated, ‘there is a name list in my office, including professors, lawyers and other consultants. So if we or other legislators in my party find there might be some problem with the law, we will invite familiar consultants to offer opinions or even ask what kind of standpoint we should hold in the first and second reading.’¹³⁴ Thus, consultation in regard to constitutional issues did happen for some legislators. It is important to point out, however, that these consultations are based on the

¹³¹ Interview with Legislative Yuan Assistant No.1 (LYASST1), in Taipei, Taiwan (October 30, 2013).

¹³² Interview with Legislative Yuan Member No.6 (LYM6) in Taipei, Taiwan (July 17, 2013).

¹³³ Interview with LYM3 (note 124 above).

¹³⁴ Interview with Legislative Yuan Member No.5 (LYM5) in Taipei, Taiwan on July 9, 2013.

quality of the individuals those people were asking, and that there is not an ‘official’ office, agency or organisation legislators can consult regarding constitutional questions.

Assistants, however, provided a somewhat different perspective. While one noted their office usually ‘consult[s] law professors,’¹³⁵ others presented a disturbing lack of options in regard to exploring constitutional questions. One said, ‘usually we won’t ask’,¹³⁶ while another peculiarly added, ‘when a law is unconstitutional, it’s actually not too difficult to understand’.¹³⁷ Further, an experienced assistant noted:

Sometimes, legislators do not care about the constitutionality or whether it’s going to pass or not; they care more about media exposure or whether certain groups feel that the legislator is contributing something for them. In our office, we pay much attention to the fundamental constitutional rules as much as possible.¹³⁸

Exhibiting signs of judicial overhang,¹³⁹ a few participants displayed overt nods to Taiwan’s Constitutional Court. One staffer suggested that if one doubts the constitutionality of a bill, ‘he or she needs to petition for interpretation, instead of interpreting it on his or her own’.¹⁴⁰ Another lawmaker stated something similar, noting, ‘if we have a very controversial case that means we have to ask the constitutional court, or [if] we have made the law and find that it’s very controversial, or maybe [we] have different opinions among the society or general public, then we can call for the joint proposal from different legislators and then we can send it to the Constitutional Court’.¹⁴¹ These answers demonstrate the deference that some have for the Constitutional Court and its powerful yet passive role in the law-making process.

¹³⁵ Interview with LYASST4 (note 126 above).

¹³⁶ Interview with LYASST3 (note 130 above).

¹³⁷ Interview with LYASST1 (note 131 above).

¹³⁸ Interview with Legislative Yuan Assistant No.5 (LYASST5) in Taipei, Taiwan (November 12, 2013).

¹³⁹ See Tushnet, *op. cit.*, note 68.

¹⁴⁰ Interview with LYASST3 (note 130 above).

¹⁴¹ Interview with Legislative Yuan Member No.7 (LYM7) in Taipei, Taiwan (November 14 & November 26, 2013).

And yet, among the responses there were also calls for reform. One lawmaker pointedly noted:

It is paramount to check if all the laws conform to the constitution, human rights, and this is especially true after we ratified ICCPR and ICESCR. There should be an organisation to monitor that all the passed law conforms to the standards of constitutions and conventions. However, there is currently no such organisation. We always hope to transform this system.¹⁴²

From the interviewees answers above it is apparent that Legislative Yuan insiders do not have a well-developed sense of constitutional interpretative authority as bills are travelling through the legislative process. Importantly, the legislature lacks any formal mechanisms that may either enhance constitutional scrutiny or spark constitutional debate, and some interviewees displayed overt evidence of judicial overhang. Thus, the following section discusses how the US Congress and Westminster Parliament have attempted to increase constitutional legislative scrutiny and also provides prospects for Legislative Yuan implementation.

III. Proposals for the Legislative Yuan & the Constitutional Court

Below I provide specific recommendations that hopefully increase the Legislative Yuan's interpretative authority, and in doing so increase Taiwan's political constitutionalism. Three of the proposals solely concern the Legislative Yuan, while the final suggestions affect the Constitutional Court.

A. Legislative Yuan proposals

¹⁴² Interview with Legislative Yuan Member No.4 (LYM4) in Taipei, Taiwan (July 18, 2013).

First, the implementation of a legislative or parliamentary counsel that can aid legislators in drafting and scrutinizing legislation should be established. Interviewees revealed that they often get outside help for drafting bills, such as from law professors or from NGOs. Although the legislature is relatively young, it was a bit surprising to find the Legislative Yuan without such an office. Other unicameral legislatures, such as the Scottish Parliament¹⁴³ and Hong Kong Legislative Council¹⁴⁴ are equipped with such offices. Sometimes the Legislative Research Bureau¹⁴⁵ is mentioned as a comparable organisation, but most of my interviewees made it clear that that office focuses on legislative research, and does not officially engage in aiding legislators with their drafting responsibilities.¹⁴⁶ Parliamentary counsel offices are essential to contemporary legislatures: they professionalise the drafting of bills and laws, aid legislators through the drafting and legislative process,¹⁴⁷ and can even advise legislators on some of the constitutional and policy dimensions of their proposals.¹⁴⁸ Usually composed of trained attorneys, the offices provide highly specialised individuals to aid legislators and their staff in the drafting process. Also, I have previously noted that such offices help to keep the focus of statutory text on neutral legal language, rather than incorporating overtly political

¹⁴³ See The Scottish Government, Office of the Scottish Parliamentary Counsel, available at <http://www.scotland.gov.uk/About/People/strategic-board/Finance/OSPC>.

¹⁴⁴ HK Law Drafting Division, Department of Justice, *How Legislation is Made in Hong Kong*, available at http://www.doj.gov.hk/eng/public/pdf/2012/Drafter_booke.PDF

¹⁴⁵ The Chinese version of the website is available at http://www.ly.gov.tw/05_orglaw/law_intro.jsp.

¹⁴⁶ The Legislative Research Bureau (LRB) does fine work, but they are not a legislative drafting office. They are primarily a research office that reports on the effects or potential effects of legislation, akin to the Congressional Budget Office in the United States. Work from the LRB can be found here: http://www.ly.gov.tw/05_orglaw/search/lawSearch.action.

¹⁴⁷ For a description of how the Westminster Parliamentary Counsel operates, see D Greenberg, *Craies on Legislation* (Sweet & Maxwell, London 2012), 5.1.1, pp 225-257.

¹⁴⁸ Daniel Greenberg, *Laying Down The Law: A Discussion of the People, Processes and Problems that Shape Acts of Parliament* (Sweet & Maxwell, London, 2011), pp 19-33; See also Hazell (note 169 above), at 495('in the absence of a higher law by which a sovereign Parliament in bound, the concept of legal policy as interpreted by Parliamentary Counsel is as close as our system has traditionally come to a check on the "constitutionality" of legislation'.)

language.¹⁴⁹ Creating such an office would bring the legislature in line with many other long-established law-making bodies.

Second, for every proposed bill the Legislative Yuan should require some type of statements of compatibility with the ratified ICCPR and ICESCR covenants. These relatively minor adjustments can be easily made to the standing orders of the Yuan, and cost little in terms of implementation. Additionally, incorporating such statements could spark debate and get legislators actively thinking about their proposals in terms of constitutional and human rights issues, which was noticeably lacking in my interview data. Taking this step would also demonstrate to international organisations, such as the United Nations, that Taiwan is taking human rights seriously.

Next, a standing or ad hoc Constitutional Committee should be developed in the Legislative Yuan¹⁵⁰ which can discuss and debate significant constitutional issues that arise in the legislative process in regard to bills and other issues. Composition of the committee should be multi-partisan, in that it would be composed of members of each political party, and no one political party would have majority powers. Thus, minority view would be actively and overtly heard. The committee could operate on the same principles the Yuan currently does for requesting the Constitutional Court to examine an issue: the 1/3 vote principle could be the standard for review.¹⁵¹ Additionally, the committee should not be able to hold legislation back, but merely make recommendations on how it can be improved, in order to enhance constitutional scrutiny and discussion in the legislative stages. Establishing a committee of this magnitude would place the Yuan

¹⁴⁹ (footnote deleted because of identifying information).

¹⁵⁰ There is currently an ad hoc Constitutional Amendment Committee, but that only convenes when a constitutional amendment is put forward.

¹⁵¹ Constitutional Interpretation Procedure Act, Art. 5(iii).

amongst the forefront of legislative bodies that take constitutional scrutiny seriously, and would increase constitutional deliberation in the law-making process. Even the long-established US Congress does not have a comparable committee that tackles constitutional issues in this manner.

A couple important admonitions for any attempts at increasing interpretative authority in the Legislative Yuan: change often arrives slowly, and respect needs to be earned. If one or more of the recommendations taken above are implemented, such changes (especially those of a parliamentary committee), take time to mature and grow into effective constitutional reviewers and guardians of fundamental rights.¹⁵² However, it should not be forgotten that constitutional change is possible and frequently occurs. Just a decade ago in the UK, the Executive used to be known as the branch that protected legal and fundamental rights in the legislative process. Now it is largely Parliament that does so, primarily because of the establishment of the Joint Committee on Human Rights and the Lords Constitution Committee.¹⁵³

B. Constitutional Court appointments and formal acknowledgement of legislative authority

¹⁵² See, Caird (note 4 above), p 4, 9-10, speaking about the evolution of the Lords Constitution Committee.

¹⁵³ R Hazell, 'Who is the guardian of legal values in the legislative process: Parliament of the Executive?' (Aut 2004) *Public Law* 495; See also M Hunt, 'The Joint Committee on Human Rights', in *Parliament and the Law*, (p. 249) noting,

The JCHR and the House of Lords Constitution Committee are integral parts of an attempt to give institutional expression to a more sophisticated form of modern constitutionalism which rejects the old dichotomy between political and legal constitutionalism. The point of departure for this more modern idea of constitutionalism is the acceptance that all branches of the state, the government, Parliament and the courts, have a shared responsibility to uphold the rule of law.

*Very few academic lawyers and even fewer judges have the time, inclination, or perhaps even capacity for political philosophy. But there must be room in every career for ... examining, and examining critically, that ice mass that lies beneath intuition.*¹⁵⁴

Finally, there are the issues of Constitutional Court appointments¹⁵⁵ and formal acknowledgement of Legislative Yuan authority.¹⁵⁶ The second appointment criterion for justices on the Constitutional Court lists nine years of Legislative Yuan membership as one possible avenue of becoming a justice.¹⁵⁷ This provides (relatively) solid footing that experienced members of the legislature, and also the institution itself, possess at least some constitutional interpretative authority.¹⁵⁸ Historically, only one candidate has ascended to the bench based on the section two criteria, and that appointment took place nearly thirty years ago (in 1985).¹⁵⁹ While most contemporary justices are highly

¹⁵⁴ Ronald Dworkin, *Is There Truth in Interpretation: Law, Literature and History*, Speech at the Library of Congress (17 Dec 2009), available at <http://www.youtube.com/watch?v=742JyiqLhuk> (at 1:03:30).

¹⁵⁵ Justices are nominated by the President and confirmed by the Legislative Yuan.

¹⁵⁶ According to Article 4, Paragraph 1, of the Organic Act of the Judicial Yuan, to be eligible for appointment as a Justice of the Constitutional Court, a candidate must:

(1). Have served as a Justice of the Supreme Court for more than ten years with a distinguished record; or

(2). Have served as a Member of the Legislative Yuan for more than nine years with distinguished contributions; or

(3). Have been a professor of a major field of law at a university for more than ten years and have authored publications in a specialized field; or

(4). Have served as a Justice of the International Court, or have had authoritative works published in the fields of public or comparative law; or

(5). Be a person highly reputed in the field of legal research and have political experience.

¹⁵⁷ Organic Act of the Judicial Yuan, Article 4, para 1. Also available on the Constitutional Court website, available at http://www.judicial.gov.tw/constitutionalcourt/en/p01_01_01.asp. Although, it is not clear if this criterion was originally set forth on the draft bill, or if the Legislative Yuan amended the bill to include it in the final version.

¹⁵⁸ I say ‘relatively’ here because I have been unable to discover whether Section 2 was part of the original bill presented to the legislature, or if it was amended into the legislation by lawmakers. However, I have found no evidence to show that it was amended into the legislation by self-serving legislators.

¹⁵⁹ For this I am indebted to Institutum Iurisprudentiae, Academia Sinica Assistant Professor Tzung-Mou Wu. Through independent research he found that only two ex-justices had been legislators: Shih Shang-Kuan 史尚寬 (justice 1958-1967) and Lee Chih-Peng 李志鵬 (1985-1994). Lee appears the only one to earn the nomination through his career of being a legislator. He was elected four times and was in office for 11 years (1972-1983) before his judicial appointment. Additionally, Lee held a full series of law degrees, including a bachelor’s from a Taiwanese college, an LL.M. (South Methodist University) and an SJD or equivalent from an unidentified California law school. He was also a practicing lawyer and an adjunct

esteemed judges, prosecutors or scholars, it seems a bit contrived to have such an important constitutional nod to the legislature so seldom exercised.

There is another, less formative, avenue for seasoned politicians with scholarly records to ascend to the Court. Section five states that those with notable scholarly achievement in legal research and with political experience may also become justices.¹⁶⁰ Nominations under this section have produced seventeen justices since 1985,¹⁶¹ although the political experience for many of these candidates usually amounted to being government officials of some sort, and not democratically elected members of a legislative body. Nevertheless, it would be wise for future candidates with significant scholarly achievement and elected political experience (*i.e.*, Legislative Yuan members, mayors, city council members, etc.), to receive nominations to the Court. This criterion should be more open to those with notable scholarly achievements that, because of an election loss or a fixed term appointment, were not able to serve in the Legislative Yuan for the full 9 years.¹⁶²

Given the importance of the section two and section five appointments articles, two changes need to occur going forward: (1) more nominations to the Constitutional Court should be made from members of the Legislative Yuan, or from those with elected political experience in general. Secondly (2), the Constitutional Court should formally acknowledge the Legislative Yuan also contains some amount, however limited, of constitutional review powers. As noted above, merely having one branch of government

professor in 2 universities. Conversely, Shih was a legislator of the previous regime (the so-called Provisional Constitution for the Period of Political Tutelage), and had not served in the post-1948 parliament. He also held a law degree. *See also* the IAS TCC Database, *supra* note 13.

¹⁶⁰ See nomination criteria above.

¹⁶¹ IAS TCC Database, *supra* note 12. This figure is equal to the nominations from section 1 (17) and also section 3 (17) during the same time period.

¹⁶² Nine years is important because it used to signify three terms of office in the Legislative Yuan. However, the terms are now four years for Legislative Yuan members.

as sole constitutional adjudicators is unhealthy for a fully-functioning democracy.¹⁶³

Upholding the constitution involves multiple branches and actors, and it is the interplay between these entities that determines a country's constitutional foundation. Acknowledging this would help bridge the wide divide between political and legal constitutionalism in Taiwan, and decrease the inherent problems of the countermajoritarian difficulty.

It should also be emphasised that many of the Court's foundational opinions and expansion of judicial review powers occurred before the Legislative Yuan was fully elected. While it may prove more appropriate to constrain and consolidate the powers of other governmental branches during a period of autocratic leadership, it is quite another to continue to do so when the legislature and the president are democratically elected. Continuing with the precedents and doctrine established in the provincial period, without a thorough re-examination of some major opinions, is troubling and unhealthy to democracy; the reality of an elected legislature passing laws through the will of the people should be fully taken into consideration by the Court.

C. Barriers to reform

While at least some reform is necessary in Taiwan, many barriers may prevent it. Firstly, members of the Legislative Yuan may find the above proposals unnecessary. Such are the effects of judicial overhang. Perhaps legislators believe their constitutional review scrutiny already operates at acceptable levels. Or, perhaps they feel that constitutional

¹⁶³ And not even one branch, but one office within one branch: Council of Grand Justices. Lower Taiwanese courts can sometimes hear constitutional challenges, but they do not have the authority to strike down regulations or statutes.

review does not form part of their remit. This may indeed be the case, given the constitutional and statutory provisions that explicitly state the role of the Judicial Yuan in interpreting the constitution.¹⁶⁴

Of course, my recommendations also contain budget and legislative processes constraints. The introduction of a parliamentary counsel would indeed require necessary appropriations, and the introduction of a constitutional committee would require a significant amount of resources. The committee would have to be staffed and worked into the operation of the Legislative Yuan, and the practicalities of the constitutional committee and how those would operate would also have to be taken into consideration. Also, some of the ideas may not structurally fit into the Legislative Yuan. Congress and Westminster are both bicameral, and Taiwan's legislature is unicameral.¹⁶⁵ Thus incorporating a constitution committee may prove overly-burdensome for the law-making body, and could potentially delay legislation for various reasons if the committee is overwhelmed or inadequately staffed.

Finally, barriers may arise because of negative perceptions of Legislative Yuan members. A recent conference held by the Brookings Institution in Washington, D.C., noted that the fist fights among lawmakers negatively impacted foreign perceptions of the legislature,¹⁶⁶ and during the same conference a member of the policy think-tank Taipei Forum said it was an 'open secret' in Taiwan that legislators were 'weak, lazy and

¹⁶⁴ *Op. cit.*, notes 83 and 84.

¹⁶⁵ de Visser notes that bicameral arrangements may give rise to better constitutional review, especially in upper houses, which are usually 'somewhat removed from the hubbub of daily politics and devoting more attention to the constitutional dimension of legislation'. (de Visser (note 20 above), p 25)

¹⁶⁶ Statement by Richard Bush, Taiwan's Legislative Yuan: Oversight or Overreach, Brookings Institution, available at <http://www.brookings.edu/events/2014/06/23-taiwan-legislative-yuan>.

ineffective'.¹⁶⁷ Scholars have even disparaged Taiwanese politicians, calling them 'outlaw legislators'.¹⁶⁸ These negative perceptions could certainly play a role in the potential expansion (or status quo) regarding the constitutional review authority of the Legislative Yuan.

IV. Conclusion

*Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first wrote or spoke them.*¹⁶⁹

Some may read this article and say that Taiwan is a young democracy, still attempting to determine their structure of constitutional governance. Thus, there is little need to make reforms in regard to legislative interpretative authority and political versus legal constitutionalism. I find such arguments obtuse and irrelevant. These types of discussions are essential, especially in young democracies. If they are left for a later period the current overreliance on legal constitutionalism will become even more firmly entrenched, thus diminishing the chances for change at a later date. Further, the changes I advocate in regard to constitutional review are practical and realistic. In fact they are much less

¹⁶⁷ William Lowther, Taipei Forum's Su Chi denounces 'weak, lazy, ineffective' legislature at US forum, TAIPEI TIMES (25 June 2014), available at <http://www.taipeitimes.com/News/taiwan/archives/2014/06/25/2003593627>.

¹⁶⁸ J Martin, 'Legitimate Force in a Particularistic Democracy: Street Police and Outlaw Legislators in the Republic of China on Taiwan' (2013) 38(3) *Law & Social Inquiry* 615. However, Martin was mostly referring to these on the local level.

¹⁶⁹ English Bishop Hoadly's Sermon preached before the King, March 31, 1717, as quoted in Thayer (note 35 above), at 152.

dramatic than ‘abolishing judicial review’¹⁷⁰ or even laying out a ‘case against judicial review’,¹⁷¹ proposed by two very highly respected US constitutional law scholars.

Ultimately, Taiwan must address the pitfalls of the countermajoritarian difficulty and judicial overhang, and it must confront its over-reliance on legal constitutionalism. This is especially apparent if Taiwan continues with the status quo, allowing the Constitutional Court, as wise, just and respected as they may be, to adjudicate the most important issues of the day. At some point a more perfect balance between legal and political constitutionalism must develop, and there is no reason for the Legislative Yuan to hold back on this for maturity’s sake.

¹⁷⁰ M Tushnet, ‘Abolishing Judicial Review’ (2010-2011) 27 *Constitutional Commentary* 581.

¹⁷¹ J Waldron, ‘Core of the Case’ (note 1 above).