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ADVISORY OPINIONS: CAUTIONS ABOUT NON-JUDICIAL UNDERTAKINGS

Robert H. Kennedy*

We exceedingly regret every event that may cause embarrassment to your administration, but we derive consolation from the reflection that your judgment will discern what is right, and that your usual prudence, decision, and firmness will surmount every obstacle to the preservation of the rights, peace and dignity of the United States.¹

I. INTRODUCTION

Justices of several states, unlike members of the federal judiciary, render advisory opinions to governors and legislatures.² In those states, the justices have the authority to issue requested

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The author participated in In re Advisory Opinion to the Governor, 509 So. 2d 292 (Fla. 1987). The process, although not the merits, is discussed in this article.

¹ III THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 489 (H. Johnson ed. 1891) (letter from the Justices to President Washington, August 8, 1793, declining to provide advice).
² Federal prohibitions against advisory opinions result from evolution of the "cases or controversy" limitation of article III § 2 of the United States Constitution. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937); Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792). These restrictions are also derived from the development of a series of self-regulating techniques employed by courts to circumscribe their review authority. See infra note 21.
The doctrinal basis for federal court refusal to provide non-case advice has shifted over time. See infra note 45. Dicta, footnotes, dissents and the power to address matters not necessarily presented by litigants provide federal and other non-advisory judiciary with adequate opportunity to express opinions about matters not directly presented by the parties. The practice of reaching issues not directly raised by parties, however, has been strongly criticized. See infra notes 45, 50.
opinions in the absence of pending litigation. Although the practice earlier had more widespread use, it has never been employed by all states. Unless carefully circumscribed, the advisory process has considerable unexamined significance.

Constitutional and statutory provisions differ from state to state in regard to the circumstances which authorize requests for advice, the governmental entities entitled to make such requests, and the permitted scope of inquiry. Within these parameters, advisory

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3. For a state’s authority to issue advisory opinions, see COLO. CONST. art. VI, § 3; FLA. CONST. art. IV, § 1(c); ME. CONST. art. VI, § 3; MASS. CONST. pt. 2, ch. 3, art. III; MICH. CONST. art. III, § 8; N.H. CONST. pt. 2, art. 74; R.I. CONST. art. 10, § 3; S.D. CONST. art. V, § 5; ALA. CODE § 12-2-10 (1975); DEL. CODE ANN. tit. 10, § 141 (1975); OKLA. STAT. ANN. tit. 22, §§ 1002, 1003 (West 1986) (advisory opinion available to the governor on questions related to the death penalty). See generally Edsell, The Advisory Opinion in North Carolina, 27 N.C.L. REV. 297 (1949).

4. A. Ellingwood, DEPARTMENTAL COOPERATION IN STATE GOVERNMENT (1918) (early use of advisory opinions is described in chapter 1). Advisory practice, which predated modern judicial review, was abandoned by Vermont, New York, Pennsylvania and Nebraska. See Note, The Validity of the Restrictions on the Modern Advisory Opinion, 29 ME. L. REV. 300, 305-06 n.6 (1978). For many years, no state adopted a new general advisory provision until Michigan adopted a provision in 1963. See supra note 3. This provision suggests broad jurisdiction over “important questions of law” but, unlike other state provisions, opened only a narrow window between the enactment and the effective date for a determination of statutory validity.

Florida recently added separate constitutional and statutory provisions which require the attorney general to submit proposed constitutional amendments to the supreme court for an advisory opinion regarding compliance with that state’s constitutional single-subject requirement. See FLA. CONST. art. 4, § 10; FLA. STAT. ANN. § 16.061 (West 1988).

5. Current interest in a variety of non-adjudicatory alternatives to traditional litigation suggests a reassessment of where non-case processes may appropriately be employed. See S. Goldberg, E. Green & F. Sanders, DISPUTE RESOLUTION (1985) (survey of the varieties of recent proposals for non-adjudicative dispute resolution).

6. The entities entitled to make a request and the matters subject to a request for advice are: Colorado—governor or either legislative house “upon important questions upon solemn occasions,” COLO. CONST. art. VI, § 3; Florida—governor only on interpretations of state constitutional provisions regarding his duties, FLA. CONST. art. IV, § 1(c); Maine—governor or either house upon important questions and solemn occasions, ME. CONST. art. VI, § 3; Massachusetts—governor or either house “upon important questions of law and . . . solemn occasions,” MASS. CONST. pt. 2, ch. 3, art. III; Michigan—governor or either house on “important questions of law upon solemn occasions as to the constitutionality of “enacted but not yet effective legislation,” MICH. CONST. art. III, § 8; New Hampshire—governor or either house upon “important questions of law and upon solemn occasions,” N.H. CONST. pt. 2, art. 74; Rhode Island—governor or either house on any question of law, R.I. CONST. art. 10, § 3; South Dakota—governor “upon important question of law involved in the exercise of his executive power and upon solemn occasion,” S.D. CONST. art. V, § 5; Alabama—governor or either legislative house may request “on important constitutional questions,” ALA. CODE, § 12-2-10; Delaware—governor or either house on questions of state or federal constitution, any enacted law, or validity of proposed constitutional amendments, DEL. CODE ANN. tit. 10, § 141.
opinions are employed to resolve a wide range of issues.  

At every turn, use of the advisory process involves questions of judicial competence and function. Where jurisdiction is exercised to determine statutory validity, however, the process presents rarely considered issues of judicial authority and the allocation of responsibility among the branches of state government.

Useful jurisprudence of advisory opinions is neither recent nor extensive. Although there have been proponents, much of the comment has been negative. The literature generally refers to the uncertain quality and problematic use of advisory opinions as well as the fact that the advisory process operates to disrupt the constitutionally mandated separation between the branches of government. Little analysis is found of the more general structural effect of the advisory process or of its peculiar effect on the courts themselves.

7. Advisory opinions are most often employed to obtain a construction of constitutional language, to assess the existence, allocation, or use of governmental powers (e.g., taxation and finance, business regulation, elections and vacancies, and legislative procedures). Only rarely are advisory opinions used in connection with the exercise of state police powers; and, in theory, not at all to determine private property or personal rights. See Comment, Advisory Opinions in Florida: An Experiment in Intergovernmental Cooperation, 24 U. Fla. L. Rev. 328, 329-30 (1972) (contains a list of subjects addressed by the Florida courts in advisory opinions). For an extensive, although dated, list of subjects, see also Ellingwood, supra note 4, at 3.

8. See infra text accompanying notes 41-61.

9. Views about the use of advisory opinions to determine statutory validity will turn, in part, on one's belief about the appropriate role of courts in the development of law. A question to ask while reading this article is should the judiciary have an institutional role in the supervision of other branches apart from that which is required in private litigation?

10. The advisory process has been defended and assailed on several grounds. Although both supporters and detractors acknowledge (except for Ellingwood) that the process engages the justices in intra-governmental cooperation inconsistent with the principles of separation of governmental powers, they differ on the other consequences. In general, the defenders see the advisory process as a useful means to resolve intra-governmental disputes, to correct the defaults of other departments of government, and to resolve questions of constitutionality without the delays incident to ordinary adjudication. They assert that advisory determination may avoid passage or continued enforcement of unlawful legislation and thereby avoid injury that may occur between the adoption and eventual invalidation by judicial review. The exercise of lawful rights and useful activity, it is argued, may be discouraged by the temporary (and sometimes longterm) existence of invalid legislation.

The contrary is also argued. Useful enactments may be too quickly considered before their merit can be demonstrated. Early commentators raised the caution regarding ordinary judicial review. In Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20 (1793), Judge Tyler warned that the power of review may be exercised, "[b]ut the violation must be plain and clear, or there might be danger of the judiciary preventing the operation of laws which might be productive of much public good." Id. at 61, quoted in II Howard, Commentaries on the Constitution of Virginia 696 (1974).

The detractors note that other adequate mechanisms exist for early determination of important matters; such advice may effect a harmful form of prior restraint on legislation and
In some jurisdictions, advisory opinions have been used to obtain accelerated consideration of the constitutional validity of proposed or enacted statutes. This use of the advisory opinion appears to enable state justices to supervise the legislative branch, yet remain themselves controlled by the executive. It is argued here that the process, unless subject to judicial control, may tend to reduce the governmental authority of both the legislative and the judicial departments.

A 1987 Florida advisory proceeding suggests that advisory opinions have the potential to hazard substantive error, to effect a redistribution of governmental authority, and to damage a court.

II. THE 1987 FLORIDA SERVICES TAX EVENT

The recent controversy arose in Florida concerning the state budget. Florida's constitution prohibits the imposition of a personal income tax. Thus, funding is largely dependent upon a sales tax which has historically exempted most services. In early 1987, the Florida legislature, with the urging of a new governor, enacted chapter 87-6 of the Florida Statutes to be effective on July 1, 1987. The Act repealed most tax exemptions for personal and other services. There was immediate and apparently unexpected strong opposition. Lawsuits were filed challenging the statute as violating both the state and federal constitutions.


12. Approximately 67% of Florida's revenue is generated by sales tax receipts, 9% from corporate income tax, and 6% from beverage tax. The Florida Handbook 140 (Peninsular Publishing Co. 1987-88).
14. The lawsuits, according to Florida procedure, were filed in the Second Judicial Cir-
The Governor, citing pending and threatened lawsuits and a resulting budgetary shortfall if the Act should be found unconstitutional, requested an advisory opinion from the justices of the Supreme Court of Florida. The court accepted jurisdiction and the pending lower court cases were stayed. The justices found the statute constitutional, but political opposition to the tax continued. The Governor called for repeal, which was accomplished at a special legislative session in December, 1987. The Florida "services tax" was in force for six months.

This brief Florida engagement provides a lesson for other courts and governmental entities employing or considering the employment of advisory opinions.
Judicial authority is enlarged when courts are granted or assume power to reach binding decisions regarding the validity of the acts of other governmental branches. Thus, the authority to provide advisory opinions regarding the validity of acts of the legislature might also seem to broaden judicial authority. However, as advisory opinions originate in a request by another branch of government and operate on quite different premises, judicial authority may in fact be lessened. Authority will be retained only if the court has reserved principled discretion to determine when to respond to a request and when to decline. When the executive branch is given authority to request opinions regarding statutory validity,

supreme court as to the interpretation of any portion of this constitution upon any question affecting his executive powers and duties.” FLA. CONST. art. IV, § 1(c).

It was widely assumed that the governor's request was made to pre-empt a trial court finding of unconstitutionality which could be followed by an injunction against enforcement. The justices, with two dissents, immediately accepted jurisdiction. After extensive briefing and argument by opponents and proponents, a majority of the justices found the Act valid under the state constitution in all but one minor provision. In re Advisory Opinion to the Governor, 509 So. 2d 292 (Fla. 1987).

The Florida justices acknowledged, but did not identify, limitations on their advisory jurisdiction. Id. at 301. (“[The constitution] does not generally empower this court to issue advisory opinions concerning the validity of statutes . . . .”). They relied on the constitutional text to decline the federal issues presented. Id. at 302. The justices found jurisdiction to consider the particular statute because it implicated the constitutional obligations of the governor. Id.

Jurisdiction to provide non-case advice regarding statutory validity had earlier been resisted in a series of Florida opinions construing the same enabling language. See infra note 28. The doctrine that power to consider a request addressing statutory validity could be exercised when the statute implicated the governor's constitutional duties had earlier been expressly rejected by that court. In re Opinion of Justices, 54 Fla. 136, 44 So. 756 (1907).

20. Insofar as advisory opinions are resolved on hypothetical facts, there is a separate sense in which the court's power can be considered enlarged. A court that can ground a decision on a factual matrix of its own construction is an unfettered court. The intentional creation of facts for use in arriving at a predetermined result would, of course, be a parody of the judicial process.

21. While no common law jurisdiction permits courts to initiate a constitutional inquiry or statutory interpretation, the authority to construe statutes and to test legislation against constitutional standards, as part of rights adjudication, is well established. To avoid constant and eventually self-destructive judicial intrusion, courts have developed a set of self-limiting doctrines of judicial restraint. The "cases or controversies" language of article III of the United States Constitution has been construed to mean that the federal courts may intervene only when such matters are presented in a form capable of judicial resolution—an adversarial context between contesting litigants. See, e.g., United States v. Freuhauf, 365 U.S. 146 (1961). Other prudential doctrines of justiciability and appropriateness include those of "mootness." See, e.g., Hall v. Beals, 369 U.S. 45 (1969). In Hall, the challenged statute had been amended to meet the stated objections and the Court's per curiam opinion noted that, "[t]he case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." Id. at 48. See generally HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 107-294 (1988).
governmental power shifts from the legislature to the executive branch. Governmental power will then flow away from the judicial branch if it has not developed legal principles upon which to decline participation.\textsuperscript{22}

The power to assess the constitutional validity of enacted statutes differs from ordinary judicial power. It permits a court to exercise authority over almost the full range of governmental functions.\textsuperscript{23} Because this authority presents long-term hazards to a balanced governmental system and to the judiciary itself, it is normally subject to a set of familiar structural controls of the judicial agenda including, inter alia, the inability of courts to initiate any inquiry and the powerlessness of any persons, including governmental entities, to seek a court's intervention where concrete rights are not in dispute.\textsuperscript{24}

The characteristic agenda of an advisory opinion is different from that of a rights dispute: it is political rather than adjudicatory. Initiation of an advisory proceeding is not by a rights-litigant but, instead, by another branch of the government. The decision to accept or decline engagement is different from the decision to accept or decline engagement at a litigant's behest.

Where useful parameters of advisory intervention are not found in the enabling language or are ignored, and where court-made standards of discretion to limit the availability of advisory opin-

\textsuperscript{22} Providing advice regarding proposed legislation has somewhat different consequences. A Court which provides such advice to the executive alters the balance of power only to the extent the legislature accepts the justices' adverse advice and amends the legislation or decides against its enactment.

\textsuperscript{23} The power was initially announced for the federal system by Justice Marshall in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). However, it had been claimed earlier at the state level. See, e.g., Commonwealth v. Caton, 8 Va. (4 Call) 5 (1782).

\textsuperscript{24} Once litigation is initiated, courts are not powerless to control the questions for resolution. Courts often decline to address issues the parties wish to have resolved. Moreover, they sometimes reach out for issues not presented by litigants. The latter power, in some ways parallel to the advisory process, has been challenged as potentially damaging not only to stare decisis but to the courts as institutions. A recent example is Justice Stevens' dissent from the Court's sui sponte calendar restoration for reconsideration of a matter neither presented by the litigants nor raised in the record, i.e., the earlier holding that 42 U.S.C. § 1981 prohibits private racial discrimination:

If the Court decides to cast itself adrift from the constraints imposed by the adversary process and to fashion its own agenda, the consequences for the Nation—and for this Court as an institution—will be even more serious than any temporary encouragement of previously rejected forms of racial discrimination. The Court has inflicted a serious—and unwise—wound upon itself today. Patterson v. McLean Credit Union, 108 S. Ct. 1419, 1423 (1988) (Stevens, J., dissenting).
ions are not employed, a court may find itself without political control of its own advice. The court may find itself participating in a realignment of governmental power by being compelled by the executive branch to review the work of the legislative branch. Thus, the court may properly be charged with invited subservience. Where the use of advisory opinions may serve to realign governmental powers or damage a court, attention should be directed to the consequences of accepting engagement.\textsuperscript{25}

In Florida, unlike other advisory states, only the governor has authority to ask the high court for an advisory opinion.\textsuperscript{26} That limitation on requesting authority only highlights the issue discussed here. What makes a critical difference is whether the scope of the constitutional authority includes the right to obtain an opinion regarding statutory validity.\textsuperscript{27} If so, then it becomes uniquely important that the justices retain the moral and institutional authority to decline an executive request.

In the Florida matter, there appeared to be a surprising display of indifference to the state's limiting constitutional language and history, and to principles upon which judicial discretion may be and had previously been exercised.\textsuperscript{28} Although denying such intent,

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\item \textsuperscript{25} Like other advisory states, Florida has a provision for separation of governmental powers. See infra note 62.
\item \textsuperscript{26} See supra note 6.
\item \textsuperscript{27} The Florida governor's authority to seek an opinion regarding statutory validity would appear to be denied by both the history and language of article IV, § 1(c) of the Florida Constitution. By way of background, an advisory provision first appeared in 1868 as article V, § 16 of the Florida Constitution. The range of advisory subject matter was both unlimited and a response was arguably mandatory: “[T]he Governor may at any time require the opinion of the justices of the [s]upreme [c]ourt as to the interpretation of any portion of this Constitution, or upon any point of law . . . .” \textsc{Fla. Const.} art. V, § 16 (1868, amended 1875) (emphasis added). That broad executive power was withdrawn by an amendment in 1875. Since 1875, the operative language has limited inquiry “to the interpretation of any portion of this Constitution upon any question affecting his Executive powers and duties.” (1885, amended 1968) (emphasis added). This language was adopted as article IV, § 13 of the 1885 constitution and is now found in the current constitution as article IV, § 1(c). The constitutional provision adopted in 1968, while retaining the limiting 1875 jurisdictional language, deleted language that could have been read to mandate a judicial response. It also provided for participation by interested parties. Language seeming to require a response (“the Governor may at any time require the opinion”) was replaced by discretionary language (“the governor may request”). See \textsc{Fla. Const.} art. IV, § 1(c).
\item \textsuperscript{28} Historically, the Florida justices had almost always declined to respond to requests for opinions regarding statutory validity. See, e.g., \textit{In re Advisory Opinion} to the Governor, 103 \textsc{Fla.} 668, \textsc{Supp.}, 137 \textsc{So.} 881, 882 (1931) (“The Justices are not authorized to render an opinion to the Governor as to the validity of a statute.”); \textit{In re Advisory Opinion}, 64 \textsc{Fla.} 1, \textsc{Supp.}, 59 \textsc{So.} 778, 782 (1912) (“The authority of the Justices of the supreme court under this section . . . . is confined to the interpretation of some portion of the Constitution upon a
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the Florida court seems to have issued an open invitation to the state's executive branch to consult the court on the constitutional validity of any enactment. The justices, by default and with a cooperative legislature not itself properly advised of the consequences, appear to have agreed that the executive branch may avoid the delay and uncertainties of ordinary rights adjudication by calling upon the justices preemptively to supervise the work of the legislature. Thus, any potential benefits of the advisory process must be weighed against the structural costs of more frequent, non-litigated and largely unexplained constitutional intrusion by a judicial branch limited only by the self-restraint of the executive.

Exceptional circumstances arise whenever a court agrees, in the absence of adjudication, to resolve matters of constitutional importance. Questions of executive or legislative power to require such an assessment, of judicial power to decline to respond, and of judicial accountability for the exercise of such non-judicial power lie at the heart of the matter.

question affecting the Governor's executive powers and duties, and does not authorize an opinion upon a question affecting the executive powers... that may be authorized by a valid statute... [T]he Justices... are not authorized to render... an opinion upon statutory enactments that affect his executive powers and duties.); In re Opinion of Judges, 62 Fla. 446,... 57 So. 345, 346 (1912) ("It is uniformly held under previous opinions... [that the judges] are not authorized... to give an opinion upon the constitutionality of statutes affecting the Governor's executive powers and duties."); Advisory Opinion to Governor, 50 Fla. 169,... 39 So. 187, 187 (1905) ("Reduced to its last analysis, the purpose of your letter is not to have us construe any clause of the Constitution affecting your executive powers and duties, but to have us pass upon the constitutionality of an act of the Legislature."). The rule was applied, interalia, in 1957 and in 1959 to decline invitations to opine regarding statutory validity. See In re Advisory Opinion to the Governor, 113 So. 2d 703 (Fla. 1959); Advisory Opinion to the Governor, 96 So. 2d 541 (Fla. 1957).

There were earlier expressions of a willingness to exercise a broader jurisdiction where new language of the 1968 Constitution, was seen as creating an opportunity to exercise a more broad participation. See, e.g., In re Advisory Opinion to the Governor, 374 So. 2d 959 (Fla. 1979). For example, in a concurring opinion, Justice Overton wrote that a limitation on jurisdiction "reflects the former view of this Court existing before the 1968 Constitutional change." Id. at 969 (Overton, J., concurring). However, there has been no explanation of how the language added in 1968 could be read to enlarge the justices' authority.

29. As indicated in note 19, the majority of the Florida Supreme Court in 1987 asserted a broad doctrine that state statutes become subject to advisory assessment when they implicate the executive's constitutional responsibilities. This means any act of the legislature may be subjected to advisory consideration. Florida's Justice Barkett made the above point when she declined to participate in the 1987 matter. Writing separately, Justice Barkett noted that the new majority analysis allowed the justices to "advise the governor concerning the validity of any statute, without limitation, because every statute potentially affects the governor's duty to faithfully execute the laws." In re Advisory Opinion to the Governor, 509 So. 2d 292, 319 (Fla. 1987) (Barkett, J., declining to join in opinion).

30. In 1987, the Florida legislature had its counsel urge the Florida Supreme Court to recognize executive authority to seek an assessment of the legislature's work. Brief for the Legislature at 65, In re Advisory Opinion to the Governor, 509 So. 2d 292 (Fla. 1987).
Judges tend to assume that they need not repeatedly justify what they do in the context of adjudication. That is the accepted work of judges. However, providing non-case advice at the request of another branch of government is different, and the need to explain such a practice should be more plainly felt by the judges involved. This is more than a matter of general civic duty; rather, it is an obligation owed to future judges who will be bound by stare decisis to follow the court’s jurisdictional decisions. Further, it is an obligation owed to other branches which may wish in the future to obtain the judges’ views. The need for articulation of the purpose and the standards is especially important where, as in Florida, the propriety of an advisory request can no longer be determined by parsing the enabling language, by tracking constitutional history, or by analysis of the case law.

Over the years, courts have appeared perplexed, and often somewhat embarrassed, in explaining the scope of their advisory jurisdiction. Often, no explanation has been provided. The scope of the Florida court’s advisory jurisdiction, for example, seems to have depended more on the composition of the bench than on any developed governmental or judicial policy.

31. Whatever the character of advisory opinions themselves, the court’s decision to accept or to decline jurisdiction is a decision which turns on interpretation of the enabling language. That institutional decision is entitled to stare decisis. Equally, the decision to accept or to deny all or any part of a particular request is entitled to precedential recognition.

32. The justices have been particularly unclear in discussing the range of subjects over which they could exercise discretion to provide advice. In any government of divided authority, discretion to act may be exercised only within the boundaries of power allocated by constitution or statute; it cannot legitimately be exercised beyond those parameters. A comparable situation is presented by the jurisdictional boundaries imposed on federal courts by article III of the United States Constitution and congressional grants of authority. While those courts exercise a degree of discretion within these limits, legitimate discretion cannot be exercised to reach subject matter beyond them.

This limit has been expressed in the federal system since Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809), where Chief Justice Marshall, in agreeing that jurisdiction was lacking stated: “Turn to the article of the constitution of the United States, for the statute cannot extend the jurisdiction beyond the limits of the constitution.” Id. at 304. That a range of judicial discretion has been exercised at least to avoid adjudication of matters otherwise within granted power is clear from, for example, the judge-made doctrine of abstention. See, e.g., Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); Reetz v. Bozanich, 397 U.S. 82 (1970); Railroad Comm’n of Texas v. Pullman Co., 312 U.S. 496 (1941).

33. There has been, in Justice Frankfurter’s words, no evidence of any “continuity of intellectual criteria and procedures” to address a continuing problem. Burford v. Sun Oil Co., 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting). For example, the authority to
The exercise of judicial restraint and retention of judicial discretion requires development and articulation of limiting standards based on general principles of government. Whatever compulsion there is for courts to respond to the request of a coordinate branch for constitutional advice, it is now largely self-imposed. Without standards with which to address a request for advice, courts will be unable to explain, in a principled manner, any engagement or re-

assess the validity of statutes at the governor's request was withdrawn from the Florida court as early as 1875 and has not been restored. See supra note 27. The court thereafter usually responded to such requests by denying that it had such authority. See supra note 28. However, in 1987 the court, without explanation, responded affirmatively to the governor's request to assess statutory constitutionality. In re Advisory Opinion to the Governor, 509 So. 2d 292 (Fla. 1987). Again, that court has been historically uncertain whether its authority to respond could turn on expressions of urgent political need. As early as 1942 the Florida Supreme Court had resisted enlargement of its advisory jurisdiction by stating that "emergencies do not create [judicial] power or authority." See In re Advisory Opinion to the Governor, 151 Fla. 44, 9 So. 2d 172, 176 (Fla. 1942). In the 1987 matter, the court found jurisdiction arising from "the potentially chaotic impact upon your constitutional duties . . . which could be caused by finding Chapter 87-6 invalid." In re Advisory Opinion to the Governor, 509 So. 2d 292, 301 (Fla. 1987). There have been earlier examples of the need-based approach. E.g., In re Advisory Opinion to the Governor, 243 So. 2d 573 (Fla. 1971); In re Advisory Opinion to the Governor, 239 So. 2d 1, 8-9 (Fla. 1970) ("[I]n view of the great public interest in maintaining the fiscal stability of state government, we have decided to answer your request"). The line of demarcation might have once appeared to be fiscal. However, it was not. In In re Advisory Opinion to the Governor, 374 So. 2d 959 (Fla. 1979), the question related not to state finances, but to judicial vacancies. The court found it had jurisdiction ""[I]n light of the irreparable harm to the public that might result from an erroneous implementation of this statute." Id. at 962.

34. In most jurisdictions, high court justices are not bound by the enabling language to respond to every advisory request. For example, Florida's constitution no longer imposes any such obligation. See supra note 27. In some states, the language still suggests a mandatory duty to respond. Massachusetts' constitution provides that the legislature "shall have authority to require" advisory opinions, but recognizes a "duty" to respond that is not absolute. See, e.g., Opinion of Justices to Senate, 383 Mass. 895, 424 N.E.2d 1092 (1981); Answer of the Justices to the House of Representatives, 373 Mass. 898, 367 N.E.2d 793 (1977). In New Hampshire, the governor has "authority to require" advisory opinions, but the court has limited its opinions nonetheless. See, e.g., In re Opinion of the Justices, 88 N.H. 484, 190 A. 425 (1937); In re Opinion of the Justices, 75 N.H. 613, 72 A. 754 (1909). The Delaware court suggests it is bound to respond. See, e.g., In re Opinions of the Justices, 47 Del. 117, 88 A.2d 128 (1952). The provision is, however, to be narrowly construed. See, e.g., Opinion of the Justices, 413 A.2d 1245 (Del. 1980); Opinion of the Justices, 382 A.2d 1384 (Del. 1978). Maine interprets the language "justices shall be obliged" as limiting opinions. See, e.g., Opinion of the Justices, 460 A.2d 1341 (Me. 1982); Opinion of the Justices, 339 A.2d 483 (Me. 1975). The Rhode Island court has recognized an obligation to respond. See Opinion to the Governor, 93 R.I. 262, 174 A.2d 553 (1969). It will, however, strictly construe the enabling language. See Advisory Opinion to the Senate, 108 R.I. 551, 277 A.2d 750 (1971).

A construction retaining discretion is probably always available. An account of the manner in which the Supreme Judicial Court of Maine has retained its discretion to determine its advisory jurisdiction, despite apparently mandatory language is found in Note, The Validity of the Restrictions on the Modern Advisory Opinion, 29 Me. L. Rev. 305 (1978).
fusal of engagement. A court which is unable to explain either its engagement or its refusal to become engaged on principle must accept or decline randomly or on what will appear to be plainly political grounds.  

III. THE THRESHOLD JURISDICTIONAL QUESTION

Given a 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. This decision is quite different in its implications from any substantive advice the justices may ultimately provide. Thus, in the Florida example, the significant governmental issue for the Florida justices was not the constitutionality of a statute, but rather the proper scope of the Florida Supreme Court’s advisory jurisdiction. The Florida supreme court was asked to define the appropriate relationship among the branches of state government. Nothing, however, suggests the matter was addressed.

Resolution of the jurisdictional issues surrounding advisory opinions is undertaken with less reliable information and with even less analysis than resolution of the substantive questions presented by a request for advice. As is discussed below, an advisory opinion carries an unacceptable risk of substantive decisional error. Still, those substantive issues are addressed with better information than is the question whether or not to respond at all. While many states provide for outside participation on the substantive issues presented, no state provides any means for the public to address

35. A court with no adequate standards with which to decline would have to make the choice at random, or on a political basis. Alternatively, the court could choose to review all proposals. In that case, a wholly different set of governmental relationships would emerge. The justices would become a general committee of review—a structure that was rejected at the federal level at the Philadelphia convention. See, e.g., Younger v. Harris, 401 U.S. 37, 52 (1971) (“It is vital responsibility [to determine constitutionality] does not amount to an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them.”).

36. The Florida provision is illustrative: “The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented.” Fla. Const. art. IV, § 1(c). Entitled to be heard only “on the questions presented,” interested persons in Florida have no access to comment on the jurisdictional question. In the recent Florida matter, the court, after accepting jurisdiction and agreeing to provide its views, invited “interested persons” to incorporate comments on the court’s jurisdiction into their briefs on the merits. In re Advisory Opinion to the Governor, 509 So. 2d 292, 300 (Fla. 1987).
the jurisdictional question.\textsuperscript{37} Outside participation is possible only after a matter has been accepted for resolution. The \textit{ex parte} decision is more than private intra-governmental advice; it is an institutional response which has a greater probable life and larger structural importance than any substantive opinion the justices may subsequently issue.

There is often little permanence to actual advisory opinions as the process is typically enmeshed in transitory events. The issues presented, typically political, often lack substance and the results are likely to be highly perishable.\textsuperscript{38} The structural implications of participation, however, are of a different order of permanence. Courts acknowledge the transitory nature of advisory opinions when they point to their precedential thinness; they are expressly said to be “non-judicial,” “non-final” and “non-binding.”\textsuperscript{39} Whatever the truth of those assertions, the threshold jurisdictional decision is final, binding and potentially very important. In the recent Florida example, a change in the political circumstances that prompted the governor’s request soon made the justices’ opinion entirely irrelevant, but the court’s unintended realignment of governmental roles persists.

Receipt of an invitation to give private advice gives any high court a potent and generally ignored opportunity to shore up its own authority and to reinforce constitutionally mandated separation of governmental powers. The choice for the court is between

\textsuperscript{37} The jurisdiction question is made \textit{ex parte}. There is no provision for other than judicial participation in deciding the matter with only the governmental request in hand. The 1987 Florida Supreme Court, for example, took jurisdiction the day following the governor’s request. The failure or inability of courts to inquire into the circumstances described as needful by another governmental branch may be explained on the theory that the more immediate political entities are better able to determine the need for advice. They are, however, not better positioned (nor perhaps equally obligated) to protect the balance of allocated governmental powers.

\textsuperscript{38} The Florida “services tax” was front-page news for six months until repeal. It was the subject of special legislative sessions. No mention seems to have been made, politically or journalistically, of the justices’ advisory opinion. The press, the governor, and the legislators simply ignored the court’s views.

\textsuperscript{39} The recent Florida opinion uses typical language: “[A]dvisory opinions are merely legal opinions of the individual justices, offered for the Governor’s guidance in the performance of his or her constitutional duties. The opinions expressed . . . do not constitute decisions of the Florida Supreme Court and, therefore, are not binding in any future judicial proceedings.” \textit{In re} Advisory Opinion to the Governor, 509 So. 2d 292, 315 (Fla. 1987). The point was reiterated in closing the opinion with the statement: “We emphasize that an advisory opinion is for the benefit of the chief executive and, therefore, does not carry with it the mandate of the Court.” \textit{Id.}
early advisory intervention and awaiting adjudication. Potential damage to the governmental structure through advisory intervention might be an acceptable cost if there was good evidence of necessity, but that is rarely the case.40 Further, the justices rarely attempt to explain why the exercise of advisory jurisdiction is likely to result in a more useful governmental product than what might be expected from adjudication. When judges cannot explain why the net benefits of advisory participation are likely to exceed the benefits of awaiting ordinary processes, they should recognize the institutional costs and decline to give advice. This comparative analysis, present in every such jurisdictional resolution and dependent upon the design and application of standards for decision, seems usually to be ignored or left unstated.

Hence, the two most persistent criticisms of the advisory process are related: (1) advisory opinions are too poorly informed to be reliable and; (2) engaging in the advisory process adversely affects both the courts and the formal structure of government.

IV. THE POORLY EDUCATED COURT AND ITS POTENTIAL FOR ERROR

A longstanding criticism of advisory opinions is that they do not promote much confidence.41 Underlying this criticism is the belief that our confidence in a particular result is warranted in proportion to the degree the tribunal was informed. Appearing to be without “real” facts and abstract, advisory opinions are thought to be more erroneous than record-based adjudicated opinions.42 There are circumstances where an opinion may relate to something called “pure law,” in which record facts and sometimes advisory courts may be dispensed.43 Advisory courts sometimes justify their

40. A review of the decided matters suggests that there has rarely been compelling reason to proceed. Virtually without exception, the matter could have been presented concretely in an adjudicatory context with only slight delay.
41. This is probably the lesser of the two basic criticisms. After all, courts make mistakes, and there is always, at least in theory, another day.
42. Others have noted that a further difference lies in the care with which such matters may be addressed. A court's potential for error probably increases as the recognized importance of what it is about diminishes. Where, as in advisory opinions, the concrete interests of identified persons are not obviously affected, the inclination to exercise care and deliberation may be lessened.
43. Some plain legal questions may be answered confidently without factual development. An example would be whether or not a complaint affirmatively demonstrated expiration of a statute of limitations. In the advisory context, examples may include construction of an ambiguous constitutional term. E.g., In re Advisory Opinion to the Governor, 243 So.
summary constitutional intervention by asserting that questions of, for example, "facial" validity, unlike questions of "applied" validity, are pure law questions. Yet, the matter of decisional incompetence resulting from a lack of traditional judicial information should be more worrisome to courts than is generally asserted. If damage to the governmental system is the price of such abstract judicial undertaking, even invitations to decide matters of pure law cannot be accepted with impunity; the confidence one may have in the resulting advisory opinion is irrelevant to the damage to the governmental system. This observation is true in all matters but is especially the case where preemptive jurisdiction is exercised to assess the constitutional validity of new statutes.

2d 573 (Fla. 1971) (Does a provision precluding imposition of an income tax on a “citizen or resident” preclude a corporate income tax?); In re Advisory Opinion to the Governor, 225 So. 2d 512 (Fla. 1969) (Is the position of Secretary of Administration an office within the purview of the constitution?). Questions of the constitutional validity of statutes are never so easy because it is uncommon that a legislature will enact a patently unconstitutional statute. But see Watson v. Buck, 313 U.S. 387, 402 (1941). ("It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.").

44. Proponents of the advisory process have argued that where matters of "facial" validity or pure textual construction are presented, the advisory process does not much differ from declaratory judgments or other forms of summary procedure. Briefs of Counsel, In re Advisory Opinion to the Governor, 509 So. 2d 292 (Fla. 1987). Summary adjudication is, however, quite different in the resources available to a tribunal. All summary processes require the participation of, and are controlled by, interested parties. Summary processes normally deal with historic events rather than with hypothetical future events. Rights-interested parties are present to assert the inappropriateness of proceeding in a summary fashion and those parties can warn a court if summary disposition is unwarranted. A factual and legal record can be made, and therefore, if summary disposition is unwarranted, the matter can be further adjudicated. If a court persists in error, appeal lies from the error based on that record.

45. Professor Tribe has indicated that, while early federal refusals to issue advisory opinions referenced article III of the United States Constitution and were stated in terms of the need to maintain a separation of governmental powers, more recent refusals tend to address problems of judicial function and competence—issues equally as relevant to state as to federal courts. L. Tribe, AMERICAN CONSTITUTIONAL LAW 57 (1978); see also Patterson v. McLean Credit Union, 108 S. Ct. 1419, 1422-23 (1988) (Stevens, J., dissenting from the Court's sua sponte calendar restoration of an issue not presented by the litigants). Justice Frankfurter's language in United States v. Freuhauf, 365 U.S. 146 (1961) states:

Such opinions, such advance expressions of legal judgment 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, we have consistently refused to give.

Id. at 157.
In addressing every matter involving statutory validity, "facial" or "applied," adjudicatory or advisory, a court grounds its decision on fact. 46 In every such matter, an advisory court is likely to know less about the facts than an adjudicatory court. Decisions about facial validity are rendered on hypothetical facts, generally unstated, and always prospective. In contrast, judicial review of operative statutes typically employs "real" facts, record-stated and retrospective. In assessing the potential for error, courts should consider the origins of the issues they address 47 and the difference in the nature and quality of the facts they employ. 48 Courts should

46. Assessing "facial" constitutionality and assessing "applied" constitutionality do not differ in that the former is an analysis of law alone and the latter is an analysis of law and fact, which requires a record. Both results turn on facts. The operative facts may be contained in a record, or they may be assumed. They may be agreed upon, or entirely hypothetical. The operative facts may be true or false, but they are there, and they drive the result. The distinctive and troublesome feature of "facial" determinations, including those arising in an advisory context, is the source and quality of the facts employed.

47. While the decision to provide an advisory opinion, like the legislative decision to proceed, requires a legal and factual analysis, courts seem to accept advisory inquiries as a matter of intra-governmental comity and accept the ex parte assertions of the requesting governmental entity. While it can be argued that the more political branches are better positioned to recognize the need for advisory intervention, those branches often have interests quite different from those of the judiciary. For example, the obligation to preserve both a separation of powers and judicial independence is not as directly imposed on the other branches. In Florida, as elsewhere, the judicial branch has acknowledged its special obligation to preserve a separation of governmental powers. See, e.g., Pepper v. Pepper, 66 So. 2d 280 (Fla. 1953).

48. The recent Florida opinion shows a court assuming non-record facts and using them to make judicial projections about the future operation of that statute. In re Advisory Opinion to the Governor, 509 So. 2d 292 (Fla. 1987). For example, in rejecting the argument that taxation of legal services would limit access to counsel, the justices asserted that:

The instant tax does not appear to have such an effect ... [because] the act . . . exempts from taxation pro bono legal services and government counsel appointed for indigents. Because of this exception, the act only taxes those who can afford to retain counsel and pay the tax.

... Because those persons who cannot afford to pay legal fees will pay no tax, the act does not appear to bar any person from seeking redress for any injury in the courts. Id. at 302-03 (footnote omitted). In this light, a 5% tax would be only an "incidental burden upon court access." Id. at 303.

In declining to address a state law equal protection claim, the court noted that "[a] decision on this claim has little or no adverse fiscal impact on the Governor's functions." Id. at 305. Addressing the argument that the tax on advertising was discriminatory, the court accepted non-record facts argued by a participant. Stating that:

As the state points out, the taxation of advertising is expected to account for only 4.7% of all revenues derived . . . . The revenues derived from the taxation of advertising services is projected to account for only 1.4% of the total tax revenues derived from [sales taxes] during the 1987-88 fiscal year. We cannot say that, on its face, this smacks of discrimination.

Id. In addressing an argument that certain exemptions were arbitrary, the court noted that:
When testing the constitutionality of a statute, a court may undertake only one of two courses of action. Both are fact dependent. A court may adjudicate by looking to record facts to see how an enactment has been applied and then test those events against constitutional standards. Alternatively, a court may consider facial validity. This analysis involves predicting how an enactment will be applied and testing the prediction against the standards. The difference is not between facts and no-facts, but in the kind of facts employed and the relative confidence one should have in adjudicated facts versus hypothetical or predictive facts. The kind of facts used in advisory opinions about the facial validity of newly enacted legislation are no more than projections of reality, state-

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"[M]any of the exemptions ... were enacted in order either to minimize the regressive nature of tax or to address the specific concerns of organizations that the general taxing mechanism affected." Id. at 305-06. In addressing whether the state can constitutionally require those who purchase advertising to identify themselves by registering with a state entity, the court said that prohibiting the state from doing so "would no doubt result in an uneven and haphazard enforcement of the tax code." Id. at 306. In addressing an argument that the media was a selected and, therefore, an invalid target of taxation, the justices concluded that the statutory exemptions are "at the very least, rationally related to the furtherance of important social policies and, therefore, constitutionally permissible." Id. at 309. None of these statements can stand without a foundation in fact. The facts asserted by the court may have been accurate or not, but either way they were not found in any record and were hypothetical.

49. Again, the fact that questions of the constitutional validity of statutes, like questions of statutory efficacy, are always questions of fact should be clear. A statute (whether proposed or enacted) may be evaluated in the constitutional sense only for what it does, or may do, and not for what it says. Like all metaphors, the one that suggests that a statute can be evaluated "on its face" is misleading. Courts do not pass judgment on statutory esthetics.

50. Record facts identify affected persons and have an operational reality. Facts generated by the trial process are not simply posited; unlike advisory facts, they do not arise from the assumptions and experiences of judges. They are stated, specific and smaller. Of course, the truth that emerges from adjudication is a limited truth. Trial-born facts are developed within the constraints of the rules of evidence and the interest, knowledge and other limitations of the parties and their counsel. The "whole truth" that the witness is sworn to provide is not what the witness provides—he or she is permitted only to answer stylized questions asked by a particular lawyer with a narrow interest. While record facts are designer facts, the design is to achieve a narrow, contested and fact-specific legal result that will be subject to review.

51. The advisory process is, in its predictive aspect, suggestive of the remedial component of modern injunctive practice. See Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976). The design of remedial injunctions, however, is an adversarial procedure which can be, and typically is, broadly informed by litigating parties, independent experts and the like.
ments of anticipated truth. Analysis of such data is a kind of functional discourse; the product of the analysis is a weak linguistic construction rather than a natural reality.\textsuperscript{52}

In being anticipatory, both the facts and the results of advisory proceedings parallel the weaker and tentative qualities of legislative products. As a threshold matter, legislatures must decide whether there are public circumstances calling for an enactment. Likewise, the justices must decide at the advisory threshold whether there are public circumstances calling for the court's advisory engagement to provide an advisory opinion.\textsuperscript{53} Once an affirmative threshold decision is made, both bodies must then anticipate factual consequences. The legislators must determine what kind of law will have the desired effect on public conduct; the justices must, in determining validity, predict what public consequences will flow from the enactment under scrutiny\textsuperscript{54} and then engage in

\begin{itemize}
\item[52.] There are at least two other ways in which opinions rendered by advisory courts have been said to be weak and structurally ill-formed. In normal adjudication, not only the facts but the issues presented for resolution come to the court after being honed by the litigation process. In the advisory context, the issues are posited \textit{ex parte} by an interested governmental department. As Justice Stevens noted in a similar context: “I believe that the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review.” New Jersey v. T.L.O., 468 U.S. 1214, 1216 (1984) (Stevens, J., dissenting from order directing reargument). The benefits of both the litigation honing and normal sequential judicial review are substantial. Courts at every level have authority to consider the constitutionality of statutes properly before them.

Normal adjudicatory determination by a highest court is by review of an inferior court decision. That process of review was clearly distinguished from original consideration as early as Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174-76 (1803) and is informed by the reasoning of lower court judges who have previously considered the matter. A request for an advisory opinion is presented directly and initially to the highest court which then operates, not as a court of review, but as a court of original jurisdiction. The useful informing thoughts of lower court judges are not available. Here it is important to remember that there is hierarchy of courts and not judges. There is no reason to believe that high court judges are more able than other judges, and none to suggest that the higher court judges cannot profit from the reasoning of the lower court judiciary.

53. When the justices agree to consider the “facial” validity of a new statute, the justices agree to compare their factual predictions with those of the legislature. Doing this at the request of the executive is quite different in its political consequences from doing the same thing at the request of the legislative branch.

54. Of course, the availability of advisory opinions may encourage other branches to avoid their own obligation independently to assess the constitutionality of what they do or to act according to those assessments. Courts should not invite such behavior. It is not unknown for legislatures to abdicate their duty to act constitutionally in reliance upon eventual judicial review. Advisory opinions facilitate this abdication. Legislators and governors often find the obligation to act constitutionally unpalatable, and an effort may be made to shift the consequences of acting constitutionally upon others. See Frankfurter, \textit{supra} note 10, at 1007.
the common judicial process of testing those consequences against constitutional standards. Both branches, therefore, engage in much the same effort. It is only the judiciary that attempts the analysis without an adequate informing mechanism.

In brief, legislatures employ processed facts while advisory justices employ unexamined ones. Unlike legislative bodies, advisory courts are without adequate machinery for gathering and processing the data necessary to determine the need for their participation; nor do advisory courts have information to predict the consequences they thereafter will evaluate. The legislative process is public. It operates with staffed committees which gather data from a range of public sources; legislative proposals are announced, considered and reconsidered; interested individuals and groups normally participate in fact gathering and bill drafting. Legal advice is available. In contrast, the advisory justices operate within a closed system and cannot independently develop the quality of information that generates confidence in legislation.

Lacking indicia of confidence, advisory opinions also suffer the deficiency that, once an opinion is issued, it cannot adequately be reviewed. Ordinarily, legislators consider a proposed statute based on their best sense of the need for the statute and on an estimate of the prospective efficacy of certain measures—a prediction of future factual consequences. The act is passed, and then judicial review is eventually available as the system’s backup to make necessary corrections. This would occur when the legislature’s advice has been faulty or disregarded or the consequences of an enacted statute are in practice different from the consequences that were anticipated. Advisory consideration of statutory validity, coming

The Florida legislature attempted this in the 1987 matter under discussion. One argument made by opponents challenging the taxing statute was that its exemptions were irrational and discriminatory. In response, the statute was amended during the advisory proceedings to provide that, if the court found an exemption to be unlawful, the entire class of exemptions would disappear and all those within the class would be taxed. Thus, had the provision been judicially invalidated, it would have been the justices who were to be blamed for the results rather than elected politicians. See generally Briefs of Counsel In re Advisory Opinion to the Governor, 509 So. 2d 292 (Fla. 1987).

55. Legislatures and governors usually may obtain independent legal advice. The governor’s or legislature’s lawyer has a governmental branch for a client, not the governmental system. An interesting example of the difference this may make was presented by the 1987 Florida matter. In 1979, Justice Alan Sundberg authored a strong dissent from enlarging the court’s advisory jurisdiction because of potential damage to the separation of governmental powers. See infra note 68. In 1987, while in private practice Sundberg represented the Florida governor and successfully urged the court to broaden its advisory jurisdiction. See In re Advisory Opinion to the Governor, 509 So. 2d 292, 297 (Fla. 1987).
up front, preempts both experience and judicial review. It leaves
the system without a normal review of real consequences. Review
is provided only if an advisory court undertakes to reconsider its
own advice in the context of later adjudication.\(^5\)

In responding to the argument that advisory courts are too
poorly informed to arrive at dependable resolutions of serious mat-
ters, some states have provided for participation by interested par-
ties.\(^5\) The engagement of interested parties, however, cannot re-
solve the problem of judicial competence, since there is no
mechanism for identifying and notifying those who may be inter-
ested in an enactment. If interested parties could be identified and
encouraged to become involved, such persons would not be permit-
ted to participate in resolving the jurisdictional questions. Further,
their hypothetical arguments on the substantive issues will not sub-
stitute for the well-developed informing processes of adjudica-
tion. Briefing and argument by interested parties adds a dimension
to the advisory justices' data. However, reliance upon that kind of
information will not change the fictional quality of the proceed-
ing.\(^5\) While there may be a more full exposition of the possible
operation of an enactment, the facts before the advisory justices
will remain non-adjudicatory, hypothetical and prospective. Thus,
the function of interested parties is only to add an expanded ver-
sion of imagined possibilities and to sharpen the advisory's parody
of reality.\(^5\)

\(^{56}\) Advisory courts always agree to reconsider if a rights-litigant later demonstrates that
the facts were predicted in error. As the Florida justices said recently, “any interested par-
ties are free to initiate lawsuits to . . . argue that this advisory opinion has either been
wrongly decided or that the act is unconstitutional as applied to their particular situations.”
In re Advisory Opinion to the Governor, 509 So. 2d 292, 302 (Fla. '1987) (emphasis added).
Where a statute is found unconstitutional by a high advisory court, lower courts may (but are
demonstrably unlikely to) disregard the advice. The legislature may disregard the opin-
ion, but it is more likely to amend, repeal or perhaps seek constitutional change. These
options effectively preclude later adjudicated review. Where a statute is found facially con-
stitutional by an advisory court, subsequent courts will need to disagree about the facts or
the law, to find to the contrary and risk reversal.

\(^{57}\) The current Florida provision is illustrative: “[T]he justices shall, subject to their
rules of procedure, permit interested persons to be heard on the questions presented . . .”
FLA. CONS'T ar't. IV, § 1(c). See also supra note 3.

\(^{58}\) While there are well recognized and perhaps inevitable limitations on the adequacy
of adjudicated facts, there is generally nothing inherently abstract about them. Adjudicated
facts identify events that have affected or at least caught the attention of real persons; they
have an operational reality. Facts produced out of the matrix of trial are not simply posited;
they do not exist merely in the assumptions and suppositions of justices. That record facts
may also be inaccurate, partial, or unclear is a different issue.

\(^{59}\) Felix Frankfurter made a similar complaint in 1924 when he stated: “[H]owever
much provision may be made on paper for adequate arguments (and experience justifies
The resulting advisory opinion, a hypothetical construct, is then quite ambiguous with uncertain future implications. Decisions reached through adjudication are announced in written opinions which provide other courts and future litigants with a statement of the underlying real data which governed and which will give force and value to the particular result. Decisional law formulates legal rules which thereafter serve as templates for others to order their affairs. Advisory opinions, however, because they are without reported facts, are little more than announcements of abstract rules. Like fresh legislation, such opinions await meaning through application.

In adjudication, the different facts of a new case may result in application of the same law or the application of a different law which may lead to a different result. This is how the law is properly developed. It is this close judicial attention to factual distinctions which avoids the unintended and unjust results of mechanically applying broad enactments. The concept that decisions are driven by facts lies at the heart of fairness and due process. Careful differential factual analysis is the common work of judges; it is expected and undertaken by judicial tribunals. It cannot, however, be engaged in by an advisory court operating with abstract principles and hypothetical facts.

The careful development of just law, like the guarantee of due process, lies in the ordered relationship of facts and rules. Furthermore, justice requires that there be operative facts that ultimately control results. The controlling substance of an advisory opinion, however, lies not in articulated operative facts, but in law as a proposition. Abstract theorizing will construct the facts and theory will control the result. This is particularly worrisome in the advisory context where opinions tend to bind persons who have had no voice in the matter. It would make little difference if advisory

little reliance) advisory opinions are bound to move in an unreal atmosphere." Frankfurter, supra note 10, at 1006. Arguably, if adequate notice were made available, participation by interested persons might provide an advisory court with a range of data more broad than is sometimes available in ordinary litigation between presumably interested parties. Freely available third-party intervention in any proceeding may carry its own problems, but it may also increase the amount of useful information before the court. An advisory opinion which may have a potentially sweeping range could thereby be widely, if abstractly, informed.

60. Due process concerns may be present whenever a person's conduct is directly constrained by an order from which he has had no opportunity to be heard. See Laycock, Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties, 1987 U. Chi. L. Forum 103. While third persons are often affected with varying degrees of directness by
opinions were ineffectual, but they are not.  

In sum, adjudicated facts are smaller and more manageable in that they commonly describe historical incidents limited to time, place and person. The careful judicial consideration of such data leads to incremental and, if necessary, distinguishable results. This contributes to the slow and confident motion of the common law. Where more sweeping directions are sought, our confidence is perhaps more appropriately left to a combination of the legislative process with its superior informing mechanisms and to subsequent judicial review of real events.

V. COMMINGLING OF POWERS AND DAMAGE TO THE GOVERNMENT AND COURT

A second general criticism of the advisory process is that it may unbalance the formal governmental structure and engage, or appear to engage, the judiciary too directly in politics. This criticism is most telling when the justices provide advice regarding the constitutionality of new legislation.

All advisory jurisdictions have provisions for the separation of governmental powers. The justices’ power to issue preemptive

what courts do without their participation, this only infrequently presents serious problems. If the effect is serious, reappraisal is available; the stranger has a right to a clean shot at different treatment if he presents different operative facts. This safety valve tends to be absent in the advisory context where a litigant is likely to be ignorant of the operative facts that gave rise to a particular result. Although no formal res judicata or estoppel will bar arguing a position contrary to that reached earlier in an advisory opinion, the practical effect may be comparable. The party who finds his argument effectively pre-empted by an interposed advisory opinion may not appreciate the benefits of being only informally barred. These due process considerations should carry weight in an advisory proceeding regarding the validity of enacted legislation where reliance may be presumed.

61. In the Florida example, the interests of parties already in the trial court were immediately affected. As soon as the high court announced its intention to provide advice to the governor, the trial court stayed the pending cases. The trial court subsequently announced that it was bound by the advisory opinion and would hear no argument contrary to that result. While commentators addressing the issue have found most advisory courts reluctant to decide matters already being litigated. See Note, Advisory Opinions on the Constitutionality of Statutes, 69 Harv. L. Rev. 1309 n.40 (1956). The Florida governor’s 1987 request for advice, however, was delivered in an effort to avoid the hazards of pending and threatened litigation. See In re Advisory Opinion to the Governor, 509 So. 2d 292 (Fla. 1987).

62. The language of the Florida Constitution is typical: “Branches of Government.—The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.” Fla. Const. art. III, § 3; see also State v. Troise, 526 A.2d 898 (Del. 1987) (interpreting the executive’s appointment power of Del. Const. art. III, § 9); Ala. Const. art III, § 43; Colo. Const. art III; Me. Const.
and non-adjudicatory advice to another branch alters the sequence and extends the range of judicial intrusion into the operation of other governmental units. Therefore, in every jurisdiction, there are at least theoretical limits imposed upon the scope of that intrusion. Where those limits are ignored by courts, the balanced structure of government is subject to risks greater than those of decisional error and process disorder.

Neither judges nor governors in any jurisdiction are given general powers to review legislation. Legislation can be proposed or vetoed by an executive, and courts may come to review legislation for validity in the context of adjudication. In every jurisdiction, it is the elected legislature's sole responsibility to determine the need for and the design of statutes. Thus, only elected legislatures are empowered to decide, in the first instance, the manner in which public conduct is to be regulated. When an advisory court provides an executive with unlimited standing to obtain constitutional assessment of new legislation, the executive branch may employ the judiciary to supervise the legislative process. Consequently, where high court justices do not adhere to commanding principles upon which judicial discretion may be exercised, and have no prin-

art. III; MASS. CONST. pt. 1, art. XXX, § 31; Mich. Const. art. III, § 2; N.H. Const. pt. 1, art. 37; N.C. Const. art. I, § 6; Okla. Const. art. IV, § 1; R.I. Const. art. V; S.D. Const. art. II; Va. Const. art. III, § 1. The federal constitution does not expressly provide for a separation of powers. The principle of division into three coordinate branches has, however, been recognized as inherent in the federal system.

63. A separation of powers affects an insulation of the judiciary. The more general purpose is to avoid abuse by one branch at the expense of the others, while retaining a proper and necessary interdependence of governmental parts. It is probably not possible to demonstrate the effect of any particular undertaking on either governmental balance or on the reputation of a court, nor is it possible to assess either with much confidence.

64. A few states permit the executive the alternative of returning a bill to the legislature with proposed amendments. See, e.g., Va. Const. art. V, § 6.


66. The Florida example demonstrates how accepting an advisory request may force the justices into the drafting process itself. Then, once the court agreed to render its opinion, the Florida legislature remained in session until after the opponents' briefs were filed. The statute the court agreed to consider was then amended to deal with issues "smoked out" in the opponents' briefs.

After the challengers' briefs were filed arguing that certain statutory exemptions were discriminatory and before the justices decided the matter, Fla. Stat. Ann. § 212.0591(10) was amended by chapter 87-72 to provide that if any tax exemption were to be struck down for facial invalidity, the entire exemption would be eliminated. The legislature's responding advisory brief then announced: "If the opponents were to convince the Court of their discrimination argument, they would thereby achieve the elimination of the exemptions granted to churches and charities." Brief for the Legislature at 50, In re Advisory Opinion to the Governor, 509 So. 2d 292 (Fla. 1987).
Advisory opinions, regarding the constitutionality of emergent statutes, are quite different from opinions regarding other subjects where non-case analysis may be advisable. There has been little effort, even by dissenting advisory justices, to identify the values protected by a separation of powers. Undoubtedly the continued independence and consequent authority of the judicial branch is among them. This interest which is largely ignored by advisory courts, seems directly vulnerable to damage from non-case resolution of constitutional issues.

Recognizing that court mandates are ultimately obeyed only because they should be obeyed, the federal and state judiciary have expended considerable energy in developing techniques to insulate

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67. Advisory intervention to resolve some intra-governmental claims to allocated power may be preferable to adjudication. Resolution of problems of authority allocation between public entities will only rarely have a direct effect on the private rights of individuals, and it is sometimes difficult for public bodies to position such issues for resolution through adjudication. E.g., In re Advisory Opinion of the Governor Civil Rights, 306 So. 2d 520 (Fla. 1975) (question whether the governor's exclusive constitutional power to grant clemency was infringed by a statute; acceptance of advisory jurisdiction rested in part on recognition that the intra-governmental issue would be difficult to reach through normal adjudication).

68. Dissenting opinions have expressed concern at the erosion of constitutionally mandated separation of powers effected by expanded advisory jurisdiction. An articulate expression is found in the dissent of Justice Sundberg:

My reluctance to render such advice does not stem from a formalistic or technical posture, but from a real concern for the appropriate role to be exercised by the coordinate branches of government. A proper regard for the separation of powers among the branches of government indicates that the solemn responsibility of passing on the constitutional validity of legislative and executive acts should be exercised within the traditional adversary context.

. . . .

I am more mindful, however, of the serious erosion to our system of separation of powers which I perceive will result from indiscriminately passing upon the constitutional validity of executive and legislative acts through the vehicle of an advisory opinion.

In re Advisory Opinion, 374 So. 2d 959, 971-72 (Fla. 1979).

69. While the mandates of a court are to be obeyed by or enforced against the litigating parties whether private or public, it is less obvious that governmental entities are bound to accept a court's constitutional views. Both the executive and legislative branches have at least an arguable right to constitutional interpretations not in conformity with those of the judiciary. As Professor Tribe demonstrates in discussing Katzenbach v. Morgan, 384 U.S. 641 (1966), such a variety of conflicting interpretations will be ultimately unsatisfactory. L. Tribe, supra note 45, at 28-29; see also Monaghan, The Supreme Court, 1974 Term—Forward: Constitutional Common Law, 89 Harv. L. Rev. 1 (1975) (acceptance of the judicial interpretation, at least where federal-state relations are not implicated, is ultimately a matter of political accommodation).
courts and to limit the occasions for judicial intervention. Foremost among these structural restraints is the posture of courts as reactive institutions. The advisory process, in its tendency both to increase and to politicize constitutional decision making, and to paint the judiciary as playing an active (or overly cooperative) role, runs counter to these useful efforts.\textsuperscript{70}

Non-case advice of high court justices is often sought to resolve problems of another branch, including problems of intra-governmental distribution of powers. Such questions are almost always highly political;\textsuperscript{71} therefore, unless the justices carefully shape and then express a sensitivity to the parameters of their own authority, later advice regarding the limits imposed by them upon other branches may carry little weight.\textsuperscript{72} Participation by courts in the allocation of governmental power may be inevitable, but it also risks an appearance of an active political engagement that may be perceived as contrary to the work of an independent judiciary.\textsuperscript{73} This risk is greater when the participation is invited. The perception of judicial dependence is not likely changed by the assertion that advisory opinions are different because they are non-judicial and therefore may be ignored. Courts cannot excuse what will be

\textsuperscript{70} The infrequency of constitutional decision making probably supports its acceptance. When rights litigation is the only avenue to constitutional assessment, the availability of constitutional determinations is limited. As both private and public persons are required to show a direct and concrete interest in the circumstances to receive judicial consideration, some issues are difficult to present in a timely manner or at all. Thus, the increased use of short cuts such as advisory opinions is encouraged. While principles of inter alia, standing, injury in fact, and a disinclination to decide avoidable issues limit access and are cited in support of advisory intervention; the use of declaratory judgments, changing concepts of inter alia, third-party standing, representative party standing and the changing views of "political" questions as in Baker v. Carr, 369 U.S. 186 (1962) have already greatly broadened access to constitutional adjudication.

\textsuperscript{71} American courts are not prohibited from deciding properly presented "political" issues. "There is hardly a political question in the United States which does not sooner or later turn into a judicial one." Alexis de Tocqueville, Democracy in America 270 (J. Mayer ed. 1969).

\textsuperscript{72} Where under the enabling language advice is sought to resolve "urgent" governmental problems and particularly where advisory jurisdiction is exercised regarding "solemn" or "important" matters, a court's threshold decision whether to provide advice will appear as an agreement with the requesting authority's characterization of the political circumstances. See supra note 3.

\textsuperscript{73} Justice Stevens recently pointed out the potential damage to the Court of not awaiting litigant-presented issues. Such participation, Stevens noted, "must also have a detrimental and enduring impact on the public's perception of the Court as an impartial adjudicator of cases and controversies brought to us for decision by lawyers representing adverse interests in contested litigation." Patterson v. McLean Credit Union, 108 S. Ct. 1419, 1423 (1988) (Stevens, J., dissenting).
perceived as inappropriate judicial behavior by asserting that what they do may be disregarded.

Justices may describe advisory opinions as non-judicial, non-institutional and non-binding; but the evidence is plain that advisory opinions become binding abstractions, the effect of which can be neither predicted nor controlled. Commentators who have addressed the issue agree that advisory opinions, once rendered, have power not unlike ordinary judicial opinions. While the substantive issues addressed may disappear with changing political circumstances, the structural effects of advisory opinions tend to persist.

Judges are charged not only with intervening upon the default of the more populist branches but with proceeding in a manner that is supportive of their continued authority to do so. Support for the exercise of their extraordinary governmental power has traditionally been strengthened by the infrequency and the restriction of the court's exercise of power within the confines of adversary litigation. The public perception of a politically inert and impartial judiciary doing its work on behalf of important legal values may well be necessary to the legitimate exercise of judicial power.

Voluntary compliance with any form of judicial intervention may be made more unlikely when a court loses its reputation as a neutral body. When courts appear to confuse law and politics by issuing hypothetical declarations of constitutionality, there is little reason for other governmental branches, competent to make their own political judgments (and equally obligated to act constitution-

74. See supra note 39.
75. Field's survey found that advisory opinions had precedential value fully equal to that of adjudicated opinions. See Field, supra note 10; see also Comment, Advisory Opinions on the Constitutionality of Statutes, 69 HARV. L. REV. 1302, 1304 (1956) (reaching the same conclusion).
76. Litigants' compliance with constitutional decisions is not different from litigants' compliance with other kinds of judicial decisions. Insofar as constitutional adjudication is a normal judicial undertaking to resolve rights, the question of compliance by the parties does not arise. Decisions that are the necessary by-products of rights adjudication are binding on the parties and fully enforceable. But, many constitutional decisions are different and tend to have a broader impact on governmental behavior. The extent to which others, including governments, may willingly follow these results may be related to the extent a court is perceived as engaging in normal adjudication rather than announcing the component parts of good government.
77. A politically acceptable reason that a court may confidentially rule that the governor may not enact laws is, for example, not that it is bad government, but that it is unlawful. While the moral authority of a "non-political" court can enforce that result, a political entity is properly to be argued with.
ally), to accept the court's advice. Further, to the extent any governmental branch is free to obtain the justices' advice on demand and to ignore it at will, the court's work may seem damagingly irrelevant. Public disregard for what a court says may well be contagious. If the chief executive may ignore the justices' advice, why should any private citizen obey the words of the same judges?

Thus, the peculiar role and exposed posture of courts carries with it a principal responsibility to husband rather than squander judicial authority—to maintain legitimacy over the long pull—whatever the political currents that affect other more "political" branches. On-demand production of constitutional opinions is foreign to that charge and to that history. The tendency is to spend a court's moral authority. There may be occasions when expenditure of a court's authority must be made, but this should be resisted, not invited. Historically, when courts have been called upon to assert authority over another department, caution and clarity of role, purpose, and expression have been exercised. Those values are rarely considered in the advisory context.

78. The fact that litigating parties (private or public) are bound by the final mandates of adjudication is more obvious than that other governmental branches are bound by the constitutional directions of a court. While courts function as final arbiters of a constitutional text, they do not do so by any clear mandate. Acquiescence by non-parties is more a consequence of accepted and necessary political practice.

79. The political value of some delay between passage and judgment is obvious. That is, before being tested by litigation, an otherwise new statute will not only have been seasoned by use which will provide a real factual context, but will provide a useful space between enactment and judgment which may lessen the public perception that a court, expected only to determine legal validity, is instead making policy. When a resulting judgment is likely to be unpopular, the advantage of casting the policy burden on the justices is not likely to be lost on governors or legislators. Bickel made a similar reference in discussing the lag between legislation and judicial review in the federal system necessitated by the requirement that a factual dispute arise before adjudication can be undertaken. A BICKEL, THE LEAST DANGEROUS BRANCH, 116 (1962).

80. State legislators and executives are bound to act constitutionally. Enacted legislation carries a presumption of constitutionality. The presumption is that the legislature has, through its informing mechanisms, found facts to make the operation of its enactments constitutional and that the executive has concurred. Legislative and executive adherence to constitutional standards benefits the judiciary by reducing the need for judicial intervention to those few cases where other branches have inaccurately predicted future operation of an enactment, or where another branch misconceives or purposefully defaults in its constitutional duty.

81. It is probably flattering to be asked for advice on matters of state. However, after giving their counsel and placing their imprimatur on, or denying legitimacy to, legislation, the justices may only watch as other branches accept their invitation to ignore what the justices have said. Thus, the justices risk becoming politically impotent whenever they appear politically engaged.
VI. Conclusion

When invited to give an advisory opinion, the high court is presented with an unusual opportunity. Resolution of the decision to proceed or to decline, and the court’s articulation of that result, may serve to either reinforce or to weaken a number of civic values including the public perception of the court’s own independent judicial role. While the advantages of providing abstract legal advice to another branch of government are frequently seen as problematic, the values of an independent judiciary are not debatable. Those values are reinforced whenever the justices assert their independence. Thus, courts should stay their hands in the absence of a clear, present and articulable need.

The advisory process has some limited value in the resolution of intra-governmental problems in clarification of ambiguous constitutional terms and in the solution of some urgent problems not easily presented for adjudication. Standards should be developed to permit courts to restrict the process within those parameters. The substantial informational weaknesses of preemptive intervention should be acknowledged. There is a need for renewed recognition that non-case decision making has a potential for disrupting the constitutionally mandated allocation of governmental powers. Its potential for inflicting damage on the authority of courts also needs reassessment. While the informational deficiencies of non-case advice are subject to some alleviation through the encouragement of participation by interested parties, damage to the governmental structure can be avoided only by a careful and principled exercise of judicial discretion to determine which matters are properly subject to non-case analysis.

Even when the call to intervene seems most urgent, courts should consider whether their advisory and adjudicatory roles are compatible and assess the benefits of deferral for adjudication. In determining jurisdiction, courts should be able to articulate and employ standards grounded in well-accepted principles of government. Further, a court should take the time to assess the effect of exercising advisory jurisdiction on the rights and expectations of unknown individuals and on pending litigation.

Judicial discharge of the obligations to maintain a proper balance of governmental power and to reinforce judicial authority, like judicial supervision of the constitutionality of government behavior, is a sensitive and difficult task. When implicated together
in a matter initiated by the claim of political necessity of a coordinate branch, courts would be wise to exercise more caution and to articulate its purposes with more clarity.