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The Jurisprudence of the Advisory Opinion Process in Rhode Island

Mel A. Topf*

[T]here is not a state in the union where the [advisory opinion] provision prevails but not only the Supreme Court but every other person who has an intimate knowledge of the workings of that provision would wish it were not there.¹

INTRODUCTION

In 1995, the justices of the Rhode Island Supreme Court issued an advisory opinion to the Governor² that affected their precedent set twenty-four years before in the adjudicated case, *State v. Holliday*.³ The case required the state to appoint counsel for indigent defendants charged with misdemeanors that carry a potential prison sentence exceeding six months, even if no prison sentence is actually imposed.⁴ In its advisory opinion the Rhode Island Supreme Court concluded that the State is no longer required to provide counsel unless the judge actually intends to send the defendant to prison.⁵ This advisory opinion reflects several characteristics of Rhode Island's advisory opinion process. First, the justices rendered their advice without a case before them.

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1. *Langer v. State*, 284 N.W. 238, 251 (N.D. 1939).

2. *In re Advisory Opinion to the Governor (Appointed Counsel)*, 666 A.2d 813 (R.I. 1995).

3. 280 A.2d 333, 337-38 (R.I. 1971).

4. *Id.* at 333.

5. 666 A.2d at 816.

Case or controversy requirements did not apply. Second, the *ex parte* nature of advisory proceedings effectively excluded from the process parties who may have been affected by the advice. Due process did not apply. Third, the issues brought before the justices were hypothetical. The doctrine of ripeness did not apply. Fourth, the advice given appeared to reverse a precedent set in 1971, but in fact advisory opinions are not binding. Precedent did not apply.

Other characteristics of the advisory process were apparent in a 1990 advisory opinion to the House of Representatives. The issue was whether the Governor may unilaterally reduce, impound or withhold from distribution funds appropriated and designated by the legislature as state aid to cities and towns.⁶ The opinion turned on interpretation of a statutory clause setting forth the conditions under which the Governor may decline to distribute funds.⁷ The justices advised that the Governor may not hold back the appropriated funds.⁸ This advisory opinion touched upon the question of when rendering advice is appropriate. First, the question from the House was propounded while litigation was pending in superior court based on precisely the same issues. Second, the question affected only the Governor's duties, though the Governor neither sought the advice nor asked the House to do so. Third, the question had nothing to do with the constitutionality of pending legislation. All three are inconsistent with the justices' standards for issuing advice, which include refusing advice when litigation is pending on the same issues, when one coordinate branch seeks advice for another, and when advice sought from the legislature is not on the constitutionality of pending legislation.⁹ This is a reflection of the extent to which the justices may set standards at will for refusing to give advice, for whatever reasons they choose.¹⁰

The characteristics of Rhode Island's advisory process reflected in these two fairly typical opinions suggest that the process deserves much more attention than the surprisingly little it has

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

7. R.I. Gen. Laws § 35-3-16 (1984).

8. 576 A.2d at 1375.

9. *See id.* at 1372; *id.* at 1375-76 (Weisberger, J., dissenting).

10. In this opinion the justices waive several of their restrictions owing to the "constitutional and public importance of the question," though they explain this only by noting that the cities and towns rely on the funds. *Id.* at 1372.

received.¹¹ The advisory power is in discord with several fundamental principles of the American systems of law and governance, such as case or controversy requirements, due process, the ripeness doctrine, and separation of powers. A further concern is that the advice rendered is purportedly non-binding and the product of non-judicial action, propositions frequently put forth by the justices and believed by almost no one else. These and other concerns cast long shadows on the legitimacy of the advisory process and hence on the court whose justices render the advice. This Article deals with those concerns; it attempts to show why the justices of the Rhode Island Supreme Court should not have advisory duties, duties which the justices do not appear to want.¹²

The Rhode Island justices have advisory power in common with the justices of ten other states.¹³ This Article will compare the advisory process in these other states with the process in Rhode Island, in part to provide context and background, but more importantly, to show that the problems with the advisory process are inherent in the process itself and not in anything unique to Rhode Island. Debate over the issues challenging the legitimacy of the process has extended over two centuries, touching most advisory states as well as the many states that, like the federal government, have rejected the process. What troubles the advisory process in Rhode Island has done so in other states; they offer no solutions to Rhode Island that would redeem an unwise and questionable practice.

11. There is no comprehensive study of Rhode Island's advisory process. No law review article has been devoted solely or mainly to the subject until now.

12. The 1986 Rhode Island Constitutional Convention proposed abolishing the constitution's advisory opinion clause in part because the duty of rendering advice "is not viewed favorably by the Justices." Report of the Judicial Selection and Discipline Committee, 25 (1986). The Convention's proposal to abolish the advisory opinion clause was grouped with three others as Resolution 86-00080-A and brought to the voters as Ballot Question No. 2. Voters' Guide to Fourteen Ballot Questions for Constitutional Revision, 7 (1986). The Question was defeated at the polls. On the reluctance of justices with advisory power to exercise the power, see *infra* Part III.A.

13. R.I. Const. art. X, § 3. All current state advisory opinion clauses are set forth in the appendix. See app. at 254-56.

I. ADVISORY OPINIONS IN THE FEDERAL AND STATE
GOVERNMENTS

A. *Federal Rejection of Advisory Opinions*

The most enduring shadow over the advisory process is the rejection of advisory opinions at the federal level. Before 1793, the practice had been common and generally accepted in both England and America. The prevalent view under the new constitution was that the President had the right to seek advice from the Supreme Court.¹⁴ In 1793, Secretary of State Thomas Jefferson wrote the Justices requesting advice regarding relations with France during France's Revolutionary wars. Certain legal questions, Jefferson wrote, had resulted in "much embarrassment and difficulty" for the President's administration.¹⁵ Chief Justice John Jay's response to President Washington courteously but very firmly refused to render the requested advice. The Court, explained Jay, considered as decisive:

the lines of separation drawn by the Constitution between the three departments of government. These being in certain respects checks upon each other, and our being judges of a court of last resort, are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to.¹⁶

It is a remarkable letter. It sets forth what is effectively the controlling federal precedent on advisory opinions, virtually unchanged to this day, despite its being a letter and not a judicial opinion. The Court, after all, was refusing to issue judicial opinions that simply render advice or that decline to do so. Despite the letter form, Jay's refusal "established a tradition so firmly engrained in our constitutional law that the Court has never questioned and seldom bothered to discuss it in any detail."¹⁷ The refusal also flew in the face of contrary centuries-old Anglo-Ameri-

14. Note, *The Advisory Opinion and the U.S. Supreme Court*, 5 Fordham L. Rev. 94, 102 (1936).

15. Letter from Thomas Jefferson to the Supreme Court Justices (July 18, 1793), quoted in Robert P. Dahlquist, *Advisory Opinions, Extrajudicial Activity and Judicial Advocacy: A Historical Perspective*, 14 Sw. U. L. Rev. 46, 59 (1983).

16. Letter from the Supreme Court Justices to President Washington (August 8, 1793), quoted in Dahlquist, *supra* note 15, at 60.

17. Patrick C. McKeever & Billy D. Perry, *The Case for an Advisory Function in the Federal Judiciary*, 50 Geo. L.J. 785, 803 (1962).

can traditions and practice.¹⁸ The practice in England could be traced as far back as records extend, at any rate, to the pre-Magna Carta doctrine of the Crown as the source of law and justice.¹⁹ The strength of advisory practice was evidenced by its survival despite increasing criticism beginning in the seventeenth century, when Lord Coke complained of its infringement on judicial independence, and continuing until the practice declined in the nineteenth century.²⁰

In the United States, a constitutional provision giving the Supreme Court advisory powers was debated at the 1787 Convention in Philadelphia.²¹ The motive for the provision was the fear, which was widely felt at the Convention, of an overly powerful legislature. Madison, for example, said that "[e]xperience in all the States had evidenced a powerful tendency in the Legislature to absorb all power into its vortex. This is the real source of danger to the American Constitution."²² Madison earlier proposed that the other two branches join in a Council of Revision with power to review and revise acts of the legislature; he felt this would provide "an additional check against a pursuit of those unwise and unjust measures which constituted so great a portion of our calamities."²³ Others at the Convention, while agreeing about the threat of "legislative usurpations," opposed the proposed council on separation of powers grounds.²⁴ Though the proposal was put forth five times, separation of powers concerns prevailed and it never passed. Charles Pinckney proposed the provision giving the Supreme Court advisory powers, using as a model the advisory clause that

18. For a fuller analysis of the 1793 correspondence, see F.R. Aumann, *The Supreme Court and the Advisory Opinion*, 4 Ohio St. L.J. 21, 36-40 (1937); Dahlquist, *supra* note 15, at 58-62; Albert R. Ellingwood, Departmental Cooperation in State Government 57-59 (1918); John F. Hagemann, *The Advisory Opinion in South Dakota*, 16 S.D. L. Rev. 291, 292-94 (1971).

19. McKeever & Perry, *supra* note 17, at 787.

20. See Stewart Jay, *Servants of Monarchs and Lords: The Advisory Role of Early English Judges*, 38 Am. J. Legal Hist. 118 (1994); see also Ellingwood, *supra* note 18, at 1-30; Van Vechten Veeder, *Advisory Opinions of the Judges of England*, 13 Harv. L. Rev. 358 (1900); E.C.S. Wade, *Consultation of the Judiciary by the Executive*, 46 Law Q. Rev. 169 (1930).

21. See Pascal F. Calogero, Jr., *Advisory Opinions: A Wise Change for Louisiana and Its Judiciary?*, 38 Loy. L. Rev. 329, 333-34 (1992); Dahlquist, *supra* note 15, at 57-58; Ellingwood, *supra* note 18, at 55-57; Note, *supra* note 14, at 101-02.

22. 2 Records of the Federal Convention of 1787, 74 (Max Farrand ed., 1987).

23. *Id.*

24. *Id.* at 76 (quoting Gouverneur Morris of Pennsylvania).

had been in the Massachusetts Constitution since 1780.²⁵ This proposal was sent to the Committee on Detail, never to return to the floor. The record reveals nothing about "the maneuverings and compromises which must have attended this abrupt termination of the issue."²⁶

Absence of an advisory opinion clause notwithstanding, prior to 1793 the new Supreme Court had issued advice apparently without causing comment. In 1790, Washington wrote the Justices inviting their opinions on the formation of the judiciary system, in particular on the Justices' own duties as circuit riders.²⁷ The Justices responded, advising Washington that Congress's requirement that they ride the circuit was constitutionally doubtful.²⁸ Still, the "rather abrupt turnabout"²⁹ in 1793 has held firm, though more recently the Supreme Court has relied on the case or controversy requirement more than separation of powers to support its ban on advisory opinions. In a leading case, the Court held that Article III limits the authority of the federal courts "to determine actual controversies arising between adverse litigants."³⁰ Supporting this conclusion, the Court ruled that the United States had no interest adverse to the claimants,³¹ and therefore, any judgment "would be no more than an expression of opinion on the validity of the acts in question."³²

25. Calogero, *supra* note 21, at 334, 341; see Ellingwood, *supra* note 18, at 57.

26. Note, *supra* note 14, at 102.

27. Letter, Washington to the Justices (April 3, 1790), *quoted in* Dahlquist, *supra* note 15, at 50-51.

28. Dahlquist, *supra* note 15, at 51-52.

29. *Id.* at 53.

30. *Muskrat v. United States*, 219 U.S. 346, 363 (1911).

31. *Id.* at 361.

32. *Id.* at 362. More recent cases affirming the Supreme Court's broad disapproval of advisory opinions include, *United States v. Fruehauf*, 365 U.S. 146 (1961), and *Flast v. Cohen*, 392 U.S. 83 (1968). The debate over providing the Supreme Court with advisory powers has continued. E. F. Albertsworth is among those favoring a constitutional amendment for this purpose in *Advisory Functions in Federal Supreme Court*, 23 *Geo. L.J.* 643 (1935). See also Paul C. Clovis & Clarence M. Updegraff, *Advisory Opinions*, 13 *Iowa L. Rev.* 188 (1927); McKeever & Perry, *supra* note 17; Note, *supra* note 14. Those opposing include, Aumann, *supra* note 18; Calogero, *supra* note 21; Lucilius A. Emery, *Advisory Opinions from Justices*, 2 *Maine L. Rev.* 1 (1908); Felix Frankfurter, *A Note on Advisory Opinions*, 37 *Harv. L. Rev.* 1002 (1924); Robert H. Kennedy, *Advisory Opinions: Cautions about Non-Judicial Undertakings*, 23 *U. Rich. L. Rev.* 173, 182 (1989).

In the 1930s, four attempts were made in Congress to pass legislation requiring the Supreme Court to give advice, owing generally to the length of time be-

B. *Advisory Opinions and the State Supreme Courts*

The long history of rejection of advisory opinions at the federal level has not prevented the states from following their own courses.³³ Those courses vary greatly, but they have in common a struggle with important doctrinal issues, especially separation of powers, as well as a widespread and longstanding reluctance by the justices to exercise advisory power. The states currently providing for supreme court advisory powers did so between 1780 and 1963; eight by constitutional provision,³⁴ three by statute³⁵ (one—Oklahoma—limited the power to capital punishment cases), and one merely out of “courtesy and respect.”³⁶ Ten other states have rejected or abandoned the practice: Kentucky, Minnesota, Ohio and Vermont ruled the practice unconstitutional,³⁷ the supreme courts of five states where advisory opinions were issued by custom abandoned the practice,³⁸ and in Missouri the advisory opinion

tween passage of New Deal laws and Supreme Court reviews. One House bill proposed a constitutional amendment authorizing either house to require advice from the Court regarding any act passed by Congress. H.R.J. Res. 317, 74th Cong. (1935), *quoted in* Dahlquist, *supra* note 15, at 71. A second, more stringent bill proposed an amendment that would require the Supreme Court to rule on the constitutionality of all acts of Congress within 60 days of passage. H.R.J. Res. 344, 74th Cong. (1935). None of the bills passed. McKeever & Perry, *supra* note 17, at 801, review debates over purported damage done by the Supreme Court’s delay in ruling the National Industrial Recovery Act of 1933, *see* A.L.A. Schechter Corp. v. United States, 295 U.S. 495 (1935), and the Agricultural Adjustment Act of 1933 unconstitutional, *see* United States v. Butler, 297 U.S. 1 (1936).

33. Ellingwood offers the most extensive treatment of advisory opinions in the states, *supra* note 18, at 30-55. *See also* James B. Thayer, *Advisory Opinions, in* Legal Essays 42-46 (1908); R.K. Hoffman, *Why Not Advisory Opinions for Illinois?*, 31 Chi.-Kent L. Rev. 141, 143-45. There is no recent comprehensive survey of the states’ advisory powers.

34. Colorado, Florida, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island and South Dakota. *See app.* at 254-56. The texts of all current advisory opinion provisions are in the appendix.

35. Ala. Code § 12-2-10 (1995); Del. Code Ann. tit. 10, § 141(a) (1996); Okla. Stat. Ann. tit. 22, § 1003 (West 1986); *see app.* at 254-56.

36. North Carolina. The “courtesy and respect” statement first appeared in North Carolina’s first advisory opinion. 31 N.C. 518 (1848).

37. *In re* Constitutionality of House Bill No. 222, 90 S.W.2d 692 (Ky. 1936); *In the Matter of the Application of the Senate*, 10 Minn. 78 (1865); *State v. Boughman*, 38 Ohio 455 (1882); *In re* Opinion of the Justices, 64 A.2d 169 (Vt. 1949).

38. Reply of the Judges of the Supreme Court to the General Assembly, 33 Conn. 586 (1867); *In re* Board of Purchase & Supplies for State Inst., 37 Neb. 425 (1893); *In re* Workmen’s Compensation Fund v. State Indus. Comm’n, 119 N.E. 1027 (N.Y. 1918); *In re* Opinion of the Judges, 105 P. 325 (Okla. 1909). *In Penn-*

provision in its 1865 constitution was omitted in its 1875 constitution.³⁹ The oldest and most influential of advisory clauses is that of Massachusetts, which appeared in its constitution of 1780.⁴⁰ Following the Massachusetts lead, three other New England states adopted advisory provisions: New Hampshire in 1784, Maine when it separated from Massachusetts in 1820, and Rhode Island within its new constitution in 1842.⁴¹ Florida incorporated an advisory provision in its constitution in 1868, Colorado in 1876, and South Dakota in 1889.⁴² Michigan, the only state to adopt a constitutional advisory provision in the twentieth century, did so in 1963.⁴³ Three states provide their supreme courts with advisory powers by statute: Delaware since 1852, Alabama since 1923, and Oklahoma since 1958.⁴⁴ North Carolina's justices have issued advisories with neither constitutional nor statutory authority from 1848 to 1985; however, they have since changed this practice by declining to issue them on separation of powers grounds.⁴⁵

C. *Advisory Opinions in Rhode Island: The Chief Provisions*

Rhode Island's advisory opinion clause, part of the state constitution since 1842, is similar to others in its brevity and relative clarity. The clause's chief provisions include the following. First, the Rhode Island advisory clause, like most others, clearly obligates the justices to issue advisories whenever requested, providing that the justices "shall give their written opinion."⁴⁶ The

sylvania, the practice fell into disuse; see Ellingwood, *supra* note 18, at 64-65. Ellingwood's statement that the North Carolina Supreme Court no longer issues advisories, *id.* at 68-69, was not then accurate in 1918, though the court did announce it would stop in 1985. See *infra* note 166 and accompanying text.

39. On the history of the Missouri advisory opinion clause, see Manley O. Hudson, *Advisory Opinions of National and International Courts*, 37 Harv. L. Rev. 970, 978-82 (1924).

40. Mass. Const. pt. II, ch. 3, art. 2; see app. at 255.

41. See app. at 254-56.

42. See app. at 254-56.

43. Mich. Const. art. III, § 8; see app. at 255. Several writers reviewing state advisory opinion practices fail to mention Michigan. See, e.g., Margaret M. Bledsoe, *The Advisory Opinion in North Carolina: 1947-1991*, 70 N.C. L. Rev. 1853 (1992); Hagemann, *supra*, note 18, at 307; T.A. Smiljanich, *Advisory Opinions in Florida: An Experiment in Intergovernmental Cooperation*, 24 U. Fla. L. Rev. 328, 328 (1972).

44. See app. at 254-56.

45. *In re Advisory Opinion*, 335 S.E.2d 890, 892 (N.C. 1985).

46. R.I. Const. art. X, § 3; see app. at 256.

justices frequently affirm their obligation.⁴⁷ Similarly, other states emphasize that the requesting authority “may require” or has “the authority to require” opinions of the justices.⁴⁸ Maine’s clause emphatically instructs the justices that they “shall be obliged” to give advisories.⁴⁹ Only in Alabama and Michigan are the requesting authorities permitted merely to “request” advice.⁵⁰ In light of the predominantly obligatory language, one of the most significant changes in advisory opinion practice—“a most startling development”⁵¹—occurred in the latter half of the nineteenth century when the justices in most advisory states, though not in Rhode Island, began to claim that they were to be the sole judges of what is an appropriate request for advice, and to assert a right to refuse to issue advisory opinions.⁵²

Second, in Rhode Island, both the coordinate branches may request advisory opinions, though not jointly. Rhode Island’s justices will render advice only on the request of the Governor “or (not and)” either house of the General Assembly.⁵³ Requests from either house must be a “formal and collective action” by the house, and not merely a request by some members to secure advice,⁵⁴ or even by house leaders seeking advice.⁵⁵ Rhode Island is similar to most advisory states in permitting both coordinate branches to seek advice. The exceptions are Florida, Oklahoma and South Dakota, where only the Governor may seek advice.⁵⁶ Delaware does not permit each house to request advice independently of the other, requiring instead that an advisory opinion be requested by “a majority of the members elected to each house.”⁵⁷

Third, all state advisory provisions place general limits on the questions the justices may answer, and it is here that Rhode Is-

47. See, e.g., *In re Opinion to the Governor*, 174 A.2d 553 (R.I. 1961).

48. Del. Code Ann. tit. 10, § 141(a) (1996); Mass. Const. pt. II, ch. 3, art. 2; N.H. Const. pt. II, art. 74; Okla. Stat. Ann. tit. 22, § 1003 (West 1986); S.D. Const. art. V, § 5; see app. at 254-56.

49. See app. at 255.

50. The Alabama justices have explicitly ruled they are not required to give advice. See, e.g., *Opinion of the Clerk*, 394 So. 2d 957 (Ala. 1981).

51. Hoffman, *supra* note 33, at 149.

52. For an extensive discussion, see *infra* Part III.B.

53. *In re Advisory Opinion (Chief Justice)*, 507 A.2d 1316, 1318 (R.I. 1986).

54. 191 A. 259 (R.I. 1937).

55. 507 A.2d at 1318.

56. See app. at 254-56.

57. See app. at 254.

land's clause is most distinctive. Rhode Island's provision is by far the broadest in this respect, requiring only that the justices give their opinions "upon any question of law."⁵⁸ This may help explain why Rhode Island was the last advisory state to impose restrictions on the types of questions it will answer.⁵⁹ In contrast, the clauses in six states require that advice be limited to "important questions of law" and "upon solemn occasions."⁶⁰ The clauses of Alabama, Delaware, Florida and Michigan restrict advisory opinions to constitutional questions,⁶¹ and those of Delaware and Florida require that the constitutional question affect the duties of the requesting authority. In South Dakota, where only the governor may seek advice, the court is not limited to constitutional questions, but the "important questions of law" must involve the exercise of executive power.⁶²

Fourth, Rhode Island's advisory clause specifies that it is the "judges" of the supreme court who render advice. The advisory provisions in seven other states are similar in this respect, designating the "judges" or "justices" as issuers of advisories.⁶³ In contrast are the clauses of Colorado, Michigan and South Dakota, which designate "the supreme court" as issuer.⁶⁴ The distinction is important and much discussed, regarding the question of the binding or non-binding nature of advisory opinions, and the judicial or non-judicial character of the advisory opinion process.⁶⁵ For example, in Colorado and South Dakota the justices have been constrained to rule that advisory opinions are binding because the

58. See app. at 256.

59. See *infra* Part III.B.

60. Colo. Const. art. VI, § 3; Me. Const. art. VI, § 3; Mass. Const. pt. II, ch. 3, art. 2; Mich. Const. art. III, § 8; N.H. Const. pt. II, art. 74; S.D. Const. art. V, § 5; see app. at 254-56. Colorado specifies simply "important questions," omitting "of law." Otherwise the two phrases are identical in all six states. Michigan is unique in imposing a time restriction on advisories, so that requests must be on "the constitutionality of legislation after it has been enacted into law but before its effective date." Mich. Const. art. III, § 8.

61. See app. at 254-56.

62. See app. at 256.

63. Alabama, Delaware, Florida, Maine, Massachusetts, New Hampshire, Oklahoma and Rhode Island. See app. at 254-56.

64. See app. at 254-56.

65. See *infra* Part III.D.

court, rather than the justices, is the designated advice-giver,⁶⁶ notwithstanding the problem of how advice can be binding.

Fifth, in Rhode Island and most other advisory states the advisory opinion clauses are silent on whether briefs and argument are permitted in advisory proceedings. The Rhode Island justices permit briefs and argument on an irregular basis.⁶⁷ The advisory opinion clauses in two other states, Alabama and Delaware,⁶⁸ provide that the justices may permit briefs and argument, and a third, Florida, is the only advisory state where this is mandatory.⁶⁹

Finally, the advisory opinion clauses in Rhode Island and four other states require that advisory opinions be in writing,⁷⁰ though that has long been the practice in all advisory states. Only Alabama's clause requires the requesting authority to put the questions in writing, though that too appears to be the longstanding practice in all advisory states.

II. ADVISORY OPINIONS: PRAGMATIC ADVANTAGES AND JUDICIAL QUESTIONS

Proponents of the advisory opinion process offer several arguments in its favor, all demonstrably weak. Opponents of the process point to the extent the process lies outside important constraints of the American judicial system. This section considers each of these arguments.

A. *Pragmatic Advantages*

Proponents of advisory opinions have put forth a defense that asserts the legitimacy and benefits of advisory opinions in non-judicial and utilitarian terms. This defense has always been most frequently and forcefully employed by observers of the process, though rarely by advisory justices themselves. The defense relies on the modern legitimating values of efficiency, cost, problem solving, cooperation and speed, and accepts advisory opinions for their

66. *In re* Resolution Relating to Senate Bill No. 65, 21 P. 478 (Colo. 1889); *In re* House Resolution No. 30, 72 N.W. 892 (S.D. 1897).

67. See Smiljanich, *supra* note 43, at 332.

68. See app. at 254.

69. Fla. Const. art. IV, § 1(c) ("[The justices] shall . . . permit interested persons to be heard on the questions presented.").

70. Alabama, Colorado, Delaware and Florida. See app. at 254-55.

pragmatic value, as an instrument to prevent the harm owing to the law's delay and expense.

Proponents see law as a means of laying down rules or norms for regulating conduct.⁷¹ Important to the success of law in this respect is the ability of those subject to the law to obtain authoritative answers to the inevitable questions on the meaning of a given law.⁷² From this viewpoint one problem with the American judicial system is that it has retained from British common law the retrospective process of determining the law's meaning authoritatively. Before its meaning may become clear, a law typically must be promulgated, then allegedly violated, tested at trial, appealed, and perhaps appealed again. All future applications of that law will rely on the clarification. This remedial concept of law requires the judiciary to "stand mute in the face of an unconstitutional statute, ignoring its possible harm until a justiciable issue is presented."⁷³

The advisory opinion process is put forth as corrective. Proponents of advisory opinions see the process as a form of preventative jurisprudence, permitting those who make and execute the law to become aware of constitutional difficulties and to be guided accordingly, before harm is done.⁷⁴ Proponents point to New Deal legislation; eleven acts were declared unconstitutional, from the Economy Act of 1933 to the Bituminous Coal Act of 1935, including the National Industrial Recovery Act of 1933 (N.I.R.A.).⁷⁵ Before the United States Supreme Court ruled the N.I.R.A. unconstitutional,⁷⁶ over one thousand national and local authorities were created under the statute, and for some two years they administered regulations with significant effects throughout the economy.⁷⁷ "[T]he whole fiasco could have been avoided had the federal supreme court been empowered, or required, to first express an

71. For two prominent treatments of law from this point of view, see H.L.A. Hart, *The Concept of Law* (1976); Hans Kelsen, *General Theory of Law and State* (1949) (particularly "General Norms Created by Judicial Acts" at 149-53).

72. Joseph Jaconelli, *Hypothetical Disputes, Moot Points of Law, and Advisory Opinions*, 101 *Law Q. Rev.* 587, 589 (1985).

73. McKeever & Perry, *supra* note 17, at 785.

74. See, e.g., Ellingwood, *supra* note 18, at 254; Hoffman, *supra* note 33, at 141; McKeever & Perry, *supra* note 17, at 785, 794.

75. McKeever & Perry, *supra* note 17, at 800-01; see also Aumann, *supra* note 18, at 25-28; Hoffman, *supra* note 33, at 141-42.

76. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

77. McKeever & Perry, *supra* note 17, at 801.

opinion on the constitutionality [of the N.I.R.A.] before it was imposed on a helpless public.⁷⁷⁸ Some advisory proponents, especially those writing in the 1930s, stress the inefficiency of adversarial litigation, noting that it hinders the government's response to social and economic needs.⁷⁹

Another value of advisory opinions, according to proponents, is that they promote interdepartmental cooperation, which helps to solve problems arising between the legislative and executive branches, in particular, issues that may not by themselves be justiciable controversies.⁸⁰ Some claim that the advisory process even promotes harmony among the branches of government.⁸¹ One benefit for contending coordinate branches is simply the availability of a source of resolution both find acceptable.⁸²

The purported preventative and cooperative values of advisory opinions, proponents say, lead to efficiency. Proponents point most often and most strongly to the speed of the advisory process, especially in contrast to the slow and expensive pace of litigation.⁸³ Oliver P. Field, in his analysis of several states' advisory practices, reported that the average time from request submission to justices' response is about thirty days.⁸⁴ This is in obvious contrast to the years it may take to resolve doubts about the constitutionality of a statute through litigation.

However, those who emphasize efficiency neglect costs. First, the justices may not have sufficient time to develop the best advice. In a 1940 advisory opinion, for example, the Rhode Island justices commented that they received the question on the Saturday before a Tuesday election day, and if the advice was to be useful they would have to answer that same day.⁸⁵ Second, claims to greater speed and lower costs for resolving constitutional questions as-

78. Hoffman, *supra* note 33, at 141.

79. Note, *supra* note 14, at 109.

80. Calogero, *supra* note 21, at 359; Smiljanich, *supra* note 43, at 338-39.

81. Ellingwood, *supra* note 18, at 252; McKeever & Perry, *supra* note 17, at 792.

82. Charles M. Carberry, *The State Advisory Opinion in Perspective*, 44 *Fordham L. Rev.* 81, 105 (1975).

83. See, e.g., Albertsworth, *supra* note 32, at 669; Ellingwood, *supra* note 18, at 251; Jaconelli, *supra* note 72, at 599; McKeever & Perry, *supra* note 17, at 793.

84. Oliver P. Field, *The Advisory Opinion—An Analysis*, 24 *Ind. L. Rev.* 203, 216 (1949).

85. *In re Opinion of the Justices*, 16 A.2d 331 (R.I. 1940). A Massachusetts justice complained in 1781 that he "could have wished that a longer space than two

sume that the justices' answers resolve doubts indefinitely. But the abstract and general nature of the questions propounded and the advice given is unlikely to deal adequately with changing reality. At any rate, as Justice Frankfurter said, constitutionality is not a fixed quality.⁸⁶ Finally, delay between passage of a law and *judicial* review of it may have political value.⁸⁷

The cooperation argument passes off its dangers. It presumes that separation of powers is successful only when the departments are "working in harmony towards a common end."⁸⁸ This presupposes a view of government as a corporation, where cooperation is a prerequisite to rational efficiency and efficiency is a means to productivity. Separation of powers, however, presumes the contrary: that the branches in close harmony are a danger. Madison described separation of powers as a protection against the "dangerous tendency" to the accumulation and concentration of power. That tendency necessitates a defense that "must be commensurate to the danger of the attack."⁸⁹ This is not the language of harmony or efficiency. The advisory process tends to place the judiciary in collusion with one or both of the coordinate branches to help them deal with what are often political matters sent to the justices to avoid the debate and deliberations that, in a democracy, are public, heated, often messy, and inconvenient to those in power.

B. *Judicial Questions*

Whatever the pragmatic value of the advisory process, the mandatory force and unusual breadth of Rhode Island's advisory opinion clause serve to highlight several jurisprudential issues burdening advisory justices. These issues arise from the extent to which the advisory opinion process is free of the constraints of important doctrinal safeguards inherent in the American judicial system. In a constitutional system characterized by constraints, the

days had been allowed me," quoted in Note, *Duty of the Court to Give Advisory Opinions*, 2 Mass. L. Q. 542, 543 (1917).

86. Frankfurter, *supra* note 32, at 1002; see also Aumann, *supra* note 18, at 42-43.

87. Kennedy, *supra* note 32, at 179. On the potential for the advisory process to cut short political processes, see *infra* Part II.B.2.

88. Ellingwood, *supra* note 18, at 252.

89. The Federalist No. 47, at 301, No. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961).

advisory process stands disturbingly removed from too many of them.

1. *Separation of Powers*

Perhaps most formidably, the advisory process is challenged by the separation of powers doctrine. This has been a persistent argument against the process since Chief Justice Jay's letter of 1793, and reasserted continually by the Supreme Court, as for example, where the Court held that "the rule against advisory opinions implements the separation of powers prescribed by the Constitution."⁹⁰

This shadow over the advisory process is lengthened by the many states that have rejected it predominantly on separation of powers grounds.⁹¹ Supreme courts in states with advisory statutes, for example, have, with three exceptions, ruled the statutes unconstitutional as violations of separation of powers.⁹² The Minnesota supreme court was typical in this regard when it ruled in 1865 that an advisory opinion statute violated separation of powers principles, any departure from which "must be attended with evil."⁹³ The Ohio Supreme Court similarly declared in 1882 that advice to the legislature would be "an unwarranted interference with the functions of the legislative department that would be . . . dangerous in its tendency."⁹⁴ Outside observers opposing the advisory opinion process have relied heavily on separation of powers;⁹⁵ and those defending advisories invariably contend with the separation of powers issue, the defenders arguing chiefly that advisory opinions are non-binding in nature.⁹⁶ Though in most advisory

90. *Flast v. Cohen*, 392 U.S. 83, 96 (1968).

91. See *supra* Part I.B.

92. The supreme courts of Alabama and Delaware have ruled their respective state's advisory opinion statutes constitutional. 96 So. 487 (Ala. 1923); 88 A.2d 128 (Del. 1952). The Oklahoma Supreme Court has not ruled on the constitutionality of the state's advisory opinion statute. The statute permits advisories only regarding convictions requiring death sentences. See *app.* at 255-56.

93. In the Matter of the Application of the Senate, 10 Minn. 78, 79 (1865); see, e.g., *In re Constitutionality of House Bill No. 222*, 90 S.W.2d 692 (Ky. 1936); *In re Constitutionality of House Bill No. 88*, 64 A.2d 169 (Vt. 1949).

94. *State v. Boughman*, 38 Ohio 455, 459 (1882).

95. See, e.g., *Bledsoe*, *supra* note 43, at 1853, 1896; *Calogero*, *supra* note 21, at 362, 382; *Emery*, *supra* note 32, at 1; *Kennedy*, *supra* note 32, at 194-96.

96. See, e.g., *Clovis & Updegraff*, *supra* note 32, at 196-97; *Hugo A. Dubuque, The Duty of Judges as Constitutional Advisors*, 34 Am. L. Rev. 369, 397 (1890); *Ellingwood*, *supra* note 18, at 250-52; *McKeever & Perry*, *supra* note 17, at 810-12;

states the advisory power derives from the constitution, this does not neutralize the separation of powers issue. The Rhode Island justices explain their policy of strict interpretation of the advisory opinion clause as necessary to legitimize advisories in view of "the obvious repugnance" of the advisory clause to the principle of separation of powers.⁹⁷

A related issue arises from the mandatory nature of the advisory duty,⁹⁸ noted as long ago as 1896 as perhaps "the most cogent objection to the practice."⁹⁹ Some see the effect of the justices' loss of control over their own advice, absent controlling restrictions, as a weakening of judicial independence. Justices for example may find themselves "participating in a realignment of governmental power by being compelled by the executive branch to review the work of the legislative branch."¹⁰⁰ This has been mitigated to some extent by the advisory justices having gradually taken upon themselves the right to refuse advisory requests.¹⁰¹ However, the Rhode Island justices have by now repeatedly affirmed their obligation to respond, as long as they view the question propounded as falling within the purview of the advisory opinion clause.¹⁰²

Note, *supra* note 14, at 105. The purportedly non-binding nature of advisory opinions is treated *infra* Part III.D.

97. Opinion to the Governor, 191 A.2d 611, 614 (R.I. 1963); see *In re* Opinion to the House of Representatives, 208 A.2d 126, 128 (R.I. 1965) (declining to render advice since answering the question propounded would be an "undue expansion" of the narrow purpose of the advisory opinion clause by "judicial fiat on the constitutional separation of powers of government"); see also Answer of the Justices to the Council, 291 N.E.2d 598, 600 (Mass. 1973) (The Massachusetts advisory opinion clause "must be strictly construed in order to preserve separation of judicial from executive and legislative branches of government.").

98. See *supra* pp. 214-15.

99. Note, *Extra-Judicial Opinions*, 10 Harv. L. Rev. 50 (1896).

100. Kennedy, *supra* note 32, at 180.

101. See *infra* Part III.B. While some observers question the advisory justices' authority to refuse to render advice, see Hoffman, *supra* note 33, at 149-50, others, like Kennedy, call it "uniquely important that the judges retain [this] moral and institutional" authority. Kennedy, *supra* note 30, at 180.

102. See, e.g., Opinion to the Governor, 191 A.2d 611 (R.I. 1963); *In re* Advisory Opinion to the Governor, 483 A.2d 1078 (R.I. 1984).

2. *The Political Process: Judicial Encroachment on Legislative and Public Debate*

The advisory process, some say, engages the justices in policy and politics,¹⁰³ creating the danger of weakened public confidence in judicial disinterestedness and independence.¹⁰⁴ In addition, the process impinges on the central political activity of legislative and public debate. "Perhaps the most costly price of advisory opinions," according to Justice Frankfurter, "is the weakening of legislative and popular responsibility."¹⁰⁵ For one thing, the legislature loses opportunities inherent in the "beneficent ordeal" of debate and negotiation with a resulting diminution of a sense of responsibility.¹⁰⁶ The very availability of the advisory process invites the legislature to surrender their obligation to independently assess the constitutionality of a pending statute¹⁰⁷ and also invites the executive to avoid assessing the constitutionality of its acts.¹⁰⁸ "It is not unknown for legislatures to abdicate their duty to act constitutionally in reliance upon eventual judicial review. Advisory opinions facilitate this abdication."¹⁰⁹

In addition, the advisory process tends to diminish the civic discourse essential to the political economy of a republic. This consequently dwarfs the political capacity of the people and deadens their sense of moral responsibility.¹¹⁰ The advisory process has a depoliticizing effect, withdrawing public questions from the political realm to the isolated realm of the justices, in which they are required to stay by virtue of their disinterestedness. There the justices are at least formally unaffected by the various and unpredictable sources of public opinion and information endlessly impinging

103. Kennedy, *supra* note 32, at 194; *see also* Calogero, *supra* note 21, at 367; Clovis & Updegraff, *supra* note 32, at 196; Dubuque, *supra* note 96, at 393 (citing the Massachusetts 1853 Constitutional Convention's attempt to delete the advisory opinion provision, fearing that justices might be drawn "into the vortex of politics").

104. Aumann, *supra* note 18, at 194; Calogero, *supra* note 21, at 367; Preston W. Edsall, *The Advisory Opinion in North Carolina*, 27 N.C. L. Rev. 297, 333 (1949); Hagemann, *supra* note 18, at 295.

105. Frankfurter, *supra* note 32, at 1007.

106. Aumann, *supra* note 18, at 48.

107. Calogero, *supra* note 21, at 363.

108. Kennedy, *supra* note 32, at 190 n.54.

109. *Id.*

110. James B. Thayer, *Life of John Marshall* 103-110, *quoted in* Frankfurter, *supra* note 32, at 1007.

on the legislative process. The advisory process relies on the "wise man" technique of government with its concomitant temptation to avoid the conflicts, ambiguities and uncertainties of the democratic political process.¹¹¹ If advisory opinions were not available, "legislative and executive officials would be forced to face up to constitutional questions and take responsibility for the initial decisions on these questions, thereby giving at least some measure of evidence as to what the public understands the constitution to mean."¹¹²

3. *The Case or Controversy Requirement*

The advisory opinion process is an exception to a doctrine that further troubles the advisory process and distinguishes advisory opinions from adjudicated opinions—the case or controversy requirement.¹¹³ One basis for the United States Supreme Court's rejection of advisories is that they tend to be "upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faceted situation embracing conflicting and demanding interests."¹¹⁴

The *ex parte* character of the advisory process puts it outside the core legal premise that the judiciary should not offer an opinion on an issue until it is before the court in an adversarial proceeding. The focus of the adversarial system is what a former Maine Chief Justice called, in 1908, "the shock of contention by adverse parties that lights the torch of truth. It is when every argument advanced, and every authority cited, is assailed by opposing counsel that the true reason and rule are most likely to be found."¹¹⁵ The absence in the advisory process, not only of opposing parties before the justices, but also of lower court opinions, themselves a product of ad-

111. C. Dallas Sands, *Government by Judiciary—Advisory Opinions in Alabama*, 4 Ala. L. Rev. 1, 37 (1951).

112. *Id.* at 38.

113. On the absence of the correlative practice of arguments and briefs in advisory proceedings, see *infra* Part III.B.5. At the 1986 Rhode Island Constitutional Convention, the lack of opposing arguments and lack of briefs were frequently cited as reasons to remove the advisory opinion clause. Judicial Selection and Discipline Committee, Minutes (May 21, 1986); Report of the Judicial Selection and Discipline Committee, Minutes (May 29, 1986); Convention Proceedings (June 4, 1986).

114. *United States v. Fruehauf*, 365 U.S. 146, 157 (1961).

115. *Emery*, *supra* note 32, at 3.

versarial process, increases the likelihood of error by the justices.¹¹⁶

4. *Facts*

An important consequence of the absence of adversarial proceedings in the advisory opinion process is that the justices act outside the context provided by full factual development.¹¹⁷ Facts, as Justice Frankfurter said, are decisive; without them advisory opinions are rendered in an abstract universe of sterile legal questions "bound to result in sterile conclusions unrelated to actualities."¹¹⁸ It is the frame of claim and counterclaim, "a proposition on one side denied on the other,"¹¹⁹ that makes judicial facts facts in the adversarial system. In this system, where judgment is required "only when an affirmative is met by a negative," a conflict of views represents a means of discovering facts.¹²⁰ One consequence to the advisory process noted by Massachusetts's Chief Justice is that there is no assurance that either the question propounded or the advice rendered reaches all issues or resolves all potential conflicts relating to the issues.¹²¹ In other words, in an adversarial case a court relies on the core adjudicative acts of challenge and

116. Smiljanich, *supra* note 43, at 337. On the increased likelihood of error, see also Calogero, *supra* note 21, at 366; Frankfurter, *supra* note 32, at 1006; Kennedy, *supra* note 32, at 186 n.42; Sands, *supra* note 111, at 31; Note, 103 U. Pa. L. Rev. 772, 773 (1955).

117. The factual vacuum of the advisory process was emphasized at the 1986 Rhode Island Constitutional Convention: "[T]he lack of factual information which would arise in an actual case or controversy, make[s] it difficult for justices to give these matters the deliberation they deserve." Report of the Judicial Selection and Discipline Committee, Minutes at 32 (May 29, 1986); see also *id.* at 1; Convention Proceedings at 127 (June 4, 1986).

118. Frankfurter, *supra* note 32, at 1005; see also Aumann, *supra* note 18, at 44; Calogero, *supra* note 21, at 364. The Maine justices have remarked on the "extraordinary responsibility of rendering their opinions outside the context of any concrete, fully developed factual situation and without the benefits of adversary evidentiary legal presentations." Opinion of the Justices of the Supreme Court Given Under the Provisions of Section 3 of Article VI of the Constitution, 460 A.2d 1341, 1345-46 (Me. 1982).

119. Hector L. MacQueen, *Pleasable Brieves, Pleading, and the Development of Scots Law*, 4 Law & Hist. Rev. 403, 413 (1986). On the historically central role of adversarial fact, see also S.F.C. Milsom, *Historical Foundations of the Common Law* 42 (1981).

120. Alessandro Guiliiani, *The Influence of Rhetoric on the Law of Evidence and Pleading*, 7 Jurid. Rev. 216, 229 (1962).

121. Letter from Massachusetts Chief Justice Paul J. Liacos to Louisiana Chief Justice Pascal F. Calogero, Jr. (May 17, 1991) (copy on file with author).

response, claim and denial, for its "finding" of facts. These adjudicated facts are judicially real in contrast to the abstract facts merely offered *ex parte* by those seeking advisory opinions. The facts offered before advisory justices remain "non-adjudicatory, hypothetical and prospective."¹²²

In this respect advisory opinions lie outside another judicial doctrine closely related to case or controversy as well as to fact requirements—ripeness.¹²³ The unripe, abstract and prospective nature of requests for advice contributes to overly broad opinions that do "implicitly what courts are forbidden to do explicitly; namely, . . . resolve[] the legal merits of questions not actually posed and which therefore need not be decided."¹²⁴ The Rhode Island justices have created a restriction against unspecific and overly broad questions¹²⁵ that appears to be in part a bar to advice on unripe issues.

5. *Briefs and Arguments*

Another way the advisory process lies outside judicial procedure is that opinions need not be briefed or argued by interested parties.¹²⁶ Typically the letter from the requesting authority may be the sole source of relevant information. Since the justices usually lack the resources and procedures to secure relevant information,¹²⁷ they arrive at conclusions only after consulting among themselves.¹²⁸

122. Kennedy, *supra* note 32, at 192.

123. The United States Supreme Court has indicated the origin of ripeness in article III case or controversy requirements, *see, e.g.*, *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 59, 81 (1978), and has viewed ripeness in part as a requirement that decisions not be handed down until facts are alleged adequate to a precise resolution of the issue, *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945).

124. Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 Harv. L. Rev. 297, 303 (1979).

125. *See infra* p. 239.

126. *See supra* p. 217. Only the Florida advisory clause requires that the justices permit interested parties to be heard. *See app.* at 254-55.

127. Calogero, *supra* note 21, at 365; *see also* Hagemann, *supra* note 18, at 296; Note, *supra* note 99, at 50.

128. Aumann, *supra* note 18, at 47; Note, *Advisory Opinions on the Constitutionality of Statutes*, 69 Harv. L. Rev. 1302, 1309 (1956). Advisory justices have long commented on this. *See, e.g.*, Reply of the Judges of the Supreme Court to the General Assembly, 33 Conn. 586 (1867) (advice refused, in part for lack of briefs and argument); Opinion of the Justices, 21 N.E. 439 (Mass. 1889); *In re Law School Manual*, 4 A. 878 (N.H. 1885). The 1820 Massachusetts Constitutional Conven-

However, advisory justices have increasingly permitted briefs and arguments whether or not their respective advisory clauses provide for it.¹²⁹ This raises its own problems. First, sole discretion to allow participation by interested parties in most advisory states remains with the justices. Second, even when outside participation is permitted, it is possible only after the question has been already accepted by the justices; threshold jurisdictional questions cannot be raised.¹³⁰ Third, participation is hampered by the short amount of time typical of the advisory process. Fourth, there is no clear procedure for identifying interested parties, much less notifying them.¹³¹ This may lead to concerns among the justices about due process infringements, which could impel them to restrict advisories to broad and general public issues, making it all the more difficult to identify parties with a sufficient stake in the issue to effectively argue on it.¹³² Fifth, briefs and arguments in advisory proceedings blur the "already imprecise distinction between decisions of the court and opinions of the justices."¹³³ Finally, briefs and arguments under advisory procedures may not be of the same quality as in adjudications. Massachusetts Chief Justice Liacos observes that a briefing from an interested party in an advisory opinion proceeding "sometimes is not so effective or so well-focused as that which follows thorough examination of the issues through the trial process."¹³⁴

6. *Due Process*

The *ex parte* character of advisory proceedings raises due process questions since the proceedings exclude a hearing by parties who may be affected by the action of the requesting authority rely-

tion's judiciary committee, in its report recommending abolition of the advisory clause, said the questions propounded "must almost inevitably be decided without the important benefit of an argument," *quoted in* Dubuque, *supra* note 96, at 391-92. The same point was made at the 1986 Rhode Island Constitutional Convention. *See supra* note 113.

129. Calogero, *supra* note 21, at 348.

130. Kennedy, *supra* note 32, at 185.

131. *Id.* at 192; Calogero, *supra* note 21, at 348.

132. Calogero, *supra* note 21, at 349.

133. Carberry, *supra* note 82, at 101. On the tendency of advisory procedures and advisory opinions themselves to take on the traits of adjudications, see *infra* Part III.E.

134. Letter from Massachusetts Chief Justice Paul J. Liacos to Louisiana Chief Justice Pascal F. Calogero, Jr. (May 17, 1991) (copy on file with author).

ing on the advice.¹³⁵ Further, advisory proceedings are prospective, and as such they "might foreclose issues on which interested parties in future litigation would not have had full opportunity to be heard."¹³⁶ Although advisory justices have increasingly permitted briefs and argument, except in Florida, decisions as to who may submit briefs, when they may be submitted, how many may be submitted, and whether they may be submitted at all, remain wholly at the discretion of the justices.

Partly to mitigate this, all advisory states have restricted advisory requests that affect private rights or pending litigation.¹³⁷ For example, the Colorado justices' ban on advisories on issues pending in litigation is in part for the protection of interested parties' "opportunity of presenting their causes to court."¹³⁸ A difficulty here is that nearly every official action can reasonably be expected eventually to affect some private right, so that a ban on advice affecting private rights, if followed with rigor, could preclude nearly all advisory opinions.¹³⁹

7. *Justices Prejudiced by Advisory Proceedings*

Justices may be prejudiced by their advisory opinions if the same issues come before them in an adjudicated case. There is risk of the justices being "insensibly biased" by their earlier conclusions in advisory opinions, since the justices may be slow to overcome the pride of first conviction and admit the need to change their views.¹⁴⁰ Even if the advice were incorrect, the justices might be slower to see error in their own work than in that of others.¹⁴¹

Advisory justices themselves are aware of the problem. This was one of the objections of the Rhode Island justices to their advisory duty that was reported to the 1986 state Constitutional Convention: "Once an advisory opinion is issued, it becomes very difficult [for the justices] to reconsider an issue and decide it differ-

135. Carberry, *supra* note 82, at 101; Note, *supra* note 99, at 50; Note, *Constitutional Law—Powers of the Judiciary—Obligation of Courts to Give Advisory Opinions*, 26 Harv. L. Rev. 655 (1912).

136. Carberry, *supra* note 82, at 101.

137. On such restrictions in Rhode Island, see *infra* p. 236-37.

138. *In re Interrogatories by the Governor*, 245 P.2d 1173 (Colo. 1952).

139. Sands, *supra* note 111, at 24.

140. Ellingwood, *supra* note 18, at 254-55.

141. Edsall, *supra* note 104, at 332; see also Sands, *supra* note 111, at 26.

ently, in light of an actual factual situation."¹⁴² The Massachusetts justices have referred to their duty to "guard against" any influence of earlier advisory opinions while considering an adjudicated case;¹⁴³ and two Alabama justices, declining to join their five brethren who affirmed the constitutionality of rendering advice under the state's advisory opinion statute, said that rendering advice "will constitute a moral obstacle . . . to stand in the way of a free and unbiased decision should the question now propounded hereafter recur in the course of litigation the court will be bound to decide."¹⁴⁴ A further problem in Rhode Island is that while the justices may seek to "guard against" any influence of earlier advice on later decisions, they in fact freely cite their advisory opinions in support of their decisions in adjudicated opinions.¹⁴⁵

III. JUDICIAL RESPONSES TO DOCTRINAL DIFFICULTIES

Given the constitutional or statutory authority to participate, the threshold issue for any advisory court will be whether the judges ought to accept an invitation to provide counsel to another branch. That decision—to become engaged or to decline—is the most important decision for the governmental system.¹⁴⁶

Advisory justices have responded in various ways to the doctrinal difficulties discussed above. Generally, in states without a constitutional mandate to issue advice the respective justices have refused to do so.¹⁴⁷ In most states with advisory opinion provisions the justices have openly expressed their reluctance to render advice. In all advisory states, the justices have imposed rules sharply restricting when they will render advice even when the state's advisory opinion clause contains clear and unqualified obligatory language, as does Rhode Island's clause. This section briefly reviews the nature of the refusals and the depth of the reluctance, followed

142. Report of the Judicial Selection and Discipline Committee, Minutes (May 21, 1986).

143. *Massachusetts Hous. Fin. Agency v. New England Merchants Nat'l Bank*, 249 N.E.2d 599 (Mass. 1969).

144. *In re Opinions of the Justices in re Amendment to Section 93 of the Constitution*, 96 So. 487, 498 (Ala. 1923).

145. See *infra* pp. 246-47.

146. Kennedy, *supra* note 32, at 184.

147. The exceptions are Alabama, Delaware and Oklahoma, where advisory opinion authority is provided by statute. See *app.* at 254-56.

by an analysis of the chief restrictions imposed by Rhode Island's justices and the rationale behind them.

A. *Refusals and Reluctance to Issue Advisory Opinions*

State supreme courts not compelled to give advice by their constitutions have tended to reject advisory opinion requests. Similarly, with three exceptions,¹⁴⁸ every supreme court confronted with the issue has ruled statutes creating advisory power to be unconstitutional. Some supreme courts have rejected advisories immediately, some after issuing them for some time.¹⁴⁹

Supreme court justices with advisory duties have freely expressed their reluctance to perform the duties. Delegates to the 1986 Rhode Island Constitutional Convention learned that former and present Rhode Island Supreme Court justices "reported that this obligation . . . is not viewed favorably by the Justices," and that several justices "spoke out in opposition" to the advisory process.¹⁵⁰ It has long been the same in other advisory states, as observers have been pointing out for the past century. A writer in 1896 noted the "extreme reluctance" with which the Massachusetts justices gave advisory opinions, which "place[d] the court in a difficult position."¹⁵¹ The Massachusetts Constitutional Conventions of 1820 and 1853 both passed proposals to remove the clause, in

148. See *supra* note 92.

149. Discussions of rejecting states are in Edsall, *supra* note 104, at 335-36; Ellingwood, *supra* note 18, at 65-75; George N. Stevens, *Advisory Opinions—Present Status and an Evaluation*, 34 Wash. L. Rev. 1, 8-10 (1959). Rejecting opinions are: Reply of the Judges of the Supreme Court to the General Assembly, 33 Conn. 586 (1867) (after issuing two advisories); *In re* Constitutionality of House Bill No. 222, 90 S.W.2d 692 (Ky. 1936) (overturning a 1936 statute); *McJunkins v. Stevens*, 102 So. 756 (La. 1925); *Maryland Nat'l Capital Park & Planning Comm'n v. Randall*, 120 A.2d 195 (Md. 1956); *Connor v. Herrick*, 84 N.W.2d 427 (Mich. 1957) (later provided for by constitutional amendment in 1963); *In re* Opinion of the Justices, 114 So. 887 (Miss. 1928); *Hester v. Miller*, 83 A.2d 773 (N.J. 1951) (overturning a statute under which it previously issued an advisory opinion); *Workmen's Compensation Fund v. State Indus. Comm'n*, 119 N.E. 1027 (N.Y. 1918) (after issuing advisories previously); *Langer v. State*, 284 N.W. 238 (N.D. 1939); *In re* Opinion of the Judges, 105 P. 325 (Okla. 1909) (later permitted by statute, limited to death penalty cases); *Morrow v. Corbin*, 62 S.W.2d 641 (Tex. 1933); *deSaussure v. Hall*, 297 S.W.2d 90 (Tenn. 1956); *In re* Opinion of the Justices, 64 A.2d 169 (Vt. 1949); *State v. Dammann*, 264 N.W. 627 (Wis. 1936).

150. The first quote is in the *Report of the Judicial Selection and Discipline Committee, Minutes*, (May 21, 1986); the second quote is in the *Convention Proceedings*, (June 4, 1986). Neither document identifies the justices.

151. Note, *supra* note 99, at 50.

part owing to such objections.¹⁵² Another observer looked grimly in 1918 on the tendency of most advisory justices "to discourage the practice" if not to deal downright harshly with their respective advisory clauses.¹⁵³ In 1923, a strong dissent by two justices to the Alabama Supreme Court opinion upholding the state's advisory opinion statute observed that "[i]t is impossible to read the opinions of the courts throughout the country without coming to the conclusion that the attitude of the judiciary generally has been unfavorable to the practice even in those states where it is expressly permitted by their constitutions."¹⁵⁴ Another wrote in 1937 that "in all jurisdictions, jurists faced with the perplexing task of formulating an opinion in advance of litigation have forcibly expressed the inadequacy of their positions."¹⁵⁵ A justice in North Dakota, a non-advisory state, remarked in 1939 that he could "safely say that there is not a state in the union where the [advisory opinion] provision prevails but not only the Supreme Court but every other person who has intimate knowledge of the workings of that provision would wish it were not there."¹⁵⁶ Likewise it was observed in 1959 that "one cannot read the cases set forth in the annotations to these [advisory opinion] provisions without sensing opposition to the practice."¹⁵⁷

The advisory justices themselves have long made clear their views of their advisory duties. In Colorado the justices' antipathy toward what they called early on "this doubtful and perilous experiment" in advisory opinions¹⁵⁸ was so strong that any practical usefulness of that state's advisory opinion clause was called "impossible" in 1932.¹⁵⁹ For example, in the 1880s, the Colorado jus-

152. As in Rhode Island in 1986, both proposals to abolish the advisory opinion clause were defeated at the polls. Aumann, *supra* note 18, at 33-34; Dubuque, *supra* note 96, at 391-93; Ellingwood, *supra* note 18, at 35-37; Note, *supra* note 85, at 548-52.

153. Ellingwood, *supra* note 18, at 256.

154. *In re* Opinion of the Justices *in re* Amendment to Section 93 of the Constitution, 96 So. 487, 497 (Ala. 1923).

155. Aumann, *supra* note 18, at 46.

156. *Langer v. State*, 284 N.W. 238, 251 (N.D. 1939).

157. Stevens, *supra* note 149, at 11.

158. *In re* House Bill No. 122, 21 P. 478, 479 (Colo. 1889).

159. William H. Robinson, Jr., *Limitations upon Legislative Inquiries under Colorado Advisory Opinion Clause*, 4 Rocky Mtn. L. Rev. 237, 237 (1932). Robinson cites several advisories where the justices "frankly" express their reluctance. See, e.g., *In re* House Resolution No. 10, 114 P. 293 (Colo. 1911); *In re* Senate Resolution No. 4, 130 P. 333 (Colo. 1913).

tices, protesting what they called the "extensive use" of the advisory process by requesting authorities, "emphasized their protest by refusing to answer the particular question proposed."¹⁶⁰ The Missouri justices were so hostile to their advisory duties that they appear to be the first to refuse outright to give advice, despite the mandatory language of the state's advisory opinion clause.¹⁶¹ Their opposition contributed to the omission of the advisory opinion clause from Missouri's 1875 Constitution.¹⁶² After Missouri's clause was omitted, the justices of the Colorado Supreme Court commented approvingly that Missouri "profited" by experience.¹⁶³ In Massachusetts and Maine, "the justices have always given these required opinions with more or less reluctance, and sometimes with expressions of reluctance and even with protests."¹⁶⁴ North Carolina's Chief Justice described the members of his court as "most reluctant to issue" advisory opinions,¹⁶⁵ and in 1985, the North Carolina justices declared that advisories are not authorized by the state constitution, apparently ending a practice of two centuries.¹⁶⁶

B. Restrictions

Before 1935, the Rhode Island justices answered just about any question propounded to them.¹⁶⁷ An 1881 advisory opinion, for example, concerned an existing statute prohibiting licenses for selling liquor "within four hundred feet of any public school." The

160. Note, 3 Harv. L. Rev. 228 (1889).

161. *Opinion of the Justices*, 37 Mo. 135 (1865). The 1865 Missouri Constitution provided that the supreme court justices "shall give their opinion . . . when required by" the governor or either house. Mo. Const. of 1865, art. VI, § 11.

162. Ellingwood, *supra* note 18, at 46.

163. *In re House Bill No. 122*, 21 P. 478, 479 (Colo. 1889); see also *In re Construction of Constitution*, 54 N.W. 650 (S.D. 1893).

164. Emery, *supra* note 32, at 5.

165. Calogero, *supra* note 21, at 345 n.74; see also Bledsoe, *supra* note 43, at 1862.

166. *In re Advisory Opinion*, 335 S.E.2d 890, 892 (N.C. 1985). North Carolina has issued advisories by custom, with neither constitutional nor statutory authority. On the 1985 decision, see Bledsoe, *supra* note 43, at 1884.

167. Between 1842, when the advisory opinion clause first went into effect, and 1935, the justices appear to have set forth a restriction only once. In 1893, they declined to answer a question because an answer would have amounted to a criticism of already passed legislation. *In re Legislative Adjournment*, 27 A. 324 (R.I. 1893). The restriction is applied unevenly thereafter. See *In re Ten-Hour Law for Street Ry. Corp.*, 54 A. 602 (R.I. 1902).

Governor asked the justices if this meant the entire space within a 400 foot radius, or just 400 feet measured along a street or highway, and if it meant the school building or the whole school lot. The entire space and the whole school lot, answered the justices in an opinion two sentences long.¹⁶⁸ Beginning in 1935, however, the justices imposed a policy setting limits on their obligation to render advice. The justices, in effect, declared that the mandatory language of the advisory opinion clause is mandatory only when the questions propounded conform to whatever restrictions the justices choose to impose from time to time. The justices began developing a set of restrictions sharply limiting the kinds of questions they will answer. They typically imposed a new restriction in the same opinion where they declined to give advice based on the new restriction.¹⁶⁹ In a striking reversal of their virtually unlimited acceptance of requests for advice, the justices now declare that the constitution and laws of the state contain ample provisions by which the constitutionality and validity of laws may be tested "by the court in a proper litigated case, and [that they] are loathe to advance merely *advisory opinions of the justices*."¹⁷⁰

Rhode Island was the last state whose top court placed restrictions on issuing advisory opinions. The first was Missouri, whose justices began imposing restrictions in 1865, soon after the state's 1865 constitution established an advisory process.¹⁷¹ They were followed in 1877 by Massachusetts and in 1889 by Colorado. The Colorado justices, like those of Missouri, set restrictions soon after they were authorized to issue advisories, not surprising in view of their open opposition to advisory duties.¹⁷² Massachusetts, in con-

168. Opinion of the Judges, 13 R.I. 736, 737 (1881).

169. See, e.g., To Certain Members of the Senate in the General Assembly, 191 A. 518 (R.I. 1937) (refusing to render advice because the Senate adjourned *sine die* before the justices had time to consider the question). Elsewhere this was similar. For example, in the first opinion where the Massachusetts justices reject a request for advice, the justices announce for the first time that they will not render advice if the question may also arise in a litigated case and if the matter at issue cannot be affected by legislative or executive action. They then refuse to advise on these grounds. Opinion of the Judges, 122 Mass. 600 (1877).

170. 191 A. at 520. On the distinction between opinions of the court and opinions of the justices, see *infra* pp. 247-48.

171. Opinion of the Judges, 37 Mo. 135 (1865).

172. *In re* Constitutionality of House Bill No. 18, 21 P. 471 (Colo. 1889).

trast, set restrictions after issuing unrestricted advisories for 96 years.¹⁷³ The other advisory states gradually followed.

In the advisory states where the justices are obliged to give advice,¹⁷⁴ do the justices have authority to set restrictions and to refuse to render advice at their pleasure? As the practice of refusing began to spread after 1877,¹⁷⁵ so did debate on that question, some arguing that this authority is reserved to the requesting authority and leaves nothing to the discretion of the justices.¹⁷⁶ Typical was Hugo A. Dubuque, who in 1890 took strong exception to justices increasingly taking it upon themselves to set restrictions on requests for advice.¹⁷⁷ Dubuque faulted the Massachusetts justices' first refusal on three grounds: their reasoning, their inconsistency (suddenly refusing after invariably replying for nearly a century even when they questioned the correctness of the request), and especially their usurping the authority of the political branches, which are "nearer to the people" and so "presumed to know and understand the wants of the people better than the judiciary."¹⁷⁸ Albert Ellingwood, writing three decades later, called refusing advisories "unhistorical and irrational,"¹⁷⁹ and around the same time, former Maine Chief Justice Emery said the Maine justices were incorrect in beginning to refuse advisories in 1891, since only the requesting authority could decide what is or is not an appropriate question.¹⁸⁰

By the time Ellingwood and Emery wrote, however, the practice of restricting advisory opinions was firmly established, and, by the late 1930s, all advisory justices had developed restrictions without challenge by the coordinate branches. Unlike Rhode Island, a majority of advisory states have constitutional or statutory clauses limiting advisory opinions to "important questions of law"

173. 122 Mass. 600.

174. All except Alabama, Michigan and North Carolina. See app. at 254-56.

175. See, e.g., *Opinion of the Judges*, 58 N.H. 623 (1879) (after 95 years without refusal); *In re Opinion of the Judges*, 23 Fla. 297 (1887) (after 20 years).

176. See, e.g., Dubuque, *supra* note 96, at 363-86; Ellingwood, *supra* note 18, at 161, 167; Emery, *Advisory Opinion of the Justices—No. II*, 11 Me. L. Rev. 1, 16 (1917); Hoffman, *supra* note 33, at 149-50; Note, *The Validity of the Restrictions on the Modern Advisory Opinion*, 29 Me. L. Rev. 305, 313 (1978).

177. Dubuque, *supra* note 96, at 394-98.

178. *Id.* at 383-86.

179. Ellingwood, *supra* note 18, at 176.

180. Emery, *supra* note 176, at 16.

and "solemn occasions,"¹⁸¹ and there the justices have tended to use these phrases as umbrellas under which they have placed a wide variety of restrictions. The Maine justices, for example, ban questions affecting private interests and questions that are not on a subject of a general public nature, ruling neither is a solemn occasion.¹⁸²

Rhode Island's advisory clause, however, is distinct in its breadth, requiring advisories on "any question of law." This, together with the clause's mandatory language, may help explain why the Rhode Island justices were late in developing restrictions.¹⁸³ Nonetheless, Rhode Island is now broadly similar to the other advisory states in its justices' routine exercise of authority over whether or not a question propounded comes under the advisory provisions.

The Rhode Island justices accomplished this by taking it upon themselves to develop an interpretation of the advisory opinion clause that permits them to refuse to render advice. Their authority to refuse is grounded in their view that "this peculiar obligation" to render advisory opinions is provided by a constitutional clause that is obviously repugnant to the principle of separation of powers.¹⁸⁴ Such a clause could not have been included in the constitution without reason or purpose.¹⁸⁵ The clause was included, the justices say, "in order to enable the executive and legislative departments to more effectively discharge particular duties that are textually committed to them by the Constitution."¹⁸⁶ From this the justices infer an assistance rationale for determining when they may properly render advice: the effective performance of constitutional obligations by the legislative and executive branches "requires from time to time assistance from the judges of this court upon questions of law, assistance which the framers of the consti-

181. Alabama, Colorado, Maine, Massachusetts, Michigan, New Hampshire and South Dakota. See app. at 254-56.

182. *In re Opinion of the Justices*, 191 A. 485 (Me. 1936); *In re Opinion of the Justices*, 128 A. 691 (Me. 1925).

183. See Ellingwood, *supra* note 18, at 172-73. Writing in 1918, Ellingwood observed that the Rhode Island justices "have never given any indication of a disposition to withhold advice" except regarding pending litigation, which he attributes to the broad language of the advisory clause "which leaves very little opportunity for a difference of opinion as between questioners and questioned." *Id.*

184. *Opinion to the Governor*, 191 A.2d 611, 614 (R.I. 1963).

185. *Id.*

186. *Id.*

tution contemplated as being best provided through the device of the advisory opinion.¹⁸⁷ This assistance, however, is not provided for "every doubt and difficulty that might present itself."¹⁸⁸ While the justices have a duty to render advice in response to proper requests, it is no less their duty, "in view of the separation of executive, legislative, and judicial departments of government," to abstain from doing so in any case which does not "fall reasonably within the constitutional clause relating thereto."¹⁸⁹ Hence, the requirement of the advisory opinion clause that advice be given upon any question of law "was intended to be exclusory in effect,"¹⁹⁰ excluding advice that does not assist the legislature and executive in the discharge of specific constitutional duties.

Under this broad rationale, the justices maintain a group of restrictions on rendering advisory opinions generally similar to those in other advisory states. The restrictions make both practical and judicial sense. They provide a screening mechanism to prevent the justices becoming overburdened by the sheer number of requests for advice. More importantly, the restrictions place controls on a process that, first, lies outside many of the judicial limits that have always characterized the judicial branch, and, second, is provided by an unusually broad constitutional clause.¹⁹¹ A brief description of the major restrictions follows.

1. *The questions propounded should not be on issues involved in pending litigation.* The Rhode Island justices will refuse to answer questions on issues that are "directly or indirectly involved" in pending litigation.¹⁹² The restriction is one of the oldest that advisory justices have applied.¹⁹³ It addresses the due process

187. *Id.* The justices adhere to this "assistance" rationale for advisory opinions, avoiding the pragmatic value rationale discussed above.

188. *To Certain Members of the Senate in the General Assembly*, 191 A. 518, 519 (R.I. 1937).

189. *Opinion to the Governor*, 191 A.2d 611, 614 (R.I. 1963).

190. *Id.*

191. Of some concern here is that the justices feel free to create restrictions at will, and set them aside at will. See *infra* Part III.C.

192. See, e.g., *Opinion to the House of Representatives (Resolution H-1225)*, 149 A.2d 343, 344 (R.I. 1959); *Opinion to the House of Representatives*, 433 A.2d 944 (R.I. 1981); *In re Advisory Opinion to the Governor*, 492 A.2d 134 (R.I. 1985).

193. It was partly grounds for the Massachusetts justices' first refusal to give advice in 1877, discussed above. Other advisory opinions imposing the restriction early on include, *Opinion of the Judges, in re Appropriations by General Assembly*, 22 P. 464 (Colo. 1889). In Britain, Lord Coke as Chief Justice complained of the

questions raised by the advisory opinion process. The Rhode Island justices point out that:

grave difficulties could follow if we were to give a purely advisory opinion upon the proposed question, only to be confronted later with the necessity of deciding the same question after a hearing, upon review or otherwise, in the litigated case. In such event, the defendant conceivably might have some ground to complain that his legal and constitutional rights had been unnecessarily prejudiced by our having reached a considered opinion, even though only advisory, upon a material question of law which we knew to have been involved in his conviction, without yet having afforded him a full hearing.¹⁹⁴

Since litigation usually involves private interests, this restriction includes within it two others that some other advisory states put forth somewhat more distinctly and perhaps more strongly. One is the ban on questions that affect private rights,¹⁹⁵ and the other is a parallel ban on questions that are not upon matters or subjects of a general public nature.¹⁹⁶

2. *The question should seek advice that relates directly to the requesting authority's duties presently awaiting performance; and the action of the requesting authority must depend on the advice.* The Rhode Island justices have been emphatic in requiring a direct connection between the question propounded and the pending constitutional duties of the requesting authority. The chief executive must have a present constitutional duty awaiting performance for which the advice is needed; the legislature must have concerns about the constitutionality of pending legislation.¹⁹⁷ Requesting

frequency of advisory requests from James I on matters pending before the courts. Note, *supra* note 172, at 308, 320.

194. 149 A.2d at 346.

195. See, e.g., Opinion of the Justices, 66 A.2d 76 (N.H. 1949); Opinion of the Judges, 140 N.W.2d 74 (S.D. 1966).

196. The justices in Alabama, Colorado and Maine have explicitly prohibited advisory opinions not on matters or subjects of a general public nature. *In re* Opinion of the Justices, 436 So. 2d 832 (Ala. 1983); *In re* Advisory Opinion, 21 P. 478 (Colo. 1888); 128 A. 691 (Me. 1925).

197. See *In re* Request for Advisory Opinion Regarding House Bill 83-H-5640, 472 A.2d 301, 302 (R.I. 1984); *In re* Advisory Opinion (Chief Justice), 507 A.2d 1316 (R.I. 1986). On the requirement that the question relate to the duties of the requesting authority, see Opinion of the Justices, 238 So. 2d 326 (Ala. 1970); Opinion of the Justices, 305 A.2d 608 (Del. 1973); *In re* Executive Communication Concerning Powers of Legislature, 6 So. 925 (Fla. 1887); Opinion of the Justices, 105

authorities may not seek advice on behalf of an unauthorized party. The justices, for example, rejected an advisory request in which the Governor "improperly" sought advice on behalf of city council members, in which instance "the giving of opinions would be grossly gratuitous and an inexcusable participation by the judges in the affairs of a municipality."¹⁹⁸

3. *Requests from the legislature for advice regarding legislation should be on pending legislation only.* The Rhode Island justices, like most advisory judges, will not issue advice on legislation already enacted because passed legislation is presumed to be constitutional.¹⁹⁹ Here they rely on "the universally accepted rule that when a legislature, acting in the exercise of the legislative power, enacts a statute, it will be presumed to have acted within the constitutional limitations until the contrary is shown."²⁰⁰ Hence, "consistency with the constitution is not a proper matter for inquiry" regarding passed legislation.²⁰¹ The executive, however, may seek advice on passed legislation if the advice is needed in order to complete a constitutional duty.²⁰²

4. *The justices will not render advice if the legislature has adjourned sine die.* The justices will refuse to give advice when the legislature has adjourned before it could receive the advice and

A.2d 454 (Me. 1952); Opinion of the Justices, 66 A.2d 76 (N.H. 1949). On the "live gravity" standard (that the advice must relate to a *present* duty awaiting performance), see Opinion of the Justices of the Supreme Court in Response to Questions Propounded by the Governor, 200 A.2d 570 (Del. 1964); Opinion of the Justices of the Supreme Judicial Court given under the provisions of Section 3 of Article VI of the Constitution, 355 A.2d 341 (Me. 1976); Opinion of the Justices, 340 A.2d 112 (N.H. 1975).

198. *In re* Opinion to the Governor, 284 A.2d 295 (R.I. 1971).

199. See, e.g., Opinion to the House of Representatives, 208 A.2d 126 (R.I. 1965); Opinion to the House of Representatives, 216 A.2d 124 (R.I. 1966); *In re* Advisory Opinion to the House of Representatives, 264 A.2d 920 (R.I. 1970). Michigan is an exception in that it permits advice only after enactment of legislation, but "before its effective date." Mich. Const. art. III, § 8.

200. *In re* Opinion to the House of Representatives, 208 A.2d 126, 129 (R.I. 1965).

201. *Id.*

202. See, e.g., Advisory Opinion to the House of Representatives, 264 A.2d 920 (R.I. 1970) (ruling that "questions concerning the validity of previously enacted legislation are the exclusive prerogative of the executive"); see also *In re* Advisory Opinion to the Governor, 483 A.2d 1078, 1079 (R.I. 1984); Opinion of the Justices, 384 So. 2d 1054 (Ala. 1980); Opinion of the Justices, 396 A.2d 219 (Me. 1979); Opinion of the Justices, 463 A.2d 891 (N.H. 1983).

without setting a day on which to assemble again.²⁰³ "In such circumstances these questions thereupon become moot" and no longer require the consideration of the justices.²⁰⁴ Advice is then presumably useless since the wisdom of the advisory opinion clause, the justices have said, is to guide the coordinate departments "on a question pending and awaiting action in the body which seeks our assistance."²⁰⁵ The adjournment must be *sine die*; the justices will issue advice when each house has adjourned subject to recall.²⁰⁶ They have also ruled that they are not obliged to give advice to a succeeding legislative body in reply to a request propounded by a preceding legislative body.²⁰⁷

5. *Questions should not be hypothetical, unclear or unduly broad, and they should refer directly to pertinent constitutional clauses.* The Rhode Island justices practice a judicial economy, declining to render advice when the "burden on the justices would be greater than the benefit conferred on the requesting authority."²⁰⁸ Accordingly, the justices will not respond to questions that are abstract or hypothetical, or otherwise insufficiently specific or clear as to the thrust of the inquiry.²⁰⁹ They will respond only to questions which are clear enough to avoid the possibility of creating confusion in the minds of the requesting authority or of the general public.²¹⁰ The justices will not respond to questions that have "too broad a sweep to fall within the purview of our constitutional obligation to render advisory opinions," particularly if the requesting

203. See *In re Advisory Opinion to the House of Representatives*, 272 A.2d 925 (R.I. 1971); see also, e.g., *In re Senate Bill No. 416*, 101 P. 410 (Colo. 1909). New Hampshire is an exception in that its justices will render advice for use at a possible future special session or the next regular one if the advice is so requested, or might be of benefit. *Opinion of the Justices*, 37 A.2d 478 (N.H. 1944).

204. *Opinion to the House of Representatives*, 206 A.2d 221, 222 (R.I. 1965).

205. 272 A.2d at 927.

206. *In re Advisory Opinion to the House of Representatives*, 485 A.2d 550 (R.I. 1984).

207. 272 A.2d at 926.

208. Carberry, *supra* note 82, at 100.

209. See *Advisory Opinion to His Excellency, Frank Licht, Governor of the State of Rhode Island*, 289 A.2d 430 (R.I. 1972); see, e.g., *Opinion of the Justices*, 100 So. 2d 565 (Ala. 1958); *In re Opinions of the Justices*, 88 A.2d 128 (Del. 1952); *Opinion of the Justices*, 355 A.2d 341 (Me. 1976); *Answer of the Justices to the House of Representatives*, 377 N.E.2d 915 (Mass. 1978).

210. See *Opinion to the Senate*, 137 A.2d 527 (R.I. 1958); see also *Opinion of the Justices*, 216 A.2d 656 (Me. 1966).

authority fails to indicate the specific provision of the constitution which might be violated.²¹¹

6. *The justices will not exercise fact finding power when rendering advisory opinions.* The justices will issue advice only on questions of law, never on questions of fact.²¹² One observer attributed this restriction to the justices' lack of resources permitting examinations of facts,²¹³ but more important is the care advisory justices take to approach advisory power as extra-judicial—distinct from characteristically judicial activity such as fact finding. In denying advice to the Governor, for example, the Rhode Island justices ruled that their constitutional obligation to advise:

does not apply to inquiries that can be answered only through an exercise of the factfinding power, inasmuch as the justices of this court, in so doing, are acting as individuals and not exercising the judicial power of the state. . . . [T]he factfinding power inheres in the court as the judicial branch of state government and . . . may not be exercised by justices when acting as individuals pursuant to the provisions of amendment xii, section 2 [the advisory clause].²¹⁴

C. *Waiving the Restrictions*

The justices regularly set forth their restrictions, sometimes quite fully²¹⁵ and nearly always categorically. Only occasionally

211. Advisory Opinion to the Senate, 277 A.2d 750, 752 (R.I. 1970); see also Advisory Opinion to the Governor, 437 A.2d 542, 543 (R.I. 1981) (ruling that "the body seeking our advice should specify the particular provisions of the Federal and State Constitutions which might be violated by the legislation under review"). According to Carberry, Rhode Island is relatively strict in this requirement, Carberry, *supra* note 82, at 102. *But see* Advisory Opinion to the Senate, 278 A.2d 852 (R.I. 1971) (giving advice when the constitutional clause implicated is not specified but merely implied); see also *In re* House Bill No. 107, 39 P. 431 (Colo. 1895); *In re* Request for Advisory Opinion on Constitutionality of 1979 PA 57, 281 N.W.2d 322 (Mich. 1979). The Delaware and New Hampshire justices are less restrictive, both permitting questions regarding an entire statute for general testing by the justices against all possible constitutional limitations. See, e.g., Opinion of the Justices, 330 A.2d 769 (Del. 1974), Opinion of the Justices, 254 A.2d 273 (N.H. 1969).

212. See, e.g., *In re* Opinion to the Governor, 91 A.2d 611, 614 (R.I. 1963); *In re* Advisory Opinion to the Governor, 324 A.2d 641 (R.I. 1974); see also, e.g., Opinion of the Justices, 382 A.2d 1364 (Del. 1978); Opinion of the Justices, 463 A.2d 891 (N.H. 1983); *In re* Construction of Constitution, 54 N.W. 650 (S.D. 1893).

213. Ellingwood, *supra* note 18, at 218.

214. *In re* Advisory Opinion to the Governor, 324 A.2d 641, 647 (R.I. 1974).

215. See, e.g., *In re* Opinion to the House of Representatives, 208 A.2d 126 (R.I. 1965); *In re* Opinion to the Governor, 284 A.2d 295 (R.I. 1971).

do they suggest that they engage in the practice of waiving restrictions at will.²¹⁶ Former Rhode Island Chief Justice Fay, in a letter to Louisiana's Chief Justice, wrote that the Rhode Island justices "only answer [requests for advice] if they meet the criteria set forth in our cases."²¹⁷ In truth, the justices waive their criteria whenever they think it warranted. Primarily, the justices will waive their restrictions if they believe advice "appears of pressing, practical necessity,"²¹⁸ and they will waive their restrictions if they believe an important constitutional or public issue is involved.²¹⁹

Waivers are usually explained in very broad terms if at all. For instance, in their advisory opinion on the Governor withholding funds to cities and towns,²²⁰ the justices said they would "overlook the procedural deficiencies" in the request for an opinion "because of the constitutional and public importance of the question propounded to the court."²²¹ In support they merely pointed to the fact that some or all of the towns and cities rely on the funds in question.²²² The justices generally do not offer standards by which they decide what questions are important. Indeed, then-Justice Weisburger objected to his colleagues giving advice under these circumstances.²²³ A 1986 advisory opinion²²⁴ was issued despite pending litigation before the Rhode Island Ethics Commis-

216. See, e.g., *In re Advisory Opinion to the House of Representatives*, 272 A.2d 925, 927 (R.I. 1971) (denying advice in part because the question from the House of Representatives involved pending legislation and because advice will not be rendered to a succeeding legislative body on a question propounded by a preceding body, but noting that "there may arise some grave governmental emergency justifying an exception to this principle").

217. Letter from Rhode Island Chief Justice Thomas Fay to Louisiana Chief Justice Pascal F. Calogero, Jr. (May 29, 1991) (copy on file with author).

218. See, e.g., *In re Opinion to the Governor*, 153 A.2d 168, 171 (R.I. 1959) (rendering advice on passed legislation); *In re Advisory Opinion to the Governor (Conflict of Interest Comm'n)*, 504 A.2d 456 (R.I. 1986) (rendering advice despite pending litigation, since the Governor's ability to persuade qualified persons to accept positions of public trust would otherwise be jeopardized).

219. See, e.g., *In re Advisory from the Governor*, 633 A.2d 664 (R.I. 1993) (rendering advice despite absence of present constitutional duty awaiting performance by the Governor, owing to "public and constitutional importance").

220. *In re Advisory Opinion to the House of Representatives*, 576 A.2d 1371, 1372 (R.I. 1990).

221. *Id.*

222. *Id.*

223. *Id.* at 1375-76 (Weisburger, J., dissenting). On the question of whether advisory opinions can have dissents, see *infra* p. 248. *In re Advisory Opinion to the Governor (Appointed Counsel)*, 666 A.2d 813, 818 (R.I. 1996) (Murray, J., dissenting).

sion, notwithstanding a ruling just eight months earlier that the restriction against advice involving pending litigation applied to administrative proceedings as well as to judicial proceedings.²²⁵ Here the justices simply cited without explanation the "public interest" in the question involved.²²⁶

The justices appear to be increasingly free in waiving their own judicially crafted restrictions. In 1986, they rendered advice responding to a question jointly propounded by the Governor and the General Assembly concerning the removal of a supreme court justice. The request for advice violated the justices' restrictions on joint requests, on requests where the Governor lacks any present constitutional duty awaiting performance, and on requests that lack a formal resolution in either house petitioning the court for advice. The justices issued the advice anyway, waiving the procedural defects owing to "the profoundly important substantive issues" involved. The justices, however, stressed that "we shall not consider this action as a precedent indicating that in the future we shall render an advisory opinion when the requesting petition is improperly before this court."²²⁷ Seven years later they issued advice to the Governor on revolving door legislation despite finding the request defective because the Governor had no present constitutional duty awaiting performance for which the advice was necessary. The justices waived the defect using language identical to the 1986 opinion²²⁸ owing to the "public importance and constitutional importance" of the question. This time, however, they were silent altogether about not establishing a precedent.²²⁹

The justices' broad discretion to issue advisory opinions even on questions not conforming to their own, equally discretionary, restrictions raises several problems. Perhaps most important, freely waiving their restrictions neutralizes the benefit of the restrictions in shoring up the legitimacy of an advisory process troubled by the extent to which it lies outside the limits of the judicial

224. *In re Advisory Opinion to the Governor (Conflict of Interest Commission)*, 504 A.2d 456 (R.I. 1986).

225. *In re Advisory Opinion to the Governor*, 492 A.2d 134, 134 (R.I. 1985).

226. 504 A.2d at 459. The public interest cited was the Governor's ability to bring qualified people to positions of public trust. *Id.*

227. *In re Advisory Opinion (Chief Justice)*, 507 A.2d 1316, 1318-19 (R.I. 1986).

228. "[W]e shall exercise our discretion and waive the defect." *In re Advisory from the Governor*, 633 A.2d 664, 667 (R.I. 1993).

229. *Id.*

and political doctrines discussed earlier. In this respect, the waivers weaken the justices' policy of strict interpretation of the advisory opinion clause, which after all is their purported justification for their restrictions in the first place. Further, the justices' main criteria for waiving restrictions are so broad they could conceivably apply to nearly all of the questions propounded.

The public or constitutional importance standard seems especially overbroad since, for one thing, advisory opinions avoid questions involving private interests and are by their nature on matters and issues of a general public nature, and, for another, the questions generally relate to constitutional duties. Consequently, any question propounded may plausibly be said to have some public or constitutional importance. Similarly, the pressing, practical necessity standard could apply to virtually any question propounded. The governor and legislature are not likely to send the justices questions that they do not feel need to be answered. The governor and legislature do after all live in a political world characterized by pressing and practical necessity. In addition, since the justices have not made clear what standards they apply to decide what is important or pressing, it is less likely that anyone can reasonably predict what a proper request for advice is, or determine why some questions failing to meet the justices' restrictions are rejected for that reason, and why some are not. In short, it has become increasingly difficult to determine the scope of the Rhode Island Supreme Court's advisory jurisdiction.

D. *The Question of Precedent: Advisory Opinions as Purportedly Non-Judicial and Therefore Non-Binding*

In addition to restrictions on requests for advice, the judicial difficulties of the advisory process are purportedly mitigated in another way. The Rhode Island justices put forth advisory opinions as products of non-judicial action by judges sitting in a non-judicial capacity, and as such, their advice is purportedly non-binding, without force or effect of precedent. They do not constitute a decision of the court.²³⁰ Hence, presumably, since advisory opinions

230. Opinion to the Governor, 149 A.2d 341, 342 (R.I. 1959); see also Opinion to the Governor, 153 A.2d 168, 170 (R.I. 1959) (ruling that the duty of issuing advice is a "duty on the *judges*," not on the supreme court "as a judicial department of the state government"). The Rhode Island justices have this in common with most advisory justices.

are not binding, they cannot violate separation of powers²³¹ or due process.²³² This non-adjudicative status ostensibly frees the justices from judicial restraints; as advisors they are not a court, not even judicial officers, but are simply giving advice in their off hours, as it were, when they are free to "go fishing, play golf, or advise the governor and legislature on matters of constitutional law."²³³

The Rhode Island justices' earliest general statement about advisories was that they were "not a decision of this court" and "can have no weight as a precedent."²³⁴ This statement was in an adjudicated opinion, *Taylor v. Place*,²³⁵ in which the justices noted that both the plaintiff and the defendant referred them to an advisory opinion. The justices replied that the question at hand was being brought to them for the first time "*judicially*,"²³⁶ and hence, their earlier advice could not be binding. This scenario was repeated over a century later when, again in an adjudicated case, plaintiff's counsel cited what the justices called "generous portions of an advisory opinion given by the justices." The justices again asserted the opinion was only advisory and without precedential weight.²³⁷ In a response to a question from the Governor, a 1959 advisory opinion began with the following observation:

It may be helpful to point out that the constitution by its express language imposes a mandatory duty on the *judges* of the supreme court to answer such questions. Section 2 [the

231. See, e.g., *Ellingwood*, *supra* note 18, at 168-69.

232. See, e.g., *Calogero*, *supra* note 21, at 366.

233. *Sands*, *supra* note 111, at 4.

234. *Taylor v. Place*, 4 R.I. 324, 362 (1856). For nearly a century—from the creation of the advisory opinion clause in 1842 until 1935—this was the only such general observation on advisories by Rhode Island justices. See also *In re Opinion of the Governor*, 103 A. 513 (R.I. 1918).

235. 4 R.I. 324.

236. *Id.* at 362.

237. *Romeo v. Cranston Redevelopment Agency*, 250 A.2d 426 (R.I. 1968). The advisory opinion cited by the plaintiff is *In re Opinion to the Governor*, 69 A.2d 531 (R.I. 1949). Most other advisory justices are equally emphatic about advisory opinions' lack of precedential weight. See, e.g., *Opinion of the Justices*, 198 So. 2d 269 (Ala. 1967); *In re Opinion of the Justices*, 88 A.2d 128, 139 (Del. 1952) (upholding the constitutionality of the state's advisory statute); *Opinion of the Justices*, 170 A.2d 652 (Me. 1961); *Massachusetts Hous. Fin. Agency v. New England Merchants Nat'l Bank*, 249 N.E.2d 599 (Mass. 1969). In Colorado and South Dakota, where the advisory clauses specify the "supreme court" and not the "justices," advisories have been ruled binding. *In re House Bill No. 122*, 21 P. 478 (Colo. 1889); *In re House Resolution 30*, 72 N.W. 892 (S.D. 1897).

advisory opinion clause] does not impose that duty on the supreme court as a judicial department of the state government. . . . Opinions of the justices given under sec. 2 of art. XII of amendments to the state constitution are merely advisory.²³⁸

This means, as the justices state elsewhere, that an advisory opinion:

is in no sense a decision of the supreme court. . . . [T]he judges do not speak *ex cathedra*, from the chair of judgment, but only as consultors somewhat like the *jurisconsults* under the Roman law. However sound the opinion may be, it carries no mandate. For this reason it is not an exercise of our judicial power.²³⁹

That advisory opinions are non-binding is plausible in theory and consistently and frequently asserted by the Rhode Island justices.²⁴⁰ But common sense, practice and virtually all observers of the advisory process say otherwise. Common sense dictates that when the state's highest judges give advice, it is an offer that cannot be refused. In fact, requesting authorities rarely if ever take action contradicting the advice of the justices,²⁴¹ and the advice has always been treated, and spoken of, as precedential. Maine's Chief Justice Emery noted in 1908 that advisory opinions 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. The practical result is that the opinion becomes, in the

238. Opinion to the Governor, 153 A.2d 168, 170 (R.I. 1959).

239. Opinion to the Governor, 174 A.2d 553, 555 (R.I. 1961).

240. The justices comment in one advisory opinion that they are "reiterating what has so often been stated in the past." 174 A.2d at 555; *see also* Opinion to the Governor, 149 A.2d 341, 343 (R.I. 1959); Opinion to the House of Representatives (Resolution H-1225), 149 A.2d 343, 345 (R.I. 1959); Opinion to the House of Representatives, 208 A.2d 126, 129 (R.I. 1965); Opinion to the Governor, 284 A.2d 295, 296 (R.I. 1971).

241. *See, e.g.* Note, *supra* note 128, at 1304; Bledsoe, *supra* note 43, at 1888, 1896; Ellingwood, *supra* note 18, at 154. Sands comments that it would be "absurdly naive" to think that the advice should be taken as anything but a reliable prediction of how the court will hold if the same question came before it later in litigation. Sands, *supra* note 111, at 25. The Delaware justices are explicit; while their advisory opinions are "binding on no one," they are still "what one would expect the justices to say if the issue had been presented to them in litigation." Opinion of the Justices, 413 A.2d 1245, 1248 (Del. 1980).

minds of the people, a rule of law established without argument or hearing."²⁴² In 1949, Oliver P. Field wrote:

advisory opinions are used as precedent by the bar, by the courts, and by the public. They are cited in briefs, in opinions by the courts, and despite the fact that they are sometimes carefully distinguished from judicial decisions, they are relied on as fully as decisions, as far as precedent is concerned.²⁴³

And in 1989, Robert H. Kennedy remarked on the "plain evidence that advisory opinions become binding abstractions, the effect of which can neither be predicted nor controlled."²⁴⁴

The Rhode Island justices themselves treat advisory opinions as precedents in fact, if not within their stated theory. The court's adjudicated opinions freely rely on advisory opinions, citing them without distinction from adjudicated opinions, and never in this context noting the non-binding nature of the advisories. A 1992 opinion advised the Governor on the legislative powers of the Rhode Island Ethics Commission.²⁴⁵ The opinion cited advisory opinions, including two from other states, and relied on them, often extensively, in a manner indistinguishable from their citations of and reliance on judicial opinions. For example, on the justices' point that constitutional conventions are products of the formally expressed will of the people, they cited only two advisory opinions.²⁴⁶ On constructing constitutional amendments, the justices cited two advisory opinions, each one grouped without distinction with two adjudicated opinions.²⁴⁷ To support the point that it is proper for them to consult extrinsic sources when construing constitutional provisions, the justices cited three advisories mingled with citations from litigated cases.²⁴⁸

242. Emery, *supra* note 32, at 2.

243. Field, *supra* note 84, at 216.

244. Kennedy, *supra* note 32, at 198.

245. *In re Advisory Opinion to the Governor (Ethics Comm'n)*, 612 A.2d 1 (R.I. 1992).

246. 612 A.2d at 7 (citing *Opinion to the House of Representatives*, 208 A.2d 116 (R.I. 1965); *In re Opinion to the Governor*, 178 A. 433, 452 (R.I. 1935)).

247. *Id.* (citing *In re Opinion of the Justices*, 120 A. 868 (R.I. 1923); *Opinion to the House of Representatives*, 6 A.2d 627 (R.I. 1953)).

248. *Id.* at 7-8; *In re Advisory Opinion (Chief Justice)*, 507 A.2d 1316 (R.I. 1986); see also *Opinion of the Justices*, 133 A.2d 790 (N.H. 1957); *Opinion to the Governor*, 185 A.2d 111 (R.I. 1962) (citing *In re Interrogatories Propounded by the Senate Concerning House Bill 1078*, 536 P.2d 308 (Colo. 1975)).

The justices cite advisory opinions in litigated cases just as freely. In a litigated case concerning dual office holding, the court's interpretation of article IX, section 6 of the state constitution relied solely on one advisory opinion.²⁴⁹ In another litigated case, the court, putting forth a rule of statutory construction, similarly relied only on one advisory opinion.²⁵⁰ In another, the justices assert that "[i]t has unquestionably been the established law" that the legislature cannot exercise judicial power, citing without distinction both an early advisory opinion and a litigated case.²⁵¹

It makes no more practical or judicial sense to claim that judges, not the court, issue advice than it does to claim that the advice is not binding. The Rhode Island justices attribute the purportedly non-binding character of an advisory opinion to their status as "individual judges" who are not performing a judicial function.²⁵² This is crucial to the effective immunity of the advisory process from the judicial safeguards discussed above. Some argue that separation of powers, for example, "is not affected in the slightest by the advisory opinion:" advisories are not a judicial function, so "it is difficult to see how they can interfere with the exercise of judicial power."²⁵³ For advisory purposes, the Rhode Island justices are transformed from a court handing down decisions to legal advisors "acting in their individual capacities"²⁵⁴ to offer non-adjudicative expressions of personal points of view.²⁵⁵ As with the non-binding effect of advisories, the distinction between justices giving advice and a supreme court handing down decisions

249. The advisory opinion is *In re Opinion of the Justices*, 116 A.2d 474 (R.I. 1955), cited in *Davis v. Hawksley*, 379 A.2d 922, 924 (R.I. 1977).

250. The advisory opinion is *Opinion to the Governor*, 80 A.2d 165 (R.I. 1951), cited in *Surber v. Pearce*, 195 A.2d 541, 543 (R.I. 1963).

251. *State v. Garnetto*, 63 A.2d 777 (R.I. 1949) (citing *Opinion of the Justices*, 3 R.I. 299 (1853); *Taylor v. Place*, 4 R.I. 324 (1856)); see also Calogero, *supra* note 21, at 366; Carberry, *supra* note 82, at 83; Smiljanich, *supra* note 43, at 332 (studying all Florida advisory opinions to 1971 and finding that a majority were cited in later cases as authority). On the tendency of judges and litigants to view advisory opinions as binding, see also Edsall, *supra* note 104, at 330-32; Ellingwood, *supra* note 18, at 311; McKeever & Perry, *supra* note 17, at 791.

252. See, e.g., *Opinion to the Governor*, 284 A.2d 295, 296 (R.I. 1971).

253. Ellingwood, *supra* note 18, at 168-69.

254. *Opinion to the Governor*, 191 A.2d 611, 615 (R.I. 1963).

255. Other advisory states stress the same point. E.g., *In re Opinion of the Justices*, 96 So. 487 (Ala. 1923); *In re Opinion of the Justices*, 320 A.2d 735 (Del. 1974); *Amos v. Gunn*, 94 So. 615 (Fla. 1922); *In re Opinion of the Justices*, 69 A. 627 (Me. 1908); *Standiford v. Kroman*, 83 A. 311 (N.H. 1912).

understandably tends to be lost. The distinction is, after all, a formality only, necessary to save the appearance of advisory opinions as non-judicial. There is nothing implausible about two Alabama Supreme Court justices calling the distinction "illusory" and "unsubstantial."²⁵⁶

The Rhode Island justices have usually, but not always, held to the distinction. They have occasionally referred to the "court" or the "supreme court" giving advice,²⁵⁷ and sometimes the opinions of justices in the minority are called dissents. Since advisory justices act in their individual capacities, express only personal points of view and do not sit as a court, there is no opinion from which to dissent.²⁵⁸ A minority opinion is simply one whose advice differs from the advice of a majority of the justices. The Rhode Island justices nevertheless will from time to time speak of "dissent" in this context, as in a minority advisory opinion from one justice which is headed "Murray, Justice, dissenting," and begins "I respectfully dissent."²⁵⁹ Other justices appear to be aware of the problem with the word: for example, Justice Rogers, who gave what he called a "separate opinion" disagreeing with the advisory opinion of the other justices.²⁶⁰ "Dissent" in a judicial context denotes opposition to a majority opinion that is binding and "official." As such, the term indicates an act and a relationship that do not properly exist in an advisory context.

It is, however, hardly remarkable that an advisory justice would speak of dissenting. Advice differing from that of a majority superficially resembles a dissent in an adjudicated case, and it is

256. 96 So. at 499 (Sayre & Miller, JJ., dissenting to the majority ruling that the Alabama advisory opinion statute is constitutional).

257. See, e.g., *In re Opinion of Justices*, 97 A. 21 (R.I. 1916); *In re Opinion of the Justices*, 120 A. 868 (R.I. 1923); *In re Advisory Opinion (Chief Justice)*, 507 A.2d 1316 (R.I. 1986).

258. See Field, *supra* note 82, at 215-16; Ellingwood, *supra* note 18, at 150-52.

259. *In re Advisory Opinion to the Governor (Appointed Counsel)* 666 A.2d 813, 818 (R.I. 1995) (Murray, J., dissenting); see *In re Ten Hour Street Law for Street Railway Corp.*, 54 A. 602, 607 (R.I. 1902) (Blodgett, J., dissenting); *In re Advisory Opinion to the House of Representatives*, 576 A.2d 1371, 1375 (R.I. 1990) (Weisburger, J., dissenting).

260. *In re Opinion of the Justices*, 36 A. 716, 717 (R.I. 1897). In the recent advisory opinion on filling a vacancy in the office of Lieutenant Governor, a headnote refers to Justice Lederberg's "[d]issenting [o]pinion," and this opinion is captioned "Lederberg, Justice, dissenting." The opinion text itself, however, begins "I respectfully disagree" and nowhere refers to "dissenting." *In re Advisory Opinion to the Governor*, No. 96-565-M.P. (issued January 22, 1997).

easy for the justices to slip into language to which they are accustomed, based on the adjudicative processes to which they are accustomed. But there is more going on here than custom. What the justices are slipping into is not only familiar language; it is also the language of legitimacy.

E. *Communicating the Purported Legitimacy of Advisory Opinions*

The Supreme Court is limited in its interpretation of the constitution only by self-restraint responding to legal tradition and the claims of moral duty. . . . The legitimacy of judicial decrees depends . . . in considerable part on public confidence that the judges are predominantly engaged not in making personal political judgments but in applying a body of law.²⁶¹

In view of the questions troubling the advisory process discussed so far, it is not unexpected that the Rhode Island justices' advisory opinions reflect some concern for the perceived legitimacy of the advisory process. They do so in part by adopting the devices of the adjudicative process and of adjudicated opinions. In many ways, the advisory process, like the language of advisory opinions, has become similar to that of adjudication. Briefs and argument have lent "an increasingly judicial flavor to the advisory process, further blurring the already imprecise distinction between decisions of the court and opinions of the justices."²⁶² The forms of reasoning in advisory opinions are indistinguishable from those in adjudicated opinions.²⁶³ The advisory justices tend to adopt a style honed through two centuries of adversarial proceedings, where an opinion is not only constructed in large part out of arguments and briefs of petitioner and respondent, but is shaped as a series of responses to directly opposing arguments.

The 1992 advisory opinion on the Rhode Island Ethics Commission's legislative powers originated when the Commission formally ruled that the constitution's clause providing for the Commission²⁶⁴ also authorizes the Commission to enact ethics

261. Archibald Cox, *The Court and the Constitution* 362 (1987).

262. Carberry, *supra* note 82, at 105.

263. Sands, *supra* note 111, at 26.

264. R.I. Const. art. III, § 8.

laws independently of the legislature.²⁶⁵ After the Commission proceeded to create several such laws, the Governor sought an advisory opinion on whether the Commission had such legislative powers under the constitutional provision. The justices published an invitation for briefs and arguments, and among those responding were the Governor and House of Representatives arguing against the Commission's interpretation, and the Attorney General and Common Cause arguing in favor of it. The briefs and arguments centered on separation of powers, the United States Constitution's Guarantee Clause,²⁶⁶ the original intentions of the Constitutional Convention creating the advisory opinion clause, and standards of constitutional interpretation. Over a third of the twenty page advisory opinion explicitly responded to the oral and written arguments submitted, offering no additional significant arguments to support the justices' conclusion that the commission indeed has legislative powers to create ethics laws.²⁶⁷ It is difficult to distinguish this advisory from an adjudicated opinion.

Observers note the strong similarities between advisory and adjudicated opinions, including reliance on precedent, on briefs and argument, often by opposing counsel, and on the precise reasoning characteristic of judicial opinions. The observers attribute such similarities to force of habit, the "judicial propensity for exactness and dependence on precedent,"²⁶⁸ and to the justices believing the advisory process is normal judicial work.²⁶⁹ But the similarities indicate more than that; advisory justices adopt the devices of the judicial process as a balance to the inescapable reality that the advisory process lies outside judicial procedure and outside the judicial safeguards discussed earlier. This process is not made entirely "safe" by the justices' policy of strict interpretation and the concomitant set of restrictions, or by insistence on advisory opinions as non-binding and non-judicial.

Writing advisory opinions like judicial opinions effectively borrows the legitimacy of the adjudicative process and projects it onto

265. Rhode Island Ethics Commission Resolution (August 22, 1991). The author, then a member of the commission, introduced the resolution.

266. U.S. Const. art. IV, § 4.

267. *In re Advisory Opinion to the Governor (Ethics Comm'n)*, 612 A.2d 1 (R.I. 1992).

268. Ellingwood, *supra* note 18, at 147.

269. Field, *supra* note 82, at 215; *see also* Calogero, *supra* note 21, at 349; Carberry, *supra* note 82, at 5.

the advisory process. It is just because advisory opinions lie outside traditional limits of the judicial process and disturb long-standing notions of judicial legitimacy that the justices employ a communication ethos that sustains the authority of the court when its justices issue advisory opinions. There is nothing unusual about this; those who are in positions of authority naturally communicate in ways that recall the grounds of their authority, and they do so more or less depending on the perceived need to communicate their legitimacy. The adoption of the careful, limiting, highly circumscribed manner of writing adjudicated opinions provides advisory opinions with a legitimizing rhetoric. What Justice Frankfurter said of the United States Constitution holds true for the states: "The Constitution's authority ultimately rests on sustained public confidence in its moral sanction. . . . [T]here is nothing judicially more unseemly nor more self-defeating than for this Court to make *in terrorem* pronouncements . . ."270 Advisory opinions are in danger of being just such pronouncements, operating under the thin cover of claims of non-binding, non-adjudicative, personal advice giving. The rhetoric of adjudicated opinions carried over to advisories helps the justices speak as if they were a court acting within the bounds of the judicial system.

Adjudicated opinions, like the judicial process, are hedged all around by limits. Hamilton argued that the power of judicial review, for example, would not be dangerous because the courts "should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."²⁷¹ The advisory justices must communicate that they are engaged not merely in personal or arbitrary pronouncements. In a government of constitutionally limited powers, they must constantly show that they work to stay within those limits. That in general is the condition of legitimacy,²⁷² and on that "the legitimacy of judicial decrees depends."²⁷³

270. *Baker v. Carr*, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting).

271. The Federalist No. 78 (Alexander Hamilton), *quoted in Cox, supra* note 261, at 69.

272. Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 Wis. L. Rev. 379, 401 (1983).

273. Cox, *supra* note 261, at 362; *see also* Craig A. McEwen & Richard J. Maiman, *In Search of Legitimacy: Toward an Empirical Analysis*, 8 Law & Pol'y 257 (1986); Mel A. Topf, *Communicating Legitimacy in U.S. Supreme Court Opinions*, 12 Language & Comm. 17 (1992).

Advisory justices, freed from the constraints of the judicial process, reintroduce constraints and make clear they are doing so. For example, the advisory justices' recourse to the forms and language of precedent recalls a fundamental doctrine of Anglo-American judicial reasoning, one that requires the court to limit itself to "finding" its decision in previous cases. Hence the decision is not presented as the personal or political opinions of judges because the decision was always there, in past cases, beyond the wills of the present members of the court.²⁷⁴ Briefs and argument, for another example, not only allow interested parties to have their say in the advisory process (recalling to it the obvious legitimating force of due process); they also allow the justices to write advisory opinions integrating the often opposing arguments of the participating parties into their reasoning. The justices are here grafting on to the advisory process not merely a customary mode of writing judicial opinions but also a core characteristic of the Anglo-American judicial process—its adversarial nature. A court has little formal means of discovering facts, and truth, other than through disputing parties: "Truth in the judicial process comes from the clash of opposites, in the arena of the courtroom."²⁷⁵ By carrying over such devices from the adjudicative process, the advisory justices are informing the advisory process with the "strict rules and precedents" which the process in and of itself so clearly lacks and which are hallmarks of limitations on judicial power. The justices are engaged in reinforcing the legitimacy of their advice.

CONCLUSION

The legitimacy of the advisory opinion process, and of the court whose justices render advice, remains vulnerable to challenge. The justices have, with doubtful success, attempted to protect the legitimacy of the process with an "assistance" rationale for the advisory opinion clause and concomitant restrictions on ren-

274. Milsom, *supra* note 119, at 81.

275. A.S. Miller & J.A. Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 Va. L. Rev. 1187, 1189 (1975); see also Henry J. Abraham, *The Judicial Process*, ch. 3 (5th ed. 1986); Leonard W. Levy, *The Origins of the Fifth Amendment*, ch. 1 (1986). On the contrast to the continental (inquisitorial) system's omission of any indication of argument in opinions, see Bernard Rudden, *Courts and Codes in England, France, and Soviet Russia*, 48 Tul. L. Rev. 1010, 1015 (1974); J. Gillis Wetter, *The Styles of Appellate Judicial Opinions* 50-51 (1960).

dering advice. We have seen, however, that the justices have acted with questionable discretion in the face of a non-discretionary advisory opinion clause, and with a kind of double discretion by which they create restrictions at will and waive them at will. The justices offer inadequate standards by which they apply their two chief grounds for waivers—practical necessity and public or constitutional importance. Most, if not all, advisory opinion requests arguably are necessary or important, or both. At any rate, it is just those questions of great public importance that the justices should generally stay away from, until the political process and public debate have had their effects and until an adjudicated case is properly before them; and it is just those questions of constitutional importance that usually arise out of questions of fact developed in the adversarial arena of litigation.²⁷⁶ The justices have also held to the doubtful assertion of the non-binding and non-judicial nature of the advisory process whose product is said to be personal advice rendered by justices who are not a court. Over all these attempts to shore up the troubled legitimacy of the advisory process hovers the long, emphatic history of federal rejection and the always present challenges of the separation of powers doctrine, due process, case or controversy requirements, absence of concrete facts, risk of prejudiced justices, and the advisory process's chilling effect on political activity and public debate.

At the least, the Rhode Island justices should apply their restrictions more consistently, waiving them more cautiously and by clearer standards. In the end, however, the advisory opinion clause should be removed from the Rhode Island Constitution and the advisory process abolished. It is neither wise nor necessary for Rhode Island.

276. See Kennedy, *supra* note 32, at 189 n.49.

APPENDIX

ADVISORY OPINION CLAUSES

ALABAMA

The Governor, by a request in writing, or either house of the Legislature, by a resolution of such house, may obtain a written opinion of the justices of the Supreme Court of Alabama or a majority thereof on important constitutional questions.

Ala. Code § 12-2-10 (1995).

COLORADO

The supreme court shall give its opinion on important questions upon solemn occasions when required by the governor, the senate, or the house of representatives; and all such opinions shall be published in connection with the reported decision of said court.

Colo. Const. art. VI, § 3.

DELAWARE

The Justices of the Supreme Court, whenever the Governor of this State or a majority of the members elected to each House may by resolution require it for public information, or to enable them to discharge their duties, may give them their opinions in writing touching the proper construction of any provision in the Constitution of this State, or of the United States, or the constitutionality of any law or legislation passed by the General Assembly, or the constitutionality of any proposed constitutional amendment which shall have been first agreed to by two-thirds of all members elected to each House.

Del. Code Ann. tit. 10, § 141(a) (1996).

FLORIDA

The governor may request in writing the opinion of the justices of the supreme court as to the interpretation of any portion of this constitution upon any question affecting his executive powers and duties. The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and shall render their writ-

ten opinion not earlier than ten days from the filing and docketing of the request, unless in their judgment the delay would cause public injury.

Fla. Const. art. IV, § 1(c).

MAINE

The Justices of the Supreme Judicial Court shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the Governor, Senate, or House of Representatives.

Me. Const. art. VI, § 3.

MASSACHUSETTS

Each branch of the legislature, as well as the governor or the council, shall have the authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions.

Mass. Const. pt. II, ch. 3, art. 2.

MICHIGAN

Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.

Mich. Const. art. III, § 8.

NEW HAMPSHIRE

Each branch of the legislature as well as the governor and council shall have the authority to require the opinions of the justices of the supreme court upon important questions of law and upon solemn occasions.

N.H. Const. pt. II, art. 74.

OKLAHOMA

[Upon receiving notice and record of a conviction requiring judgment of death,] [t]he Governor may thereupon require the opinion of the Judges of the Criminal Court of Appeals, or any of them, upon the statement so furnished.

Okla. Stat. Ann. tit. 22, § 1003 (West 1986).

RHODE ISLAND

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.

R.I. Const. art. X, § 3.

SOUTH DAKOTA

The Governor has authority to require opinions of the Supreme Court upon important questions of law involved in the exercise of his executive power and upon solemn occasions.

S.D. Const. art. V, § 5.