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Phillip M. Kannan

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ADVISORY OPINIONS BY FEDERAL COURTS

*Phillip M. Kannan**

I. INTRODUCTION

Since 1793, the affirmative grant of authority to federal courts in Article III of the Constitution to hear and decide cases or controversies¹ has been interpreted to prohibit these courts from giving advisory opinions. In that year, United States Supreme Court Chief Justice Jay, Justice Cushing, and District Judge Duane rejected a provision in a 1792 act of Congress that would have required the Supreme Court to settle federal pension claims of widows and orphans subject to the approval of the Secretary of War.² The basis for the position taken by the Chief Justice was "that neither the legislative nor the executive branches can constitutionally assign to the judicial branch any duties but such as are properly judicial, to be performed in a judicial manner."³ The Supreme Court has acknowledged this limitation on federal judicial power repeatedly since that date in its decisions, including the recent case of

* B.S., 1961, University of North Carolina; M.A., 1963, University of North Carolina; J.D. 1974, University of Tennessee. Member of the Tennessee Bar and corporate counsel. The views expressed are solely those of the author.

1. Article III, Section 2 states in part:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1.

2. See Act of March 23, 1792, ch. 11, 1 Stat. 243 (1792); see also *Muskrat v. United States*, 219 U.S. 346 (1911) (discussing the statute).

3. *Muskrat*, 219 U.S. at 346.

Arizonans for Official English v. Arizona,⁴ in which the Court faulted the en banc Ninth Circuit Court for failing to recognize "federal courts' lack of authority to act in friendly or feigned proceedings."⁵ Yet, despite the universality and age of this fundamental principle of federal jurisprudence, federal courts, including the Supreme Court, do not always honor it.

The statement that federal courts do not have the authority to give advisory opinions is an over simplification of the rule as it is actually applied by federal courts. There is, in fact, a three part rule regarding advisory opinions. Two parts do indeed foreclose federal courts to persons seeking advice,⁶ but one part recognizes the usefulness of judicial advice and allows it to be imbedded in decisions.⁷ As the cases and discussion in Sections III-V of this article show, the determination of which branch of the rule will be applied in a particular case is made through the use of a balancing process in which the federal courts ultimately retain the power to determine the policies that are placed on the scales and the weight of each.

The basic hypothesis of this article is that federal courts cannot be compelled, either by Congress or parties, to render advisory opinions, but under circumstances they themselves define, these courts may elect to give advice. Section II provides a brief explanation of what is meant by the term "advisory opinion," and its antithesis, case or controversy. Sections III and IV discuss the cases that establish the first part of this hypothesis. Section V analyzes federal cases that imbed advice in the opinions. The goal of this latter analysis is to identify the reasons that have motivated courts to give advice and which reasons may prompt that result in future cases. Section VI provides recommendations that may be helpful in striking a balance between the constitutional theory of no advisory opinions by federal courts and the practice of those courts of using advisory opinions to better fulfill their constitutional role.

4. 117 S. Ct. 1055 (1997).

5. *Id.* at 1070; see also *Raines v. Byrd*, 117 S. Ct. 2312, 2317 (1997) ("Under Article III, [section] 2 of the Constitution, the federal courts have jurisdiction over this dispute . . . only if it is a 'case' or 'controversy.'").

6. See *infra* Parts III & IV.

7. See *infra* Part V.

II. MEANING OF "ADVISORY OPINION"

Under Article III of the Constitution, federal courts are limited to deciding cases and controversies.⁸ Therefore, if a federal court purports to rule on an issue that is not a case or controversy, it is performing a duty that is not "properly judicial,"⁹ and hence, its opinion would be merely advisory. Thus, the meaning of advisory opinion can be understood by considering its antithesis, namely, case or controversy.

The basic elements of the meaning of case and controversy given in *Muskrat v. United States* are as follows:

By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it had become a case. The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication.¹⁰

This definition of case and controversy includes the requirements that the court have subject-matter jurisdiction,¹¹ that

8. Some states provide otherwise for their courts. See Note, *Advisory Opinions on the Constitutionality of Statutes*, 69 HARV. L. REV. 1302 (1956).

9. *Muskrat v. United States*, 219 U.S. 346, 352 (1911) (quoting Chief Justice Jay).

10. *Id.* at 357 (quoting *In re Pacific Ry. Comm'n*, 32 F. 241, 255 (N.D. Cal. 1887)).

11. See *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982). Moreover, courts have an independent duty to examine their jurisdiction. See, e.g., *Maier v. EPA*, 114 F.3d 1032, 1036 (10th Cir. 1997); *Natural Resources Defense Council v. United States Dept. of Interior*, 113 F.3d 1121, 1124 (9th Cir. 1997); *Missouri v. Cuffley*, 112 F.3d 1332, 1334 (8th Cir. 1997); *United States v. Oakar*, 111 F.3d 146, 149 (D.C. Cir. 1997).

There are cases in which, although the court did not have jurisdiction, neither the parties nor the court raised the issue and the court rendered an opinion. See, e.g., *Califano v. Sanders*, 430 U.S. 99, 105 (1977) ("Three decisions of this Court arguably have assumed, with little discussion, that the APA is an independent grant of subject-matter jurisdiction However, an Act of Congress enacted since our grant of certiorari in this case now persuades us that the better view is that the APA is not to be interpreted as an implied grant of subject-matter jurisdiction to review

the issue be justiciable,¹² that the plaintiff have standing to raise the issue,¹³ that the issue not be moot,¹⁴ and that the court have authority to enter an enforceable remedy.¹⁵ If any of these is absent, the pronouncement by a federal court would be non-binding and hence advisory.¹⁶

agency actions.”).

12. See *Baker v. Carr*, 369 U.S. 186, 210-11 (1962) (“The nonjusticiability of a political question is primarily a function of the separation of powers Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, . . . is a responsibility of this Court as ultimate interpreter of the Constitution.”).

13. See *Raines v. Byrd*, 117 S. Ct. 2312, 2317 (1997) (“One element of the case-or-controversy requirement is that appellees, based on their complaint, must establish that they have standing to sue.”); *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1067 (1997) (“Standing to sue or defend is an aspect of the case or controversy requirement.”); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“[The core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III”). Standing is defined as follows:

First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly trace[able] to the challenged action of the defendant, and not th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”

Id. at 560-61 (alterations in original) (citations omitted).

14. See *Arizonans for Official English*, 117 S. Ct. at 1069 n.22. Mootness has been described as “the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).” *Id.* (quoting *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 397 (1980)).

15. See *Muskrat*, 219 U.S. at 356.

16. In addition to these types of advisory opinions, it has been argued that a court’s decision that was to “be applied prospectively only” would not be a judicial resolution of a case or controversy under Article III. See James B. Bean *Distilling Co. v. Georgia*, 501 U.S. 529, 546 (1991) (Blackmun, J., concurring); see also Jill E. Fish, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1056, 1076 (1997) (“To the extent that the formalist distinction between legislative and judicial lawmaking powers depends on temporal limits on the lawmaking process, separation of powers considerations can be used to argue that adjudication should be exclusively retroactive.”).

III. FEDERAL COURTS CANNOT BE COMPELLED BY CONGRESS TO RENDER ADVISORY OPINIONS

The attitude of the Supreme Court regarding attempts by Congress to compel advisory opinions from federal courts can be seen from three cases decided over an eighty-five year period. These cases are *Muskrat v. United States*,¹⁷ *Aetna Life Insurance Co. v. Haworth*,¹⁸ and *Lujan v. Defenders of Wildlife*.¹⁹

The statute at issue in *Muskrat* is highly unusual in that it contained an express provision purporting to give the Court of Claims in the first instance, and the United States Supreme Court on appeal, jurisdiction to render an advisory opinion.²⁰ Under previous statutes of 1902, Congress had made allocations of lands of the Cherokee Nation to individuals and groups defined in the statute.²¹ In 1906, Congress enacted new legislation that changed this allotment.²² The validity of the 1906 Act was doubtful, and, in 1907, the following statute was enacted as the means to resolve this uncertainty:

That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens, having like interests in the property allotted under the Act of July first, nineteen hundred and two, . . . and David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September first, nineteen hundred and two, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any Acts of Congress passed since the said act of July first, nineteen hundred and two²³

When the appeal of a suit brought under the 1907 Act in the Court of Claims reached the Supreme Court, the central issue was whether these courts had jurisdiction to hear and decide

17. 219 U.S. 346 (1911).

18. 300 U.S. 227 (1937).

19. 504 U.S. 555 (1992).

20. See Act of March 1, 1907, ch. 2285, 34 Stat. 1015, 1028 (1907).

21. See Act of July 1, 1902, ch. 1375, 32 Stat. 716 (1902).

22. See Act of April 26, 1906, ch. 1876, 34 Stat. 137 (1906), amended by Act of June 21, 1906, ch. 3504, 34 Stat. 325 (1906).

23. Act of March 1, 1907, ch. 2285, 34 Stat. 1015, 1028 (1907).

the cases. The Supreme Court proceeded to answer this question by supporting an argument based on the separation of powers. It quoted from and relied upon Chief Justice Jay's analysis regarding a 1792 statute "[t]hat by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either."²⁴ The Court then noted that the only power of the judicial branch was to hear and decide cases and controversies. Thus, if the suits were not cases or controversies, the 1907 Act would be an unconstitutional attempt by the legislative branch to assign non-judicial duties to the judicial branch.²⁵ After adopting the definition of case and controversy given above,²⁶ the Court found that the suit before it failed to qualify.²⁷ It summarized this failure as follows:

The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation.²⁸

The fundamental flaw in the attempt was that the plaintiffs lacked standing. In the language of present day cases, the plaintiffs had not demonstrated injury in fact that was concrete and particularized and which could be redressed by the Court.²⁹

A landmark in congressional efforts to authorize federal courts to give advisory opinions was the enactment of the Federal Declaratory Judgment Act in 1934.³⁰ That Act stated that "[i]n cases of actual controversy the courts of the United States

24. *Muskrat v. United States*, 219 U.S. 346, 352 (1911) (quoting *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792)).

25. *See id.* at 362.

26. *See supra* text accompanying note 10.

27. *See Muskrat*, 219 U.S. at 363.

28. *Id.* at 361-62.

29. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

30. *See Federal Declaratory Judgment Act*, ch. 512, 48 Stat. 955 (1934) (current version at 28 U.S.C. § 2201 (1994)).

shall have power . . . to declare rights and other legal relations of any interested party . . . and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.³¹ Whereas the previous legislative acts purporting to authorize advisory opinions by federal courts were limited to specific subjects, the Declaratory Judgment Act was a wholesale grant of power regardless of subject matter.

When the constitutionality of the Declaratory Judgment Act was challenged, the Court was faced with conflicting interests. Although the Act provided a form of relief that could be useful to litigants, it could also be viewed as imposing non-judicial duties on the courts. This clash was resolved in *Aetna Life Insurance Co. v. Haworth*.³² The issue on appeal was whether the district court had jurisdiction over the suit under the Federal Declaratory Judgment Act.³³ The plaintiff, Aetna, filed a complaint in the United States district court that sought a decree declaring that four policies it had issued to the defendant were null and void, and that its obligations under a fifth policy were limited to forty-five dollars upon the death of the defendant.³⁴ The district court held that the complaint did not

31. *Id.* The act provides:

(1) In cases of actual controversy the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not.

Id. at 955-56.

32. 300 U.S. 227 (1937).

33. *See id.* at 236.

34. *See id.* at 238.

set forth a "controversy" and thus dismissed the case.³⁵ The United States Court of Appeals for the Eighth Circuit affirmed the dismissal.³⁶

The Supreme Court began its analysis by recognizing that federal courts are limited to the exercise of judicial power only in "cases" and "controversies." The Court, however, acknowledged that Congress has constitutional authority to enact new procedures for presenting cases and controversies and to provide new remedies that can be awarded in cases and controversies.³⁷ Thus, if the Declaratory Judgment Act was an attempt to require advisory opinions, it would be unconstitutional. If the Act only provided new procedures or remedies in actual cases or controversies, it would be constitutional. The resolution of these conflicting possibilities was made by reliance on the words of the statute itself. Since Congress had limited the Declaratory Judgment Act to "cases or actual controversies," the Court held that the Act was "procedural only," and thus constitutional.³⁸

It is instructive to see how the Supreme Court resolved the issue before it in *Aetna*. The Court found three determining factors: a dispute relating to legal rights and obligations arising out of contracts of insurance, that the dispute was definite and concrete, and that it called for an adjudication of present rights.³⁹ It was irrelevant that the adjudication of rights did not require "the award of process or the payment of damages . . . [or] an injunction."⁴⁰ The judicial power of federal courts was determined by the facts regarding the claim, not whether a traditional remedy was being sought.⁴¹

The balancing process applied in *Aetna* of steering clear of an advisory opinion while recognizing the lawful procedures and

35. See *Aetna Life Ins. Co. v. Haworth*, 11 F. Supp. 1016 (W.D. Mo. 1935).

36. See *Aetna Life Ins. Co. v. Haworth*, 84 F.2d 695 (8th Cir. 1936).

37. See *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 277, 240 (1937).

38. *Id.*; see also *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 15-16 (1983) (holding that the Declaratory Judgment Act is a procedural statute, not a jurisdictional statute).

39. See *Aetna*, 300 U.S. at 240-41.

40. *Id.* at 241.

41. See *id.* at 240.

remedies Congress created in the Declaratory Judgment Act has been characterized in a later opinion as follows:

[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues "concrete legal issues, presented in actual cases, not abstractions" are requisite. This is as true of declaratory judgments as any other field.⁴² The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.⁴³

The end result of the Court's opinions interpreting and applying the Declaratory Judgment Act is that the Court gave itself the best of two worlds. It has held that the Act created a much needed procedure and remedy, and the Court has retained for federal courts alone the power to say when an action seeking to use the new procedure and remedy crossed the line separating advisory opinions from cases and controversies. The position that has evolved is clear affirmation that the Court will not allow the other branches of government to impose on the federal judiciary the non-judicial duty of rendering advisory opinions.

That the Court's approach under the Declaratory Judgment Act of retaining ultimate authority to decide when a complaint crosses the line separating cases and controversies from advisory opinions is also the law regarding other statutory attempts to force advisory opinions can be seen in its interpretation of citizen-suit provisions in the False Claims Act,⁴⁴ and in recent

42. *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (quoting *United Public Workers of Am. v. Mitchell*, 330 U.S. 75, 89 (1947) (alteration in original)).

43. *Id.* (quoting *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

44. 31 U.S.C. § 3730(e)(4)(A) (1994). For cases upholding the standing of *qui tam* plaintiffs under this act, see *United States ex rel. Taxpayers Against Fraud v. General Electric Co.*, 41 F.3d 1032 (6th Cir. 1994) and *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993). The Court did not address this issue in *Hughes Air-*

environmental laws.⁴⁵ These latter statutory attempts to create authority in all citizens to act as "private attorneys general" to enforce the environmental laws are based on the *qui tam* section of the Rivers and Harbors Appropriations Act of 1899.⁴⁶ The common law doctrine codified in the Rivers and Harbors Act allows citizens to prosecute crimes and keep half of the fines imposed.⁴⁷

Encouraged by the success under the Rivers and Harbors Act, Congress went beyond the criminal *qui tam* actions and attempted to create broader civil authority in all citizens to bring suit for violations of the various environmental statutes. Typical of the citizen-suit provisions is that of the Endangered Species Act which states that "any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other government instrumentality or agency, . . . who is alleged to be in violation of any provision of this chapter."⁴⁸ A literal interpretation of this subsection would give anyone the right to sue if a federal agency or any person failed to comply with any provision of the Act. This would represent a dramatic broadening of the meaning of standing, and hence the meaning of case and controversy, with a corresponding narrowing of the class of advisory opinions. Predictably, the Supreme Court rejected this literal reading and thereby protected its authority to decide when a suit is seeking an advisory

craft Co. v. United States ex rel. Schumer, 117 S. Ct. 1871 (1997).

45. See, e.g., Toxic Substance Control Act, 15 U.S.C. § 2619 (1994); Endangered Species Act, 16 U.S.C. § 1540(g) (1994); Clean Water Act, 33 U.S.C. § 1365 (1994); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (1994); Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a) (1994); Clean Air Act, 42 U.S.C. § 7604(a) (1994); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9654 (1994); Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11046 (1994).

46. See 33 U.S.C. §§ 407, 411 (1994). For a discussion of the scope of this Act, see *United States v. Standard Oil Co.*, 384 U.S. 224 (1966) and *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960). For a discussion of the evolution of *qui tam* actions under the Rivers and Harbors Act of 1899, see Robert L. Potter, Comment, *Discharging New Wine into Old Wineskins: The Metamorphosis of the Rivers and Harbors Act of 1899*, 33 U. PITT. L. REV. 483, 509 (1972) (arguing that the broad language used by Justice Douglas in *United States v. Standard Oil Co.* was merely dictum). If that is the case, this is an example of advisory dicta shaping the entire field of water law, or perhaps all of environmental law.

47. See 33 U.S.C. § 411 (1994).

48. 16 U.S.C. § 1540(g) (1994).

opinion. This narrowing occurred in *Lujan v. Defenders of Wildlife*.⁴⁹ In that case, the Court was confronted with the holding of the Ninth Circuit that the Endangered Species Act created procedural rights which, if breached by the Secretary, could be enforced by anyone. In rejecting this interpretation the Court stated:

The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and that permits all citizens . . . to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious⁵⁰

The *Lujan* opinion continues the law as stated in *Muskrat* and *Haworth*. The federal courts will tolerate no wholesale or fact-specific determination by Congress as to when the line separating cases and controversies from advisory opinions is crossed. It is for the federal courts, and them alone, to make these decisions.

The three decisions discussed above, which deal specifically with Congress' attempts to create in federal courts the power to issue advisory opinions, fit squarely within general constitutional principles developed by the Court regarding the limits on Congress to interpret the Constitution. The most recent case limiting Congress' power is *City of Boerne v. Flores*,⁵¹ in which the Court held that Congress does not have the authority to enact legislation that purports only to interpret a substantive constitutional provision, but which, in fact, makes changes to the provision.⁵² *Immigration and Naturalization Service v. Chadha*⁵³ addressed the issue of the power of Congress to enact laws establishing lawmaking procedures different from those specified in the Constitution and held that Congress has no

49. 504 U.S. 555 (1992).

50. *Id.* at 576-77.

51. 117 S. Ct. 2157 (1997).

52. *See id.* at 2160.

53. 462 U.S. 919 (1983).

such power.⁵⁴ Given the long-standing attitude of the Court regarding Congress' authority to require advisory opinions and the consistency of that position with the Court's jurisprudence on Congress' authority to alter substantive or procedural constitutional standards, it is unlikely that the Court will reverse its position on this issue.

IV. FEDERAL COURTS CANNOT BE COMPELLED BY PARTIES TO RENDER ADVISORY OPINIONS

Pressure on federal courts to render advisory opinions also comes from sources other than Congress. Litigants, aware that the line separating cases and controversies from advisory opinions is not well defined, have pressed suits that fall in the grey zone. When a federal court has an interest in establishing law in an area pressed by a litigant, it may draw the line to include the suit as a controversy. An example of this process is found in *Lucas v. South Carolina Coastal Council*.⁵⁵ If, however, the cautionary instincts of the federal judiciary prevail, the line will be drawn to exclude the case. *Arizonans for Official English*⁵⁶ illustrates this cautionary approach by the Supreme Court, in contrast to the press of the en banc Court of Appeals for the Ninth Circuit to reach the merits in this case.⁵⁷ These decisions and others are discussed below to demonstrate the general principle that litigants cannot, through stipulation or collusion, compel a federal court to render an opinion. Litigants may, however, be able to offer a federal court the opportunity to develop law when it is so inclined.

If parties to a suit in a federal court were permitted to stipulate the facts and the law that should be applied to them, they would have a method to present hypothetical questions to the court and obtain advisory opinions. To prevent this, the Court has held that stipulations of law do not bind federal courts.⁵⁸

54. *See id.* at 959.

55. 505 U.S. 1003 (1992).

56. 117 S. Ct. 1055 (1997).

57. *See Yniguez v. Arizona*, 69 F.3d 920, 1084 (9th Cir. 1995).

58. *See United States Nat'l Bank of Oregon v. Independent Ins. Agents*, 508 U.S. 439, 446-47 (1993) ("[P]ermitt[ing] litigants, by agreeing on the legal issue presented, to extract the opinion of a court on hypothetical Acts of Congress or dubious constitu-

Yet, federal courts use a device that amounts to virtual stipulation of the law: "assuming without deciding" what the law is. A recent example of this practice is the en banc decision in *Shahar v. Bower*.⁵⁹ By using this device, the United States Court of Appeals for the Eleventh Circuit avoided deciding whether a lesbian, whose offer of employment with the state of Georgia was withdrawn, had a constitutionally protected federal right to be "married" to another woman.⁶⁰ The constitutional rights implicated were the First Amendment right to intimate association and the right to expressive association.⁶¹ The majority assumed "for argument's sake" that plaintiff Shahar had these rights regarding her "marriage" to another woman.⁶² Based on this assumption, the majority held that the proper constitutional standard would be the *Pickering* balancing test.⁶³ Yet, because the majority proceeded on a hypothetical path, it was reduced to giving arguments about weighing "x" against "y," rather than putting real facts and policies in the balance pans.⁶⁴ In a concurring opinion sharply criticizing this approach, Judge Tjoflat stated that "the court must describe qualitatively the constitutional right it is placing on the scale in order to determine whether, on balance, the government's interest is to prevail."⁶⁵ By using the "assuming without deciding" device, the majority was able to render, at its election, an advisory opinion.

tional principles . . . would be difficult to characterize as anything but advisory."); see also *Freytag v. Commissioner*, 501 U.S. 868 (1991) (rejecting the position taken by both parties in the suit that the Tax Court is not a "court" as that term is used in a statute at issue in the case).

59. 114 F.3d 1097 (11th Cir. 1997).

60. As the rationale for using the "assuming without deciding" technique in constitutional cases such as *Shahar* the court stated: "[a] fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Id.* at 1100 (quoting *Employment Div., Dep't of Human Resources v. Smith*, 485 U.S. 660, 673-74 (1988)). It is questionable, however, whether this principle is applicable to *Shahar* since the tack the majority used also required a constitutional determination; that is, the majority merely substituted one constitutional question for another.

61. *See id.* at 1102.

62. *See id.*

63. *See id.* at 1103. The outcome of the *Pickering* balancing test is a question of law. *See Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).

64. *See Shahar*, 114 F.3d at 1106.

65. *Id.* at 1112 (Tjoflat, J., concurring).

In *Lucas v. South Carolina Coastal Council*,⁶⁶ the discretion the Court had in deciding whether to render what amounts to an advisory opinion was its general power to decide cases that turn on an erroneous finding of fact by the trial court.⁶⁷ In this case, the "fact" in question was that two building lots on the Isle of Palms, South Carolina, purchased in 1986 for \$975,000, were now valueless because of a state regulation that prevented their use for residential construction.⁶⁸ The disposition of the case by the state supreme court, however, made the status of that "fact" unclear. As Justice Blackmun pointed out in his dissent, "[r]espondent contested the findings of fact of the trial court in the South Carolina Supreme Court, but that court did not resolve the issue."⁶⁹ In *Lucas*, the Court, acting within its discretion, seized the opportunity to assume that the value was zero and make law regarding regulatory taking.⁷⁰ It did so at its election, however, not through compulsion by the parties.⁷¹

The Ninth Circuit's decision in *Arizonans for Official English* demonstrates that federal courts do not merely evaluate the legal and factual arguments of the parties when it determines on which side of the line separating cases and controversies from advisory opinions a pending suit falls.⁷² It also illustrates how a court's interest in reaching the merits of suit may cause it to interpret procedures normatively to enable it to reach the merits of the case.⁷³ In an effort to keep this suit alive, the majority refused to give weight to an opinion by the state Attorney General that would have mooted it, refused to refer it to the state supreme court for a definitive interpretation of the state initiative at issue, refused to stay its proceedings while the state supreme court decided a parallel case, and refused to

66. 505 U.S. 1003 (1992).

67. See *id.* at 1045 (Blackmun, J., dissenting) ("I agree . . . that [the Court] has the power to decide a case that turns on an erroneous finding, but I question the wisdom of deciding an issue based on a factual premise that does not exist in this case, and in the judgment of the Court will exist in the future only in "extraordinary circumstance[s] . . .").

68. See *id.* at 1007.

69. *Id.* at 1044 n.6.

70. See *id.* at 1010-14.

71. See *id.*

72. See *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1065-66 (1997).

73. See *id.* at 1059-60, 1065-66.

moot the case when the only plaintiff, Yniguez, resigned from her position with the state.⁷⁴

Instead of following the general principle of avoiding unnecessary constitutional adjudication, the majority of the Ninth Circuit introduced a theory of nominal damages to create standing after the only plaintiff had resigned from her position with the state and, effectively, from the case.⁷⁵ This enabled the court to rule on the constitutionality of the state initiative.⁷⁶ The Supreme Court faulted the Ninth Circuit for losing sight of the limitations placed on federal courts; namely, that “[f]ederal courts lack competence to rule definitively on the meaning of state legislation, nor may they adjudicate challenges to state measures absent a showing of actual impact on the challenger.”⁷⁷ Regarding the introduction of the nominal damages theory in an attempt to keep the case alive, the Court stated: “In advancing cooperation between Yniguez and the Attorney General regarding the request for an agreement to pay nominal damages, the Ninth Circuit did not home in on the federal courts’ lack of authority to act in friendly or feigned proceedings.”⁷⁸ Instead, in a press to make constitutional law in a high-profile case, the Ninth Circuit majority gave too little consideration to the fundamental constitutional restraints on its judicial power.⁷⁹

In summary, the cases discussed in this Part demonstrate that federal courts deny parties to suits the power to determine conclusively on which side of the line separating cases and controversies from advisory opinions their suit falls. The courts themselves, however, retain a great deal of discretion in making that call.

74. *See id.*

75. *See id.* at 1067.

76. *See id.* at 1066-67.

77. *Id.* at 1059 (citations omitted).

78. *Id.* at 1070.

79. *See id.* at 1059.

V. FEDERAL COURTS MAY ELECT TO PROVIDE ADVISORY OPINIONS

The binding or precedential force of federal courts' opinions is limited to those conclusions that are necessary to support the decisions.⁸⁰ Any other statement made in opinions is obiter dictum⁸¹ or dictum for short. It is incorrect to think, however, that dicta have no force at all. In reality, the weight given to dicta ranges on an inexact, non-linear scale from rejection, to indifference, to persuasion, to deference, to compulsion. Where particular dicta fall on this scale for a court that is faced with it depends on many factors, most of which are unknowable. Among the controlling factors for such a court may be the level of the court giving the dicta, reaction of other courts to the dicta, quality of the analysis supporting the dicta, the age of the dicta, and the closeness of the fit of the dicta to the case under consideration.

If a court includes dicta in an opinion deciding an actual controversy, it is going beyond its jurisdiction in the case and rendering advice on the law.⁸² The statements that are not necessary to support the decision amount to an advisory opinion contained within the resolution of a case or controversy.

80. See *United States Nat'l Bank of Oregon v. Independent Ins. Agents*, 508 U.S. 439, 463 n.11 (1993) ("[O]ur remark in *Posadas v. National City Bank*, 296 U.S. 497, 502 (1936), that the 1916 Act "amends [sections of the Federal Reserve Act]" . . . is obviously not controlling, coming as it did in an opinion that did not present the question we decide in these cases [Cases such as *Posadas*] contain a valuable reminder about the need to distinguish an opinion's holding from its dicta.").

81. Dictum is defined as

an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination; any statement of the law enunciated by the court merely by way of illustration, argument, analogy, or suggestion. Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of an adjudication.

BLACK'S LAW DICTIONARY 454 (6th ed. 1990).

82. See, e.g., *Recupero v. New England Tel. & Tel. Co.*, 118 F.3d 820, 828 (1st Cir. 1997) ("A central characteristic of federal jurisdiction is that it tends to be claim-based, and thus specific to claims, rather than case-based, and thus general to an entire case if the court has jurisdiction over any claim.").

Dicta that are given little or no precedential weight are of no concern; they are judicial advice that has no practical significance. However, dicta that are perceived as binding or virtually binding have become judicial advisory opinions and reflect a de facto or virtual jurisdiction in Article III courts to issue such opinions. The United States Court of Appeals for the Tenth Circuit explicitly acknowledged this de facto jurisdiction by stating that "this court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings"⁸³

A. *Harm Caused by Judicial Advice*

Use of the de facto jurisdiction to render advisory opinions creates two types of problems in the federal judiciary. First, since the application of advisory precedent is wholly dependent on the willing acceptance by other courts, such precedence can be rejected at any time by any court. This introduces instability and uncertainty in law, both of which are undesirable. In *Payne v. Tennessee*,⁸⁴ the Court stated that "[s]tare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."⁸⁵ Advisory dicta lack these desirable qualities underlying stare decisis, and thus weaken the judicial process. A leading example of the use of de facto jurisdiction, the constitutionality of public universities using race in their admission programs, is discussed below. The second problem created by the use of de facto jurisdiction is that the application of advisory precedent may not be uniform since it is based on subjective attitudes of various judges. This can lead to splits among the circuits and splits at the district

83. *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) (citing *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1540 n.10 (10th Cir. 1995)).

84. 501 U.S. 808 (1991).

85. *Id.* at 827. The Court also quotes Justice Brandeis stating that adhering to precedent "is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right." *Id.*; see also *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) ("Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.").

court level within a circuit. Examples of this problematic development also are discussed below.

The instability created when a court gives an advisory opinion in dicta is illustrated in *Regents of the University of California v. Bakke*.⁸⁶ In this case, Bakke, a white male, challenged an admission rule of the University of California at Davis that reserved sixteen of 100 admission slots to its medical school for "minority groups" or groups designated as "economically and/or educationally disadvantaged."⁸⁷ He claimed this rule, which excluded him from consideration for appointment to the sixteen slots, violated the Fourteenth Amendment of the Constitution and Title VI of the Civil Rights Act of 1964.⁸⁸ Justices Stevens, Stewart, and Rehnquist and Chief Justice Burger held that the rule violated Title VI, and that it was therefore unnecessary to consider Bakke's constitutional claim.⁸⁹ Justices Brennan, White, Marshall, and Blackmun rejected the Title VI argument and held that under the Fourteenth Amendment the intermediate scrutiny standard was applicable to this case.⁹⁰ Applying this standard, they upheld the university's rule.⁹¹ The ninth vote was that of Justice Powell who rejected the rationales given by both of the four-member blocks. He concluded that it was necessary to reach the constitutional issue, but that the proper standard was strict scrutiny.⁹² Under this standard, Justice Powell concluded that the university's purpose of a racially diverse student body was a compelling interest, but the university had failed to make the necessary showing that its rule was the least restrictive means of accomplishing its purpose.⁹³ Justice Powell's vote that the university's decision not to consider Bakke for all medical school slots violated the Equal Protection Clause, when added to the Stevens-Stewart-Rehnquist-Burger block, yielded a majority to that effect. His rejection of the California Supreme Court's holding that the University was prohibited from using race in admission deci-

86. 438 U.S. 265 (1978).

87. *Id.* at 274.

88. *See id.* at 266; *see also* 42 U.S.C. § 2000d (1994).

89. *See Bakke*, 438 U.S. at 412, 418.

90. *See id.* at 361-62.

91. *See id.* at 379.

92. *See id.* at 289-91.

93. *See id.* at 320.

sions combined with that of the other four-Justice block to yield the majority holding on that point. Justice Powell, however, included an extensive discussion of the use of the race of applicants as one factor in making admission decisions. No other Justice joined his position that such use of race would be constitutional.⁹⁴ It was dicta by a single Justice. Yet, Justice Powell's dictum appears to have become the de facto law of the land to schools on the question of admission programs, which have broadly accepted the use of race as a "plus."⁹⁵

This acceptance of Justice Powell's dicta rests on a willingness of the institutions to follow it, not on its binding force. When the Court, in other cases, reached conclusions that rejected the use of race by governments except as remedial measures and questioned whether *Bakke* was binding precedent,⁹⁶ this willingness was questioned and rejected. This occurred in *Hopwood v. Texas*,⁹⁷ where the United States Court of Appeals for the Fifth Circuit was faced with admissions rules under which applications of Blacks and Mexicans to the University of Texas Law School were given favorable treatment. The justification offered by the University of Texas was that this practice increased diversity in the student body.⁹⁸ The status of *Bakke* as precedent for this rationale was presented in starkest terms: "The law school maintains . . . that Justice Powell's formulation

94. See *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996) ("Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case."). This was at least implicitly acknowledged by the Court in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2109 (1995) ("The Court's failure to produce a majority opinion in *Bakke* . . . left unresolved the proper analysis for remedial race-based governmental action.").

95. See Robert G. Dixon, Jr., *Bakke: a Constitutional Analysis*, 67 CAL. L. REV. 69 (1979) (Justice Powell's "tiebreaking opinion . . . has acquired wide programmatic appeal."); see also *Jones ex rel. Michele v. Board of Educ.*, 632 F. Supp. 1319, 1324 (E.D.N.Y. 1986) (accepting the Board's position that coeducation better prepares students and relying on *Bakke* as precedent); *Phelps v. Washburn Univ.*, 634 F. Supp. 556, 566 (D. Kan. 1986) (stating that the "Washburn plan is substantially similar to the Harvard College admission process, which was approved by the Supreme Court in *Regents of the University of California v. Bakke*"). The same type of plan for teachers was at issue in *United States v. Board of Education of Piscataway*, 832 F. Supp. 836 (D.N.J. 1993), 91 F.3d 1547, 1550 (3rd Cir. 1996), cert. granted, 117 S. Ct. 2506 (1997).

96. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2109 (1995).

97. 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996).

98. See *id.* at 944.

in *Bakke* is law and must be followed—at least in the context of higher education.⁹⁹ The Fifth Circuit expressly rejected this position. It stated: “Justice Powell’s view in *Bakke* is not binding precedent on this issue. While he announced the judgment, no other Justice joined in that part of the opinion discussing the diversity rationale.”¹⁰⁰ Having freed itself from Justice Powell’s conclusion that diversity in state universities is a compelling interest under the Fourteenth Amendment, the Fifth Circuit held, in language a concurring judge thought overbroad,¹⁰¹ that “the use of race to achieve a diverse student body . . . simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny.”¹⁰²

The holding in *Hopwood*¹⁰³ undermined all of the affirmative action programs at public colleges and universities in the Fifth Circuit that had relied on Justice Powell’s dicta as though it were binding precedent. A dramatic shift in this area of the law was perceived as having occurred, and the predictability of the law was dealt a severe blow. Public colleges and universities in other circuits are left wondering about the legality of their affirmative action programs that relied on Justice Powell’s speculation.¹⁰⁴

A second example illustrating the house-of-cards nature of law based on an advisory opinion, even one by the Supreme Court, is *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*.¹⁰⁵ The advisory opinion at issue was dic-

99. *Id.*

100. *Id.*

101. *See id.* at 963.

102. *Id.* at 948.

103. It is ironic that the Fifth Circuit, after rejecting Justice Powell’s view as dicta, introduced dicta of its own when it stated that “[a]n admissions process may also consider an applicant’s . . . relationship to school alumni.” *Id.* at 946. For an analysis questioning this dicta see Note, *Hopwood v. Texas*, 110 HARV. L. REV. 775, 780 (1997).

104. This uncertainty may have been resolved if the Court had decided on appeal *Taxman v. Board of Education*, 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 117 S. Ct. 2506 (1997). Although this case dealt with employment of teachers rather than an admissions program, the Court could have used the case to address the broader issue of the use of race in a non-remedial case. The parties, however, settled the case before the Court could hear it.

105. 512 U.S. 267 (1994), *aff’g* 990 F.2d 730 (3d Cir. 1993); *see also* Rachel Courtney, Note, *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries: The Reasons for and Ramifications of Eliminating “True Doubt,”* 49 ADMIN.

ta in a footnote in *NLRB v. Transportation Management Corp.*¹⁰⁶ that interpreted section 7(c) of the Administrative Procedure Act, which states that “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”¹⁰⁷ In *Transportation Management Corp.*, the Court stated that this provision determines only the burden of going forward, not the burden of persuasion.¹⁰⁸ At issue in *Greenwich Collieries* was a rule called the “true doubt rule”¹⁰⁹ under the Black Lung Benefits Act,¹¹⁰ which was consistent with the Court’s interpretation in *Transportation Management Corp.* The United States Court of Appeals for the Third Circuit had held the true doubt rule to be inconsistent with section 7(c) of the APA, and therefore invalid.¹¹¹ Thus, the Court in *Greenwich Collieries* was reviewing a decision that had rejected its position. In affirming the Third Circuit’s holding and explaining its apparent shift, the Court stated:

[W]e do not think our cursory conclusion in the *Transportation Management* footnote withstands scrutiny [Its] cursory answer to an ancillary and largely unbriefed question does not warrant the same level of deference we typically give our precedents.¹¹²

While the Court’s evaluation in *Greenwich Collieries* of the precedential value of the footnote is correct, it is also incomplete since it does not explain what deference should be given to such advisory statements of the Court. That is the inherent problem with advice in opinions that go beyond the controversy. An explanation of the precedential value of such advice would prove extremely useful since courts, including the Supreme

L. REV. 223 (1997).

106. 462 U.S. 393, 403 n.7 (1983).

107. 5 U.S.C. § 556(d) (1994).

108. See *Transportation Management Corp.*, 462 U.S. at 403 n.7.

109. See *Freeman United Coal Mining Co. v. Director, Office of Workers’ Compensation Program*, 988 F.2d 706, 709-10 (7th Cir. 1993) (The “true doubt rule” is derived from S. Rep. No. 92-743 (1972), in which Congress noted that the Black Lung Benefits Act was intended to be remedial. Thus, indefinite medical conclusions should be resolved in favor of the miner or his survivor.).

110. 30 U.S.C. §§ 931-945 (1994).

111. See *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 270 (1994).

112. *Id.* at 277.

Court, continue to include it in footnotes and elsewhere in their opinions. For example, in *Key Tronic Corp. v. United States*,¹¹³ referring to the relationship between two sections of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")¹¹⁴ that appear to provide recovery alternatives for parties potentially responsible for remediation cost, the Court stated that CERCLA "expressly authorizes a cause of action for contribution in section 113 and impliedly authorizes a similar and somewhat overlapping remedy in section 107."¹¹⁵ The existence of two separate remedies, however, is a hotly contested issue that has split the circuits¹¹⁶ and will no doubt land at the Supreme Court which will be faced then with its own words.

One last example of the instability and uncertainty created by advisory statements in opinions comes from *Ross v. Bernhard*.¹¹⁷ In *Ross*, the Court in a footnote gave a three-prong test regarding the Seventh Amendment right to a jury trial.¹¹⁸ The third prong states that the "legal" nature (as opposed to the "equitable" nature) of the issue "is determined by . . . the practical abilities and limitations of juries."¹¹⁹ Whether the Court meant this third prong to be a holding or dicta is unclear. When considering this question, the United States Court of Appeals for the Third Circuit stated, "We also find it unlikely that the Supreme Court would have announced an important new application of the seventh amendment in so cursory a fashion,"¹²⁰ This possible exception to a right to a jury trial led almost immediately to contradictory lower court decisions.¹²¹ There continues to be a split in the circuits regarding whether the third prong is the law. It has been recognized as law by the Third Circuit in *In re Japanese Electronic Products Antitrust Litigation*,¹²² but rejected by the Ninth Cir-

113. 511 U.S. 809 (1994).

114. 42 U.S.C. §§ 9601-9675 (1994).

115. *Key Tronic Corp.*, 511 U.S. at 816.

116. See *infra* text accompanying notes 157-66.

117. 396 U.S. 531 (1970).

118. See *id.* at 538 n.10.

119. *Id.*

120. *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1080 (3rd Cir. 1980).

121. See *In re United States Fin. Sec. Litig.*, 609 F.2d 411, 418-19 (9th Cir. 1979).

122. 631 F.2d 1069, 1088-89 (3d Cir. 1980).

cuit in *In re U.S. Financial Securities Litigation*.¹²³ Thus, the Court by its advisory language in a footnote has fueled, rather than resolved, a split in the circuits.

B. *Benefits of Judicial Advice*

Courts' practice of including advice that goes beyond the actual controversies being decided does have some benefits. As the discussion below will show, the advisory statements can enrich the opinion and help it achieve the desirable objectives of being understandable, useful, and persuasive. The discussion will present examples of dicta being used to accomplish these goals.

In *Lucas v. South Carolina Coastal Council*,¹²⁴ the Court stated that if a governmental regulation that eliminated all economically valuable use of a person's property was merely the assertion of a "permanent easement that was a pre-existing limitation upon the landowner's title," it would be upheld.¹²⁵ To explain its position and to indicate what may be included in the meaning of the terms it had used, the Court resorted to dicta in the form of examples and advice. It stated:

[T]he owner of a lake bed . . . would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action . . . does not proscribe a productive use that was previously permissible under relevant property and nuisance principles.¹²⁶

These examples make the bare legal rule announced earlier in the opinion more understandable and will provide guidance to lower courts as they attempt to apply it.

123. 609 F.2d 411, 430 (9th Cir. 1979).

124. 505 U.S. 1003 (1992).

125. *Id.* at 1028-29.

126. *Id.* at 1029-30.

Advice in opinions can also be used by a court to mark a boundary for a legal doctrine¹²⁷ or even bracket it, that is, provide upper and lower limits for the doctrine. An example of bracketing is given in *United States v. Winstar Corp.*,¹²⁸ where the Court was called upon to define the “unmistakability doctrine,” which determines when a government has, by contract, waived certain sovereign rights. By the following examples, the Court bracketed the contractual claims that enclose the ultimate resolution of this issue:

At one end of the wide spectrum are claims for the enforcement of contractual obligations that could not be recognized without effectively limiting sovereign authority, such as a claim for a rebate under an agreement for a tax exemption. Granting a rebate, like enjoining enforcement, would simply block the exercise of the taxing power, and the unmistakability doctrine would have to be satisfied. At the other end are contracts, say, to buy food for the army; no sovereign power is limited by the Government's promise to purchase and a claim for damages implies no such limitation. That is why no one would seriously contend that enforcement of humdrum supply contracts might be subject to the unmistakability doctrine.¹²⁹

Starting from these boundaries, Justice Souter, for the plurality, was able to conclude that the doctrine did not apply to the case before the Court.

Advisory dicta can serve as counter-examples to refute positions taken by parties. Justice Scalia, speaking for the Court in *Lujan v. Defenders of Wildlife*,¹³⁰ used this device to demonstrate the untenability of the plaintiffs' “animal nexus” and “vocational nexus” arguments to establish their standing. He stated:

127. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 210-11 (1987) (“[A] grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of Congress' broad spending power.”).

128. 116 S. Ct. 2432 (1996).

129. *Id.* at 2457 (citation and footnote omitted).

130. 504 U.S. 555 (1992).

Under these theories, anyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing to sue because the Director of The Agency for International Development (AID) did not consult with the Secretary regarding the AID-funded project in Sri Lanka.¹³¹

With the aid of these examples of his own creation, Justice Scalia quite convincingly could conclude: "This is beyond all reason."¹³²

This use of dicta also surfaced in *Wittmer v. Peters*,¹³³ where the court was faced with plaintiffs' position that "the *only* form of racial discrimination that can survive strict scrutiny is discrimination designed to cure the ill effects of past discrimination by the public institution that is asking to be allowed to try this dangerous cure."¹³⁴ *Wittmer* involved a claim by white correctional officers alleging that they were not selected for a lieutenant's position because of their race. Chief Judge Posner characterized the authority cited in support of the plaintiffs' argument as dicta.¹³⁵ To refute the plaintiffs' argument, he relied at least partially on a counter-example created by the court:

At argument the plaintiffs' counsel conceded, in response to a question from the bench, that separation of the races in a prison that was undergoing a race riot would not violate the Constitution. That is a clearer case for discrimination than this, but our point is only that the rectification of past discrimination is not the only setting in which government officials can lawfully take race into account in making decisions.¹³⁶

Chief Judge Posner, having justified dismissing precedent by characterizing it as dicta, thereby created dicta himself to support his contrary position.¹³⁷

131. *Id.* at 566.

132. *Id.*

133. 87 F.3d 916 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 949 (1997).

134. *Id.* at 919 (emphasis in original).

135. *See id.*

136. *Id.*

137. For a case in which the Court uses a counter example to refute a party's

Even if the counter-example in the advisory dicta fails to rebut an argument, it may focus and sharpen the debate among the Justices. This occurred in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*¹³⁸ with Justice Scalia's example of a "farmer who tills his field and causes erosion that makes silt run into a nearby river which depletes oxygen and thereby 'impairs [the] breeding' of protected fish"¹³⁹ who would be held to have "harmed" an endangered species under The Endangered Species Act.¹⁴⁰ This example is cited by Justice O'Connor and helps give context to her concurrence in which she joins the majority only with the understanding that proximate causation is a requirement in the meaning of "harm" under the Act and its implementing regulations.¹⁴¹

In addition to the possible value of advisory dicta to the decision itself, often dicta indicate the path law may take in the future. For example, in *Babbitt*, the Court pointed to a footnote in *TVA v. Hill*,¹⁴² an earlier Endangered Species Act decision, which, although not relevant to *Hill*, foreshadowed the holding in *Babbitt*.¹⁴³ The Court is implying that clearly the parties should have understood from that footnote the direction of the law regarding the meaning of "take" under the Endangered Species Act. In *James B. Beam Distilling Co. v. Geor-*

position, see *Bowsher v. Synar*, 478 U.S. 714 (1986). *Bowsher* was a case involving the independence of the Comptroller General, who could be removed only for permanent disability, inefficiency, neglect of duty, malfeasance, or conviction of certain crimes. Reviewing this issue, the Court stated: "Surely no one would seriously suggest that judicial independence would be strengthened by allowing removal of federal judges only by a joint resolution finding 'inefficiency,' 'neglect of duty,' or 'malfeasance.'" *Id.* at 730. For an interesting insight into why this opinion includes other dicta, see *id.* at 725 n.4; see also Bernard Schwartz, "Shooting the Piano Player"? Justice Scalia and Administrative Law, 47 ADMIN. L. REV. 1 (1995).

138. 515 U.S. 687 (1995).

139. *Id.* at 719 (Scalia, J., dissenting).

140. 16 U.S.C. §§ 1531-1544 (1994).

141. See *Babbitt*, 515 U.S. at 711 (O'Connor, J., concurring).

142. 437 U.S. 153 (1978). The Court in *Hill* explained that [t]he Secretary of the Interior has defined the term "harm" to mean "an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering; significant environmental modification or degradation which has such effects is included within the meaning of 'harm.'"

Id. at 184-85 n.30 (emphasis in original).

143. See *Babbitt*, 515 U.S. at 699 n.12.

gia,¹⁴⁴ Justice White, in a concurring opinion, detected a not-so-subtle hint in the majority opinion for a possible change in direction on the prospective operation of judicial opinions:

I do not understand how Justice SOUTER can cite the cases on prospective operation, and yet say that he need not speculate as to the propriety of pure prospectivity. The propriety of prospective application of decision in this Court . . . is settled by our prior decisions. To nevertheless "speculate" about the issue is only to suggest that there may come a time when our precedents on the issue will be overturned.¹⁴⁵

These signposts of the courts can be used by legislatures as well as courts to avoid problems. In the murky world of the use of governmental subsidies to attract or retain industries, the rules that separate legal assistance from illegal discrimination are complex. When the Maine legislature was faced with drafting a law to assist local dairies, it turned to advice from the Supreme Court in *West Lynn Creamery, Inc. v. Healy*,¹⁴⁶ which included in dicta a test that the Court suggested could be used to differentiate between the two. Its law based on this suggestion was upheld when challenged.¹⁴⁷

VI. ON BALANCE

Federal courts have successfully resisted attempts by Congress and parties to impose on them an obligation to render advisory opinions. At the same time, they have retained the authority to weigh competing interests in particular cases and

144. 501 U.S. 529 (1991).

145. *Id.* at 546 (White, J., concurring) (internal citations omitted); see also *Reeves, Inc. v. Stake*, 447 U.S. 429, 437-38 n.9 (1980) (Although the case involved only domestic commerce, the Court nevertheless stated: "We note, however, that Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged.")

146. 512 U.S. 186, 199 n.15 (1994) (stating that "it is undisputed that States may try to attract business by creating an environment conducive to economic activity").

147. See *Cumberland Farms, Inc. v. Mahany*, 943 F. Supp. 83, 90 (D. Me. 1996), vacated and remanded, 116 F.3d 943 (1st Cir. 1997); see also Note, *Functional Analysis, Subsidies, and the Dormant Commerce Clause*, 110 HARV. L. REV. 1537, 1553 (1997) (discussing the *Cumberland Farms* decision).

decide when, under the Declaratory Judgment Act, a declaration of rights would be an advisory opinion and when it would not. They also retain the sole right to decide when including advisory dicta that go beyond the actual controversy being adjudicated is proper. The rules regarding advisory opinions, however, do not necessarily indicate a judiciary that is hostile to giving advice. For example, federal courts routinely hold that the Declaratory Judgment Act¹⁴⁸ is to be construed liberally,¹⁴⁹ and declaratory judgments have long been an integral part of federal procedure.¹⁵⁰

Although there are no data, it is certainly not unusual to find hypothetical examples and other advisory dicta in opinions of appellate courts and in the findings of fact and conclusions of law of district courts. Often these advisory statements provide texture and meaning to the decision and indicate the general direction a legal doctrine may take in the future. Advisory dicta can also be useful to other courts who find themselves in uncharted waters. As the United States Court of Appeals for the Eighth Circuit stated, "We hesitate to ignore judicial pronouncements too readily as mere dicta, however, for we must find guidance somewhere in the parties' proffered authorities."¹⁵¹ The key word here is "guidance." Dicta can suggest a path and provide reinforcement if the court goes down that path.¹⁵²

148. 28 U.S.C. §§ 2201, 2202 (1994).

149. See *Exxon Corp. v. F.T.C.*, 588 F.2d 895, 900 (3rd Cir. 1978); *Beacon Const. Co. v. Matco Elec. Co.*, 521 F.2d 392, 397 (2d Cir. 1975); *Allstate Ins. Co. v. Employers Liab. Assurance Corp.*, 445 F.2d 1278, 1280 (5th Cir. 1971).

150. See *Developments in the Law, Declaratory Judgments—1941-1949*, 62 HARV. L. REV. 787, 787 (1949) ("The past thirty years have seen the declaratory judgment develop into an integral part of the American scheme of judicial remedies.").

151. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 917 (8th Cir. 1997), *cert denied*, 117 S. Ct. 2482 (1997); see also *Capital Dev. Co. v. Port of Astoria*, 109 F.3d 516, 519 (9th Cir. 1997); *Henkin v. Northrop Corp.*, 921 F.2d 864 (9th Cir. 1990) (stating that "[d]icta from the highest court in the state, while not controlling, is relevant to this inquiry [of determining state law]").

152. See, e.g., *New York Life Ins. Co. v. United States*, 118 F.3d 1553, 1557 (Fed. Cir. 1997) (stating "even though some aspects of the analysis may be characterized as dictum rather than holding, it is appropriate to follow and apply the stated principles . . . Courts frequently and properly cite and rely upon dicta that correctly set forth governing or relevant legal principles"); *Exxon Corp. v. Esso Workers' Union, Inc.*, 118 F.3d 841, 850 (1st Cir. 1997) ("[T]wo recent cases . . . note, albeit in dicta, that employers must not be compelled to reinstate personnel who violate the terms of a comprehensive drug-free workplace program.").

It would be helpful to lower courts and litigants if the Court made a clear statement regarding how it expects lower courts to treat advisory dicta in its opinions. A weak version of what is needed was made in *United States National Bank of Oregon v. Independent Insurance Agents*,¹⁵³ where, in a footnote responding to the argument that the case under consideration was controlled by two of its previous holdings, the Court stated “[n]either case tells us anything helpful for resolving this one, though together they contain a valuable reminder about the need to distinguish an opinion’s holding from its dicta.”¹⁵⁴

The Court had the opportunity to provide guidance on the weight it expects lower courts to give to its dicta in *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*,¹⁵⁵ where it reviewed a decision from the Third Circuit that had rejected earlier Supreme Court dicta. If the Court had noted this fact and had indicated its approval of the independence of the Third Circuit, it would have signaled other courts to be more objective when faced with similar situations. This would lessen the practice of courts “consider[ing] [themselves] bound by Supreme Court dicta almost as firmly as by the Court’s outright holding.”¹⁵⁶

In all likelihood, the Court will have another opportunity to make such a statement in an appeal to resolve the split in the circuits over the relationship between sections 107 and 113 of CERCLA.¹⁵⁷ In *Key Tronic Corp. v. United States*,¹⁵⁸ the issue was whether a person liable under CERCLA could recover attorney fees as a “necessary cost of response” under section 107.¹⁵⁹ However, the Court in dicta regarding the relationship of sections 107 and 113 stated that CERCLA “expressly autho-

153. 508 U.S. 439 (1993).

154. *Id.* at 463 n.11.

155. 512 U.S. 267 (1994).

156. *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996), *cert. denied*, 116 S. Ct. 1830 (1996).

157. 42 U.S.C. §§ 9607(a), 9613(f)(1). Under § 9607(a), categories of parties defined in CERCLA may be held liable for “(A) all costs . . . incurred by the United States Government or a State or an Indian tribe . . . [and] (B) any other necessary costs of response incurred by any other person . . .” Section 9613(f)(1) provides that “[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) . . .”

158. 511 U.S. 809 (1994).

159. *Id.* at 811.

rizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107.¹⁶⁰ The circuits are split on the relationship between these two sections of CERCLA. The Sixth Circuit has held that persons liable under section 107 can seek recovery from other persons under both sections 107 and 113.¹⁶¹ The courts of appeals for the First,¹⁶² Seventh,¹⁶³ Ninth,¹⁶⁴ Tenth,¹⁶⁵ and Eleventh¹⁶⁶ Circuits have held that a person liable under section 107 can only seek contribution under section 113. Thus, all the pieces are in place for a decision by the Supreme Court in which it would be confronted with its own dicta on this issue. If the Court decides to grant certiorari in one of these cases and resolve this split, it would be a great service to lower courts and litigants if it spoke out on the issue of the use of dicta.

160. *Id.* at 816.

161. *See Velsicol Chem. Corp. v. Enenco, Inc.*, 9 F.3d 524, 528-30 (6th Cir. 1993).

162. *See United Tech. Corp. v. Brown-Ferris Indus., Inc.*, 33 F.3d 96 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1176 (1995).

163. *See Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994).

164. *See Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997).

165. *See United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530, 1536 (10th Cir. 1995).

166. *See Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489 (11th Cir. 1996).