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“GHOSTS THAT SLAY”: A CONTEMPORARY LOOK AT  
STATE ADVISORY OPINIONS

I. INTRODUCTION

In the summer of 2004, one issue dominated the Rhode Island political scene: whether or not Harrah’s, the Las Vegas-based gambling conglomerate, would be allowed to build a casino on tribal land in West Warwick.<sup>1</sup> Battle lines were swiftly drawn between industry lobbyists and legislative leaders, who supported sending the question to state voters on the November ballot, and Governor Donald L. Carcieri, who staunchly opposed the plan.<sup>2</sup> After the House and Senate voted to override the governor’s veto,<sup>3</sup> Carcieri vowed to challenge the constitutionality of the proposal in court.<sup>4</sup> Thus, the Rhode Islander who picked up the *Providence Journal* on Friday, August 13 might have believed that the saga had finally come to an end. The lead article began: “The state Supreme Court yesterday, in an advisory opinion, declared unconstitutional both a planned November vote on a West Warwick casino and the legislation establishing the casino.”<sup>5</sup>

In fact, nothing of the sort had happened. Only two justices then sitting on the five-member Court participated in the opinion, *In re Advisory Opinion to the Governor (Casino)*.<sup>6</sup> The justices did not exercise jurisdic-

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<sup>1</sup> See Katherine Gregg, *Casino Foes Fear Effort to Amend the Constitution*, PROVIDENCE J., July 20, 2004, at A1, available at LEXIS, News Library, Prvjnl File.

<sup>2</sup> See Katherine Gregg & Scott Mayerowitz, *Carcieri Vetoes Casino Vote Bills*, PROVIDENCE J., July 2, 2004, at A1, available at LEXIS, News Library, Prvjnl File. Supporters cited the economic benefits of a casino, including thousands of new jobs and boosted tax revenues, while opponents decried the social costs of gambling and warned of an adverse impact on local restaurants and businesses. *Id.*

<sup>3</sup> Scott Mayerowitz, *Casino Vote Still On Track*, PROVIDENCE J., July 24, 2004, at A1, available at LEXIS, News Library, Prvjnl File (discussing the Senate vote); Scott Mayerowitz, *House Trumps Casino Veto*, PROVIDENCE J., July 31, 2004, at A1, available at LEXIS, News Library, Prvjnl File (discussing the House vote).

<sup>4</sup> Mayerowitz, *House Trumps Casino Veto*, *supra* note 3.

<sup>5</sup> Liz Anderson, *Justices Advise Casino Bill Illegal*, PROVIDENCE J., Aug. 13, 2004, at A1, available at LEXIS, News Library, Prvjnl File.

<sup>6</sup> 856 A.2d 320 (R.I. 2004). Chief Justice Frank J. Williams and Justice Paul A. Suttell were the only active members of the court who participated in the opinion. *Id.* at 334. A third signer of the opinion, Joseph R. Weisberger, is a retired Chief Justice. *Id.* The other three active justices—Robert G. Flanders, Jr., Francis X. Flaherty, and Maureen McKenna Goldberg—recused themselves because they or their family members had financial interests in the casino plan. See Katherine Gregg, *Lynch*

tion by certifying an appeal from a lower court ruling. Rather, the opinion was issued pursuant to a constitutional provision requiring “[t]he judges of the supreme court [to] give their written opinion upon any question of law whenever requested by the governor or by either house of the general assembly.”<sup>7</sup> The justices expressly disclaimed any suggestion that they promulgated the opinion as a decision of the court, stating that they were “[s]peaking in our individual capacities as legal experts rather than Supreme Court justices” and that “this opinion is not an exercise of judicial power, it is not binding and it carries no mandate.”<sup>8</sup> Yet this distinction was lost on many, including the governor himself.<sup>9</sup> And when a state superior court judge issued an injunction the following day prohibiting the referendum from appearing on the November ballot,<sup>10</sup> the move was seen as little more than a formality, since the judge’s bench ruling adopted the reasoning and conclusion of the advisory opinion.<sup>11</sup>

Perhaps this confusion is attributable to the fact that in every respect, the adjudication process that led to the advisory opinion resembled any other proceeding before the state’s highest court. The governor (who had initially requested the opinion)<sup>12</sup> and attorney general filed briefs urging the justices to find the enabling law and referendum unconstitutional.<sup>13</sup> Leaders of the two legislative houses took the opposite position.<sup>14</sup> Harrah’s, the Narragansett tribe, and representatives from the state’s existing gambling

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*Sides with Carcieri in Legal Question*, PROVIDENCE J., July 16, 2004, at A1, available at LEXIS, News Library, Prvjnl File.

<sup>7</sup> R.I. CONST. art. X, § 3.

<sup>8</sup> *Advisory Opinion to the Governor (Casino)*, 856 A.2d at 323 (internal quotation marks omitted).

<sup>9</sup> See Press Release of Governor Donald L. Carcieri (Aug. 12, 2004), available at <http://www.gov.state.ri.us/pr.php?ID=295> (last visited March 9, 2005) (on file with the Connecticut Law Review) (“I’m very pleased that the Supreme Court today ruled that the Harrah’s casino bill violates the state constitution.”); cf. C. Dallas Sands, *Government By Judiciary—Advisory Opinions in Alabama*, 4 ALA. L. REV. 1, 15 (1951) (discussing the Alabama press’s inability to distinguish between “holdings” of the court and “opinions” of the justices).

<sup>10</sup> Daniel Barbarisi, *Council Plans To Delete Casino Ballot Question*, PROVIDENCE J., Aug. 18, 2004, at C3, available at LEXIS, News Library, Prvjnl File.

<sup>11</sup> See Liz Anderson, *Casino Vote Is Off Nov. Ballot*, PROVIDENCE J., Aug. 14, 2004, at A1, available at LEXIS, News Library, Prvjnl File (“[Superior Court Judge Daniel A.] Procaccini based his decision, in large part, on what he called a ‘clear, thorough and well-supported’ advisory opinion issued a day earlier by the state Supreme Court.”). Indeed, the governor, attorney general, and secretary of state had filed a request for injunctive relief immediately after the advisory opinion was released. *Id.*

<sup>12</sup> In his formal request for an advisory opinion, Governor Carcieri did not state a position on the legislation’s constitutionality, but did indicate that he was “prepared to submit a brief within ten (10) days . . . and a reply brief within five (5) days to those arguing a negative answer [i.e., that the law is constitutionally valid] to the question presented.” See Letter from Governor Donald L. Carcieri to the Honorable Justices of the Supreme Court of Rhode Island (July 9, 2004), reprinted in Katherine Gregg & Scott Mayerowitz, *Carcieri Seeks Court Opinion on Casino Question*, PROVIDENCE J., July 10, 2004, at A4, available at LEXIS, News Library, Prvjnl File.

<sup>13</sup> *Advisory Opinion to the Governor (Casino)*, 856 A.2d at 323.

<sup>14</sup> *Id.*

facilities also weighed in with amici briefs.<sup>15</sup> The court heard oral argument from lawyers for the governor and for the legislature.<sup>16</sup> And the justices issued an opinion shortly thereafter, concluding that the referendum and its enabling legislation were unconstitutional.<sup>17</sup>

Given the similarities to an actual litigated controversy, why would the governor choose to invoke the advisory opinion mechanism, subjecting himself and the other litigants through a procedural maze? Surely any disposition of the constitutional question by a superior court judge, either friendly or adverse to the governor's position, would wind its way on expedited appeal<sup>18</sup> to the state supreme court, which would undoubtedly have arrived at the same conclusion as the justices had in the advisory opinion.<sup>19</sup> Two reasons are evident. When asked why the governor chose to request an advisory opinion, his spokesman cited expediency: that, faced with the secretary of state's immutable August 19 deadline to finalize the composition of the November ballot, the governor felt that an opinion favorable to his position, even a nonbinding one, would propel a trial court to issue injunctive relief based on the reasoning formulated by the justices.<sup>20</sup> Indeed, that is exactly what happened.<sup>21</sup>

It would not take a cynical observer of state government to appreciate the second reason why the request was made: to exercise raw executive clout.<sup>22</sup> Governor Carcieri was the only person in the state who could, un-

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<sup>15</sup> *Id.* at 323–24.

<sup>16</sup> Katherine Gregg, *Casino: Is It Constitutional?*, PROVIDENCE J., Aug. 7, 2004, at A1, available at LEXIS, News Library, Prvjnl File.

<sup>17</sup> *Advisory Opinion to the Governor (Casino)*, 856 A.2d at 325.

<sup>18</sup> See Casino Act, 2004 R.I. Pub. Laws 594, § 2 (to be codified at R.I. GEN. LAWS § 41-9.1-9(f)), available at <http://www.rilin.state.ri.us/PublicLaws/law04/law04594.htm> (“[A]ny appeal to the Rhode Island Supreme Court shall be heard on an expedited basis; provided, however, that no such suit, action or proceeding shall serve to enjoin . . . the question . . . from being submitted by the Secretary of State to the qualified electors of the state . . . until a final, non-appealable decision has been rendered by a court.”). Recognizing the futility of bringing the same case back to the Supreme Court on appeal, Harrah's decided not to seek to enforce this provision after the superior court granted the injunction. See Anderson, *supra* note 11.

<sup>19</sup> Given that the justices issued their opinion with the assistance of briefs and oral argument from state officials representing both sides of the issue as well as an amicus brief from Harrah's, see *Advisory Opinion to the Governor (Casino)*, 856 A.2d at 323–24, it is unlikely that the factual record underpinning the dispute would have differed materially in a traditional adversarial setting.

<sup>20</sup> Katherine Gregg, *Officials Poised to Act on High Court's Opinion*, PROVIDENCE J., Aug. 6, 2004, at A1, available at LEXIS, News Library, Prvjnl File (quoting the governor's spokesman as saying that such an opinion would “allow an interested party to go to Superior Court with that advisory opinion in hand and stress the urgency of the matter”).

<sup>21</sup> See Anderson, *supra* note 11.

<sup>22</sup> See, e.g., Pascal F. Calogero, Jr., *Advisory Opinions: A Wise Change for Louisiana and Its Judiciary?*, 38 LOY. L. REV. 329, 364 (1992) (noting that courts often feel compelled to answer political questions upon request from an executive); Robert H. Kennedy, *Advisory Opinions: Cautions About Non-Judicial Undertakings*, 23 U. RICH. L. REV. 173, 176 (1988) (arguing that courts sitting in an advisory capacity are “controlled by the executive”); Mel A. Topf, *The Advisory Opinion on Separation*

der the constitution, unilaterally submit a request to the justices.<sup>23</sup> The justices have no constitutional discretion,<sup>24</sup> and relatively little self-imposed discretion,<sup>25</sup> to refuse a request from the governor or legislature. In the case of the casino, the justices acknowledged that since the enforceability of the Casino Act was contingent on voter approval, the governor had no pending constitutional duty with respect to the provisions contained in the voter referendum.<sup>26</sup> As the justices explained, this “procedural flaw” merely made jurisdiction discretionary, rather than mandatory.<sup>27</sup> In their view, the expense and public confusion that would result from a constitutionally-flawed referendum question being submitted to the voting public made the advisory opinion request one of critical importance and thus one that demanded a response.<sup>28</sup>

Given the charged environment under which the casino advisory opinion was requested and issued, one can easily understand why the advisory opinion system generates significant consternation among separation of

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*of Powers: The Uncertain Contours of Advisory Opinion Jurisprudence in Rhode Island*, 5 ROGER WILLIAMS U. L. REV. 385, 413 (2000) (criticizing the “ability of the [Rhode Island] Governor to use the judiciary to supervise the legislature”).

<sup>23</sup> See R.I. CONST. art. X, § 3 (“The judges of the supreme court shall give their written opinion upon any question of law whenever requested by the governor or by either house of the general assembly.”).

<sup>24</sup> See *In Re Advisory Opinion to the Governor (Appointed Counsel)*, 666 A.2d 813, 814 (R.I. 1995) (explaining that the constitutional provision is “mandatory in respect to inquiries that fall within [its] purview”). Of the ten states that permit advisory opinions, Rhode Island is the only one whose enabling language fails to define even vague substantive boundaries for legislative or executive requests. See ALBERT R. ELLINGWOOD, DEPARTMENTAL COÖPERATION IN STATE GOVERNMENT 42 (1918) (stating that because of the absence of the “solemn occasion” provision, there had been no record of a refusal to issue advisory opinions (as of 1918)). For an absolutist view, see Justice Flanders’s minority opinion in *In re Request for Advisory Opinion from the Governor (Warwick Station Project)*, 812 A.2d 789, 791–93 (R.I. 2002).

<sup>25</sup> See, e.g., *In Re Advisory Opinion to the Governor (Rhode Island Ethics Comm’n – Separation of Powers)*, 732 A.2d 55, 59 (R.I. 1999) (finding that, despite “significant procedural deficiencies,” the advisory request contained an issue of great public importance and warranted an answer “in deference to your Excellency’s concern”). But see *Warwick Station Project*, 812 A.2d at 790 (accepting a governor’s request only on the condition that the answer would address a “present constitutional duty awaiting performance by the Chief Executive,” and explaining that the justices will not issue advisory opinions requiring them to exercise fact-finding power); *To the Honorable Senate of the State of Rhode Island and Providence Plantations*, 610 A.2d 131, 131 (R.I. 1992) (explaining that the constitutional obligation to advise the General Assembly exists only when the question concerns the constitutionality of pending legislation).

<sup>26</sup> *In re Advisory Opinion to the Governor (Casino)*, 856 A.2d 320, 324 (R.I. 2004).

<sup>27</sup> *Id.* at 324–25.

<sup>28</sup> See *id.* at 325 (“If we were to sit idly by while an unconstitutional question was submitted to the voters, only to later issue a binding decision declaring the Casino Act and the referendum question void, chaos might well ensue.”); see also Thomas R. Bender, *Rhode Island’s Public Importance Exception for Advisory Opinions: The Unconstitutional Exercise of a Non-Judicial Power*, 10 ROGER WILLIAMS U. L. REV. 123, 155–57 (2004) (criticizing the use of the “public importance” exception in the casino case).

powers advocates,<sup>29</sup> despite substantial disagreement among critics over whether advisory opinions over-strengthen or over-weaken the judiciary.<sup>30</sup> Because the United States Supreme Court renounced the advisory opinion as a tool of federal judges as early as 1793,<sup>31</sup> and has reaffirmed this belief many times in the years since,<sup>32</sup> state courts that continue to issue advisory opinions do so under a presumption that they are disruptive—in Felix Frankfurter’s words, a “grave danger”<sup>33</sup>—to the functioning of government. Moreover, opponents claim that the nonbinding doctrine, one of the central tenets of the advisory system, is all but ignored.<sup>34</sup> Despite the opinions’ reassurances that the legal principles expressed therein are not binding whatsoever in future cases, commentators argue that members of the bar and bench, as well as the press and citizenry, regularly fail to “distinguish between advisory opinions and real cases.”<sup>35</sup> Justice Frankfurter cautioned that the distinction was transparent. “It must be remembered that advisory opinions are not merely advisory opinions. They are ghosts that slay.”<sup>36</sup>

Why, then, is the advisory opinion still put to use? Alternatively, why

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<sup>29</sup> See Kennedy, *supra* note 22, at 194–96 & n.63 (arguing that judges who render advice inappropriately extend their influence onto the domains of other branches of government); Mel A. Topf, *The Jurisprudence of the Advisory Opinion Process in Rhode Island*, 2 ROGER WILLIAMS U. L. REV. 207, 221 (1997) (discussing Minnesota’s and Ohio’s rejection of advisory opinion legislation on the grounds that it interfered with the legislative function). One of the most vociferous opponents of the advisory regime was then-Professor Felix Frankfurter, who warned that by forcing the judiciary to resolve abstract questions, advisory opinions “weaken[] . . . legislative and popular responsibility” by shifting the policymaking burden away from the people’s branch of government. Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1007–08 (1924).

<sup>30</sup> See Calogero, *supra* note 22, at 362–64.

<sup>31</sup> See *Muskrat v. United States*, 219 U.S. 346, 354 (1911); STEWART JAY, *MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES* 1 (1997).

<sup>32</sup> See, e.g., *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998) (explaining that the Court will not proceed to the merits of a question notwithstanding legitimate procedural infirmities, since “such an approach . . . carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers”); *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (calling the ban on advisory opinions the “oldest and most consistent thread in the federal law of justiciability”) (citation and internal quotation marks omitted); *Muskrat*, 219 U.S. at 356 (explaining that the court is powerless outside of the case and controversy provision of Article III); *Gordon v. United States* (1864), *unpublished opinion reported in* 117 U.S. 697, 700 (1886) (Taney, C.J.) (“[The Court’s] jurisdiction and powers and duties being defined in the organic law of the government, and being all strictly judicial, Congress cannot require or authorize the court to exercise any other jurisdiction or power, or perform any other duty.”).

<sup>33</sup> Frankfurter, *supra* note 29, at 1007.

<sup>34</sup> See Mel A. Topf, *State Supreme Court Advisory Opinions as Illegitimate Judicial Review*, 2001 LAW REV. MICH. ST. U. DETROIT C. L. 101, 130–34.

<sup>35</sup> Cynthia R. Farina, *Supreme Judicial Court Advisory Opinions: Two Centuries of Interbranch Dialogue*, in *THE HISTORY OF THE LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT 1692-1992*, 353, at 389 (Russell K. Osgood ed., 1992). Eight of the ten advisory states purport to use the nonbinding doctrine. See Topf, *supra* note 34, at 106 n.21.

<sup>36</sup> Frankfurter, *supra* note 29, at 1008.

do judges continue to issue them when they enjoy wide discretionary power to simply ignore the request?<sup>37</sup> The answer lies in the positive externalities that are ever-present, but largely unheralded. *Advisory Opinion to the Governor (Casino)* provided much-needed finality in a politically charged, time-sensitive public dispute. It is easy to imagine a scenario in which the procedural and legal risks inherent in conventional litigation come to fruition, foreclosing a final disposition before the ballot deadline.<sup>38</sup> Should this have occurred, the cost of moving forward on shaky legal ground would have been substantial. While the status of the ballot question was still in limbo, a Brown University professor predicted that both sides would spend between \$5 and \$6 million on advertising and lobbying in the months leading to the November election, on top of the \$1.3 million already expended through June 2004.<sup>39</sup> If the electorate had approved the referendum, actions taken by Harrah's in reliance on the vote, combined with escalating litigation, would undoubtedly have caused this figure to rise even higher. These costs, of course, take into account only the burden on would-be private litigants. The social cost of constitutionally defective legislation can be just as great, if not greater.<sup>40</sup>

The Rhode Island casino case illustrates both the substantial risks and substantial rewards of litigating public disputes via the state advisory opinion mechanism. This Comment evaluates these costs and benefits with fifteen years of empirical data. It analyzes all 143 responses to requests for advisory opinions handed down by state supreme courts between 1990 and 2004, and concludes that many of the attacks on the advisory process are

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<sup>37</sup> As explained *infra*, some state constitutions provide that jurisdiction over advisory questions is optional. Other state courts rely on constitutional phrases such as "solemn occasion" in imposing jurisdictional limitations based on substantive or procedural criteria. In Rhode Island, where a textual analysis provides little in the way of explicit or implicit discretion, the justices have still found ways to decline advisory opinion requests. *See, e.g., In re Request for Advisory Opinion (Warwick Station Project)*, 812 A.2d 789, 790–91 (R.I. 2002) (declining to answer two questions on account that they required fact-finding, a power the justices lacked, and additionally because they pertained to issues presently litigated in state superior court). *But see id.* at 792 (minority opinion of Flanders, J.) (opining that the advisory opinion clause was mandatory and that the justices had no discretion whatsoever to refuse to answer questions).

<sup>38</sup> For instance, absent direct authority on the merits of the governor's argument, a trial court may have been reluctant to issue a temporary restraining order or preliminary injunction absent a determination by the justices of the state's highest court. While the casino legislation provided for expedited supreme court review, *see supra* note 18, this would not guarantee timely certification or an appealable final judgment. *See, e.g., Rogers v. Rogers*, 201 A.2d 140, 142 (R.I. 1964) (explaining that suits arising in equity are appealable only after a decree has been issued by the trial court).

<sup>39</sup> Scott Mayerowitz, *Ad Spending Dips In June Relating to Casino Debate*, PROVIDENCE J., July 16, 2004, at A13, available at LEXIS, News Library, Prvjnl File.

<sup>40</sup> *See Calogero, supra* note 22, at 356 ("While they are in existence, invalid statutes may both discourage the exercise of lawful rights and encourage misplaced reliance."); Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1934 (2001) ("delaying review leaves . . . disputes to fester, generating a larger circle of disagreement and more costly reliance interests").

unsupported by the contemporary data. It argues instead that the data shows judicious use of the modern advisory opinion has strengthened, not weakened, representative government by preventing both public reliance on facially unconstitutional legislation and governmental expenditure on programs or initiatives likely to face a successful challenge. Part II outlines the historical development of the advisory opinion, discussing the rejection of the doctrine at the federal level and the reasons for adoption of advisory opinion laws by state legislatures and their citizens. It then summarizes existing scholarship on the topic and the major arguments for and against the advisory system. Part III describes modern advisory opinion jurisprudence in the ten states that currently issue advisory opinions,<sup>41</sup> examining the guidelines used in determining whether to accept or reject a request for an advisory opinion and the subject matter of opinions issued by the state courts between 1990 and 2004. Part IV responds specifically to criticisms that such opinions, contrary to their “advisory” status, create law that is in fact binding and operative as precedent in future litigation. It does this by investigating how state courts, and federal courts interpreting the law of the state, have cited advisory opinions in the fifteen-year period. Presenting and generalizing the 359 citations in this sample, the Part then suggests that the majority are nonsubstantive and the cases that do turn dispositively on the legal analysis in an advisory opinion are few in number and well-confined. Part V concludes by suggesting that a tightly controlled, shrewdly implemented advisory opinion system promotes efficiency and accountability in state government without violating the due process rights of individuals or corrupting the independence of the judicial branch.

## II. BACKGROUND

The American advisory opinion, an inheritance from prerevolutionary English practice, has undergone significant transformation and introspection since its unremarkable origin in the Massachusetts constitution of 1780 and bold rejection by the federal Supreme Court thirteen years later. This Part briefly traces the history of the doctrine in the American states and summarizes the academic debate on the topic.

### A. *Historical Development*

#### 1. *English Roots*

Like so many other facets of American law, the story of advisory opin-

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<sup>41</sup> Although Oklahoma’s advisory opinion statute, permitting that state’s governor to require opinions from the judges of the Criminal Court of Appeals on the constitutionality of death sentences, is still on the books, *see* OKLA. STAT. ANN. tit. 22, § 1003 (West 2003), it has not been used since 1948 and for the purposes of this Comment is considered entirely dormant.

ions is intertwined with the development of the common law under the English Crown. Given the political control of the King, and absent a constitutionally independent judiciary, there was no structural reason why the judges of the law courts should not also advise the Crown on legal and political matters.<sup>42</sup> While some of these extrajudicial requests were legitimate, others were thinly veiled power grabs. In 1614, King James I ordered his Attorney General, Francis Bacon, to determine the “feeling of the judges of the King’s Bench” concerning the legality of the Crown’s prosecution of a dissident for treason.<sup>43</sup> The King ordered further that the judges provide opinions separately, without making their views known to their peers on the bench.<sup>44</sup> Of the twelve judges on the King’s Bench, only Lord Coke, then serving as Chief Justice, objected to the sequestered nature of the proceedings as a blatant attempt to influence the outcome of the case.<sup>45</sup> For this transgression the King relieved Coke of his duties.<sup>46</sup> Judges who pleased the Crown fared far better: not only were they permitted to keep their positions on the King’s Bench, a highly lucrative and powerful position in pre-revolutionary England, but they were rewarded with administrative and executive policymaking powers.<sup>47</sup> Nevertheless, growing judicial aversion to the advisory function and the judiciary’s increasing political autonomy led to the cessation of advisory opinions to the Crown in 1760, twenty years before Massachusetts’ constitutional convention authorized advisory opinions to its own chief executive.<sup>48</sup>

While the judges’ executive advice giving was frequently informal and surreptitious, their advisory role to the legislature was public and well-defined. Until the creation of separate Law Lordships in 1873, the House of Lords—in addition to its legislative duties—functioned as an appellate court, reviewing decisions of the law judges.<sup>49</sup> Because nonlawyers were permitted to vote on these rulings, legal advice was critical to an informed decision.<sup>50</sup> Judges almost always accepted this advice. Of 125 cases adjudicated in the House of Lords with the assistance of advisory judges between 1827 and 1899, the House of Lords adopted the recommended outcome of the majority of advisory judges in all but five, and did so unani-

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<sup>42</sup> See JAY, *supra* note 31, at 10–11.

<sup>43</sup> *Id.* at 15.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 16.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 11.

<sup>48</sup> See ELLINGWOOD, *supra* note 24, at 15–17 (noting that Lord Sackville’s case was the last advisory opinion to the executive in England).

<sup>49</sup> JAY, *supra* note 31, at 13; cf. Van Vechten Veeder, *Advisory Opinions of the Judges of England*, 13 HARV. L. REV. 358, 358 (1900) (noting that the establishment of permanent courts of appeal replaced the need for the House of Lords to pose questions to advisory judges).

<sup>50</sup> See JAY, *supra* note 31, at 13.

mously in all but eleven.<sup>51</sup> Some of the most canonical contributions to British and American common law were adjudicated under this system: among them, *Wright v. Tatham*,<sup>52</sup> setting forth the concept of implied assertion hearsay in evidence law; *Cox v. Hickman*,<sup>53</sup> creating the doctrine of constructive partnerships; and *M’Naghten’s Case*,<sup>54</sup> creating the criminal insanity defense.<sup>55</sup>

The respect afforded advisory law judges by the House of Lords was not a two-way street. Their fealty to the Crown only indirectly implicated, advisory judges openly grumbled about their roles. By the eighteenth century, judges had begun to refuse to answer questions pertaining to pending legislation if they felt that litigants might raise the same issues before them in court.<sup>56</sup> In language foreshadowing that of critics of the American advisory system, one judge rendered his opinion in *M’Naghten’s Case* only reluctantly, after recounting the deficiencies in the record before him:

I feel great difficulty in answering the questions put by your lordships on this occasion: first, because they do not appear to arise out of, and are not put with reference to, a particular case, or for a particular purpose, which might explain or limit the generality of their terms, so that full answers ought to be applicable to every possible state of facts not inconsistent with those assumed in the questions; secondly, because I have heard no argument at your lordship’s bar, or elsewhere on the subject of these questions, the want of which I feel the more, the greater are the number and extent of questions which might be raised in argument; and, thirdly, from a fear, of which I cannot divest myself, that as these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the judges may embarrass the administration of justice when they are cited in criminal cases.<sup>57</sup>

By the end of the nineteenth century, the practice of using designated Law Lords as appellate judges—all but ensuring legal proficiency in mat-

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<sup>51</sup> Veeder, *supra* note 49, at 360–62. This high rate of adherence belies the often fractious debates among advisory judges. In fully half of the 125 cases decided with the assistance of advisory judges, there was at least one dissent within the advisory panel. *Id.* at 363–64.

<sup>52</sup> 112 Eng. Rep. 488 (K.B. 1837).

<sup>53</sup> 11 Eng. Rep. 431 (H.L. 1860).

<sup>54</sup> 8 Eng. Rep. 718 (H.L. 1843).

<sup>55</sup> Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1819 & n.517 (1998); Veeder, *supra* note 49, at 359, 364; ELLINGWOOD, *supra* note 24, at 28–29.

<sup>56</sup> JAY, *supra* note 31, at 13.

<sup>57</sup> Veeder, *supra* note 49, at 359.

ters before the bench—made advisory judges superfluous.<sup>58</sup> By this time, the United States and many of its sovereigns had already rejected the British advisory system as structurally incompatible with representative government. Critics of the advisory opinion in the New England states, which had adopted advisory opinions shortly after the Revolution, questioned the continuing utility of the doctrine in light of its obsolescence abroad.<sup>59</sup> But several other states were adopting advisory regimes just as Britain phased hers out. The reasons for this divergence are traced below.

## 2. *Federal Rejection of the Advisory Opinion*

If *Marbury v. Madison*<sup>60</sup> dramatically expanded the power of the judicial branch by asserting its right to nullify unconstitutional legislation, Chief Justice John Jay's August 8, 1793 letter to President George Washington amassed power for the Supreme Court by limiting its jurisdiction over nonadjudicative functions. On behalf of Washington, Secretary of State Thomas Jefferson submitted to each of the Justices a request to appear before the Cabinet and submit to a series of questions of international law and treaty construction pertaining to the government's position of neutrality in the ongoing war between Britain and France.<sup>61</sup> All of these questions—twenty-nine in number—were to be purely hypothetical, with no explicit reference to any specific act alleged to have been committed on the high seas.<sup>62</sup> Three weeks later, the President received a polite but terse reply authored by Jay and signed by all five sitting Justices, seemingly invoking constitutional deference to separation of powers and limited executive authority. The letter stated: "The Lines of Separation drawn by the Constitution between the three Departments of Government—their being in certain Respects checks on each other—and our being Judges of a court in the last Resort—are Considerations which afford strong arguments against the Propriety of our extrajudicially deciding the questions alluded to."<sup>63</sup>

What prompted the Justices' reply? The conventional wisdom is that the early Court participated, as they would in *Marbury*, in shaping its own role under a fledgling and still uninterpreted founding document by expounding a uniquely judicial view of the principle of separation of pow-

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<sup>58</sup> See ELLINGWOOD, *supra* note 24, at 23.

<sup>59</sup> See, e.g., Lucilus A. Emery, *Advisory Opinions from Justices*, 2 ME. L. REV. 1, 5 (1908) (criticizing Maine's advisory opinion clause as "merely a survival of an ancient English prerogative already largely fallen into disuse in the country of its origin").

<sup>60</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>61</sup> JAY, *supra* note 31, at 134–35; Patrick C. McKeever & Billy Dwight Perry, Note, *The Case for An Advisory Function in the Federal Judiciary*, 50 GEO. L.J. 785, 802 (1962).

<sup>62</sup> See JAY, *supra* note 31, at 136 (summarizing the submitted questions).

<sup>63</sup> *Id.* at 179.

ers.<sup>64</sup> That role was expressly nonpolitical: in an adjudicated case, the Court is constrained by the posture of the record. Washington and Jefferson had asked the Court to not only adjudicate, but imagine. The unwillingness of the Justices to act “extrajudicially” defined what is in fact “judicial”—constituting the initiation of a strict case and controversy requirement that dominates Article III jurisprudence to the present day.<sup>65</sup>

Others have suggested that the separation of powers argument is an overly simplistic view of the early Court’s refusal to issue advisory opinions. What may have been seen as fierce independence may just as easily have been an act of executive fealty.<sup>66</sup> More likely, however, the incorrect presumption is the one that holds that the Justices were acting apolitically. The early Court had a substantial and tangible interest in not alienating the other branches of government in the midst of an intense lobbying effort to persuade Congress to eliminate the practice of circuit-riding, which the Justices loathed.<sup>67</sup> Any answer to the questions propounded would anger half of the bitterly divided political leadership and foster accusations of partiality.<sup>68</sup> Nor was there evidence that Chief Justice Jay took an absolutist position on the separation of powers issue; he wanted to limit advice giving, not abandon it fully.<sup>69</sup>

Regardless of whether or not the Justices expected their letter to Washington to be a lasting statement on separation of powers or a mere refusal to become entangled in a particularly contentious issue, the ban on advisory opinions is one of the most settled doctrines in federal jurisprudence.<sup>70</sup> But, as the Court noted in *Flast v. Cohen*, history does not provide a complete explanation for this doctrine.<sup>71</sup> Instead, “[t]he Article III prohibition against advisory opinions reflects the complementary constitutional con-

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<sup>64</sup> See *id.* at 150; J. E. Rhodes, 2d, *Advisory Opinions*, 6 ME. L. REV. 28, 31–32 (1912) (“the authority of the executive department of the Federal Government to impose duties other than judicial on the judicial department was decided in the negative once for all”).

<sup>65</sup> See Phillip M. Kannan, *Advisory Opinions by Federal Courts*, 32 U. RICH. L. REV. 769, 771 (1998) (explaining that advisory opinions and Article III “cases and controversies” are mutually exclusive concepts); Katyal, *supra* note 55, at 1804 (quoting Chief Justice Marshall’s view of the 1793 letter as proof that the Court understood the impropriety of answering political questions).

<sup>66</sup> See Katyal, *supra* note 55, at 1744–45 (noting the Justices’ flowery apology to the President, which concluded with: “your usual prudence, decision, and firmness will surmount every obstacle to the preservation of the rights, peace, and dignity of the United States”).

<sup>67</sup> JAY, *supra* note 31, at 161–62.

<sup>68</sup> See *id.* at 168–69 (discussing the differences in foreign policy views between the Federalists and Republicans and Chief Justice Jay’s ideological alignment with Hamilton and the Federalists).

<sup>69</sup> See Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123, 155–56 (explaining and distinguishing Jay’s effort as governor of New York to extract an advisory opinion from the state courts, which was rebuffed).

<sup>70</sup> See *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (“the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions”) (internal quotation marks omitted).

<sup>71</sup> *Id.*

siderations expressed by the justiciability doctrine.”<sup>72</sup> In order for federal courts to assume jurisdiction, disputes must “confine federal courts to a rule consistent with a system of separated powers and . . . be capable of resolution through the judicial process.”<sup>73</sup> The result of this narrow interpretation of the case and controversy doctrine is the Court’s two-pronged standing doctrine.<sup>74</sup>

### 3. *State Adoption of the Advisory Opinion*

Advisory opinions in the states are a “two-century experiment in what many have said to be impossible: a constitutional commitment to *both* a government of separated powers *and* a judiciary that renders advisory opinions to the legislature and executive.”<sup>75</sup> This experiment was initiated by the Massachusetts constitutional convention of 1780—an historic proceeding, led by John Adams, that signaled the early struggle to strike a balance between the traditions of English common law and the ideals that drove American independence.<sup>76</sup> The advisory opinion itself was a direct adoption of the English practice.<sup>77</sup> The conventioners had translated “king” to “governor” and “House of Lords” to “senate,” and then for parity’s sake extended the power to the House of Representatives.<sup>78</sup>

Interpreting these facts, Professor Albert R. Ellingwood suggests that the adoption of the advisory opinion was merely the result of an absence of a convincing argument *against* the advisory opinion.<sup>79</sup> Adams and the other drafters were not ignorant of Baron de Montesquieu’s Enlighten-

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<sup>72</sup> *Id.* at 97.

<sup>73</sup> *Id.*

<sup>74</sup> Constitutional standing ensures that at least somebody’s concrete rights will be vindicated before others can benefit from reliance on a judicially expressed rule of law. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) (explaining that only Congress or the President can respond to generalized grievances absent a concrete injury). The prudential standing doctrine is an additional discretionary means by which the Court can rid itself of jurisdiction when the questions involved tangentially concern private disputes but in the end are so abstract and undefined that they are more appropriately handled by a policymaking arm of government. For a recent example, see *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301, 2312 (2004), in which the Court held that a divorced noncustodial father had no standing to sue for a constitutional injury alleged to have been suffered by his daughter, because state courts deserve deference in their determinations on what constitutes a familial relationship.

<sup>75</sup> Farina, *supra* note 35, at 357.

<sup>76</sup> See ELLINGWOOD, *supra* note 24, at 32–33 (discussing Adams’s role in the convention); Russell K. Osgood, *The Supreme Judicial Court 1692-1992: An Overview*, in *THE HISTORY OF THE LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT 1692-1992*, 9, at 16–17 (Russell K. Osgood ed., 1992) (discussing Massachusetts’s incorporation of preexisting colonial common law). For an overview of the adoption and early development of the advisory opinion in Massachusetts, see generally Mel A. Topf, *The Origins and Early History of Supreme Judicial Court Advisory Opinions in Massachusetts*, 7 *MASS. LEGAL HIST.* 21 (2001).

<sup>77</sup> ELLINGWOOD, *supra* note 24, at 33; Topf, *supra* note 76, at 25.

<sup>78</sup> See JAMES BRADLEY THAYER, *Advisory Opinions*, in *LEGAL ESSAYS* 42, 45–46 (1927).

<sup>79</sup> See ELLINGWOOD, *supra* note 24, at 32–33.

ment-era theories on separation of powers, and Adams himself had been a strong advocate of an independent judiciary.<sup>80</sup> Nonetheless, Ellingwood concludes that the appropriation of the English advisory opinion did not threaten these ideals. Rather, “the framers of the clause aimed merely at securing coordination between the government, and promoting a uniformity of interpretation that would make for greater justice and efficiency.”<sup>81</sup> The early opinions were rendered in this cooperative spirit, and were not viewed by judges and court reporters as a threat to the adjudicative process or, indeed, a matter of much importance at all.<sup>82</sup> This informality is surprising, given that Massachusetts’s advisory doctrine is one of the broadest of all the states, providing that “[e]ach branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions.”<sup>83</sup>

As three other New England states traded in their colonial charters for constitutions between 1784 and 1842, they liberally borrowed, in letter or in spirit, from Massachusetts.<sup>84</sup> Because Massachusetts had used the doctrine so sparingly in the first several decades of its existence, the provision was appropriated in these states without much controversy or debate.<sup>85</sup> Nonetheless, by the time Maine’s constitution was adopted in 1820, Massachusetts had already begun discussing repealing the doctrine.<sup>86</sup> This effort was brought about in two subsequent constitutional conventions, in 1820 and 1853 respectively. In the first of these, Justice Joseph Story, who chaired the convention’s judiciary committee, advocated eliminating the advisory doctrine because of the special dangers of political influence on

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<sup>80</sup> *Id.* at 33 & n.133.

<sup>81</sup> *Id.* at 33.

<sup>82</sup> *See id.* at 34 (discussing the infrequency of cases between 1780 and 1830); Topf, *supra* note 76, at 32.

<sup>83</sup> MASS. CONST. pt. II, ch. III, art. II. The Executive Council has not requested an advisory opinion since 1978. *See* Opinion of the Justices to the Council, 372 N.E.2d 759 (Mass. 1978). Before the 1960s, the governor technically had to get approval from the council before submitting advisory opinions, although this rule was infrequently enforced. Farina, *supra* note 35, at 364. The subsequent constitutional amendment changed the words “governor and council” to “governor or council” to legitimize this practice. *Id.* at 365. Note that New Hampshire’s constitution still reflects the original wording of Massachusetts’s clause. *See* N.H. CONST. pt. II, art. 74.

<sup>84</sup> *See* ME. CONST. art. VI, § 3; N.H. CONST. pt. II, art. 74; R.I. CONST. art. X, § 3; ELLINGWOOD, *supra* note 24, at 39–43 (discussing the adoption of the clause by New Hampshire, Maine, and Rhode Island); THAYER, *supra* note 78, at 44 (explaining that New Hampshire’s original constitution of 1776 did not contain such a provision).

<sup>85</sup> *See, e.g.*, THAYER, *supra* note 78, at 45 (concluding that despite the absence of the “solemn occasion” clause in Rhode Island’s constitution, its otherwise “close similarity” implies that it was adopted from that of Massachusetts); Comment, *The Validity of the Restrictions on the Modern Advisory Opinion*, 29 ME. L. REV. 305, 312 (1978) (explaining that Maine adopted the advisory opinion upon its independence from Massachusetts in 1820).

<sup>86</sup> ELLINGWOOD, *supra* note 24, at 40.

the court, arguing that the legislature and governor would manipulate the system to force the justices into issuing unpopular opinions.<sup>87</sup> He also cited the deprivation of individual rights caused by nonadjudicative proceedings.<sup>88</sup> Despite the unanimous recommendation of the committee, the voters defeated this amendment because it was tied with a more radical provision authorizing without-cause removal of judges.<sup>89</sup> The force behind the 1853 effort was the state bar, which again emphasized the importance of protecting “private rights.”<sup>90</sup> But this argument lacked the public attention of the earlier effort, and the amendment was narrowly defeated.<sup>91</sup>

The next states to add constitutional advisory opinion doctrines were Missouri (1865), Florida (1868), Colorado (1886), and South Dakota (1889).<sup>92</sup> Geographically and politically distant from New England, these adoptions carried little historical perspective, and, it is surmised, little practical justification.<sup>93</sup> The failure of the Missouri advisory opinion is a case in point. Uneasy with the concept of extra-judicial advice, state judges quickly balked at the scope of the doctrine and aggressively imposed restrictions on its use, and by 1875, the advisory opinion clause had been removed from the state constitution.<sup>94</sup> The other three states in this group fared better. South Dakota<sup>95</sup> and Florida<sup>96</sup> vested the power to request an advisory opinion only with the executive branch, which served to stem the tide of opinion requests.<sup>97</sup> Colorado’s clause<sup>98</sup> was enacted ten years after the creation of its original constitution, in order to respond to frequent legislative confusion over its interpretation.<sup>99</sup> Michigan, whose advisory opinion clause dates to 1963, is the twentieth-century outlier.<sup>100</sup>

#### 4. *Statutory and Common Law Advisory Opinion Doctrines*

Six states—Alabama, Delaware, Kentucky, Minnesota, Oklahoma, and Vermont—have enacted statutes authorizing advisory opinions. State

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<sup>87</sup> *Id.* at 35; *see also* Topf, *supra* note 76, at 32–40 (discussing Story’s role in the convention of 1820 and his fervent opposition to the advisory opinion doctrine).

<sup>88</sup> ELLINGWOOD, *supra* note 24, at 35.

<sup>89</sup> *Id.* at 36.

<sup>90</sup> *Id.* at 37.

<sup>91</sup> *See id.* at 38.

<sup>92</sup> *Id.* at 258–59.

<sup>93</sup> *See id.* at 43 (“An adequate conception of the origin, history and purpose of extra-judicial consultation was lacking and the deficiency foredoomed failure.”).

<sup>94</sup> *Id.* at 46; *see* Topf, *supra* note 34, at 122–125.

<sup>95</sup> S.D. CONST. art. V, § 5.

<sup>96</sup> FLA. CONST. art. IV, § 1(c).

<sup>97</sup> ELLINGWOOD, *supra* note 24, at 46, 48, 54.

<sup>98</sup> COLO. CONST. art. VI, § 3.

<sup>99</sup> ELLINGWOOD, *supra* note 24, at 48–49.

<sup>100</sup> MICH. CONST. art. III, § 8.

courts in Kentucky, Minnesota, and Vermont have declared these statutes unconstitutional on separation of powers grounds.<sup>101</sup> Alabama's,<sup>102</sup> Delaware's,<sup>103</sup> and Oklahoma's,<sup>104</sup> however, remain on the books, and the justices of the Alabama Supreme Court have been the most prolific producers of advisory opinions in the past century.<sup>105</sup> The supreme courts of these states have harmonized their respective laws with the rule concerning separation of powers. Both courts determined that because opinions are issued by the justices, and not the court, they are extrajudicial and do not affect the independence of the judicial branch.<sup>106</sup>

In Oklahoma and five other states—Connecticut, Nebraska, New York, North Carolina, and Pennsylvania—courts flirted with, but eventually abandoned, advisory roles that were not otherwise delineated in the state constitution or statutory scheme.<sup>107</sup> Informal advisory opinions, in the form of judicial dicta or friendly or nonadversarial adjudications, are still issued from time to time.<sup>108</sup>

### 5. *Modern Struggles With the Advisory Doctrine*

In states that use the advisory opinion, the topic continues to be included in discussions of potential constitutional reforms. The effort at Rhode Island's 1986 constitutional convention to remove the clause was led by several of the justices themselves, who cited the lack of adversarial argument and the absence of a factual background as reasons why they did not view the obligation favorably.<sup>109</sup> The amendment, grouped with three other proposals, was rejected by the voters.<sup>110</sup>

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<sup>101</sup> *In re* Constitutionality of House Bill No. 222, 90 S.W.2d 692, 693 (Ky. 1936); *In re* Senate, 10 Gil. 56, 58–59 (Minn. 1865); *In re* Opinion of the Justices, 64 A.2d 169, 172 (Vt. 1949); *see also* Topf, *supra* note 29, at 213. Professor Topf lists Ohio as one of these states, but the case he cites refers to a one-time joint resolution instructing the attorney general to query the justices, and not a permanent legislative enactment. *See* State v. Baughman, 38 Ohio St. 455, 456–57 (1882); Topf, *supra* note 29, at 213 n.37.

<sup>102</sup> ALA. CODE § 12-2-10 to -12 (1995).

<sup>103</sup> 10 DEL. CODE ANN. § 141(a) (Michie 1999).

<sup>104</sup> OKLA. STAT. ANN. tit. 22, § 1003 (West 2003); *see also supra* note 41.

<sup>105</sup> Since 1923, the justices have published 344 responses to advisory opinion requests. Between 1990 and 2004, the justices published 36 responses to requests for advisory opinions, by far the most of any advisory state during the time period considered in this Comment.

<sup>106</sup> *In re* Opinions of the Justices, *in re* Amend. to Sec. 93 of the Const., No. 1, 96 So. 487, 491 (Ala. 1923); *In re* Opinions of the Justices, 88 A.2d 128, 136 (Del. 1952). In Oklahoma, where the advisory doctrine is limited to death penalty cases, the advisory opinion statute has not been challenged. Topf, *supra* note 29, at 221 n.92.

<sup>107</sup> *See* Topf, *supra* note 29, at 213 & n.38. A discussion of North Carolina's unique circumstances appears *infra*.

<sup>108</sup> *See, e.g.,* Hershkoff, *supra* note 40, at 1846 (discussing the Minnesota Supreme Court's offering "comment and analysis" in a case in which the court admitted it had no jurisdiction).

<sup>109</sup> Topf, *supra* note 29, at 224 n.113, 225 n.117, 230.

<sup>110</sup> *Id.* at 209 n.12.

The North Carolina Supreme Court shut down its common law advisory system in 1985, after over two hundred years of infrequent use.<sup>111</sup> The court had exercised its authority in uncharted waters: as interpreters of a common law doctrine, it was bound only by the state's separation of powers clause. The court had unfettered authority to modify or destroy the doctrine, or place demands on those who would use it—a position which was reaffirmed by the justices' statement that advisory opinions are issued not pursuant to any constitutional authority, but merely "as a matter of courtesy, and out of respect to a coordinate branch of the government."<sup>112</sup> It chose to accept requests sparingly and only in emergency situations.<sup>113</sup> Over time, even this narrow jurisdiction eroded, and beginning in 1985, the justices began to categorically issue refusals to render advisory opinions.<sup>114</sup> Since then, two gubernatorial attempts to persuade the justices to change their minds have been met with letters, unreported in the state or regional reporters, explaining that the justices viewed the advisory task with "disfavor."<sup>115</sup> In one of these, the Chief Justice failed to understand why an opinion from the supreme court was necessary, stating that he was "prepared . . . to assign especially a superior court judge, unaffected by the challenged statute, to hear the matter in the first instance" on an expedited schedule that would satisfy the governor's time restraints.<sup>116</sup>

On the heels of North Carolina's abandonment of the advisory doctrine, the chief justice of the Louisiana Supreme Court, Pascal F. Calogero, Jr., published an introspective evaluation of whether his state should adopt an advisory opinion doctrine, ultimately concluding that it would be "unnecessary and . . . unwise."<sup>117</sup> Nonetheless, the conclusion was "a closer one than had been expected at the beginning of [the author's] study."<sup>118</sup> Calogero was particularly impressed by studies showing that advisory opinions resolved constitutional questions years faster than litigated cases, and noted that the opinions were useful as guidance to prospective litigants.<sup>119</sup>

Calogero's recommendation against adoption of the advisory opinion doctrine was fourfold. First, the advisory opinion, an important companion to evolving and often contradictory case law and common law constitu-

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<sup>111</sup> See Margaret M. Bledsoe, Comment, *The Advisory Opinion in North Carolina: 1947 to 1991*, 70 N.C. L. REV. 1853, 1854 (1992) (describing twenty-two opinions issued between 1776 and 1985).

<sup>112</sup> *In re Advisory Opinion*, 335 S.E.2d 890, 891 (N.C. 1985) (internal quotation marks omitted).

<sup>113</sup> See Advisory Opinion *in re* Time of Election to Fill Vacancy in Office of Assoc. Justice of the Supreme Court of N.C., 61 S.E.2d 529, 532 (N.C. 1950) (minority opinion of Barnhill, J.).

<sup>114</sup> See Bledsoe, *supra* note 111, at 1854.

<sup>115</sup> *Id.* at 1879–83.

<sup>116</sup> *Id.* at 1879.

<sup>117</sup> Calogero, *supra* note 22, at 385.

<sup>118</sup> *Id.* at 381.

<sup>119</sup> *Id.* at 355, 381.

tional interpretation in Britain and the New England states, was inapposite to Louisiana's civil law tradition.<sup>120</sup> There, the judge's role is "passive," and judicial interpretation of statutes is "rarely required" due to the self-evident meaning of legislative enactments and the low level of reliance on judicial precedent.<sup>121</sup> Second, Calogero felt that Louisiana's tradition of electing, rather than appointing, judges magnified the problems inherent in issuing advisory opinions in political disputes.<sup>122</sup> Third, Calogero worried about the added workload of the justices, who, absent the assistance of adversarial counsel, would have to invest more time into researching the law and developing a legal analysis.<sup>123</sup> Finally, Calogero noted that Louisiana already employed three measures designed to expedite supreme court review of constitutional questions: direct appeal from the trial court to the supreme court, declaratory judgment actions reviewable in the supreme court on an interlocutory basis, and mechanisms to "facilitate a complete or partial bypass of the district court and/or the court of appeal."<sup>124</sup> In the third category, the court has "plenary, unfettered . . . discretion" to remove a case at any stage from the trial court in order to hear constitutional questions as matters of first impression.<sup>125</sup> The court can grant expedited review after minimal trial court proceedings, and allows "friendly" proceedings and other actions that would not pass muster in federal court or those of many states.<sup>126</sup> However, the court still must refuse cases that do not present justiciable controversies, and it explicitly rejects the notion of an advisory opinion.<sup>127</sup> Nonetheless, Calogero felt that, to the extent that important questions are afforded an expedited review by the supreme court, these alternative avenues "operate in a fashion similar to advisory jurisdiction."<sup>128</sup>

In contrast to the antipathy toward the advisory doctrine shown by judges in other states, Calogero's fresh look at the benefits and drawbacks of the institution reveals that, tailored as necessary, advisory opinions can bring tangible benefits to the workings of state government in a common

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<sup>120</sup> *Id.* at 382.

<sup>121</sup> *Id.* at 382–84.

<sup>122</sup> *Id.* at 384. Of the ten advisory states, only Alabama's and Michigan's supreme court judges are elected. See AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2004), available at <http://www.ajs.org/js/JudicialSelectionCharts.pdf> (last accessed Apr. 23, 2005) (on file with the Connecticut Law Review).

<sup>123</sup> Calogero, *supra* note 22, at 384.

<sup>124</sup> *Id.* at 374–75.

<sup>125</sup> *Id.* at 377 (quoting *State Bond Comm'n v. All Taxpayers, Property Owners, & Citizens*, 510 So. 2d 662, 663 (La. 1987)).

<sup>126</sup> See *id.* at 377–79 (citing cases).

<sup>127</sup> *Id.* at 380.

<sup>128</sup> *Id.* at 382.

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law jurisdiction. These arguments are outlined below.

B. *The Academic Debate*

1. *Arguments in Favor of Advisory Opinions*

Proponents of advisory opinions focus on the practical and empirical, rather than the theoretical, underpinnings of the doctrine.<sup>129</sup> While acknowledging the apparent disharmony between the advisory opinion system and traditional separation of powers theory, proponents argue that its use in intragovernmental disputes and other intricate constitutional questions can be a boon to the efficiency of the judicial process.

a. *Efficiency and Expediency*

Constitutional determinations made by legislatures and executives carry risks of both inaccuracy and futility.<sup>130</sup> The legislature that bears uncertainty as to the constitutionality of its enactments may delay or weaken them so as to avoid the political embarrassment or financial cost of a determination of unconstitutionality.<sup>131</sup> The executive that worries about the constitutionality of a statute that he is required to enforce might require access to an informed opinion before he proposes a line-item budget to the legislature.<sup>132</sup> “Why should it be necessary,” asked Albert Ellingwood in his volume on advisory opinions, “for these groups to be unenlightened by the wisdom of the chosen judicial servants of the state, until some individual is willing to devote enough time and money to bring the matter up in connection with a particular set of facts?”<sup>133</sup>

The delay inherent in constitutional adjudication is obvious especially in jurisdictions that enforce rigid justiciability requirements on would-be litigants. In federal courts, for instance, the wait for a proper litigant can be frustrating; meanwhile, the constitutional error persists through enforcement and subsequent legislation.<sup>134</sup> State adjudications often fare no better. A study published in 1949 showed that the average requesting authority waited only 29.8 days to receive an advisory opinion, while litigants in the same states waited seven and a half years from the date of passage to

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<sup>129</sup> See Topf, *supra* note 29, at 217.

<sup>130</sup> *Advisory Opinions on Constitutional Questions*, 8 CONST. REV. 231, 232 (1924).

<sup>131</sup> See ELLINGWOOD, *supra* note 24, at 253 (explaining that advisory opinions in connection with pending legislation are “designed to improve the form of bills, to make for perspicuity, consistency and satisfactory technic, to reduce the possibility of enacting statutes that will have to be declared null and void”).

<sup>132</sup> See Bledsoe, *supra* note 111, at 1890.

<sup>133</sup> ELLINGWOOD, *supra* note 24, at 253.

<sup>134</sup> See Calogero, *supra* note 22, at 356 (noting that the affirmative action issue decided in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) had been raised before the Supreme Court four years earlier but was dismissed as moot at the time).

obtain a determination of the constitutionality of the challenged law.<sup>135</sup>

Recognizing that all forms of “anticipatory adjudication” are prone to legal error, Professor William Landes and Judge Richard Posner have constructed economic models of the risks and benefits associated with future-looking judicial functions—declaratory judgments, applications of *res judicata*, punishments for unfulfilled “intent” or “preparatory” crimes, and advisory opinions.<sup>136</sup> With regard to the latter, they hypothesize that “the benefit of an advisory opinion lies in preventing the government from acting when that is the correct outcome, while the cost lies in sometimes telling the government that it cannot act when it should.”<sup>137</sup>

In order to determine where the cost-benefit analysis breaks in favor of keeping the doctrine, Landes and Posner attempt to identify characteristics of jurisdictions where the benefits are most significant and the costs are lowest. For instance, advisory opinions are more likely to be beneficial when the volume of litigation encountered by courts is not prohibitive.<sup>138</sup> Landes and Posner suggest that federal courts, which are already overtaxed, could not reasonably adopt an advisory function without outsourcing this task to administrative courts or newly created Article III courts.<sup>139</sup> While they do not suggest that state courts are not similarly overworked, they imply that the state judiciary is less resistant to institutional change (i.e. adding new courts or administrative layers) than is the federal government.<sup>140</sup> They also predict that the costs of legal error are lowest in states where the fewest barriers exist to amend the constitution.<sup>141</sup> For example, as of 2001 no less than 700 amendments had been appended to Alabama’s 1901 constitution, making that state’s amendment process a critical component of state government.<sup>142</sup> As a consequence, it would seem relatively simple for legislators or voters to reject particularly egregious errors in advisory opinions without forcing the justices to reverse themselves.<sup>143</sup> Conversely, since the federal constitution is extremely difficult to change, and the United States Supreme Court is reluctant to explicitly overrule prior precedent, the resistance to advisory opinions by federal courts sug-

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<sup>135</sup> Oliver P. Field, *The Advisory Opinion—An Analysis*, 24 IND. L.J. 203, 207 (1949).

<sup>136</sup> William M. Landes & Richard A. Posner, *The Economics of Anticipatory Adjudication*, 23 J. LEGAL STUD. 683, 698–713 (1994).

<sup>137</sup> *Id.* at 711.

<sup>138</sup> *See id.* at 712.

<sup>139</sup> *Id.*

<sup>140</sup> *See id.* at 712 & n.45 (explaining that the federal judiciary is “one of the nation’s largest and busiest,” and noting that the courts of large states such as California, New York, and Texas do not issue advisory opinions).

<sup>141</sup> *Id.* at 710.

<sup>142</sup> Mark Sabel, *The Role of Stare Decisis in Construing the Alabama Constitution of 1901*, 53 ALA. L. REV. 273, 276 (2001).

<sup>143</sup> For a particularly troublesome example of such a reversal, see *infra* Part IV.B.4.a.

gests a risk-averse approach to legal error in the advisory setting.<sup>144</sup>

b. Public Reliance

Proponents of advisory opinions subscribe to the notion that state supreme court judges are the most appropriate officials in state government to render advisory opinions. This is so for two reasons. First, the judges are well-respected as eminent legal authorities, and their advice is highly valued in of itself.<sup>145</sup> More importantly, however, the opinion gives the requesting authority and the public a certain degree of predictability as to how those judges might decide, or at least frame, the issue in subsequent litigation. This view necessarily grates against the concern that advisory opinions should not be treated as binding precedent.<sup>146</sup> In their own defense, the Delaware justices pointedly tried to balance the benefits of public reliance with the risks of compromising the nonbinding doctrine:

We have emphasized that opinions given by the Justices “administratively” under the Statute are non-adjudicative expressions of personal points of view, but this is not to say that such opinions are the same as those given to the Governor by other lawyers. They are not. Such opinions are different and useful, and, properly understood, they are authoritative for one reason: the persons giving them are the members of the highest Court of this State and, in effect, are what one would expect the Justices to say if the issue had been presented to them in litigation . . .

‘As has been said, an advisory opinion of the kind required by our statute is not a judicial act, and such persuasiveness as it has rests solely in any weight that may attach to it as emanating from the individuals constituting the State’s highest judicial officers.’

In short, that is the reason why opinions given under § 141 are commonly regarded as authoritative, and that is why they are relied upon by the Governor and the public.<sup>147</sup>

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<sup>144</sup> Landes & Posner, *supra* note 136, at 710. As of 2000, the Supreme Court has overruled a prior case in whole or in part on 219 occasions. CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION 2245–56 (1996); CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, 2000 SUPPLEMENT 171 (2000).

<sup>145</sup> See Rhodes, *supra* note 64, at 34 (“An opinion may possess particular merit because of the high standard of character and the ability of the judge who wrote it.”).

<sup>146</sup> See *infra* Part IV.A.

<sup>147</sup> Opinion of the Justices, 413 A.2d 1245, 1248 (Del. 1980) (internal citation omitted) (quoting *In re Opinions of the Justices*, 88 A.2d 128, 136 (Del. 1952)).

This compromise gives the justices ultimate flexibility. If they decide to adopt a certain view in subsequent litigation, they can justify that adoption by appealing to the persuasiveness of the earlier opinion. If they decide to abandon that view, they can dismiss the earlier opinion as nonbinding dicta.<sup>148</sup> The flexibility of this approach is one of “[t]he most obvious advantages of advice giving . . . . Advice in judicial decisions acts as a compromise—such language does not have the binding force of a holding yet provides some guidance and predictability for the future while simultaneously undermining some of the reliance interests that would mandate future application of stare decisis.”<sup>149</sup> Treading carefully, the justices can effectively communicate their preferred degree of reliance to those who might use the advisory opinion as a sword or shield in court.

### c. Inter-Branch Dialogue and Remedial Legislation

In many respects, the advisory opinion process is an ongoing conversation between two branches of government: the requesting authority outlines the situation, explains the constitutional issue involved, and delineates the question; the justices respond by clarifying the question, establishing jurisdiction, and providing an answer. In many cases, however, the advisory opinion is merely an intermediate step in this larger conversation. Often, the dispute alluded to in the advisory opinion request is “effectively remand[ed] . . . back to the other branches” for further disposition.<sup>150</sup> The requesting authority has the choice to accept the opinion and act in conformance, reject the opinion and act contrary to the judges’ advice, or modify the proposed action and resubmit this correction to the judges for further input.<sup>151</sup> This process of continuing dialogue can temper the disruption caused by negative judicial review.<sup>152</sup>

In some cases, the conversation is started well before the request is launched. When the legislature enacts laws designed to remedy defects previously identified by the court, in either an adjudicative or advisory setting, the advisory opinion is a useful and efficient mechanism by which the legislature or executive can test the conformity of the new legislation with the prior doctrine. For example, when the Massachusetts Supreme

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<sup>148</sup> Katyal, *supra* note 55, at 1714.

<sup>149</sup> *Id.*

<sup>150</sup> Hershkoff, *supra* note 40, at 1851.

<sup>151</sup> See, e.g., *Town of Cedar Bluff v. Citizens Caring for Children*, No. 1030785, 2004 WL 3017000, at \*1 (Ala. Dec. 30, 2004) (explaining that the legislature expressed disagreement with an advisory opinion and enacted the rejected legislation anyway); Farina, *supra* note 35, at 386, 388 (showing that a fraction of advisory opinions in Massachusetts prompted amendments and follow-up requests for opinions, while in the vast majority of cases, the legislature shelved the bill or tried to correct the infirmity when the justices advised that it would be unconstitutional).

<sup>152</sup> Cf. Katyal, *supra* note 55, at 1794 (discussing the Supreme Court’s attempt, in *New York v. United States*, 505 U.S. 144 (1992), to provide remedial advice to Congress).

Judicial Court handed down its highly-publicized decision in *Goodridge v. Department of Public Health*,<sup>153</sup> mandating that the state legislature act to allow gay and lesbian couples to obtain marriage certificates, the advisory opinion was an expedient route by which the legislature could test whether or not its response conformed to *Goodridge*.<sup>154</sup> The advisory opinion is useful under such circumstances because it enables the requesting authority to balance its need to eliminate the constitutional violation with its desire to adhere as closely as possible to the original policy.<sup>155</sup>

d. Nonadversarial and Intragovernmental Disputes

Many legal disputes are adequately handled by private citizens, but some important issues are essentially beyond the legal or practical scope of many state standing doctrines. While, for instance, taxpayers have standing to litigate most state expenditures, the rules on general citizen standing vary from state to state; some venture out into more liberal territory while others adhere strictly to the same Article III limitations imposed on federal courts.<sup>156</sup> Still, even in states whose courts provide the ordinary citizen with the ability to prosecute public disputes, there is nothing to suggest that this will happen automatically. Citizen plaintiffs in public disputes are not acting in their economic self-interest; they seek to vindicate shared rights in addition to personal political and moral interests.<sup>157</sup> And because these suits are economically irrational, they do not occur with regularity.<sup>158</sup> Finally, because the most intricate disputes are likely of interest only to those who wield power—or who would like to assume power—over the affected governmental institution, taxpayer plaintiffs are unlikely to find the moral

<sup>153</sup> 798 N.E.2d 941 (Mass. 2003).

<sup>154</sup> Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004); *see also* discussion *infra* notes 317–321. Arguably, the legislature was encouraged to make the post-*Goodridge* advisory opinion request, because the *Goodridge* court had demanded that an acceptable remedy be enacted within 180 days of the decision. *Goodridge*, 798 N.E.2d at 970.

<sup>155</sup> For example, if the Massachusetts legislature had not had the option to submit its remedial legislation to the justices, they would likely have not bothered to create a compromise bill, eliminating gay marriage but allowing gay civil unions, in fear that the remedial process (and the public controversy) would be extended through protracted litigation over the new bill. The advisory process enabled the legislature to at least test this admittedly dubiously constitutional compromise in the courts without suffering the consequences of additional private litigation. In the absence of the advisory opinion option, it would have been extremely unlikely that the legislature would have attempted to enact any legislation other than that expressly mandated by *Goodridge*. Additionally, the added layer of review allowed the justices to better refine *Goodridge* and assist future litigants in applying it toward new situations. For other examples, see *infra* text accompanying notes 322–326 (remedial legislation allowing employees to be excused from work for a holiday arising from a sincerely held religious belief); *infra* text accompanying notes 310–316 (property tax scheme designed to alleviate funding inequalities in New Hampshire public schools).

<sup>156</sup> Hershkoff, *supra* note 40, at 1838, 1853–54.

<sup>157</sup> *Id.* at 1854.

<sup>158</sup> *See id.* at 1932–33 (stating that despite open access to courts, many plaintiffs will be psychologically and financially constrained from going forward with their grievances).

incentive to vindicate what is likely a very small, if any, economic deprivation. Thus, many disputes will continue to remain within the walls of state government, and many of those that are litigated will be litigated only by government officials and absent private plaintiffs. Consequently, shifting from the adjudicative to the advisory process does not materially increase the risk of legal error.<sup>159</sup>

## 2. Arguments Against Advisory Opinions

Opponents of advisory opinions attack the regime on two general grounds. First, they argue that the process assigns judicial functions to the other branches, and legislative and executive functions to the judiciary, corrupting well-established separation of powers doctrines in the states and diluting the adjudicative process. Second, they argue that advisory opinions affect the due process rights of individuals by ignoring specific factual scenarios and binding future litigants to outcomes based on preliminary pre-fabricated review.<sup>160</sup>

### a. Separation of Powers

The very notion of one branch of government acting in an advisory capacity to another branch raises serious concerns about the independence of the advisor. In jurisdictions that allow the legislature or executive to “require” rather than “request” opinions, this subservience becomes self-evident as justices are legally unable to refuse an advisory question falling within the prescribed constitutional or statutory boundaries.<sup>161</sup> Some supreme courts in states where the provision is mandatory have become bitterly divided over the question of whether the justices can, and should, issue pseudodiscretionary refusals by making ad hoc determinations of what constitutes a “solemn occasion” suitable for review.<sup>162</sup> As a textual

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<sup>159</sup> Landes & Posner, *supra* note 136, at 711–12.

<sup>160</sup> The question of whether advisory opinions bind litigants in future cases is discussed in depth *infra* Part IV.

<sup>161</sup> See Kennedy, *supra* note 22, at 195–96 (stating that justices may become subservient to the requesting branch). Only three states, Alabama, Florida, and Michigan, have completely discretionary advisory provisions; the rest “require” the justices to respond. See Topf, *supra* note 34, at 114 n.64.

<sup>162</sup> This disagreement is most pronounced in Maine, where three of the seven justices dissented from a 2004 opinion in which the constitutionality of a citizen initiative was brought before the justices. Opinion of the Justices, 850 A.2d 1145, 1153 (Me. 2004) (opinion of Clifford, Rudman, and Alexander, JJ.). The majority view continues to be that the justices have absolutely no discretion to refuse questions constituting “solemn occasions,” and that the requesting authority is granted broad deference in determining whether or not a solemn occasion exists:

In the past, a majority of justices found that a solemn occasion existed when the House had a question about the constitutionality of an initiated bill that had not yet gone to the electorate. There may be policy reasons in favor of amending the constitution to limit the use of advisory opinions from the justices when the questions involve an initiative, but because such amendment has not been enacted, the policy reasons do not allow us to decline to give our opinions. . . .

matter, advisory opinion clauses are “narrow exception[s] to the fundamental principle of separation of powers”—a principle which is itself explicit in many state constitutions.<sup>163</sup> In the event of a conflict between the narrow advisory clause and the broad scope of the separation of powers doctrine, the whale should generally swallow the minnow.<sup>164</sup> Yet the relationship between the two doctrines is more intertwined than a simple balancing act suggests. The United States Supreme Court has stated that “the rule against advisory opinions *implements* the separation of powers prescribed by the Constitution.”<sup>165</sup> State courts create and allude to bans on advisory opinions in response to perceived threats on intrusion by one branch in the affairs of another.<sup>166</sup> In advisory states, these seemingly polar concepts coexist uneasily.<sup>167</sup>

Under the separation of powers view, the judiciary is often seen as a mere pawn in power disputes between opposing factions in the legislative and executive branches.<sup>168</sup> When a governor inquires about the constitutionality of pending legislation, the subsequent advisory opinion allows the executive to exert control over the lawmaking process by “employ[ing] the judiciary to supervise the legislative process.”<sup>169</sup> Ironically, many advisory opinions themselves concern the topic of separation of powers, a fact which emphasizes the critical need for an independent judiciary. For example, an executive who is concerned about the expanding power of the legislature may enlist the supreme court to enforce the interests of the ex-

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The members of the Maine Senate and the House of Representatives have told us that they need our opinion in order to undertake their responsibilities. We take them at their word that an opinion on the constitutionality of the initiated bill by the justices would assist and inform the Senate and House in their deliberations.

*Id.* at 1148 (internal citation omitted).

<sup>163</sup> *Id.* at 1153 (opinion of Clifford, Rudman, and Alexander, JJ.). Until 2004, one of the advisory opinion states, Rhode Island, was an outlier in this respect. See discussion *infra* note 293 and accompanying text.

<sup>164</sup> See *In re Opinion of the Justices*, 56 N.H. 574, 577 (1875) (“The somewhat exceptional provision found in our constitution, that the governor and council may, upon important questions of law and upon solemn occasions, require the opinions of the justices of the superior court, makes no difference as to the application of [separation of powers] principles.”); Topf, *supra* note 34, at 122 (explaining that both due process and separation of powers trumps the duty to advise).

<sup>165</sup> *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (emphasis added).

<sup>166</sup> See, e.g., *Yancy v. Shatzer*, 97 P.3d 1161, 1168–71 (Or. 2004) (en banc) (using the rule against advisory opinions to justify the adoption of a rule eliminating appellate jurisdiction over moot questions); *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (explaining that Texas has adopted the ban on advisory opinions because such opinions are the function of the executive branch).

<sup>167</sup> See Topf, *supra* note 29, at 222 (describing the Rhode Island justices’ view that the advisory clause is in “obvious repugnance” to the separation of powers principle).

<sup>168</sup> See *Kennedy*, *supra* note 22, at 195 (discussing the effect of advisory opinions on the “balanced structure of government”).

<sup>169</sup> *Id.*

ecutive against competing interests of the legislature.<sup>170</sup>

The separation of powers argument also runs in the opposite direction in that the judiciary's preliminary review of legislative and executive actions carries the risk of its own embracing of legislative and executive functions. With respect to lawmaking, Justice Frankfurter argued that the practice deprived the legislature of its "creative function."<sup>171</sup> In his view, the notion of submitting unenacted bills for judicial review destroys the traditional deference given by the courts to legislative acts.<sup>172</sup> Because the proposed legislation will only satisfy the courts if it falls into a preconceived pigeonhole of constitutionality based on judicial review of prior enactments, the boldness is lost and the result is a dulled, cautious bill that tries too hard to be constitutional.<sup>173</sup>

#### b. Politicization of the Judicial Function

The Rhode Island casino example illustrates the concern over the propriety of courts issuing advisory opinions on topics with political overtones.<sup>174</sup> There, although the question implicated only the lottery clause of the state constitution, the opinion had the effect of displacing voters from a question that they had been empowered to decide, one that the court admitted was an issue of substantial public interest.<sup>175</sup> Such concerns, however, are not unique to advisory opinions; litigated cases can and do frequently affect political interests and spawn accusations of partisanship in the deciding court.<sup>176</sup> Advisory opinions on intra-governmental disputes, it is argued, contribute to the politicization of the judiciary because they almost always resolve the question of who among two or more government actors controls a policymaking decision.<sup>177</sup> The fact that the justices are "in-

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<sup>170</sup> See Topf, *supra* note 22, at 406 (discussing a 1999 advisory opinion on the powers of the Rhode Island ethics commission).

<sup>171</sup> Frankfurter, *supra* note 29, at 1005.

<sup>172</sup> *Id.* at 1003.

<sup>173</sup> See *id.* at 1004 (critiquing the assumption that "constitutionality is a fixed quantity").

<sup>174</sup> See, e.g., Bender, *supra* note 28, at 158, 162 (positing that important public disputes are "virtually always political" and that the Rhode Island justices "voluntarily inject themselves into a highly political contest" by exercising the public importance exception, as was done in the casino case).

<sup>175</sup> The Rhode Island justices acknowledged this, but stated a "strong preference for resolving election issues before the voters have spoken" that "applies . . . to controversial and socially important questions concerning a casino operation in this state." *In re* Advisory Opinion to the Governor (Casino), 856 A.2d 320, 327 (R.I. 2004).

<sup>176</sup> The obvious example is *Bush v. Gore*, 531 U.S. 98 (2000), which decided a presidential election. Justice Breyer, recalling judicial involvement in the disputed Hayes/Tilden election of 1876, worried that the Court's interference in the Florida recount would "embroil[] Members of the Court in partisan conflict, thereby undermining respect for the judicial process." *Id.* at 156–57 (Breyer, J., dissenting). Nonetheless, it is important to separate the concept of a nonjusticiable political question, see generally *Baker v. Carr*, 369 U.S. 186, 208–32 (discussing examples), from a question which happens to impact politics but is nonetheless predicated on a legitimate constitutional question.

<sup>177</sup> Kennedy, *supra* note 22, at 197.

vited,” rather than “forced,” to participate through the posture of an appeal from a final judgment contributes to the perception that the judiciary is taking a proactively administrative as well as an adjudicative role in the proceedings.<sup>178</sup> This is a lose-lose situation: regardless of the outcome, and “[h]owever diligent and sincere their efforts to give correct answers, they will give offence. . . . The submission of every such question is fraught with danger to the dignity of the Court and the reputation of the Justices for judicial integrity and impartiality.”<sup>179</sup>

c. Abstraction of Legal Questions and Inadequate Factual Context

Because advisory opinions are anticipatory rather than reactive, they are often rendered in a factual vacuum.<sup>180</sup> Opponents of advisory opinions claim that legal questions decided in the abstract carry the risk not only of legal error, but irrelevance. Justice Frankfurter warned sternly that attempts to “formulate [controversies] in terms of sterile legal questions [are] bound to result in sterile conclusions unrelated to actualities.”<sup>181</sup> So fundamental is the need for a rich factual record in judicial disposition of constitutional questions, he continued, that “failure scrupulously and persistently to observe these commonplaces jeopardizes the traditional American constitutional system more than all the loose talk about ‘usurpation.’”<sup>182</sup> Frankfurter’s warnings are tepidly heeded by some advisory courts, in boilerplate disclaimers that serve to dispel their own confidence in the opinions they have rendered,<sup>183</sup> or to excuse the decision not to render one at all.<sup>184</sup> Judges, however, are aware of the possibility that bad law will arise out of “sterilized and mutilated issues.”<sup>185</sup> In response, they have de-

<sup>178</sup> *See id.* Of course, many state supreme courts and the United States Supreme Court have the ability to control their adjudicative docket by issuing writs of certification and certiorari.

<sup>179</sup> Emery, *supra* note 59, at 3.

<sup>180</sup> *See* Topf, *supra* note 34, at 110 (criticizing the fact that justices often advise without receiving briefs and hearing argument).

<sup>181</sup> Frankfurter, *supra* note 29, at 1003.

<sup>182</sup> *Id.*

<sup>183</sup> *See, e.g.,* Opinion of the Justices, 673 A.2d 693, 695 (Me. 1996) (advisory opinions are “rendered within a tight time schedule and without the benefit of full factual development, oral argument, or full briefing by all interested parties”); Opinion of the Justices to the Senate, 668 N.E.2d 738, 746 (Mass. 1996) (“Unlike an opinion on the merits of a litigated case, the questions the Justices answer in responding to a request for an advisory opinion are almost invariably abstract, focussed [sic] neither by the circumstances of a particular case, nor by the adversary presentation of parties with a concrete interest, nor by the shaping influence of earlier proceedings and factfinding.”).

<sup>184</sup> *See, e.g., In re* Opinion of the Justices (Appointment of the Chief Justice of the Supreme Court), 842 A.2d 816, 818 (N.H. 2003) (“Part II, Article 74 of the State Constitution empowers the justices of the supreme court to render advisory opinions, outside the context of concrete, fully-developed factual situations and without the benefit of adversary legal presentations . . .”).

<sup>185</sup> Frankfurter, *supra* note 29, at 1006; *see also* Topf, *supra* note 29, at 225 n.117 (reporting that the Rhode Island justices complained at the 1986 constitutional convention that the absence of facts

mandated that advisory opinion requests both tie the issue to concrete events and specifically reference the constitutional clauses thought to be affected.<sup>186</sup> But opponents say that this still does not affect the procedural infirmities inherent in nonadjudicative disputes, since even the most straightforward review of facial validity requires access to real facts against which constitutional law principles can be tested.<sup>187</sup>

A related concern is that questions brought by state actors in an effort to obtain a declaratory statement of legal rights, rather than vindicate an injury, are often “friendly” proceedings that lack the adversarial nature of a legitimate dispute.<sup>188</sup> As a result, the justices may be persuaded toward a predetermined outcome rather than allowed to independently reach a decision after weighing the impassioned advocacy of either side of a dispute. This is said to increase the risk of legal error.<sup>189</sup>

### III. STATE ADVISORY REGIMES, 1990-2004

This Part presents an overview of jurisdictional limitations by state courts on acceptance of advisory opinions, and an analysis of responses to advisory opinion requests issued in the ten advisory states during the fifteen-year period 1990 through 2004. The data presented is summarized below. Table 1 and Table 2 show that only a bare majority of advisory opinion requests are fully answered. Indeed, taking into account that most requests contain multiple questions, almost four out of every ten questions posed to the justices are never answered.<sup>190</sup> Table 3 shows the number of requests issued by the governor and the legislature respectively, as well as the number of requests affecting the statutory or constitutional authority of a particular branch of government.

*Table 1. Responses to Advisory Opinion Requests, 1990-2004*

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made it “difficult for justices to give these matters the deliberation they deserve”); McKeever & Perry, *supra* note 61, at 814 (stating that state judges have refused to answer questions presented abstractly).

<sup>186</sup> See, e.g., Opinion of the Justices No. 360, 692 So. 2d 106, 106–07 (Ala. 1997) (rejecting a question for not referencing a specific constitutional provision); Opinion of the Justices, 169 A.2d 634, 636 (N.H. 1961) (stating justices should not have to “speculate on whether other constitutional issues might be raised”).

<sup>187</sup> See Kennedy, *supra* note 22, at 189–90 (“The kind of facts used in advisory opinions about the facial validity of newly enacted legislation are no more than projections of reality, statements of anticipated truth. Analysis of such data is a kind of functional discourse; the product of the analysis is a weak linguistic construction rather than a natural reality.”).

<sup>188</sup> Hershkoff, *supra* note 40, at 1857.

<sup>189</sup> See Topf, *supra* note 29, at 224–25.

<sup>190</sup> Declined questions fall into two broad categories. One, the justices will consider a question moot when it is contingent on a certain answer to an earlier question and the justices have not reached that answer. Two, the justices may decline the question (or the entire request) when it fails to meet constitutional, statutory, or court-imposed criteria for issuance of an advisory opinion. See text *infra*.

State	Total Responses Issued	Answered Fully	Answered Partially	Declined Completely
Alabama	36	17	8	11
Colorado	5	3	2	0
Delaware	6	4	1	1
Florida	8	8	0	0
Maine	11	7	2	2
Massachusetts	27	14	9	4
Michigan	4	0	0	4
New Hampshire	25	8	16	1
Rhode Island	16	11	2	3
South Dakota	5	4	0	1
TOTAL	143	76 (53%)	40 (28%)	27 (19%)

Table 2. Number of Questions Addressed in Advisory Opinion Responses, 1990-2004

State	Total Questions Presented	Questions Answered	Questions Declined	Average Number of Questions Per Request
Alabama	80	44	36	2.2
Colorado	18	14	4	3.6
Delaware	8	6	2	1.3
Florida	12	12	0	1.5
Maine	36	25	11	3.3
Massachusetts	102	52	50	3.8
Michigan	10	0	10	2.5
New Hampshire	79	53	26	3.2
Rhode Island	32	21	11	2.0
South Dakota	8	7	1	1.8
TOTAL	385	234 (61%)	151 (39%)	2.7

Table 3. Advisory Opinion Responses by Source and Proposed Action, 1990-2004

State	Responses Issued	Source of Request			Action Contemplated In Request <sup>191</sup>		
		Governor	Legislature	Both	Executive	Legislative	Other
Alabama	36	5	31	0	1	35	0
Colorado	5	2	3	0	1	4	0
Delaware	6	4	2	0	1	1	4
Florida	8	8	0	0	8	0	0
Maine	11	5	5	1	3	8	0
Massachusetts	27	3	24	0	5	20	2
Michigan	4	2	2	0	0	4	0
New Hampshire	25	1	24	0	0	25	0
Rhode Island	16	10	6	0	6	7	3

<sup>191</sup> An advisory opinion request concerns a “legislative” action if it addresses the constitutionality of legislation. “Executive” actions are those delegated to the governor or executive branch—i.e., appointing state officials or calling a special session of the legislature. “Other” includes regulatory and administrative functions as well as requests unrelated to any official action.

State	Responses Issued	Source of Request			Action Contemplated In Request <sup>191</sup>		
		Governor	Legislature	Both	Executive	Legislative	Other
South Dakota	5	5	0	0	3	1	1
TOTAL	143	45 (31%)	97 (68%)	1 (1%)	28 (20%)	105 (73%)	10 (7%)

Table 4 charts the number of responses to advisory opinion requests over time. It is especially striking that the years 2000 through 2004 saw only one-sixth of the total responses issued during the fifteen-year period, indicating a sharp drop-off in advisory opinion activity during this time. Paradoxically, despite the recent liberalization of the multi-factor jurisdictional hurdles introduced during the late nineteenth century, fewer advisory opinions are being requested, and accordingly, fewer are being issued. A study conducted in 1974 of advisory opinion requests in the fourteen-year period 1960 through 1973 illustrates this point: the justices of eight states received 314 requests during this period, and fully declined only 36.<sup>192</sup> Those requests contained 723 questions, of which 607 were answered.<sup>193</sup> Thus, in a span of thirty years, the acceptance rate of advisory opinion requests has fallen from 89% to 81%, the answer rate of advisory questions has fallen from 84% to 61%, and the number of requests submitted to the justices has plummeted by more than half.<sup>194</sup>

Table 4. *Advisory Opinion Responses by Year, 1990-2004*

State	Total Responses			Requests Fully or Partially Answered			Requests Completely Declined		
	1990-94	1995-99	2000-04	1990-94	1995-99	2000-04	1990-94	1995-99	2000-04
Alabama	10	20	6	6	15	4	4	5	2
Colorado	2	2	1	2	2	1	0	0	0
Delaware	3	2	1	2	2	1	1	0	0
Florida	4	3	1	4	3	1	0	0	0
Maine	3	6	2	3	4	2	0	2	0
Massachusetts	10	12	5	8	11	4	2	1	1
Michigan	1	1	2	0	0	0	1	1	2
New Hampshire	14	8	3	14	8	2	0	0	1
Rhode Island	10	4	2	8	4	1	2	0	1
South Dakota	1	2	2	0	2	2	1	0	0
TOTAL	58	60	25	47	51	18	11	9	7

<sup>192</sup> Charles M. Carberry, Comment, *The State Advisory Opinion in Perspective*, 44 FORDHAM L. REV. 81, 101 (1975). The analysis did not include Colorado due to the small number of opinions issued in that state, *id.* at 85 n.18, nor did it include Michigan.

<sup>193</sup> *Id.* at 102.

<sup>194</sup> In contrast to the data presented in Table 4, Carberry's study showed that the frequency of requests by the legislature or executive in the states of Alabama, Maine, Massachusetts, New Hampshire, and Rhode Island actually increased between 1960 and 1973. *Id.* at 92 & n.21.

### A. *Explicit Jurisdictional Restraints*

Early explications of state advisory opinion doctrines created complex networks of procedural and substantive barriers to jurisdiction. In Colorado, the court placed no less than nine categories of restrictions on the court's ability to issue advisory opinions—most soon after the advisory clause was added to the constitution in the nineteenth century.<sup>195</sup> After more than a century of deferential treatment of legislative requests, the Rhode Island justices, beginning in the 1930s, imposed a number of specific limitations that led to increased refusals of advisory questions.<sup>196</sup> In Alabama, decisions to accept or refuse advisory opinion requests are largely based on a four-prong test promulgated by the justices a mere four months after the advisory opinion statute was enacted in 1923.<sup>197</sup>

While discretionary jurisdiction and the public importance exception play major roles in shaping state courts' decisions to accept or reject advisory opinion requests, advisory justices still rely heavily on rule-based regimes. The most common of these are detailed below.

#### 1. *Pending Constitutional Duty*

Most advisory states require that opinions be rendered in response to a present or imminent constitutional duty on the part of the requesting body. Strictly defined, the requirement ensures that two key goals of the advisory system are fulfilled. First, the request is grounded in an actual, rather than theoretical, issue of law and fact. Second, judicial advice concretely assists the requesting body in its duties; there is little danger that an executive or legislature not otherwise empowered to control a particular policy debate will use the advisory system to suppress the work of a rival branch.

Florida, which allows only its governor to submit advisory opinion requests,<sup>198</sup> represents the logical extreme. By 1887, the justices of the Flor-

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<sup>195</sup> See generally William H. Robinson, Jr., *Limitations Upon Legislative Inquiries Under Colorado Advisory Opinion Clause*, 4 ROCKY MTN. L. REV. 237 (1932) (discussing the nine restrictions on advisory jurisdiction).

<sup>196</sup> See Topf, *supra* note 29, at 236–40.

<sup>197</sup> *In Re Opinions of the Justices, In Re Amend. to Sec. 93 of the Const.*, No. 1, 96 So. 487 (Ala. 1923). The justices reached the following conclusions:

(a) That the act does not at all contemplate the advice or the advisory opinions of the Justices upon any matter relating to the wisdom, desirability, or policy of prospective legislative or executive action; (b) that the merely advisory opinions contemplated are those of the individual Justices, not of the Supreme Court of Alabama in its judicial capacity; (c) that specific inquiries, within the intent of the act, must involve or concern concrete, important constitutional questions upon matters or subjects of a general public nature, as distinguished from questions involved in the ascertainment or declaration of private right or interest; (d) and that responses to questions within the purview of the act are designed to be advisory, consultative only, not concluding or binding the Governor or the House or Houses propounding inquiries or the Justices responding thereto.

*Id.* at 489.

<sup>198</sup> See FLA. CONST. art. IV, § 1(c).

ida Supreme Court had declared that they need only address requests related to the gubernatorial function of executing and enforcing existing laws.<sup>199</sup> Thus, the governor could not ask the justices to render an opinion on endorsed legislation awaiting his signature, nor could he request advice on matters he planned to submit to the legislature for consideration.<sup>200</sup> Later, the justices stated that only constitutional, rather than statutory, executive powers are appropriately reviewed in the advisory context.<sup>201</sup> The modern trend indicates that this strict approach is unworkable. Today, requests to determine the constitutionality of a statute are generally frowned upon, but are accommodated when “the legislative enactment severely impacts the fiscal stability of the state” which “necessarily affects the chief executive’s fiscal duties under the Florida Constitution.”<sup>202</sup> This exception has been criticized for its propensity to open the floodgates to executive inquiries on any statutory enactment.<sup>203</sup>

In the New England states, the present constitutional duty requirement is a core component of the solemn occasion doctrine. The Massachusetts justices require that, with respect to the legislature, the action proposed must not be so far in the future as to be merely hypothetical and still substantially unplanned,<sup>204</sup> and must not relate to laws already enacted or bills no longer pending, over which the legislature has no control.<sup>205</sup> With respect to the executive, the “power or authority” of the governor must be affected before the justices will accept jurisdiction.<sup>206</sup> In Maine, the governor cannot request advice on the constitutionality of legislation unless he is proposing a bill or is about to sign a bill into law—the gubernatorial scope does not include periods of preliminary planning or legislative debate.<sup>207</sup> The Rhode Island justices do not allow the governor to propound questions relating to legislative authority, and vice versa. Once a bill has passed the

<sup>199</sup> *In re Exec. Communication Concerning Powers of Legislature*, 6 So. 925, 925 (Fla. 1887).

<sup>200</sup> See Terrance A. Smiljanich, Comment, *Advisory Opinions in Florida: An Experiment in Intergovernmental Cooperation*, 24 U. FLA. L. REV. 328, 329–30 & n.20 (1971).

<sup>201</sup> *In re Opinion of Supreme Court*, 22 So. 681, 681 (Fla. 1897).

<sup>202</sup> *In re Advisory Opinion to the Governor*, 509 So. 2d 292, 301 (Fla. 1987).

<sup>203</sup> Kennedy, *supra* note 22, at 180–81.

<sup>204</sup> See Answer of the Justices to the Senate, 780 N.E.2d 444, 446 (Mass. 2002) (complaining that “the questions are based on a series of hypothetical intervening events that may or may not occur”).

<sup>205</sup> See Opinions of the Justices to the House of Representatives, 696 N.E.2d 502, 505 (Mass. 1998) (explaining that the question of whether the city of Boston could provide domestic partner benefits to city employees was not a solemn occasion because the legislature had no authority to take action in response to the opinion); Answer of the Justices to the House of Representatives, 570 N.E.2d 991, 992 (Mass. 1991) (finding no solemn occasion when a bill is no longer pending before the legislature).

<sup>206</sup> Answer of the Justices to the Acting Governor, 686 N.E.2d 444, 446–47 (Mass. 1997). This includes questions relating to bills that have been passed by the legislature and are awaiting the governor’s signature. See, e.g., Opinions of the Justices to the Governor, 556 N.E.2d 1002, 1002 (Mass. 1990).

<sup>207</sup> See Opinion of the Justices, 709 A.2d 1183, 1186 (Me. 1997).

legislature, it is the executive's to enforce, and at this point only the executive can request an opinion from the justices.<sup>208</sup>

A minority of state courts decline to distinguish between executive and legislative requests, recognizing that the executive has a critical constitutional role in the legislative process—namely, the signing of bills into law. The South Dakota Supreme Court is generally willing to entertain gubernatorial requests on the constitutionality of pending legislation, under the reasoning that it impacts the governor's constitutional responsibility to decide whether to sign or veto a particular bill.<sup>209</sup> The court will also acknowledge when a pending executive action is particularly urgent, and weigh the importance of the request against the perception of impropriety given the tangential nature of the request to a specific executive responsibility.<sup>210</sup>

## 2. *Matters Affecting Public Rights*

Justices in most advisory states prefer to exercise jurisdiction over questions that affect public, rather than private, rights. In addition to its influence on the exercise of flexible jurisdiction through the use of the public importance exception, discussed below, the public rights rule takes shape in two forms. At its broadest, justices may require that a question affect important public rights before it can be considered. This view was adopted by the Colorado Supreme Court in the 1880s in creating the doctrine of *publici juris*, a concept borrowed from the discretionary grant of a writ of mandamus.<sup>211</sup> The *publici juris* doctrine states that advisory opinion questions must not only be public in nature (i.e. not affecting private interests,) but publicly important—and in a nod toward prevailing judicial resentment of the advisory opinion doctrine, the court stated that “even questions of this character should rarely be thus presented or considered.”<sup>212</sup> But by 1931, the court appeared to relax this requirement by stating that the constitution authorizes advisory opinions when “a bill involving a constitu-

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<sup>208</sup> See Opinion to the House of Representatives, 208 A.2d 126, 128 (R.I. 1965) (“opinions sought on questions of the constitutionality of legislation that has been enacted by the general assembly . . . are available only to the executive branch”).

<sup>209</sup> See *In re Janklow*, 530 N.W.2d 367, 369 (S.D. 1995) (explaining that “we have answered questions regarding the constitutionality of legislation before the Governor for his approval or disapproval, and did not reject such a request on the basis that the matter was not final”).

<sup>210</sup> See *id.* at 369–70 (“[T]his matter has a degree of urgency . . . our advice at this time will permit the Governor the opportunity to veto a bill which may be constitutionally infirm.”).

<sup>211</sup> *In re Senate Resolution Relating to Senate Bill No. 65*, 21 P. 478, 478 (Colo. 1889); see also *Wheeler v. N. Colo. Irrigation Co.*, 11 P. 103, 107 (Colo. 1886) (rejecting a litigant's effort to use the writ of mandamus as a mechanism to bypass the trial court and launch an original proceeding in the state supreme court, holding that original jurisdiction could be invoked only in matters involving exceptional public importance, not private expediency).

<sup>212</sup> *Senate Bill No. 65*, 21 P. at 479.

tional *or* publici juris question is before the body.”<sup>213</sup> In Alabama, the public rights doctrine is most often manifested in the justices’ refusal to answer questions regarding local rather than statewide legislation, a policy adopted in 1959<sup>214</sup> and used several times since to decline jurisdiction.<sup>215</sup>

In other states, the requirement is manifested in rules that bar consideration of questions involved in litigation. As early as 1816, the New Hampshire Supreme Court explained the discord between private litigation and public advice.<sup>216</sup> The justices stated that “the constitution of this state did not contemplate that the opinion of the justices of the superior court should be required upon a mere question of right between the legislature and individuals, but upon important questions of a nature altogether public.”<sup>217</sup> The justices pleaded with the legislature to “perceive the reason and utility of this distinction, when it is considered how very important it is that to the decision of every question of a new impression, involving private rights, we should not only in fact come, but that those who are interested should have a reasonable confidence that we come, with minds entirely unshackled by preconceived opinions.”<sup>218</sup> The doctrine that private rights not be adjudicated in the form of an advisory opinion led the justices to conclude that only proposed, not enacted, legislation, was a proper subject for a legislative request.<sup>219</sup> In achieving the same end, the South Dakota justices have borrowed Colorado’s *publici juris* doctrine, stating in one case that due process concerns prevented the justices from conducting an “ex parte adjudication of private rights by means of an executive question, without giving the party interested a day or voice in court.”<sup>220</sup> In Massachusetts, while topics affecting private rights are often frowned upon as issues likely to be raised in subsequent litigation,<sup>221</sup> the justices have

<sup>213</sup> *In re* House Resolution No. 12, 298 P. 960, 960 (Colo. 1931) (emphasis added).

<sup>214</sup> Opinion of the Justices No. 164, 111 So. 2d 605, 608 (Ala. 1959) (stating that henceforth “no more advisory opinions should be issued by the members of this Court when the only questions, constitutional or otherwise, involve purely local matters”).

<sup>215</sup> *See, e.g.*, Opinion of the Justices No. 362, 692 So. 2d 828, 829 (Ala. 1997) (relating to imposition of court costs at the Etowah County jail); Opinion of the Justices No. 348, 665 So. 2d 1377, 1377–78 (Ala. 1995) (relating to sales of wine in Jefferson County); Opinion of the Justices No. 343, 636 So. 2d 680, 680–81 (Ala. 1994) (relating to elective reinstatement of pensions for former Jefferson County employees); *see also In Re* Opinions of the Justices, *In Re* Amend. to Sec. 93 of the Const., No. 1, 96 So. 487, 489 (Ala. 1923) (“specific inquiries, within the intent of the act, must involve or concern concrete, important constitutional questions upon matters or subjects of a general public nature, as distinguished from questions involved in the ascertainment or declaration of private right or interest”).

<sup>216</sup> *In re* Opinion of the Court, N.H. 1816, *reported in* 62 N.H. 704 (1883).

<sup>217</sup> *Id.* at \*1.

<sup>218</sup> *Id.*

<sup>219</sup> *E.g.*, Opinion of the Justices, 337 A.2d 354, 355 (N.H. 1975).

<sup>220</sup> *In re* H. Res. No. 30, 72 N.W. 892, 892 (S.D. 1897).

<sup>221</sup> *See* Opinion of the Justices to the House of Representatives, 673 N.E.2d 36, 38 (Mass. 1996) (“when the issue presented to the Justices is one that can be raised in pending litigation, the Justices have been unwilling to provide an opinion”); Answer of the Justices to the House of Representatives,

defined “private rights” loosely.<sup>222</sup>

### 3. *Specificity of Law and Fact*

The justices’ aversion to answering hypothetical questions is mitigated by the requirement that questions be narrowly tailored, invoke specific questions of law and, where possible, provide as rich a factual background as possible. In these states, justices will address only those constitutional clauses that have been cited, and reject queries that seek to determine whether a pending bill would be unconstitutional in general. In Alabama, a specific request for constitutional (as opposed to statutory) interpretation is an explicit prerequisite to advisory jurisdiction.<sup>223</sup> In New Hampshire, the justices generally reject questions that require them to “speculate on whether [unstated] constitutional issues might be raised.”<sup>224</sup> Nevertheless, the New Hampshire justices excused this default in at least one circumstance, answering a catch-all question by stating that a proposed voter referendum would violate the separation of powers clause in the state constitution since the state legislature, not the electorate, possessed the sole legislative power.<sup>225</sup> In Rhode Island, questions cannot be moot, generalized, or hypothetical, and must identify with particularity the provision of the constitution affected.<sup>226</sup>

The advisory system often deals with questions of prospective law, not existing law, and a fully developed factual record is often impossible when no litigant exists. Still, advisory justices will often refuse to answer when the facts or questions of law detailed in the request are unclear, hypothetical, or otherwise in dispute.<sup>227</sup> On the other hand, at least one court has

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376 N.E.2d 554, 557 (Mass. 1978) (“We have refrained in the past from rendering advisory opinions which might seriously, even if indirectly, affect private rights.”) (internal quotation marks omitted).

<sup>222</sup> See, e.g., Opinion of the Justices to the Senate, 668 N.E.2d 738, 746–47 (Mass. 1996) (distinguishing between community notification provisions in a sex offender registration law, which imposed obligations on the government, and personal registration provisions in the same statute, which imposed obligations on the offender, stating that the justices would interpret the former but not the latter).

<sup>223</sup> See, e.g., Opinion of the Justices No. 271, 384 So. 2d 1056, 1058 (Ala. 1980) (requiring that a question be directed to a specific provision of the state or federal constitution). Thus, a question simply asking whether “S. 585 violate[s] any provision of the Constitution of 1901” was dismissed as overbroad. Opinion of the Justices No. 360, 692 So. 2d 106, 106–07 (Ala. 1997). Similarly, the question “Does HB1 meet the standards articulated in your recent decision, and is it constitutional?” was answered only to the extent that it referenced two specific constitutional provisions discussed in the court’s prior decision; the justices declined to pass upon the bill’s general constitutionality. Opinion of the Justices No. 370, 756 So. 2d 21, 22 (Ala. 1999).

<sup>224</sup> Opinion of the Justices, 169 A.2d 634, 636 (N.H. 1961).

<sup>225</sup> Opinion of the Justices, 725 A.2d 1082, 1086–87 (N.H. 1999).

<sup>226</sup> Topf, *supra* note 29, at 239–40.

<sup>227</sup> See, e.g., Opinion of the Justices No. 358, 692 So. 2d 107, 112 (Ala. 1997) (“[W]e are uncertain as to what is here requested . . . and we do not wish to speculate.”); *In re Interrogatory Propounded By Governor Roy Romer On House Bill 91S-1005*, 814 P.2d 875, 881 (Colo. 1991) (refusing to take judicial notice of a proposed financing agreement for the construction of a United Airlines maintenance facility on the ground that the agreement was hypothetical and not yet enacted); Opinion of the Justices,

used the doctrine of judicial notice to justify an advisory opinion based on facts extrinsic to legislative findings.<sup>228</sup>

#### 4. *Ripeness and Timeliness*

All states reject, in principle, the use of advisory opinions to address moot or untimely questions. Questions pertaining to pending legislation are deemed expired, and unanswerable, when the legislature that requested the opinion adjourns.<sup>229</sup> The Maine justices have formalized their ripeness doctrine as “live gravity,” defined as matters of “instant, not past nor future, concern.”<sup>230</sup> A question will be declined if it is “too tentative, hypothetical and abstract.”<sup>231</sup> Similarly, questions mooted by expiration of the contested legislation will be rejected as “[not] useful to the Legislature.”<sup>232</sup> The purpose of the live gravity rule is to ensure that the advisory opinion will have some practical effect on the decisionmaking of the questioner.<sup>233</sup>

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815 A.2d 791, 794 (Me. 2002) (“[T]he questions presented must be sufficiently precise that we can determine ‘the exact nature of the inquiry.’”) (internal citation omitted); Opinion of the Justices, 216 A.2d 656, 661 (Me. 1966) (declining to answer because “[t]he intended import of the question is not entirely clear to us”); *In re Advisory Opinion to the Governor* (Rhode Island Ethics Comm’n—Separation of Powers), 732 A.2d 55, 73 (R.I. 1999) (“defer[ring] our response until a litigated case is presented to us with a factual record upon which we more properly can address concrete questions rather than abstractions and hypotheses”).

<sup>228</sup> See *In re Senate Bill No. 95 of the Forty-Third Gen. Assembly of the State of Colo.*, 361 P.2d 350 (Colo. 1961). In 1961, the court used judicial notice to cure one particularly egregious attempt to bypass constitutional restrictions on local legislation. The bill in question provided for annexation by its neighbor of any town “less than six hundred and forty acres in area and . . . surrounded for a period of not less than five years by a city or city and county.” *Id.* at 351. The court saw through the smoke-screen. It took notice of the fact that the legislative history clearly identified the single town that would be affected by the bill—a town that had twice before voted against being annexed by the city of Denver. *Id.* at 353. The court found that, “when considered in the light of common knowledge of which we may take judicial notice,” the bill was obviously local and thus unconstitutional. *Id.* at 354.

<sup>229</sup> E.g., Opinion of the Justices No. 374, 826 So. 2d 109, 111 (Ala. 2002); Answer of the Justices to the House of Representatives, 570 N.E.2d 991, 992 (Mass. 1991); see also Opinions of the Justices to the House of Representatives, 696 N.E.2d 502, 505 (Mass. 1998) (explaining that the question of whether the city of Boston could provide domestic partner benefits to city employees was not a solemn occasion because the legislature had no authority to take action in response to the opinion); To the Hon. Senate of the State of Rhode Island and Providence Plantations, 610 A.2d 131 (R.I. 1992) (declaring moot a query as to whether a proposed school funding measure was constitutionally disproportionate because the justices assumed that the legislation would no longer be pending by the time an opinion could be prepared); cf. *In re Senate Resolution on the Subject of Irrigation*, 21 P. 470, 471 (Colo. 1886) (worrying that “the period of time provided for a legislative session would hardly be sufficient to return safe and satisfactory answers to more than one such inquiry”).

<sup>230</sup> *In re Opinion of the Justices*, 191 A. 487, 488 (Me. 1936).

<sup>231</sup> Opinion of the Justices, 330 A.2d 912, 915 (Me. 1975) (“Clearly, a ‘solemn occasion’ is absent when, in the discharge of the responsibility in ordinary course to nominate persons for appointments to public offices, a Governor becomes concerned with questions as to legal aspects of the qualifications, or disqualifications, of one or more persons whom the Governor is merely considering for nomination.”).

<sup>232</sup> Opinion of the Justices, 674 A.2d 501, 502 (Me. 1996).

<sup>233</sup> Comment, *supra* note 85, at 320.

## B. *Flexible Jurisdictional Tools*

In the New England states, jurisdiction over advisory questions is governed less by explicit litmus tests and more by gestalt evaluations of what constitutes “important questions of law, and . . . solemn occasions.”<sup>234</sup> The doctrine works in both directions. The justices may decide that an otherwise permissible advisory opinion request fails to rise to a level of importance appropriate for an advisory opinion. More commonly, however, the justices will overlook one or more procedural or substantive defaults in the advisory opinion request precisely because the matter is of utmost public importance. Finally, in a handful of states, advisory jurisdiction is completely discretionary; the justices may reject an advisory question for any reason.

### 1. *Solemn Occasion*

The vagueness of the phrases “important questions of law” and “solemn occasion” caused much consternation among the justices of New England courts in the nineteenth and early twentieth centuries. In Maine, this debate turned sharply on the question of who—the requesting body or the justices—decided whether a query was sufficiently important. Early on, the majority view was that importance and solemnity were to be decided by the requesting authority, not the justices themselves.<sup>235</sup> Accordingly, declining a request was rarely, if ever, constitutionally permissible.<sup>236</sup> Starting in the 1890s, however, the justices began imposing restrictions on their advisory jurisdiction, effectively becoming arbiters of the solemnity and importance of the request.<sup>237</sup> Nevertheless, a significant minority of justices continued to assert that they had no discretion to deny requests from the legislature and governor.<sup>238</sup> Lucilius A. Emery, Chief Justice of the Supreme Judicial Court in the early twentieth century, implied that he would rather see the doctrine destroyed altogether than interpreted so as to allow the justices control over which questions they take jurisdiction.<sup>239</sup> The justices’ current position is that they are required to submit an opinion whenever they determine that a “solemn occasion” has been established,

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<sup>234</sup> MASS. CONST. pt. II, ch. III, art. II.

<sup>235</sup> Comment, *supra* note 85, at 313.

<sup>236</sup> *Id.* The first refusal was not until 1891. *Id.* at 316.

<sup>237</sup> Lucilius A. Emery, *Advisory Opinion of the Justices No. II*, 11 ME. L. REV. 15, 18 (1917).

<sup>238</sup> *See id.* at 16 (“Whether the question of law be important and whether there be sufficient occasion for submitting it . . . are questions of fact . . . determinable by laymen as by lawyers, and even better by the Governor, Council, Senate, or House requiring the opinion.”); *see also* Opinion of the Justices, 51 A. 224, 227 (Me. 1901) (opinions of Emery, Whitehouse, and Peabody, JJ.) (“The language of the constitutional provision . . . leaves nothing to the discretion of the Justices.”)

<sup>239</sup> *See* Emery, *supra* note 237, at 15 (“I still deprecate the existence of that constitutional provision.”); Emery, *supra* note 59, at 1 (calling the clause “undesirable”). *But see* Emery, *supra* note 237, at 16 (criticizing the justices’ refusal to answer questions posed by the requesting authority).

and enjoy no discretion to refuse requests that meet these basic criteria.<sup>240</sup> In opinions where the importance of the request is a matter of controversy, the justices devote substantial space to explaining and defending their decision to accept the advisory opinion, providing a detailed explanation of why a solemn occasion exists.<sup>241</sup>

The Massachusetts Supreme Judicial Court has robustly developed its “solemn occasion” doctrine through the imposition of jurisdictional constraints such as the rule that opinions be given “only respecting pending matters in order that assistance may be gained in the performance of a present duty”<sup>242</sup> and the rule that questions directly implicate the specific constitutional provision that is thought to be violated by the action undertaken.<sup>243</sup> This reflects a conscious shift, beginning in the late nineteenth century, away from limiting refusals to textual violations of the constitutional phrase “questions of law”<sup>244</sup> and toward the adoption of unenumerated restrictions.<sup>245</sup> To the consternation of the requesting authorities, this led to an increase in refusals of advisory opinion requests.<sup>246</sup> But even these unenumerated restrictions are not absolute bars to obtaining a response: in one instance, the justices found, “clearly implicit in the . . . question,” a constitutional provision to be interpreted even though the governor had failed to cite one.<sup>247</sup> Discretion to answer procedurally flawed requests

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<sup>240</sup> See Opinion of the Justices, 850 A.2d 1145, 1148 (Me. 2004) (discussing whether a ballot initiative meets the criteria for a solemn occasion).

<sup>241</sup> See, e.g., *id.* at 1147–48 (explaining that the issues presented are “serious” and that “immediacy and an unusual exigency exist”).

<sup>242</sup> Answer of the Justices to the Senate, 780 N.E.2d 444, 445–46 (Mass. 2002) (quoting Answer of the Justices, 99 N.E. 286, 286 (Mass. 1912)).

<sup>243</sup> See Opinion of the Justices, 113 N.E.2d 452, 470 (Mass. 1953) (stating that the question asks whether a bill is constitutional “without mentioning any particular parts of that statute or informing us as to the nature of any doubts concerning it”).

<sup>244</sup> In 1876, the governor asked for advice on whether to commute a death sentence in light of a memorandum signed by the jury members in which they recognized that capital punishment was mandatory but nonetheless appealed to the court for mercy. Opinion of the Justices to the Governor and Council, 120 Mass. 600, 601–02 (1876). The justices advised that such a memorandum had no legal effect and were not part of the proceedings. *Id.* at 602. But it refused to advise the Governor as to the weight he should ascribe to the memorandum in deciding whether to commute the sentence, saying that the issue did not “depend upon any question of law, or upon any precedents from which any rule or principle of law can be derived; but upon a pure question of fact, upon which [the justices] are not authorized to express an opinion.” *Id.* In the absence of a question of law, the justices noted that the pardon power was purely discretionary on the part of the Governor and Council, and not an appropriate subject for judicial advice. *Id.*

<sup>245</sup> See Answer of the Justices to the House of Representatives, 122 Mass. 600, 603 (1877) (refusing to adjudicate a grievance brought by the House on behalf of one of its legislators, stating that it did not relate to “any matter which can be affected by legislation”).

<sup>246</sup> See Farina, *supra* note 35, at 372 (charting the percentage of advisory opinion requests refused by decade); *id.* at 375 (describing the overwhelming passage by the House in 1889 of a resolution disagreeing with the justices’ refusal and reaffirming the legislature’s authority to require opinions on questions of law).

<sup>247</sup> Opinions of the Justices to the Governor, 556 N.E.2d 1002, 1004 (Mass. 1990).

is apparently based on the justices' finding a degree of public importance that outweighs the justification for their refusing to answer.<sup>248</sup> Thus, in defining the boundaries of the solemn occasion doctrine, the Massachusetts justices surreptitiously invoke the public importance exception.

## 2. *The Public Importance Exception*

As illustrated by the debate over the West Warwick casino, Rhode Island continues to be the exemplar of the practice of invoking matters of public importance in answering advisory questions otherwise barred by judicially established rules.<sup>249</sup> Under the public importance doctrine, the Rhode Island justices will openly ignore previously stated limitations if they find "extreme circumstances involving the public interest."<sup>250</sup> This doctrine was put to use frequently in the period 1990 to 2004. Of the sixteen requests for advisory opinions received during this time, thirteen were answered at least in part, and of those, the justices identified deficiencies in five that would have destroyed jurisdiction if not for the public importance exemption. One involved pending litigation,<sup>251</sup> two involved a request by the governor unrelated to his official duty,<sup>252</sup> and one involved a request by the legislature pertaining to a bill that had already been enacted into law.<sup>253</sup> Only twice did the justices find no public importance that could cure the procedural defects in the request.<sup>254</sup> In the final analysis, there is no bright-

<sup>248</sup> See *id.* ("Mindful of this constitutional limitation on our power and duty to render advisory opinions, we restrict our response to the important, broad issue . . .").

<sup>249</sup> See *Bender*, *supra* note 28, at 151; *Topf*, *supra* note 22, at 414–16; *Topf*, *supra* note 29, at 241–43.

<sup>250</sup> *In re* Advisory Opinion to the House of Representatives (Impoundment of State Aid to Cities and Towns), 576 A.2d 1371, 1372 (R.I. 1990).

<sup>251</sup> See *id.* (explaining that three municipalities had filed suit against the state prior to the governor's request for an opinion on whether he could constitutionally withdraw municipal appropriations).

<sup>252</sup> See *In re* Advisory Opinion to the Governor (Rhode Island Ethics Comm'n—Separation of Powers), 732 A.2d 55, 59 (R.I. 1999) (governor has no constitutional authority to enforce regulation that has not yet become effective); *In re* Advisory From the Governor, 633 A.2d 664, 666–67 (R.I. 1993) (governor has no constitutional duty to make appointments to various commissions).

<sup>253</sup> *In re* Advisory Opinion to the Governor (Casino), 856 A.2d 320, 324 (R.I. 2004) (noting that the Assembly's override of the governor's veto has rendered the casino bill an existing statute and no longer pending legislation).

<sup>254</sup> A 1992 query as to whether a proposed school funding measure was constitutionally disproportionate was declared moot because the justices assumed that the legislation would no longer be pending by the time an opinion could be prepared. To the Honorable Senate of the State of R.I., 610 A.2d 131, 131 (R.I. 1992). Ten years later, the justices declined to address a request related to the financing of a car rental facility at the state airport. *In re* Request for Advisory Opinion from the Governor (Warwick Station Project), 812 A.2d 789, 790 (R.I. 2002). The justices stated that the question of whether the facility met the statutorily prescribed criteria for public funding raised "mixed questions of law and fact" and thus was inappropriate for an advisory opinion. *Id.* at 791. However, the fact that the question pertained to interpretation of a statute, rather than a constitutional provision, did not bother the majority justices, who explained: "Arguably, every request for advisory opinion requiring statutory interpretation relates back to Your Excellency's constitutional duties." *Id.* at 790.

line test for invoking the public importance doctrine. It is invoked “on a case-by-case basis in the exercise of the justices’ discretion.”<sup>255</sup>

In other states, the public importance exception is used more sparingly. In Alabama, only two of the thirty-six responses to advisory opinion requests between 1990 and 2004 invoked the public importance doctrine to justify answering a question not otherwise contemplated by the original interpreters of the enabling statute.<sup>256</sup> In 1992, the justices answered a request pertaining to a bill exempting veterans’ nursing homes from the certification process mandated by the state health agency although the question was one of statutory construction and not of constitutional interpretation and the legislative session had expired without passage of the bill.<sup>257</sup> The public importance, as it turned out, was financial: “If the Department of Veterans’ Affairs is required to conduct a certificate of need process, then the projects will be lost, because that process cannot be completed before the expiration of the Federal Government’s commitment to the project.”<sup>258</sup> The following year, the justices again invoked the public importance doctrine in order to answer a question involving the subject of pending litigation, but made clear that they were acting only in the interest of expediency and deliberately avoided addressing the merits of the question.<sup>259</sup>

### 3. *Discretionary Jurisdiction*

In Alabama, Florida, and Michigan, advisory opinions may merely be

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A third opinion declined to address questions related to the constitutionality under the federal due process clause of a plan which would consolidate two voting districts, but instead issued a sua sponte determination that the plan violated the Rhode Island constitution—a question that was not even asked by the legislature. *In re Advisory Opinion to the House of Representatives*, 628 A.2d 537, 538 (R.I. 1993). Although the justices stated that the federal questions were mooted, they did not explain why they did not address these points first, as originally requested. *Id.* at 539.

<sup>255</sup> *Advisory Opinion to the Governor (Casino)*, 856 A.2d at 324–25; see also Topf, *supra* note 22, at 414–15 (criticizing the justices’ discretionary use of the public importance doctrine to answer questions deemed politically important).

<sup>256</sup> See Topf, *supra* note 22, at 404 & n.112 (discussing the two cases below as well as a third from 1989).

<sup>257</sup> *Opinion of the Justices No. 334*, 599 So. 2d 1166, 1167 (Ala. 1992).

<sup>258</sup> *Id.*

<sup>259</sup> A state circuit court had granted a declaratory judgment against the state board of education for constitutional violations arising out of its inadequate instruction of children with disabilities. *Ala. Coalition for Equity, Inc. v. Hunt*, Civ. A. Nos. CV-90-883-R, CV-91-0117 (Ala. Cir. Ct. Apr. 1, 1993), reprinted in *Opinion of the Justices No. 338*, 624 So. 2d 107, 110–11 (Ala. 1993). The state Senate asked whether its remedial legislation must be prefaced with a finding that the legislature was “constitutionally required to comply with the order of the circuit court.” *Opinion of the Justices No. 338*, 624 So. 2d at 107. The justices did not address whether a legislative finding was required, but merely answered that “the Legislature is required to follow the order of the Circuit Court of Montgomery County.” *Id.* at 110. The justices noted that although “the legal issues presented [below] could be raised on appeal,” the declaratory judgment order was “not presently appealable, because the trial court has retained jurisdiction.” *Id.* at 108. The justices opined only that the order of the trial court was binding on the other branches of government. *Id.* at 110.

“requested,” not “required.”<sup>260</sup> In these states, justices have unfettered discretion to decline requests for any reason. In practice, this prerogative is used to varying degrees. The Michigan advisory opinion has fallen into almost complete disuse, with the last advisory opinion being issued in 1988.<sup>261</sup> Four requests since then have been denied.<sup>262</sup> To three of these requests, the justices issued a per curiam response stating simply that “the Court concludes that under the circumstances it would be an inappropriate exercise of its discretion to grant the request.”<sup>263</sup>

In Florida, by contrast, the justices rarely refuse advisory opinion requests.<sup>264</sup> The justices answered all twelve questions propounded in the eight opinion requests between 1990 and 2004, and every minority opinion constituted a dissent on the merits, not on the decision to accept jurisdiction.<sup>265</sup> In Alabama, while the justices declined nearly half of the submitted questions during this period for failure to meet certain jurisdictional prerequisites,<sup>266</sup> there were only two instances in which a dissenting justice expressed his intention to decline a request without explanation.<sup>267</sup>

<sup>260</sup> FLA. CONST. art. IV, § 1(c); MICH. CONST. art. III, § 8; ALA. CODE § 12-2-10 (1995); *see also* Topf, *supra* note 34, at 114 n.64 (discussing a 1968 constitutional amendment in Florida making advisory opinions discretionary rather than mandatory).

<sup>261</sup> *In re* Request for Advisory Opinion on Constitutionality of 1986 PA 281, 422 N.W.2d 186 (Mich. 1988). The language of Michigan’s advisory opinion clause is uniquely constraining in that it requires that the governor request opinions only as to the constitutionality of legislation and then only in the narrow time window after its enactment and before its effective date. MICH. CONST. art. III, § 8.

<sup>262</sup> *In re* Request for Advisory Opinion Regarding Constitutionality of 2002 PA 678, 658 N.W.2d 124 (Mich. 2003); *In re* 2002 PA 48, 652 N.W.2d 667 (Mich. 2002); Request for Advisory Opinion on Constitutionality of 1994 PA 416, 533 N.W.2d 310 (Mich. 1995); *In re* Request for Advisory Opinion on Constitutionality of 1989 PA 117, 459 N.W.2d 504 (Mich. 1990).

<sup>263</sup> *Constitutionality of 2002 PA 678*, 658 N.W.2d at 124; *Constitutionality of 1994 PA 416*, 533 N.W.2d at 310; *Constitutionality of 1989 PA 117*, 459 N.W.2d at 504.

<sup>264</sup> Eight advisory opinions were rendered in Florida between 1990 and 2004, representing a significant decrease in frequency from prior years. It is unclear whether fewer gubernatorial requests have been submitted to the justices, or the justices have agreed to answer fewer questions. Because the justices invite briefs and argument on advisory questions, they have essentially agreed to answer the question at this preliminary stage. *See* FLA. R. APP. P. 9.500(b) (West 2003) (setting out procedures for refusing or accepting advisory opinion requests); Advisory Opinion to the Governor *re*: Appointment or Election of Judges, 824 So. 2d 132, 133 (Fla. 2002) (“Upon receipt of your letter, we issued an order permitting interested parties to file briefs in order to be heard on an expedited basis on the question you presented.”). The last reported refusal to answer was in 1980. *See In re* Advisory Opinion to Governor Request of Aug. 28, 1980, 388 So. 2d 554, 555–56 (Fla. 1980) (refusing to answer because the request did not involve interpretation of the constitution). In addition, two dissenting justices would have refused to answer a 1987 request. *In re* Advisory Opinion to the Governor, Request of May 12, 1987, 509 So. 2d 292, 316–20 (Fla. 1987) (opinions of Ehrlich and Barkett, JJ.) (declining to address the governor’s request for a determination of the constitutionality of a statute).

<sup>265</sup> *See* database compiled by author (on file with the Connecticut Law Review).

<sup>266</sup> *Supra* Table 2.

<sup>267</sup> *See* Opinion of the Justices No. 373, 795 So. 2d 630, 648 (Ala. 2001) (minority opinions of Lyons, J. and Johnstone, J.).

### C. *Subject Matter of Advisory Opinions*

The level of adherence of state courts to explicit jurisdictional limitations has a significant impact on the subject matter of advisory opinions. In states whose courts closely adhere to a defined set of restrictions, such as Alabama, advisory opinions largely concern intragovernmental disputes and other public matters such as taxing and spending. Likewise, in states such as Florida and South Dakota that limit advisory opinion requests to the executive branch, advisory opinion requests are generally restricted to matters concerning public activities. By contrast, in Massachusetts and New Hampshire, states that rely heavily on the solemn occasion doctrine, courts are more likely to engage in discussions of private rights under the theory that these are matters of “public importance.” But they are also more likely to foster intrabranch dialogue by addressing remedial legislation intended to cure a prior constitutional violation. Five broad categories of advisory opinion subject matter are discussed below.

#### 1. *Revenue and Expenditure*

Taxing and spending questions play a major role in advisory opinion jurisprudence. This is partly because the complexity of the questions involved—in the absence of a specially aggrieved litigant constituency—make such issues of law ideal for anticipatory adjudication. For instance, Alabama has “the most heavily laden state constitution in the United States with respect to provisions dealing with taxation and government spending,”<sup>268</sup> making the state supreme court an ideal venue for this type of advisory opinion.<sup>269</sup> Nearly ninety percent of state revenues are earmarked, by constitutional fiat, for various special funds related to basic governmental functions such as public education and highways.<sup>270</sup>

Indeed, taxing and spending questions are popular in most advisory

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<sup>268</sup> Bruce P. Ely & Howard P. Walthall, Sr., *State Constitutional Limitations On Taxing and Spending: A Comparison of the Alabama Constitution of 1901 to Its Counterparts*, 33 CUMB. L. REV. 463, 464 (2002-2003).

<sup>269</sup> *E.g.*, Opinion of the Justices No. 381, 2004 WL 1158044, at \*2 (Ala. May 17, 2004) (state could enter into “swap agreements” without violating the ban on creation of new public debt); Opinion of the Justices No. 370, 756 So. 2d 21, 22–23 (Ala. 1999) (franchise tax on corporations was constitutionally permissible in the wake of a recent United States Supreme Court decision); Opinion of the Justices No. 365, 708 So. 2d 585, 587 (Ala. 1997) (minority opinion of Butts, J.) (opining unconstitutional the use of fuel tax revenue for other purposes); Opinion of the Justices No. 351, 665 So. 2d 1389, 1391 (Ala. 1995) (similar); Opinion of the Justices No. 346, 665 So. 2d 1357, 1358 (Ala. 1995) (bill incentivizing the building of a Mercedes-Benz factory with interest income from the state trust fund was violative of a constitutional provision that required interest income to be placed in the general fund); Opinion of the Justices No. 337, 613 So. 2d 393, 396 (Ala. 1993) (stating that a gasoline tax transgressed the intent behind the constitutional amendment that pigeonholes revenue from vehicle fuel); Advisory Opinion No. 331, 582 So. 2d 1115, 1118–19 (Ala. 1991) (heavily amended general appropriations bill was violative of requirement that legislation retain its essential purpose throughout its journey through the legislative process and be restricted to one subject).

<sup>270</sup> Ely & Walthall, *supra* note 268, at 470.

opinion states. All five advisory opinions issued in Colorado between 1990 and 2004 concerned questions of revenue or public expenditure.<sup>271</sup> These opinions are lengthy, technical and sophisticated, surely incorporating much of the briefing expertise of legislative and executive counsel.<sup>272</sup> Two Maine opinions dealt with the federal or state constitutionality of tax measures.<sup>273</sup> The South Dakota Supreme Court held a sales tax increase unconstitutional as a usurpation of the public's semi-exclusive right to enact tax increases by citizen initiative.<sup>274</sup> In Florida, where only the governor can submit advisory opinion requests, the executive branch's use and allocation of public funds is a recurring topic.<sup>275</sup>

Occasionally, taxing and spending measures under advisory consideration disproportionately affect classes of citizens and thus invoke at least some rights that are not wholly public. In Massachusetts, measures concerning taxation predominantly concerned personal taxes on subsets of the population. For example, the court opined that an income tax deduction on elderly people fell within the constitutional requirement that any deviations to the uniformity of income tax be "reasonable."<sup>276</sup> In a similar opinion,

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<sup>271</sup> *In re* Interrogatories Submitted by General Assembly on House Bill 04-1098, 88 P.3d 1196 (Colo. 2004); *In re* Submission of Interrogatories on House Bill 99-1325, 979 P.2d 549 (Colo. 1999); *In re* Interrogatories Relating to the Great Outdoors Colo. Trust Fund, 913 P.2d 533 (Colo. 1996); Submission of Interrogatories on Senate Bill 93-74, 852 P.2d 1 (Colo. 1993); *In re* Interrogatory Propounded by Governor Roy Romer on House Bill 91S-1005, 814 P.2d 875 (Colo. 1991).

<sup>272</sup> *Submission of Interrogatories on House Bill 99-1325* is typical. The bill in question authorized the state department of transportation to issue "revenue anticipation notes" that would cover the fiscal gap between the commencement of a highway project and the realization of concomitant federal funding. 979 P.2d at 552. Three questions were posed, each relating to a separate section of the state constitution restricting the accumulation of public debt or limiting overall spending. *Id.* at 551. In a structured analysis, the court held that the bill was constitutional as written, but its effectuation would be subject to voter approval pursuant to a constitutional provision restricting the issuance of multi-year public debt. *Id.* at 559. This satisfied the legislature, which promptly passed the bill after amending it to provide that a ballot question be included in that fall's statewide election. Compare A Bill for an Act Concerning Transportation Revenue Anticipation Notes, H.B. 99-1325 (introduced), reprinted in *House Bill 99-1325*, 979 P.2d at 559-67, with COLO. REV. STAT. § 43-4-703 (West 2004) (providing for a ballot question). For a timeline of the legislation, see House Status Sheet, available at [http://www.state.co.us/gov\\_dir/leg\\_dir/sess1999/hstat99.htm#1325](http://www.state.co.us/gov_dir/leg_dir/sess1999/hstat99.htm#1325) (last visited Mar. 14, 2005) (on file with the Connecticut Law Review).

<sup>273</sup> See Opinion of the Justices, 850 A.2d 1145, 1148 (Me. 2004) (opining that the "full cash value" method of property tax calculation violated the Maine constitution); Opinion of the Justices of the Supreme Judicial Court, 601 A.2d 610, 619-20 (Me. 1991) (opining that a dairy tax violated neither the dormant nor negative federal commerce clauses, nor the "public purpose" clause of the Maine constitution).

<sup>274</sup> *In re* Janklow, 530 N.W.2d 367, 370 (S.D. 1995). The constitutional clause also provided that the legislature can enact tax increases with a two-thirds supermajority vote of both houses. *Id.*

<sup>275</sup> See *In Re* Advisory Opinion to the Governor—State Revenue Cap, 658 So. 2d 77 (Fla. 1995) (discussing whether insurance premiums from a state-subsidized underwriter were "state revenues" subject to constitutional spending restrictions); *In Re* Advisory Opinion to the Governor—Land Acquisition Trust Fund, 572 So. 2d 1356 (Fla. 1990) (concerning the expiration date of a cash fund for park land).

<sup>276</sup> Opinion of the Justices to the Senate, 690 N.E.2d 422, 423 (Mass. 1998).

the justices declared that an exemption of military veterans from the state income tax would not be unconstitutional.<sup>277</sup>

## 2. *Intragovernmental Disputes*

Many advisory opinions issued between 1990 and 2004 attempted to resolve disputes between two branches or agencies within state government, or between state and local governments. As explained above, such disputes are unlikely to be litigated by private citizens and concern matters central to the inner workings of government but largely transparent to the day-to-day lives of the public.<sup>278</sup>

A crudely drawn classification of intragovernmental disputes in the period 1990 to 2004 might encapsulate four broad subject areas. First, advisory opinions address the tension between state and municipal governments. In Alabama, this is manifested in the justices' interpretation of constitutional proscriptions against enacting various laws deemed "local," including the requirement that the state legislature not pass local laws when the subject matter is already "provided for by a general law, or when the relief sought can be given by any court of this state."<sup>279</sup> In recent years, bills regulating (or deregulating) alcohol sales,<sup>280</sup> nude dancing establishments,<sup>281</sup> collection of fees in county jails,<sup>282</sup> and prisoner housing<sup>283</sup> were deemed local laws in violation of these provisions, while a bill setting fishing quotas in certain state reservoirs was deemed general (and constitutional) because the state's goal of protecting and preserving wildlife necessitated targeting specific zones of regulation.<sup>284</sup> On several occasions, the New Hampshire justices have addressed that state's complex relationship between the state government and municipal authorities.<sup>285</sup>

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<sup>277</sup> Opinion of the Justices to the Senate, 681 N.E.2d 857, 863 (Mass. 1997).

<sup>278</sup> *Supra* Part II.B.1.d.

<sup>279</sup> ALA. CONST. art. IV, §§ 104–05. Importantly, the constitution affords state courts the exclusive right to determine whether a bill is a local or general law. *Id.* § 105.

<sup>280</sup> Opinion of the Justices No. 376, 825 So. 2d 109, 116 (Ala. 2002); Opinion of the Justices No. 363, 694 So. 2d 1307, 1310 (Ala. 1997).

<sup>281</sup> Opinion of the Justices No. 361, 693 So. 2d 21, 23 (Ala. 1997).

<sup>282</sup> Opinion of the Justices No. 354, 672 So. 2d 1294, 1298 (Ala. 1996); Opinion of the Justices No. 353, 672 So. 2d 1293, 1294 (Ala. 1996).

<sup>283</sup> Opinion of the Justices No. 342, 630 So. 2d 444, 447 (Ala. 1994).

<sup>284</sup> Opinion of the Justices No. 349, 665 So. 2d 1378, 1381–82 (Ala. 1995). It is important to note that the justices may appropriately decide the threshold question of whether a bill is local or general without running afoul of the rule against nonconstitutional questions. This is because the legislature is constitutionally required to notify citizens in the affected region of all pending local legislation, regardless of subject matter, and the courts are required to strike as void legislation unaccompanied by official notice. ALA. CONST. art. IV, § 106. Thus, any bill that the legislature mistakenly believes to be general in nature will typically be exposed to constitutional review under this provision.

<sup>285</sup> *See* Opinion of the Justices (Mun. Bonds), 765 A.2d 706 (N.H. 2001) (discussing the authority of the legislature to change a town charter pursuant to the town's affirmative vote); Opinion of the Justices (Materials in Solid Waste Stream), 608 A.2d 870 (N.H. 1992) (bill setting requirements for

Second, advisory opinions often deal with legislative procedure, a topic that tests the attention spans of all but the most dedicated political junkies. Delving into technical minutia, the South Dakota Supreme Court held in three different opinions that the legislature's passage of a bill twenty minutes after the official expiration of the legislative session did not void the bill,<sup>286</sup> that the governor could wait to submit a veto message until the legislature returned from recess,<sup>287</sup> and that the governor's five-day veto deadline consisted of calendar days, not working days.<sup>288</sup> In Alabama, the legislature twice sought guidance on the vote margin needed to advance legislation at various stages of the deliberative process.<sup>289</sup>

Third, advisory opinions grapple with separation of powers disputes between two branches of government. In an Alabama opinion, the justices stated that the legislature was within its powers to eliminate the governor's authority to redistribute appropriated funds between programs, as long as it did not "encroach upon the core power of the executive branch to execute a statute."<sup>290</sup> But a related provision establishing legislative oversight over contracts entered into by the executive branch was thought to unconstitutionally interfere with executive power.<sup>291</sup> In Rhode Island, a series of lengthy advisory opinions on the constitutional authority of the state ethics commission<sup>292</sup> played a key role in the years leading up to a 2004 constitutional amendment that provided for "separate and distinct" legislative, ex-

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waste disposal does not unconstitutionally impose funding requirements on a local government); Opinion of the Justices (Weirs Beach), 598 A.2d 864 (N.H. 1991) (legislative creation of new town does not impermissibly change existing town charter); Opinion of the Justices, 592 A.2d 180 (N.H. 1991) (statute immunizing municipalities from slip-and-fall liability is constitutional).

<sup>286</sup> *In re Rounds*, 659 N.W.2d 374, 380 (S.D. 2003).

<sup>287</sup> *In re Request of Governor Janklow*, 615 N.W.2d 618, 620, 623 (S.D. 2000).

<sup>288</sup> *In re Janklow*, 589 N.W.2d 624, 627 (S.D. 1999).

<sup>289</sup> Opinion of the Justices No. 371, 756 So. 2d 23, 25 (Ala. 1999) (two-thirds majority required on appropriations measure); Opinion of the Justices No. 352, 672 So. 2d 1290, 1293 (Ala. 1996) (three-fifths majority required to approve a constitutional amendment).

<sup>290</sup> Opinion of the Justices No. 380, 2004 WL 693431, at \*3 (Ala. Mar. 31, 2004).

<sup>291</sup> *Id.* at \*5.

<sup>292</sup> See generally *In re Advisory Opinion to the Governor (Rhode Island Ethics Comm'n—Separation of Powers)*, 732 A.2d 55 (R.I. 1999) (finding a rule promulgated by the commission to be unconstitutional); *In re Advisory Opinion to the Governor (Ethics Comm'n)*, 612 A.2d 1 (R.I. 1992) (finding that the ethics commission did not unconstitutionally adopt legislative powers). These directly implicated the hot-button issue of separation of powers. See Topf, *supra* note 22, at 414 (criticizing the questions as an "opportunity afforded the political branches . . . to shift political responsibility to the justices"). A majority of the justices in 1999, however, refused to directly address whether the commission's activities violated an implied separation of powers doctrine, choosing instead to answer the more limited question of whether the activities were contemplated by the constitutional amendment creating the commission. See *Advisory Opinion to the Governor (Rhode Island Ethics Comm'n—Separation of Powers)*, 732 A.2d at 73 (deferring a response "until a litigated case is presented to us with a factual record upon which we more properly can address concrete questions rather than abstractions and hypotheses"); see also Topf, *supra* note 22, at 391–97 (discussing the majority opinion).

ecutive, and judicial branches.<sup>293</sup>

A fourth major category of intragovernmental disputes concerns the status of state employees. In Delaware, three of the five opinions during the fifteen-year period 1990 to 2004 dealt with the constitutional classification of state workers for purposes of restrictions and privileges concomitant with their positions.<sup>294</sup> In Florida, more than half of advisory opinions issued during this time concerned the governor's authority to appoint, suspend, or terminate employees from various state positions.<sup>295</sup>

### 3. Criminal Law

A minority of advisory opinions concern legislation affecting criminal law and criminal procedure, enabling justices to preemptively address the constitutionality of such measures. In one unusual instance, the Delaware justices, the day after receiving the governor's request, advised her that a bill amending the state's death penalty law was constitutional.<sup>296</sup> The Mas-

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<sup>293</sup> Carl T. Bogus, *The Battle for Separation of Powers in Rhode Island*, 56 ADMIN. L. REV. 77, 133 n.276 (2004); Liz Anderson, *Support Mounting for Separation-of-Powers Bill*, PROVIDENCE J., Oct. 17, 2004, at C1, available at LEXIS, News Library, Prvjl File; Peter B. Lord, *Separation of Powers Wins By Big Margin*, PROVIDENCE J., Nov. 3, 2004, at A1, available at LEXIS, News Library, Prvjl File. This had the significant practical result of ensuring that state legislators resigned their posts from various state commissions with oversight and executive authority. Liz Anderson, *Separation of Powers Spurs Resignations*, PROVIDENCE J., Jan. 5, 2005, at A9, available at LEXIS, News Library, Prvjl File. But the symbolic effect was to restore what "the people see . . . [as] the doctrinal center of the American political system" and end "the most extreme rejection of the principle of separation of powers in the history of the Republic." Bogus, *supra*, at 79.

<sup>294</sup> *In re Request of the Governor for an Advisory Opinion*, 722 A.2d 307, 318 (Del. 1998) (opining that, under the separation of powers doctrine, a state trooper must resign his post before assuming elected office in the state legislature); *Opinion of the Justices*, 672 A.2d 4, 8 (Del. 1995) (opining that appointed members of commissions were public officers and thus permitted to carry over their tenures beyond the expirations of their terms, until replacements could be found); *Opinion of the Justices*, 647 A.2d 1104, 1109 (Del. 1994) (determining that the Governor could accept a directorship on the board of Amtrak without violating the Delaware Constitution's prohibition on state employees simultaneously holding federal office).

<sup>295</sup> Of the eight opinions rendered since 1990, four dealt with specific personnel issues: in one, the governor wished to appoint a community college trustee to a state position, *In re Advisory Opinion to the Governor—Dual Office-Holding*, 630 So. 2d 1055 (Fla. 1994), in another, the governor wished to suspend a school board member for wrongdoing, *In re Advisory Opinion to the Governor—Sch. Bd. Member—Suspension Auth.*, 626 So. 2d 684 (Fla. 1993), and in two others, the governor wished to fill judicial vacancies with a particular candidate, *Advisory Opinion to the Governor re: Appointment or Election of Judges*, 824 So. 2d 132 (Fla. 2002); *In re Advisory Opinion to the Governor (Judicial Vacancies)*, 600 So. 2d 460 (Fla. 1992). A fifth opinion concerned a constitutional amendment extending the terms of office of local judges. See *Advisory Opinion to the Governor—Terms of County Court Judges*, 750 So. 2d 610 (Fla. 1999). The justices stated that the Governor need not extend the terms of judges appointed before the amendment went into effect. *Id.* at 615.

<sup>296</sup> *Opinion of the Justices*, 840 A.2d 637 (Del. 2003). The Governor, in a letter dated July 10, 2003, explained that the bill would become operative without her signature on July 15. *Id.* at 638. The justices' response was issued on July 11, explaining (without quoting the actual legislation) that the bill was not facially unconstitutional as applied prospectively to future criminal defendants. *Id.* at 639. It declined to address whether retrospective application would be constitutional, citing the case-by-case nature of the question. *Id.*

sachusetts justices addressed criminal law on three occasions. In 1992, they opined that prosecutors could not seek admission of a defendant's refusal to take a breathalyzer test, claiming that it violated the defendant's right against self-incrimination.<sup>297</sup> Four years later, the justices considered whether the notification provisions of the proposed sex offender registry violated various portions of the state constitution, being careful to limit its opinion to the facial constitutionality of the government's obligations under the new law and to not discuss the effect on the due process rights of individuals.<sup>298</sup> Finally, the justices wrote that a bill requiring prisoners to forfeit profits from books and other proceeds related to their crimes was unconstitutional under the First Amendment and the state equivalent.<sup>299</sup>

A distinctive use of the advisory opinion in New Hampshire is the justices' frequent review of legislative enactments concerning evidentiary admission and procedure in criminal proceedings. An important series of advisory opinions dealt with the admission and exclusion of evidence in sexual assault prosecutions, which resulted in a minor power struggle between the legislature and judiciary over the ability to make procedural reforms.<sup>300</sup> The justices also considered various measures to reform the jury

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<sup>297</sup> Opinion of the Justices to the Senate, 591 N.E.2d 1073, 1078 (Mass. 1992). This opinion generated no less than twenty-five subsequent citations, each adopting or referencing this constitutional determination of first impression. See *infra* Part IV.B.4.c.

<sup>298</sup> Opinion of the Justices to the Senate, 668 N.E.2d 738, 747 (Mass. 1996). The justices emphasized the narrow scope of their review over the request:

Though our speculations in this regard must not hypothesize the fanciful, still in a facial challenge such as this, if the statute allows the setting of guidelines that may reasonably be applied in ways that do not violate constitutional safeguards, then we must indulge that presumption and find that the notification provisions escape a facial constitutional challenge.

*Id.*

<sup>299</sup> Opinion of the Justices to the Senate, 764 N.E.2d 343, 352 (Mass. 2002).

<sup>300</sup> In one of these, the legislature had proposed a bill that would allow evidence of prior sex crimes to be used as evidence against a defendant accused of a sex offense. Opinion of the Justices (Prior Sexual Assault Evidence), 688 A.2d 1006, 1008 (N.H. 1997). The justices declared this unconstitutional on separation of powers grounds: since the legislation would have the effect of amending an existing evidentiary rule pertaining to character evidence, the legislature would be "usurp[ing] the judicial function." *Id.* at 1016. In reviewing enactments restricting the right of a criminal defendant to bring a civil action against his victim, and excluding evidence pertaining to the victim's dress in a criminal proceeding, the justices were more accommodating, though the questions propounded only related to the impact of the legislation on the defendant's fair trial and due process rights and were silent on separation of powers. See Opinion of the Justices (Certain Evidence in Sexual Assault Cases), 662 A.2d 294, 296-97 (N.H. 1995) (concluding that a sexual assault victim's manner of dress when offered on the issue of consent is not evidence about which a defendant has the right to cross-examine, but that the defendant would be entitled to a bench hearing concerning the probative value of the victim's dress); Opinion of the Justices (Limitation on Civil Actions), 628 A.2d 1069, 1073 (N.H. 1993) (stating that since the bill would delay the filing of an action, but does not deny that right altogether, the due process and equal protection clauses of the state and federal constitutions are not affected). As is their practice, the justices did not consider whether the measures were "otherwise permitted by the New Hampshire Constitution." *Id.* at 1074; see also *Opinion of the Justices (Certain Evidence in Sexual Assault Cases)*, 662 A.2d at 297 (similar).

system,<sup>301</sup> eliminate de novo appellate review of misdemeanors<sup>302</sup> and expedite prosecutions of repeat DWI offenders.<sup>303</sup>

#### 4. *Individual Rights*

Topics concerning individual rights comprise a minority of advisory opinions, but often concern some of the most diverse—and contentious—subject matter. In 2000, the Massachusetts justices weighed in on whether a bill establishing buffer zones for abortion clinic protestors was constitutional.<sup>304</sup> Noting that “the rights of the citizens of the Commonwealth are adequately protected by the Federal decisions in this area concerning fixed buffer zones,” the justices relied solely on federal law in determining that the buffer zone was unconstitutional.<sup>305</sup> Interestingly, the justices did not comment on their decision to accept the question in the abstract, although this might have been a good candidate for a refusal on that ground. They cited five cases from other states and from federal courts involving “comparable” buffer zones, but in their disposition of the advisory question, they did not benefit from the factual scenario associated with any one clinic or a related specific situation.<sup>306</sup>

The Alabama justices’ explication of constitutional provisions dealing with social issues is rare, but problematic. In recent years, two advisory opinions were issued on the topic of gambling, the second reversing the first.<sup>307</sup> The justices were unapologetic about reversing their position on

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<sup>301</sup> Opinion of the Justices (SLAPP Suit Procedure), 641 A.2d 1012, 1014–15 (N.H. 1994) (bill providing a procedure whereby a civil action would be dismissed unless the plaintiff can show a “probability that [he or she] will prevail on the claim” violates plaintiff’s right to a jury trial); Opinion of the Justices (Alternate Jurors), 623 A.2d 1334, 1336 (N.H. 1993) (stating that a bill providing for substitution of an alternate juror after deliberations have begun was constitutional, but warning that it could be applied in a manner that is unconstitutional).

<sup>302</sup> Opinion of the Justices (Misdemeanor Trial De Novo), 608 A.2d 874, 878 (N.H. 1992) (providing that elimination of trial de novo system does not violate equal protection or fair access to courts provisions of state or federal constitutions).

<sup>303</sup> Opinion of the Justices (DWI Jury Trials), 608 A.2d 202, 204–05 (N.H. 1992) (eliminating trial by jury for a second DWI offense violates defendant’s due process rights).

<sup>304</sup> Opinion of the Justices to the Senate, 723 N.E.2d 1, 2–3 (Mass. 2000).

<sup>305</sup> *Id.* at 4 n.3.

<sup>306</sup> *Id.* at 6.

<sup>307</sup> In 1997, the legislature asked the justices whether a bill authorizing video poker machines in horse and dog racing facilities would violate Section 65 of the Alabama Constitution, which banned lotteries and “tickets in any scheme in the nature of a lottery.” ALA. CONST. art. IV, § 65; Opinion of the Justices No. 358, 692 So. 2d 107, 108 (Ala. 1997). The justices prefaced *Opinion of the Justices No. 358* by warning that “[t]he abstractions with which we are often confronted when we consider requests for advisory opinions are particularly prominent in this request . . . we are asked to consider the scope of [the constitutional provision] in purely hypothetical contexts—even in the context of devices that may not currently exist.” 692 So. 2d at 110. The hypothetical device, however, was limited by the advisory question to a “form of gambling . . . involv[ing] a sufficient degree of skill on the part of the player as to prevent such gambling from being a lottery or gambling by lot.” *Id.* at 109. The justices answered that there was no such thing as a sufficient degree of skill. *Id.* at 112. They opined

the issue, stating that the earlier opinion had “resulted in the very confusion and error it expressly sought to avoid . . . [t]he failure to address and clarify this underlying constitutional question creates a great danger that local and state officials will similarly rely upon *Opinion of the Justices No. 358* to the detriment of the citizens of this State.”<sup>308</sup> Two years after this reversal, the Rhode Island casino dispute would underscore the problems inherent in addressing gambling through the advisory opinion mechanism.<sup>309</sup>

### 5. Remedial Legislation

In New Hampshire, the advisory opinion was integral to decade-long litigation over the exclusive use of property taxes to fund local schools.<sup>310</sup> After a lengthy trial, a lower court determined that the property-poor town of Franklin was forced to tax its residents at high rates in order to properly fund its schools, while the wealthy town of Gilford was able to expend more money per student and keep property taxes relatively low.<sup>311</sup> The supreme court held that since the state ultimately bore the responsibility to provide public education, this practice was unconstitutional as a de facto levy of a “disproportionate and unreasonable” state tax.<sup>312</sup> This required remedial legislation in order to fix the constitutional infirmity.<sup>313</sup> The legislature requested, and received, no less than three advisory opinions on various bills designed to establish a school funding system in conformance

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that a game involving any degree of skill would be constitutional, regardless of the degree to which a player’s skill controls the outcome. *Id.* Nonetheless, they refused to address whether, “as a matter of law,” a particular game was one of skill. *Id.*

In 2001, a plurality of justices, interpreting a similar bill, backed off of this analysis. The legislature inquired as to whether the bill was a revenue-raising measure that must originate in the House of Representatives rather than the Senate. *Opinion of the Justices No. 373*, 795 So. 2d 630, 644 (Ala. 2001) (minority opinion of Houston, Harwood, and Woodall, JJ.). The plurality quickly answered yes, then offered a sua sponte criticism of *Opinion of the Justices No. 358*’s conclusion that a modicum of skill saves a particular game from being a “lottery” under Section 65. *Id.* at 633. The justices felt that earlier authority, including several older advisory opinions, supported a more expansive view of Section 65. *Id.* at 639. Following this theory, the justices felt that the requisite test for unconstitutionality under Section 65 should not be whether no degree of skill is involved, but rather whether the dominant element in the game is chance. *Id.* at 640. While the original question presented in *Opinion of the Justices No. 373* was probably appropriate under the advisory opinion doctrine, it remains an open question as to whether the unrequited determination of constitutionality was a good idea. *See infra* Part IV.B.4.a (discussing the lingering effect of the video poker opinions).

<sup>308</sup> *Opinion of the Justices No. 373*, 795 So. 2d at 633.

<sup>309</sup> *See supra* Part I.

<sup>310</sup> *See* *Claremont Sch. Dist. v. Governor*, 794 A.2d 744 (N.H. 2002) (*Claremont IV*); *Claremont Sch. Dist. v. Governor*, 761 A.2d 389 (N.H. 1999) (*Claremont III*); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997) (*Claremont II*); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375 (N.H. 1993) (*Claremont I*).

<sup>311</sup> *Claremont II*, 703 A.2d at 1355.

<sup>312</sup> *Id.* at 1354.

<sup>313</sup> *See id.* at 1360–61 (“We are confident that the legislature and the Governor will act expeditiously to fulfill the State’s duty to provide for a constitutionally adequate public education . . .”).

with the court's holding. In each of these circumstances, the justices rebuffed these efforts as insufficient either under *Claremont II* or on a separate constitutional ground.<sup>314</sup> In the end, neither litigation nor an advisory opinion has unearthed the solution to the vexing problem of school funding inequality.<sup>315</sup> Nevertheless, the availability of the advisory opinion as a mechanism by which the legislature could "test" its remedies prior to enactment was a boon to the justices, who could more expeditiously review these proposals, and to the legislature, who could test the waters with borderline proposals without subjecting the public to reliance costs.<sup>316</sup>

The advisory opinion doctrine was an important component of *Goodridge v. Department of Public Health*,<sup>317</sup> the Massachusetts Supreme Judicial Court decision that affirmed the right of gay and lesbian couples to obtain marriage licenses. In rendering *Goodridge*, the court had stayed its order for 180 days in order to provide the legislature an opportunity to create a marriage law that satisfied the rule set forth in the decision.<sup>318</sup> Not surprisingly, the legislature proposed its remedial bill to the justices in the form of an advisory opinion request. The bill would have barred gay couples from marrying, but created a civil union doctrine that would extend these couples all the benefits of legal marriage.<sup>319</sup> The majority of justices were unimpressed, and following *Goodridge*, stated that the bill was unconstitutional in that it "maintains an unconstitutional, inferior, and discriminatory status for same-sex couples."<sup>320</sup> While important in its own right, the advisory opinion was seen primarily as a procedural follow-up to *Goodridge*, and public comments to the opinion—including those from both presidential campaigns—referenced primarily the original decision and not the advisory opinion.<sup>321</sup>

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<sup>314</sup> See Opinion of the Justices (Reformed Pub. Sch. Financing System), 765 A.2d 673, 677 (N.H. 2000) (stating that the new legislation retained the disproportionate tax scheme that was found unconstitutional in *Claremont II*); Opinion of the Justices (Tax Plan Referendum), 725 A.2d 1082, 1092 (N.H. 1999) (opining that submitting the school taxing question to the electorate in a referendum was an unconstitutional delegation of legislative power); Opinion of the Justices (Sch. Financing), 712 A.2d 1080, 1086 (N.H. 1998) (stating that a proportional tax rate minus a selective "tax abatement" for certain communities does not remedy the defect in *Claremont II*).

<sup>315</sup> In 2002, parents in the school district challenged the state's existing funding levels and petitioned the supreme court to retain jurisdiction. *Claremont IV*, 794 A.2d at 750. The court reaffirmed the "governing constitutional principles" in its earlier decisions, and held that the state had not sufficiently assessed its obligations under an "adequate education" standard. *Id.* at 759–60. Neither the funding issue nor the equality issue appears to have been resolved to the court's satisfaction.

<sup>316</sup> See discussion *supra* Part II.B.1.c.

<sup>317</sup> 798 N.E.2d 941 (Mass. 2003).

<sup>318</sup> *Id.* at 970.

<sup>319</sup> Opinions of the Justices to the Senate, 802 N.E.2d 565, 568 (Mass. 2004).

<sup>320</sup> *Id.* at 572.

<sup>321</sup> See Raphael Lewis, *Same Sex Ruling; SJC Affirms Gay Marriage Court; Deems Civil Unions Insufficient*, BOSTON GLOBE, Feb. 5, 2004, at A1, available at LEXIS, News Library, Bglobe file (discussing reaction to the advisory opinion by the White House and by Senator John Kerry).

The Massachusetts legislature in one other instance asked the justices for advice on a bill that sought to remove the constitutional infirmities found by the court in a prior decision. In *Pielech v. Massasoit Greyhound, Inc.*,<sup>322</sup> the court had held that a law protecting certain employees from being required to work on a day of religious observance violated the Establishment Clause because it distinguished between members of an organized church (who were protected) and persons whose beliefs were not similarly situated (who were not protected).<sup>323</sup> The legislature responded by adding a clause defining “religion” as “any sincerely held religious beliefs, without regard to whether such beliefs are approved, espoused, prescribed or required by any established church or other religious institution or organization.”<sup>324</sup> The justices opined that the bill fixed the constitutional infirmity exposed in *Pielech*.<sup>325</sup> But they did not address the constitutionality of a retroactivity clause, stating that the issue of reasonableness was inherently fact-dependent.<sup>326</sup>

#### IV. THE PRECEDENTIAL EFFECT OF ADVISORY OPINIONS IN LITIGATED CASES

One of the most common criticisms of advisory opinions is that the opinions create law that evolves into binding precedent.<sup>327</sup> If true, this proposition would be problematic in several ways. First, the use of advisory opinions as substantive law would contravene judicial pronouncements in eight of the ten advisory opinion jurisdictions that the opinions

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<sup>322</sup> 668 N.E.2d 1298 (Mass. 1996).

<sup>323</sup> *Id.* at 1303.

<sup>324</sup> Opinion of the Justices to the House of Representatives, 673 N.E.2d 36, 36–37 (Mass. 1996).

<sup>325</sup> *Id.* at 37.

<sup>326</sup> *See id.* at 38 (“We are unable to say that in all instances that the application of § 3 of the proposed bill will or will not violate due process of law principles. Each case will depend on its facts . . .”).

<sup>327</sup> For a detailed analysis of the “failure of the non-binding doctrine,” see Topf, *supra* note 34, at 114–34. While Topf’s criticisms are perhaps the most pointed of all commentators on the subject, there is substantial academic agreement with the basic premise. *See, e.g.,* Calogero, *supra* note 22, at 366 (“despite judicial pronouncements to the contrary, [advisory opinions] become very strong precedents”); Emery, *supra* note 59, at 2 (“though the opinions are theoretically only advisory, . . . they are often cited as judicial authority and the people are prone to regard them as adjudications to be adhered to despite all argument to the contrary”); Field, *supra* note 135, at 216 (“they are relied on as fully as decisions are, so far as precedent is concerned”); Kennedy, *supra* note 22, at 198 (“the evidence is plain that advisory opinions become binding abstractions”); George Neff Stevens, *Advisory Opinions—Present Status and an Evaluation*, 34 WASH. L. REV. & ST. B.J. 1, 7 (1959) (“[t]hey are almost invariably accepted by those who requested the opinion and are cited quite frequently in later cases both at home and in the other jurisdictions as authority”); Note, *Advisory Opinions on the Constitutionality of Statutes*, 69 HARV. L. REV. 1302, 1304 (1956) (“the opinions appear to have precedential effect in the courts similar to that of litigated decisions”).

are not decisions of the court and are not binding upon future litigants.<sup>328</sup> Second, the introduction of advisory opinions into the stream of case law might undermine the complex and often stringent justiciability requirements that state courts place on matters litigated before them.<sup>329</sup> When the need arises, state courts will distinguish advisory opinions as extrajudicial endeavors, separating constitutionally prescribed advicegiving from traditional adjudication of litigated controversies.<sup>330</sup> Finally, the very word “advisory” evokes a recommendation rather than a rule; a suggestion rather than a mandate.<sup>331</sup> It would thus seem that a system that used advisory opinions as precedent-setting case law would give the requesting authority an upper hand in eventual litigation, and might even encourage a governor or legislature to surreptitiously draft opinion requests designed to bind private litigants to a predetermined legal outcome.<sup>332</sup>

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<sup>328</sup> For representative citations, see Topf, *supra* note 34, at 106 n.21 (explaining that all except Colorado and South Dakota have adopted the nonbinding doctrine).

<sup>329</sup> Cf. *Soc’y of Plastics Indus., Inc. v. County of Suffolk*, 573 N.E.2d 1034, 1040 (N.Y. 1991) (“The requirement of injury in fact for standing purposes is closely aligned with our policy not to render advisory opinions.”). In states that issue advisory opinions, the rules governing justiciability and standing make evident that advisory opinions cannot be extracted through conventional litigation. See, e.g., *Siegelman v. Ala. Ass’n of Sch. Bds.*, 819 So. 2d 568, 576 (Ala. 2001) (requiring that a plaintiff have a “tangible interest” in the outcome of litigation and be adverse to another party “having an interest in opposing his claim”); *Alliance, AFSCME/SEIU, AFL-CIO v. Commonwealth*, 694 N.E.2d 837, 839 & n.4 (Mass. 1998) (explaining that except for the specific constitutionally prescribed procedure by which an opinion of the justices can be obtained, “we do not intrude into the business of a coequal branch in the course of a controversy that is to any degree remote or abstract”); *Horton v. McLaughlin*, 821 A.2d 947, 949 (N.H. 2003) (“The principle of justiciability prevents judicial violation of the separation of powers by limiting judicial review of certain matters that lie within the province of the other two branches of government.”); *Berberian v. Travisono*, 332 A.2d 121, 124 (R.I. 1975) (stating that an “actual justiciable controversy, wherein the plaintiff asserts some legal or property right adverse to the defendant, is basic to the court’s jurisdiction”).

<sup>330</sup> See, e.g., *Ala. Ed. Ass’n v. James*, 373 So. 2d 1076, 1081 (Ala. 1979) (“advisory opinions rendered by justices of this court are nonjudicial in nature, and binding upon no person, for the obvious reason that advisory opinions do not conclude or vindicate any right or remedy nor do they result in any judgment or decree”); *Opinion to the Governor*, 191 A.2d 611, 613 (R.I. 1963) (“[The advisory opinion clause] does not so obligate the judges as the judicial department of the state but rather in their capacities as individual judges of this court and therefore action pursuant thereto does not constitute an exercise of the judicial power.”).

<sup>331</sup> Indeed, the requesting authority has the right to disagree with the advisory opinion, and act contrary to the advice provided by the justices. See, e.g., Act of June 20, 2003, No. 2003-362, 2003 Ala. Session Law Serv. (reenacting a bill thought to be unconstitutional by the justices in *Opinion of the Justices No. 376*, 825 So. 2d 109 (Ala. 2002) and including a preamble explaining the legislature’s disagreement with the justices’ interpretation of the word “regulate”); *Town of Cedar Bluff v. Citizens Caring for Children*, No. 1030785, 2004 WL 3017000, at \*1 (Ala. Dec. 30, 2004) (explaining the legislative history of the law in question). For an evaluation of how the Massachusetts executive and legislative branches respond to advisory opinions issued on their behalf, see Farina, *supra* note 35, at 385–91. For general thoughts on the subject of executive and legislative reliance on advisory opinions, see Field, *supra* note 135, at 213–14.

<sup>332</sup> Indeed, it could be fairly argued that the governor of Rhode Island did just that by obtaining an advisory opinion on the casino ballot question, effectively preventing Indian tribes and casino developers from seeking a fresh review of the constitutional issues in a declaratory judgment proceeding

A minority of commentators have posited that the use of advisory opinions as precedent might actually have a long term benefit to the state's body of law. Two University of Iowa scholars wrote in 1927 that

if because of the excellence of the opinions, great weight is accorded them, this is not a defect of the system, but proof of its efficacy as a form of preventative justice. If such opinions gain a following which treat them as precedent, they must do so on the basis of pure merit, not on the doctrines of *res judicata* or *stare decisis*.<sup>333</sup>

A similar view holds that any principled, reasoned legal analysis stands on its own, and while the opinions should not be binding, there is no obstacle to their use as dicta.<sup>334</sup>

To the extent that it exists, the nonbinding doctrine has been attacked as a mere legal fiction.<sup>335</sup> However, a review of state courts' use of recent advisory opinions in litigated cases indicates that this view is overstated. Only 323 litigated cases reference one or more of the 143 responses to advisory opinion requests issued between 1990 and 2004.<sup>336</sup> Of the 116 fully or partially answered advisory opinions issued during this time,<sup>337</sup> thirty-five, or over thirty percent, have never been cited. Seventy-nine (68%) were cited less than three times. As Table 5 illustrates, the typical advisory opinion is cited only once.<sup>338</sup> Only a handful of opinions account for the

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or other cause of action. *See supra* notes 10–11 and accompanying text. In states whose supreme court justices rigidly refuse to address issues likely to be privately litigated, this problem is somewhat alleviated.

<sup>333</sup> Paul C. Clovis & Clarence M. Updegraff, *Advisory Opinions*, 13 IOWA L. REV. 188, 195 (1928).

<sup>334</sup> Rhodes, *supra* note 64, at 34.

<sup>335</sup> *See* Topf, *supra* note 34, at 111–12 (positing that the justices' reluctance to issue opinions on matters affecting private individuals "reveal[s] an uneasiness about the validity and persuasiveness of the nonbinding doctrine").

<sup>336</sup> Because some of the citing cases reference more than one advisory opinion, the total number of citations (counting each advisory opinion/citing case combination only once) is 359.

For the purpose of this analysis, "citing reference" includes any adjudicated court decision, published or unpublished, available on Westlaw, originating from either (1) a trial, appellate, or supreme court of the state that issued the advisory opinion, or (2) a federal district or circuit court interpreting the law of the state that issued the advisory opinion. The analysis does not include citations from courts outside the state that issued the advisory opinion, administrative or regulatory adjudications, nonjudicial court documents (including subsequent advisory opinions), or legislative materials.

<sup>337</sup> Four published opinions declining advisory opinion requests have been cited in a total of seven subsequent litigated cases. These cases are not included in the summary statistics in Table 5.

<sup>338</sup> To be sure, the total number of citing references is somewhat understated because not enough time has elapsed for the newest of the advisory opinions to generate many citing references by Dec. 31, 2004. However, this effect is mitigated by two factors. One, about half of all cases citing advisory opinions issued between 1990 and 1994 were issued within five years of the date of the advisory opinion, and ninety percent were issued within ten years. Two, the total number of advisory opinions issued between 2000 and 2004 declined precipitously from the period 1995 to 1999. *See supra* Table 4.

majority of citing references.<sup>339</sup> Additionally, as Table 6 demonstrates, nearly eighty percent of all citations consist of brief references of less than a paragraph. Only a small minority are substantially discussed in the citing case. Table 7 illustrates that the court that originated the advisory opinion is most likely to cite it again; trial courts utilize advisory opinions in only a handful of states.

*Table 5. Summary Statistics, 1990–2004—Citing References to Fully or Partially Answered Advisory Opinion Requests*

State	Opinions Issued	Opinions Cited	Total Citing References	Median Citing References
Alabama	25	15	29	1
Colorado	5	4	33	7
Delaware	5	3	4	1
Florida	8	5	14	1.5
Maine	9	7	13	1
Massachusetts	23	16	110	1
Michigan	0	0	0	0
New Hampshire	24	18	73	2.5
Rhode Island	13	10	68	4
South Dakota	4	3	7	1.5
TOTAL	116	81 (70%)	351	1

*Table 6. Significance of Citing References (Westlaw Depth of Treatment Rating)<sup>340</sup>*

State	Citing References	1 Star	2 Stars	3 Stars	4 Stars	Negative History
Alabama	30	3	16	5	5	1
Colorado	33	2	25	5	1	0
Delaware	5	0	4	1	0	0
Florida	14	0	10	2	1	1
Maine	13	0	9	3	1	0
Massachusetts	111	15	67	21	5	3
Michigan	0	0	0	0	0	0
New Hampshire	73	7	50	11	4	1
Rhode Island	72	7	56	7	2	0
South Dakota	7	0	7	0	0	0

<sup>339</sup> Of the 116 advisory opinions, twenty-two accounted for two-thirds of all citing references, and five accounted for 31% of all citing references.

<sup>340</sup> Four stars indicate an extended discussion of a case (usually more than a printed page), three stars indicate a discussion constituting less than a printed page, two stars indicate discussion of less than a paragraph (usually a single proposition followed by a citation), and one star indicates a brief reference, typically a string citation. WESTLAW, USING KEYCITE IN WESTLAW.COM 11, available at <http://west.thomson.com/documentation/westlaw/wlawdoc/web/kcwlcg04.pdf> (last visited Mar. 25, 2005) (on file with the Connecticut Law Review).

State	Citing References	1 Star	2 Stars	3 Stars	4 Stars	Negative History
TOTAL	359 <sup>341</sup>	34 (9%)	244 (68%)	56 (16%)	19 (5%)	6 (2%)

Table 7. Citing Authority

	Citing References	State Supreme Court	State Appellate Court	State Trial Court	Federal District Court	Federal Circuit Court
Alabama	30	22	5	0	3	0
Colorado	33	22	9	0	1	1
Delaware	5	3	0	2	0	0
Florida	14	5	7	0	1	1
Maine	13	7	0	0	4	2
Massachusetts	111	66	24	10	5	6
Michigan	0	0	0	0	0	0
New Hampshire	73	61	0	7	4	1
Rhode Island	72	41	0	27	4	0
South Dakota	8	7	0	0	1	0
TOTAL	359	234 (65%)	45 (13%)	46 (13%)	23 (6%)	11 (3%)

This Part briefly outlines the historical justifications for the nonbinding doctrine. It then uses the data presented above to model ways in which courts use advisory opinions, pausing to describe in some detail cases in which rules developed in the advisory opinion play a substantial role. My thesis is that while the more egregious episodes suggest that some adjudicative courts fail to recognize the specialized role of advisory courts and the limitations placed on them, the damage is well-contained and the vast majority of citations implicitly respect that the opinions of the justices are persuasive rather than controlling.

#### A. *The Nonbinding Doctrine*

The nonbinding doctrine is based on the well-established premise that justices issue advisory opinions in their personal capacities as legal scholars rather than as a court of law.<sup>342</sup> The preservation of the wall of division between judicial and extrajudicial power—“the court” versus “the justices”—is at the heart of the rule.<sup>343</sup> As the Rhode Island justices stated:

In performing this constitutional function the judges do not speak *ex cathedra*, from the chair of judgment, but only as consultants somewhat like the *jurisconsults* under the Roman

<sup>341</sup> For an explanation as to why this number differs from the total number of citing references in Table 5, see *supra* note 337.

<sup>342</sup> See Topf, *supra* note 34, at 106 (characterizing the nonbinding doctrine as “obvious” to the justices of Rhode Island and Massachusetts).

<sup>343</sup> See *id.* at 107.

law. However sound the opinion may be, it carries no mandate. For this reason it is not an exercise of our judicial power.<sup>344</sup>

Failure to adhere to the nonbinding doctrine raises significant due process concerns. If advisory opinions are used to resolve “private” rather than “public” disputes, a litigant with a legitimate claim may be deprived of his or her right to allege facts against perceived wrongdoers and pray for relief.<sup>345</sup> Out of concern for depriving an aggrieved plaintiff of a “day in court,” the nonbinding doctrine ensures that litigants with developed factual records and case-specific arguments will not be bound by a practical equivalent of *res judicata* or collateral estoppel.<sup>346</sup>

The nonbinding doctrine is a solely judicial creation. No state’s constitution or statutory scheme explicitly restricts the ability of any court to rely on an advisory opinion or otherwise provides that the advisory opinion is not binding on future litigants.<sup>347</sup> For this reason the justices are understandably wary that their advisory opinions, often issued within a short span of time and devoid of developed argumentation by counsel, might be misinterpreted by courts or litigants as concrete statements of legal truths.<sup>348</sup> Yet this fear is mitigated by two empirical facts. First, in most states, the justices may decline a request when the issue is likely to be litigated in court. Some, however, refuse to exercise this discretion,<sup>349</sup> and in

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<sup>344</sup> Opinion to the Governor, 174 A.2d 553, 554 (R.I. 1961).

<sup>345</sup> See, e.g., *In the Matter of the Constr. of Art. III, § 5, of the S.D. Const.*, 464 N.W.2d 825, 827 (S.D. 1991) (“[w]hether an advisory opinion affects individual rights is an important qualification on [the court’s] capacity to issue opinions on solemn occasions”).

<sup>346</sup> Calogero, *supra* note 22, at 366.

<sup>347</sup> Topf, *supra* note 34, at 106.

<sup>348</sup> In response to a party’s reliance on an advisory opinion, the New Hampshire Supreme Court stated: “[A]s a note of caution, we reiterate that opinions of the justices are advisory opinions on the constitutionality of proposed legislation, and may not be entitled to weight equal to that given judicial decisions following full adversary process.” *Schoff v. City of Somersworth*, 630 A.2d 783, 785 (N.H. 1993). *But see* *Opinion of the Justices*, 413 A.2d 1245, 1248 (Del. 1980) (explaining that advisory opinions “are what one would expect the Justices to say if the issue had been presented to them in litigation”). In criticizing the advisory system, one commentator has likened advisory opinions to legislation, describing them as “announcements of abstract rules . . . await[ing] meaning through application.” Kennedy, *supra* note 22, at 193.

<sup>349</sup> Two opinions issued by the justices of the Florida Supreme Court in the 1990s concerned issues pending before the trial courts. In one, a school board member who had been convicted of crimes “directly related to her official duties” filed suit for a declaratory judgment claiming that her removal proceedings should be conducted pursuant to her status as a county officer, not a district officer. *In re Advisory Opinion to the Governor—Sch. Bd. Member—Suspension Auth.*, 626 So. 2d 684, 685 (Fla. 1993). The Governor recognized that the pending lawsuit might affect the propriety of his request, stating:

While this Court’s opinion as to whether a school board member is a district or county officer would obviously assist me in my conduct as to that one issue in the Hernando County School Board member’s suit, please also be aware that I regularly receive complaints against school district officers.

these instances, the decision to accept jurisdiction constitutes an implicit understanding that the justices are likely to confront their advisory opinion when asked to render a judgment in a future litigated proceeding. Second, most citing references originate from the very court that issued the opinion.<sup>350</sup> This suggests that the state supreme court retakes “ownership” of the advisory opinion, incorporating the statements of law in the context of a broader rule that, expressed in a litigated case, lower courts can freely cite as precedential authority.

### 1. *Evolution and Explication of the Nonbinding Doctrine*

In many states, the nonbinding doctrine was established at the same time as jurisdictional requirements such as public importance and the absence of pending litigation. Shortly after the adoption of the Alabama advisory statute, that state’s justices declared that, “[i]nterpreting the act according to its manifest effects, these conclusions must, of necessity, prevail: . . . responses to questions within the purview of the act are designed to be advisory, consultative only, not concluding or binding the Governor or the House or Houses propounding inquiries or the Justices responding thereto.”<sup>351</sup> This analysis was dispositive to the justices’ conclusion that the statutory enactment authorizing advisory opinions was itself constitutional. The justices reasoned that their advice giving power—a wholly “nonjudicial function”—did not affect the constitutional relationship between the judiciary and the other branches of government, and thereby did not violate the constitutional provision that “the judicial [department] shall never exercise the legislative and executive powers.”<sup>352</sup> The justices explained why the nonbinding doctrine would be effective at helping to separate the judicial functions from the nonjudicial:

There are several reasons why the practice of invoking the merely advisory opinions of the Justices, in their individual capacities, cannot and will not operate to invite the Justices to prejudge concrete causes or proceedings that may later come to the Supreme Court for decision: First. Such

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*Id.* at 686. The justices responded by ignoring the dispute that prompted the Governor’s request and generalizing the issue as “whether a school board member is a ‘county’ officer . . . or a ‘district’ officer.” *Id.* at 687. In another, the Governor acknowledged that a constitutional amendment regulating pollution in the Everglades had arisen out of “years of litigation,” and warned that the constitutional amendment “promise[d] to engender further litigation absent an expeditious resolution of the questions I am posing.” Advisory Opinion to the Governor—1996 Amend. 5 (Everglades), 706 So. 2d 278, 280 (Fla. 1997).

<sup>350</sup> See *supra* Table 7.

<sup>351</sup> *In re* Opinions of the Justices, *In re* Amend. to Sec. 93 of the Const., No. 1, 96 So. 487, 489 (Ala. 1923).

<sup>352</sup> ALA. CONST. art. III, § 43; see *Opinions of the Justices No. 1*, 96 So. at 491 (“[T]he Legislature is not restrained from imposing or conferring upon a judicial officer, in his individual capacity as such, nonjudicial duties or functions.”).

merely advisory opinions must often pertain to important constitutional questions that never can or will come to the Supreme Court's consideration and decision; this, to illustrate, in all cases where the Legislature or the Executive does no act projecting or raising the constitutional inquiry upon which an advisory opinion or opinions have been requested and given. Second. Since only one prejudiced by official act or action can invoke the courts to judicially determine a constitutional question, it cannot be at all certain that the subject of such advisory opinion will be presented for judicial determination in a cause or proceeding in the courts. Third. The decision by the Supreme Court upon the constitutional validity of a legislative enactment or of an act by the Executive always contains this important factor that is wholly absent in a response by the Justices to a request for a merely advisory opinion on the question, pending legislative or executive action, namely, that in judicially testing and determining the constitutionality of legislative or executive action the Supreme Court—in the discharge of its high and concluding judicial function—always enters upon such an inquiry with the presumption, suggested by the deference due from one department to another, that the other department has not ignored or violated the Constitution; and this judicial presumption requires the sustaining of legislative or executive act, unless its invalidity appears beyond a reasonable doubt. In the observance of the practice, this act establishes, responses by the Justices would not at all involve recourse to or recognition of the stated presumption pending action by the interrogator on the subject of the advice sought. In these circumstances, no evoking of the judgment of the Justices in advance of contestation of any constitutional question in the Supreme Court itself is or would be effected by the practice the act establishes.<sup>353</sup>

The justices' explanation of their authority to issue advisory opinions surely reflects an optimistic view that, because of the differing presumptions applied, a disposition of a constitutional question in an advisory opinion would not bias an answer to the same question in a litigated case. Two dissenting justices in the 1923 opinion were not as sanguine. They maintained that "human nature" would trump diligent application of the non-binding doctrine, stating that "the opinions of a majority of us will very definitely foreshadow the decision of the court in the event a lawsuit

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<sup>353</sup> *Opinions of the Justices No. 1*, 96 So. at 492–93.

should hereafter arise involving the same question.”<sup>354</sup>

The modern trend appears to be that courts tacitly condone the fact that members of the public, if not the courts themselves, interpret their advisory opinions as substantive law. A few go even further. Delaware courts acknowledge that their nonbinding doctrine exists, but make no effort to strictly construe it, explaining that rules expressed in advisory opinions are “what one would expect the Justices to say if the issue had been presented to them in litigation.”<sup>355</sup> The Florida Supreme Court holds a similar view, stating that “[w]hile advisory opinions to the Governor are not binding judicial precedents, they are frequently very persuasive and usually adhered to.”<sup>356</sup>

In the New England states, a more nuanced view of the nonbinding doctrine applies. While the courts of Maine,<sup>357</sup> Massachusetts,<sup>358</sup> New Hampshire,<sup>359</sup> and Rhode Island<sup>360</sup> have all asserted that advisory opinions are not binding precedents, only the Maine justices rigorously enforce the nonbinding doctrine by issuing detailed explanations of the “solemn occasion” rule prior to reaching the merits in most advisory opinions issued by the justices.<sup>361</sup> The other three states seem to have suffered from the lack of attention given the nonbinding rule. The data bears this out: Maine’s advisory opinions issued between 1990 and 2004 have been cited only thirteen times (six by federal courts), while those of Massachusetts, New Hampshire, and Rhode Island have been cited in 111, 73, and 72 cases respectively.<sup>362</sup> As such, interpretation of the nonbinding doctrine in this latter group of states has fallen into the hands of trial and intermediate appellate courts, which apply it haphazardly. When confronted with a citation to an advisory opinion in a party’s brief, a Massachusetts appeals court recognized the existence of the nonbinding doctrine but faulted the opposing party for “present[ing] us with nothing to indicate that the Supreme Judicial Court would reach a different conclusion upon reexamination of the issues in the context of litigation.”<sup>363</sup> In doing so, the court seemed to apply a presumption that the opinion was controlling unless otherwise dis-

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<sup>354</sup> *Id.* at 499 (opinions of Sayre and Miller, JJ.).

<sup>355</sup> Opinion of the Justices, 413 A.2d 1245, 1248 (Del. 1980); *see also* Topf, *supra* note 22, at 409 (providing this statement as evidence that advisory opinions control issues that may arise later in litigation).

<sup>356</sup> *Barley v. S. Fla. Water Mgmt. Dist.*, 823 So. 2d 73, 82 (Fla. 2002); *Lee v. Dowda*, 19 So. 2d 570, 572 (Fla. 1944).

<sup>357</sup> *E.g.*, Opinion of the Justices, 682 A.2d 661, 663 (Me. 1996).

<sup>358</sup> *E.g.*, *Metros v. Sec’y of Commonwealth*, 484 N.E.2d 1015, 1020 (Mass. 1985).

<sup>359</sup> *E.g.*, Opinion of the Justices, 712 A.2d 1080, 1084 (N.H. 1998).

<sup>360</sup> *E.g.*, *Lerner v. Gill*, 463 A.2d 1352, 1365 (R.I. 1983).

<sup>361</sup> *See supra* text accompanying notes 235–241.

<sup>362</sup> *See supra* Table 7.

<sup>363</sup> *HTA Ltd. P’ship v. Mass. Tpk. Auth.*, 747 N.E.2d 707, 711 (Mass. App. Ct. 2001).

puted by an adverse party. A Rhode Island superior court judge used similar reasoning in choosing to adopt the reasoning of an advisory opinion of that state.<sup>364</sup> The court acknowledged that advisory opinions were “of limited precedential effect,” but nonetheless considered the opinion “highly persuasive, if not binding.”<sup>365</sup>

In Colorado and South Dakota, the two advisory states lacking a nonbinding doctrine,<sup>366</sup> courts deal with a different set of concerns—namely, shaping discretionary jurisdiction so as to cause the least amount of disruption when future litigants rely on advisory opinions before the courts in adjudicative settings. Underscoring the criticality of heightened jurisdictional discretion in a state lacking the shelter of the nonbinding doctrine, a dissenting justice from a 1985 South Dakota advisory opinion expressed concern that the majority opinion would “bind it, in precedent, on legislative acts which the legislature *might* pass in the future.”<sup>367</sup> In the nineteenth century, the Colorado Supreme Court imposed substantial limitations on its authority to issue advisory opinions in large part because of its acknowledgement that “they have all the force and effect of judicial precedents.”<sup>368</sup> The court warned that “a careless construction and application of this constitutional provision might lead to the *ex parte* adjudication of private rights by means of a legislative or executive question, without giving the party interested a day or voice in court.”<sup>369</sup> To varying degrees, then, both the South Dakota and Colorado courts have recognized the need to tread carefully in an “exceedingly dangerous” adjudicative environment.<sup>370</sup>

## 2. *The Citing Authority’s Acknowledgement of the Nonbinding Doctrine*

If the nonbinding doctrine is to have any meaningful effect in an advi-

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<sup>364</sup> *Almond v. R.I. Lottery Comm’n*, No. PC 99-2323, 1999 WL 1001190, at \*5 (R.I. Super. Ct. Oct. 27, 1999), *rev’d in part on other grounds*, 756 A.2d 186 (R.I. 2000).

<sup>365</sup> *Id.*

<sup>366</sup> The lack of a nonbinding doctrine in Colorado was noted shortly after enactment of its constitutional amendment permitting advisory opinions. See *In re Senate Resolution Relating to Senate Bill No. 65*, 21 P. 478, 479 (Colo. 1889). South Dakota eliminated its nonbinding doctrine in 1972 upon passage of a constitutional amendment changing the phrase “opinions of the judges of the Supreme Court” to “opinions of the Supreme Court.” Topf, *supra* note 34, at 108 n.32. This was done apparently to assure the governor that by following the advisory opinion, he would be acting under color of law. *Id.* In Alabama, the reliance interest is protected by a statutory provision that any state official acting in accordance with an advisory opinion would be immune from liability. See ALA. CODE § 12-2-12 (1995).

<sup>367</sup> *In re Request for Opinion of the Supreme Court Relative to the Constitutionality of SDCL 21-32-17*, 379 N.W.2d 822, 828 (S.D. 1985) (Henderson, J., dissenting).

<sup>368</sup> *In re Senate Resolution Relating to Senate Bill No. 65*, 21 P. 478, 479 (Colo. 1889).

<sup>369</sup> *Id.*

<sup>370</sup> *Constitutionality of SDCL 21-32-17*, 379 N.W.2d at 828 (Henderson, J., dissenting).

sory opinion jurisdiction, it is not enough for the justices of the state supreme court to simply recite the doctrine whenever it issues an advisory opinion. The state supreme court, lower state courts, and federal courts should also recognize, disclose, and apply the nonbinding doctrine when citing an advisory opinion as persuasive authority. To treat the advisory opinion as any other citation from the state supreme court would be to further blur the line of demarcation between the judicial and nonjudicial functions. Having adopted with approval a proposition or quotation from an advisory opinion, that statement becomes law without any further study or analysis of the underlying substantive issue. If that case subsequently becomes a wellspring for authority on a particular point of law, the fact that the advisory opinion was the source of that proposition will have been lost altogether.<sup>371</sup>

It follows that the persistent failure of citing authorities to pay heed to the nonbinding doctrine is one of the most substantial liabilities in the modern advisory opinion system. Of the 322 unique citing authorities, only a handful explicitly acknowledge that the opinion cited is not binding upon the court.<sup>372</sup> Of these, most engage in significant discussion of the advisory opinion, some even explicitly adopting the reasoning of the opinion.<sup>373</sup> Other references to the nonbinding doctrine appear in dissenting opinions that constitute debates over the value of the legal statements ex-

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<sup>371</sup> While the scenario in this paragraph is purely hypothetical, it closely mirrors the line of cases in Massachusetts stemming from the advisory opinion concerning the constitutionality of legislation mandating the admission into evidence of a DWI suspect's refusal to submit to a breathalyzer test. See *infra* Part IV.B.4.c. None of these cases explicitly stated that the advisory opinion was not controlling law.

<sup>372</sup> See, e.g., *Taylor v. Siegelman*, 230 F. Supp. 2d 1284, 1285 (N.D. Ala. 2002) ("Plaintiffs concede that none of these [advisory] opinions has the force of law."); *League of Women Voters v. Gwadosky*, 966 F. Supp. 52, 59 (D. Me. 1997) ("Maine's Supreme Judicial Court issued a non-binding, advisory, decision on certain questions regarding the Act"); *League of Women Voters v. Diamond*, 923 F. Supp. 266, 273 (D. Me. 1996) ("An advisory opinion is not binding precedent on courts construing Maine law."); *Ex parte Ted's Game Enters.*, No. 1021125, 2004 WL 1178748, at \*4 (Ala. May 28, 2004) (Johnstone, J., dissenting) ("opinions of the Justices are not binding precedent"); *Ex parte James*, 713 So. 2d 869, 887 n.7 (Ala. 1997) (Maddox, J., concurring and dissenting) ("It is also instructive to note that advisory opinions are not binding precedents as are decisions on appeal to this Court.") (internal quotation marks and citation omitted); *Barley v. S. Fla. Water Mgmt. Dist.*, 823 So. 2d 73, 82 (Fla. 2002) ("advisory opinions to the Governor are not binding judicial precedents"); *Almond v. R.I. Lottery Comm'n*, No. PC 99-2323, 1999 WL 1001190, at \*5 (R.I. Super. Ct. Oct. 27, 1999), *rev'd in part on other grounds*, 756 A.2d 186 (R.I. 2000) ("Of course, the Court is aware that Advisory Opinions issued by our Supreme Court ' . . . are of limited precedential effect'") (citation omitted); *State v. Garcia*, No. P3/96-3559A, 1998 WL 241631, at \*4 (R.I. Super. Ct. Apr. 20, 1998) ("It should be mentioned that an advisory opinion of the Rhode Island Supreme Court, 'merely represents the individual opinions of the justices of this court and is not a binding precedent.'") (citation omitted).

<sup>373</sup> E.g., *Almond*, 1999 WL 1001190, at \*5 (after noting that advisory opinions are of "limited precedential effect," stating: "Be that as it may, the Majority Advisory Opinion issued only months ago represents the view of four of the five justices presently sitting on our Supreme Court and is highly persuasive, if not binding, upon this Court.").

pressed in the advisory opinion.<sup>374</sup> In sum, courts will typically refer to the nonbinding doctrine only when there is a *need* to refer to the nonbinding doctrine. This represents an all-too-cavalier attitude toward the unique circumstances by which advisory opinions are issued.

#### B. *Toward a Model of Precedential Use*

In order to determine whether advisory opinions have legitimate precedential effect, it is important to see whether the citation is used in a way that lends substantive credibility to the conclusions of law expressed in the advisory opinion. It is thus necessary to examine each citing case, evaluating the citing court's purpose in utilizing the advisory opinion. A review of these cases permits some admittedly crude, but nonetheless illuminating, categorization. Table 8 summarizes all 359 citing references according to their treatment of the advisory opinion. Following the table, this section explains each of the categories, presents examples, and evaluates the effect of a typical citation on the development of state law. It then isolates several examples of "strong substantive" citations, analyzing their impact on the nonbinding doctrine of that state and determining how and to what extent the court erred by using the advisory opinion to settle points of law.

Table 8. *Citing References by Category of Precedential Use*

	TOTAL	Standard of Review	Constitutional Principles	Legislative Facts	Strong <sup>375</sup> Substantive	Weak Substantive	Misc. <sup>376</sup>
Alabama	30	5	2	2	7	8	6
Colorado	33	13	8	4	1	1	6
Delaware	5	1	0	1	0	0	3
Florida	14	3	4	1	2	3	1
Maine	13	3	0	2	3	3	2
Massachusetts	111	4	55	12	14	16	10
Michigan	0	0	0	0	0	0	0
New Hampshire	73	16	20	7	8	12	10
Rhode Island	72	16	19	24	2	7	4

<sup>374</sup> *E.g.*, *Ted's Game Enters.*, 2004 WL 1178748, at \*4 (Johnstone, J., dissenting) (citing the nonbinding doctrine as justifying his departure from the reasoning expressed in the advisory opinion).

<sup>375</sup> Strong substantive citations are those that have a Westlaw depth of treatment rating of three or four stars. Weak substantive citations are those that have a rating of one or two stars. *See supra* note 340.

<sup>376</sup> This category includes citations in circumstances where plaintiffs lack standing to bring individual suits, *see, e.g.*, *Gen. Motors Corp. v. New Castle County*, 701 A.2d 819, 823 (Del. 1997) (explaining that only the justices under statutorily prescribed circumstances, not the Court, can issue advisory opinions); *Polhill v. Buckley*, 923 P.2d 119, 121 (Colo. 1996) (explaining that only advisory opinions can address pending legislation), or miscellaneous citations to dicta contained in advisory opinions absent an implicit or explicit suggestion that the statement is one of legal authority, *see, e.g.*, *Care and Prot. of Stan.*, 757 N.E.2d 292, 292 (Mass. App. Ct. 2001) ("There is a growing awareness that children who witness or experience domestic violence suffer deep and profound harms."), or for very general statements of departmental powers, *see, e.g.*, *Minuteman, LLC v. Microsoft Corp.*, 795 A.2d 833, 840 (N.H. 2002) (explaining that issues of public policy are best left to the legislature).

	TOTAL	Standard of Review	Constitutional Principles	Legislative Facts	Strong <sup>375</sup> Substantive	Weak Substantive	Misc. <sup>376</sup>
South Dakota	8	7	0	0	0	0	1
TOTAL	359	68 (19%)	108 (30%)	53 (15%)	37 (10%)	50 (14%)	43 (12%)

### 1. *Defining a Standard of Review*

A standard of review constitutes a court's approach to analyzing constitutional and statutory questions, including presumptions, burdens of proof, and interpretive methods.<sup>377</sup> Citations in this category represent a harmless precedential use of advisory opinions, for several reasons. First, the subject matter of the advisory opinion is usually entirely unrelated to the subject matter of the citing reference. For example, the Colorado Supreme Court cited two advisory opinions in *Davidson v. Sandstrom*,<sup>378</sup> a declaratory judgment action concerning term limits for state officers. The court relied on one of its advisory opinions to explain that electorate intent is a major factor in its interpretation of a voter-enacted constitutional amendment,<sup>379</sup> and another to justify its use of legislative reports to help interpret ambiguous language.<sup>380</sup> These advisory opinions dealt with taxing and spending measures, respectively, and had nothing to do with the question presented by the citing case.

Second, the standard of review is typically not fact-dependent, and there would likely be no meaningful difference between a doctrine developed or explained in an advisory opinion and one explained in a substantive case. Because there is no factual record, advisory opinions address only generalized points of law, making the standard of review transferable from case to case and from nonadjudicative to adjudicative proceedings. Moreover, advisory justices sometimes deliberately adopt the standard of review of a court of law, with an eye toward anticipating the outcome of a hypothetical constitutional challenge in a litigated case.<sup>381</sup>

<sup>377</sup> For exemplars, see *Caribbean Conservation Corp. v. Fla. Fish & Wildlife Comm'n*, 838 So. 2d 492, 501 (Fla. 2003) (general principles of constitutional interpretation); *In re Custody of Zia*, 736 N.E.2d 449, 454 (Mass. App. Ct. 2000) (principles of legislative intent); *Roberts v. Gen. Motors Corp.*, 673 A.2d 779, 782 (N.H. 1996) (principles of statutory interpretation).

<sup>378</sup> 83 P.3d 648 (Colo. 2004) (en banc).

<sup>379</sup> *Id.* at 654 (citing *In re Interrogatories Relating to the Great Outdoors Colo. Trust Fund*, 913 P.2d 533, 538 (Colo. 1996)).

<sup>380</sup> *Id.* at 655 (citing *In re Submission of Interrogatories on House Bill 99-1325*, 979 P.2d 549, 554 (Colo. 1999)).

<sup>381</sup> *See* Opinion of the Justices, 850 A.2d 1145, 1149 (Me. 2004) ("Because we are asked to give our opinion on the constitutionality of a proposed law, and because that opinion must be based on a reasonable anticipation of the Law Court's conclusion, should it be called upon to rule on the constitutionality of the initiative as enacted in the context of a live controversy, we begin our analysis by addressing the Law Court's standard of review of initiated laws."). *But see* *Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1, 5 n.4 (Colo. 1993) ("No . . . presumption of constitutionality arises

Third, the standard of review itself is usually a well-settled judicial doctrine. As a tightly controlled document restricting itself to a handful of generalized legal principles, the advisory opinion is an ideal laboratory for accumulating and synthesizing various authoritative points, making itself attractive to citing courts as a single comprehensive statement of procedural rules.<sup>382</sup>

## 2. *Extrapolating General Constitutional Principles*

Cases extrapolating general constitutional principles from advisory opinions are closely related to those detailing a standard of review. The major difference is that the former concerns a specific constitutional provision, while the latter is applicable to a broad range of adjudicative endeavors. Nonetheless, with increased specificity comes increased dependence on the analysis in the cited authority. It is thus helpful to consider cases citing general constitutional principles as occupying positions on a lengthy bridge connecting well-settled procedural analysis on one side, and novel areas of substantive law on the other.

Most cases fall on the harmless end of the bridge. These cases include extrapolations of the procedural<sup>383</sup> and substantive<sup>384</sup> due process, equal protection,<sup>385</sup> and criminal rights<sup>386</sup> provisions of state constitutions. In these cases, there is typically little or no overlap between the subject matter of the advisory opinion and that of the citing case.

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when we are asked by the General Assembly to address the constitutionality of legislation that has not yet been passed by both houses of the General Assembly.”).

<sup>382</sup> See, e.g., *Great Outdoors Colo. Trust Fund*, 913 P.2d at 538 (laying out a two-paragraph generalized statement of constitutional review, with four propositions culled from one source each, including a previous advisory opinion).

<sup>383</sup> See, e.g., *Vaccaro v. Vaccaro*, 680 N.E.2d 55, 60 n.9 (Mass. 1997) (listing various state constitutional provisions affording due process); *Doe v. Sex Offender Registry Bd.*, No. CIV.A. 97-2462, 1997 WL 819765, at \*4 n.8 (Mass. Dist. Ct. Dec. 22, 1997) (citing proposition that procedural due process involves a balancing of the individual interest and the governmental interest); *Parkins v. Boule*, No. 94000987, 1994 WL 879558, at \*13 n.15 (Mass. Dist. Ct. Aug 3, 1994) (stating that procedural due process pertaining to loss of property is subject to the same analysis under both the state and federal constitutions).

<sup>384</sup> See, e.g., *Steinbergh v. City of Cambridge*, 604 N.E.2d 1269, 1272 (Mass. 1992) (explaining that the rational basis test for economic due process is essentially the same under the state and federal constitutions).

<sup>385</sup> See, e.g., *Naples v. Comm’r of Dep’t of Employment and Training*, 591 N.E.2d 203, 206 (Mass. 1992) (applying rational basis review to a legislative classification involving “neither a suspect class nor a fundamental right”); *Trovato v. DeVeau*, 736 A.2d 1212, 1215–16 (N.H. 1999) (explaining that there is no violation of the equal protection clause when middle tier scrutiny justifies a discriminatory law); *State v. Lopes*, 660 A.2d 707, 709 (R.I. 1995) (stating that state and federal equal protection guarantees are coextensive).

<sup>386</sup> See, e.g., *MacLean v. State Bd. of Ret.*, 733 N.E.2d 1053, 1062 n.14 (Mass. 2000) (double jeopardy); *Commonwealth v. Blais*, 701 N.E.2d 314, 318 (Mass. 1998) (self-incrimination); *State v. Comeau*, 697 A.2d 497, 500 (N.H. 1997) (ex post facto); *State v. Seymour*, 673 A.2d 786, 791 (N.H. 1996) (right to put on evidence on one’s own behalf).

Nearer to the center of the bridge are cases analyzing constitutional provisions that are cited less frequently by private litigants. Chief among these are clauses dealing with intragovernmental disputes, including local and general legislation,<sup>387</sup> constitutional powers of executive departments and administrative agencies,<sup>388</sup> and separation of powers.<sup>389</sup> Courts tend to find advisory opinions on these subjects quite persuasive. The New Hampshire Supreme Court in *Petition of Mone*<sup>390</sup> cited no less than eleven advisory opinions in granting a writ of prohibition, precluding enforcement of a law that would require county sheriffs to provide security in court buildings.<sup>391</sup> The court held that the plan would violate the separation of powers doctrine since it “invade[d] the province of the judiciary to (1) control courtroom functions, and (2) ensure the fair adjudication of controversies.”<sup>392</sup> In a single paragraph recounting the constitutional history of the separation of powers clause and the judicial gloss applied to it over the years, the court cited six advisory opinions for various theoretical and practical propositions.<sup>393</sup> From these statements, the court synthesized a test: whether the challenged law “prevent[ed] the judiciary from performing an essential judicial function.”<sup>394</sup>

Citing authorities involving determinations of individual constitutional rights and substantive due process will invariably share common subject matter with the cited advisory opinion. In 1998, the Massachusetts justices opined, after applying a balancing test, that legislation shifting the burden to the parent to demonstrate worthiness for custody in domestic violence situations would not violate the parent’s substantive due process right to

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<sup>387</sup> *E.g.*, Ala. Power Co. v. Citizens, 740 So. 2d 371, 384 (Ala. 1999); City of Greenwood Village v. Petitioners for the Proposed City of Centennial, 3 P.3d 427, 440 (Colo. 2000); Cent. Colo. Water Conservancy Dist. v. Simpson, 877 P.2d 335, 343 (Colo. 1994); Bd. of County Comm’rs v. E-470 Pub. Highway Auth., 881 P.2d 412, 422 (Colo. Ct. App. 1994), *rev’d in part sub nom.* Nicholl v. E-470 Pub. Highway Auth., 896 P.2d 859 (Colo. 1995).

<sup>388</sup> *E.g.*, Barnes v. Sec’y of Admin., 586 N.E.2d 958, 960 (Mass. 1992) (governor’s veto power); State v. Cronan, 774 A.2d 866, 874 (R.I. 2001) (powers of attorney general); Livermore v. Atty. Gen., 703 A.2d 1120, 1121 (R.I. 1997) (powers of attorney general); Warwick Mall Trust v. State, 684 A.2d 252, 256 (R.I. 1996) (public entities); State v. Lead Ind. Assn., Inc., No. 99-5226, 2001 WL 345830, at \*2 (R.I. Super. Ct. Apr 02, 2001) (powers of attorney general); Pine v. Charlestown Town Council, NO. 95-491, 1997 WL 839926, at \*3 n.4 (R.I. Super. Ct. Jun 04, 1997) (powers of attorney general).

<sup>389</sup> *E.g.*, First Justice of Bristol Div. of Juvenile Court Dept. v. Clerk-Magistrate of Bristol Div. of Juvenile Court Dept., 780 N.E.2d 908, 923 (Mass. 2003); *In re* Petition of Judicial Conduct Committee, 855 A.2d 535, 538 (N.H. 2004); McKay v. N.H. Comp. Appeals Bd., 732 A.2d 1025, 1029 (N.H. 1999); *Petition of Mone*, 719 A.2d 626, 632 (N.H. 1998); State v. Almonte, 644 A.2d 295, 303 (R.I. 1994); Town of East Greenwich v. O’Neil, 617 A.2d 104, 107 (R.I. 1992).

<sup>390</sup> 719 A.2d 626 (N.H. 1998).

<sup>391</sup> *Id.* at 628–29.

<sup>392</sup> *Id.* at 633.

<sup>393</sup> *Id.* at 631.

<sup>394</sup> *Id.*

raise children.<sup>395</sup> Eight subsequent citing references discussed the opinion in the context of the constitutional right to parent.<sup>396</sup> In one, the court considered whether a biological father could assert exclusive parental rights years after assenting to the child's residing with her maternal aunt in a de facto parent/child relationship.<sup>397</sup> The court cited the advisory opinion for the proposition that "attainment of the children's best interest may involve some limitation on the liberties of one or the other of the parents."<sup>398</sup> Under this framework, the court held that the trial court did not breach the father's constitutional rights.<sup>399</sup>

### 3. Taking Notice of Legislative Facts

Advisory opinions are often cited in order to provide a clear narrative of legislative and procedural history. When a bill subjected to an advisory opinion becomes law, the fact of its initial constitutional challenge becomes an informative and important fact in a subsequent adjudication. The citations do not make substantive judgments of the law expressed in the opinion, and are harmless under the nonbinding doctrine. Moreover, ambiguity about legislative intent is rarely problematic because the communication sent to the justices typically identifies the specific constitutional issue pondered and details the circumstances precipitating the request.<sup>400</sup>

Legislative fact citations are especially useful in litigation preceding and following remedial legislation. In 1999, an intermediate appellate court in Massachusetts took jurisdiction of ongoing litigation concerning an employee who was dismissed for refusing to work on Christmas Day.<sup>401</sup> The Supreme Judicial Court had held in a 1996 decision, *Pielech v. Massasoit Greyhound, Inc.*, that an employment discrimination statute relied on by the plaintiff was unconstitutional under the Establishment Clause because it protected the right to be absent from work because of a religious

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<sup>395</sup> See *Opinion of the Justices to the Senate*, 691 N.E.2d 911, 917 (Mass. 1998) ("The risk of error is greatly outweighed by children's interest in being free of abuse and neglect, and the State's interest in promoting the welfare of its children.").

<sup>396</sup> See *Suboh v. Dist. Atty's Office*, 298 F.3d 81, 91 (1st Cir. 2002); *Commonwealth v. Adkinson*, 813 N.E.2d 506, 512 (Mass. 2004); *Blixt v. Blixt*, 774 N.E.2d 1052, 1059 (Mass. 2002); *In re Adoption of Vito*, 728 N.E.2d 292, 302 n.22 (Mass. 2000); *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 893 (Mass. 1999); *Youmans v. Ramos*, 711 N.E.2d 165, 170–71 n.16 (Mass. 1999); *Sagar v. Sagar*, 781 N.E.2d 54, 58 (Mass. App. Ct. 2003); *In re Adoption of Olivia*, 761 N.E.2d 536, 541 (Mass. App. Ct. 2002).

<sup>397</sup> *Youmans*, 711 N.E.2d at 173.

<sup>398</sup> *Id.* at 172 (quoting *Opinion of the Justices*, 691 N.E.2d at 915).

<sup>399</sup> *Id.* at 173.

<sup>400</sup> For example, in *Opinion of the Justices to the House of Representatives*, 673 N.E.2d 36 (Mass. 1996), discussed *infra*, the advisory opinion request had informed the justices that the bill was intended to remedy a constitutional violation identified in a prior case, had identified the phrase in the bill that necessitated a constitutional determination, and had identified one section of the bill as providing for "retroactive application," even though those words did not appear in the bill. *Id.* at 36–37.

<sup>401</sup> *Pielech v. Massasoit Greyhound, Inc.*, 712 N.E.2d 1200 (Mass. App. Ct. 1999) (*Pielech II*).

holiday, but only if the religion was connected to an organized church or sect.<sup>402</sup> At the request of the legislature, the justices reviewed, and declared constitutional, a bill that would remedy *Pielech* by removing the distinction between organized religion and personally held beliefs.<sup>403</sup> In response, the plaintiff relaunched her complaint.<sup>404</sup> The issue before the appellate court, purposely left unaddressed by the advisory opinion, was whether the amended statute would be made retroactive to the second cause of action.<sup>405</sup> From the advisory opinion, the court gleaned that the purpose of the remedial legislation was specifically to overturn *Pielech*.<sup>406</sup> Basing its analysis on the justices' interpretation of the bill pending before the legislature, the court stated: "No great inferential leap is required to conclude that the court [i.e., the advisory justices] believed that it was the intention of the Legislature to encompass the plaintiffs' action in the retroactivity provision."<sup>407</sup>

#### 4. *Justifying Substantive Rules of Law*

Substantive citations are those purporting to apply a rule of law in closely analogous legal and/or factual circumstances. Because they are held out as apparent legal authority, citations to advisory opinions in this context pose the most risk to the nonbinding doctrine. This is because of two factors. First, the legal analysis in an advisory opinion may suffer from infirmities such as an insufficient or hypothetical factual background, a constrained time in which to answer the request, and the absence of developed legal argumentation from parties with a personal stake in the outcome.<sup>408</sup> Second, the use of advisory opinions in substantive citations may validate these opinions to future litigants and courts as good law.<sup>409</sup> Thus, even if the advisory justices explicitly warn their audience of the unique

<sup>402</sup> 668 N.E.2d 1298, 1303 (Mass. 1996) (*Pielech I*); see also text accompanying notes 322–326.

<sup>403</sup> Opinion of the Justices to the House of Representatives, 673 N.E.2d 36, 37 (Mass. 1996).

<sup>404</sup> *Pielech II*, 712 N.E.2d at 1202.

<sup>405</sup> *Id.* at 1202–03.

<sup>406</sup> *Id.* at 1203.

<sup>407</sup> *Id.* at 1204. In fact, in reaching this conclusion, the appeals court may have misread the advisory opinion. The court had noted the statement in the opinion indicating that the constitutionality of the retroactivity provision "is one that can be raised in pending litigation." *Id.* at 1203–04 (quoting *Opinion of the Justices of the House of Representatives*, 673 N.E.2d at 38). The *Pielech II* court evidently misinterpreted this quotation as proof that the legislature specifically intended to allow the plaintiffs to prevail in their suit. This was likely so, but the quotation from the advisory justices actually referred to their refusal to reach the constitutionality of the retroactive clause, precisely because it was a question that could be raised in pending litigation. In any event, this misreliance was probably harmless since the defendant had conceded that the legislature intended its bill to apply directly to the plaintiffs. *Id.* at 1204.

<sup>408</sup> See generally Kennedy, *supra* note 22, at 186–94 (discussing the propensity of advisory courts for legal error).

<sup>409</sup> Cf. Topf, *supra* note 22, at 413 ("Prudence dictates that when the justices of the state's high court offer advice on a matter of law, it is an offer that cannot be refused.").

procedures and circumstances undergirding the request and subsequent response—and many do not—the use of the advisory opinion as substantive law in a litigated case threatens to compromise their precautions.

That being said, there are benign substantive uses of advisory opinions. For example, courts might employ a string citation or explanatory appendage where the same proposition of law is supported by both advisory and adjudicative precedent.<sup>410</sup> More often, however, the proposition stated in the advisory opinion is itself appropriated, or logically constructed, from an adjudicated state supreme court case. For example, the New Hampshire Supreme Court held in *Nash Family Investment Properties v. Town of Hudson* that a tax assessment statute was facially unconstitutional because it disproportionately taxed some property at a higher rate than others.<sup>411</sup> In rejecting an alternative argument that the statute improperly created classifications of various kinds of property for the purpose of tax exemptions, the justices cited a 1999 advisory opinion for the proposition that “[t]he legislature possesses broad authority to classify property as taxable and non-taxable and grant reasonable exemptions from taxation.”<sup>412</sup> The proposition for the statement in the 1999 advisory opinion was a 1935 advisory opinion.<sup>413</sup> This opinion, in turn, cited a 1906 dispute over an inheritance tax.<sup>414</sup> Thus, the winding road from start to finish connected adjudicated decisions, and the proposition of law was massaged but not materially altered by advisory opinions.<sup>415</sup>

Of course, the prior example is illustrative, not categorical, and behind every substantive citation to an advisory opinion lies a unique roadmap

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<sup>410</sup> *E.g.*, *Town of Brilliant v. City of Winfield*, 752 So. 2d 1192, 1199 (Ala. 1999); *Lyman v. Comm’r of Correction*, 704 N.E.2d 1195, 1198 (Mass. App. Ct. 1999).

<sup>411</sup> 786 A.2d 825, 828 (N.H. 2001).

<sup>412</sup> *Id.* at 827 (quoting Opinion of the Justices (Mun. Tax Exemptions for Elec. Util. Pers. Prop.), 746 A.2d 981, 988 (N.H. 1999)) (alterations in original).

<sup>413</sup> *In re* Opinion of the Justices, 178 A. 125, 126 (N.H. 1935).

<sup>414</sup> *Thompson v. Kidder*, 65 A. 392 (N.H. 1906). The *Thompson* court held:

The reasonable exemption of certain classes of property by express language, or by its omission from the description of the property required to be taxed, has not, in the practical construction given to the Constitution ever since its adoption, been considered to affect the validity of the tax upon other property.

*Id.* at 396.

<sup>415</sup> The *Thompson* court itself cited two advisory opinions as well as an 1839 case that contains a point of law mirroring almost exactly the proposition cited by *Nash Family Investment Properties*:

There is no doubt that the legislature may provide, by general laws, for the exemption of certain classes of property from taxation, as well as exempt it, in fact, by omitting it in the description of property required to be taxed. Such exemptions will be valid, until the law is repealed.

*Brewster v. Hough*, 10 N.H. 138, 142 (1839). Mercifully, the yellow brick road ends here: if there was any prior authority on the subject at the time, Chief Justice Parker did not identify it. The difference between the statements of law in 1839 and 2001 is the addition of the word “reasonable,” which would seem to place some upper bound on this type of legislative prerogative. This word apparently originated in *Thompson*.

transversing years, decades, or even centuries of doctrinal development. Still, this only helps to explain, not excuse, the substantive use of advisory opinions as precedent. In *Nash Family Investment Properties*, the challenged law was thrown out under a different constitutional theory than the one under which the 1999 advisory opinion was concerned, rendering the discussion dicta.<sup>416</sup> However, in a handful of instances, advisory opinions constituted dispositive statements of law that, explicated through subsequent litigation, concretely and substantially realigned jurisprudence in the particular field. While these confluences of events are rare, they are worth highlighting so as to better understand the pitfalls inherent in judicial disregard of the nonbinding doctrine. Three recent examples are described in detail below.

a. The Alabama Gaming Cases

The question of whether video poker machines were permissible under the provision of the state constitution banning lotteries was addressed by two highly unusual Alabama advisory opinions, one effectively reversing the other.<sup>417</sup> By answering a question that was not asked, *Opinion of the Justices No. 373* became a unique sua sponte determination that a previously issued advisory opinion was untenable. Originated in reliance on *Opinion of the Justices No. 358*, which stated that any game involving “some degree of skill” was distinguishable from a lottery and thus unconstitutional,<sup>418</sup> the bill at issue would have allowed horse and dog racing facilities to operate skill-dependent games on the premises.<sup>419</sup> The House request had simply inquired into the procedural matter of whether the bill was a revenue-raising measure required to originate in the House of Representatives rather than the Senate.<sup>420</sup> The justices felt it “obligatory” to declare an act unconstitutional when “it is clear that a statute transgresses the authority vested in the Legislature by the Constitution.”<sup>421</sup>

Accordingly, the majority opinion in *Opinion of the Justices No. 358*

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<sup>416</sup> In holding that the statute violated the constitutional requirement that the legislature “impose and levy proportional and reasonable assessments, rates, and taxes,” N.H. CONST. pt. II, art. 5, the court relied on a 1990 adjudicated decision, *Appeals of Towns of Bow, Newington and Seabrook*, 575 A.2d 1301, 1305 (N.H. 1990). Although two advisory opinions from the early twentieth century were cited in support, the decision turned on *Bow*’s determination that disproportionate taxation is calculated on the “true value” of the property. *Nash Family Investment Properties*, 786 A.2d at 828 (quoting *Bow*, 575 A.2d at 1305). The two advisory opinions supported the policy and historical basis behind the cited proposition, but ultimately *Bow* controlled. See *id.* (citing *Opinion of the Justices*, 138 A. 284, 286 (N.H. 1927); *Opinion of the Justices*, 79 A. 31, 33 (N.H. 1911)).

<sup>417</sup> *Opinion of the Justices No. 373*, 795 So. 2d 630 (Ala. 2001); *Opinion of the Justices No. 358*, 692 So. 2d 107 (Ala. 1997).

<sup>418</sup> 692 So. 2d at 112.

<sup>419</sup> *Opinion of the Justices No. 373*, 795 So. 2d at 632.

<sup>420</sup> *Id.* at 631.

<sup>421</sup> *Id.* at 632 (quoting *McCall v. Automatic Voting Mach. Corp.*, 180 So. 695, 697 (Ala. 1938)).

was abruptly modified. Rather than a wagering game being constitutional as long as it involved “some degree of skill,” the plurality justices,<sup>422</sup> after conducting an extensive historical analysis of the purpose and constitutional history of the lottery clause, felt instead that a wagering game was unconstitutional if “chance is the dominant factor,” regardless of the amount of skill required by the player.<sup>423</sup> In attacking the prior opinion’s substantive conclusions, the justices effectively illegitimated the process by which the justices of the 1997 opinion had reached its conclusion.<sup>424</sup> The justices criticized their predecessors for ignoring their “stated concerns over rendering an opinion ‘without a body of pertinent facts,’ and . . . [their] steadfast practice of abstaining from issuing opinions based upon hypothetical situations.”<sup>425</sup> The justices did not explain why, or even if, the instant opinion cured these procedural defects.

In 1998, after *Opinion of the Justices No. 358* but before *Opinion of the Justices No. 373*, the District Attorney of Mobile County filed a civil forfeiture complaint against a local distributor, Ted’s Game Enterprises, in an attempt to seize twenty machines from various convenience stores within the county’s jurisdiction.<sup>426</sup> Ted’s defended itself by arguing that the games fell within an exception to the criminal gambling statute authorizing “bona fide coin operated amusement machines” offering low-value non-cash rewards for games involving “some skill.”<sup>427</sup> The DA rebutted that the exception was unconstitutional, and asked the trial court for a declaratory judgment on this point.<sup>428</sup> In ruling that the exception was in fact constitutional, the trial court relied on *Opinion of the Justices No. 358* to hold that the exception “did not authorize the operation of a lottery” since “the issue is not the *degree* of skill involved, but whether *some* skill is in-

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<sup>422</sup> Four justices joined the plurality opinion. Three answered only the procedural question posed by the House of Representatives and ignored the plurality’s constitutional discussion, and two exercised their discretion to decline the request. Justice Lyons noted that answering the procedural question would have constituted a tacit acceptance of the doctrine expressed in *Opinion of the Justices No. 358*, and he refused to “provid[e] a basis for speculation” on that question. *Id.* at 648 (opinion of Lyons, J.). His implication seems to be that the House submitted the procedural request in order to force the justices to revisit the prior opinion.

<sup>423</sup> *Id.* at 643.

<sup>424</sup> It bears noting that of the nine justices sitting on the Alabama Supreme Court in 2001, only two were on the bench in 1997 when the justices issued *Opinion of the Justices No. 358*. Both maintained their positions on the issue throughout—Justice See espousing the view that games should involve a “material” amount of skill to be constitutional, *Opinion of the Justices No. 373*, 795 So. 2d at 647 (opinion of See, J.); *Opinion of the Justices No. 358*, 692 So. 2d at 113 (opinion of See, J.), and Justice Houston joining the majority in 1997 and the minority in 2001.

<sup>425</sup> *Opinion of the Justices No. 373*, 795 So. 2d at 637.

<sup>426</sup> *State v. Ted’s Game Enters.*, No. 2000424, 2002 WL 31780143, at \*1 (Ala. Civ. App. Dec. 13, 2002).

<sup>427</sup> *Id.* (citing ALA. CODE § 13A-12-76).

<sup>428</sup> *Id.*

volved.”<sup>429</sup> On appellate review, the stage was set for litigation of exactly the same issue contemplated by the advisory opinion.

While the Court of Civil Appeals was taking jurisdiction over *Ted's Gaming Enterprises*, the Alabama justices were issuing *Opinion of the Justices No. 373*. In its opinion reversing the trial court, the appeals court noted the justices' "helpful discussion of the history of lotteries in America."<sup>430</sup> It then cited with approval their "thorough and erudite discussion" of the earlier advisory opinion and "acknowledge[d] the rejection" of the rule that a minimal amount of skill was sufficient under the lottery clause of the constitution.<sup>431</sup> While it engaged in a thorough substantive discussion of the issues presented by the justices, and was careful to not mimic the advisory opinion or rest on its authority, it ultimately reached the same conclusion: "The issue is whether the nature of the game is such that the role of chance in determining the outcome is thwarted by skill involved, or whether chance meaningfully alters the outcome and thereby predominates over the skill."<sup>432</sup>

The case next reached the Alabama Supreme Court, which was forced to reconcile its advisory opinion with the record below.<sup>433</sup> Instead, the court punted. Of the 2,325 words in the court's majority opinion, 1,711 were directly quoted from *Opinion of the Justices No. 373*. After recounting the basic analysis in the advisory opinion, the court stated: "Accordingly, we hold that Article IV, § 65, means what it says, and prohibits the Legislature from authorizing 'lotteries or gift enterprises' that involve games or devices in which chance predominates the outcome of the game, even if 'some skill' is involved."<sup>434</sup>

In a dissenting opinion, Justice Johnstone explained his vote to reverse the court below. He stated that he did not feel bound by *Opinion of the Justices No. 373*, since "opinions of the Justices are not binding precedent" and neither is "[an] opinion of a minority of this Court."<sup>435</sup> He then cited a series of Alabama cases, rendered shortly after the lottery clause was adopted in 1875, as supporting the proposition that gambling required surrendering choice and skill to fate and chance.<sup>436</sup> Justice Johnstone com-

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<sup>429</sup> *Id.* at \*3 (quoting from unpublished trial court decision).

<sup>430</sup> *Id.* at \*10.

<sup>431</sup> *Id.* at \*12.

<sup>432</sup> *Id.* at \*16.

<sup>433</sup> *Ex parte Ted's Game Enters.*, No. 1021125, 2004 WL 1178748 (Ala. May 28, 2004). Given the circumstances, it is especially curious that this opinion still has not been published in the Southern Reporter.

<sup>434</sup> *Id.* at \*3.

<sup>435</sup> *Id.* at \*4 (Johnstone, J., dissenting). For an explanation of the alignment of the justices in *Opinion of the Justices No. 373*, see *supra* note 422.

<sup>436</sup> See *Ted's Game Enters.*, 2004 WL 1178748, at \*11–\*12.

plained that *Opinion of the Justices No. 373* contravened this case law.<sup>437</sup>

*Ted's Game Enterprises* is a stark illustration of the problems inherent in the precedential use of advisory opinions. In the opinion, the members of the Alabama Supreme Court promulgated two competing views of the constitutionality of certain gaming devices under the state constitution. One (the majority opinion) is based wholly on a rule of law developed in an advisory opinion. The other (Justice Johnstone's dissent) is based on an independent, albeit selective, interpretation of state case law. The divergence in views reflects not only a disagreement as to the substance of the question but also the legitimacy of the process by which the result was reached.<sup>438</sup> Putting aside the question of whether or not Justice Johnstone was justified in attacking the authoritativeness of the citations used in the majority opinion and in *Opinion of the Justices No. 373*, the utter failure of the majority to examine other arguments besides that of the advisory opinion—or even to recount the basic facts of the case it was adjudicating—raises serious questions about the disposition of the case and promotes further uncertainty in the eyes of prospective litigants.

b. The Florida Pollution Tax Case

In 1996, voters added a “polluter pays” amendment to the Florida Constitution, providing that those who cause water pollution in the Everglades Protection Area would be “primarily responsible” for the cleanup costs.<sup>439</sup> In a subsequent advisory opinion, the justices informed the governor that the amendment was not self-executing.<sup>440</sup> Since the amendment “fail[ed] to lay down a sufficient rule for accomplishing its purpose,” the justices opined that legislative action was required to make operative the provisions of the constitutional amendment.<sup>441</sup>

No such legislation ensued.<sup>442</sup> Shortly after the issuance of the advisory opinion, homeowners within the protection zone filed suit against the

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<sup>437</sup> *Id.* at \*12.

<sup>438</sup> The parties themselves were not unaware of the controversy. Ted's filed motions for recusal against the three justices then sitting that had participated in the plurality opinion in *Opinion of the Justices No. 373*, claiming that the advisory opinion compromised their impartiality. *Id.* at \*14 (statement of nonrecusal of See, J.). Speaking for the group of three, Justice See dismissed this argument, claiming that “[w]hen a judge reaches conclusions of fact or law in an official capacity, those conclusions cannot be the basis for the judge's recusal.” *Id.* at \*15. However, in an apparent contradiction, Justice See acknowledged that the issuance of advisory opinions was “non-judicial.” *Id.* at \*16 (quoting *Opinion of the Justices No. 188*, 198 So. 2d 269, 280 (Ala. 1967)).

<sup>439</sup> Advisory Opinion to the Governor—1996 Amend. 5 (Everglades), 706 So. 2d 278, 281 (Fla. 1997).

<sup>440</sup> *Id.*

<sup>441</sup> *Id.*

<sup>442</sup> See *Barley v. S. Fla. Water Mgmt. Dist. (Barley I)*, 766 So. 2d 433, 434 (Fla. Dist. Ct. App. 2000) (stating that “Florida courts cannot force the legislature to pass the legislation which would implement Amendment 5”).

local water authority, claiming that despite being nonpolluters, they were being taxed under a law called the Everglades Forever Act (EFA) that predated the constitutional amendment.<sup>443</sup> To counteract the advisory opinion, the plaintiffs argued that their case presented specific factual issues that had not been considered by the advisory justices.<sup>444</sup>

The trial court dismissed the claim, and the appellate and supreme courts both affirmed.<sup>445</sup> The trial court expressly adopted the advisory opinion's interpretation of the amendment.<sup>446</sup> Likewise, the brief majority opinion in the intermediate appellate court quoted the key portions of the advisory opinion and reaffirmed its conclusion that because the amendment was not self-executing, the tax on the homeowners was not unconstitutional.<sup>447</sup> The dissenting judge in the intermediate court was the only one who disputed the preclusive effect of the advisory opinion on the instant litigation, stating that "the court is open, when an actual controversy concerning the issue comes up, to reconsider its advisory opinion in light of the parties' arguments."<sup>448</sup> Judge Harris went on to distinguish between the facial and applied constitutionality of the tax in light of the 1996 amendment. Because in an advisory opinion, "any discussion of the constitutionality of a statute is necessarily limited to the facial constitutionality of the enactment," Judge Harris felt that *1996 Amendment 5 (Everglades)* left the discussion incomplete.<sup>449</sup>

Nevertheless, the Florida Supreme Court held that "our *1997 Advisory Opinion* has answered the fundamental issues in this case and that the circuit court's following our *1997 Advisory Opinion* is to be affirmed."<sup>450</sup> Recounting that the governor himself had discussed the "uncertainty . . . as to its meaning and effect," the court held that the advisory opinion had adequately interpreted the amendment and thus controlled the instant case.<sup>451</sup> The majority opinion concluded, "we again hold that the EFA remains in effect. . . . [T]axes in conformity with the EFA [are] not unconstitutional as applied to petitioners."<sup>452</sup> Two dissenting Supreme Court justices stated that the advisory opinion stood for the proposition that those

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<sup>443</sup> *Barley v. S. Fla. Water Mgmt. Dist. (Barley II)*, 823 So. 2d 73, 74 (Fla. 2002).

<sup>444</sup> *See id.* at 82 (explaining that the petitioners presented an as-applied constitutional challenge rather than a facial constitutional challenge, and argued that the plain language of the amendment precluded abatement payments by nonpolluting homeowners).

<sup>445</sup> *Id.*

<sup>446</sup> *See id.* at 81–82.

<sup>447</sup> *Barley I*, 766 So. 2d at 434.

<sup>448</sup> *Id.* at 435 n.3 (Harris, J., dissenting).

<sup>449</sup> *See id.* at 436 & n.7 (distinguishing a hypothetical case where "everyone . . . is a polluter" from the allegation of the plaintiffs that they are nonpolluters).

<sup>450</sup> *Barley II*, 823 So. 2d at 82.

<sup>451</sup> *Id.* at 83.

<sup>452</sup> *Id.*

who cause water pollution should bear the costs of abating the pollution, and the taxes at issue would thus violate the clear language of the amendment.<sup>453</sup> But the dissent did not attack the propriety of using the advisory opinion to control the case. In fact, the chief justice wrote a concurring opinion in which he stated that the advisory opinion “compels us to affirm the circuit court’s ruling below.”<sup>454</sup>

While it is clear that the constitutional analysis conducted in the advisory opinion could well have been repeated and applied in *Barley* in order to reach the same result, the case raises the concern, identified by Judge Harris in the intermediate court, that advisory opinions concerning the facial constitutionality of statutes can be applied so as to compel a conclusion as to its applied constitutionality. The advisory opinion was issued so that the governor could “see that the law is faithfully executed (by providing the South Florida Water Management District and the Department of Environmental Protection with direction as to their enforcement responsibilities) and to report on the state’s progress in restoring the Everglades System.”<sup>455</sup> The advisory opinion constituted nonbinding advice to the water district, indirectly through the governor, to assist it in its operational planning and budgeting. That the district was essentially allowed to rely on the opinion in its capacity as a legal defendant raises the possibility that the water district gleaned a distinct advantage in litigation through an avenue that was not available to the plaintiffs.

### c. The Massachusetts Breathalyzer Refusal Cases

A single advisory opinion, issued in 1992 by the justices of the Massachusetts Supreme Judicial Court, garnered no less than twenty-five subsequent citations by the courts of the commonwealth. The advisory opinion stood for the proposition that prosecutors could not introduce evidence of a defendant’s refusal to take a breathalyzer test in order to prove that he was driving while intoxicated, and the constitutional question was a matter of first impression in the commonwealth.<sup>456</sup> Because the opinion touched on an issue that had not previously been litigated in the state, and because the justices ultimately chose the position of the minority of states that had considered the issue, *Opinion of the Justices to the Senate* created entirely new substantive law. Short of entirely repeating the analysis—at the risk of reaching the opposite conclusion—a Massachusetts court could not have confronted this, or a closely related, question without referencing the advi-

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<sup>453</sup> *Id.* at 85 (Pariente, J., dissenting).

<sup>454</sup> *Id.* at 83 (Wells, C.J., concurring).

<sup>455</sup> Advisory Opinion to the Governor—1996 Amend. 5 (Everglades), 706 So. 2d 278, 280–81 (Fla. 1997) (footnote omitted).

<sup>456</sup> See *Opinion of the Justices to the Senate*, 591 N.E.2d 1073, 1074 (Mass. 1992) (discussing the approach of other states).

sory opinion in a significant way.

In February 1992, the Massachusetts Senate asked the justices whether the bill under advisement, permitting the introduction of evidence pertaining to breathalyzer refusals, violated the self-incrimination clause of the state constitution.<sup>457</sup> The justices acknowledged that the federal government and the majority of states had held that the refusal was constitutionally admissible.<sup>458</sup> It conceded that of the handful of states adopting the minority approach, several had not had an opportunity to revisit the issue after the United States Supreme Court held in *South Dakota v. Neville*<sup>459</sup> that the practice did not violate the Fifth Amendment to the federal Constitution.<sup>460</sup>

In deciding to nonetheless adopt the minority rule, the justices framed the question as whether a refusal to submit to a breathalyzer test was testimonial or physical evidence.<sup>461</sup> They stated that a refusal is testimonial because “it is reflective of the knowledge, understanding, and thought process of the accused.”<sup>462</sup> To support this conclusion they relied on the proposition that the self-incrimination clause under the Massachusetts constitution “requires a broader interpretation than that of the Fifth Amendment” as well as two adjudicated cases from the 1980s holding that a witness could not be compelled to turn over self-incriminating documents because the “act of production, quite apart from the content of that which is produced, is in itself communicative.”<sup>463</sup> The refusal was distinguished from an ordinary admission because the only alternative to refusal was submission to the test—another form of self-incrimination.<sup>464</sup> “In our view,” the justices concluded, “it is simply wrong to conclude that refusal evidence used in the manner proposed is not evidence furnished by the accused.”<sup>465</sup> Unanimously, the justices informed the Senate of their opinion that the bill was unconstitutional.<sup>466</sup>

Soon thereafter, the SJC used the advisory opinion to hold unconstitutional the introduction into evidence of a homicide suspect’s refusal to

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<sup>457</sup> *Id.* at 1073.

<sup>458</sup> *Id.* at 1073–74.

<sup>459</sup> 459 U.S. 553 (1983).

<sup>460</sup> *Opinion of the Justices to the Senate*, 591 N.E.2d at 1073–74.

<sup>461</sup> *Id.* at 1077–78.

<sup>462</sup> *Id.* at 1078.

<sup>463</sup> *Id.* (internal quotation marks omitted) (citing *Commonwealth v. Doe*, 544 N.E.2d 860 (1989); *Commonwealth v. Hughes*, 404 N.E.2d 1239 (1980)).

<sup>464</sup> *See id.* (“The accused is thus placed in a ‘Catch-22’ situation: take the test and perhaps produce potentially incriminating real evidence; refuse and have adverse testimonial evidence used against him at trial.”).

<sup>465</sup> *Id.*

<sup>466</sup> *Id.* No indication exists that the justices received the benefit of briefing or oral argument in rendering their opinion. The Senate resolution merely stated that “grave doubt” existed as to the bill’s constitutionality. *Id.* at 1073.

have his hands swabbed for gunpowder residue.<sup>467</sup> “The Justices’ reasoning in that opinion applies here,” the court stated in *Commonwealth v. Lydon*.<sup>468</sup> This alone was sufficient for the reversal of the defendant’s murder conviction: on all the other issues raised on appeal, the court agreed with the prosecution.<sup>469</sup>

Two years later, the court reaffirmed and expanded the rule. In *Commonwealth v. Zevitas*,<sup>470</sup> the trial judge had informed the jury that no blood alcohol test result had been introduced into evidence, that a defendant had the right to accept or refuse such a test, and that no favorable or adverse inference could be drawn from the fact that a test had not been admitted into evidence.<sup>471</sup> The court held that the jury instructions “tended to have the same effect as the admission of refusal evidence, considered in *Opinion of the Justices* . . . would have had. . . . [T]he issue in this case for all practical purposes is the same . . . .”<sup>472</sup> In *Commonwealth v. McGrail*,<sup>473</sup> the court applied *Opinion of the Justices to the Senate* and *Lydon* to reach the conclusion that a refusal to perform a field sobriety test invoked similar constitutional protections.<sup>474</sup> Shortly thereafter, a trial court applied the same reasoning to an alphabet recitation test.<sup>475</sup>

Two opinions followed which implicated not only the substantive content of *Opinion of the Justices to the Senate*, but the extent to which both criminal defendants and trial judges were expected to recognize the rule in the advisory opinion and apply it in their arguments and rulings. On the same day in 1995, the SJC issued decisions in *Commonwealth v. Koney*<sup>476</sup> and *Commonwealth v. D’Agostino*.<sup>477</sup> In *Koney*, the trial court had issued, over the defendant’s objection, a jury instruction similar to the one the court struck down in *Zevitas* over a year later.<sup>478</sup> The court held that *Zevitas* should be applied retroactively to Koney’s vehicular homicide conviction because the trial judge should have anticipated that the holding in *Zevitas* would follow from the advisory opinion:

*Opinion of the Justices* had been submitted to the Legislature

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<sup>467</sup> *Commonwealth v. Lydon*, 597 N.E.2d 36, 39–40 (Mass. 1992).

<sup>468</sup> *Id.* at 40.

<sup>469</sup> *See id.* at 39, 41–42 (finding no error in the trial court’s determination that there was sufficient evidence to convict, in the exclusion of possibly exculpatory evidence, or in the jury instructions).

<sup>470</sup> 639 N.E.2d 1076 (Mass. 1994).

<sup>471</sup> *Id.* at 1078–79.

<sup>472</sup> *Id.* at 1079.

<sup>473</sup> 647 N.E.2d 712 (Mass. 1995).

<sup>474</sup> *Id.* at 715.

<sup>475</sup> *Commonwealth v. Van Houtin*, No. 9477CR2947, 9477CR2946, 1995 WL 808637, at \*6 (Mass. Dist. Ct. July 10, 1995).

<sup>476</sup> 657 N.E.2d 210 (Mass. 1995).

<sup>477</sup> 657 N.E.2d 217 (Mass. 1995) (*D’Agostino II*).

<sup>478</sup> *Koney*, 657 N.E.2d at 212–13.

. . . well before this case was tried. We can assume that the judge presiding at the trial was familiar with the discussion in *Opinion of the Justices*. That discussion indicated that an instruction having an effect very like the effect of the one required by [the law held unconstitutional in *Zevitas*] would violate the self-incrimination provision of art. 12 . . . .<sup>479</sup>

In *D'Agostino*, the court identified a similar erroneous jury instruction in a trial held before *Zevitas* was decided. Here, however, the trial had also taken place before the advisory opinion was handed down by the justices of the SJC.<sup>480</sup> The court excused the defendant's failure to raise the objection at trial, stating:

In view of the state of the law at the time of his trial, the defendant should be excused for having failed to foresee that there might be a sound legal basis for an objection to the jury instruction mandated by G.L. c. 90, § 24(1)(e). Not until *Opinion of the Justices, supra*, was there anything in the nature of discussion by an appellate court in the Commonwealth which would have put the defendant fairly on notice that an instruction calling the jury's attention to a defendant's probable refusal to submit to a breathalyzer test might be held to violate art. 12's right against self-incrimination.<sup>481</sup>

The logic used by the *Koney* and *D'Agostino* courts is striking. Not only did the nonbinding doctrine go completely undiscussed by *Opinion of the Justices to the Senate* or any of its citing references, but the Supreme Judicial Court *expected*, in the context of its waiver and forfeiture doctrines, that lower courts and litigants be bound to the reasoning of the justices and apply extensions of that reasoning to entirely new circumstances. The justices' pronouncements in the advisory opinion were treated as indistinguishable from a binding court decision.

The breathalyzer refusal cases illustrate a particularly unfortunate judicial application of an advisory opinion. The doctrine developed in *Opinion of the Justices to the Senate* arose from a matter of first impression and was created by way of reference to the case law of other states and analogy to other strands of Massachusetts constitutional law. In the end, no advocate with a concrete interest in the constitutionality of the legislation argued or suggested the rule that the justices eventually adopted. In subsequent cases, attorneys could either reconcile the opinion with, or distinguish the

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<sup>479</sup> *Id.* at 213.

<sup>480</sup> Commonwealth v. D'Agostino, 646 N.E.2d 767, 769 n.3 (Mass. App. Ct. 1995) (*D'Agostino I*) (explaining that the trial was held on March 19 and 20, 1992, and *Opinion of the Justices* was handed down on May 12, 1992).

<sup>481</sup> *D'Agostino II*, 657 N.E.2d at 220.

opinion from, the case at bar, but they could not attack its validity by dismissing it as the result of a nonjudicial, hypothetical proceeding. In all respects, *Opinion of the Justices to the Senate* is settled law.<sup>482</sup>

## V. CONCLUSION

The age and inconsistent application of the advisory opinion has not rendered it an anachronism. On the contrary, the doctrine has substantial positive benefits. Informed opinions as to the constitutionality of proposed legislative or executive action can speed the development of state constitutional law and provide judges, litigants, and the public with notice of what constitutes boundaries of permissible state action. In the fifteen years of data considered in this study, one could interpret the vast majority of advisory opinion requests as attempts to minimize the costs of constitutional error. Any invidious effects, such as political advantage or self-interest, must be viewed as subsidiary externalities to the basic goal of efficient and constitutionally “correct” state government. Moreover, the decreasing number of advisory opinion requests during the past five years, and the consistent frequency of refusals to issue advisory opinions, suggest that government actors are using the doctrine with increasing restraint.

Public reliance on advisory opinions works best when the topic is either very broad or very specific. In some circumstances, invocation of a due process or equal protection clause in an advisory setting can generate synthesized statements of constitutional principles which apply to a variety of factual and legal situations. Since individual adjudications based on these generalized principles are impossible without litigated facts, a plaintiff is not estopped of his “day in court.” On the opposite pole, little-used or highly technical constitutional provisions—especially those delineating legislative authority over taxing and spending—can generate, without detrimental preclusive effect, case law relying entirely on public facts and legislative findings. Since these disputes often reflect disagreement between a generic electorate and a branch of government, or between two branches of government, fully “private” rights are seldom impacted. A litigant who stands merely as a taxpayer will seldom plead facts that have not already been considered by the advisory justices; if for some reason she does, the court will be bound to revisit that opinion. The same reasoning applies to the use of advisory opinions as devices to ratify remedial legislation: this practice should not be harmful to future litigants because the ad-

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<sup>482</sup> To be sure, citations to this opinion began declining in frequency within seven years or so of its issuance. Only five citations appear in cases handed down in the year 2000 onwards. In 2004, the court held that *Opinion of the Justices to the Senate* did not apply to cases where the accused resisted compliance with a search warrant. See *Commonwealth v. Delaney*, 814 N.E.2d 346, 351–52 (Mass. 2004) (distinguishing on the basis that “the police are not pressuring the suspect into furnishing any testimonial consciousness of guilt evidence”). This was the first case that limited, rather than merely applied or expanded, the reach of the original advisory opinion.

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visory court can use the factual circumstances of the original litigation in interpreting the corrective action of the legislature.

Conversely, when judges are asked to view a narrow, but oft-repeating, set of legislative facts through the prism of a broad constitutional doctrine, the risk of mischief increases. The duller the subject matter, the better the advisory opinion: public officials concerned about the procedural requirements for a bond issue, or the constitutional pigeonhole for a tax measure, will not suffer from being bound by a nonadjudicative determination, but determinations of the constitutionality of legislation that inflames the public interest are incomplete without the stories and perspectives of the aggrieved. As the Massachusetts breathalyzer case illustrates, advisory questions pertaining to criminal law and individual constitutional rights are best avoided as topics especially likely to resonate in future private litigation. Because most advisory states have developed a theoretical distinction between the “public” domain of the advisory opinion and the “private” realm of individual litigation, courts should not hesitate to employ their power of discretionary or pseudodiscretionary rights of refusal over advisory questions. This will both realign the advisory opinion doctrine as a nonlitigious device to resolve intragovernmental disputes, and restore the independence of the judiciary by preserving the formal roles inherent in tripartite jurisdiction over the creation, preservation, and enforcement of individual rights.

Any use of advisory opinions as binding precedent is troublesome. In contrast to the anecdotal evidence offered by opponents of the advisory opinion system, the data shows that the vast majority of litigated cases that reference advisory opinions merely use them persuasively, rather than dispositively. However, the fact that substantive law has, in several instances, been created without the benefit of a factual background and developed argumentation reflects an obvious weakness in the courts’ use of the doctrine. The effect multiplies when private rights are directly affected by the advisory opinion’s conclusion of law, binding the aggrieved litigant to doctrines that have not been developed by impassioned adversaries and informed courts. Rather than abolish the advisory opinion doctrine entirely, courts can undertake simple reforms to ensure that advisory opinions are never controlling by implementing procedural rules restricting itself, lower courts, and litigants from using advisory opinions as dispositive statements of law, and printing disclaimers whenever using them nonsubstantively or persuasively. Combined with proper vigilance over the case-by-case propriety of taking jurisdiction over advisory questions, these policies can preserve the advisory opinion as a jurisprudential tool while ensuring that fact-based adjudications of constitutional questions are available to all litigants.

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