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## Judges as Advicegivers

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# ARTICLES

## Judges As Advicegivers

Neal Kumar Katyal\*

*Since Alexander Bickel, scholars have understood the Supreme Court to have a threefold power: striking down acts for unconstitutionality, legitimating them, or employing the passive virtues. Professor Katyal contends that the Court wields a fourth power: advicegiving. Advicegiving occurs when judges recommend, but do not mandate, a particular course of action based on a concern for rule or principle. Courts have been giving advice, consciously at times, unconsciously at others, and this article seeks to provide a normative justification for the practice. Professor Katyal breaks down advicegiving into several categories and explains how advice, when given to the political branches, can engender a colloquy that maximizes respect for the coordinate branches while also serving the goals of federalism, enhancing political accountability, and encouraging judicial candor. In particular, Professor Katyal explains how advicegiving can become an alternative to aggressive forms of judicial review while simultaneously maintaining constitutional fidelity.*

### INTRODUCTION

Contemporary constitutional law is preoccupied with the antidemocratic nature of judicial review. Ever since Alexander Bickel first posed the countermajoritarian difficulty, scholars have struggled heroically to resolve the contradiction. Bickel himself might have been surprised by his successors' obsessive focus, for his work raised issues well beyond the tension between

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democratic self-rule and the judicial negative.<sup>1</sup> In particular, Bickel explored the possibility of a more expansive role for the judiciary—the “least dangerous branch”—in our system of government and showed how judicial decisionmaking might enhance or detract from political choices made by the people through their elected representatives.<sup>2</sup> Bickel himself realized what scholars today rarely acknowledge: A complete theory of federal courts must not narrowly focus on the few and rare instances in which a court negates a law.

Today’s academic debate, waged in spectacular terms over the tension between democracy and judicial review, has obscured the various other roles courts play in our republican government. In addition to striking down legislation as unconstitutional, the judiciary performs a host of other tasks, from settling concrete disputes between parties to interpreting and even making law in areas such as antitrust and federal common law. This article concentrates on one other judicial task—advicegiving. The article claims that the judiciary has used, and should continue to use, a range of interpretive and decisionmaking techniques to give advice to the political branches and state governments.

Advicegiving occurs when judges recommend, but do not mandate, a particular course of action based on a rule or principle in a judicial case or controversy. Despite advicegiving’s deployment in cases and controversies, the Court often expresses ambivalence about dispensing advice. Consider the following: the Court delivers “an advisory opinion unnecessary to today’s decision” by “decid[ing] an issue that is not in dispute”;<sup>3</sup> the Court should “declare legal principles only in the context of specific factual situations, and . . . avoid expounding more than is necessary for the decision of a given case”;<sup>4</sup> the Court “is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied”;<sup>5</sup> and a litigant “cannot upon mere supposition that the Act will be

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1. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 127-33 (1962) (discussing the implications of the Court declining to adjudicate certain constitutional issues).

2. See *id.* at 244-72 (using the school desegregation cases as an example).

3. *Grove City College v. Bell*, 465 U.S. 555, 579-80 (1984) (Stevens, J., concurring in part and concurring in the result); see also *Shaffer v. Heitner*, 433 U.S. 186, 220-22 (1977) (Brennan, J., concurring in part and dissenting in part) (labeling part of the majority opinion “advisory” and criticizing it for “reaching out to decide a question that . . . has yet to emerge from the state courts ripened for review on the federal issue”).

4. *Culombe v. Connecticut*, 367 U.S. 568, 636 (1961) (Warren, C.J., concurring).

5. *Liverpool, N.Y. & Phila. S.S. Co. v. Comm’rs of Emigration*, 113 U.S. 33, 39 (1885); see also *Burton v. United States*, 196 U.S. 283, 295 (1905) (“It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.”).

unconstitutionally construed and applied . . . obtain an advisory decree that the Act must not be so administered.”<sup>6</sup>

Despite these declarations, this article argues that the Justices often act to provide advice in their published opinions. Indeed, advicegiving is a natural adaptation in a world in which judges fear *deciding* issues due to the counter-majoritarian difficulty; those jurists who want to avoid interference with legislative power announce narrow holdings, but superimpose broad advice (a form of dicta) by fully explicating the rationale and assumptions behind a decision. The combination of “narrow holding + advicegiving dicta” enjoys a natural advantage over a broad holding in terms of democratic self-rule, flexibility, popular accountability, and adaptability. Many commentators have noticed some aspect of these concepts, most notably in connection with the Bickelian passive virtues and the role of clear statement rules.<sup>7</sup> This article contends that these devices and many others such as *Pullman* abstention<sup>8</sup> and the political question doctrine can be linked to the advicegiving function.

There are, of course, different types of advice, such as constitutional and statutory advice. There are also different recipients of advice—for example, the political branches, lower courts, litigants, and the public. This article will not attempt to defend advicegiving’s use in all situations, nor will it defend advicegiving’s use by all courts. Rather, this article will defend a single type of advice within a particular context: constitutional advicegiving by the Supreme Court.<sup>9</sup> It outlines a proactive theory of judging under which the Justices may recommend courses of action to provide advice, clarify constitutional issues, or shine light on particular matters. In this capacity, the Court can provide federal and state governments with ways to avoid constitutional problems and sort out the constitutional issues politically, instead of relegating such questions to the judiciary. The Court, by providing advice, enters into a conversation with the political branches and embraces its partnership. As the only federal officials with life tenure and guaranteed salary,<sup>10</sup> federal

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6. *Great Atl. & Pac. Tea Co. v. Grosjean*, 301 U.S. 412, 429-30 (1937).

7. See, e.g., BICKEL, *supra* note 1, at 111-98; William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules As Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992) (noting that the Rehnquist Court has created new “super-strong clear statement rules” used to protect constitutional structures); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6-8 (1996) (exploring the use of “decisional minimalization” by the Supreme Court—i.e., “saying no more than necessary to justify an outcome and leaving as much as possible undecided”—and noting that such “constructive uses of silence . . . can improve and fortify democratic processes” (emphasis omitted)).

8. See *Railroad Comm’n v. Pullman Co.*, 312 U.S. 496, 508-09 (1941) (declining adjudication on constitutional grounds because a definitive ruling on the state issue would have terminated the controversy); see also text accompanying notes 329-331 *infra* (discussing *Pullman* abstention).

9. The advicegiving model can be adapted to other milieus, though each poses somewhat different issues. For example, advicegiving by lower courts naturally poses other questions, such as fractured and conflicting advice by equally weighty circuits, political inattention to court advice, and so on.

10. See U.S. CONST. art. III, § 1.

judges have structural advantages that enable them to stand above the political fray and provide other officials with a detached, perhaps unpopular, perspective. This article unveils a portrait of the Court that depicts it as guiding the political branches not only through its coarse mechanism of judicial review, but also through its more subtle power of nonbinding counseling.

Examples abound. A court that writes an opinion striking down a law might provide a blueprint of a new law that might be constitutional.<sup>11</sup> A court that is procedurally barred from reaching a constitutional issue in a death penalty case can call out to the state's courts or governor for review of the case for commutation.<sup>12</sup> Or that court might at least make clear that its decision not to hear the case because of a procedural bar is not an endorsement of the execution's constitutionality, thus precluding state officials from hiding behind what they claim to be a legitimization of the execution by the federal courts. Because of a misguided focus on interbranch and intergovernmental autonomy, doctrines of justiciability, abstention, political questions, and the like have been phrased largely in negative terms as doctrines that preserve respect for states and politically accountable branches of the federal government by minimizing the judicial role. But once the advicegiving view is adopted, a space develops for courts to act *affirmatively* without compromising the power of these other political entities.

This article explores the advicegiving approach from the vantage points of both history and theory. Part I details how federal courts have given advice to political officials in many different ways since the founding. This part is intentionally sprawling. It is designed to give readers a sense of the vast and rich judicial topography upon which such a theory may be constructed. Part II, by contrast, is highly specific and focuses the discussion on advicegiving. I have selected four Supreme Court cases, and I contrast those cases with several others to demonstrate how the Court could have done things differently had it followed the advicegiving model. This part, in many ways, is the heart of the article because its specificity allows readers to see the merits of advicegiving through concrete application. The examples themselves will yield a fresh round of criticisms of advicegiving. Part III attempts to catalog and respond to some of these objections.

This article will not exhaust the objections to advicegiving, nor will it provide all the answers. It should be understood as a continuation of a story first told by Bickel; one whose twists and turns will inevitably be shaped by the ways in which courts think about their position within our federal government.

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11. See text accompanying notes 390-397 *infra* (discussing *New York v. United States*, 505 U.S. 144 (1992)).

12. See text accompanying notes 359-376 *infra* (discussing *Gray v. Netherland*, 116 S. Ct. 2074 (1996)).

## I. ADVICEGIVING OVER TIME

A. *Types of Advice*

Since Bickel, American constitutionalists have believed that the Court has essentially three circumscribed roles. The “threefold power” is that the Court “may strike down legislation as inconsistent with principle. It may validate, or . . . ‘legitimate’ legislation as consistent with principle. Or it may do neither.”<sup>13</sup> The third option is Bickel’s creative attempt to transcend the either/or character of judicial review. Doing “neither” meant exercising what Bickel called “the passive virtues,” a set of doctrines that courts could use to avoid deciding constitutional issues. Bickel’s passive virtues centered around standing, ripeness, political questions, and denials of certiorari<sup>14</sup>—all “techniques of ‘not doing’” that permit courts to avoid the political fray through silence.<sup>15</sup>

Professor Cass Sunstein has recently reinvigorated Bickelian notions with an elaborate defense of “the constructive uses of silence.”<sup>16</sup> Sunstein contends that judicial minimalism—the avoidance of “broad rules and abstract theories”—can be democracy enhancing because the judiciary’s silence allows democratic debate to occur.<sup>17</sup> Sunstein’s minimalism is vintage Bickel, primarily concerning itself with methods of jurisprudential silence that permit the continuation of legislative and popular debate. And the judicial devices Sunstein adapts for that task are much the same as Bickel’s passive virtues: jurisdictional prohibitions, certiorari denials, and the like.<sup>18</sup>

These two authors have demonstrated that a court’s refusal to decide a constitutional issue enables a social, political, perhaps even moral, conversation to unfold. Unveiling a similar thought, Chief Justice Rehnquist, in penning his majority opinion in *Washington v. Glucksberg*<sup>19</sup> last Term, explained how the Court’s decision would permit the debate over assisted sui-

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13. BICKEL, *supra* note 1, at 69.

14. *See id.* at 115-98.

15. *Id.* at 169; *see also id.* at 117-27 (discussing the doctrines of standing, ripeness, political questions, and discretionary review as forms of the passive virtues). Bickel acknowledged that the passive virtues could be used as vehicles for something more than silence, but his writing on the subject is undeveloped. *See, e.g., id.* at 70 (observing that use of the passive virtues “does not necessarily forsake an educational function”); *id.* at 152 (describing the vagueness doctrine as a passive virtue mechanism that “asks that the legislature” to clarify its statute).

16. Sunstein, *supra* note 7, at 7 (emphasis omitted).

17. *Id.* at 14, 19-20 (“[M]inimalism can promote democracy because it allows democratic processes room to maneuver.”).

18. *See id.* at 7, 51-53, 99 (discussing the doctrines of justiciability and denial of certiorari as forms of judicial minimalism).

19. 117 S. Ct. 2258 (1997).

cide to continue.<sup>20</sup> Silence, however, is not the only alternative to judicial review.

This article contends that advicegiving is a hidden fourth power for the Court, a role which lies in the interstices of the threefold power recognized by Bickel. Advicegiving is not necessarily concerned with striking down acts, or legitimating them, or staying silent via the passive virtues. Rather, it emphasizes that the Justices can act as counselors to the political branches, whether they strike down a law or uphold it. When the Court strikes down an act, it may provide advice about how to construct a constitutional act. When it upholds a particularly odious law, it may remove any imprimatur of legitimacy through explicit advice in its opinion. And when the Court uses the passive virtues, it may use advice in its written opinion to guide and channel the popular discussion to create a more productive conversation. Advicegiving thus combines aspects of each part of Bickel's threefold power.

The most obvious advantages of advicegiving flow from its nature as dicta, particularly its ability to mediate the tensions in a system of law based on stare decisis. A system of precedent is desirable because it encourages predictability and gives guidance to actors about how to plan their affairs, but it also has an undesirable tendency to be crusty and inflexible. Advice in judicial decisions acts as a compromise—such language does not have the binding force of a holding yet provides some guidance and predictability for the future while simultaneously undermining some of the reliance interests that would mandate future application of stare decisis. Because advice is given ex ante rather than ex post, it can instruct actors about how to avoid conflicts with the Constitution. And the court can later reassess its earlier conclusions in light of changed circumstances, stating that those conclusions were “only dicta.”

To these advantages of advicegiving can also be added the virtues of announcing narrow holdings, which are catalogued in Sunstein's justification for minimalism. In this sense, Sunstein's adaptation of the passive virtues comes closer to advicegiving than what Bickel initially proposed. For Sunstein, one of Bickel's justifications for the passive virtues—a minimalist role for the judiciary—supports not only techniques to prevent courts from deciding various cases, but also those that encourage courts to issue narrow holdings when they do decide them.<sup>21</sup> Sunstein thus appropriates one of the chief advantages of the passive virtues and applies it to situations in which

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20. See text accompanying notes 291-292 *infra* (quoting Chief Justice Rehnquist).

21. See Sunstein, *supra* note 7, at 51-52 (noting the courts' use of narrow holdings and justiciability doctrines in pursuit of judicial minimalism). There is some evidence that Bickel himself was moving in this direction. See, e.g., Alexander Bickel, *Obscenity Cases*, NEW REPUBLIC, May 27, 1967, at 15, 17 (stating that, in obscenity cases, “it is neither wise nor is it possible . . . for the Court to impose and enforce a broadly permissive constitutional rule”).

the courts do exercise the power to strike down or validate legislation. The goal is to ensure legislative supremacy and flexibility by adopting narrow holdings.

The relationship between Sunstein's minimalism and the judiciary's third power (the passive virtues) is analogous to the relationship between Judge Guido Calabresi's second-look doctrine and the courts' first power (striking down legislation).<sup>22</sup> Under Calabresi's theory, "when the legislature has acted with haste or hiding in a way that arguably infringes even upon the penumbra of fundamental rights, courts should invalidate the possibly offending law and force the legislature to take a 'second look' with the eyes of the people on it."<sup>23</sup> Calabresi's theory requires that when courts strike down legislation, they announce a narrow (or minimalist, in a Sunsteinian sense) holding that confines the holding to the particular time and place of the case. Second-look theories thus modify the first judicial power by coloring it with minimalism, thereby helping to preserve legislative decisionmaking. But they are still aggressive forms of judicial review because the Court is required to invalidate a legislative act.

These variants on the threefold power reveal how the Court can mix and match its three powers to resolve cases and controversies narrowly. But they are essentially negative doctrines designed to curb the Court's use of judicial review in the name of popular rule.<sup>24</sup> There are, however, numerous circumstances in which the Justices might not want to exercise their three powers fully and yet might still endeavor to provide guidance to the political branches. They might want to note the strong constitutional case against an act, but leave the decision up to the legislature rather than following

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22. See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 16-32 (1982) (discussing the second-look principle in the common law context); Guido Calabresi, *The Supreme Court, 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 83, 103-07, 119-20 (1991) (discussing the second-look principle in the constitutional context). For the origin of the idea, see Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 34 (1957) (discussing "the invocation of constitutional doubts" and its impact on the legislative process).

23. Calabresi, *supra* note 22, at 104 (relying on Bickel & Wellington, *supra* note 22, at 34-35).

24. Sunstein makes a wonderful case for a certain type of judicial minimalism, and although acknowledging that both minimalism and "[m]aximalism can . . . be democracy-forcing," he has not been concerned with the latter argument and thus has not explained how judicial strategies (apart from those where judges leave matters undecided) can reinforce democracy. Sunstein, *supra* note 7, at 38, 48-52 (noting that maximalist decisions may "trigger or improve processes of deliberation"). My work here, by contrast, attempts to fill out that picture by demonstrating how judges can reinforce popular accountability, separation of powers, and federalism through rendering judicial advice and by advocating a certain type of judicial maximalism that would permit courts to provide a range of nonbinding and broad opinions to the political branches. I also explore the federalism advantages of minimalism that are not developed in the accounts of either Bickel or Sunstein. See text accompanying notes 316-358, 374-376, 397 & 421-426 *infra* (discussing how the advicegiving model preserves cooperative judicial federalism).



Calabresi's prescription. Or the Court might want to uphold an act, but not to legitimate it, and so on.

From this perspective, many of the advantages of minimalism and second-look theories might be achieved through what I have called advicegiving. I have already suggested that advicegiving can attain minimalism's advantage of preserving legislative flexibility while simultaneously tempering minimalism's dangerous tendency to reduce predictability and guidance. But there are other advantages of advicegiving as well which depend on the type of advice that courts are dispensing.

For example, an advantage of Calabresi's and Sunstein's approaches is that they can be used to encourage politicians to remove vagueness from legislation. One type of advicegiving, which I call "clarification," flags ambiguity and gaps in statutes and offers guidance for the political branches in resolving the ambiguity. Through clarification, the Court can both guide legislative determinations and avoid needless friction with democratically elected representatives. The Court's decision in *Nixon v. Fitzgerald*<sup>25</sup> was based on clarification principles in that it announced that Congress' general statutes would be read so as not to apply to the President without a clear statement by the legislature, while warning that such a clear statement could chill the President in the performance of his official duties.<sup>26</sup> The Court not only flagged the vagueness in the relevant statutory law, but also gave advice about the possible downside of rewriting the statutes to encompass the President. Clarification thus not only removes statutory ambiguity, it also enhances political accountability by requiring representatives to make clear statements for which they are responsible in the public eye. It can be a constraining force on legislative self-dealing and shady back-room compromise.

Instead of reaching to decide constitutional issues not squarely presented, the Court can use clarification to advise the political branches of possible constitutional problems and encourage them to revise their statutes. For example, in *Greene v. McElroy*,<sup>27</sup> the Court's opinion included a long discussion of the Constitution's requirement that the accused be able to confront the witnesses against them, even in cases of national security.<sup>28</sup> But the Court did not so hold. Instead, it held only that, as a matter of statutory interpretation, the law at issue did not authorize government officials to deny the accused the right to confront witnesses.<sup>29</sup> The Court therefore used its advisory power to put the political branches on notice of a constitutional issue and then used its interpretive power to avoid deciding that issue. This is a striking use of the Court's advisory power, for it occurred in the sensitive context of national security. In

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25. 457 U.S. 731 (1982).

26. See text accompanying notes 246-252 *infra* (discussing *Fitzgerald*).

27. 360 U.S. 474 (1959).

28. See *id.* at 495-500.

29. See *id.* at 508.

response, the President quickly amended the Industrial Security Program regulations to expand the right to confront witnesses.<sup>30</sup>

"Self-alienation," another variety of advicegiving, is a two-step strategy for courts to provide counsel when they cannot use the power of judicial review. It is therefore particularly helpful in cases that are barred (formally or informally) from binding judicial decision by dint of the political question doctrine, ripeness, mootness, military deference, and so on. In step one, the courts make clear that their role is circumscribed by limits on judicial power but that other branches will need to scrutinize the issue because there is a gap between what is unconstitutional and what the courts may hold unconstitutional. This gap is widest in cases that deal with military affairs or political questions, but it exists in narrower form in many cases because courts do not review legislation for unconstitutionality in a pure sense; they review it to determine whether it is proper *for them* to declare it unconstitutional. In step two, the courts give advice to the relevant political actor about the constitutional difficulties engendered by the case and may suggest possible courses of action.

Self-alienation techniques have three primary advantages. First, they can draw attention to a constitutional issue and prod legislative reconsideration. Second, they can strip away the air of legitimacy that the Court imparts to statutes it upholds as constitutional.<sup>31</sup> When the Court announces a full withdrawal from an area and explains that the other branches are responsible for ensuring compliance with the Constitution in that area, constitutionalism and political accountability may be enhanced, not destroyed.<sup>32</sup> And third, because counseling is not binding, the Court might feel more free to dispense such advice without worrying that it has irreversibly interfered in a matter not suited for final decision by the judiciary.

"Personification," a third form of advicegiving, is advice the Court can give to define which political bodies have responsibility for which acts. It attempts to enhance accountability among different political bodies, such as Congress, the executive branch, and state legislatures and executives. Each of these entities has a natural tendency to blame the others, and personifica-

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30. See Exec. Order No. 10,865, 25 Fed. Reg. 1583 (1960).

31. See *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) ("[O]nce a judicial opinion rationalizes such an order to show that it conforms to the Constitution, . . . the Court for all times has validated the principle of racial discrimination . . . . The principle then lies about like a loaded weapon," and "[e]very repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes."); see also CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 52 (1960) ("[T]he Court, through its history, has acted as the legitimator of the government. In a very real sense, the Government of the United States is based on the opinions of the Supreme Court."); see text accompanying notes 245, 258-263, 369-376, 379-382 & 496-497 *infra* (discussing the Court's role as legitimator of particular policies).

32. See text accompanying notes 258-263 *infra* (discussing self-alienation and constitutional compliance).

tion is a tool the Court can use to clarify otherwise confused lines of political responsibility. The decision in *Pennhurst State School and Hospital v. Halderman*,<sup>33</sup> which held that "if Congress intends to impose a condition on the grant of federal moneys [to states], it must do so unambiguously" and "speak with a clear voice," is but one example.<sup>34</sup> The decision enhances accountability because it makes Congress specify that it is requiring a different political actor (in this case, a state) to perform a particular action. Personification vests the Court with the power to stop a political body from shirking its responsibilities or externalizing its hard choices by forcing another branch to make them. The justification for such a doctrine is amply illustrated by President Buchanan's evasion of the slavery issue in his 1856 Inaugural Address: "[The matter] legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is understood, be speedily and finally settled."<sup>35</sup> The President was referring to the pending decision in *Dred Scott v. Sandford*.<sup>36</sup>

These three types of advicegiving are devices that remove vagueness and encourage popular accountability. A separate justification for advicegiving is based on judicial expertise and the structural advantages that flow from Article III. Two forms of constitutional counseling to which this justification applies are "exemplification" and "demarcation." Exemplification refers to instances in which the Court uses judicial review to strike down an act for its unconstitutionality, but then provides the legislature with a constitutional method to achieve the same end. Chief Justice Taft's opinion in *Hill v. Wallace*<sup>37</sup> and Justice O'Connor's majority opinion in *New York v. United States*<sup>38</sup> provide two examples.<sup>39</sup> In each, the Court struck down a congressional act as unconstitutional while explaining, in dicta, how Congress could pass a similar act that would be constitutional.

33. 451 U.S. 1 (1981).

34. *Id.* at 17.

35. President James Buchanan, Inaugural Address, in 5 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 430, 431 (James D. Richardson ed., 1897).

36. 60 U.S. (19 How.) 393 (1857).

37. 259 U.S. 44 (1922).

38. 505 U.S. 144 (1992).

39. See text accompanying notes 390-408 *infra* (discussing the *Hill* and *New York* opinions). In the *Employers' Liability Cases*, 207 U.S. 463 (1908), the Supreme Court, by a five to four vote, see *id.* at 464 n.1, struck down the first Federal Employers' Liability Act ("FELA"), Act of June 11, 1906, Pub. L. No. 219, 34 Stat. 232, but explained how Congress could fashion a constitutional statute:

The act, then, being addressed to all common carriers, . . . without qualification or restriction as to the business in which the carriers or their employes may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce.

*Employers' Liab. Cases*, 207 U.S. at 498. Four months later, Congress amended the Act by providing liability only in cases in which the employee is "employed by such carrier in such commerce." Act of Apr. 22, 1908, Pub. L. No. 100, § 1, 35 Stat. 65. A few years later, a unanimous Court upheld the new law. See *Second Employers' Liab. Cases*, 223 U.S. 1, 58-59 (1912).

The flip side of exemplification is demarcation, by which courts uphold an act as constitutional, but inform the political branches that statutes that go further than the one upheld will trench upon constitutional protections. A modern example is Justice Breyer's warnings in the right to die cases that if states restrict pain medication at the same time they prohibit assistance in dying, they could violate the Constitution.<sup>40</sup>

At times, courts might not confine the substance of their advice to constitutional matters and might expand their discussion to include policy issues as well. I will call this quasi-advice "prescription." Although this type of counseling is not my concern here, prescription can be justified in circumstances in which the Court has acquired particular knowledge by virtue of its position as the overseer of the law. Justice Iredell's various recommendations to Congress and Chief Justice Jay's consultation with the executive branch regarding the Neutrality Proclamation are two early examples. The advantage of prescription is that it permits relatively intellectual federal judges with life tenure to impart their nonbinding wisdom to politicians. Many prescriptive matters are routine, such as the annual tradition whereby some Supreme Court justices go before Congress and testify about the Court's budget and similar matters. Recommendations to Congress about the asbestos litigation crisis may be a less obvious but equally valid example of legitimate prescription because courts have a special expertise in understanding the nature of the crisis and recommending specific solutions.<sup>41</sup> The most tenuous prescriptive situations occur when judges expound on matters of general policy when they have no structural expertise in the subject matter. An example is the dicta of Judge Posner, in a published opinion joined by Judge Easterbrook, that upheld various landlord-tenant regulations in the city of Chicago. The two judges wrote separately to put forth an economic critique of these regulations to explain why the regulations were not in the public interest.<sup>42</sup>

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40. See note 303 *infra* (discussing Justice Breyer's concurring opinion in *Washington v. Glucksberg*, 117 S. Ct. 2302, 2310-12 (1997)).

41. See note 426 *infra* (discussing asbestos class action suits). For example, in the *Pipe Line Cases*, 234 U.S. 548, 560-62 (1914), the Court upheld the constitutionality of the Hepburn Act, Pub. L. No. 357, 34 Stat. 584 (1906), which regulated oil pipelines under the theory that they were common carriers. Justice Holmes wrote an opinion for the Court that was, in his words, "wholly unsatisfactory," FELIX FRANKFURTER, *FELIX FRANKFURTER REMINISCES* 298 (Harlan B. Phillips ed., 1960), because it did nothing except say that because Congress deemed the pipelines common carriers, they must be so. The problem, as Justice Frankfurter later documented, was that Holmes couldn't get a majority of the Court to sign onto an opinion that set out Congress' power under the Commerce Clause because such an opinion was troubling to the other members of the Court. See *id.* Holmes therefore had to write an opinion that would discourage Congress from enacting similar bills yet would not be "disturbing for the future, which sustains this legislation, and gives little further encouragement to the underlying economic impulse behind the legislation which some of the [Justices] certainly feared." *Id.* at 297.

42. See *Chicago Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 741-45 (7th Cir. 1987). Separate writings can also serve prescriptive ends. To take one example, the Court upheld the

Another closely related function of courts is that of "education"—the way in which courts attempt to instruct the citizenry about various matters. The Justices, as Dean Rostow once said, "are inevitably teachers in a vital national seminar."<sup>43</sup> *Brown v. Board of Education*<sup>44</sup> might be thought of as having been written in this spirit, drafted with the coerced force of nine behind it to teach citizens about the virtues of integration. Justice O'Connor's recent attack on Arizona's poor record of enforcement of child support obligations in her majority opinion in a recent case is another example.<sup>45</sup> The educative role can, but need not, be yoked to a separate form of advicegiving—"moralization." Moralization refers to occasions when courts express moral outrage at particular acts or events. Justice Story's outrage towards slavery, expressed in his grand jury charges and his extrajudicial political activities, provides one illustration.<sup>46</sup> Judicial moralization naturally has the potential to be an engine for social change, whereby relatively nonpolitical officials with life tenure stand up to challenge popular orthodoxy.

All of the different forms of advicegiving can be used in conjunction with two juridical techniques. One technique, "decentralization," attempts to maximize comity with the states via advicegiving. The other, "penalization," is designed to ensure that the relevant political actors listen to the advice dispensed by courts. Decentralization is primarily concerned with the way in which the Supreme Court interacts with the states. The idea is for the Court to use interpretive and constitutional doctrines to ensure that as many decisions as possible are made by state actors. The Court's recent opinion in *Arizonaans for Official English v. Arizona*<sup>47</sup> serves as an example, as does *Pullman* abstention.<sup>48</sup> By avoiding federal court intervention, decentralization

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constitutionality of the Emergency Price Control Act of 1942, Pub. L. No. 420, 56 Stat. 23, in *Yakus v. United States*, 321 U.S. 414 (1944). The Act had given jurisdiction to federal and state courts to hear violations of price ceilings, but it denied courts the power to examine the ceilings' validity. Instead, Congress created a separate administrative procedure to challenge the regulations. Justice Rutledge dissented, arguing that the scheme undermined judicial integrity. The dissent was so powerful that it quickly led Congress to amend the statute; as now Justice Stevens remarked, "Congress promptly amended the statute to correct the defects which he had criticized." John Paul Stevens, *Mr. Justice Rutledge*, in MR. JUSTICE 319, 341 (Allison Dunham & Phillip B. Kurland eds., rev. ed. 1964); see Stabilization Extension Act of 1944, Pub. L. No. 383, § 104, 58 Stat. 632, 639 (amending previous Act, which allowed Congress to bar a defendant in a criminal trial from attacking the constitutionality of a regulation he allegedly violated).

43. Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).

44. 347 U.S. 483 (1954).

45. See *Blessing v. Freestone*, 117 S. Ct. 1353, 1357 (1997) ("Arizona's record of enforcing child support obligations is less than stellar, particularly compared with those of other States."); see also note 426 *infra*.

46. See text accompanying notes 191-195 *infra*.

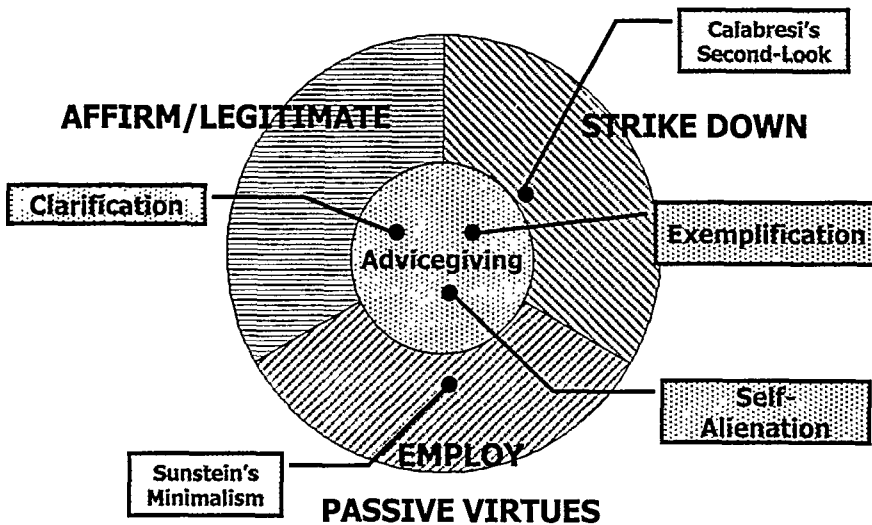
47. 117 S. Ct. 1055, 1073-75 (1997) (chastising the district court and circuit court for not seeking certification by the Arizona Supreme Court regarding a question of state law); see also text accompanying notes 339-346 *infra*.

48. See text accompanying notes 329-331 *infra* (discussing *Pullman* abstention).

strategies aim for state-level decisionmaking in the first instance, thus avoiding needless friction and insuring that states are permitted the opportunity to decide the scope and meaning of their own statutes before federal courts get involved.

Penalization is a judicial attempt to make sure that the political branches heed advice. Because advice is not binding, courts that dispense it run the risk that it will be disregarded—a particularly unattractive outcome when courts use advicegiving in lieu of judicial review. Penalization techniques use judicial warnings to make clear that if the political bodies do not heed the judicial advice, a court will hold their “foot-dragging”—as Justice Souter’s concurring opinion in the Washington right to die case called it—against them.<sup>49</sup> These cautions work as judicial fuses: If political actors do not listen, then the judicial time bomb will explode and the court will strike down the act. They avoid a major downfall of Bickel’s approach—that legislative inertia will prevent judicial silence from having constructive force.<sup>50</sup>

Put together, the main forms of advicegiving look something like this:



This taxonomy does not exhaust all the forms of advicegiving nor all of its advantages and drawbacks. These are best seen through concrete application. Rather than fleshing out the entire theory here, I will first describe

49. *Washington v. Glucksberg*, 117 S. Ct. 2258, 2293 (1997) (Souter, J., concurring in the judgment); see also text accompanying notes 306-307 *infra*.

50. See BICKEL, *supra* note 1, at 206 (“[T]he Legislature’s freedom of action and its readiness to make its response in colloquies with the judiciary are qualified by an inertia that constitutes a major force in our . . . representative bodies.”).

the historical roots of advicegiving in Part I and then describe the theory through case vignettes from recent Supreme Court decisions in Part II. At the outset, a chart may help clarify matters:

TECHNIQUE	DEFINITION	PRECEDENT	RECENT APPLICATION
Minimalism	Deciding only narrow case at hand	<i>Hylton v. United States</i>	<i>Arizona v. Arizonan Citizens for Official English</i>
Second-Look	Striking down statute for legislative reconsideration	<i>Rutgers v. Waddington</i>	<i>United States v. Lopez</i>
Clarification	Requiring clear statement + providing guidance	<i>Nixon v. Fitzgerald</i>	Jones Proposal
Self-Alienation	Defining limits of judiciary's role + giving guidance	<i>Marbury v. Madison</i>	<i>Able v. United States</i>
Personification	Defining which governmental actor has responsibility	<i>Pennhurst v. Halderman</i>	<i>New York v. United States</i>
Exemplification	Striking down act as unconstitutional but providing examples of similar constitutional ones	<i>Hill v. Wallace</i>	<i>New York v. United States</i>
Demarcation	Upholding act as unconstitutional but providing examples of closely similar unconstitutional ones	<i>Commonwealth v. Caton</i>	Justice Breyer's <i>Glucksberg v. Washington</i> concurrence
Prescription	Providing policy advice	Jay's advice about Neutrality Proclamation to Washington	<i>Chicago Bd. of Realtors v. City of Chicago</i>
Education	Teaching citizens	Wilson's grand jury charges about criminal law	<i>Blessing v. Freestone</i>
Moralization	Expressing moral sentiments on political topics	<i>Cherokee Nation v. Georgia</i>	Gray Proposal
Decentralization	Encouraging state decisionmaking	<i>Pullman</i> abstention	<i>Arizona v. Arizonan Citizens for Official English</i>
Penalization	Threatening to strike down legislation as unconstitutional	<i>Hayburn's Case</i>	<i>Wittmer v. Peters</i>

The following section explains how our nation's Justices and judges have, at times, not only decided the narrow case in front of them, but have gone further to provide advice to political bodies.

## B. *Advicegiving's Historic Roots*

In the beginning, there was advice. Although there was much confusion about the role of judges in the new Republic, many of them gave direct and indirect advice to the political branches at this time. Indeed, the Supreme Court gave constitutional advice before it engaged in judicial review—a fact amply demonstrated by the remarkable series of events that led to *Hayburn's Case*.<sup>51</sup> Instead of striking down the 1792 Invalid Pension Act, the Justices informed the President of their beliefs and asked him to fix the problem. Examples of advice at the founding include judicial opinions, grand jury charges, and personal meetings. These historical illustrations serve as precedents for the modern-day proposals presented in Part II.

### 1. *Founding thoughts.*

The available records of the Constitutional Convention reveal little about the original understanding of the judiciary's advicegiving role. In general, it appears that many members of the Convention assumed that, following the English model, the new government would make "further use . . . of the judges," as George Mason stated, outside of the mere resolution of cases and controversies.<sup>52</sup> For example, Charles Pinckney proposed that the Supreme Court be required to give advisory opinions "upon important questions of law, and upon solemn occasions," when requested to do so by the President or Congress.<sup>53</sup> Specifically, Pinckney's proposal tracked the Massachusetts Constitution of 1780, which permitted the governor and each legislative branch to "require the opinions of the Justices of the Supreme Judicial Court, upon important questions of law, and upon solemn occasions."<sup>54</sup> But Pinckney's proposal was not adopted.

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51. 2 U.S. (2 Dall.) 409 (1792).

52. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 78 (Max Farrand ed., 1923) [hereinafter FARRAND].

53. *Id.* at 341. Although such language did not appear in the final text, the Convention never explicitly rejected the proposal, perhaps because they believed that the language was superfluous. See Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123, 129-30 (arguing that this reasoning explains the failure to include explicitly advisory opinion power).

54. MASS. CONST. of 1780 pt. II, ch. III, art. 2, reprinted in RONALD M. PETERS, JR., *THE MASSACHUSETTS CONSTITUTION OF 1780: A SOCIAL COMPACT* 217 (1978). On the dramatic importance of the 1780 Massachusetts Constitution to the U.S. Constitution, see Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 484-85 (1995). Massachusetts appears to have borrowed this practice from England. See *Opinion of the Justices to the Senate and House of Representatives*, 126 Mass. 557, 561 (1878) (stating that members of the Massa-



A separate proposal for a Council of Revision received more consideration. Governor Randolph first proposed the Council in the Virginia Plan—one of the two major proposals for the Constitution—calling for the national executive and a “convenient number” of the national judiciary to have a qualified veto over every congressional act—the “authority to examine every act of the National Legislature before it shall operate.”<sup>55</sup> The proposal also gave the Council the power to invalidate those state laws “contravening in the opinion of the National Legislature the articles of Union.”<sup>56</sup>

The debate over the Virginia Plan in the Convention helps reveal the way in which the Framers understood the judicial function. Many believed that judges were elite intellectuals who would fortify legislation through the proposed Council mechanism. James Madison, for example, declared that the “Code of laws” would have “the perspicuity, the conciseness, and the systematic character” from exposure to “the Judiciary talents.”<sup>57</sup> And Oliver Ellsworth “approved heartily of the motion” for a Council of Revision and stated that the “aid of the Judges will give more wisdom . . . [and] firmness to the Executive.”<sup>58</sup> Ellsworth understood that judges had a structural advantage over the political branches with respect to knowledge of law—i.e., that judges “possess a systematic and accurate knowledge of the Laws, which the Executive can not be expected always to possess.”<sup>59</sup> Elbridge Gerry, however, complained that the proposal would eventually make “Statesmen of the Judges.”<sup>60</sup> This, in turn, prompted Gouverneur Morris to explain how, in England, judges “had a great share in ye Legislation,” that “[t]hey are consulted in difficult [and] doubtful cases,” and that they may be “members of the privy Council” or even the legislature.<sup>61</sup> Another Council opponent, Nathaniel Gorham, confronted Madison

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chusetts Constitutional Convention “evidently had in view the usage of the English Constitution” when drafting the advisory opinion article). The Massachusetts Supreme Court made clear that, “[i]n giving such opinions, the Justices do not act as a court, but as the constitutional advisers of the other departments of the government.” *Id.* at 566.

55. 1 FARRAND, *supra* note 52, at 21.

56. *Id.* New York State already had a Council of Revision. See THE FEDERALIST NO. 73, at 446 (Alexander Hamilton) (Clinton Rossiter ed., 1961); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787, at 435-36, 455-56 (1969).

57. 1 FARRAND, *supra* note 52, at 139. Madison also believed that a Council of Revision would exalt the executive and judiciary into a working partnership, believing that the President’s “firmness therefore [would] need support” and that an “association of the Judges in his revisionary function [would] both double the advantage and diminish the danger” of being controlled by outside influence. *Id.* at 138.

58. 2 *id.* at 73-74. Other plans reveal similar conceptions of the judiciary as the branch of statesmanship. See Wheeler, *supra* note 53, at 127. For example, Gouverneur Morris’ plan placed the Chief Justice as the second-ranking member of the Council of State. See *id.* In that capacity, he was to propose laws for judicial administration “and such as may promote useful learning and inculcate sound morality throughout the Union.” 2 FARRAND, *supra* note 52, at 342.

59. 2 FARRAND, *supra* note 52, at 74.

60. *Id.* at 75.

61. *Id.*

head on, contending that judges “are not to be presumed to possess any peculiar knowledge of the mere policy of public measures.”<sup>62</sup> But this led George Mason to explain how the nature of adjudication fostered special qualities that could aid in legislation, such as “the habit and practice of considering laws in their true principles, and in all their consequences.”<sup>63</sup>

Consider James Wilson’s words in defense of the Council. In a dramatic speech, this key Founder exclaimed, “Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect.”<sup>64</sup> In his speech, Wilson made two critical moves. First, as with Mason,<sup>65</sup> he simply assumed the existence of a power that Chief Justice Marshall is credited with establishing later in *Marbury v. Madison*<sup>66</sup>—the power of the Supreme Court to nullify unconstitutional laws. Second, Wilson put forth a gradational view of constitutionality, under which acts may not be “so unconstitutional” as to justify nullification of a law. Constitutionality, Wilson realized, was not a binary matter, but one that involved shades of gray. If a law fell within the gray zone between the clearly constitutional and the clearly unconstitutional, Wilson believed that judges should not nullify it. But this view of judicial review did not prevent judges from speaking out against the law, nor did it forbid them from warning the legislature about potential future problems. Rather, Wilson believed that judges should “counteract[], by the weight of their opinions the improper views of the Legislature.”<sup>67</sup> Justice Iredell also shared Wilson’s gradational view of constitutionality. In 1787, Justice Iredell stated that an act “should be unconstitutional beyond dispute before it is pronounced such,”<sup>68</sup> and in 1798 stated that the power to strike down an act “is of a delicate and awful nature, the court will never resort to that authority, but in a clear and urgent case.”<sup>69</sup>

We do not know why the Council never became law. George Mason’s remarks, however, give us one hint. In making a structural argument in favor of

62. *Id.* at 73.

63. *Id.* at 78.

64. *Id.* at 73. On the importance of James Wilson, see Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 473-74 (1994).

65. See text accompanying note 70 *infra*.

66. 5 U.S. (1 Cranch) 137 (1803).

67. 2 FARRAND, *supra* note 52, at 73.

68. 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 24 n.1 (1926); see also *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810) (opinion of Marshall, C.J.) (“The question, whether a law be void for its repugnancy to the constitution, . . . ought seldom, if ever, to be decided in the affirmative, in a doubtful case.”); *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 19 (1800) (opinion of Paterson, J.) (“[T]o authorise this Court to pronounce any law void [requires] a clear and unequivocal breach of the constitution . . .”).

69. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J., concurring). See generally James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (arguing that the Court can only invalidate a law “when those who have the right to make laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question”).

the Council, Mason indicated that the power to influence laws generally, not just to influence specific cases, would be essential to an effective judiciary. He argued that without

this capacity judges could impede in one case only, the operation of laws. They could declare an unconstitutional law void. But with regard to every law however unjust oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course. . . . [F]urther use [should] be made of the Judges, of giving aid in preventing every improper law.<sup>70</sup>

Mason thus made two key points. First, the courts would have the power to declare statutes unconstitutional—the power of judicial review. Second, because not all improper legislation is unconstitutional, judges should have the power to review legislation outside of a court of law. The Council's opponents seized on this latter point—the Council would have vested formal power in judges to trump the views of the popular legislature. Bedford of Delaware, for example, declared himself “opposed to every check on the Legislative, even the Council of Revision . . . . The Representatives of the People were the best judges of what was for their interest, and ought to be under no external controul whatever. The two branches would produce a sufficient controul within [the Legislature itself].”<sup>71</sup>

The fact that the opponents of the Council, such as Bedford, prevailed might suggest the conceptual defeat of advicegiving as well. But this reading is an exaggerated reaction to the Council's demise. After all, the Council would have vested in the judiciary the formal and binding power to remove laws for nonconstitutional policy reasons. The Council's function thus would have differed from advicegiving, as described in this article, in two critical respects. First, the Council would have been charged with policy (not constitutional) review. It would have given the judiciary an expanded purview over questions that judges would not ordinarily consider and over questions in which they did not necessarily have expertise. Advicegiving, by contrast, yields alternative answers to the *constitutional* questions that judges already have before them. Second, and more importantly, the Council was to have the *binding* power to void laws. The Council's binding review differed significantly from advicegiving, which is an alternative to some forms of binding review. The Council failed, no doubt in part because the Convention feared an “external *control*”

70. 2 FARRAND, *supra* note 52, at 78.

71. 1 *id.* at 100-01 (alteration in original). Madison criticized the opponents of the Council who feared it gave “too much strength either to the Executive or Judiciary.” 2 *id.* at 74. For Madison, there was not

the least ground for this apprehension. It was much more to be apprehended that notwithstanding this co-operation of the two departments, the Legislature would still be an overmatch for them. Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex. This was the real source of danger to the American Constitutions . . . .

over “the Representatives of the People.”<sup>72</sup> This failure should be read in light of the fact that its proponents sought judicial control, not influence on or counsel to the political branches.

## 2. *The early American experience: cases.*

Because the text of the Constitution and constitutional debates reveal little about the role of the judiciary, early practice may help clarify matters. The 1789 Judiciary Act<sup>73</sup> divided the country into three circuits (Eastern, Middle, and Southern) and assigned two Supreme Court justices to each circuit to ride across the region and act as lower federal court judges.<sup>74</sup> Before the Justices embarked on their first ride, President Washington wrote to them, asking them to transmit to him any ideas they learned on their travels.<sup>75</sup> As President

72. The rejection of this form of judicial control did not necessarily mean that judges were forbidden from serving in a dual capacity as executive branch officials. The Constitution precludes federal officers from serving as members of Congress, *see* U.S. CONST. art I, § 6, but that is all. Patterson sought to prevent judges from “receiving or holding any other office or appointment during their time of service, or for thereafter.” 1 FARRAND, *supra* note 52, at 244. Charles Pinckney also proposed prohibiting plural office holding by all executive and judicial officers. *See* 2 *id.* at 341-42. But none of these proposals succeeded. Pinckney later renewed his proposal in the Sixth Congress, asking Congress to “say that your judges, while they continue as such, shall hold no other offices.” 10 ANNALS OF CONGRESS 42 (1800). At the founding, Justices often served as executive officials. *See* text accompanying note 174 *infra* (discussing Chief Justice Jay’s service as Special Ambassador to England).

The Constitution’s fluidity is not that surprising when we put the Founders’ views in context. Their fears of plural office holding stemmed from the colonial experience, when British governors attempted to control legislators by promising them important jobs, including judgeships. *See* Wheeler, *supra* note 53, at 126; *see also* JACK P. GREENE, *THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES, 1689-1776*, at 186 (1963) (discussing the attempts of early legislatures to bar “placemen” or political appointees from membership). Indeed, the Declaration of Independence listed as one of its complaints against the King of England that “He has made judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.” THE DECLARATION OF INDEPENDENCE para. 13 (U.S. 1776). Some colonies, such as New York, sought to prevent this manipulation by forbidding plural officeholding. *See* 5 COLONIAL LAWS OF N.Y. 73-74 (1770). The New Jersey Constitution similarly barred “judges of the supreme or other courts” from serving in the legislature so that the law-making body “may, as much as possible, be preserved from all suspicion of corruption.” N.J. CONST. of 1771 art. XX.

73. Act of the First Congress of the United States, ch. 20, 1 Stat. 73 (1789).

74. *See id.* § 4. Note that the Act itself raised separation of powers concerns—Congress was forcing the Justices to abandon the Supreme Court for large portions of the year so that they could act as circuit judges. But, to my knowledge, no one made such an argument against the Act.

75. In the letter to the Supreme Court, President Washington wrote:

In my opinion, therefore, it is important, that the Judiciary System should not only be independent in its operations, but as perfect as possible in its formation.

As you are about to commence your first Circuit, and many things may occur in such an unexplored field, which it would be useful should be known; I think it proper to acquaint you, that it will be agreeable to me to receive such Information and Remarks on this Subject, as you shall from time to time judge expedient to communicate.

Letter from George Washington, President of the United States, to the Chief Justice and Associate Justices of the Supreme Court of the United States (Apr. 3, 1790), *in* 31 WRITINGS OF GEORGE

Washington knew, circuit riding gave the Justices immense contact with the sprawling geography of the country; indeed, they were the only federal officials with such regular ongoing contact.<sup>76</sup> (This fact led Ralph Lerner to label circuit riding the duty of “republican schoolmasters.”<sup>77</sup>) As one important summary put it:

It was, in fact, almost entirely through their contact with the Judges sitting in these Circuit Courts that the people of the country became acquainted with this new institution, the Federal Judiciary; and it was largely through the charges to the Grand Jury made by these Judges that the fundamental principles of the new Constitution and Government and the provisions of the Federal statutes and definition of the new Federal criminal legislation became known to the people.<sup>78</sup>

When the Justices rode, they did not merely rub shoulders with locals and give impromptu political advice; instead, they entered into a dialogue with the people via an official channel, the grand jury charge.<sup>79</sup> Unlike today’s rather lean grand jury proceedings, the Justices would give charges that would first define a violation of law and then embellish it.<sup>80</sup> The early charges discussed such matters as the Jay Treaty, the Antifederalists, the wisdom of the present administration, and the seditious nature of those criticizing the administration.<sup>81</sup> After one attempt to persuade the public to support the 1791 Excise Act<sup>82</sup> through a grand jury charge in Georgia, Justice Iredell was criticized as “labouring to reconcile the Grand Jury [a]nd through them the bulk of the people” to the Act.<sup>83</sup> In another incident, Chief Justice Ellsworth—the same man who believed that judges “possess a systematic and accurate knowledge of the

WASHINGTON: FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, at 31-32 (John C. Fitzpatrick ed., 1939) [hereinafter WRITINGS OF WASHINGTON].

76. See Maeva Marcus & Emily Field Van Tassel, *Judges and Legislators in the New Federal System, 1789-1800*, in *JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY* 31, 32 (Robert A. Katzmann ed., 1988) [hereinafter *JUDGES AND LEGISLATORS*].

77. Ralph Lerner, *The Supreme Court As Republican Schoolmaster*, 1967 SUP. CT. REV. 127; see also Marcus & Van Tassel, *supra* note 76, at 32 (employing Lerner’s label).

78. 1 WARREN, *supra* note 68, at 58-59. Such charges were “delivered to sizable audiences.” Alan F. Westin, *Out-of-Court Commentary by United States Supreme Court Justices, 1790-1962: Of Free Speech and Judicial Lockjaw*, 62 COLUM. L. REV. 633, 640 (1962).

79. See 1 WARREN, *supra* note 68, at 58-59 (discussing how the grand jury became the vehicle to explain the Constitution and the federal government to the people).

80. See *id.* at 58-60; see also Lerner, *supra* note 77, at 131 (discussing how judges would not only “summarize the statutes,” but also would play the role of “exhorter and teacher”). John Dickinson, for example, told members of the Pennsylvania Supreme Court about to go on circuit that “all the Influence to be derived from your Characters, and the Dignity of your Stations, might be applied in disseminating the best Principles & setting forward the most effectual Regulations for the prevention of offences.” Letter from John Dickinson, President of the State of Pennsylvania, to the Chief Justice and Other Judges (Oct. 8, 1785), in 10 PENNSYLVANIA ARCHIVES 523, 523 (Samuel Hazard ed., Philadelphia, Joseph Severno & Co. 1854).

81. See Westin, *supra* note 78, at 641.

82. Act of Mar. 3, 1791, 3 Stat. 199.

83. Letter of “Philanthropos,” AUGUSTA CHRON., Nov. 26, 1791, at 2.

Laws”<sup>84</sup>—told grand juries in South Carolina that those “opposing the existence of the National government or the efficient exercise of its legitimate powers”<sup>85</sup> *could* and *should* be indicted for subversive activity. Note Ellsworth’s dramatic words: He told the executive whom to indict, despite the fact that indictments were a classic executive function.<sup>86</sup> In addition, he told the executive that the lack of legislative action—there was no statute prohibiting subversion—was no obstacle. Such prosecution was inherent in “the rules of a known law, matured by the reason of ages.”<sup>87</sup> His words were prescriptive; Iredell’s were educative.

James Wilson, appointed by President Washington to the Supreme Court, gave a grand jury charge that is a wonderful example of educative and prescriptive advice. In a dramatic charge that foreshadows some work done in criminal law two centuries later,<sup>88</sup> Justice Wilson explained how high criminal penalties would lead to an irreverence for law, that the best punishments are “moderate and mild,” and that contemporary critics of the criminal codes who believed that the codes suffered from “their unwieldy bulk and their ensan-

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84. See text accompanying note 59 *supra*.

85. 1 WARREN, *supra* note 68, at 162 (quoting INDEP. CHRON., June 13, 1799).

86. See *Clinton v. Jones*, 117 S. Ct. 1636, 1656 (1997) (Breyer, J., concurring in the judgment) (contending that a lawful judicial order “cannot impede or obstruct, or interfere with the President’s basic task—the lawful exercise of his Executive authority”); *Morrison v. Olson*, 487 U.S. 654, 698-702 (1988) (Scalia, J., dissenting) (arguing that an independent prosecutor usurps the executive’s constitutional powers); *United States v. Nixon*, 418 U.S. 683, 693-96 (1974) (“[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . .”); see also Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701, 719 n.72 (1995) (discussing the President’s prosecution power); Steven G. Calabresi & Saikrishna Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 570-99, 603-35, 635-61 (1994) (discussing the theory of the unitary executive vested with the power to administer all federal laws).

87. 1 WARREN, *supra* note 68, at 162 (quoting INDEP. CHRON., June 13, 1799). Other times, the charges would break off to discuss matters of a more general nature, such as the political philosophy behind the Constitution and federal government. See, e.g., John Jay, Charge to Grand Juries by Chief Justice Jay (Apr. 4 and 22, 1790, and May 4 and 22, 1790), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 387, 390 (Henry P. Johnston ed., New York, G.P. Putnam’s Sons 1891) [hereinafter CORRESPONDENCE OF JAY]. Elsewhere, Jay also went out of his way to praise the balance reached by the laws of the nation, remarking that “the national laws” were “mindful” of the virtues of liberty and self-government and that, “while they meet transgression with punishment, their mildness manifests much confidence in the reason and virtue of the people.” *Miscellany*, COLUMBIA CENTINEL (Boston), July 28, 1792, at 1.

Some observers appear to have constructed an argument for the legitimacy of circuit riding with charges such as Jay’s serving as a subtle template. For these observers, circuit riding was a mechanism to enhance the judiciary’s public legitimacy. Because judges have “political functions to discharge,” they must be attentive to political support and “should be conversant with public opinion, and imbibe the spirit of the times.” 2 REGISTER OF DEBATES IN CONGRESS, 19th Cong., 1st Sess., Part 1, Col. 554 (Apr. 14, 1826) (statement of Sen. Harper).

88. See Neal Kumar Katyal, *Deterrence’s Difficulty*, 95 MICH. L. REV. 2385, 2450-55 (1997) (explaining the importance of concepts such as anomie and inverse sentencing effects to criminal law).

guined hue" had an "unfounded and pernicious" view.<sup>89</sup> After his lengthy discourse, Wilson "offer[ed] no apology . . . for the nature or the length" of his remarks because he thought it his "duty to embrace every proper opportunity of disseminating the knowledge" of the criminal code "far and speedily."<sup>90</sup> And despite his positivist slant on the criminal law, he warned that he did not "recommend . . . an undistinguishing approbation of the laws of [our] country. Admire; but admire with reason on your side."<sup>91</sup> Wilson led directly into an example: "If, for instance, you think, that the laws respecting the publick securities are more severe than is absolutely necessary for supporting their value and their credit; it will be no crime to express your thoughts decently and properly to your representatives in congress."<sup>92</sup> Wilson's not-so-subtle hint illustrates his commitment to the idea that courts can prod citizens and their representatives to question various policy decisions.

A sense of *déjà vu* is only natural here. We have heard this before when Wilson theorized about the judiciary's advicegiving role at the Convention.<sup>93</sup> His charges thus reveal that, as a judge, he implemented his theoretical designs. Wilson's practical experience gave him new insights into his theory, for he began to see the grand jury charge as a mechanism to enhance political accountability.<sup>94</sup> Justices such as Wilson did not only decide narrow "cases or controversies," but also deigned to give advice to the political branches and the people.

Consider *Hayburn's Case*. The controversy originated from a congressional act, the 1792 Invalid Pensions Act, which permitted disabled Revolutionary War veterans to apply for pensions by proving, to a U.S. circuit court, that they had been wounded during the war and that their disability prevented them from working.<sup>95</sup> Under the Act, if the court sided with the veteran, it transmitted the claimant's name to the Secretary of War and recommended a specific pension amount. The Secretary was able, however, to reject the court's determination if he suspected an "imposition or mistake."<sup>96</sup>

A veteran brought an action for benefits in New York soon after the Act's passage. But the Eastern District—composed of Chief Justice Jay, Justice

89. James Wilson, A Charge Delivered to the Grand Jury in the Circuit Court of the United States for the District of Virginia (May 1791), in 2 THE WORKS OF JAMES WILSON 803, 803-04 (Robert Green McCloskey ed., Harv. Univ. Press 1967) (1804).

90. *Id.* at 822.

91. *Id.* at 823.

92. *Id.*

93. See text accompanying notes 64-67 *supra* (discussing Wilson's gradational view of constitutionality).

94. See Lerner, *supra* note 77, at 141-42 (discussing Wilson's use of the grand jury, for periods of up to an hour, in disseminating his knowledge of the laws).

95. See Act of Mar. 23, 1792, ch. 11, §§ 2, 3, 1 Stat. 243, 244.

96. *Id.* § 4.

Cushing, and District Judge Duane—refused to carry out the Act for constitutional reasons—namely, separation of powers.<sup>97</sup> According to the jurists:

That, 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. That neither the legislative nor the executive branches, can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner.

That the duties assigned to the circuit, by this act, are not of that description, and that the act itself does not appear to contemplate them as such; inasmuch as it subjects the decisions of these courts, made pursuant to those duties, first to the consider[a]tion and suspension of the secretary at war, and then to the revision of the legislature; whereas, by the constitution, neither the secretary at war, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.<sup>98</sup>

The court was not upset by the Act's order that its judges perform executive tasks. Instead, the members of the court were concerned about being asked by another branch to perform these duties *in their capacity as judges*. In other words, they were saying that the hallmark of the judiciary is that it is not susceptible to second-guessing by another branch.

The Supreme Court, or some of its members at least, agreed with the New York court's determination.<sup>99</sup> The way in which we know this fact is itself significant—a series of extraordinary letters were sent from the circuit courts to President Washington in a striking demonstration of interbranch dialogue. Indeed, the language from the New York court's opinion comes from a letter sent by the Justices to the President.<sup>100</sup> These letters stated, ironically, that the Justices would give advice about the fact that they cannot give advice!

With no sense of irony, the Middle District, sitting in Pennsylvania and composed of Justices Wilson and Blair and District Judge Peters, followed the Eastern District's lead in sending a letter to the President.<sup>101</sup> According to the letter, William Hayburn, the veteran who brought *Hayburn's Case*, had petitioned for relief under the Act, but the court had refused to decide the matter:

97. See 1 WARREN, *supra* note 68, at 70.

98. *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.a. (1792). The *Dallas Reporter* reprints this text as a letter from "April 5, 1791," but it is no doubt a typographical error, since the Act was not passed until March 1792. See 1 WARREN, *supra* note 68, at 70 (quoting from the same letter); cf. Letter from John Jay, William Cushing, and James Duane to George Washington (Apr. 10, 1792), in 1 AMERICAN STATE PAPERS: MISCELLANEOUS 49, 49-50 (Walter Lowrie & Walter S. Franklin eds., Washington, D.C., Gales & Seaton 1833) (reprinting similar language in the text).

99. See *Hayburn's Case*, 2 U.S. (2 Dall.) at 409. The Court reporter stated, "The Court observed, that they would hold the motion under advisement, until the next term; but no decision was ever pronounced, as the legislature, at an intermediate session, provided, in another way, for the relief of the pensioners." *Id.*

100. See *id.* at 410 n.a.

101. See 1 WARREN, *supra* note 68, at 70.



Upon due consideration, we have been unanimously of opinion, that, under this act, the circuit court held for the Pennsylvania district could not proceed.

1st. Because the business directed by this act is not of a judicial nature. It forms no part of the power vested by the constitution in the courts of the United States; the circuit court must, consequently, have proceeded *without* constitutional authority. 2d. Because, if, upon that business, the court had proceeded, its *judgments* (for its *opinions* are its judgments) might, under the same act, have been revised and controlled by the legislature, and by an officer in the executive department. Such revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts; and consequently, with that important principle which is so strictly observed by the constitution of the United States.<sup>102</sup>

The Middle District's decision echoed both the procedure and substance of the New York judgment by, first, abstaining from decision and writing a letter to the President and, second, stating that its judgments should not be readily second-guessed by a legislative body.

The final circuit court, the Southern District, began its letter to the President by praising the Act as "one founded on the principles of humanity and justice."<sup>103</sup> This court, composed of Justice Iredell and District Judge Sitgreaves, then went on to explain why it could not comply with the Act: "[I]nasmuch as the decision of the court is not made final, but may be at least suspended in its operation, by the Secretary of War . . . ; this subjects the decision of the Court to a mode of revision, which we consider to be unwarranted by the constitution."<sup>104</sup>

It is this letter from Justice Iredell that is the most interesting. Note, first, that Justice Iredell took it upon himself to laud the "humanity and justice" of the Act. These are high words of praise, perhaps startlingly so for those trained to believe that judges should stay out of legislative determinations. These words, in turn, set up a strong conclusion:

The high respect we entertain for the Legislature, our feelings, as men, for persons whose situation requires the earliest, as well as the most effectual relief, and our sincere desire to promote, whether officially or otherwise, the just and benevolent views of Congress, so conspicuous on the present as well as on many other occasions, have induced us to reflect, whether we could be justified in acting, under this act, personally, in the Character of Commissioners . . . . But we confess we have great doubts on this head. The power appears to be given to the Court only, and not to the Judges . . . . We do not mean, however,

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102. *Hayburn's Case*, 2 U.S. (2 Dall.) at 411 n.\* (quoting Letter of Justices Wilson and Blair and District Judge Peters of the Circuit Court for the District of Pennsylvania to George Washington, President of the United States (Apr. 18, 1792)).

103. Letter from Justice Iredell and District Judge Sitgreaves of the Circuit Court for the District of North Carolina to George Washington, President of the United States (June 8, 1792) (on file with the *Stanford Law Review*) [hereinafter Letter from Justice Iredell and District Judge Sitgreaves]; see also 3 ANNALS OF CONG. app. at 1319-22 (1849) (reprinting letter); *Hayburn's Case*, 2 U.S. (2 Dall.) at 412 n.\* (same).

104. Letter from Justice Iredell and District Judge Sitgreaves, *supra* note 103, at 4.

to preclude ourselves from every deliberate consideration, whether we can be warranted in executing the purposes of the act in that manner, in case an application should be made.

No application has yet been made to the Court, or to ourselves individually, and therefore, we have had some doubts as to the propriety of giving an opinion in a case which has not yet come regularly and judicially before us. None can be more sensible than we are of the necessity of Judges being, in general, extremely cautious in not intimating an opinion, in any case, extra judicially, because we well know how liable the best minds are, notwithstanding their utmost care, to a bias, which may arise from a preconceived opinion, even unguardedly, much more, deliberately, given: But in the present instance, as many unfortunate and meritorious individuals, whom congress have justly thought proper objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined, by a long one, we determined, at all events, to make our sentiments known as early as possible, considering this as a case which must be deemed an exception to the general rule, upon every principle of humanity and justice; resolving, however, that so far as we are concerned, individually, in case an application should be made, we will most attentively hear it; and if we can be convinced this opinion is a wrong one, we shall not hesitate to act accordingly . . . .<sup>105</sup>

Essentially, Justice Iredell makes five points. First, that the Act was motivated by humanity and justice. Second, that, as a federal judge, he could not issue a judgment that would be subject to legislative revision due to separation of powers. Third, that he had strong doubts about whether he, as an individual, could serve as a commissioner. Fourth, that the ordinary rule is that he should not pass judgment or reveal his pattern of thinking about a possible case that may one day come before him. Fifth, notwithstanding this, that he should alert both Congress and possible litigants to his doubts in this instance so that they may act accordingly.

This series of appellate court rulings, from Chief Justice Jay sitting in the Eastern District to Justice Iredell sitting in the Southern District, led to the Supreme Court's consideration of *Hayburn's Case*. In that case, the Attorney General sought a writ of mandamus from the Supreme Court directing the Middle District to act on Revolutionary War veteran William Hayburn's petition for disability benefits.<sup>106</sup> The Middle District had decided that Hayburn's application "be not proceeded upon,"<sup>107</sup> and the Attorney General then sought an order forcing it to proceed. The Attorney General first sought the writ of mandamus without an application from a particular person. He argued that the writ would execute a congressional act and that he thus had the power to bring such a suit *ex officio*. The Court was divided on that question, and this led the Attorney

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105. *Id.* at 6-7.

106. See *Hayburn's Case*, 2 U.S. (2 Dall.) at 409-10.

107. See 1 WARREN, *supra* note 68, at 71; see also Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 598 (quoting opinion of the Circuit Court for the District of Pennsylvania).

General to alter his procedural stance, claiming that he was intervening “on behalf of Hayburn.”<sup>108</sup> At that point, the Court, instead of ruling on Hayburn’s petition, decided to hold the decision over until the next Term.

The Court never rendered a decision in *Hayburn’s Case* because Congress changed the Act. Congress had been closely monitoring the situation in the courts and, in April 1792, had appointed a committee to study the matter.<sup>109</sup> As one report of the House proceedings put it:

It appeared that the Court thought the examination of Invalids a very extraordinary duty to be imposed on the Judges—and looked on the law, which imposes that duty, as an unconstitutional one . . . .

. . . This being the first instance in which a Court of justice had declared a law of Congress to be unconstitutional, the novelty of the case produced a variety of opinions with respect to the measures to be taken on the occasion. At length a Committee of five was appointed to enquire into the facts contained in the Memorial, and to report thereon.<sup>110</sup>

Other contemporary reports indicate that many took the decisions as declarations of unconstitutionality.<sup>111</sup> But in actuality, these letters were examples of judicial advice; the courts were warning Congress that the Act would be declared unconstitutional. The subtle threat of penalization—that the Supreme Court would strike down the Act—lurked in the quill-dipped correspondence of the Justices.

Many observers believed that Congress would listen to the advice of the circuit courts and modify the Act.<sup>112</sup> Congress did so, in time to stave off a Su-

108. *Hayburn’s Case*, 2 U.S. (2 Dall.) at 409.

109. The impetus for the committee came from Hayburn’s request to Congress for relief. See 2 ANNALS OF CONG. 556-57 (1792).

110. 1 WARREN, *supra* note 68, at 72 (quoting report in DUNLAP’S AM. DAILY ADVERTISER (Philadelphia), Apr. 16, 1792) (second alteration in original).

111. Indeed, when one Antifederalist, writing under the name “Camden,” described the three holdings as “[t]he Southern Circuit Court may execute the Law in its full extent without any squeamishness or difficulty; the Eastern Circuit Court may execute the law, as commissioners; while the Middle Circuit Court may refuse to execute it at any rate,” the *National Gazette* replied that the Eastern Circuit “too ha[s], tho’ in a delicate manner, passed sentence of unconstitutionality on the invalid law.” *Id.* at 72-77 (quoting NAT’L GAZETTE (Philadelphia), Apr. 16, 19, 23, 1792, and May 11, 1792).

112. For example, one commentator wrote:

[T]he late decision of the Judges . . . in the Circuit Court of Pennsylvania, declaring an act of the present session of Congress, unconstitutional, must be matter of high gratification to every republican and friend of liberty . . . . And whilst we view the exercise of this noble prerogative of the Judges in the hands of such able, wise and independent men as compose the present Judiciary of the United States, it affords a just hope that not only future encroachments will be prevented, but also that any existing law of Congress which may be supposed to trench upon the constitutional rights of individuals or of States, will, at convenient seasons, undergo a revision . . . .

*Id.* at 73 (citing NAT’L GAZETTE (Philadelphia), Apr. 1792); see also David P. Currie, *The Constitution in Congress: The Second Congress, 1791-1793*, 90 NW. U. L. REV. 606, 638-40 (1996) (“The judges themselves had suggested that it might be permissible to ask them to step off the bench to

preme Court decision. In large part taking heed of Justice Iredell's words—his letter was laid before Congress on November 7, 1792<sup>113</sup>—Congress changed the Act in February 1793 to minimize the role judges played in enforcing the Act.<sup>114</sup> The new modifications also required the Attorney General to obtain a Supreme Court adjudication of the validity of claims approved by the judge-commissioners.<sup>115</sup>

Justice Iredell's letter thus had two important effects. First, it suggested that judges could act as commissioners under the 1792 Act. From April 1792 until the new veteran's pension law was passed in February 1793, the judges—acting as commissioners and not as judges—heard the claims of Revolutionary War veterans.<sup>116</sup> Second, Iredell gave Congress advice about how to craft a constitutional act. Congress listened to that advice and drafted an act that hewed more closely to the constitutional line.<sup>117</sup>

Consider the obvious alternative to this judicial advice: Any of the courts involved could have struck down the Act. But they did no such thing. Indeed, although the Justices felt obliged not to participate in what they saw as an unconstitutional venture, they took it upon themselves to advise the President about their reasoning and thus provide him with a way in which to advise the legislature to craft a constitutional act. Justice Iredell went even further, informing Congress that his “high respect” for the legislative body and “sincere desire to promote” its views might mean that Congress would not have to modify the Act because he might be able to sit in his personal capacity. Iredell did precisely this, for he sat as a commissioner in several later cases, after construing the Act to mean “that Congress may have contemplated it as a personal rather than a judicial exercise of power.”<sup>118</sup>

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perform nonjudicial duties, and Congress clearly continued to think there was no problem.” (footnote omitted)).

113. See 3 ANNALS OF CONG. app. at 1319-22 (1849).

114. See 1 WARREN, *supra* note 68, at 79.

115. See *id.* at 79-80; see also Susan Low Bloch & Maeva Marcus, *John Marshall's Selective Use of History in Marbury v. Madison*, 1986 WIS. L. REV. 301, 306.

116. See 1 WARREN, *supra* note 68, at 79-80 & n.1 (citing, *inter alia*, CONN. COURANT, Oct. 7, 1792, at 3 (“We are equally happy in mentioning to the public that two of the Judges have, notwithstanding some objections, consented to act as Commissioners in executing the Pension Law.”)).

117. There is, however, some dispute as to whether the Court eventually rejected Justice Iredell's interpretation as unconstitutional in *United States v. Yale Todd*, an unpublished decision that held that the decisions of judges acting as commissioners had no legal sanction. Compare Wilfred J. Ritz, *United States v. Yale Todd (U.S. 1794)*, 15 WASH. & LEE L. REV. 220, 227 (1958) (stating that the case was the Court's “first declaration that an Act of Congress was unconstitutional”), with 1 WARREN, *supra* note 68, at 81 (observing that “the Court appears to have found it unnecessary to pass upon the constitutionality of the Act of 1792”).

118. See Marcus & Van Tassel, *supra* note 76, at 40 (citing Reasons for Acting As a Commissioner on the Invalid Act, Oct. 1792, Johnson Collection, North Carolina State Dept. of Archives & History). Iredell's written explanation noted that he had worried greatly about the issue, in part “because ‘authorities’ for whom he had the ‘highest respect’ had differed with him.” *Id.* at 39 (citing Letter from James Iredell to Hannah Iredell (Sept. 30, 1792), in 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL: ONE OF THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED

*Hayburn's Case* shows that the Justices, from a very early point, provided advice to the political branches. Not content to "just say no," these early Justices explained their reasons for their decisions and suggested possible constitutional courses of action. Instead of using the full power of judicial review to strike down an act (as many modern courts do), the early circuit courts alerted Congress to the constitutional problems with the 1792 Act and asked the legislature to change it. This method of dealing with unconstitutionality seems to have been a popular one.<sup>119</sup> It is patently different from today's court decisions that "strike down," rather than simply declare, an act unconstitutional. One of the most important constitutional theorists of the founding, Nathaniel Chipman, believed that the judiciary should act as an advisor in the process of writing legislation and should "give information of all difficulties, which they foresee will arise, either in the interpretation, the application, or the execution of the law."<sup>120</sup> Chipman argued that, once judges made their views known, they were to acknowledge that the legislators were the "sole judges" of the community's interests and that courts would not use judicial review to strike down the legislation.<sup>121</sup>

Indeed, the famous case of *Marbury* itself demonstrates the power of advicegiving. Chief Justice Marshall's opinion began by questioning whether William Marbury should receive his commission under the Constitution and concluded that to "withhold the commission . . . is an act deemed by the court not warranted by law, but violative of a vested legal right."<sup>122</sup> Along the way, Marshall also concluded that statutes repugnant to the Constitution could be declared void by the Court. But significantly, both of these conclusions were nothing more than dicta, as the Court held that it could not use its power to force President Jefferson to give the commission to Marbury.<sup>123</sup> The Court found that it did not have jurisdiction and that it thus could not order a writ of mandamus. In other words, the Court dispensed a tremendous amount of advice to the executive, even though the advice was not important to the disposition of the case. President Jefferson was alerted to his unconstitutional activity,

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STATES 361 (Griffith J. McRee ed., 1949) (stating that James Wilson refused to act as a commissioner)).

119. See 1 WARREN, *supra* note 68, at 73 (quoting an article from the *National Gazette* for the contention that unconstitutional laws will, "at convenient seasons, undergo a revision" after court declarations similar to the circuit courts' decisions in the invalid pension case). It is also instructive that Chief Justice Jay, who was running against George Clinton in a fiercely contested race for governor of New York, was not attacked for his pension act decision, though he was attacked on many other grounds. See *id.* at 76 (describing the "hotly contested campaign" between the two) (citing *Letter of "Aristides,"* N.Y. DAILY ADVERTISER, Apr. 4, 1792).

120. NATHANIEL CHIPMAN, SKETCHES OF THE PRINCIPLES OF GOVERNMENT 126-27 (J. Lyon 1793).

121. *Id.* at 127.

122. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 154, 162 (1803).

123. See *id.* at 176-78.

and the Court was able to make the point without resorting to the full power of judicial review.

*Marbury* is thus an early example of advicegiving in that the Court made several nonbinding constitutional pronouncements in a case and controversy. Jefferson later went on to reject Marshall's advice about *Marbury's* commission, calling those sections "obiter dictum."<sup>124</sup> But Jefferson's rejection of the advice highlights an advantage of advicegiving as compared to judicial review. Advicegiving permits the political branches temporarily to maintain potentially unconstitutional acts so long as the people, alerted by the advice to the constitutional difficulties, permit them and so long as the Court does not have a case that forces it to decide the issue in a holding. Moreover, Marshall's words drew popular attention to Jefferson's potentially unconstitutional course of activity. Deference, flexibility, and accountability are some words that describe advicegiving's virtues, even if some might disagree about their application in *Marbury*. *Marbury* is an early example of self-alienation: The Court said it lacked jurisdiction, but nevertheless explained what the Constitution required the President to do.

Consider also Chief Justice Marshall's opinion in *Cherokee Nation v. Georgia*.<sup>125</sup> The Cherokee had sought an injunction to restrain Georgia from enforcing state laws against them. Although Marshall found that the Court did not have jurisdiction in the case because the Cherokee was not a foreign state, his opinion was drafted to make clear that he agreed with the Cherokee.<sup>126</sup> He began the opinion by noting that the Cherokee alleged that the Georgia laws "go directly to annihilate the Cherokees as a political society" and that "[i]f courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined."<sup>127</sup> He continued, writing that "[a] people once numerous, powerful, and truly independent . . . gradually sinking beneath our superior policy, our arts and our arms," were filing the action to preserve the "remnant" of land that they had; "the Indians are acknowledged to have an unquestionable, and heretofore, unquestioned, right to the lands they occupy."<sup>128</sup> Despite the fact that the Court lacked jurisdiction, it still condemned the government's land policy and sided with the Cherokee. Marshall did not detail his views, although Justices Baldwin and Johnson criticized the Cherokees' arguments on the merits.<sup>129</sup> The Baldwin and Johnson opinions led the Jacksonian press to claim that the Court had sided against the Cherokee.

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124. Mark A. Graber, *The Passive-Aggressive Virtues: Cohens v. Virginia and the Problematic Establishment of Judicial Power*, 12 CONST. COMM. 67, 92 n.7 (1995).

125. 30 U.S. (5 Pet.) 1 (1831).

126. *See id.* at 14-20.

127. *Id.* at 14.

128. *Id.* at 14, 17.

129. *See id.* at 20-31 (opinion of Johnson, J.) (deciding the "legal question"); *id.* at 31-50 (opinion of Baldwin, J.) (examining the jurisdictional question).

This, in turn, prompted Marshall to push the dissenters, Justices Story and Thompson, to respond by issuing dissenting opinions after the majority opinion had been released.<sup>130</sup> As in *Marbury*, the Court made sure that its advice was being heard, even in the context of a case in which it lacked jurisdiction.<sup>131</sup>

Another important early decision is *Hylton v. United States*,<sup>132</sup> in which the Court upheld the constitutionality of an excise tax on carriages.<sup>133</sup> The tax had been challenged as unconstitutional, and despite the growing influence of decisions like *Commonwealth v. Caton*,<sup>134</sup> many Justices were uncomfortable with the notion of judicial review. Justice Chase's opinion specifically refused to decide whether the Court had such power, thus embracing minimalism:

As I do not think the tax on carriages is a direct tax, it is unnecessary, at this time, for me to determine, whether this court, constitutionally possesses the power to declare an act of congress void, on the ground of its being made contrary to, and in violation of the constitution; but if the court have such power, I am free to declare, that I will never exercise it, but in a very clear case.<sup>135</sup>

Chase was acknowledging the Wilsonian sentiment that constitutionality is not a binary matter, but rather one with gradations and shades of gray.<sup>136</sup> His words seem almost like abdication, a refusal to exercise his constitutional obligations. But that is only a modern view, for it is not obvious that courts had such power at the time Chase was writing—at least with respect to acts of Congress that were not clearly unconstitutional. Nor is it obvious that Chase's words contravened his constitutional duties. As this article argues, complete judicial abdication in constitutional matters can enhance respect for the Constitution by making the political branches more accountable for their constitutional transgressions.<sup>137</sup> What's more, Chase's view that a "very clear case" is required for striking down legislation enables the Court to engage in advice-giving. Rather than striking down an act, the Court may note its constitutional difficulties and reserve the weapon of judicial review for a clear case.<sup>138</sup>

130. See Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 515-18 (1969).

131. Another example is given by Marc Graber in his discussion of *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). See Graber, *supra* note 124, at 72-80 (explaining that in *Cohens*, Chief Justice Marshall found, through a tortured reading of the National Lottery statute, Act of May 4, 1812, 2 Stat. 721, that the statute did not intend to authorize out-of-state sales, but that Marshall nevertheless went on to decide, in language that has become famous, that the federal courts could exercise jurisdiction over state court convictions).

132. 3 U.S. (3 Dall.) 171 (1797).

133. See *id.* at 184.

134. 8 Va. (4 Call) 5 (1782).

135. *Hylton*, 3 U.S. (3 Dall.) at 174.

136. For Wilson's statement, see text accompanying note 64 *supra*.

137. See text accompanying notes 258-263 & 369-370 *infra*.

138. See text accompanying notes 435-438 *infra* (using advicegiving as an argument in favor of James Bradley Thayer's clear error rule).

Many early cases in state courts raise similar issues. One example is the Virginia Supreme Court's *Caton* decision, one of the primary cases establishing judicial review.<sup>139</sup> The specific matter in the case was whether the 1776 Virginia treason law was constitutional, though what concerns us is the way in which the matter was decided. Justice Wythe wrote an opinion that upheld the law, but nevertheless cautioned that

if the whole legislature . . . should attempt to overleap the bounds, prescribed to them by the people, I . . . will meet the united powers, at my seat in this tribunal; and, pointing to the constitution, will say, to them, here is the limit of your authority; and, hither, shall you go, but no further."<sup>140</sup>

In *Caton*, the court affirmed the power of judicial review and yoked that power to the court's advicegiving role. Wythe did not see his role as a mere negative—that the legislature cannot do X. Rather, he saw the power of judicial review as something more robust, a mechanism to give advice to the legislature about what was permissible and what was forbidden. By going beyond the strict necessities of the case, he claimed the power—a power earlier called “demarcation”—to tell the legislature how to avoid a constitutional confrontation.<sup>141</sup>

A second example is *Holmes v. Walton*,<sup>142</sup> a 1780 case argued before the New Jersey Supreme Court. In 1778, the New Jersey legislature passed a statute that authorized the seizure of all goods in transit to or from British lines. The act further provided that all actions resulting from such seizures would be tried before a jury of six men. In 1789, the plaintiff in *Holmes* argued that the New Jersey Constitution required a common law jury of twelve.<sup>143</sup> After ten months, the court ordered judgment for the plaintiff.<sup>144</sup>

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139. See Edward S. Corwin, *The Supreme Court and Unconstitutional Acts of Congress*, 4 MICH. L. REV. 618, 621-22 (1906) (noting that five state courts had established judicial review at the time of the Constitutional Convention).

140. *Commonwealth v. Caton*, 8 Va. (4 Call) 5, 8 (1782).

141. See text accompanying note 40 *supra*. The other judges in *Caton* did not necessarily disagree. Judge Edmund Pendleton believed that the question of judicial review “is indeed a deep, important, and . . . tremendous question” that was not directly implicated by the case, *Caton*, 8 Va. (4 Call.) at 17, and he expressed his hope that “the wisdom and prudence of the legislature will prevent the disagreeable necessity of ever deciding it” by passing acts that complied with the Constitution. *Id.* at 18. The other judges stated that “the court had power to declare any resolution or act of the legislature . . . to be unconstitutional and void.” *Id.* at 20.

142. See Austin Scott, *Holmes v. Walton: The New Jersey Precedent*, 4 AM. HIST. REV. 456 (1899) (discussing unpublished decision).

143. Section 22 of the New Jersey Constitution required that “the inestimable right of trial by jury shall remain confirmed as part of the law of this colony without repeal forever.” N.J. CONST. of 1776, art. XXII.

144. Its rendered opinion has been lost over time, but there is evidence that the court found the act unconstitutional. For example, a petition from 60 inhabitants of Monmouth County complained that the New Jersey Supreme Court justices had set aside the law as unconstitutional. See Scott, *supra* note 142, at 459-60.



The interesting aspect of *Holmes* is not that it declared an act unconstitutional—other courts in decisions such as *Caton* had claimed that power<sup>145</sup>—but what happened on the day following oral argument in the case. On November 12, 1779, a “member of the legislative council obtained leave to bring in a bill amending the ‘seizure acts.’”<sup>146</sup> After some debate, the legislature passed an amendment empowering courts to use a jury of twelve.<sup>147</sup> Could the court have signaled its constitutional displeasure at oral argument? It is impossible to say. But this brings home another fundamental point: The very fact that judicial review exists can often become an inducement for the political branches to comply with constitutional tenets. Sometimes the legislature may take an *ex ante* approach to constitutional interpretation, deciding constitutional questions before the passage of an act. Other times, the legislature may wait to see if courts are actually going to hear such cases, particularly in an era of discretionary Supreme Court review. In these instances, the time gap between oral argument and decision may provide a last clear chance to modify the legislation and save it from being struck down as unconstitutional. This is, after all, what Congress did after oral argument in *Hayburn’s Case*.<sup>148</sup>

*Rutgers v. Waddington*,<sup>149</sup> a New York decision, shows how judicial advice-giving and interpretation can work to achieve many of the same results as modern-day judicial review. The case was an action for trespass against a defendant for his occupancy of premises during the British occupation of New York City.<sup>150</sup> The relevant statute contained what could today be called an anti-Nuremberg Defense provision, stating that no defendant could “plead in justification, any military order, or command of the enemy for such occupancy.”<sup>151</sup> The defendant’s counsel, Alexander Hamilton, argued that the statute unfairly

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145. Moreover, as Charles Warren has shown, the circuit courts struck down state statutes for violating the U.S. Constitution within two years of the start of the new government. 1 WARREN, *supra* note 68, at 65-69.

146. Scott, *supra* note 142, at 461.

147. *See id.* at 461-62.

148. *See* text accompanying notes 95-108 *supra*. In a similar vein, the modern Italian Constitutional Court, *Corte Costituzionale*, sometimes holds a law unconstitutional but delays publication of its opinion in order to give the legislature a chance to modify the unconstitutional legislation. *See* Vincenzo Vigoriti, *Italy: The Constitutional Court*, 20 AM. J. COMP. LAW 404, 410 (1972) (discussing the Italian Court’s delay in publishing a pretrial detention opinion and the subsequent modification of the statute by the legislature). The threat of publication serves as a penalization strategy designed to encourage compliance. *See id.*; Cass., sez. un., 3 apr. 1969, n.60, 14 Giur. Cost. 971 (Italian Court suspended publication for four months to permit legislature to change criminal jurisdiction of the Ministry of Finance; when legislature did not change jurisdiction, Court published opinion).

149. *See* *Rutgers v. Waddington* (N.Y. City Mayor’s Ct. 1784), reprinted in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 393-419 (Julius Goebel Jr. ed., 1964) (discussing unpublished opinion).

150. *See id.* at 393-94.

151. *Id.* at 395.

deprived foreigners of their right to appeal to courts of law under the Law of Nations.<sup>152</sup>

The court agreed with Hamilton, but did not strike down the act. It began by taking a very restrictive view of judicial review:

The supremacy of the legislature need not be called into question; if they think *positively* to enact a law, there is no power which can controul them. When the main object of such a law is clearly expressed and the intention manifest, the Judges are not at liberty, altho[ugh] it appears to them to be unreasonable, to reject it: for this were to set the judicial above the legislative which would be subversive of all government.

But when a law is expressed in *general words*, and some *collateral matter*, which happens to arise from those general words is *unreasonable*, there the Judges are in decency to conclude that the consequences were not foreseen by the Legislature; and therefore they are at liberty to expound the statute by *equity* and only quoad hoc to disregard it.<sup>153</sup>

In other words, statutory interpretation can avoid a conflict with international law without resorting to the ultimate power to strike down a law. The court used what this article has called clarification, calling for a clear statement that would have focused popular accountability on the legislature. If the legislature failed to make such a statement, the court would take a restrictive view of the act. What's more, the court went further and declared a broad reading of the act to have "unreasonable" effects that were contrary to "equity"—a political statement that could hardly be an inducement to further legislation on the subject!

Many other early decisions help to clarify the role of the courts in the beginning of the Republic. This article offers a few key examples to show how the courts exercised a role beyond yes/no constitutionalism. As we shall see, this role corresponds to one many judges took up in their out of court capacities.

### 3. *The early American experience: judicial speech.*

Throughout the first decades of the Republic, judges, acting in their individual capacities, provided Congress with advice about legislative matters. For example, when Congress took up consideration of whether to amend the 1789 Judiciary Act, Justices Paterson and Washington actually offered their own bill to the House Judiciary Committee for consideration.<sup>154</sup> Such prescriptive advice was not unwelcome; Representative Robert Harper later wrote to Justice Paterson, seeking the views of the other Justices on the issue: "I beg leave . . .

152. *See id.* at 403-11.

153. *Id.* at 415.

154. Samuel Sewall wrote to William Cushing that "Judge Paterson and Judge Washington were with the Committee according to appointment and favoured us with the details of a bill calculated upon the plan which had been suggested, and which in the principal points will be adopted by the Committee." Marcus & Van Tassel, *supra* note 76, at 43 (quoting Letter from Samuel Sewall to William Cushing (Feb. 25, 1800)).

to suggest that no persons can be so competent to that task as the judges, and to request that they will be pleased to give it their attention."<sup>155</sup>

A similar type of advice concerned circuit riding, a topic of great concern to the Justices. After complaints from Justices Iredell and Rutledge about the burdens of riding, Chief Justice Jay told Iredell that he could not do anything without congressional action.<sup>156</sup> This led Iredell to "appl[y] to several Members of Congress that the law may be amended so as to compel a rotation" in March 1792.<sup>157</sup> Five months later, the Court made a formal appeal to the political branches to modify the Act's circuit riding provisions. The way in which the Justices made their formal request itself is interesting. Instead of writing directly to Congress, they wrote to the President and asked him to place the matter before Congress, stating that his

official connect[ion] with the Legislature, and the consideration that applications from us to them, cannot be made in any manner so respectful to Government as through the President, induce us to request your attention to the enclosed representation, and that you will be pleased to lay it before [the] Congress.<sup>158</sup>

As Maeva Marcus has noted, this routing of official requests through the President was routine.<sup>159</sup> President Washington himself had written Congress the previous August, telling them that he hoped that the legislative body would give the Justices "relief from these disagreeable tours."<sup>160</sup> Congress, in March 1793, reduced the load on the Justices by providing that the circuit courts should consist of one Supreme Court justice and one district judge—demonstrating the success of prescriptive advicegiving by the judiciary.<sup>161</sup>

Thus, judicial advice could be rendered to the political branches through several different channels. A first was dicta in a judicial opinion, such as that in

155. *Id.* (quoting Letter from Robert Goodloe Harper to William Paterson (May 10, 1800)).

156. *See id.* at 48 (citing Letter from John Jay to James Iredell (Mar. 19, 1792)).

157. *Id.* (quoting Letter from James Iredell to Thomas Johnson (Mar. 15, 1792)).

158. Letter from John Jay, William Cushing, James Wilson, John Blair, James Iredell, and Thomas Johnson to George Washington (Aug. 9, 1792), in 1 AMERICAN STATE PAPERS: MISCELLANEOUS, *supra* note 98, at 51, 51. In their letter to the President, the Justices stated, "We really, sir, find the burdens laid upon us so excessive that we cannot forebear representing them in strong and explicit terms." *Id.* The same Justices also wrote:

That the task of holding twenty-seven circuit courts a year, in the different States, from New Hampshire to Georgia, besides two sessions of the Supreme Court at Philadelphia, in the two most severe seasons of the year, is a task which, considering the extent of the United States, and the small number of judges, is too burdensome.

*Id.* at 52 (quoting Letter of the Chief Justice and the Associate Judges of the Supreme Court to the Congress of the United States (undated)). President Washington transmitted the communication from the Justices to Congress on November 7, 1792. *See id.* at 51.

159. *See* Maeva Marcus, *Separation of Powers in the Early National Period*, 30 WM. & MARY L. REV. 269, 274-75 (1989). There might be a deep structural reason for this practice, as it might reflect a desire to have a two-branch consensus on an issue before asking a third to modify its position.

160. Letter from George Washington to Thomas Johnson (Aug. 7, 1791), in 31 WRITINGS OF WASHINGTON, *supra* note 75, at 332, 333.

161. *See* 1 WARREN, *supra* note 68, at 89.

*Marbury and Cherokee Nation*.<sup>162</sup> A second was the private letter, typified by Justice Iredell's 1792 letter to President Washington and the Court's letters to the President about circuit riding.<sup>163</sup> A third was back-room discussion between the branches, such as Chief Justice Jay's advice to Washington concerning the Neutrality Proclamation.<sup>164</sup> A fourth was the charge to the grand jury, of which Wilson's provides a dramatic example.<sup>165</sup>

Readers will note that one method of communication—direct advice from the courts to the political branches via an advisory opinion—has not been outlined as an option. That omission is deliberate, for such formal opinions were not used at the founding. One set of events illustrates this early practice and underscores the accepted mechanisms of political colloquy between the courts and Congress. The issue involved President Washington's famous Neutrality Proclamation of April 1793, which provided that America would not get involved in the disputes between England and France. Following this declaration, French privateers began capturing ships and bringing them into American waters, where they would claim them as prizes. In June 1793, French privateers captured two American vessels—*The William* and *The Fanny*—and the American owners sought a federal court order in Pennsylvania to preclude the claim.<sup>166</sup> The Americans argued that the courts were vested with the power in admiralty to prevent violations of international law. The district court judge, Judge Peters, rejected that argument and found that he lacked jurisdiction. President Washington was incensed and ordered the governor of Pennsylvania to post guards on *The William*. He also issued an executive order directing that the taking of such prizes violated neutrality and that the ships should be restored to their owners.

162. See text accompanying notes 122-131 *supra*.

163. See text accompanying notes 157-161 *supra*; see also Letter from James Iredell to George Washington (Feb. 23, 1792), in 11 PAPERS OF ALEXANDER HAMILTON 46, 46 (Harold Syrett ed., 1966). Iredell began his letter by outlining the legitimacy of such a letter. Building on precedent set by Washington, Iredell stated:

In consequence of the letter you did the Judges of the Supreme Court the honour to write to them on the 3d. April, 1790, I presume it is not only proper for a single Judge, but his express duty when he deems it of importance to the public service, to state any particular circumstances that occur to him in the course of his personal experience which occasion unexpected difficulties or inconveniences . . . .

*Id.* For President Washington's letter to the Court, see note 75 *supra*. The Iredell letter concerned two different problems: the statutory requirement that a stay from a circuit court decision be filed in the Supreme Court within ten days of circuit court judgment and the lack of authorization for states to file interpleaders. Iredell was successful, for the President transmitted the request to Congress via the Attorney General and the policies were changed. See Act of May 8, 1792, 1 Stat. 275, 278.

164. See text accompanying notes 166-176 *infra*. There are many other examples that this article will not detail. Chief Justice Jay and Senator King, for example, were frequent collaborators in private, as were Justice Iredell and his brother-in-law Senator Samuel Johnston. See Marcus & Van Tassel, *supra* note 76, at 46.

165. See text accompanying notes 79-92 *supra*.

166. For a more detailed description of this episode, see 1 WARREN, *supra* note 68, at 105-18.

President Washington then asked Secretary of State Thomas Jefferson to request that the Supreme Court issue an opinion about the interpretation of various treaties with European nations. Jefferson, with Hamilton's help, drafted a list of questions to the Supreme Court, and added:

The President therefore would be much relieved if he found himself free to refer questions of this description to the opinions of the judges of the Supreme Court of the United States, whose knowledge of the subject would secure us against errors dangerous to the peace of the United States, and their authority insure the respect of all parties.<sup>167</sup>

The Justices, in another private letter, told the President that the Court did not have such authority.<sup>168</sup> The Court explained that they had considered "the lines of separation drawn by the Constitution between the three departments of the government" and had found "strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments."<sup>169</sup> Note the Court's *expressio unius* reading of the Constitution. Article II, section 2, gave the President the power to call on his cabinet for advice, and the Court read this grant to imply that the President could *not* call for Supreme Court advice. Strictly speaking, Article II, section 2, which is addressed only to the President, does not preclude Congress from seeking such advice. But in reality?

No one can say. The circumstances of the Washington request were even more unusual because there were cases pending in the circuit courts involving issues that the advisory opinion would have discussed.<sup>170</sup> Still the Court did not simply decline to speak; it went out of its way in the last passages of the letter to "exceedingly regret every event that may cause embarrassment to your administration."<sup>171</sup> It further explained that the Court "derive[d] consolation

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167. Letter from Thomas Jefferson to Chief Justice Jay and Associate Justices (July 18, 1793), in 3 CORRESPONDENCE OF JAY, *supra* note 87, at 486-87; *see also* 1 WARREN, *supra* note 68, at 108-09 (reprinting letter with slight alteration). Hamilton had objected to the letter on the ground that the issue was not within the judicial domain, but he wrote the questions anyway. *See* 1 WARREN, *supra* note 68, at 109.

168. *See* Letter from Chief Justice John Jay and Associate Justices of the Supreme Court to President George Washington (July 20, 1793), in 3 CORRESPONDENCE OF JAY, *supra* note 87, at 487-88; *see also* 1 WARREN, *supra* note 68, at 108-09 (reprinting letter). In fact, Jay had warned Washington in private that the Court might make this determination. *See* Wheeler, *supra* note 53, at 150.

169. Letter from Chief Justice John Jay and Associate Justices of the Supreme Court to President George Washington (Aug. 8, 1793), in 3 CORRESPONDENCE OF JAY, *supra* note 87, at 488-89 [hereinafter Letter from Chief Justice Jay]; *see also* 1 WARREN, *supra* note 68, at 110-11 (reprinting letter with slight alteration).

170. *See* FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 49-89 (Philadelphia, Carey & Hart 1849) (providing insight into the 1793 trial of Gideon Henfield for illegally enlisting in a French privateer).

171. Letter from Chief Justice Jay, *supra* note 169, at 488.

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."<sup>172</sup> So much for courts staying out of politics.

Hamilton eventually did consult with Chief Justice Jay about the Neutrality Proclamation, and Jay had issued an earlier grand jury charge that revealed some of his thinking on the issue.<sup>173</sup> To make matters even more intriguing, after the Proclamation episode, Jay, while serving as Chief Justice, was appointed by the President to serve as Special Ambassador to England to negotiate the settlement treaty that bears his name.<sup>174</sup>

Just as with the rejection of the Council of Revision, it is tempting to read the 1793 events as a rejection of advicegiving. Still key differences persist. First, President Washington's request made it clear that the Court's advice would be binding if given. By asking for judicial counsel that would "secure us against errors dangerous to the peace" and stating that the Court's "authority" would "insure the respect of all parties," the President was asking, in effect, for the ability to shunt important questions to the Court.<sup>175</sup> If the Court's interpretation created problems down the road, Washington could say he was acting on the advice of binding counsel and dodge responsibility. As we shall see, in countries that have advisory opinion power, that power is undermined

172. *Id.*

173. In a charge delivered to the grand jury empanelled to hear the case against Gideon Henfield, *see* note 170 *supra*, Jay argued that President Washington's desire for "conduct friendly and impartial towards the belligerent powers" is "exactly consistent with and declaratory of the conduct enjoined by the law of nations." WHARTON, *supra* note 170, at 53-54. After a lengthy discussion, he proclaimed that he was "aware that [he] was treading on delicate ground; but as the path of [his] duty led over it, it was incumbent on [him] to proceed." *Id.* at 58.

174. *See* 1 WARREN, *supra* note 68, at 118-21. Jay's service while Chief Justice was much to the Senate's initial consternation. One unsuccessful Senate resolution introduced by Aaron Burr proclaimed:

That to permit Judges of the Supreme Court to hold at the same time any other office or employment, emanating from and holden at the pleasure of the Executive, is contrary to the spirit of the Constitution, and, as tending to expose them to the influence of the Executive, is mischievous and impolitic.

1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 152 (Washington, D.C., Duff Green 1828); *see also* 1 WARREN, *supra* note 68, at 119 (reprinting resolution). The Senate eventually confirmed him by an 18 to 8 vote. *See* 1 WARREN, *supra* note 68, at 119.

Besides Jay, other Justices in the early years served formally and informally as advisers to the political branches. Justice Ellsworth served simultaneously as Special Ambassador to France and Chief Justice. Perhaps the most dramatic example is John Marshall, who continued to serve as Secretary of State in the Adams administrations after he was appointed Chief Justice. His double job was, in many ways, more threatening than most because he wound up deciding *Marbury*, which of course concerned the failure of Madison—while Secretary of State—to deliver judicial commissions that had been left by his predecessor in office (who was none other than now Chief Justice Marshall).

175. *See* text accompanying note 167 *supra*.

when the political branches announce, ahead of time, that the advice will be binding.<sup>176</sup>

Second, and more importantly, advicegiving in a case or controversy is quite different from an advisory opinion. With advicegiving, a concrete case exists, which allows the Court to focus and test hypotheses. The Court—as *Marbury*'s three questions reveal—decides what questions to ask and which to answer. Advice in a case or controversy is therefore closer to the Court's practice of writing written majority opinions, concurrences, and dissents than is an advisory opinion. Advicegiving is simply a way in which opinions can be written, not an expansion of the Court's authority into new realms.

What happened to the other mechanisms for dialogue after the advisory opinion episode? In part, the answer has to do with a complicated series of events surrounding Justice Chase. Before his impeachment proceedings, Justices commonly acted as explicit and implicit politicians while still serving in the judiciary.<sup>177</sup> But in May 1803, Chase read a politicized charge to a Baltimore grand jury. His charge began by emphasizing the need for judges to educate citizens, stressing that it "is essentially necessary at all times, but more particularly at the present, that the public mind should be truly informed; and that our citizens should entertain correct principles of government, and fixed ideas of their social rights."<sup>178</sup> It then attacked Congress' efforts to abolish sixteen federal circuit judgeships and Maryland's decision to provide universal suffrage. Declaring that "[t]he independence of the judges of this State will be entirely destroyed" and that universal suffrage will "certainly and rapidly destroy all protection to property,"<sup>179</sup> Chase claimed that such legislative maneuvers were contrary to dearly held individual rights.<sup>180</sup> Chase not only attacked legislation that would destroy judicial independence, he went further to attack universal suffrage itself. But even here he yoked his comments to a claim about constitutional meaning.<sup>181</sup>

176. See text accompanying note 520 *infra*.

177. While serving on the Supreme Court, Justice William Cushing ran for governor of Massachusetts in 1794, Justice John Jay ran for governor of New York, Justice Samuel Chase campaigned for John Adams in the presidential campaign of 1800, and Justice Bushrod Washington campaigned for Charles C. Pinckney in the same campaign. See 1 WARREN, *supra* note 68, at 273-76; WHARTON, *supra* note 170, at 46. The campaigning was so out of hand that one newspaper complained about Justices "mounting the tub at an electioneering meeting . . . and there expos[ing] the dignity of the National Judiciary to the coarse jibes and scoffing jokes of every mischievous bystander." 1 WARREN, *supra* note 68, at 274.

178. Justice Chase's Charge to a Baltimore Grand Jury, in DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES, 8th Cong., 2d Sess., 674 (1805) [hereinafter Chase's Charge].

179. *Id.* at 674-75.

180. See *id.* at 675.

181. See *id.* (describing how universal suffrage would "pull down the beautiful fabric of wisdom and republicanism" in the state constitution).

Yet Chase's words still appeared too political—prescriptions gone amok with partisanship—despite their being dressed up in constitutional clothing. Eventually, the charge became a catalyzing event in his impeachment proceedings, prompting President Jefferson to ask a congressional leader rhetorically, "Ought this seditious and official attack on the principles of our Constitution and on the proceedings of the State to go unpunished?"<sup>182</sup> Jefferson originated the call for Chase's impeachment, and the House of Representatives eventually approved impeachment charges.<sup>183</sup> The eighth article of the charges stated that Chase "disregard[ed] the duties and dignity of his judicial character . . . for the purpose of delivering to the said grand jury an intemperate and inflammatory political harangue, with intent to excite the fears and resentment of the said grand jury, and of the good people of Maryland."<sup>184</sup>

Chase responded to these charges by emphasizing both legal precedent and the text of the Constitution. Arguing that "[i]t has been the practice in this country, ever since the beginning of the revolution, . . . for the judges to express from the bench, by way of charge to the grand jury, and to enforce to the utmost of their ability, such political opinions as they thought correct and useful," Chase referred to "instances in which the legislative bodies of this country, have recommended this practice to the judges; and it was adopted by the judges of the supreme court of the United States, as soon as the present judicial system was established."<sup>185</sup> Further, his counsel made an equally strong argument from the text:

Is it not lawful for an aged patriot of the revolution to warn his fellow-citizens of dangers, by which he supposes their liberties and happiness to be threatened? Or will it be contended that a citizen is deprived of these rights, because he is a judge? That his office takes from him the liberty of speech, which belongs to every citizen, and is justly considered as one of our most invaluable privileges? I trust not . . .

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182. 1 WARREN, *supra* note 68, at 277. The Jeffersonian press reported that Chase's charge to the Baltimore grand jury attacked Jefferson's administration as "weak, relaxed and not adequate to a discharge of their functions." *Id.* at 276. And one newspaper asked, "Is it proper, is it decent that this man should be forever making political speeches from the Bench?" *Id.* at 277 n.1 (quoting VA. ARGUS, June 11, 1803).

183. See 2 HENRY ADAMS, HISTORY OF THE UNITED STATES OF AMERICA DURING THE ADMINISTRATION OF THOMAS JEFFERSON 149-50 (Albert & Charles Boni 1930) (1889) (stating that the call for impeachment proceedings originated in a letter from President Jefferson to Representative Joseph H. Nicholson dated May 13, 1803).

184. 1 SAMUEL H. SMITH & THOMAS LLOYD, TRIAL OF SAMUEL CHASE 8 (De Capo Press 1970) (1805).

185. *Id.* at 96. Chase's counsel argued that "the practice of introducing political matter into charges to grand juries, has been sanctioned by the custom of this country, from the beginning of the revolution to this day." 2 *id.* at 328. Referring to William Henry Drayton's grand jury charge in 1776—the Pennsylvania Executive Council's recommendation spearheaded by John Dickinson and Judge Addison—Chase's counsel declared that, "[f]rom the time of judge Drayton to the time of judge Chase, it has been considered as innocent." *Id.* at 329.



. . . In what part of our laws or constitution is it written, that a judge shall not speak on politics to a grand jury? . . . There is no such law. Neither is there any constitutional provision or principle, or any custom of this country, which condemns this practice.<sup>186</sup>

Chase's critics responded that there was no justification for "a judge in his judicial character, and from the judgment seat to preach political sermons, and impose his private dogmas on the people under the garb of administering the laws."<sup>187</sup> Although Chase was not impeached, the largest number of votes to do so—nineteen out of thirty-four—was cast on the eighth article, based on his grand jury charge.<sup>188</sup> Despite his victory, Chase's lack of subtlety made it more difficult for judges to make openly political charges to grand juries.<sup>189</sup> Would everything have been different had Chase's counsel chosen to forego the emphasis on Chase's individual right to speak and instead chosen to highlight the structurally advantageous reasons for him, as a federal official with life tenure, to do so?

#### 4. *Dialogue in the post-Chase era.*

Impossible questions. But we do know that the proceedings against Justice Chase chilled the delivery of such charges and that, after Chase's trial, judges were more cautious in making speeches from the bench that emphasized party politics.<sup>190</sup> After a few years, some judges did return to prescriptive advice, however. One example is Justice Joseph Story, who "carefully abstained from writing in the newspapers, and . . . endeavored to avoid mingling in political engagements,"<sup>191</sup> but who also issued grand jury charges containing a great deal of political advice. In 1819, Story wrote a powerful attack on the slave trade and delivered it throughout his circuit via a grand jury charge, district by district, from Boston to Providence.<sup>192</sup>

The charge, replete with prescriptive advice, was an open attack on slavery. "I make no apology, Gentlemen," Story concluded each time he delivered the charge, "for having detained you so long upon this interesting subject. . . . If we tolerate this traffic, our charity is but a name, and our religion little more

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186. 2 *id.* at 326-27. Chase's counsel also relied on precedent, arguing that, "according to the custom of this country, subsisting for almost thirty years, without any mark of public disapprobation, [Justice Chase] had a right to warn his fellow-citizens, in a charge from the bench, against the political dangers by which he believed them to be threatened." *Id.* at 317.

187. *Id.* at 446 (statement of Rep. Caesar Rodney).

188. See *id.* at 492-93 & tbl.; Lerner, *supra* note 77, at 148 n.61.

189. See Lerner, *supra* note 77, at 154-55 (relaying that the long-term effects of Chase's trial were that political charges would no longer be used).

190. See Westin, *supra* note 78, at 644-55.

191. Letter from Joseph Story to Edward Everett (Aug. 4, 1825), in 1 LIFE AND LETTERS OF JOSEPH STORY 363 (William W. Story ed., London, J. Chapman 1851).

192. See Westin, *supra* note 78, at 645.

than a faint and delusive shadow.”<sup>193</sup> Repeatedly calling slavery the “most detestable traffic,”<sup>194</sup> Story explained how slaves were kidnapped from their homes in Africa and separated from their families, and he provided a detailed explanation of the potentially fatal Atlantic passage:

When the scuttles in the ship’s sides are shut in bad weather, the gratings are not sufficient for airing the room; and the slaves are then seen drawing their breath with all that anxious and laborious effort for life, which we observe in animals subjected to experiments in foul air, or in an exhausted receiver of an air-pump. Many of them expire in this situation, crying out in their native tongue, “We are dying.”<sup>195</sup>

As Story’s example suggests, the tradition of legal and political counseling from the Court continued throughout the nineteenth century.<sup>196</sup> For example, Chief Justice Taney sent Salmon P. Chase, who was then Secretary of the Treasury, a letter stating that the Civil War income tax was unconstitutional. Taney limited his letter to the argument that the tax was unconstitutional as

193. Joseph Story, *Piracy and the Slave Trade*, in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 122, 147 (William W. Story ed., Boston, Charles C. Little & James Brown 1852); see also Westin, *supra* note 78, at 645 (quoting from the same charge).

194. Story, *supra* note 193, at 136; cf. *id.* at 140 (calling slavery “a loathsome traffic”); *id.* at 141 (calling slavery “an inhuman traffic”).

195. *Id.* at 145. His words led one Boston newspaper to say that Story should be “hurled from the bench.” 1 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 191, at 348; see also Westin, *supra* note 78, at 645 (quoting same language). But as Story’s son reminisced:

This, like all popular clamors, blew by him like the empty wind upon a rock. He had made up his mind that it was his duty, judicially and morally, to exert his utmost powers to procure the annihilation of this trade, and nothing availed to check him. He delivered and redelivered this charge. He printed and circulated it, and steadily bore his testimony against the slave trade, as repugnant to law, religion, and humanity.

1 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 191, at 48; see also Westin, *supra* note 78, at 645 (quoting same language). Justice Story’s outrage against slavery was so strong that, despite his inclination to avoid political appearances, he attended a crucial town meeting during the same year he delivered his antislavery grand jury charges. See 1 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 191, at 359-60. Story’s son, in a memoir, commented that “the only instance during his whole judicial life in which he was present at a political meeting, or publicly engaged in a discussion of a political question,” was at this 1819 meeting. *Id.* at 360. Story avidly supported resolutions asking Congress to outlaw slavery in the federal territories and prevent the incorporation of any slaveholding territory into the Union as a state. As Story’s son put it:

Involving as it did a question not merely of party politics, but of national policy and constitutional law, striking at the very principles of the government, darkening the whole future of an oppressed race, and drawing after it vast consequences of evil,— he felt that his duty to himself, his country, and the world, required him to overstep the limits he had set for himself on ordinary occasions, and to throw the whole weight of his influence and opinions upon the side of liberty and law.

*Id.*

196. For example, Justice John McLean, appointed in 1829 by President Jackson, often wrote letters to newspapers on various political topics. See FRANCIS P. WEISENBURGER, THE LIFE OF JOHN MCLEAN: A POLITICIAN ON THE UNITED STATES SUPREME COURT 140 (1937) (describing how McLean’s political “letter-writing” activities got him in trouble with the legislative branch). In 1856, he declared his opposition to slavery—a move that triggered much criticism and led Senator James Stewart of Maryland to accuse McLean of having rendered an “extra-judicial opinion.” *Id.* at 272.

applied to the salaries of federal judges, but the arguments he made were generally applicable. It was therefore no surprise that decades later the Supreme Court printed the letter as an appendix to its decision in *Pollock v. Farmers' Loan and Trust Co.*,<sup>197</sup> which invalidated the income tax. In addition to proposing new financial legislation to President Van Buren, Taney also gave advice to the President on matters such as the constitutionality of financial regulation, what should go into President Jackson's farewell address, and the desirability of continuing Jackson's banking and currency programs in the Van Buren administration.<sup>198</sup>

As another illustration, during Reconstruction, Salmon P. Chase, by then Chief Justice, urged the President to end martial law and restore the writ of habeas corpus; Chase also gave the President a draft of such a proclamation.<sup>199</sup> Although the President disregarded his advice, Chase continued to give advice to the executive branch on topics such as the suffrage of the freedmen, the budget deficit, and the identity of the leading military commanders.<sup>200</sup> Chase also drafted an early version of the Fourteenth Amendment and discussed his views of the Amendment with politicians.<sup>201</sup> Although no other Justice appears to have gone as far as Chase—who drafted constitutional amendments he would later interpret—other Justices also injected themselves into Reconstruction policy. Justices Swayne and Davis, for example, tried and failed to persuade President Lincoln to soften the administration's policy of arbitrary arrest and confinement of civilians by military authorities.<sup>202</sup>

197. 157 U.S. 429 (1895), *overruled by* *South Carolina v. Baker*, 485 U.S. 505 (1988).

198. See CARL BRENT SWISHER, ROGER B. TANEY 326-32, 339-42 (1935).

199. See J.W. SCHUCKERS, THE LIFE AND PUBLIC SERVICES OF SALMON PORTLAND CHASE 540-42 (New York, D. Appleton & Co. 1874) (discussing Letter from Salmon Chase to J.W. Schuckers (Sept. 24, 1866)); see also WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 170 (1964) (referring to same letter).

200. See MURPHY, *supra* note 199, at 170.

201. See Letter from Salmon Chase to Stephen J. Field, Associate Justice of the Supreme Court (Apr. 30, 1866), in SCHUCKERS, *supra* note 199, at 526 ("So far as I have had opportunity of conversing with Senators and Representatives, I have recommended them to confine constitutional amendments to two points: (1.) No payment of rebel debt, and no payment for slaves; and, (2.) No representation beyond the constituent basis.").

202. See MURPHY, *supra* note 199, at 170; see also David M. Silver, *Lincoln's Supreme Court*, 38 ILL. STUD. SOC. SCI. 1, 63 (1956) (detailing Justice Swayne's "abiding interest" in curtailing arbitrary military arrest). There were also instances of official interbranch communication. For example, five Justices—Clifford, Strong, Miller, Field, and Bradley—were appointed to the Electoral Commission of 1876, a 15-member Commission set up by act of Congress to decide disputes over election returns between Samuel Tilden and Rutherford Hayes in four states. The Commission reached an eight to seven decision giving the presidency to Hayes. See C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION 161-67 (1956). Other forms of more modern crossbranch service include Justice Jackson's service as prosecutor during the Nuremberg trials and President Johnson's decision to have Chief Justice Warren chair the Kennedy assassination investigation. Justice Douglas believed Jackson's role as special prosecutor "was a gross violation of separation of powers" and that "[Jackson] should resign" from the Court. WILLIAM O. DOUGLAS, THE COURT YEARS, 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 28 (1980).

Indeed, contacts between members of the Supreme Court and the political branches were all but inevitable, since until 1935 the Court sat not in the pristine marble building it now occupies, but in the Old Senate Chamber.<sup>203</sup> During this century, judges have continued to play a role in political decisions. For example, Justice Brandeis—worried about World War I—indicated to the President (via Justice Frankfurter) that he would help in the reorganization of the government.<sup>204</sup> Brandeis then drafted a plan to reorganize the government agencies concerned with the war effort. This memorandum led to the enactment of the Overman Act, which essentially gave the President the ability to restructure the war agencies.<sup>205</sup> During the Depression, Brandeis also campaigned for unemployment insurance.<sup>206</sup> And Chief Justice Taft, a former President, did not hesitate to give prescriptive advice to the political branches.<sup>207</sup>

Another Chief Justice, Charles Evans Hughes, opposed President Franklin Roosevelt's court-packing plan by sending a letter to Senator Burton Wheeler that drew considerable popular attention, helping to ensure the defeat of the plan.<sup>208</sup> Wheeler used the letter in his opening statement in opposition to the plan; it was so effective that it led one observer to wire Hughes: "Others may

203. As Justice Scalia put it:

[O]nce upon a time, the Supreme Court used to sit in the Capitol . . . and one can imagine . . . the scene of the judges leaving their session and mingling in the corridors with the legislators. . . . I am sure that to some extent the reason that the executive and the legislature get along well enough, despite the inherent conflict that's built into the system, is the fact that they're composed of people who get to know one another, and I think that makes a big difference in any institution.

Robert A. Katzmann, *Summary of Proceedings, in* JUDGES AND LEGISLATORS, *supra* note 76, at 162, 178 (quoting Justice Scalia) (alterations in original).

204. See BRUCE ALLEN MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES* 52-53 (1982).

205. *See id.*

206. This is made clear by Brandeis' letter to his daughter describing a meeting with the President on June 7, 1934:

Don't be discouraged by the President's message.

He summoned me yesterday & when I reached him at 4:45 P.M. he had in his hand his message & started in to read it to me. When he came to the part on social insurance, I stopped him, told him it was all wrong, & for about 3/4 hours discussed that question & I think convinced him of the error. . . . I have left some efficient friends in Washington, who are to work for the true faith during the summer.

Letter from Louis D. Brandeis to Elizabeth Brandeis Raushenbush (June 8, 1934), *in* 5 LETTERS OF LOUIS D. BRANDEIS, at 539-40 (Melvin I. Urofsky & David W. Levy eds., 1978).

207. On one occasion, Taft waged a strong fight against the Caraway Bill, which would have prevented federal judges from making comments to jurors about the credibility of witnesses. See MURPHY, *supra* note 199, at 163-65. Not only did he write a detailed memorandum against the Bill, but he also implored his friends who were members of Congress to vote against the Bill, and his effort has been credited with leading to the Bill's defeat. *See id.* For additional examples of Taft's prescriptive advice, see *id.* at 149-55.

208. See 2 MERLO J. PUSEY, *CHARLES EVANS HUGHES* 749-65 (1951) (giving a detailed description of the opposition to Roosevelt's court-packing plan).

speak for weeks or months . . . but you have closed the debate."<sup>209</sup> More recently, Justice Fortas consulted broadly with President Johnson after his appointment to the Supreme Court on matters ranging from the Vietnam War to recommendations for legislation.<sup>210</sup> The back-door nature of Fortas' communications became an issue in his proposed chief justiceship.<sup>211</sup>

Extrajudicial communications such as those I have described in the past few pages do not serve as direct precedent for what I advocate in this article: advicegiving via written opinions in cases and controversies. If anything, such communication is a vastly inferior substitute. Extrajudicial advice raises troublesome issues about judicial propriety and smoky, back-room deals. The prospect of advicegiving acts as a constraint on the understandable human tendency to employ these more troubling methods of communication between the judiciary and the political branches.

### 5. *Reprise.*

Against this backdrop, it is not surprising that Alexis de Tocqueville began his chapter on judicial power with the observation that judges seem to "interfere in public affairs only by chance, but by a chance that recurs every day."<sup>212</sup> Despite the courts' "immense" political power, Tocqueville found that there were a number of limits on the time and place of its exercise:

If the judge had been empowered to contest the law on the ground of theoretical generalities, if he were able to take the initiative and to censure the legislator, he would play a prominent political part; and as the champion or the antagonist of a party, he would have brought the hostile passions of the nation into the conflict. But when a judge contests a law in an obscure debate on some particular case, the importance of his attack is concealed from public notice; his decision bears upon the interest of an individual, and the law is slighted only incidentally.<sup>213</sup>

Tocqueville did not say that judges wouldn't be able to refer to "theoretical generalities" in reviewing a law, but only that they could not use the power of review to "contest" the law on that basis. What's more, in Tocqueville's

209. *Id.* at 757 (quoting Henry L. Stoddard).

210. For a discussion of Fortas' involvement in the Vietnam War, see BRUCE ALLEN MURPHY, *FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE* 238-67 (1988).

211. See Alexander M. Bickel, *Voting Up or Down: Fortas, Johnson and the Senate*, *NEW REPUBLIC*, Sept. 28, 1968, at 21, 22 (discussing how Fortas' relationship with President Johnson became an issue during Senate confirmation). The disclosure of Fortas' advice to Johnson prompted a Senate hearing on whether his advice violated separation of powers and led Senator Sam Ervin to propose a bill "[t]o enforce the principle of separation of powers" by precluding judges from nonjudicial involvement in the government. S. 1097, 91st Cong. (1969). See generally *Nonjudicial Activities of Supreme Court Justices and Other Federal Judges: Hearings Before the Subcomm. on Separation of Powers of the Comm. on the Judiciary*, 91st Cong. (1969) (debating the desirability and danger of judicial interference with the executive and legislative branches).

212. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 98 (Phillips Bradley ed., Alfred A. Knopf 1989) (1848).

213. *Id.* at 102.

view, comity with Congress meant that a judge who did refer to such generalities would only do so within the context of a particular case. This institutional limit also created salutary moderation on the part of the judge: "If the judge could attack the legislator only openly and directly, he would sometimes be afraid to oppose him; and at other times party spirit might encourage him to brave it at every turn."<sup>214</sup>

We have seen how courts have "interfere[d] in public affairs" from the founding onward. It is time to be honest about this fact and consider whether our judicial system can harness this advicegiving capacity and use it to the nation's advantage.

## II. CONCRETE CASES

A taxonomy and theory of advicegiving has been outlined in the introduction, but it still remains to be applied. At this point, a few illustrations will be helpful. This article will use four Supreme Court cases as examples and will contrast those decisions with several others. After fleshing out the theory, the article then considers some of the arguments against the advicegiving model.

The four examples illustrate four different aspects of advicegiving. Each one shows how advicegiving could have enhanced both fidelity to constitutional structure and governmental functioning. In *Clinton v. Jones*,<sup>215</sup> the Court made a weak attempt at advicegiving, but it could have used clarification to acknowledge Clinton's strong case and to ask Congress for a clear statement about the meaning of the relevant statute. In the right to die case *Vacco v. Quill*,<sup>216</sup> the Court could have used a decentralization strategy to ask the New York state courts to resolve the thorny questions about what the state statute meant before stepping into the controversy on its own. By seeking a state court determination, the Court could have planted the seeds of a productive federal-state conversation about the state statute at issue.<sup>217</sup>

A different type of federal-state advice is considered in the discussion of the death penalty case *Gray v. Netherland*.<sup>218</sup> This section shows how federal courts can single out particularly egregious death penalty cases and call on state governors to review them for commutation of the death sentence. This strategy is particularly appropriate when procedural bars exist—a court opinion can explain those procedural bars through self-alienation, thereby preventing state officials from hiding behind the imprimatur of a court's decision

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214. *Id.*

215. 117 S. Ct. 1636 (1997).

216. 117 S. Ct. 2293 (1997).

217. I was a law clerk at the Supreme Court during *Jones* and *Quill* and in the Court of Appeals for the Second Circuit during *Quill*. Nothing in this article reflects information unavailable to the public.

218. 116 S. Ct. 2074 (1996).

not to interfere with an execution. Self-alienation can thus put the governor's choice in the public eye.

Exemplification, a final type of advicegiving, is illustrated by *New York*, which struck down part of the Low-Level Radioactive Waste Act. When courts strike down legislation, they have the opportunity to suggest constitutional ways to achieve the statute's objectives. Exemplification allows courts to help avoid future constitutional confrontations between the branches and help legislators comply with their constitutional obligations.

These four decisions, and the other cases sprinkled throughout this part, do not exhaust the advicegiving concept. They are simply a few examples. Together, they reveal the virtues of advicegiving: maximizing popular accountability, producing sunlight, aiding federalism, promoting respect for coordinate branches, inspiring better policy choices, enhancing constitutional compliance, and encouraging judicial candor.

## A. *Clinton v. Jones*

### 1. *Background.*

In one of the rare instances of a private civil suit being brought against a sitting President, Paula Jones alleged that President Clinton, while governor of Arkansas, violated her constitutional rights by making improper sexual advances toward her.<sup>219</sup> Upon receipt of the complaint, the President filed a motion seeking temporary immunity, arguing that his weighty duties as Head of State precluded him from defending himself in court while in office. In a lengthy opinion, the Supreme Court rejected his argument.<sup>220</sup>

The Court found little historical support for the President's position. Narrowly reading language from Justice Story, Jefferson, and others, it found that historical statements provided "little" or "no" support for the President because this language concerned immunity for official acts.<sup>221</sup> It then went on to hold that, even though the President occupies a "unique office with powers and responsibilities so vast and important," he is not entitled to immunity as a matter of constitutional text and structure.<sup>222</sup> Even though the exercise of jurisdiction over a sitting President appeared to be an encroachment on the executive and thus a violation of separation of powers, the Court merely observed, "Of course the lines between the powers of the three branches are not always neatly defined."<sup>223</sup>

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219. See *Jones*, 117 S. Ct. at 1640.

220. See *id.* at 1643.

221. See *id.* at 1645 n.23.

222. *Id.* at 1646.

223. *Id.* at 1647.

The end of the opinion, however, contains the most interesting language. After deciding that the text and history of the Constitution provide no support for presidential immunity against civil suits, the Court then pointedly observed:

If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation. As petitioner notes in his brief, Congress has enacted more than one statute providing for the deferral of civil litigation to accommodate important public interests. Brief for Petitioner 34-36. See, e.g., 11 U.S.C. § 362 (litigation against debtor stayed upon filing of bankruptcy petition); Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. §§ 501-525 (provisions governing, *inter alia*, tolling or stay of civil claims by or against military personnel during course of active duty). If the Constitution embodied the rule that the President advocates, Congress, of course, could not repeal it. But our holding today raises no barrier to a statutory response to these concerns.<sup>224</sup>

Setting the Court's advice to the side for the moment, the problem with the majority opinion is that it overstated its arguments. As Justice Breyer's concurrence pointed out, there are strong arguments based on the text of Article II that support temporary presidential immunity.<sup>225</sup> Briefly, Article II vests the entire executive power in a president.<sup>226</sup> Akhil Amar and I have elsewhere argued that this constitutional structure militates heavily in favor of temporary immunity for a sitting President.<sup>227</sup> And the structural point is reinforced by Congress asserting its power to "compel the Attendance of absent Members"<sup>228</sup> and invoking its inherent privilege against "[a]rrest"<sup>229</sup> to protect its official functioning by delaying the enforcement of judicial process in civil cases brought against members while Congress is in session.<sup>230</sup> This historical practice, we argued, was crucial in interpreting Justice Story's key words:

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224. *Id.* at 1652. As further evidence of the distinction between advicegiving and advisory opinions, it is helpful to point out that this language appears just five pages after the Court stated, "This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive." *Id.* at 1647 n.33 (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)).

225. *See id.* at 1652-59 (Breyer, J., concurring in the judgment).

226. *See* U.S. CONST. art. II, § 1 (emphasis added).

227. *See* Amar & Katyal, *supra* note 86, at 702-05 (arguing that Clinton's claim to presidential immunity is supported by the text and structure of the Constitution).

228. U.S. CONST. art. I, § 5, cl. 1.

229. U.S. CONST. art. I, § 6, cl. 1.

230. *See* JOHN C. GRABOW, CONGRESSIONAL INVESTIGATIONS: LAW AND PRACTICE § 7.4, at 213 (1988) (relying on Article I, § 5 authority to "compel the attendance of absent Members" as basis for temporary immunity); Amar & Katyal, *supra* note 86, at 710-21 (describing Article I, § 6 immunity from arrest); *see also* 121 CONG. REC. 37,888 (1975) (statement of Rep. Patterson) ("Under the precedents of the House, I am unable to comply with this subp[er]ona [in a California criminal case] without the consent of the House, the privileges of the House being involved."); *id.* at 37,888-89 (House Resolution permitting Patterson to testify "when the House is not sitting in session"); 108 CONG. REC. 8824 (1962) (House Resolution stating that "by the privileges of the House of Representatives no staff employee is authorized to appear and testify, but by order of the House"); 99 CONG. REC. 3013-14 (1953) (statement of Rep. Hoffman) (describing the Arrest



There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among those, must necessarily be included the power to perform them, without any obstruction or impediment whatsoever. The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.<sup>231</sup>

Those words figured prominently in the Court's earlier *Fitzgerald* opinion.<sup>232</sup>

I do not want to reargue the matter here. I only wish to point out that the Court slighted these arguments in *Jones*. It made sweeping overstatements, claiming that the language of Justice Story provides "no substantial support" and that Jefferson's numerous statements give "little support" to presidential immunity.<sup>233</sup> The majority shrank the precedent of *Fitzgerald* into a shadow of its former self, choosing to describe that opinion by relying on chopped up phrases from the majority opinion and Chief Justice Burger's pithy concurrence.<sup>234</sup> It stretched other precedent, such as the *Steel Seizure Case*,<sup>235</sup> *United States v. Burr*,<sup>236</sup> and *United States v. Nixon*,<sup>237</sup> beyond their facts and logic.<sup>238</sup> Finally, it dismissed the President's rather weighty separation of powers contention with a mischaracterization of his argument.<sup>239</sup>

Clause and stating, "Under the precedents of the House, I am unable to comply with this summons [for a traffic ticket] without the consent of the House, the privileges of the House being involved."); *id.* at 3014 (House Resolution permitting Hoffman to testify "when the House is not sitting in session"); CONG. GLOBE, 39th Cong., 2d Sess. 52 (1866) (statement of Rep. Williams) (describing Arrest Clause immunity as "as much [a] privilege[] of this House, and of the constituent body, as [it is] of the member individually aggrieved"); CONG. GLOBE, 29th Cong., 1st Sess. 768 (1846) (statement of Rep. Holmes) ("The privileges of the House were thus a wall of fire beyond which the courts could not pass . . ."); *id.* at 767 (statement of Rep. Winthrop) (describing Arrest Clause immunity as "a privilege of our constituents, as well as of ourselves. . . . [Otherwise a] representative might be withdrawn from his place when questions of the gravest importance . . . were depending for their decision upon his single vote."); *id.* (statement of Rep. Dromgoole) ("[T]he courts of the District could not dissolve Congress, for that was the whole amount of the matter. If they could subpoena one member, they could subpoena both branches of Congress, and thus, for all practical purposes, dissolve Congress itself.").

231. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1569, at 372 (Boston, Little Brown & Co., 4th ed. 1873) (1833).

232. See *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (quoting 3 STORY, *supra* note 231, § 1563, at 418-19).

233. *Clinton v. Jones*, 117 S. Ct. 1636, 1645 n.23 (1997).

234. See *id.* at 1644 ("Our central concern was to avoid rendering the President 'unduly cautious in the discharge of his official duties.' This reasoning provides no support for an immunity for unofficial conduct." (quoting *Fitzgerald*, 457 U.S. at 752 n.32) (footnote and emphasis omitted)).

235. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

236. 25 F. Cas. 30 (No. 14,692d) (C.C. Va. 1807).

237. 418 U.S. 683 (1974).

238. See *Jones*, 117 S. Ct. at 1656 (Breyer, J., concurring in the judgment) (observing that criminal precedents, such as *United States v. Nixon*, and suits about a President's official duties, such as the *Steel Seizure Case*, have no relationship to a private civil suit).

239. See *id.* at 1647-48 ("[T]here is no suggestion that the Federal Judiciary is being asked to perform any function that might in some way be described as 'executive.'").

The fact is, lawyers and judges sometimes misread or overstate texts to support their position. Learned Hand described the way some judges reach their conclusions as “sweeping all the chessmen off the table.”<sup>240</sup> One reason we might suspect the Court was so dismissive of the President’s arguments is because an open acknowledgment of constitutional uncertainty did not fit anywhere in the Court’s conception of the case. As with pregnancy, either the President received immunity or he didn’t. Regardless of which side was picked, the other was completely wrong. There was, it seemed, no way to acknowledge the executive’s constitutional principle without siding with the President *carte blanche*. In this light, the question then becomes: What can theoreticians do about this either/or argumentation trap?

## 2. Proposal.

Imagine a different opinion, this one also siding with Jones and against the President. In this opinion, instead of finding that the text and history provide “no support” for the President, and instead of expanding and contracting various precedents to manufacture an ironclad constitutional case for Jones, the Justices would be open about the constitutional uncertainty. Their opinion would acknowledge the strong historical evidence in favor of the President, such as the language used by Story and Jefferson, the text of Articles I and II, and the rather strong similarities between the Court’s earlier *Fitzgerald* decision and the circumstances of Jones’ case. Yet after acknowledging such evidence, the Court would then use the evidence on the other side to say that the matter is uncertain. And then, as its *pièce de résistance*, the Court would argue that a constitutional ruling by the judiciary would freeze the matter permanently and that the proper remedy would have Congress contemplate a statutory response *informed by the articulated constitutional considerations*.<sup>241</sup>

This ruling—an example of what I have called clarification—would be, if nothing else, more honest. The Court could have informed Congress about the potential constitutional problems, thus giving Congress the advantage of the “perspicuity” and “systematic character” of judges.<sup>242</sup> The ruling would also

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240. LEARNED HAND, *Mr. Justice Cardozo*, in *THE SPIRIT OF LIBERTY* 129, 131 (Irving Dillard ed., 3d ed. 1960); see also Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 9 (1966) (“Although an opinion may be born only after deep travail and may be the result of a very modest degree of conviction, it is usually written in terms of ultimate certainty.”). Even Chief Justice Rehnquist, in a recent majority opinion, noted that, although a court may say that its decision is “controlled” by an earlier one, “[c]ourts frequently view their decisions as being ‘controlled’ or ‘governed’ by prior opinions even when aware of reasonable contrary conclusions reached by other courts.” *Butler v. McKellar*, 494 U.S. 407, 415 (1990).

241. As I have already noted, *Jones* did state that a constitutional ruling would freeze the matter. See text accompanying note 224 *supra*. But it undercut any possibility of a constitutional legislative response with its narrow constitutional reading and its bad predictions. See text accompanying notes 221-225 *supra*; text accompanying note 245 *infra*.

242. See text accompanying note 57 *supra* (quoting Madison).

permit the courts to have the benefit of congressional participation in constitutional decisionmaking (does the Constitution speak to suits against sitting Presidents?) and also as to constitutional remedy (what should be done about the constitutional difficulty?). Although it is tempting to think that the Court could not learn anything about constitutional decisionmaking from Congress, this view is almost certainly wrong. For example, the Court could have had the benefit of Congress' interpretation of the "compel attendance" clause of Article I, section 5, and the Arrest Clause of Article I, section 6—two strong structural supports for the President. Indeed, Congress is the only government body that keeps data on its members' private lawsuits. This type of ruling would have given Congress the opportunity to consider a variety of legislative protections for sitting Presidents.

Alternatively, the Court in *Jones* could have resorted to what I have called penalization<sup>243</sup> by construing the relevant statute, 42 U.S.C. § 1983, as not extending to suits against sitting Presidents. The Court could have simply stated that section 1983 does not clearly extend this far and that, in light of the potential constitutional infirmity of a contrary reading, the Court will construe the statute so as to avoid the constitutional problem in the absence of a clear statement from Congress.<sup>244</sup>

Either one of these strategies would have permitted the Court to shine the spotlight on the legislature and prod congressional action. The 105th Republican-dominated Congress is not likely to help the President on its own. By speaking to the constitutional issues, the Court could have aided Congress by helping it frame the issue as not just politics or policy, but one about the Constitution. Thus, some Republicans might vote to free the presidency from the shackles of copycat lawsuits if they think that the Court recognizes constitutional arguments for doing so. But when the Court openly rejects the constitutional arguments in a hyperbolic opinion that states that "it seems unlikely that a deluge of such litigation will ever engulf the Presidency,"<sup>245</sup> it is difficult for Congress to make constitutional arguments in favor of such legislation. In this respect, the Court "interferes" in the legislative process whether or not it uses clarification or penalization. By so strongly dismissing the President's arguments, the Court told Congress not to worry about the constitutional issues. This judicial fiction is thus exported to Congress, where it lies stagnant.

In short, the Court could have acknowledged its uncertainty about the constitutional arguments and then used these doubts to read into the statute a soft

243. See text accompanying notes 49-50 *supra* (explaining penalization as used by the judiciary).

244. See text accompanying notes 335-337 *infra* (describing the doctrine of *Ashwander* avoidance). I have intentionally put the state law claims in *Jones*' complaint to one side, though it is possible for the Court to interpret the relevant state law along the same lines as I suggest for § 1983. Alternatively, the Court could have certified such questions to the Arkansas Supreme Court using decentralization. See text accompanying notes 339-346 *infra*.

245. *Clinton v. Jones*, 117 S. Ct. 1636, 1648 (1997).

constitutional principle favoring immunity. Or it could have acknowledged the constitutional conflict more openly and asked Congress to consider a new statute in light of such difficulties. Instead, the Court slighted these problems and confidently announced overstated constitutional principles.

### 3. Nixon v. Fitzgerald.

The most closely analogous case to *Jones, Fitzgerald*, used clarification. The case concerned whether a former government employee could sue President Nixon for conduct that occurred while Nixon was President, and the Court said that the employee could not.<sup>246</sup> But when carefully parsed, it is clear that the Court simply announced that authorization for civil suits against sitting Presidents could not be inferred from general statutory prohibitions and that there were policy reasons, informed by constitutional considerations, that weighed in favor of exempting the President from such statutes.

The Court's analysis began with an outline of the causes of action: "He stands named as a defendant in a direct action under the Constitution and in two statutory actions under federal laws of general applicability. In neither case has Congress taken express legislative action to subject the President to civil liability for his official acts."<sup>247</sup> The Court then dropped a long and important footnote:

In the present case we therefore are presented only with "implied" causes of action, and we need not address directly the immunity question as it would arise if Congress expressly had created a damages action against the President of the United States. . . . [I]t does not follow that we must—in considering a *Bivens* remedy or interpreting a statute *in light of the immunity doctrine*—assume that the cause of action runs against the President of the United States. Consequently, our holding today need only be that the President is absolutely immune from civil damages liability for his official acts *in the absence of explicit affirmative action by Congress*.<sup>248</sup>

*Fitzgerald*, then, held that if Congress wanted to fashion a statute that put the President within its ambit, it had to say so. Indeed, it went further and advised Congress not to do so, stating that "the President would be an easily identifiable target for suits for civil damages" and that "[c]ognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve" because "there exists the greatest public interest in providing an official 'the maximum ability to deal fear-

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246. See *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

247. *Id.* at 748. *Fitzgerald* had brought suit using the First Amendment under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), and under implied causes of action found in 5 U.S.C. § 7211 and 18 U.S.C. § 1505.

248. *Fitzgerald*, 457 U.S. at 748 n.27 (citations omitted) (second emphasis added); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-14, at 273-74 (2d ed. 1988) (interpreting *Fitzgerald* as a clear statement case).

lessly and impartially with' the duties of his office."<sup>249</sup> The Court simply required a clear statement from Congress, but made such a clear statement difficult by issuing a warning about the potential constitutional problems with such legislation. In this respect, *Fitzgerald* was the intellectual heir to the Court's earlier official immunity cases. In those cases, the Court stated that, unless Congress has explicitly created an exception, executive officials are generally immune from suits for acts performed in the discharge of their official duties.<sup>250</sup> *Fitzgerald* simply took that idea and extended it to the President.<sup>251</sup>

Note the obvious democracy-reinforcing qualities of such a ruling. The Court singled out Congress as the relevant actor and asked it, in light of constitutional difficulties, to consider whether it wanted to adopt a statute that brings the President within its ambit. Rather than grabbing that power for itself, the Court left the decision to a political branch and acted as a facilitator of reasoned debate. It is the same idea of clarification expressed in the eighteenth-century *Rutgers* case: The Court will enforce law that is "clearly expressed and the intention manifest."<sup>252</sup> *Fitzgerald* went further by using penalization, holding that, in light of the constitutional difficulties with a suit against a President, the Court would read the statutes so as not to authorize such a suit in the absence of affirmative acts by Congress. If Congress wants to risk a potentially unconstitutional encroachment on the executive, the Court implied, then it should pass a statute to permit civil suits based on official executive acts. The Court would then, and only then, have to decide the question.

In this respect, *Fitzgerald* provided a blueprint for *Jones*. The constitutional difficulties in *Jones* tugged in favor of giving the President temporary immunity by virtue of his weighty duties as Head of State. The Court could have required Congress to make a clear statement of inclusion (rather than exclusion, which raises no significant constitutional concerns) by following its *Fitzgerald* approach. This strategy would have focused popular accountability

249. *Fitzgerald*, 457 U.S. at 753 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 203 (1979)).

250. See *Barr v. Matteo*, 360 U.S. 564 (1959) (sustaining a ruling that the Acting Director of the Office of Rent Stabilization has absolute privilege); *Spalding v. Vilas*, 161 U.S. 483, 498 (1896) (granting immunity from civil suits for damages to "official communications made by heads of executive departments when engaged in the discharge of duties imposed upon them by law"); cf. *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (construing § 1983 in light of immunity doctrine and stating that the Court could not accept "that Congress . . . would impinge on a tradition [of legislative immunity] so well grounded in history and reason by covert inclusion in the general language before us").

251. On the merits, there is a deep question about whether the official immunity line of cases has firm support and whether that line of cases actually supported Nixon's position in *Fitzgerald*. See *Amar & Katyal*, *supra* note 86, at 710-15 (discussing the problematic concept of permanent immunity). I am therefore relying on *Fitzgerald* as an example of how courts can use a clear statement rule, but am not defending the decision on its merits.

252. See text accompanying note 153 *supra*.

on the relevant political actor, alerted that branch to the constitutional difficulties, and been more honest to boot.

#### 4. *Able v. United States.*

In *Able v. United States*,<sup>253</sup> gay and lesbian members of the armed forces sued the United States, contending that the military's "Don't Ask, Don't Tell" policy was unconstitutional because it violated their rights to speech and equal protection.<sup>254</sup> District Judge Eugene Nickerson agreed in a 1995 opinion, but his opinion was vacated by the Second Circuit, which held that the policy did not violate the Free Speech Clause.<sup>255</sup>

The Second Circuit believed that the policy was constitutional largely because of judicial deference to the military: "In the military context, . . . free speech rights are substantially diminished and the courts' deference to the views of Congress and the military as to the need for speech restrictions based on the requirements of discipline and readiness is high."<sup>256</sup> The court reasoned that judges are "ill-equipped to determine the impact upon discipline," that "judicial deference . . . 'is at its apogee' when reviewing congressional decisionmaking in this area," and that, "unless Congress has specifically provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military . . . affairs."<sup>257</sup>

An argument based on self-alienation strongly supports the Second Circuit's deference-based approach. The argument is that Congress should ask the courts for their views about the constitutionality of a policy affecting the military by explicitly endorsing judicial review in the statute. As the Supreme Court noted in a recent case, the 1996 Line-Item Veto Act<sup>258</sup> contains a provi-

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253. 88 F.3d 1280 (2d Cir. 1996).

254. *See id.* at 1283. The act implementing the policy mandates separation if one or more of three findings is made:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, . . . (2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, . . . (3) That the member has married or attempted to marry a person known to be of the same biological sex.

10 U.S.C. § 654(b) (1994).

255. *See Able*, 88 F.3d at 1299 (vacating *Able v. United States*, 880 F. Supp. 968 (E.D.N.Y. 1995)) ("We also find that the statements presumption restricts speech no more than is reasonably necessary"). It noted, however, that if a separate provision that excludes those who engage in homosexual activity from military service violates the Equal Protection Clause, then the provision restricting speech would be unconstitutional as well. *See id.* at 1300. On remand, the district court declared the policy to be a violation of equal protection. *See Able v. United States*, 968 F. Supp. 850, 865 (E.D.N.Y. 1997).

256. *Able*, 88 F.3d at 1296.

257. *Id.* at 1293-94 (citations and internal quotation marks omitted).

258. Pub. L. No. 104-130, 110 Stat. 1200 (codified at 2 U.S.C.A. § 691 (West Supp. 1997)).

sion somewhat like this.<sup>259</sup> This is the main idea of *Fitzgerald*: A clear statement authorizing review avoids the pitfalls of judicial second-guessing. This concept has origins in Justice Iredell's letter providing the President with advice, which states that judicial meddling is easier "in consequence of" a specific request by a political branch.<sup>260</sup> In terms of *Able*, explicit legislative authorization of judicial review would have the virtue of disaggregating deference issues from First Amendment analysis, allowing courts to evaluate the free speech merits of the policy without addressing the thorny issues of military readiness, which Congress could explore through hearings if necessary. It permits courts to decide honestly the free speech issues without having to water down First Amendment doctrine to fit the facts of the case, a dilution which could adversely impact free speech jurisprudence in later, nonmilitary cases.

What's more, if the courts announced that, in the absence of a clear statement from Congress authorizing review, they were fully abdicating their general role as promulgators of binding constitutional law governing the military, the result could be greater, not lesser, constitutional compliance. Most liberal scholars tend to decry doctrines based on deference and political questions,<sup>261</sup> but sometimes the doctrines can enhance constitutionalism and political accountability. Because courts are generally reluctant to interject their views into military affairs, they are not particularly effective constitutional police for the military.<sup>262</sup> But every time they uphold a military policy with deference-laden review, they legitimize the policy as constitutional. In reality, courts are only rendering pragmatic judgments, deciding that, as a matter of institutional competence, they cannot interfere except in the most egregious cases. Deference thus has the potential to distort constitutional judgments and tolerate—perhaps even encourage—unconstitutional activity both in the case at hand and in later ones.

Self-alienation solves this problem by making policymakers responsible for constitutional compliance. By declaring that a particular matter is not justiciable, a court sends a signal that may compel legislative and executive at-

259. See *Raines v. Byrd*, 117 S. Ct. 2312, 2316, 2318 n.3 (stating that the act provided for a direct and expedited appeal to the Supreme Court); *id.* at 2323 n.1 (Souter, J., concurring) ("While Congress may, by authorizing suit for particular parties, remove any prudential standing barriers, as it has in this case, . . . it may not reduce the Article III minimums.").

260. See note 163 *supra* and accompanying text.

261. See, e.g., JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 55 (1993).

262. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944) (justifying the exclusion of Korematsu from the West Coast by citing the threat of Japanese invasion, military urgency, and congressional confidence in the military in times of war). In general, self-alienation is a wise strategy for those who believe that courts are not ultimately able to preserve liberty. See, e.g., LEARNED HAND, *The Spirit of Liberty*, in *THE SPIRIT OF LIBERTY*, *supra* note 240, at 189, 190 ("Liberty lies in the hearts of men and women; when it dies here, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.").

tion. Because the courts are not making decisions, the political branches must take responsibility for constitutional fidelity. Self-alienation thus ensures that “the buck stops here” for legislatures. The Court can amplify its signal by explicitly coupling deference with counseling about the constitutional difficulties created by an act, thus adopting the strategy I advocated above with respect to *Jones*. Deference does not have to mean silence. Instead, as many early Americans believed, the courts could strongly suggest that an act was unconstitutional, but leave the ultimate decision up to Congress.<sup>263</sup>

Self-alienation thus does not preclude courts from flagging particular constitutional issues for political attention. It only means that courts will not resolve those constitutional issues themselves. At the very least, self-alienation precludes the political branches from claiming victory after a favorable court decision and asserting that their actions have been “affirmed” by the courts. Instead, advicegiving strategies create a judicial-legislative conversation about constitutional responsibility and make the politicians who passed the act popularly accountable for their constitutional decisions.

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263. See text accompanying notes 119-120 *supra*. Again, as with *Jones*, I am only advocating this strategy as an illustration of advicegiving. Although self-alienation is a powerful argument in favor of the Second Circuit’s approach in *Able*, it does not justify the entire result the court reached. After all, the policy covered much more activity than the court acknowledged, as the statute required the instigation of termination procedures for a service member who “has engaged in, attempted to engage in, or solicited another to engage in a homosexual act” or who “has married or attempted to marry” a person of the same biological sex. See note 254 *supra* (providing the relevant portion of the statute). The policy thus was not limited to postentrance military conduct. If a service member “has” engaged in or attempted the conduct, at any time, it could lead to termination. And the accompanying DOD regulations explicitly provided that a premilitary “statement” of homosexuality will trigger a proceeding. See Department of Defense Directive No. 1332.14, 32 C.F.R. § 41 app. A, pt I, § H(1)(c) (1997).

The policy thus restricted speech not only within the military, but also in the civilian context. By joining a gay student association in high school, an individual risked losing her military future. Anyone who thought military service was a possibility had to stay in the closet. When viewed this way, the court’s claims that “free speech rights are substantially diminished” “in the military context” and its reliance on the military “requirement of individual self-sacrifice to collective needs” appear inapposite with respect to these aspects of the policy. *Able v. United States*, 88 F.3d 1280, 1293, 1296 (2d Cir. 1996). The case for deference is naturally much weaker when the regulations affect ordinary civilians; otherwise, the deference exception could swallow the constitutional rule. The fact that the military policy restricted premilitary civilian conduct, however, went unmentioned by the court and both sides in the litigation.

A better approach might have been to use a self-alienation model for the military conduct provisions, ask Congress for explicit authorization to review the matter in a subsequent case, and evaluate the premilitary conduct provisions on their own terms without the taint of deference. Alternatively, if the courts did not want to ask Congress for such authorization, they might have followed the proposed *Jones* strategy: defer completely, but tell Congress about the constitutional doubts engendered by the legislation and ask it to decide the matter. This type of abdication could be coupled with court advice that shines the spotlight of public accountability on particular constitutional concerns.



5. *Turner Broadcasting System, Inc. v. FCC and United States v. Lopez.*

Several other cases demonstrate a similar point. Consider the Court's decision to uphold the 1992 Cable Act's "must-carry" provisions<sup>264</sup> against a free speech challenge brought by cable operators in *Turner Broadcasting System v. FCC*.<sup>265</sup> It reasoned that Congress had "stated interests," supported by "explicit factual findings," that justified the Act.<sup>266</sup> The Court explained that it "owe[d] Congress' findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data," particularly when the issue involves "congressional judgments concerning regulatory schemes of inherent complexity and assessments about the likely interaction of industries undergoing rapid economic and technological change."<sup>267</sup> The Court further reasoned that the failure to provide deference would "infringe on traditional legislative authority to make predictive judgments."<sup>268</sup>

*Turner* is a twist on the strategies suggested in *Jones* (clarification and penalization) and *Able* (self-alienation). *Turner* essentially requires Congress, if it seeks to survive constitutional challenge, to clearly articulate the reasons behind its policies. The Court will defer to Congress' predictive judgments, but Congress must first announce its judgments in clear language. This approach has two virtues. First, it minimizes interference by courts in the legislative process by asking Congress to state clearly why it wants to restrict speech rights and then by refraining from easily second-guessing those determinations. The second virtue is that the Court, by requiring such legislative statements, makes clear that Congress is popularly accountable for its decisions (particularly ones such as these, which smell of being a sweetheart deal for special interests), thus shining the spotlight of accountability on congressional decisions.

The same idea is at work in *United States v. Lopez*,<sup>269</sup> in which the Supreme Court struck down the Gun-Free School Zones Act.<sup>270</sup> The Act made it a federal offense to possess a firearm at a place an individual knows or has reasonable cause to believe is a school zone. The Court held that the Act exceeded Congress' Commerce Clause authority because possession of a gun in a local school zone was not economic activity that substantially affected inter-

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264. See 47 U.S.C. §§ 522, 533-535 (1994).

265. 117 S. Ct. 1174, 1184 (1997). The "must-carry" provision required "cable television systems to dedicate some of their channels to local broadcast television stations." *Id.*

266. *Id.* at 1187.

267. *Id.* at 1189 (internal quotation marks omitted).

268. *Id.* (internal quotation marks omitted).

269. 514 U.S. 549 (1995).

270. See *id.* at 561-63 (invalidating Pub. L. No. 101-647, § 1702(a), 104 Stat. 4789, 4844-45 (codified at 18 U.S.C. § 922(q) (1994))).

state commerce.<sup>271</sup> *Lopez* is the factual converse of *Turner* in that the government did not make a clear statement of facts and purposes in the former, but it did in the latter. In *Lopez*, the Court explained that, while it would “consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce,”<sup>272</sup> the government had conceded that “[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.”<sup>273</sup> Justice Kennedy’s concurrence, joined by Justice O’Connor, explained that “[t]he deference given to Congress has since been confirmed” and ended by explaining that, “[a]bsent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference [the effect of gun possession in school zones and interstate commerce] contradicts the federal balance the Framers designed and that this Court is obliged to enforce.”<sup>274</sup> The idea behind *Lopez* is that if Congress believes an activity substantially affects interstate commerce, it should clearly say so. The virtues of the decision are the same as those of *Turner*: enhancing popular accountability while minimizing judicial interference.<sup>275</sup>

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271. *See id.*

272. *Id.* at 562.

273. *Id.* (quoting Brief for the United States at 5-6, *United States v. Lopez*, 514 U.S. 549 (1995) (No. 93-1260)).

274. *Id.* at 573, 583 (Kennedy, J., concurring).

275. In the administrative law context, courts have often acted similarly when asking an agency to take a second or “hard” look. Although the doctrine is in flux, as a historical matter courts have often required agencies to reexamine and explain the basis for their actions. For example, the D.C. Circuit has said that the Environmental Protection Agency “has a continuing duty to take a ‘hard look’ at the problems involved in its regulatory task, and that includes an obligation to comment on matters identified as potentially significant by the court order remanding for further presentation.” *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973). Other courts have insisted that agencies announce a clear statement of the reasoning and purpose of an agency action before allowing them to proceed. *See, e.g., United States v. Garner*, 767 F.2d 104, 121, 123 (5th Cir. 1985) (finding that the Secretary of Agriculture, acting through the Farmers Home Administration, failed to show that regulatory changes were not arbitrary); *Maryland People’s Counsel v. FERC*, 761 F.2d 768, 774-79 (D.C. Cir. 1985) (invalidating agency’s policy for not considering all relevant factors); *International Bhd. of Teamsters v. United States*, 735 F.2d 1525, 1530 (D.C. Cir. 1984) (holding that the Federal Highway Administration did not act arbitrarily or capriciously in adopting a new rule in order to reduce paperwork); ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 499 (1993). *But see Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549-55 (1978) (holding that the Atomic Energy Commission fulfilled its obligations despite the uncertainties of an environmental impact statement). As the Supreme Court explained, “[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change . . .” *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 42 (1983). *State Farm* led to a resurgence in hard-look decisions. As Judge Wald remarked about the D.C. Circuit, “[U]nder a third of the direct agency appeal opinions this past year (Apr. 1987–Apr. 1988) in which we reversed or remanded (58 reversals or remands out of a total of 159 opinions), we did so on the basis that the agency’s rationale was inadequate.” Patricia M. Wald, *The Contributions of the D.C. Circuit to Administrative Law*, 40 ADMIN. L. REV. 507, 528 (1988).

There are cases, however, where Congress receives minimal deference or where its stated reasons for a policy are later proved wrong. One recent example is the Second Circuit decision in *United States v. Then*,<sup>276</sup> a case involving the Sentencing Guideline's treatment of crack and powder cocaine. A defendant challenged the sentencing scheme on equal protection grounds,<sup>277</sup> and the court, as it had done several times before,<sup>278</sup> rejected the argument.<sup>279</sup> In a concurring opinion, however, Judge Guido Calabresi argued that the constitutional landscape had changed and that "constitutional arguments that were unavailing in the past may not be foreclosed in the future."<sup>280</sup> He noted that the Sentencing Commission had issued a new report determining that "whatever greater danger crack might pose, the harm clearly does not justify the current 100-to-1 sentencing ratio."<sup>281</sup> In addition, he observed that "the statistical evidence demonstrating the discriminatory impact of the current sentencing differential is now 'irresistible.'"<sup>282</sup> The sentencing ratio, Calabresi warned, was heading toward unconstitutionality because new evidence was beginning to erode the stated rational basis for the law.<sup>283</sup> The opinion thus advised the legislature of a potential constitutional difficulty and asked it to reconsider the underlying basis for the statute in light of the new evidence.

The clarification strategy in these cases is the counterpart to legislative delegations to courts, which occurs when Congress passes a vague statute and then asks the courts to define its boundaries.<sup>284</sup> The virtue of clarification is that Congress retains legislative supremacy because it can alter the language of the statute if it disagrees with a particular judicial interpretation. In *Turner and Lopez*, the Court gave advice to Congress about the parameters of the Consti-

276. 56 F.3d 464 (2d Cir. 1995).

277. The defendant claimed that the 100:1 ratio unfairly affected racial minorities, who are statistically the primary consumers of crack cocaine. *See id.* at 466. According to the Sentencing Guidelines, one gram of crack cocaine is considered the equivalent of 100 grams of powder cocaine for the purposes of punishment. *See id.* at 466.

278. *See id.* at 466-67 (Calabresi, J., concurring) (discussing *United States v. Moore*, 54 F.3d 92, 98-99 (2d Cir. 1995) (holding that the 100:1 sentencing ratio did not violate equal protection because it was not enacted with a discriminatory purpose), and *United States v. Stevens*, 19 F.3d 93, 96-97 (2d Cir. 1994) (holding that the sentencing ratio is rationally related to the greater threat posed by crack cocaine)).

279. *See id.* at 465, 466 (holding that the 100:1 sentencing ratio did not violate equal protection).

280. *Id.* at 467 (Calabresi, J., concurring).

281. *Id.*

282. *Id.* (quoting *Moore*, 54 F.3d at 97).

283. *See id.* at 469 (noting that Continental Courts have referenced changed circumstances to explain how previously constitutional laws become constitutionally contentious).

284. For example, in *United States v. Lanier*, 117 S. Ct. 1219 (1997), which dealt with the question whether an individual had "fair warning" when a broad civil rights statute was used to convict a man for sexually harassing women, the statute merely specified that it is a crime to act willfully and under color of law to deprive a person of rights protected by the Constitution or laws of the United States. *See* 18 U.S.C. § 242 (1994).

tution and the legislative findings necessary to support congressional conclusions. Thus, it retained ultimate authority over these matters if Congress does not satisfy its burdens.

The point of clarification is to have Congress focus on particular matters when crafting a statute and to have the legislature make the constitutional determinations in the first instance. Can Congress plausibly say that a given activity affects interstate commerce? Can it really say that the broadcasting industry is jeopardized unless one-third of the cable stations are taken over by the government? The Supreme Court lacks institutional competence to evaluate fully the strength of these contentions. But it does not lack competence to tell Congress what the relevant questions are. If Congress can answer "yes" to these questions with a straight face, then the judiciary will not review those findings. But Congress will be reviewed in the court of public opinion for the answers it gives to the Supreme Court's questions. In the *Turner* and *Lopez* cases, therefore, the Court abided by its institutional limitations while capitalizing on its institutional strengths. In this way, the Court reinforces legislative supremacy, popular accountability, and constitutionalism.<sup>285</sup>

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285. In another governmental immunity case, *Johnson v. Fankell*, 117 S. Ct. 1800 (1997), the Court held that defendant state officials did not have a federal right to an immediate appeal of a state trial court ruling that denied them qualified immunity. See *id.* at 1804-06. The Court also found that § 1983 did not preempt a state procedural law that bars interlocutory appeals and that concerns about federalism are "at [their] apex when we confront a claim that federal law requires a State to undertake something as fundamental as restructuring the operation of its courts." *Id.* at 1807.

The opinion, however, did not put forth a theory about what qualified immunity means. The Court did not have a completely satisfactory answer to the petitioner's basic argument that "preemption is necessary to avoid 'different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court.'" *Id.* at 1804 (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988)). And a previous decision had described the right of defendants sued under § 1983 in federal court to seek an immediate appeal of an adverse qualified immunity decision as an "entitlement." *Mitchell v. Forsyth*, 472 U.S. 511, 524-27 (1985). Just why federal defendants could get immediate appeals but state ones could not was not exactly clear in *Fankell*. The Court's incantations of "federalism" did not do the trick.

There was an obvious answer, however. The Court could have explicitly stated that qualified immunity is a federal defense, but not an entitlement. Qualified immunity originates from Congress' enactment of § 1983 against the backdrop of state common law immunities. See *Procunier v. Navarette*, 434 U.S. 555, 561 (1978) (noting that § 1983 "has been consistently construed as not intending wholesale revocation of the common-law immunity afforded government officials"); *Wood v. Strickland*, 420 U.S. 308, 320 (1975) (noting that common law tradition as well as a strong public policy rationale led to the construction of § 1983); *Scheuer v. Rhodes*, 416 U.S. 232, 239, 241, 244-45 (1974) (discussing the development of qualified immunity at common law and its application in Supreme Court precedent); *Pierson v. Ray*, 386 U.S. 547, 553-54, 557 (1967) (holding that § 1983 did not abolish common law immunity of judges for damages). Qualified immunity is therefore an area into which § 1983 simply does not reach. It is a defense in either state or federal court. But it is not, by itself, an entitlement. Section 1983 itself does not guarantee qualified immunity; the 1871 Congress simply recognized that such common law immunity existed and did not legislate beyond, i.e., preempt, it. Under this interpretation, however, a state is free to create an entitlement to such immunity.

## B. *The Right to Die*

### 1. *Background.*

In *Glucksberg*, the Court held that Washington State's ban on assisting suicide did not violate the Due Process Clause.<sup>286</sup> The opinions in this case serve as nice illustrations of my descriptive and normative points: that courts do engage in this advicegiving function and that they should do so more often. Nevertheless, the Court was quite timid about its rendering of advice, and in the pages that follow, I will show how the Court could have constructed an opinion that was faithful to a model of judicial restraint and that enhanced structuralism.

Chief Justice Rehnquist's majority opinion began with a historical analysis of the right to suicide and found that "our laws have consistently condemned, and continue to prohibit, assisting suicide."<sup>287</sup> The opinion went on to reject analogies to precedents,<sup>288</sup> such as *Cruzan v. Director, Missouri Department of Health*<sup>289</sup> and *Planned Parenthood v. Casey*.<sup>290</sup> After a lengthy discourse about the state's interest, the Chief Justice ended with the startling conclusion that, "[t]hroughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."<sup>291</sup> The Chief Justice's encouragement of a national

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Such a decision would have made clear that states have the power to provide defendant officials with interlocutory appeals and would have clarified the balance between state and federal laws. It would have taken advantage of the judiciary's "systematic and accurate knowledge of the Laws," to borrow Ellsworth's phrase, in a rather complicated area. See text accompanying note 59 *supra*. And the decision might have gone on to provide states with a prescriptive discussion of how federal interlocutory appeals worked in practice so that state courts and legislatures could have some evidence about their utility. The Court thus should have married its idea about federalism to clarification strategies, advising Congress that if it wants § 1983 to encroach on state procedural rules, it should have said so in clear language. This approach would have made it easier for Congress, if it wanted to provide such a federal right, to do so. Instead, by using language about federalism concerns being at their "apex," the Court's opinion makes it sound as if such a congressional decision would be unconstitutional. *Fankell*, 117 S. Ct. at 1807.

286. See *Washington v. Glucksberg*, 117 S. Ct. 2258, 2275 (1997).

287. *Id.* at 2267.

288. See *id.* at 2270-72.

289. 497 U.S. 261, 269-80 (1990) (discussing both the common law and constitutional status of bodily integrity).

290. 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.").

291. *Glucksberg*, 117 S. Ct. at 2275.

debate might appear unusual at first blush, but when viewed in the historical context I described earlier, such words are no aberration.<sup>292</sup>

Justice Souter's advice was more explicit. In an elegant concurring opinion that borrowed heavily from Justice Harlan's dissent in *Poe v. Ullman*,<sup>293</sup> Justice Souter began by setting out a framework for due process analysis.<sup>294</sup> Casting aside the majority's historicist approach, Souter argued that the nature of the current substantive due process framework invited judicial exaggeration. He explained that "when a generally accepted principle is challenged, the broader the attack the less likely it is to succeed. The principle's defenders will, indeed, often try to characterize any challenge as just such a broadside, perhaps by couching the defense as if a broadside attack had occurred."<sup>295</sup> Souter believed that the majority was guilty of overstatement and that it had distorted both the plaintiffs' claim and precedent such as *Casey* to serve its ends.<sup>296</sup> It was this tendency toward overstatement that led Souter to favor Justice Harlan's common law approach to substantive due process: "[T]he usual thinking of the common law is suspicious of the all-or-nothing analysis that tends to produce legal petrification instead of an evolving boundary between the domains of old principles."<sup>297</sup>

After announcing this framework, Justice Souter examined the individual and state interests in light of *Poe*. In his view, the constitutional question came down to the weight of the state interest because, based on analogies to abortion and other medical decisions, "the importance of the individual interest here . . . cannot be gainsaid."<sup>298</sup> Despite the strong individual interest, however, Souter voted to uphold the prohibition on assisted suicide because he believed that the state had an interest in preventing suicide—namely, the rational fear of a slide toward involuntary suicide and euthanasia.

The way in which Justice Souter's opinion reached this conclusion is significant. He realized that the state's interest was built on disputed empirical

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292. See text accompanying notes 79-94, 122-131, 185-186, 190-195, 224 & 249 *supra*. The *Glucksberg* opinion was criticized by many in the popular media on the basis of this language. See, e.g., David Tell, *Suicidal Jurisprudence*, WKLY. STANDARD, July 14, 1997, at 9 (arguing that the court's reasoning "cannot retard the nation's slow but continuing cultural embrace of death" and that "the court has now welcomed that embrace, and—as the majority opinion has it—urged 'this debate to continue'").

293. 367 U.S. 497, 541-45 (1961) (Harlan, J., dissenting) (setting forth an evolving notion of substantive due process based on the history and traditions of America).

294. See *Glucksberg*, 117 S. Ct. at 2277-86 (Souter, J., concurring in the judgment).

295. *Id.* at 2284.

296. See *id.* at 2288 ("The analogies between the abortion cases and this one are several. . . . Like the decision to commit suicide, the decision to abort potential life can be made irresponsibly and under the influence of others, and yet the Court has held in the abortion cases that physicians are fit assistants.").

297. *Id.* at 2284.

298. *Id.* at 2290.

evidence—principally, the Dutch experience with legal assisted suicide.<sup>299</sup> However, as Souter noted, there was much disagreement about the lessons from the Dutch studies. As a result, Souter stated, the state interest was enough to make the statute constitutional, *but only in the present state of affairs*. If, Justice Souter suggested, later studies by states showed that the interest was weaker, then perhaps the result would change.<sup>300</sup> The Supreme Court, however, was not suited to evaluate the dispute at this time:

The principal enquiry at the moment is into the Dutch experience, and I question whether an independent front-line investigation into the facts of a foreign country's legal administration can be soundly undertaken through American courtroom litigation. . . . Since there is little experience directly bearing on the issue, the most that can be said is that whichever way the Court might rule today, events could overtake its assumptions . . . .<sup>301</sup>

Justice Souter's fluid reading of the Constitution is not unusual; it harkens back to Justice Wilson's early view that laws might not be "so unconstitutional as to justify the Judges in refusing to give them effect."<sup>302</sup> Indeed, Justices O'Connor and Breyer have also embraced fluid readings of their own.<sup>303</sup> What is distinctive about Justice Souter's approach is that he took it upon himself to help the states craft policy and research with an eye toward the constitutional landscape of the future. Demarcation with a twist.

Silence on the above point could have been dangerous for constitutionalism and federalism. Without Souter's advice, states might have simply continued their prohibitions without inquiring into the underlying assumptions behind the state interest, assumptions which time could prove false. And if those assumptions are false, then states are complicit in an unconstitutional scheme.<sup>304</sup> Put differently, without Souter's statement the Court might have interfered with public deliberation and encouraged an unconstitutional course of conduct by suggesting that all was fine when it in fact was not. With regards to federalism, Souter spoke as a federal officer in partnership with the

299. *See id.* at 2292.

300. Justice Souter wrote, "The day may come when we can say with some assurance which side is right, but for now it is the substantiality of the factual disagreement, and the alternatives for resolving it, that matter. They are, for me, dispositive of the due process claim at this time." *Id.* (citations omitted).

301. *Id.* at 2292-93.

302. *See* text accompanying note 64 *supra*.

303. *See Glucksberg*, 117 S. Ct. at 2303 (O'Connor, J., concurring) (declining to reach the question of whether "a mentally competent person who is experiencing great suffering" would have a constitutional claim if circumstances changed, such as if there were "legal barriers" to acquiring pain medication); *id.* at 2312 (Breyer, J., concurring in the judgment) (stating that if state law prevented pain treatment, "then the law's impact upon serious and otherwise unavoidable physical pain (accompanying death) would be more directly at issue" and that "the Court might have to revisit its conclusions in these cases").

304. Of course, when an assumption is proved false, courts will be able to step in, but relying on courts to solve constitutional problems risks constitutional infidelity in the interim.

states, helping them avoid constitutional difficulties *ex ante*, instead of simply surprising officials by creating new barriers years down the road.<sup>305</sup>

Yet Souter did even more. After all, politicians do not always listen to narrow technical reasoning by courts about vague hypothetical problems that might one day arise. Souter, however, tried to ensure that legislatures would listen by employing penalization. In careful language, he warned the states that if they did not undertake studies to assess the state interest, then courts might hold their sloth against them; "legislative foot-dragging" might be "significant[t]" because it could mean that "a court may be bound to act" to protect the individual right.<sup>306</sup> But Souter emphasized that at the present time these are only warnings to state legislators:

Now, . . . the Legislature of the State of Washington is no more obviously at fault than this Court is in being uncertain about what would happen if [the plaintiffs] prevailed *today*. . . .

. . . .

. . . The experimentation that should be out of the question in constitutional adjudication displacing legislative judgments is entirely proper, as well as highly desirable, when the legislative power addresses an emerging issue like assisted suicide. The Court should accordingly stay its hand to allow reasonable legislative consideration. While I do not *decide for all time* that . . . [plaintiffs'] claim should not be recognized, I acknowledge the legislative institutional competence as the better one to deal with that claim *at this time*.<sup>307</sup>

From this standpoint, Souter appears to be the heir to the concurring opinion written by Judge Guido Calabresi in the other right to die case decided by the Supreme Court in the 1996 Term, *Quill*.<sup>308</sup> Judge Calabresi, in analyzing New York's prohibition on assistance of suicide, drew attention to the constitutional difficulties it created. In honest language, Calabresi essentially admitted that he couldn't tell whether or not the statute was constitutional; he remarked that *Casey* and *Cruzan* show that the prohibition is "highly suspect," but do not "clearly make [it] invalid."<sup>309</sup> At the very least, Calabresi continued, the statute was close to being unconstitutional because it invaded individual privacy and thus the case would turn on the weight of the state interest.<sup>310</sup> Upon examination of that interest, said Calabresi, it was hard to know whether

305. There is much evidence from the founding that defends a partnership model between the federal government and states, a model similar to the one proposed for the three branches. *See, e.g., THE FEDERALIST PAPERS* NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

306. *Glucksberg*, 117 S. Ct. at 2293.

307. *Id.* (emphasis added).

308. *See Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996) (holding that New York's prohibition on assisted suicide violates the Fourteenth Amendment's Equal Protection Clause), *rev'd*, 117 S. Ct. 2293 (1997) (holding that the prohibition does not violate equal protection).

309. *Id.* at 738.

310. *See id.* at 737-38, 740-43. Note the similarities to Justice Souter's framework. *See text accompanying notes 293-302 supra.*



the people of New York really supported the prohibition as applied to doctors or whether it was merely the product of legislative inertia.

The difficulty arose because the prohibition on assistance of suicide originated in 1828, when suicide was still a crime. Under ordinary criminal law principles, if an underlying act is a crime, being an accessory to it is a crime as well. Calabresi believed that there was strong evidence that the prohibition on assistance of suicide arose out of this legal principle. But when the New York legislature decided to remove the prohibition against suicide in 1919, it did not explain why it left the statute forbidding assistance of suicide on the books. The decision could have been deliberate or accidental. In favor of the accidental interpretation, Calabresi noted, was the fact that no doctor had ever been prosecuted under the statute.<sup>311</sup> Because there was a significant chance that the underpinnings behind the statute had been eroded, Calabresi concluded, he would declare the present statute unconstitutional and give the people of New York the chance to pass a new statute that could be based on different, or more clearly articulated, grounds.

The Calabresi opinion is an excellent example of a second-look opinion. Calabresi admitted that the constitutionality of the New York prohibition was fluid and dependent on the weight of the state interest. He then noted that, among the various plausible state interests, such as the protection of life, none appeared to motivate this particular act.<sup>312</sup> He did not stretch the act to read it as having been motivated by one of these grounds. (This is, I shall argue later, what courts often do under the *Ashwander* avoidance model—with grave consequences for legislatures and comity.) Instead, he declared that the lack of stated mooring in one of these grounds meant that the act was unconstitutional. As far as future legislation was concerned, Calabresi openly advised the legislature of potential constitutional difficulties and reserved judgment.

Calabresi's opinion is notable in two other respects. First, like Justice Souter, he employed penalization to ensure legislative compliance. Indeed, his fuse was set much shorter, as he immediately declared the act unconstitutional in the case at bar, thus telling the legislature that the only possible way to have a statute to prohibit assisted suicide was to heed his opinion and announce a clear purpose. Second, Calabresi's opinion was sunlight-producing in that it advised the legislature and people of New York about the constitutional problems that arise from prohibitions on assistance of suicide. Even if most people would have understood the privacy or liberty arguments without the benefit of his opinion, many probably would not understand the somewhat more difficult equal protection issues he had discussed.<sup>313</sup> The opinion thus forced the legis-

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311. See *Quill*, at 732 n.1, 733, 735 n.9.

312. See *id.* at 741-43.

313. Because most citizens tend to defer to the opinions of judges in interpreting the Constitution, moreover, sound judicial exegesis—without hydraulic distortion by the facts of an immediate case—is particularly important. On the hydraulic nature of nonadvisory judicial review, see text

lature to make an explicit policy choice and, if it wanted to maintain its ban on assistance of suicide, to explain its substantive reasons for doing so. The eventual upshot of the opinion might only be that New York would pass the exact same statute, but would do so with full knowledge of the constitutional difficulties and would be forced to articulate clearly its purpose. The advice, in short, might *help*, rather than hinder, New York in its attempt to craft a constitutional prohibition on assistance of suicide. The alternative creates judicial mystery by giving courts the option to negate every possible incarnation of such legislation until the state stumbles upon the right justification. The Calabresi opinion was, in many ways, a highly sophisticated version of judicial restraint.

The *Quill* concurrence exemplifies one of a number of ways in which courts give advice to legislatures. The problem with the opinion was not its reasoning, but its facts. The legislature in 1990 appeared to have explicitly affirmed the prohibition on assistance of suicide, so Calabresi's notion of legislative inertia and desuetude seemed, at least to some, inappropriate for the given case.<sup>314</sup> And so the concurrence went without explicit mention by the Supreme Court. Instead, the Court decided that New York's prohibition on assistance of suicide did not violate the Equal Protection Clause.<sup>315</sup>

## 2. Proposal.

Might the Court have used a different tactic that combined advicegiving functions with structural considerations? Though no brief in the case suggested it, I believe that the Court missed a crucial opportunity to use decentralization in *Quill*.<sup>316</sup> Begin with Judge Calabresi's observation that no doctor has ever been prosecuted under the New York statute. The state prohibition was drafted in general language in 1819, and it has retained its general language ever since. As such, it is not clear whether or not the statute even applies to doctors.

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accompanying notes 221-240, 245, 262-263 & 295-297 *supra* and text accompanying notes 324, 374-376 & 429-430 *infra*.

314. See N.Y. PUB. HEALTH LAW §§ 2982(1), 2989(3) (McKinney 1993) (permitting a competent person to designate an agent who has "authority to make any and all health care decisions on the principal's behalf that the principal could make," but stating that the "article is not intended to permit or promote suicide, assisted suicide, or euthanasia; accordingly, nothing herein shall be construed to permit an agent to consent to any act or omission to which the principal could not consent under law"). See generally Jeffrey Rosen, *What Right to Die?*, NEW REPUBLIC, June 24, 1996, at 28 (criticizing Calabresi on these grounds); Cass Sunstein, *The Right to Die*, 106 YALE L.J. 1123 (1997) (applauding Calabresi's approach in *Quill* as "democracy-supporting," but finding the approach inapplicable in the right to die context because most states consider the subject at length before legislating).

315. See *Vacco v. Quill*, 117 S. Ct. 2293 (1997).

316. The application of this strategy to *Glucksberg* raises different questions, as Washington State appears to have expressly rejected physician-assisted suicide in recent years. See 1992 Wash. Laws, ch. 98, § 10.

Despite this statutory ambiguity, everyone in the case simply assumed that the New York act would prohibit *doctors* from providing assistance to terminally ill patients at the end of their lives.<sup>317</sup> The state's interest in keeping such people alive is, from one vantage point at least, quite weak,<sup>318</sup> and doctors, by dint of their professional training and general lack of nefarious personal motive, might not be subject to the act when acting in their medical capacity. These matters are naturally open to dispute, but the vague words of the New York statute themselves do not reveal what the legislature thought. In many other areas of the law, courts are commonly asked to answer this type of interpretive question and decide whether a particular category or class is covered by a given statute. With a state statute at issue, a state court determination about the reach of the New York statute would have been more appropriate under standard principles of federalism:

If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law. Avoidance of such guesswork, by holding the litigation in the federal courts until definite determinations on local law are made by the state courts, merely heeds this time-honored canon of constitutional adjudication.<sup>319</sup>

In *Quill*, the Court might have used statutory ambiguity as a mechanism to embrace its advicegiving function. Instead of imposing a federal reading of the statute and assuming that it applied to doctors, the Court could have acknowledged the statute's uncertain scope and let New York courts interpret the meaning of their statute. The Supreme Court has repeatedly said that when the relevant state provisions "have never been interpreted by" a state court, waiting for a "state court decision . . . could conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritant in the fed-

317. See Guido Calabresi, Keynote Address at American Association of Law Schools Convention (Jan. 8, 1998) (on file with the *Stanford Law Review*) (emphasizing the ambiguity of the New York and Washington statutes and the need for a state court interpretation of them).

318. As Judge Minor put it in the Second Circuit majority opinion, "[W]hat interest can the state possibly have in requiring the prolongation of a life that is all but ended?" *Quill*, 80 F.3d at 729.

319. *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) (citations omitted); see also *Albertson v. Millard*, 345 U.S. 242 (1953). The Court stated in *Albertson* that "[i]nterpretation of state legislation is primarily the function of state authorities, judicial and administrative" and that "[t]he construction given to a state statute by the state courts is binding upon federal courts" and deemed "it appropriate . . . that the state courts construe this statute before the District Court further considers the action." *Albertson*, 345 U.S. at 244-45; see also *Chicago v. Fieldcrest Dairies, Inc.* 316 U.S. 168, 172 (1942) (holding that, in the absence of an "authoritative and controlling determination by the state tribunals" construing the state law, an issue requiring construction of the law should be left "to the state courts, which alone can give a definite answer"); text accompanying notes 339-346 *infra* (discussing the decentralization strategy used by the Court in *Arizonans*).

eral-state relationship” and that federal courts should stay their “hand while the parties repair to the state courts for a resolution of their state constitutional questions.”<sup>320</sup> This rule has, as the Court has observed, particular salience in the criminal context.<sup>321</sup> The court could have implemented this strategy in two ways: seek direct certification to the New York Court of Appeals or note the statutory ambiguity, refuse to decide the constitutional question, and let the issue percolate in the New York courts.

There is a lot to be said for these approaches. For one thing, they would have been much more respectful to the states than was the Second Circuit’s majority opinion, and perhaps more respectful than was the Supreme Court decision. When federal courts delay intervening by asking state courts to interpret the scope of their statutes, the respect saves “time, energy, and resources and helps build a cooperative judicial federalism.”<sup>322</sup> If the Court was worried that it would take too long to let the issue percolate through the state courts, it could have expedited matters through certification. This would have been more faithful to comity than a federal interpretation of a state statute. It also would have taken seriously Justice O’Connor’s exhortation that the “challenging task of crafting appropriate procedures for safeguarding . . . liberty interests is entrusted to the laboratory of the States . . . in the first in-

320. *Reetz v. Bozanich*, 397 U.S. 82, 86-87 (1970); *see also Henry v. Mississippi*, 379 U.S. 443, 452-53 (1965) (“By permitting the Mississippi courts to make an initial determination of waiver, we serve the cause[] of . . . harmonious federal-state judicial relations. . . . The Court is not blind to the fact that the federal habeas corpus jurisdiction has been a source of irritation between the federal and state judiciaries.” (citation omitted)); *Jackson v. Denno*, 378 U.S. 368, 392-96 (1964) (denying writ of habeas corpus because a state defendant should first proceed through state courts).

321. As the Court wrote in 1941:

[C]ourts of equity do not ordinarily restrain criminal prosecutions. . . .

This is especially the case where the only threatened action is the prosecution in the state courts by state officers of an alleged violation of state law . . . . The state courts are the final arbiters of their meaning and appropriate application . . . .

Hence interference with the processes of the criminal law in state courts, in whose control they are lodged by the Constitution, and the determination of questions of criminal liability under state law by federal courts of equity can be justified only in most exceptional circumstances . . . .

*Beal v. Missouri Pac. R.R. Corp.*, 312 U.S. 45, 49-50 (1941) (citations omitted); *see also Watson v. Buck*, 313 U.S. 387, 401-02 (1941).

322. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974); *see also Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207 (1960) (refusing to decide issues of state law before the state’s supreme court construed the statute); Philip P. Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 487-92 (1960) (discussing the abstention doctrine, its problems, and the potential for a cooperative judicial federalism); Note, *Inter-jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. PA. L. REV. 344, 305, 362 (1963) (noting that interjurisdictional certification prevents federal invasion of the state law-making function, avoids needless federal-state friction, is more efficient, and as a result, is “a more perfect attempt at cooperative judicial federalism”). In my view, the arguments based on federalism and competence are somewhat stronger than those based on judicial minimalism. For a criticism of minimalism-based arguments, see Mark Tushnet, *How to Deny a Constitutional Right: Reflections on the Assisted-Suicide Cases*, 1 GREEN BAG 2D 55, 63 (1997).

stance" and would have ensured that states fulfill this obligation by undertaking extensive and serious evaluation of physician-assisted suicide.<sup>323</sup>

Another reason in favor of this strategy is institutional competence. State courts are better situated to decide the meaning of their state statutes than are federal courts. They have a unique insight into their state's legislative processes and quirks. Apart from constitutional issues regarding comity, then, state courts should generally be favored in determining questions about the meaning of a statute. What's more, the approach would avoid the hyperbolic tendency of courts to downplay constitutional problems by exaggerating the evidence in favor of a statute's constitutionality, as exemplified by *Glucksberg's* reading of *Casey* and *Cruzan*,<sup>324</sup> as well as *Quill's* complete failure, despite building an opinion around the action/inaction distinction, to mention that one member of the *Quill* majority had earlier declared that distinction "irrelevan[t]" because "the cause of death in both cases is the suicide's conscious decision to pu[t] an end to his own existence."<sup>325</sup>

The approach would have squared nicely with several familiar constitutional precepts. In particular, it would have gained support from doctrines of ripeness, *Pullman* abstention, exhaustion requirements, and *Ashwander* avoidance. Ripeness generally requires federal courts to decide issues only when they must; judges are empowered to make constitutional determinations "only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough."<sup>326</sup> In *Quill*, there were strong questions about whether the lawsuit was hypothetical because the statute might not have applied to doctors. Indeed, the fact is that none of the physician-plaintiffs in the case had even been convicted under the statute. Rather, the doctors were seeking declaratory and injunctive relief to prevent the threat of future prosecutions. But it is rather an odd matter for plaintiffs to ask a federal court to restrain a state from enforcing an unused state statute, particularly when the statute's reach is not clear. Ripeness is designed to prevent courts "from entangling themselves in abstract disagreements . . . through premature adjudication."<sup>327</sup> Standard considerations of

323. *Washington v. Glucksberg*, 117 S. Ct. 2258, 2303 (1997) (O'Connor, J., concurring) (citation and quotation marks omitted).

324. Just as with *Jones*, the Court overstated the strength of its arguments in *Glucksberg* in an attempt to sledgehammer any opposition. See *id.* at 2271 (arguing that *Casey* does not support petitioner's "sweeping conclusion," even though *Casey* states that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992))). The majority's hypernarrow reading of this precedent was attacked by Justice Souter. See note 296 *supra*.

325. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 296-97 (1990) (Scalia, J., concurring) (alteration in original).

326. *United Pub. Workers of America v. Mitchell*, 330 U.S. 75, 90 (1947).

327. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967).

ripeness would suggest that federal courts should not decide the scope of the statute due to statutory ambiguity.<sup>328</sup>

Particularly so when we recall that what is at issue is not a federal statute, but a state one.<sup>329</sup> In such circumstances, federal courts use a variety of doctrines to enforce notions of comity and respect for state courts. The classic doctrine is *Pullman* abstention, whereby unsettled issues of state law are remitted to state court.<sup>330</sup> *Pullman* abstention serves to avoid decision of constitutional issues, as well as to minimize the risk that a federal decision will interfere with the role of state courts as “the principal expositors of state law.”<sup>331</sup>

The requirement of exhaustion—that litigants must, in general, first exhaust state administrative remedies—echoes this idea. For example, except in carefully limited circumstances, federal habeas corpus defendants are not permitted to raise issues they did not raise before the state courts.<sup>332</sup> Again, the requirement is “grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner’s federal rights.”<sup>333</sup> *Pullman* abstention and exhaustion address the proper *timing* of federal intervention in state court matters and the need to respect state court autonomy.

One other way in which federal courts attempt fidelity to both timing issues and comity is through the avoidance of constitutional questions doctrine. The point is encapsulated in Justice Brandeis’ famous concurrence in *Ashwan-*

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328. See *Parker v. County of Los Angeles*, 338 U.S. 327, 332-33 (1949) (“[T]his Court’s experience admonishes us not to entertain constitutional questions in advance of the strictest necessity. Decent respect for California and its courts demands that this Court wait until the State courts have spoken . . . [T]hese cases . . . are not ripe for decision . . .”).

329. See *Rescue Army v. Municipal Court*, 331 U.S. 549, 573-74 (1947) (“To the more usual considerations of timeliness and maturity, of concreteness, definiteness, certainty, and of adversity of interests affected, are to be added in cases coming from state courts involving state legislation those arising when questions of construction, essentially matters of state law, remain unresolved or highly ambiguous.”).

330. See *Railroad Comm’n v. Pullman Co.*, 312 U.S. 496, 500-01 (1941) (holding that because “the constitutional issue does not arise . . . [i]f there was no warrant in state law” for the challenged regulation, a state court should first decide the validity of the regulation under state law so as to “avoid the waste of a tentative decision as well as the friction of premature constitutional adjudication”).

331. *Moore v. Sims*, 442 U.S. 415, 429 (1979).

332. See, e.g., *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9-10 (1992) (noting that state prisoners are required by statute and common law to exhaust state remedies before seeking federal habeas relief). Cf. *Ex parte Royall*, 117 U.S. 241, 250-53 (1871) (observing that, before conviction, federal courts have discretion to discharge a defendant from custody, but that this discretion should be “subordinated to any special circumstances requiring immediate action” by the state).

333. *Coleman v. Thompson*, 501 U.S. 722, 731 (1991); see also *Rose v. Lundy*, 455 U.S. 509, 518 (1982) (“The exhaustion doctrine is principally designed to protect the state courts’ role in the enforcement of federal law and prevent disruption of state judicial proceedings.” (internal quotation marks omitted)).

*der v. TVA*:<sup>334</sup> Federal courts should not decide constitutional questions unless they are pressed to do so.<sup>335</sup> Of the seven canons Justice Brandeis catalogued as illustrations of this principle, the most famous is the saving construction doctrine (or “*Ashwander* avoidance,” for short), which states that federal courts will construe statutes so as to avoid constitutional problems.<sup>336</sup> This axiom is grounded in comity with political branches, federalism, and ripeness.<sup>337</sup> In *Quill*, the Court could have used *Ashwander*-like considerations to say that the statute was ambiguous enough that the Court would not decide the question at the present time, but instead would wait for illumination on the issue from the New York courts.

My claim is not that any of these four doctrines, by itself or in combination with others, would have settled the question in *Quill*. It is rather that when they are taken together, the interstices of these doctrines yield support for the advicegiving approach.<sup>338</sup> These doctrines explain why the approach provides

334. 297 U.S. 288 (1936).

335. See *id.* at 346 (Brandeis, J., concurring) (observing that the Court had developed, “for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision”). For an incisive explanation of this doctrine, see Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1945-49 (1997) (suggesting that the duty to construe statutes to avoid constitutional problems underpins two main principles of statutory interpretation: the canon of avoidance and the doctrine of severability).

336. For expressions of the doctrine, see *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”); *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909) (“It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one . . . it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity.”); *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800) (stating that the 1789 Judiciary Act “must . . . receive a construction . . . consistent with the constitution”).

337. Cf. *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 138 (1974) (suggesting that ripeness furthers the prudential policy of “judicial restraint from unnecessary decision of constitutional issues”). *Ashwander* avoidance has been criticized as a way for courts to interfere with legislative primacy by conjuring up novel readings that have no grounding in reality. See Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 94-95. Moreover, the twisting of a statute’s language may create problems in later cases in which there is no constitutional difficulty; once the language is twisted, it may take on a life of its own. While not a complete answer, modifying the timing of *Ashwander* avoidance can help minimize the problem, at least when state statutes are involved. In the state context, *Ashwander* avoidance can be used with abstention doctrines so that federal courts provide state courts with the chance to use *Ashwander* first. This technique was recently suggested by the Supreme Court in *Arizonans*. See text accompanying notes 339-346 *infra*. All the federal court would do is note the statutory ambiguity and ask for a state court decision out of deference to the policies behind the *Ashwander* doctrine: ripeness and federalism. Because state courts have a much greater understanding of the peculiar legislative and political dynamics at work in their jurisdiction, they—not the federal courts—should be the first ones to use the doctrine.

338. Doctrines like *Pullman* abstention are therefore not just negative ideas designed only to create a blind deference to the states. They can also be used to enhance constitutional federalism by providing deference to the states while at the same time lending a helping hand that allows state

a superior solution from the standpoint of timing (because federal courts should generally avoid constitutional questions not considered by state courts), federalism (because federal courts generate friction when they do not permit state courts to interpret the meaning of their own statutes in the first instance), and institutional competence (because state courts are better able to interpret their statutes than are federal courts).

### 3. *Arizonans for Official English v. Arizona*.

It is now time to discuss a recent case where the Court got it exactly right. In *Arizonans*, decided just a few months before the right to die cases, the Court correctly applied notions of abstention and *Ashwander* avoidance, thereby serving the goals of federalism, proper timing, and institutional competence. The issue in the case was whether Arizona's "English-only" law violated the First Amendment. The Ninth Circuit held that it did, and the Supreme Court was inundated with briefs from a plethora of amici about the wisdom or terror engendered by the new law.

The Court did not decide the merits of the case. Instead, it scolded the Ninth Circuit for deciding the constitutionality of the matter without an authoritative interpretation of the law by the Arizona Supreme Court. The unanimous opinion opened this way: "Federal 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. The Ninth Circuit, in the case at hand, lost sight of these limitations."<sup>339</sup> As the previous section explained, both of these arguments were slighted by the same Court in *Quill*. There, as in *Arizonans*, it was not clear that the state prohibition had an "actual impact on the challenger," nor was it clear that the federal circuit court should "rule definitively on the meaning of state legislation."

The inattention to these arguments in the *Quill* opinion, coming from a unanimous Court only months earlier, is striking. Particularly so when *Arizonans* both leads with these arguments and returns to emphasize them later; the opinion is in fact built on these arguments. The Court stated that such questions should be certified:

Is this conflict really necessary? When anticipatory relief is sought in federal court against a state statute, respect for the place of the States in our federal system calls for close consideration of that core question.

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officials to keep their oath to the Constitution. Federal abstentions can be coupled with advice about the constitutional difficulty created by a particular interpretation, thus putting state courts on notice that a given interpretation may raise such concerns. Such federal advice might also flag the issue for popular attention and lead to a modification of the statute by the legislature, thereby enhancing democratic decisionmaking.

339. *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1059 (1997) (citations omitted).



Certification . . . allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response.<sup>340</sup>

The Court then explained that certification would enhance federalism and partnership: "Through certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save 'time, energy, and resources and hel[p] build a cooperative judicial federalism.'"<sup>341</sup>

The Court found that seeking an authoritative state court interpretation was not in tension with *Ashwander* avoidance because, even though federal courts follow this "cardinal principle," so too do state courts.<sup>342</sup> Because of the absence of any reason why the state court could not decide the issue, the Supreme Court held that the Ninth Circuit made a dramatic mistake:

Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court. "Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when . . . the state courts stand willing to address questions of state law on certification from a federal court."

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. . . The Arizona Supreme Court was not asked by the District Court or the Court of Appeals to say what Article XXVIII means. . . . Once that court has spoken, adjudication of any remaining federal constitutional question may indeed become greatly simplified.<sup>343</sup>

By now the point is clear: *Arizonans* was part of a long tradition of federal-state dialogue through decentralization. As the Court realized, this tradition's pedigree reached at least as far back as *Pullman*<sup>344</sup> and Justice Harlan's important dissent in *Poe*<sup>345</sup> (a fact which makes Justice Souter's omission in his *Quill* concurrence even more interesting) and has become part and parcel of modern jurisprudence.<sup>346</sup>

340. *Id.* at 1072-73 (citations and footnote omitted).

341. *Id.* at 1073 (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)).

342. *Id.* at 1074 ("State courts, when interpreting state statutes, are similarly equipped to apply that cardinal principle. See *Knoell v. Cerkenik-Anderson Travel, Inc.*, 185 Ariz. 546, 548, 917 P.2d 689, 691 (1996) (citing *Ashwander*).").

343. *Id.* at 1074-75 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'Connor, J., concurring)).

344. *See id.* at 1073.

345. *See id.* ("[N]ormally this Court ought not to consider the Constitutionality of a state statute in the absence of a controlling interpretation of its meaning and effect by the state courts." (quoting *Poe v. Ullman*, 367 U.S. 497, 526 (1961) (Harlan, J., dissenting))).

346. *See id.* at 1074-75 (citing recent Supreme Court cases). There were, of course, distinctions between *Arizonans* and *Quill*. For one thing, as the Court noted, the Arizona Supreme Court had

In *Arizonans*, the Supreme Court held that, for reasons of cooperative federalism, it would not decide the constitutional issue until it had to; the Court thus sought an initial state court adjudication of the meaning of the statute. This is, in short, exactly the approach the Court might have taken in *Quill*.

#### 4. Kansas v. Hendricks.

*Quill* is not the only recent case where the Supreme Court did not fully consider state court primacy. *Kansas v. Hendricks*<sup>347</sup> concerned Kansas' Sexually Violent Predator Act, which permitted the state to continue to confine "sexual predators" for an indefinite length of time after their scheduled release from jail.<sup>348</sup> Leroy Hendricks, convicted of child molestation in 1984, was confined under the Act in 1994, the year of the Act's passage. He challenged his confinement on several constitutional grounds, and the U.S. Supreme Court granted certiorari to decide whether Hendricks' confinement violated the Ex Post Facto and Due Process Clauses of the Constitution.

The Court, in a five to four decision, said that the confinement was constitutional. It justified the confinement as necessary for treatment and declared that the Act was not motivated by a punitive purpose. It explained that the Act's text demonstrated a therapeutic, not punitive, motive and that even if the Act was also motivated by the desire to incapacitate sexual predators, incapacitation was not necessarily a punitive goal. Because the Act was not punitive, the Court reasoned, it did not violate the Ex Post Facto Clause.

But the majority faced one crucial problem: The Kansas Supreme Court had already decided that the Act was not motivated by treatment and that the Act was punitive.<sup>349</sup> In addition, the two most relevant precedents, *Pearson*<sup>350</sup>

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a case pending, at the time, in which it might interpret the Arizona statute. *See id.* at 1075. The New York Court of Appeals, by contrast, did not have a case before it involving doctors. But the fact that a case is already present before the courts is of no real import because a federal court can certify state issues to a state court with little delay. A second difference might be that the New York statute was not as ambiguous as the Arizona one. But the lack of any prosecution against a doctor in almost 200 years is of some significance and certainly enough to qualify the issue for certification. *Cf.* *Bellotti v. Baird*, 428 U.S. 132, 148 (1976) (stating that, to warrant certification, "[i]t is sufficient that the statute is susceptible of . . . an interpretation [that] would avoid or substantially modify the federal constitutional challenge to the statute").

Perhaps a final dissimilarity is that the theory might not have worked in *Glucksberg* and that the Court would have had to decide a constitutional issue in any event. *See* note 335 *supra*. Assuming the premise is true with respect to Washington, it still does not follow that the Court should have usurped New York's role in interpreting its own statute. The point of *Arizonans* is that certification and abstention benefit the states as mechanisms to respect comity. The fact that the Court might have had to decide a constitutional issue in *Glucksberg* does not make *Quill* any easier for New York to swallow. This is particularly so because the issue in *Glucksberg* involved only due process, whereas *Quill* concerned equal protection.

347. 117 S. Ct. 2072 (1997).

348. KAN. STAT. ANN. § 59-29a01 (1994).

349. The Kansas Supreme Court wrote:

and *Allen*,<sup>351</sup> required the U.S. Supreme Court to use the construction of the state supreme court rather than substituting its own. In *Pearson*, the Court considered whether Minnesota's Sexually Dangerous Persons Act was constitutional. The Court held that the state court's interpretation of the statute was controlling: "In advance of a decision by the state court applying the statute to [the present issue], we should not adopt a construction of the provision which might render it of doubtful validity."<sup>352</sup> In *Allen*, the Court considered whether Illinois could confine sexually dangerous persons. Because Illinois' highest state court had deemed its statute "essentially civil" and had described "the aim of the statute being to provide 'treatment, not punishment,'" the Supreme Court deemed the statute not punitive.<sup>353</sup> A host of other cases make the same point: that the federal courts should not second-guess state court interpretations of the purpose or meaning of their own laws.<sup>354</sup> In *Romer v. Evans*,<sup>355</sup> for example, the Court held: "We rely not upon our own interpretation of the amendment but upon the authoritative construction of Colorado's Supreme Court."<sup>356</sup>

To make matters worse in *Hendricks*, the Court had to struggle with the Kansas Supreme Court's decision that the Act was not motivated by treatment. This fact was, after all, the centerpiece argument in the dissent, which attracted four votes.<sup>357</sup> On the other hand, the majority did have some strength in its contention that the Kansas Supreme Court opinion did not completely rule out treatment as a goal of the statute and in its reference to the dispute as to whether *Hendricks* himself was actually receiving treatment.<sup>358</sup> In light of these two ambiguities, the majority would have been on stronger footing had it remanded the case so that the Kansas Supreme Court could reconsider its earlier pronouncements about Kansas' law. The Kansas Supreme Court could have had the benefit of having the U.S. Supreme Court clarify the relevant is-

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It is clear that the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent. . . . [T]he provisions of the Act for treatment appear somewhat disingenuous.

*In re Hendricks*, 912 P.2d 129, 136 (Kan. 1996), *rev'd*, 117 S. Ct. 2072 (1997).

350. *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940).

351. *Allen v. Illinois*, 478 U.S. 364 (1986).

352. *Pearson*, 309 U.S. at 274.

353. *Allen*, 478 U.S. at 367 (quoting *Allen v. Illinois*, 107 Ill. 2d 91, 99-101 (1985)); *see also id.* at 380 (Stevens, J., dissenting) (describing the state court as "the final authority on the . . . purpose" of the statute).

354. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) ("We must . . . accept the State Court's view of the purpose of its own law."); *see also Hernandez v. New York*, 500 U.S. 352, 366-70 (1991) (plurality opinion); *Edwards v. Aguillard*, 482 U.S. 578, 594, n.15 (1987).

355. 116 S. Ct. 1620 (1996).

356. *Id.* at 1624.

357. *See Kansas v. Hendricks*, 117 S. Ct. 2072, 2092-93 (1997) (Breyer, J., dissenting).

358. *See id.* at 283-85.

sues with regard to the meaning and actual effect of the statute, and the U.S. Supreme Court could have had the benefit of a determination by the court best suited to the task.

In sum, *Quill* and *Hendricks* did not defer to state court interpretation but should have, whereas *Arizonans* should have and did. Decentralization advicegiving (in the form of certification) in *Quill* would have permitted the conversation about the scope of the state statute to continue. Instead, the Court assumed that it could independently divine the statute's true meaning. Its failure to solicit the guidance of the state court created a somewhat premature constitutional adjudication that minimized dialogue and cooperation.

### C. Gray v. Netherland

#### 1. Background.

The issue in *Gray*, an important death penalty case, was whether the *Teague* "new rule" doctrine<sup>359</sup> barred the defendant from challenging his state court sentence on the ground that the prosecutor violated *Brady*<sup>360</sup> by ambushing him at the sentencing phase of his capital trial. (The prosecutor, on the eve of the sentencing phase, decided to introduce evidence showing that the defendant had murdered another woman and her three-year-old daughter which was against the prosecutor's explicit promise to the judge and defense attorneys earlier in the proceedings not to introduce the evidence.) Under the *Teague* new rule doctrine, habeas relief is appropriate only if "a state court considering [the petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution."<sup>361</sup> In a hair-splitting opinion, a five-Justice majority rejected Gray's petition because the *Brady* line of "cases do[es] not compel a court to order the prosecutor to disclose his evidence."<sup>362</sup>

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359. See *Teague v. Lane*, 489 U.S. 288 (1989).

360. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

361. *Saffle v. Parks*, 494 U.S. 484, 488 (1990).

362. *Gray v. Netherland*, 116 S. Ct. 2074, 2084 (1996). According to the majority, the relevant precedents were *Gardner v. Florida*, 430 U.S. 349, 362 (1977), which held that a defendant may not be sentenced to death "on the basis of information which he had no opportunity to deny or explain"; *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977), which stated that "[i]t does not follow from the prohibition against concealing evidence favorable to the accused that the prosecution must reveal before trial the names of all witnesses who will testify unfavorably"; and *Wardius v. Oregon*, 412 U.S. 470, 476 (1973), which noted that "[i]t is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State."

A four-Justice dissent attacked the majority. Beginning with the general claims that "precedent decided well before 1987 'dictates' the conclusion that Gray was not accorded due process at the penalty phase of his trial" and that "[t]here is nothing 'new' in a rule that capital defendants must be afforded a meaningful opportunity to defend against the State's penalty phase evidence," the dissent explained how existing precedent compelled a ruling for Gray.<sup>363</sup> Beginning with *Baldwin v. Hale*<sup>364</sup> and tracing the doctrine up through cases such as *Gardner v. Florida*<sup>365</sup> and *Weatherford v. Bursey*,<sup>366</sup> the dissenters argued that the rule Gray sought was not new and that his habeas petition should have been granted.<sup>367</sup>

What concerns us here is not the legal soundness of the *Gray* decision, but rather what judges can do when their hands are tied by procedural obstacles. The procedural bar is not a muzzle to prevent either a majority or a minority of the Justices from speaking out on the merits. Indeed, the Court has, since the time of *Marbury*, reached the merits even when it lacked, or arguably lacked, jurisdiction.<sup>368</sup> This power is important because the dispensation of advice is necessary to preclude the Court's jurisdictional decisions from being misunderstood as ones on the merits. The narrow technical holding in *Gray*, for example, could be used to legitimate the execution. Consider Justice Jackson's thoughts in his *Korematsu* dissent:

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, . . . the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon . . . Every repetition embeds that principle more deeply in our law and thinking and expands it to new purposes. . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.<sup>369</sup>

The vexing problem is one of improper jurisgenerative legitimacy. Political actors often hide behind court decisions and use them as authority for

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363. *Gray*, 116 S. Ct. at 2089-90 (Ginsburg, J., dissenting).

364. 68 U.S. (1 Wall.) 223 (1864).

365. 430 U.S. 349 (1977).

366. 429 U.S. 545 (1977).

367. See *Gray*, 116 S. Ct. at 2090-92 (Ginsburg, J., dissenting).

368. See text accompanying notes 122-124 *supra* (discussing *Marbury*); see also *Norton v. Matthews*, 427 U.S. 524, 530-31 (1976) (deciding merits and not jurisdiction); *McLucas v. De-Champlain*, 421 U.S. 21, 32 (1975) (same).

369. *Korematsu v. United States*, 323 U.S. 214, 245-46 (1944) (Jackson, J., dissenting).

dubious propositions. It is not uncommon for governors to draw on the Court's denial of certiorari or its denial of a death row inmate's procedural claims as evidence of an execution's propriety. In a recent Illinois case, Governor Edgar denied commutation because "the U.S. Supreme Court rejected [the defendant's] appeals on four occasions" and because the Illinois Supreme Court had affirmed his conviction; in Edgar's view, the "case has had a full, fair review by our legal system, and it is time for the penalty to be carried out."<sup>370</sup> Faced with the real potential for improper legitimation, what could concerned Justices in a case like *Gray* do?

## 2. Proposal.

Self-alienation and demarcation are tools crafted for the improper legitimacy problem. Governors have, after all, the power to grant clemency in death penalty cases. The power of clemency is consistently emphasized by the more conservative members of the Court in death penalty cases. The argument runs something like this: While procedural bars and other technicalities might look unfair, it is important to remember that courts do not have the last word on the matter because governors always have the power to commute a sentence of death.<sup>371</sup> The argument is infused in the Court's death penalty jurisprudence. And while it has conservative origins, it can have a liberal effect.

A procedural bar essentially means that a court cannot exercise its own power to prevent an execution. It does not mean that a court has no influence over an execution, particularly when the procedural bar is debatable. Imagine that the Court, either in the *Gray* case or in a subsequent habeas proceeding, called upon the governor to give the case close consideration for commutation precisely because the Court could not exercise control over the matter under its *Teague* jurisprudence. The statement would emphasize the

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370. Emily Wilkerson, *Edgar Denies Mass Murderer's Death Penalty Appeal*, STATE JOURNAL-REGISTER (Springfield, Ill.), Sept. 17, 1996, at 7. Another example of improper legitimation occurs when the Court denies certiorari in a case challenging the constitutionality of a statute or other piece of legislation and the denial is used to legitimate a particular policy. See, e.g., Paul Hefner, *Court Upholds Prop. 209, Affirmative Action Foes Not Giving Up*, L.A. DAILY NEWS, Nov. 4, 1997, at N1.

371. Chief Justice Rehnquist gives an example of such a statement:

Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.

....

Executive clemency has provided the "fail safe" in our criminal justice system. . . .

....

. . . History shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency.

*Herrera v. Collins*, 506 U.S. 390, 411-12, 415, 417 (1993) (footnotes and citations omitted).

constitutional doubts that the prosecutor's *Brady* violations created and, while not deciding the merits, could flag the issues for the governor.

What are we to make of such an opinion? On the one hand, it seems to be interfering in state functions. But a carefully drafted statement that was designed to shine sunlight on the matter, rather than directly calling for commutation, could avoid this criticism. Indeed, the statement could be toned down to emphasize simply that the Court's denial of certiorari is not an implicit blessing to let the execution go forward and that serious issues remain that the Court cannot consider due to legal barriers. Those legal barriers should not, the statement could emphasize, preclude executive consideration of the sentence.

There is much to be said in favor of the approach. As judges are the only federal officials with life tenure, they stand in a unique position to provide states with unpopular advice. And recommending the commutation of a death sentence is almost always unpopular. By flagging particular issues for consideration, the Court draws attention to a matter and encourages political accountability and open debate.<sup>372</sup> The Court, moreover, has a tremendous amount of institutional expertise when it comes to analyzing matters of criminal procedure, such as the prosecutor's statements in *Gray*. It can do more than decide, in automatic fashion, whether a particular rule is "compelled" by precedent; because of the enormous number of criminal cases and petitions, it may be able to provide advice about whether the state acted in a heinously unfair, and perhaps unconstitutional, manner. The Justices have a "systematic and accurate knowledge of the Laws" and an unparalleled understanding of fundamental fairness because they apply these laws every day.<sup>373</sup>

Finally, if courts do not feel they can use advicegiving, it is not unreasonable to believe they will manipulate procedural bars in ways that lack integrity to achieve a particular outcome. In particular, when courts cannot advise governors about the strong case for commutation, they may aggrandize that power for themselves by casting aside their *Teague* jurisprudence in sympathetic cases. Recall what Justice Jackson once stated: "When the penalty is death, we, like state court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned

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372. Indeed, Justice Scalia has made at least one statement respecting the denial of certiorari that educated the public in a death penalty case. *See, e.g., O'Dell v. Netherland*, 117 S. Ct. 631, 631 (1996) (statement of Scalia, J., respecting the grant of certiorari) ("My vote was to deny the petition for certiorari in this case . . . , but I think it important to point out that the issue on which certiorari has been granted, and for which stay has been accorded, has nothing to do with O'Dell's claimed innocence of his crime."). The issue of O'Dell's innocence had been discussed in virtually every paper in America, and Pope John Paul had called for the Supreme Court to hear the case due to the defendant's possible innocence.

373. *See* text accompanying note 59 *supra* (discussing judicial expertise in understanding the law).

man another chance.”<sup>374</sup> (Viewed in this light, the availability of my proposed option might have reduced the pressure the four dissenting Justices faced in *Gray* to claim that “[t]here is *nothing* ‘new’” in the constitutional rule *Gray* was seeking.<sup>375</sup>) To the extent that courts distort doctrine to achieve a result in a given case, their manipulation could have unintended consequences in later cases because “hard cases make bad law.” If the Court watered down the *Teague* doctrine for a sympathetic petition, its ruling would have precedential effect in later, less sympathetic cases and risk an even greater interference with state procedures.<sup>376</sup>

Even if the Court does not explicitly call for commutation, there is much that it could do to ensure that states listen. I have advocated one such strategy in particular cases, penalization. The Court could warn governors, for example, that if they do not take their commutation responsibilities seriously, courts will have to exercise heightened review (just as Justice Souter warned legislatures about the consequences of “foot-dragging” in *Glucksberg*). In other words, if part of the underlying theoretical basis for procedural bars like *Teague* is that courts do not have the last word and yet it turns out, in practice, that courts really are the only entities to screen executions for error, then the Court might have to rethink its rules. Again, although this fuse seems to be judicial aggrandizement at first blush, it might not be any more aggressive than the simple exercise of judicial review. The big difference is that the Court gives governors a chance to take their obligation seriously before it acts on its own. It can be more, not less, deferential to states.

### 3. *Contrast: Texas v. Hopwood.*

In *Hopwood*,<sup>377</sup> the Court of Appeals for the Fifth Circuit struck down the University of Texas Law School’s affirmative action program and overruled *Bakke*.<sup>378</sup> The details of the case are not important here. Suffice it to say that the case had numerous procedural difficulties, or “vehicle problems,” that might have precluded the Court from reaching the underlying

374. *Stein v. New York*, 346 U.S. 156, 196 (1953).

375. *Gray v. Netherland*, 116 S. Ct. 2074, 2090 (1996) (Ginsburg, J., dissenting) (emphasis added). For similar arguments about how advicegiving encourages judicial honesty, see text accompanying notes 221-240, 262-263 & 324 *supra* and text accompanying notes 429-430 *infra*.

376. One reason the *Teague* doctrine might exempt “actual innocence” cases from its reach is not, as liberals would have it, that such cases are too important, but rather that the *Teague* doctrine might be watered down in order to provide relief in sympathetic cases and that this doctrinal weakening, in turn, would have precedential force in nonactual innocence cases.

377. *Hopwood v. Texas*, 84 F.3d 720 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996).

378. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); see also *Hopwood*, 84 F.3d at 724 (denial of rehearing en banc and dissent) (“The majority of the panel overruled *Bakke* . . . That was not their prerogative, yet this court declined to reconsider *Hopwood* en banc.”). On the Fifth Circuit’s misrepresentation of precedent and usurpation of Supreme Court authority, see generally Akhil Reed Amar & Neal Kumar Katyal, *Bakke’s Fate*, 43 UCLA L. REV. 1745 (1996).



merits. Because of the vehicle problems, many observers believed that the Court was almost certain to deny the case (although I will argue in a moment that vehicle problems can also be a reason *for* the court to take a particular case). If the Court denied certiorari in *Hopwood* and followed Bickelian silence, however, it would be read by virtually everyone as endorsing the Fifth Circuit's drastic analysis and overturning of *Bakke*.

In a statement that countered this misperception, Justices Ginsburg and Souter tacked language that explained the vehicle problem onto the order denying certiorari in *Hopwood*.<sup>379</sup> The statement began by signaling the Court's interest in taking a similar case: "Whether it is constitutional for a public college or graduate school to use race or national origin as a factor in its admissions process is an issue of great national importance."<sup>380</sup> But it then explained why, though the issue was important, this was not the proper case to take:

The petition before us, however, does not challenge the lower courts' judgments that the particular admissions procedure used by the University of Texas Law School in 1992 was unconstitutional. . . . Accordingly, we must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition.<sup>381</sup>

The statement thus made plain that the Court had not weighed in on one side of the issue and that its denial of certiorari should not be understood as legitimization of the decision.

A similar idea has been at work in other denials of certiorari, such as Justice Stevens' statement last Term, joined by Justices Ginsburg and Breyer, that the Court would not review a Louisiana Supreme Court opinion permitting the imposition of the death penalty for statutory rape alone because the conviction was not final.<sup>382</sup> Such statements serve the function of correcting a possible misunderstanding by the public and also warn political branches that the issue is still open. (Those in universities know that the Ginsburg/Souter statement has been quoted by many defenders of affirmative action in response to pressures to comply with *Hopwood*.)

The two Justices in *Hopwood* might have modified their statements and gone even further to give both the state and federal governments advice

379. See *Texas v. Hopwood*, 116 S. Ct. 2581, 2581-82 (1996) (statement of Ginsburg, J., respecting the denial of certiorari).

380. *Id.*

381. *Id.* at 2582.

382. See *Bethley v. Louisiana*, 117 S. Ct. 2425, 2425-26 (1997) (statement of Stevens, J., respecting the denial of certiorari). Justice Stevens wrote:

It is well settled that our decision to deny a petition for writ of certiorari does not in any sense constitute a ruling on the merits of the case in which the writ is sought. That is certainly true of our decision to deny certiorari in this case. It is worth noting the existence of an arguable jurisdictional bar to our review. . . . Petitioner has been neither convicted of nor sentenced for any crime.

*Id.* (citations omitted).

about the types of arguments that they might be concerned about, particularly if there were evidentiary issues or studies that needed to be conducted (such as data about minority applicants, studies about diversity's effectiveness, and the like). In that way, the Court could have encouraged states to create the evidentiary record that would permit them to rule on the issue with full knowledge.

Just a month or so after the *Hopwood* statement, Chief Judge Richard Posner did exactly that in *Wittmer v. Peters*,<sup>383</sup> an affirmative action opinion dealing with boot camps. The defendants argued that the boot camp would not succeed if a black male was not appointed to a position of authority and Posner agreed. He reasoned that the government had brought forth expert testimony that "black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority"<sup>384</sup> and that, although the evidence was not conclusive, it was sufficient for the time being:

It is true, as the district court pointed out, that the defendants' expert witnesses had had little experience with boot camps and that the social scientific literature on which they relied does not focus on such institutions. The reason is that these institutions are too recent to have been studied exhaustively, given the leisurely pace at which most academic research proceeds. If academic research is required to validate any departure from strict racial neutrality, social experimentation in the area of race will be impossible despite its urgency. Roughly half the prison population of the United States is black. On the conception of strict scrutiny advanced by the plaintiffs, the first boot camp that tried to alter the racial composition of its staff would be enjoined. It would be impossible to accrue experience on the issue and the whole boot camp experiment might fail if, as the defendants' experts believe, its success requires some departure from racial neutrality.<sup>385</sup>

In other words, Posner argued that the only way to obtain the data was to permit the boot camp to go forward with race-conscious promotions. And in the event that the government would misunderstand the importance of the data, he concluded with a poignant reminder:

We do not hold that after correctional boot camps have been around long enough to enable thorough academic (or academic-quality) study of the racial problems involved in their administration, prison officials can continue to coast on expert evidence that extrapolates to boot camps from the experts' research on conventional prisons. Maybe such studies exist, for there have been correctional boot camps since 1983. But the plaintiffs do not claim that there are any such studies, and our own research has not turned up any. We hold only that on the record compiled in the district court, the preference that the administration

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383. 87 F.3d 916 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 949 (1997).

384. *Id.* at 920.

385. *Id.*

of the Greene County boot camp gave a black male applicant for a lieutenant's job on the ground of his race was not unconstitutional.<sup>386</sup>

Posner thus used penalization and attached a fuse to the opinion that told the state to conduct studies and obtain data to justify their claims about the need for black supervisors in the boot camps. Although his language comes in the context of a majority Seventh Circuit opinion rather than as a statement respecting the denial of certiorari in the Supreme Court, the opinion serves the same function as would the modified *Hopwood* statement suggested above.

In fact, in *Lackey v. Texas*,<sup>387</sup> decided the Term before *Hopwood*, Justice Stevens made a statement respecting the denial of certiorari that provided the states with such advice. The issue concerned whether executing a prisoner who spent some seventeen years on death row violated the Eighth Amendment. The Court denied certiorari, and Stevens crafted a statement designed to signal the importance of the issue. His statement began by noting the "importance and novelty of the question presented," but then explained that those same reasons "provide a principled basis for postponing consideration of the issue until after it has been addressed by other courts." He then explained why the prisoner had a powerful claim, both because a seventeen-year delay might have been unreasonable to the framers of the Eighth Amendment and because the delay would not serve either retribution or deterrence.

Justice Stevens did not come out and say he definitively believed that the Eighth Amendment was violated. He mentioned the strength of the prisoner's claim, thereby alerting state and federal officials that the Court's denial of certiorari was not "a ruling on the merits," and explained why denying certiorari in the case would serve cooperative federalism and the interests of justice:

[D]enial of certiorari on a novel issue will permit the state and federal courts to 'serve as laboratories in which the issue receives further study before it is addressed by this Court.' Petitioner's claim, with its legal complexity and its potential for far-reaching consequences, seems an ideal example of one which would benefit from such further study.<sup>388</sup>

The judicial pronouncements in *Hopwood*, *Wittmer*, and *Lackey* show how judges can clarify misunderstandings through their written opinions and how they may seek to put states on notice about constitutional claims.<sup>389</sup> In

386. *Id.* at 920-21 (citation omitted).

387. 514 U.S. 1045 (1995).

388. *Id.* at 1047 (statement of Stevens, J., respecting the denial of certiorari) (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983)).

389. The Connecticut Supreme Court adopted a strong variant of this approach in *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996), which held that the state's school financing scheme violated the Connecticut Constitution. The court explained that it is "crucial for a democratic society to provide all of its schoolchildren with fair access to an unsegregated education" and that the failure

*Hopwood*, the statement assured state governments that the Court had not decided that diversity programs were unconstitutional. In *Wittmer*, the court explained why, even though it upheld the affirmative action program, the state needed to obtain data to avoid a future declaration of unconstitutionality. And in *Lackey*, the statement asked state courts and lower federal courts to begin examining a potentially revolutionary new issue. The three cases thus provide a blueprint for the judicial advice I suggest might have been given in *Gray*.

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to do so would create "significant social costs." *Id.* at 1289 (citation omitted). Despite its decision that the financing scheme was unconstitutional, however, the court declined to take the further step of fashioning a remedy. Because of "the complexities of developing a legislative program" and "[p]rudence and sensitivity to the constitutional authority of coordinate branches of government," the court believed that "further judicial intervention should be stayed 'to afford the General Assembly an opportunity to take appropriate legislative action.'" *Id.* at 1290 (quoting *Horton v. Meskill*, 376 A.2d 359, 376 (1977)).

Having decided not to fashion a remedy, the court then took it upon itself to advise the legislature about the need to do so immediately:

In staying our hand, we do not wish to be misunderstood about the urgency of finding an appropriate remedy for the plight of Hartford's public schoolchildren. Every passing day denies these children their constitutional right . . . [and] shortchanges these children in their ability to learn to contribute to their own well-being and to that of this state and nation.

*Id.* And the court pointedly warned the legislature at the end of its opinion that "the Superior Court is directed to retain jurisdiction." *Id.* at 1291.

The Connecticut Supreme Court's opinion in *Sheff* thus educated the legislature about the constitutional parameters to which it must adhere when fashioning a remedy. In doing so, it probably unconsciously followed a strategy, first suggested by Larry Sager, that courts should set basic guidelines based on the Constitution and then let state legislatures pick policies within those guidelines. See Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1218-20 (1978) (explaining that when a constitutional norm is "underenforced," a distinction exists between the extent to which the judiciary may enforce the norm and the extent to which the norm is otherwise valid and enforceable); Lawrence Gene Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 419-28 (1993) (exploring the marked discrepancy between the range of matters addressed in constitutional case law and the range of serious political concerns). In other words, the court provided strong judicial advice—that the school financing scheme was unconstitutional—and coupled that advice with a short fuse—that the legislature must remedy the matter or the court would do so on its own. The beauty of the decision is that, by separating out the advice and fuse issues, the court was able to avoid the problem many other state courts have faced in similar litigation: Declaring a school financing statute unconstitutional requires judicial remedies that smell of legislative usurpation. That problem has led many state courts to manipulate text and history to simply affirm their financing schemes as constitutional rather than to confront the thorny issues surrounding remedies. See Neal Kumar Katyal, *The Republican Guarantee of Education* 36-40, 102-07 (unpublished manuscript, on file with author). *Sheff* teaches that courts, by creatively deciding when not to decide a matter, may hew to both a constitution-protecting and legislature-respecting line. The Connecticut Supreme Court's decision thus evokes the notion, suggested in my earlier discussion of *Gray*, that judicial dialogue in lieu of much judicial review may be both more deferential to political entities such as legislatures, as well as better suited to enforcing constitutional norms.

## D. New York v. United States

### 1. *Background.*

The *New York* case involved a federalism-based challenge to the Low-Level Radioactive Waste Policy Amendments Act.<sup>390</sup> The Act contained three different “incentives” designed to encourage states to dispose of radioactive waste. The first two incentives, which provided federal monetary grants for compliance to states and authorization for states to increase the cost of access to their disposal sites, were upheld by the Court.<sup>391</sup> But the third incentive, the so-called “take title” provision, was declared unconstitutional.<sup>392</sup> The take title provision provided that if a state could not dispose of its own waste, the state government would be required to take title and possession of the waste and that the state would be liable for all damages as a result of the waste. The Court, in a divided opinion, held that the take title provision “commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”<sup>393</sup>

There is a deep idea underlying *New York*, and it is an idea that is central to this article—namely, that political interactions between governments often work to hide responsibility and political accountability. The third provision in the Act was problematic because it permitted the federal government to externalize the hard work onto state governments and make it look as if they, not the federal government, were responsible for their hazardous waste decisions:

[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate . . . .<sup>394</sup>

*New York* stands for the proposition that the federal government cannot cloud the channels of political accountability by interfering with state legislative processes. Readers will note that this article has built on the positive idea behind *New York* and has tried to carve out a role for the federal courts as enforcers of political accountability and producers of sunlight.

But *New York* is also helpful because it is a clear illustration of exemplification. Justice O’Connor’s opinion gave the federal government several ways in which it could accomplish the same end as the take title provision:

390. Pub. L. No. 99-240, 99 Stat. 1842 (codified at 42 U.S.C. §§ 2021b-j (1992)).

391. See *New York v. United States*, 505 U.S. 144, 173-74 (1992).

392. See *id.* at 176-77.

393. *Id.* at 176 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 288 (1981)).

394. *Id.* at 169.

This is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State's policy choices. Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests. Two of these methods are of particular relevance here.

First, under Congress' spending power, "Congress may attach conditions on the receipt of federal funds." . . . Similar examples abound. See, e.g., *Fulilove v. Klutznick*; *Massachusetts v. United States*; *Lau v. Nichols*; *Oklahoma v. United States Civil Service Comm'n*.

Second, where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. *Hodel v. Virginia Surface Mining & Reclamation Assn, Inc*. This arrangement . . . is replicated in numerous federal statutory schemes. These include the Clean Water Act; the Occupational Safety and Health Act of 1970; the Resource Conservation and Recovery Act of 1976; and the Alaska National Interest Lands Conservation Act.

By either of these methods, . . . the residents of the State retain the ultimate decision as to whether or not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program, and they may continue to supplement that program to the extent state law is not pre-empted. Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.

By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.<sup>395</sup>

The Court therefore gave examples of ways to accomplish what the take title provision sought to do, through invoking either the spending power or pre-emption authority. The Court's suggestion of constitutional methods reduced the sting of judicial review and aided a congressional attempt to find a workable solution to the radioactive waste crisis. When closely parsed, *New York* appears to be written in a precise exemplification style; the tone is one of trying to work with, rather than against, Congress. Indeed, Justice O'Connor began and ended her majority opinion with paragraphs that stressed the constitutional methods by which Congress could regulate radioactive waste.<sup>396</sup>

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395. *Id.* at 166-68 (citations omitted).

396. See *id.* at 149 ("We conclude that . . . Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders . . ."); see also *id.* at 188.

## 2. Proposal.

*New York*, simply put, is a striking use of exemplification and shows how the Court can give advice to legislatures about ways to craft constitutional laws. This advice is particularly helpful when the Court takes the ultimate step of striking down a statute, for it reveals the limits of the opinion while maintaining constitutional fidelity. Such advice, moreover, is an important step in the creation of cooperative dialogue between the branches and can soften the blow of judicial review. The *New York* case teaches us that the Court can be the faithful servant of constitutionalism and act as a partner with the legislature at the same time.<sup>397</sup>

But it is at this point that we should consider a matter that I have been intentionally avoiding until now: the difference between separate and majority opinions. This issue raises itself because the advicegiving in *New York* was done by the majority, whereas in *Printz v. United States*,<sup>398</sup> a recent case that struck down portions of the Brady Handgun Act, it was done by a one-Justice concurrence.<sup>399</sup> Sometimes advicegiving will come in the form of

397. Another illustration of exemplification is obscenity. For example, the Court in *Freedman v. Maryland*, 380 U.S. 51 (1965), used exemplification in explaining how a state could fashion a constitutional procedure to prevent the sale of obscene material. Maryland required films to be given to a Board of Censors before they could be shown, and the Court struck down the statute as a prior restraint that chilled speech. See *id.* at 59-60. The Court then went on to observe that a constitutional "model" for future legislation "is not lacking" and proceeded to describe New York's method for preventing the sale of obscene books, which the Court had upheld as constitutional. See *id.* at 60. And in another example of exemplification, the Court announced a more explicit test for the regulation of obscenity in *Miller v. California*, 413 U.S. 15, 24 (1973) ("A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."). *Miller* then went on to provide examples of constitutional statutes, stating that, although "it is not our function to propose regulatory schemes for the States, . . . [i]t is possible, however, to give a few plain examples of what a state statute could define for regulation" under the "patently offensive" test. *Id.* at 25. These examples included "representations or descriptions of ultimate sexual acts," "masturbation," and "excretory functions." *Id.*

398. 117 S. Ct. 2365 (1997).

399. In *Printz*, the Court examined whether a 1993 amendment to the federal Gun Control Act, which restricts the sale of handguns, violates the Tenth Amendment. See 18 U.S.C. § 922(s)(1)(A)(i) (1994). The Act required the Attorney General to establish a national instant background check system by November 30, 1998, and, in the interim, to have firearms dealers require prospective purchasers to make a statement about their identity and verify that they are not prohibited purchasers and to have those dealers provide the local "chief law enforcement officer" with copies of such statements. See *id.* Despite its popular appeal and evident success, the Court struck down portions of the Act. It explained that political accountability was diminished because, by "forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." *Printz*, 117 S. Ct. at 2382.

But Justice O'Connor reassured the public that the decision was not the last word and that Congress could craft a constitutional act. In a remarkable concurrence that made this sole point, she said, "Our holding, of course, does not spell the end of the objectives of the Brady Act. States and chief law enforcement officers may voluntarily continue to participate in the federal program. Moreover, the directives to the States are merely interim provisions scheduled to terminate Novem-

such concurrences, and it is worth speculating about the different forms advicegiving can take. One reason why Justices write opinions that splinter off from majority ones is because they seek to give advice, and a question thus arises about the problems of advice when it is given by a minority of the Court. It is, of course, natural for an opinion to have more predictive power if it has more Justices behind it, and so the power of advice can be undercut in situations in which only one Justice explicitly agrees with it.<sup>400</sup> The general power of advicegiving is thus at its height when a majority of Justices sign on to it.

Suppose that advicegiving takes the form of a one-Justice concurrence or dissent. Such a writing can, in appropriate circumstances, have some advantages. It might permit one member of the Court (and an influential one in some cases) to define her thinking without having to tone down the opinion to meet the wishes of her colleagues. It thus might be more candid and provide more, not less, guidance in the event that the Court is deadlocked four to four on an issue (as it was in *Printz*). Even if the Court is not deadlocked, the opinion might at least, as Justice Ginsburg has emphasized, educate the political branches about “the strength of a minority view.”<sup>401</sup> In other cases, a one-Justice concurrence or dissent might clarify the holding of the Court and describe the areas of agreement. Furthermore, separate opinions can have the virtue of building institutional legitimacy by maximizing comity. If an opinion criticizes a political entity, a sole writing might be more respectful, and hence more appropriate, to that entity. Other Justices might feel no

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ber 30, 1998.” *Id.* at 2385 (O’Connor, J., concurring). Her next words went on to provide a way for Congress to pass the same basic legislation:

Congress is also free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs. See, e.g., 23 U.S.C. §402 (conditioning States’ receipt of federal funds for highway safety program on compliance with federal requirements).

*Id.* In this passage, Justice O’Connor followed her *New York* exemplification advice and made clear that if the federal government simply tied its state grants to participation in the program, Congress would be “free” to provide such grants. She thus tempered the bitter pill of *Printz* with a solution that paid proper respect to the legislature. Her language was quoted widely following the decision—in virtually every major American newspaper—and there is no doubt that it will influence the course of future legislation. See, e.g., *Court Strikes Heart of Brady Gun-Control Law*, AUSTIN-AMERICAN STATESMAN, June 28, 1997, at A1 (“In a concurring opinion, Justice Sandra Day O’Connor wrote, ‘Our holding, of course, does not spell the end of the objectives of the Brady Act.’ O’Connor noted that states and police may voluntarily continue the background checks.”); Linda Greenhouse, *Appealing to the Law’s Brooding Spirit*, N.Y. TIMES, July 6, 1997, § 4, at 1; David Jackson, *Justices Strike at Brady Law*, DALLAS MORNING NEWS, June 28, 1997, at 1A; Robert C. Post, *States’ Right Rulings: A Tempest in a Constitutional Teapot*, L.A. TIMES, July 6, 1997, at M2.

400. Advicegiving might increase the number of unanimous or near unanimous holdings because the Court might be less inclined to disagree when the holdings are minimalist ones.

401. Ruth Bader Ginsburg, *Remarks On Writing Separately*, 65 WASH. L. REV. 133, 145 (1990) (quoting L. BLOM-COOPER & G. DREWRY, *FINAL APPEAL: A STUDY OF THE HOUSE OF LORDS IN ITS JUDICIAL CAPACITY* 89 (1972)).



need to sign on, as the one-Justice opinion has made the relevant arguments and further Court pressure could be viewed as unwise interference.

Sometimes, however, strong pressure and interference is not only permissible, it is appropriate. Pressure was necessary in the judicial review case of *Cooper v. Aaron*,<sup>402</sup> and so the opinion was actually signed by all nine Justices. There may be other, less obvious matters in which advicegiving by a majority is a virtual necessity in order to command respect and provide adequate guidance.<sup>403</sup> But the existence of such cases should not blind us to the possibility of advicegiving's utility in other cases and contexts.

### 3. *Hill v. Wallace and the Trade-Mark Cases.*

Other cases lend credence to the approach in *New York*. In the pre-New Deal case *Hill*, for example, the Court struck down the first federal Future Trading Act,<sup>404</sup> which imposed a tax on all futures contracts for the sale of grain on the Chicago Board of Trade. The Court found that futures sales were not in themselves interstate commerce and that the tax violated the Tenth Amendment. Chief Justice Taft, however, went beyond the narrow dictates of the case to write a majority opinion that told the Congress how to enact a constitutional statute:

Looked at in this aspect and without any limitation of the application of the tax to interstate commerce, or to that which the Congress may deem from evidence before it to be an obstruction to interstate commerce, we do not find it possible to sustain the validity of the regulations as they are set forth in this act. . . . [Congress] did not have the exercise of its power under the commerce clause in mind and so did not introduce into the act the limitations which certainly would accompany and mark an exercise of the power under the latter clause.

....

. . . [The sales for future delivery] can not come within the regulatory power of Congress as such, unless they are regarded by Congress, from the evidence before it, as directly interfering with interstate commerce so as to be an obstruction or a burden thereon.<sup>405</sup>

Taking the hint, Congress shortly enacted a new Grain Futures Act.<sup>406</sup> The text of the this Act proclaimed that manipulation of futures markets on the Chicago Board of Trade was obstruction on interstate commerce and

402. 358 U.S. 1, 4 (1958) (ordering Little Rock School Board to desegregate despite refusal by the Arkansas Governor and Legislature to recognize the binding force of *Brown*).

403. Dissents will thus provide the most helpful advice when they fulfill Charles Curtis' description of them as exercising "a curious concurrent jurisdiction over the future" and a "formal appeal for a rehearing by the Court sometime in the future." CHARLES CURTIS, *LIONS UNDER THE THRONE* 75 (1947).

404. Pub. L. No. 675, § 3, 42 Stat. 187, 187 (1921) (repealed 1922).

405. *Hill v. Wallace*, 259 U.S. 44, 68-69 (1922).

406. Pub. L. No. 331, § 3, 42 Stat. 998, 999 (1922) (codified as amended at 7 U.S.C. § 6(a)(1) (1994)).

therefore subject to federal regulation. The next year, in *Board of Trade v. Olsen*,<sup>407</sup> the Supreme Court sustained the validity of the second act. Chief Justice Taft again wrote the opinion:

The Grain Futures Act which is now before us differs from the Future Trading Act in having the very features the absence of which we held in the somewhat carefully framed language of the foregoing quotations [in *Hill*] prevented our sustaining the Future Trading Act.

....

In the act we are considering, Congress has expressly declared that transactions and prices of grain in dealing in futures are susceptible to speculation, manipulation and control which are detrimental to the producer and consumer and persons handling grain in interstate commerce and render regulation imperative for the protection of such commerce and the national public interest therein.<sup>408</sup>

To take another case that demonstrates exemplification principles, the Court confronted the question of Congress' power over trademarks in an 1879 decision.<sup>409</sup> Congress, in its very first attempt to regulate trademarks, provided for registration of trademarks in the Patent Office and created civil and criminal penalties for trademark infringement and misappropriation.<sup>410</sup> Individuals were indicted under the Act, and the question before the Court was whether Congress had the power to enact the trademark statute when the Constitution only gave Congress authority over copyrights and patents. The Court, in an opinion by Justice Miller, struck down the act, claiming that if Congress'

main purpose [was] to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress.

... Here is no requirement that such person shall be engaged in the kind of commerce which Congress is authorized to regulate.<sup>411</sup>

Congress, years later, took the Court's advice and enacted a new law that copied the Court's words.<sup>412</sup>

These cases thus provide empirical support for the idea that when the Court strikes down legislation, it can provide advice to Congress about ways to

407. 262 U.S. 1 (1923). For a discussion of the case, see E.F. Albertsworth, *Advisory Functions in Federal Supreme Court*, 23 GEO. L.J. 643, 651-52 (1935).

408. *Olson*, 262 U.S. at 32, 37.

409. See *Trade-Mark Cases*, 100 U.S. 82 (1879).

410. See Act of Aug. 14, 1876, ch. 274, 19 Stat. 141 (concerning punishment for counterfeiting of trade-marked goods); Act of July 8, 1870, ch. 230, 16 Stat. 198 (revising, amending, and consolidating the statutes relating to patents and copyrights).

411. *Trade-Mark Cases*, 100 U.S. at 96-97.

412. See 15 U.S.C. § 81 (1905) (repealed 1946); see also Albertsworth, *supra* note 407, at 656 & n.63 (pointing out that Congress' language copied the syllabus of the *Trade-Mark Cases*: "If an Act of Congress can in any case be extended as a regulation of commerce to trade-marks, it must be limited to their use 'in commerce with foreign nations, and among the several States, and with the Indian tribes.'" (quoting *Trade-Mark Cases*, 100 U.S. at 82 (1879))).

craft a constitutional statute—and Congress will listen. The Court has also rendered such advice in the context of judicial review of state legislation. To take one set of examples, in *Nixon v. Herndon*<sup>413</sup> the Court struck down a Texas statute that barred “a negro [from being] eligible to participate in a Democratic party primary election held in the State of Texas.”<sup>414</sup> The Court held that the statute discriminated against colored voters, was an “act of the State,” and thus violated the Fourteenth Amendment.<sup>415</sup> The next year, the Texas legislature repealed the provision and inserted a provision that “[e]very political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party.”<sup>416</sup> In 1932, in *Nixon v. Condon*,<sup>417</sup> the Supreme Court found this an act of the state in violation of the Fourteenth Amendment as well. Justice Cardozo’s opinion for the Court, however, gave Texas a way to craft a constitutional statute:

Whether the effect of Texas legislation has been to work so complete a transformation of the concept of a political party as a voluntary association, we do not now decide. Nothing in this opinion is to be taken as carrying with it an intimation that the court is ready or unready to follow the [minority plaintiff] so far. . . . Whatever our conclusion might be if the statute had remitted to the party the untrammelled power to prescribe the qualifications of its members, nothing of the kind was done.<sup>418</sup>

The Texas Democratic Convention adopted a resolution a few days after the decision, providing that all white citizens who were qualified to vote were eligible for membership, but excluding “all negroes” from voting and participating in the primary elections.<sup>419</sup> The Supreme Court three years later upheld the constitutionality of the resolution, stating, “The court declared that a proper view of the election laws of Texas, and their history, required the conclusion that the Democratic Party in that State is a voluntary political association . . . .”<sup>420</sup>

The *Nixon* cases show how the courts can be more deferential, as a constitutional matter, to the political branches than they sometimes are when they use judicial review to strike down legislation.<sup>421</sup> Other cases illustrate exem-

413. 273 U.S. 536 (1927).

414. TEX. REV. CIV. STAT. art. 3107 (1925) (repealed 1927).

415. *Herndon*, 273 U.S. at 541.

416. Act of June 7, 1927, 1927 Tex. Gen. Laws 193.

417. 286 U.S. 73 (1932).

418. *Id.* at 84.

419. Albertsworth, *supra* note 407, at 657.

420. *Grovey v. Townsend*, 295 U.S. 45, 52 (1935).

421. There are, of course, other values beyond maximizing comity that call the *Nixon* cases into question. Advicegiving is a means to an end, not an end in itself. When the ends are improper, judges should, of course, abstain from advicegiving.

plification.<sup>422</sup> To take one quick and final example, consider *Bailey v. Alabama*,<sup>423</sup> a Thirteenth Amendment case that struck down a statute providing criminal penalties for an employee who intended to defraud his employer by entering into a service contract and not performing it. Justice Hughes' majority opinion, after striking down the act, explained how a constitutional act might be created.<sup>424</sup> Three months later, Alabama passed such an act and the Alabama courts upheld it.<sup>425</sup>

*Bailey* and the *Nixon* cases, in connection with those mentioned earlier, demonstrate that the Court has, at times, taken it upon itself to suggest constitutional courses of conduct when it strikes down statutes.<sup>426</sup> Such advice

422. See *Clark v. Williard*, 292 U.S. 112, 123 (1934) (stating that the Montana Supreme Court must rule on a particular matter before the U.S. Supreme Court can decide the issue); see also *Clark v. Williard*, 294 U.S. 211 (1935) (following advice from the earlier decision and noting that the Montana Supreme Court had decided issue in interim); Albertsworth, *supra* note 407, at 658-63.

423. 219 U.S. 219 (1911).

424. See *id.* at 237, 239, 245.

425. See 1911 Ala. Acts 93; see also *Thomas v. State*, 69 So. 908 (Ala. 1915) (upholding statute).

426. Sometimes such constitutional advice will also have overtones of advice about policy, since the divide between the two is not a clean one. Courts have, over time, given pure policy advice in many different contexts. For example, in *Amchem Products v. Windsor*, 117 S. Ct. 2231 (1997), the Court examined whether a class action certification to achieve a global settlement of current and future asbestos-related claims was legitimate under Federal Rule of Civil Procedure 23. The Supreme Court upheld the invalidation of the settlement, holding that common questions of law or fact did not predominate among members of the class and that there was not adequate assurance that the named parties would adequately protect the interests of the class. See *id.* at 2250-52.

The Court, however, did more than that. The opinion, written by Justice Ginsburg, ended with a subtle recommendation that Congress adopt a nationwide administrative claim system to address the asbestos litigation crisis. See *id.* at 2252. And it started off with a long block quote from the United States Judicial Conference's asbestos report about the "millions of Americans" exposed to asbestos and the 265,000 deaths such exposure would cause. *Id.* at 2237 (quoting REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2-3 (1991)). It then went on to describe the Conference's view that "[r]eal reform . . . required federal legislation creating a national asbestos dispute-resolution scheme" and how the Conference "urged Congress to act." *Id.* at 2238. The Court then explained that because Congress did not act, the federal courts had to take it upon themselves to try and work out the massive class action at issue in the suit. See *id.* The circuit court opinion below also provided similar advice to the legislature. The opinion, written by Judge Becker, concluded in its last two pages by asking Congress to create a statute. See *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 634 (3d Cir. 1996) ("The most direct and encompassing solution would be legislative action. . . . Such legislation could do more to simplify (and facilitate) mass tort litigation than anything else we can imagine."), *aff'd*, 117 S. Ct. 2231 (1997). This language led Judge Wellford to note in his concurrence, "I have some reservations, however, about any intimation that Congress might or should enact compensation-like statutes to deal with mass torts . . ." *Id.* at 635 (Wellford, J., concurring).

*Amchem* appears to be written in a style calculated to attract legislative attention. Like a good novelist, Justice Ginsburg saves the juicy parts of her opinion for the beginning and the end, goading Congress to act because the class action scheme the federal courts worked out on their own was not effective and invalid under Rule 23. Her particular strategy is not that unusual. For example, Justice O'Connor began a majority opinion last year by chastising her home state of Arizona for failing to enforce child support decrees: "Arizona's record of enforcing child support obligations is

maximizes comity for coordinate branches by holding out the possibility that they may achieve their sought goals in some other constitutional manner. Justice O'Connor's suggestion in *New York* thus built on a longstanding pedigree of judicial advice to political branches in both federal and state government. It serves as a model to be emulated.

### III. SOME OBJECTIONS

This article has thus far illustrated how courts can exercise an advicegiving role that enhances structural constitutional guarantees. In *Jones*, the Court could have either used its power of interpretation to construe section 1983 narrowly or demanded a clear statement from Congress. In *Quill*, the Court could have asked the New York state courts to interpret the scope of the relevant statute before interjecting a federal interpretation. The Court in *Gray* had the ability to call on the governor for review of the case, thereby shining sunlight on his political decision. And *New York* serves as a template for the way in which courts can provide advice about the limits of their opinions.

The proposals themselves not only reveal some of advicegiving's virtues, but also suggest the need to revise somewhat our common conception of federal judicial power. For example, once the Supreme Court's discretionary review function is conceptualized as focused not on the individual inequities in the case at hand, but on the extraction of generalizable principles and lessons (which is, after all, the Supreme Court's standard for certiorari<sup>427</sup>), the Court's focus on vehicle problems as a reason not to grant certiorari becomes somewhat questionable. A case with vehicle problems does not preclude the Court from devising tentative advicegiving-style solutions to the issues it raises. No less venerable a case than *Marbury* demonstrates this point.<sup>428</sup> Thus, the Court could, for example, have noted the vehicle problems in *Hopwood* yet still provided a tentative discussion of the viability of *Bakke*.

Although Bickel and Sunstein have counseled us about the virtues of silence in *Hopwood*-like situations, there are reasons why the Court might want to focus less on vehicle problems. One reason flows from the principle that "hard cases make bad law."<sup>429</sup> To the extent that the facts in a given case might, as Holmes says, create "hydraulic pressure" that "appeals to the feelings and distorts the judgment,"<sup>430</sup> the Court might find it desirable to expound on its interpretation of the Constitution in another case in which its statement will be

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less than stellar, particularly compared with those of other States." *Blessing v. Freestone*, 117 S. Ct. 1353, 1357 (1997).

427. See SUP. CT. R. 10 (providing that "certiorari will be granted only for compelling reasons," such as a conflict in the circuits, and that a petition "is rarely granted when the asserted error consists of erroneous factual findings").

428. See text accompanying notes 122-124 *supra*.

429. *Northern Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

430. *Id.* at 400-01.

dicta and thus not necessarily matter to the parties involved. Doing so might, in some circumstances, yield a more honest and better decision, one focused more on universal principles than results-oriented, or party-focused, adjudication. It will also provide guidance and flexibility to lower courts. Instead of conducting a nationwide guessing game about how the Court will eventually rule, these actors will have some sense of the Court's views. Other virtues of deemphasizing vehicle problems include increased flexibility and the option of rendering a nonbinding decision: If the Court later believes its advice was wrong, it can reach a different holding without drastic consequences. The Court thus fashions a mechanism that permits it to reveal its tentative beliefs, but that leaves those beliefs open to further consideration.

There are at least four other important functions advicegiving can serve. First, advicegiving provides an explanation and justification for the role of dicta. As Michael Dorf reminds us, lawyers are confused about the role and importance of dicta in our judicial system.<sup>431</sup> Yet dicta is commonplace, and it serves the function of advicegiving. Using dicta permits courts to give guidance to the political branches and has the virtue of flexibility. As Chief Justice Marshall put it in *Cohens v. Virginia*, dicta "may be respected, but ought not to control the judgment in a subsequent suit."<sup>432</sup> Because the Court has put litigants on notice that its dicta are not binding, dicta allow the Justices to mediate the tension between wanting to provide guidance and fearing that such guidance will be misunderstood to be the last word on a matter.

Second, advicegiving highlights the centrality of the full written opinion in lieu of the one sentence of the opinion that constitutes the holding. Advicegiving checks the natural tendency to focus on the bottom line and helps explain why the reasons behind a holding are published. Instead of focusing on the aid a written opinion gives to parties in litigation, advicegiving shows how the written opinion serves the systemic interest of providing guidance to the other branches as well.<sup>433</sup> As Justice Stone wrote to then Professor Frankfurter:

I can hardly see the use of writing judicial opinions unless they are to embody methods of analysis and of exposition which will serve the profession as a guide to the decision of future cases. If they are not better than an excursion ticket, good for this day and trip only, they do not serve even as protective coloration for the writer of the opinion and would much better be left unsaid.<sup>434</sup>

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431. See Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 1997-2009 (1994).

432. 19 U.S. (6 Wheat) 264, 399 (1821); see also *Kastigar v. United States*, 406 U.S. 441, 454-55 (1972) (stating that dicta "cannot be considered binding authority"); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 627 (1935) (stating that "general expressions" are not controlling in later cases).

433. To this it might be argued that the government and other parties do not actually read Supreme Court opinions, but that argument slights the role of lawyers and journalists and others whose job it is to read and translate those decisions to the public. Cf. Katyal, *supra* note 88, at 2449-50 (arguing that, in the criminal context, the public does not need to know the law to be affected by it because "information vanguards" translate and disseminate the information).

434. CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 13 (1969).

Advicegiving by the Court in opinions that guide but do not bind is self-revealing. It exposes the Court's tentative thinking on a constitutional issue, but leaves the ultimate decision about whether to pursue the issue with the political branches. The flip side is also true: Advicegiving becomes a mechanism to criticize the application of minimalism in some contexts. Minimalism has the advantage of leaving the unelected generalist courts out of many political disputes, but is problematic because it often offers no guidance to the other branches about what is and is not permissible.

Third, advicegiving provides an argument in favor of James Bradley Thayer's famous rule of constitutional exposition: that the Court should strike down an act only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,— so clear that it is not open to rational question."<sup>435</sup> Although this is not the place to defend Thayer's much criticized "clear error" rule,<sup>436</sup> advicegiving provides a strong response to the criticism that the rule leads to judicial abdication. Rather than leading the Court to be "profoundly complacent,"<sup>437</sup> the clear error rule permits courts to provide judicial advice about how close a statute is to being *declared* unconstitutional. This leaves the decision to the political branches. The Court might even explicitly state that the statute is "almost certainly" unconstitutional, but because the argument is not "very clear," it will not strike down the act at that particular time. Nevertheless, because Thayer wisely reserved the power to strike down acts in clear cases, the Court has a tool for penalization; the Court can assess constitutionality in light of what the legislature has or has not done to address the constitutional difficulties noted earlier by the Court (by reevaluating the state interest, for example). In this respect, Justice Souter's opinion in *Glucksberg*, which warned of the constitutional dangers of "legislative foot-dragging" yet upheld the prohibition on assisted suicide, is quintessential Thayer.<sup>438</sup> When combined with advicegiving, Thayer's clear error rule permits courts to expound and interpret the Constitution in ways that guide, but do not in the first instance bind, the political branches.

Fourth, advicegiving might shed light on Article III's grant of life tenure to judges. In *Federalist 78*, Alexander Hamilton made two arguments for life tenure. One was that the "independence of the judges may be an essential safeguard against the effects of occasional ill humours in society" that "sometimes extend no farther than to the injury of the private rights of particular classes of

435. Thayer, *supra* note 69, at 144; *see also id.* at 150.

436. *See, e.g.*, Gary Lawson, *Thayer Versus Marshall*, 88 NW. U. L. REV. 221, 223 (1993) (noting Thayer's reliance on "political morality" and the negative consequences that reliance has for legal discourse); Robert F. Nagel, *Name-Calling and the Clear Error Rule*, 88 NW. U. L. REV. 193, 211 (1993) (arguing that Thayer's ideas have produced disrespectful, intolerant, and expansive judicial decisions).

437. Nagel, *supra* note 436, at 201.

438. *See* text accompanying note 306 *supra* (discussing *Washington v. Glucksberg*, 117 S. Ct. 2258, 2293 (1997) (Souter, J., concurring)).

citizens.”<sup>439</sup> And a second was that such independence is “requisite to guard the Constitution and the rights of individuals.”<sup>440</sup> But as the focus on the immediate facts diminishes in lieu of the focus on the systemic issues in a case, this argument for life tenure might have to be rethought.<sup>441</sup> To be sure, Justices still have to resolve legal issues in favor of one side or another. Even today that fact alone might be enough to justify life tenure. But once we understand that judges exercise a range of influence well beyond the immediate case via advicegiving, the case for life tenure might be stronger. That is, without life tenure the Justices might be afraid to expose their tentative views or to say anything more than they have to in deciding a case. Of course, most will take their job seriously and decide the cases in front of them; the question is how much more they will do. Life tenure, by largely removing the fear of government and popular reprisal, becomes a mechanism to facilitate advicegiving and discourage a tendency towards dangerous minimalism.

Having detailed the advicegiving model, I will now endeavor to answer some of the criticisms that it may raise. There are, to be sure, other objections and other answers. For now, I want to begin, not finish, the dialogue.

#### A. *Advisory Opinions*

An obvious response to advicegiving is to cite the prohibition on advisory opinions: that courts cannot “give opinions in the nature of advice concerning legislative action.”<sup>442</sup> Because judicial advice outside of proper cases and controversies could potentially create a drastic transformation in the role and function of the Court, I have limited my argument in this article to advicegiving only in the context of a case or controversy. The prohibition on advisory opinions to Congress by the judiciary appears deeply rooted—with one notable exception.<sup>443</sup> And sometimes this prohibition is read by the Justices to forbid advice even within cases and controversies. Judges who give such advice seem to flout standard separation of powers thinking: Judges adjudicate, Con-

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439. THE FEDERALIST No. 78, at 528 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

440. *Id.* at 527.

441. For example, Justice Thomas’ defense of life tenure is based on the need for judicial “impartiality” when deciding a case. See Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 4 (1996). Others have attacked the idea of life tenure for federal judges. See Stephen Gillers, *Too Old to Judge?*, A.B.A. J., Dec. 1993, at 94; Symposium, *Term Limits for Judges?*, 13 J.L. & POL. 669, 671-73 (1997) (remarks of former Assistant Attorney General Charles Cooper); *id.* at 686-87, 696 (remarks of Judge Laurence Silberman).

442. *Muskrat v. United States*, 219 U.S. 346, 362 (1911).

443. When President Monroe asked the Supreme Court for an advisory opinion on the question of whether the federal government had the power to appropriate federal monies for internal improvements, the Court did answer and told the President that Congress could do so as an incident to its power over the military. See JAMES M. BECK, *THE FUTURE OF THE SUPREME COURT: AN ADDRESS BEFORE THE BAR OF THE CITY OF NEW YORK* 16 (1924) (pamphlet on file with the *Stanford Law Review*); Albertsworth, *supra* note 407, at 644.



gress legislates. Advice is nonetheless a two-way street, and there are very few members of Congress who *don't* give advice to judges. We take those legislative advisory statements for granted, but recoil when judges give them back.

This dichotomy is particularly bizarre given 200 years of American history. As this article has noted, there is a wealth of evidence that judges have given direct advice to political bodies in all sorts of ways. Additionally, courts have often used cases to recommend particular courses of action to political bodies. Thus, the view that the advisory opinion prohibition somehow precludes judges from giving advice is naive as a descriptive matter.

Nonetheless, there is a narrower version of the advisory opinion prohibition that does have force today. That version is essentially a strong "case or controversy" requirement under which judges will not decide or give advice on issues outside the context of an Article III case.<sup>444</sup> That lesson has been reiterated since the Court's refusal to give advice to President Washington in the summer of 1793. As Chief Justice Marshall put it, the members of the Court "deemed it improper to enter the field of politics, by declaring their opinion on questions not growing out of the case before them."<sup>445</sup> There are good reasons, ranging from resource concerns to worries about interference with the legislature, to confine courts to cases and controversies.

Apart from the prudential concerns involved with such a dramatic and open shift in the Court's stated role, perhaps the strongest reason for confining courts to Article III cases and controversies is one that was not available at the founding. Many Americans were deeply affected by Watergate and have grown to distrust back-room dealing. As Part I demonstrated, however, courts have often provided politicians with secret advice over the course of American history. Indeed, there is no doubt that such advice has, at times, served the country. The challenge is therefore to obtain the benefit of this good advice without the odor of the smoke-filled room.

The challenge is met with the rediscovery of another great American tradition: transparent, open, and public judicial advice to political entities through the vehicle of cases and controversies. In one sense, virtually every major Supreme Court decision today contains such advice. The Court, after all, only hears cases of great national importance that also shed light on other, peripheral matters. Thus, the reasons the Justices give for a decision—e.g.,

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444. See Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 297-98 (1979) (arguing that the standing, ripeness, and mootness doctrines serve important functions).

445. 5 JOHN MARSHALL, *THE LIFE OF GEORGE WASHINGTON* 441 (Philadelphia, C.P. Wayne 1807). The Justices' rejection of the request made this explicit. See 3 CORRESPONDENCE OF JAY, *supra* note 87, at 488-89 (reprinting portions of the Letter to the President stating that "neither the Legislature nor the Executive branches can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner" (emphasis added)).

that homosexuality violates the Judeo-Christian tradition<sup>446</sup> or that affirmative action violates a core principal of color-blindness<sup>447</sup> and stigmatizes minorities<sup>448</sup>—will influence the course of public debate. Indeed, the fact that Justices publish written dissents and separate concurrences shows that they intend to signal their constitutional philosophies to the people and their elected representatives.<sup>449</sup>

These are all basic examples of advicegiving through dicta, plain and simple. The real problem with dicta is not that it violates the constitutional prohibition on advisory opinions, but rather only that dicta does not have binding effect. Dicta is, in short, nothing more than a warning (albeit one written by powerful and generally principled individuals), one which can help political branches and people plan their affairs. Dicta is useful, for example, to suggest tentative limitations of a decision or to scold Congress.<sup>450</sup> Without dicta, courts would strand politics, businesses, and individual citizens in uncertainty—particularly today when the high court does not hear many cases.<sup>451</sup> With advicegiving through dicta, each case has the potential to become a storybook lesson for America, permitting the Court not only to definitively resolve the legal status of the case at hand, but also to define its tentative think-

446. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring).

447. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment).

448. See *id.* at 241 (Thomas, J., concurring in part and concurring in the judgment).

449. Dissents often contain a philosophy that can alter the course of legislative enactment or possibly even drive the call for a constitutional amendment. For discussion on the value of dissenting opinions, see *Employers' Liab. Cases*, 207 U.S. 463, 505-06 (1908) (Moody, J., dissenting); *Briscoe v. Bank of Ky.*, 36 U.S. (11 Pet.) 257, 329 (1837) (Story, J. dissenting). There are many cases in which a well-reasoned dissent has eventually become the law of the land. See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J. dissenting) (providing a list of dissenting opinions that have become majority ones). Examples of other cases in which the dissent later became the majority viewpoint are legion. The dissent in *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870), contains the majority view in *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1872); *Motion Picture Co. v. Universal Film Co.*, 243 U.S. 502 (1917), overruled *Henry v. A.B. Dick Co.*, 224 U.S. 1 (1912); *Leisy v. Hardin*, 135 U.S. 100 (1890), overruled the *License Cases*, 46 U.S. (5 How.) 504 (1847); *Farmers Loan Co. v. Minnesota*, 280 U.S. 204 (1930), adopted the dissent in *Blackstone v. Miller*, 188 U.S. 189 (1903); *Brenham v. German American Bank*, 144 U.S. 173 (1892), adopted the dissent in *Rogers v. Burlington*, 70 U.S. (3 Wall.) 654 (1865); and so on. The powerfully worded dissent in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), galvanized public opinion and led to the adoption of the Eleventh Amendment. See Albertsworth, *supra* note 407, at 652.

450. See *Watkins v. United States*, 354 U.S. 178 (1957) (using dicta to scold Congress). The advisory role I advocate is thus, in many ways, the flip side of Cass Sunstein's recent defense of judicial minimalism. See Sunstein, *supra* note 314, at 1149-52.

451. See PAUL M. BATOR, DAVID L. SHAPIRO, PAUL J. MISHKIN & HERBERT WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 40-41 (2d ed. 1973) (observing that certiorari is rarely granted); ROBERT L. STERN, EUGENE GRESSSMAN, STEPHEN M. SHAPIRO & KENNETH S. GELLER, *SUPREME COURT PRACTICE* 165-67 (7th ed. 1993) (stating that grants of certiorari are a matter of judicial discretion reserved for "special or important" circumstances).

ing about a range of other issues as well.<sup>452</sup> Courts already perform this role, as Part II demonstrates. Indeed, they have been providing advice through dicta throughout this century.<sup>453</sup> Thus, judicial advicegiving through cases is not a radical suggestion designed to flout the prohibition on advisory opinions.

Against this historical backdrop, let us consider Justice Frankfurter's two famous arguments in favor of the prohibition on advisory opinions.<sup>454</sup> First, he disputed the claim that such opinions would be "constructive," arguing that this position wrongly assumes that "constitutionality is a fixed quantity" when "[c]oncepts like 'liberty' and 'due process' are too vague in themselves to solve issues."<sup>455</sup> However, as I have argued, constitutional fluidity is a factor in favor of judicial advice, not one against it. Constitutional fluidity is what enables judges to warn legislators through advice about potential constitutional problems that may arise in the future<sup>456</sup> and attach fuses to opinions that dispense advice.<sup>457</sup> Constitutional fluidity also allows the Court to feel free to give advice, all the while acknowledging that the advice will not be binding in the context of some future concrete case or controversy. The fluidity of the Constitution is not an argument against judicial advice, only against taking it too seriously.<sup>458</sup> (After all, the Court at times even reverses its own majority holdings, sometimes within just a few years.<sup>459</sup>)

452. Judicial opinion on this matter is somewhat divided. Some, such as Judge Learned Hand, believing an attempt by courts to instill "fundamental principles of equity and fair play" will fail, have downplayed the judiciary's role of educating the public. See LEARNED HAND, *The Contribution of an Independent Judiciary to Civilization*, in THE SPIRIT OF LIBERTY, *supra* note 240, at 155, 164. Gerald Gunther's biography of Hand, however, states that Hand gave advice to presidential candidate Theodore Roosevelt and believed it was appropriate for him to do so as long as his association was not public, though he evidently changed his mind later. See GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 237 (1994). Others, such as Judge Reinhardt, believe that courts are obligated to "help educate not just the legal community but the public at large about matters concerning which we have particular knowledge or experience" and that courts "cannot stand above the public dialogue that is so essential to the proper functioning of a true democracy." Stephen Reinhardt, *Judicial Speech and the Open Judiciary*, 28 LOY. L.A. L. REV. 805, 805 (1995).

453. See Albertsworth, *supra* note 407, at 645; see also Patrick C. McKeever & Billy D. Perry, Note, *The Case for an Advisory Function in the Federal Judiciary*, 50 GEO. L.J. 785, 795-99 (1962) (arguing that American judges do, in fact, render advisory opinions); Jack B. Weinstein, *Rendering Advisory Opinions—Do We, Should We?*, 54 JUDICATURE 140, 143 (1970) (same). Many states also permit advisory opinions. For a comprehensive early analysis of state advisory opinions, see generally Oliver P. Field, *The Advisory Opinion—An Analysis*, 24 IND. L.J. 203 (1949).

454. See generally Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924).

455. *Id.* at 1004-05.

456. See text accompanying notes 276-283 *supra* (discussing Judge Calabresi's opinion in *Then*).

457. See text accompanying notes 293-307 *supra* (discussing Justice Souter's fuse in *Glucksberg*); text accompanying notes 383-386 *supra* (discussing Chief Judge Posner's fuse in *Wittmer*).

458. Consider, for example, Justice Sutherland's majority opinion in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), which gave advice that the Court later repudiated. In *Adkins*, the Court overturned a minimum wage law, but noted in dicta that a "statute requiring an employer to

Justice Frankfurter made a second argument against advisory opinions: They would weaken "legislative and popular responsibility."<sup>460</sup> But advice-giving, as I have described it, is calculated precisely to enhance popular accountability and democratic decisionmaking. If courts played an advicegiving role in every possible area, they might lead Congress to shirk its duties of updating and modifying laws on its own. (Even in that case, such shirking is doubtful, since Congress would still have to interpret, consider, and act on this nonbinding advice.) But because of limited jurisdiction, limited time, and institutional resistance, it is virtually unthinkable that judicial advice—even if dispensed profligately—could lead legislatures to slight their responsibilities. To the contrary, the Court can draw attention to particularly troublesome legislative decisions and require clear statements to encourage popular accountability—so long as the advice "grow[s] out of the case before them."<sup>461</sup>

### B. *Separation of Powers*

Perhaps if advicegiving does not flout the specific prohibition on advisory opinions, it might contravene the more general spirit of the Constitution's separation of powers. For those who believe that the Constitution established three fully independent branches—a wall between each branch—advicegiving might reek of judicial encroachment.<sup>462</sup> The word "independence" should remind us of the Founders' initial use of the word in the Declaration of Independence. That document, after all, was not a full break with the prior regime, for the new government still retained much of the structure of the old, such as its explicit borrowing of the former colonial structure to create states.<sup>463</sup> Here too, what may initially appear to be strong walls are really not so.

One easy way to glimpse the blurring of constitutional roles is to look at some of the activities that other branches undertake. The "strict wall" theory posits, for example, that constitutional matters are for the courts, whereas policy

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pay . . . the value of services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable." *Id.* at 559. This, of course, led the New York legislature to enact a law that took the employer's interests into account. But the Supreme Court later declared that law unconstitutional, in an opinion Justice Sutherland joined. Of course, if the *Adkins* dictum was included solely to provide camouflage for the Court, the Court betrayed the oath requirement of Article VI, § 3, of the Constitution, as well as structuralism more generally. The fact that the Court backed away from dicta in an earlier case, by itself, is not indicative of bad faith. Dicta is not binding on later adjudications precisely because our system is based on flexibility and growth. Any legislature listening to judicial advice must heed this lesson.

459. See note 449 *supra* and accompanying text; see also *Agostini v. Felton*, 117 S. Ct. 1997 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985)).

460. Frankfurter, *supra* note 454, at 1006-07.

461. 5 MARSHALL, *supra* note 445, at 441.

462. For one well-known view of the proposition, see *Kilbourn v. Thompson*, 103 U.S. 168, 190-91 (1880).

463. See THE DECLARATION OF INDEPENDENCE final para. (U.S. 1776).

ones are for the legislature. Yet there is a long tradition of executive branch constitutionalism in this country. Presidents, not just courts, have made constitutional decisions—President Andrew Jackson's veto of the National Bank is one example.<sup>464</sup> Additionally, Congress sometimes takes constitutional matters into account when passing legislation—an example is the debate over the constitutionality of the Communications Decency Act.<sup>465</sup> What's more, Congress often legislates in a manner that permits it to exercise quasi-constitutional judgment.<sup>466</sup> It has attempted to curtail federal jurisdiction over various matters, thus preventing courts from rendering judgment in areas of particular concern.

Express consideration of constitutional issues by the President and Congress may be viewed as official advice from the political branches to the courts about judicial matters. Congress also provides courts with other types of advice. Consider impeachment. Even though the potential for securing an impeachment based on a controversial judicial decision is very low, Congress uses its impeachment power as a threat to encourage judges to follow its interpretation of the Constitution. Recall, for example, the recent controversy over Judge Harold Baer's decision to exclude evidence in a drug case and the frequent calls for impeachment that ensued.<sup>467</sup> Similarly, following *Dred Scott*,<sup>468</sup> Senator Hale of Maine introduced a resolution in the Senate to abolish the entire Court.<sup>469</sup> Such proposals provide a vehicle for members of Congress to criticize Court determinations and focus popular attention on the Court's decisions.

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464. See Andrew Jackson, Veto Message of July 10, 1832, in 2 MESSAGES AND PAPERS OF THE PRESIDENT 576 (J.D. Richardson ed., 1899). Jackson's veto emphasized that "the opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both." *Id.* at 582.

465. Pub. L. No. 104-104, §§ 501-561, 110 Stat. 56, 133-43 (1996) (codified as amended at scattered sections of 42 U.S.C.A.); see also 142 CONG. REC. S1180 (1996) (statement of Sen. Leahy) (arguing that the Act should be voted down because it is unconstitutional); 142 CONG. REC. S1646 (1996) (statement of Sen. Exon) (arguing that the Act is constitutional and should be supported).

466. For example, Congress has altered the composition of the Court numerous times, sometimes in order to change potential votes on various matters. The 1789 Judiciary Act provided for six Justices. President Adams and the Federalist Congress changed it to five in 1801 to prevent Jeffersonian control; it was increased to nine in 1837 to give the Jacksonians a majority over nationalists, and increased to ten in 1863 to make sure that the Legal Tender Act and emancipation would be ratified. See Thomas Halper, *Supreme Court Responses to Congressional Threats: Strategy and Tactics*, 19 DRAKE L. REV. 292, 304 (1970).

467. See, e.g., Joan Biskupic, *Has Public Interest in Trials Become Public Pressure on the Judicial System?*, WASH. POST., Nov. 12, 1997, at A01 (discussing the controversy over Judge Harold Baer's decision to exclude evidence in a drug case and the frequent calls for impeachment that ensued).

468. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

469. See CONG. GLOBE, 37th Cong., 2d Sess. 26 (1861) (instructing the Judiciary Committee "to inquire into the expediency and propriety of abolishing the present Supreme Court of the United States, and establishing, instead thereof, another Supreme Court, in pursuance of the provisions of the constitution, which, in the opinion of CONGRESS, will meet the requirements of the Constitution").

Not only do the executive and legislative branches seem to encroach on judicial functions, they also sometimes seem to encroach on each other. Five years into the Republic, for example, Congress ordered an investigation into what was an executive matter.<sup>470</sup> The early Congresses imposed duties on executive officers—a practice explicitly sanctioned by the Supreme Court's *Kendall* decision.<sup>471</sup> Congress has, at various times, also imposed restrictions on executive agency actions, even going so far as to seek legislative preclearance before an agency can act.<sup>472</sup> Presidents have vetoed, on constitutional grounds, statutes containing such restrictions.<sup>473</sup>

There is much evidence that the Framers did not intend the system to establish tight independent branches without play between the joints. Indeed, the Constitution's looseness with regards to separation of powers led to much criticism. Madison in *Federalist 47* explained, "One of the principal objections inculcated by the more respectable adversaries to the Constitution is its supposed violation of the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct."<sup>474</sup> Madison wrote *Federalist 47* through *51* to attack such arguments, in large part by refining the concept of separation of powers.<sup>475</sup>

Madison began his defense with a close parsing of Montesquieu, explaining that Montesquieu did not believe that departments could not overlap. He meant only that, "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental

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470. See 3 ANNALS OF CONG. 493 (1792) (recounting House resolution ordering investigation into the expedition of Major General St. Clair, an executive officer).

471. *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 610 (1838). One example occurred in 1794, when the Senate requested the President "to lay before the Senate the correspondences which have been had between the Minister of the United States at the Republic of France and said Republic, and between said Minister and the office of Secretary of State." Walter Dellinger & H. Jefferson Powell, *The Attorney General's First Separation of Powers Opinion*, 13 CONSTITUTIONAL COMMENTARY 309, 311 (1996). The Attorney General, in a formal written opinion, found the request to be a permissible legislative order except insofar as it might be read to require disclosure of "unsafe and improper" material. *Id.* at 316.

472. See John A. Johnson, *Congressional Control of Executive Functions*, in SEPARATION OF POWERS 82, 82-83 (Virginia Law Weekly ed., 1954-55) (describing such laws).

473. See *id.* at 83. President Truman stated, in his veto of a bill that controlled military real estate action, his concern about the "gradual trend on the part of the legislative branch to participate to an even greater extent in the actual execution and administration of the laws." *Id.* In 1920, President Wilson vetoed an appropriation bill that required executive agencies to have prior congressional approval to print magazines. Wilson stated it was an "invasion of the province of the executive." *Id.* at 84. In 1933, President Hoover vetoed a bill prohibiting tax refunds without prior approval of the joint committee on internal taxation on similar grounds. See *id.*

474. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

475. See Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 597 (1986). Madison actually drafted a constitutional amendment (which was defeated) specifically outlining separation of powers. See RICHARD B. MORRIS, *THE FORGING OF THE UNION 1781-1789*, at 319 (1987).

principles of a free constitution are subverted."<sup>476</sup> Madison then explained that Montesquieu "did not mean that these departments ought to have no *partial agency* in or no *control* over, the acts of each other."<sup>477</sup> Madison's argument was that, while external balances between the branches are necessary, internal checks provide an even better balance. Although no branch should have dominion over another, the Constitution sought a fine-tuning of balance by granting one branch authority over another in some instances.

Madison viewed constitutional government not unlike a sort of trinity: one government with three parts, each of which is both blended and independent. For support and precedent, Madison pointed to the earlier state constitutions, noting that "there is not a single instance in which the several departments of power have been kept absolutely separate and distinct."<sup>478</sup> He then describes the "impossibility and inexpediency" of complete separation.<sup>479</sup>

The argument in *Federalist 48* placed a particular emphasis on the need for a blending of powers, "unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained."<sup>480</sup> Madison argued that separation of powers was not a concept with a fixed meaning, but instead required a certain degree of flexibility to permit the government to adapt to unforeseen situations—a theme repeated in *Federalist 49* through *51*. His ideas were echoed by other influential Framers. In *Federalist 66*, for example, Alexander Hamilton reinforced Madison's idea of integrating separation and checks and balances by explaining that "[t]he true meaning of [separation of powers] . . . has been shown to be entirely compatible with a partial intermixture of those departments for special purposes" and that "[t]his partial intermixture is even, in some cases, not only proper but necessary to the mutual defense of the several members of the government against each other."<sup>481</sup> Jefferson believed that "no peculiar prerogatives should be allowed to one branch, or particular rights to another, lest as in Britain; the seeds of a political warfare should be sowed in the Constitution."<sup>482</sup> Separation of powers worked because, in James Wilson's

476. THE FEDERALIST NO. 47, *supra* note 474, at 302-03; *see also id.* at 302 ("[Montesquieu] did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other."). On the role and meaning of Montesquieu's role in the American Revolution, see BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 71 n.16 (1967).

477. THE FEDERALIST NO. 47, *supra* note 474, at 302.

478. *Id.* at 304.

479. *Id.*

480. THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961); *see also* THE FEDERALIST NO. 37, at 235 (James Madison) (Clinton Rossiter ed., 1961) (describing the need for fluidity in separation of powers).

481. THE FEDERALIST NO. 66, at 401-02 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

482. THOMAS JEFFERSON, NOTES ON VIRGINIA 121 (William Peden ed., 1954).

words, "the materials, of which it is constructed, be not an assemblage of different and dissimilar kinds."<sup>483</sup>

Indeed, the entire phrase—separation of *powers*—appears to refer only to the sense of binding force that a particular branch has at its disposal, not to non-binding advice from one branch to another. The constitutional structure, in Jefferson's words, is one "in which the *powers* of government should be so divided and balanced among several bodies of magistracy, as that no one should transcend their legal limits, without being effectually checked in or strained by the others."<sup>484</sup> But advice is an exercise of persuasion, not coercive power, and it does not contravene this notion of separation of powers so long as it does not usurp a political branch's right to have the final word on a matter committed to that branch. This is why, as Richard Neustadt puts it, the Constitution created "separated institutions *sharing* powers," not completely separate institutions.<sup>485</sup>

Separation of powers, as the Framers understood it, is not about hostility, enmity, or wars between the branches. It is rather about the superior institutional competence that each branch possesses and the need to ensure that the branches do not stray beyond their area of expertise. Each branch has a special function in which its final judgment cannot be formally and ultimately questioned in the absence of extenuating circumstances. For the judiciary, it is the power to interpret the laws and the Constitution; for the executive, the power to enforce the laws; for the legislature, the power to make them. But the lack of formal power to overrule another branch's decision does not preclude less formal strategies of influence.

Three modern examples emphasize the effectiveness of informal power. First, the judiciary "makes" law when it creates federal common law. Its action is legislative, but only because Congress so permits it by failing to preempt by statute judicial common law rules. In the absence of statutory legislation, the courts are making law, and the Congress is implicitly sanctioning it. Some statutes, such as the Sherman Act, expressly delegate lawmaking power to the courts. Second, when Congress passes legislation it believes to be constitutional,<sup>486</sup> it exercises a judgment of constitutional fidelity that can be overridden

483. WOOD, *supra* note 56, at 604. All three branches were seen as part of one organic whole, "consisting of three branches elected by the people, and having checks on each other," a government with "three different chambers, . . . all equally competent to the subject and equally governed by the same motives and interests, viz., the good of the great commonwealth, and the approbation of the people." *Id.* at 561-62.

484. JEFFERSON, *supra* note 482, at 120 (emphasis added).

485. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* 33 (1960). Similarly, Edward Levi has argued that the "branches of government were not designed to be at war with one another. The relationship was not to be an adversary one, though to think of it that way has become fashionable." Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 391 (1976); see also David Luban, *The Twice-Told Tale of Mr. Fixit: Reflections on the Brandeis/Frankfurter Connection*, 91 YALE L.J. 1678, 1681-92 (1982) (book review) (suggesting that the branches were meant to have partial interaction).

486. As it must under the oath requirement of Article VI, § 3.



by courts via their superior power of constitutional interpretation. Third, executive agencies issue administrative regulations that have the force of law yet are subject to Congress' superior legislative power.

Each of these examples is a form of "advice" given from one branch to another. Sometimes the advice a branch gives is formally part of the Constitution, such as the Senate's "advice and consent" over presidential nominations. Other times it is not, such as when members of Congress criticize the courts. When it is not, the advicegiving branch will try to ensure—sometimes with sticks, other times with carrots—that its views are heard by the others. The sticks and carrots each branch fashions implicitly reveal that the advicegiver is not exercising the power of another branch, but instead using coercive persuasion.<sup>487</sup>

A separation of powers model based on fluidity and cooperation not only has much originalist support in its favor, but also has strong jurisprudential backing. The first Justice Chase opined:

The general principles contained in the constitution are not to be regarded as rules to fetter and control; but as matter merely declaratory and directory: for even in the constitution itself, we may trace repeated departures from the theoretical doctrine, that the legislative, executive and judicial powers should be kept separate and distinct.<sup>488</sup>

Justice Holmes, over 100 years later, explained:

The great ordinances of the Constitution do not establish and divide field of black and white. . . .

. . . .

It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires.<sup>489</sup>

Finally, Justice Jackson, writing one of the most famous passages of constitutional law in the *Steel Seizure Case*, exclaimed:

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins

487. Courts explicitly endorse persuasion, even where it is highly coercive, in all sorts of other spheres, such as in Congress' use of contingent dollar grants to force state governments to carry out a particular federal agenda. For a discussion of the constitutionality of such grants, see text accompanying notes 395-396 *supra*.

488. *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 18-19 (1800) (opinion of Chase, J.).

489. *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 209-11 (1928) (Holmes, J., dissenting).

upon its branches separateness but interdependence, autonomy but reciprocity.<sup>490</sup>

Judicial advice, when dispensed in cases and controversies, strengthens this interdependence and cooperation of the branches.

### C. Legitimacy

Another potential cost of advicegiving is that the Court may undermine its legitimacy by opining on matters in which it may lack special institutional competence. Leaving aside the problem that such an argument asks the courts to make a political judgment to refrain from political judgments,<sup>491</sup> the empirical support for the argument is weak. Courts have consistently made judgments in areas in which they lack specialized expertise—even going so far as to suggest congressional action.<sup>492</sup> Modern courts reach into traditional legislative areas all the time, such as when they order injunctive relief that requires the spending of money, such as in litigation over prisons or mental health in-

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490. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring in the judgment and opinion of the Court).

491. That is, the concern over court legitimacy itself recognizes that courts must make political judgments, at least to save their own skins. The paradigm example is, of course, *Ex parte McCordle*, 73 U.S. (6 Wall.) 318 (1868) (*McCordle I*), in which a majority of the Court believed that Reconstruction was unconstitutional yet used a series of techniques to avoid deciding so. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (suggesting but not deciding that Reconstruction was unconstitutional). This was a heady time for Congress, with radical Reconstructionist Republicans dominating the agenda. See MURPHY, *supra* note 199, at 193-94. The Court, of course, was not their favorite institution after the horror of *Dred Scott*. The Justices “caved in” and delayed judicial action until Congress stripped the Court of its jurisdiction. See *id.* at 194. Had the Court declared Reconstruction unconstitutional, there is little doubt that it would have suffered enormously. At the very time the Court was deciding *McCordle I*, the House had just passed a bill that would have required a two-thirds majority of the Court to invalidate a federal statute, and some Republicans were proposing abolishing the Court altogether. See *id.* This is an instance of successful congressional advice to the Court about a constitutional matter. The Court’s delaying tactics themselves interfered with the legislative process and were designed to forestall attempts by Congress to curb the Court’s jurisdiction and power.

492. See, e.g., *Nelson v. George*, 399 U.S. 224, 228 n.5 (1970) (stating that it was “anomalous” that federal statutes did not provide state prisoners with postconviction remedies that federal prisoners had and that the “obvious, logical, and practical solution is an amendment to § 2241 to remedy the shortcoming which has become apparent”); *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 712 (2d Cir. 1992) (noting developments since initial congressional enactment and stating that “the resolution of this specific issue could benefit from further legislative investigation”); *Brock v. Peabody Coal Co.*, 822 F.2d 1134, 1152-53 (D.C. Cir. 1987) (Ginsburg, Ruth Bader, J., concurring) (“Congressional attention to this matter may well be in order.”); note 426 *supra*. Moreover, we do not think that the President or members of Congress are somehow less legitimate because they express opinions about constitutional matters. We do not think that Congress is illegitimate when it attempts to restrict administrative agencies through all sorts of statutes. Rather, in each of these instances, we think that the nature of our government—a blended government—counsels in favor of such an approach.

stitutions.<sup>493</sup> And courts reach into executive areas as well when they enjoin the executive or use the mandamus power.<sup>494</sup> Even when they do not declare a governmental act unconstitutional, courts may insert themselves into legislative matters whenever they confront questions about statutory interpretation and the meaning and role of legislative history.

Such intervention is typically justified because the Supreme Court is thought to be the "ultimate interpreter of the Constitution."<sup>495</sup> To the extent that the objection of legitimacy is based on the belief that courts should not intervene in legislative matters, the answer is that the objection is really an assault on judicial review. Every time the Court strikes down an act, it intervenes in the legislative process. But conversely, when it upholds an act, the Court legitimates and condones it, possibly skewing legislative decisionmaking and decreasing the legislature's popular accountability. Justice Frankfurter understood this point well:

If judges want to be preachers, they should dedicate themselves to the pulpit; if judges want to be primary shapers of policy, the legislature is their place. Self-willed judges are the least defensible offenders against government under law. But since the grounds of decisions and their general direction suffuse the public mind and the operations of government, judges cannot free themselves from the responsibility of the inevitable effect of their opinions in constricting or promoting the force of law throughout government.<sup>496</sup>

It is one thing to be a "primary shaper" of policy and a decisionmaker, quite another to give persuasive advice that other branches will hear and that will "suffuse the public mind." All decisions, to some extent, directly or indirectly fulfill this advicegiving role.<sup>497</sup>

Courts also interfere with the legislative process in other subtle ways, such as when they interpret, and perhaps rewrite, statutes to avoid constitutional difficulties by *Ashwander's* principle of the saving construction.<sup>498</sup> The use of this doctrine is a mechanism for advicegiving, and the legislature can either listen to the Court's advice or rewrite the statute to make clear that it really intended the act to include the constitutionally questionable provi-

493. See generally Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978) (exploring the limits on the judiciary's ability to impose remedies requiring government expenditures).

494. See David A. Pine, *Judicial Control of the Executive by Mandamus and Injunction*, 13 GEO. L.J. 73, 73 (1925) ("The necessity for such adequate legal remedies may theoretically be disputed by the purist who desires to maintain inviolate and unimpaired the three independent branches of government . . .").

495. *Baker v. Carr*, 369 U.S. 186, 211 (1962).

496. Felix Frankfurter, *John Marshall and the Judicial Function*, in GOVERNMENT UNDER LAW 31 (Arthur E. Sutherland ed., 1956).

497. Frankfurter himself was a vocal critic of FELA in his published opinions. See *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 529-31 (1957) (Frankfurter, J., dissenting) (lamenting the "vast litigation" under FELA due to its constitutional infirmities).

498. See *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring); see also text accompanying notes 335-337 *supra* for a discussion of the *Ashwander* doctrine.

sions the Court construed away. That new statute might then go back to the courts for judicial review. *Ashwander* avoidance can be problematic, however, because it encourages fanciful judicial construction and because a legislature may have difficulty repassing legislation embodying its initial intent when a judicial interpretation fails to capture that intent.<sup>499</sup> We need an intermediate option that permits courts to engage in dialogue without either potentially distorting the statute by applying *Ashwander* avoidance or striking it down altogether.<sup>500</sup>

The above arguments are all points about how courts already interfere in the legislative process through interpretation and judicial review without harming their legitimacy. There is, however, a deeper historical argument, relying on the evidence presented in Part I of this article: Courts have been giving advice to the political branches since the founding, and the assumption that such advice will undermine their legitimacy is disproved by the high regard in which they are held today. Chief Justice Burger made this the centerpiece of his vigorous defense of judicial advicegiving, drawing on the historic precedents mentioned in Part I:

The separation of powers concept was never remotely intended to preclude cooperation, coordination, communication and joint efforts by the members of each branch with the members of the others. Examples of this are legion: the Executive, represented by the Solicitor General, volunteers, or is invited by the Supreme Court, to provide briefs advising the Supreme Court on questions of law. This happens countless times each term. . . .

We all remember that President Washington formally asked the Supreme Court for advice on certain policy questions but wisely the court decided they would not advise him on such matters. Justices have come to realize that they should avoid advising Presidents and the Congress on substantive policy questions but on matters relating to the courts there must be joint consultation. The separation of powers does not preclude such consultation. . . .

....

To be sure, there is a great and necessary tradition of insulation of judges and justices from political activities generally. But participation in legislative and executive decisions which affect the judicial system is an absolute obligation of judges, as it is of lawyers. . . .

It is entirely appropriate for judges to comment upon issues which affect the courts. . . .

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499. Two reasons why legislatures might not be able to correct judicial mistakes are inertia and executive vetoes. To remove a statute from the books, the legislature must repeal it, and the repealing statute will be subject to an executive veto that can be overridden only by a supermajority. The interesting point here is that the legislature might have a supermajority in favor of the old statute, but not one in favor of removing the newly narrowly construed one.

500. Such a device is, at a minimum, needed in cases where another branch asks for a judicial opinion via a clear statement. In such circumstances, the worries about the legitimacy of judicial advice will be diminished. See ROBERT A. KATZMANN, COURTS AND CONGRESS 99 (1997).

Historically, the most valuable judicial improvements are made when the judiciary makes proposals and consults with Congress. Indeed, even after Congress acts, the President regularly requests the views of the Judicial Conference before he passes on legislation which relates to the federal courts. This has been going on for nearly two hundred years.<sup>501</sup>

The judiciary's recent out-of-court forays into policy advicegiving have been catalogued and analyzed in detail by my colleague Professor Bob Katzmann.<sup>502</sup> Katzmann's work documents how courts communicate with Congress through out-of-court statements such as those made by the Judicial Conference.<sup>503</sup> Although he does not mention advicegiving through the written opinion, Katzmann's rich work shows how the advicegiving tradition, as exemplified through out-of-court statements, has not, as an empirical matter, undermined the role of courts. And to the extent that such statements do hurt the judiciary's legitimacy, it is important to remember that advicegiving through dicta in cases and controversies might serve as a safety valve to reduce the need for—and thus prevent—extrajudicial activity.<sup>504</sup>

501. Remarks of Warren E. Burger Accepting the Fordham Stein Award (Oct. 25, 1978) (on file with the *Stanford Law Review*). Chief Justice Burger then went on to describe Chief Justice Hughes' letter to Senator Burton Wheller during the court-packing controversy:

This letter was written for public use during the heat of the "court packing" fight. Historians regard that letter as the "deathblow" to President Roosevelt's proposal to enlarge the Supreme Court. This drew Hughes into the vortex of one of the most bitter political controversies in the history of the Supreme Court. This was not an agreeable position for the Chief Justice to be in, but he had a duty to provide Congress and the people with relevant facts relating to a proposal which would have distorted the structure of the judicial system as politicized by the court.

*Id.* Burger might also have mentioned that courts have been making out-of-court statements defending their decisions since the founding. For example, after the Attorney General criticized Judge William Johnson in 1808 for a circuit decision that invalidated an executive instruction regarding an embargo, see *Gilchrist v. Collector of Charleston*, 10 F. Cas. 355 (No. 5420) (C.C.D.S.C. 1808), Johnson publicly replied to the charges in South Carolina newspapers. See 1 WARREN, *supra* note 68, at 334. And it is no secret that Chief Justice John Marshall defended his ruling in *McCulloch v. Maryland*, 17 U.S. 316 (1819), in response to Spenser Roane's laborious attack on the decision. His defense appeared in a leading federalist newspaper, *The Philadelphia Union*. See 1 WARREN, *supra* note 68, at 515.

502. See generally KATZMANN, *supra* note 500 (examining key aspects of the relationship between the courts and Congress).

503. See *id.* at 93-104. The Judicial Conference has given Congress recommendations about federal habeas corpus reform and has opposed some of the mandatory minimum sentences proposed by Congress. See *id.* at 93-94.

504. The current ethical rules not only permit but also encourage the conveyance of views by judges to the legislature. The ABA's 1990 Model Code of Judicial Conduct encourages judges to "speak, write, lecture, teach and participate in other extrajudicial activities concerning the law, the legal system, the administration of justice and non-legal subjects." MODEL CODE OF JUDICIAL CONDUCT Canon 4(B) (1990). It notes, however, that such activities must not "cast reasonable doubt on the judge's capacity to act impartially as a judge." *Id.* Canon 4(A)(1). Pursuant to Canon 5, however, political activity is generally not permitted. See *id.* Canon 5 ("A judge or judicial candidate shall refrain from inappropriate political activity."). As Professor Kelso has shown, the Canons are not actually a bar to most extrajudicial speech, even political speech. See J. Clark Kelso, *Time, Place, and Manner Restrictions on Extrajudicial Speech by Judges*, 28 LOY. L.A. L. REV. 851, 852-54 (1995). To the contrary, Canon 4 provides that a judge cannot "appear at a public

Of course, I have confined my argument here to advicegiving in the area in which the courts have the most expertise, constitutional law.<sup>505</sup> Despite the longstanding presence of advicegiving, there is no doubt that the courts could do more of it in published opinions. As Part II demonstrated, the Supreme Court often renders decisions with little thought dedicated to its advicegiving function. Historically, courts have refrained from advicegiving as often as they have indulged in it; Justice Cardozo once stated that the "[l]egislature and courts move on in proud and silent isolation."<sup>506</sup> As a result:

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hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests." MODEL CODE OF JUDICIAL CONDUCT Canon 4(C)(1). The commentary to Canon 4(B) states that "a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice," and that the judge should be "encouraged to do so." *Id.* Canon 4(B). The Justice Department has even stated that judges may be allowed to use appropriated money to contact legislators in congressional committees to convey their views on legislation. *See* 2 Op. Off. Legal Counsel 30, 33 (1978) (discussing applicability of the antilobbying statute, 18 U.S.C. § 1913, to federal judges).

505. In doing so, I recognize that many have elsewhere made the positive case for judicial advice about policy. Judge Abner Mikva of the D.C. Circuit once explained that, on the first congressional commission on which he served, the Brown Commission, the presence of judges furthered the reform of the criminal law. "It was very important to have them, because here were academicians and congressmen sitting around and arguing about what we were going to do to the criminal law, and it was nice to have three people on it who knew . . . the impact of . . . what we were proposing to do." Katzmann, *supra* note 203, at 166. Justice Breyer once remarked about his former job as chief counsel to the Senate Judiciary Committee, "I think to myself, we saw a lot of these bills, and I wish I knew then what I know now [after being a federal judge]. It would have changed a little bit of my attitude." *Id.* at 169. On the special competence of judges, see Roger J. Traynor, *The Limits of Judicial Creativity*, 29 HASTINGS L.J. 1025, 1038-39 (1978) ("The very independence of judges, fostered by tradition even when not guaranteed by tenure, and their continuous adjustment of sight to varied problems, tend to develop in the least of them some skill in the evaluation of massive data.").

Out-of-court statements about matters of judicial administration are fairly common. As Chief Justice Rehnquist put it in his 1994 report, "Judicial comment and proposals with respect to what might loosely be called 'wages, hours, and working conditions' seem obviously appropriate." William H. Rehnquist, *Chief Justice Rehnquist Reflects on 1994 in Year-End Report*, 27 THIRD BRANCH, Jan. 1995, at 1, 2-3. But his logic extends no further, as he explicitly argued:

Whether the scheme of federal sentencing should emphasize deterrence as opposed to punishment, what is an appropriate sentence for a particular offense, and similar matters, are questions upon which a judge's view should carry no more weight than the view of any other citizen. In such cases I do not believe that the Judicial Conference, or other judicial organizations, should take an official position. . . . There is certainly no formal inhibition on judges publicly stating their own personal opinions about matters of policy within the domain of Congress, but the fact that their position as a judge may give added weight to their statements should counsel caution in doing so.

*Id.* at 3. Rehnquist's distinction between permissible and impermissible advice is not obvious, for judges might have an expertise about sentencing matters. Indeed, Congress even sought out the advice of judges in crafting the Sentencing Guidelines. *See* Ebern Cohn, *Judge Challenges Rehnquist's Silence on Mandatory Minimum Sentences*, LEGAL TIMES, Jan. 30, 1995, at 30.

506. Benjamin Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 114 (1921).

On the one side, the judges, left to fight against anachronism and injustice by the methods of judge-made law, are distracted by the conflicting promptings of justice and logic, of consistency and mercy, and the output of their labors bears the tokens of the strain. On the other side, the legislature, informed only casually and intermittently of the needs and problems of the court, without . . . systematic advice as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend.<sup>507</sup>

This lack of communication creates what Judge Coffin called an "estrangement" between the courts and Congress.<sup>508</sup> A leading Reconstruction case, *Ex parte McCardle*,<sup>509</sup> demonstrates how advicegiving can reduce this estrangement. In that case, a newspaper editor in the South contested his federally ordered confinement through a writ of habeas corpus in federal court. He claimed that the Court had jurisdiction over the case due to a statute passed by Congress in 1867 that authorized federal habeas actions.<sup>510</sup> One problem: Congress, scared that the Supreme Court would vote to strike down the Reconstruction Acts using *McCardle*'s case as its vehicle, repealed its 1867 statute. In a classic opinion on jurisdiction stripping, the Court held that Congress could limit the Court's Article III appellate jurisdiction and dismissed *McCardle*.<sup>511</sup> The Court also stated that, even though it did not have jurisdiction under the 1867 Act, it might have jurisdiction under another act, the 1789 Judiciary Act. However, *McCardle* had not pled the 1789 Act, and the Court did not consider whether it might have jurisdiction in *McCardle*'s specific case.<sup>512</sup>

The advice in *McCardle* thus did two things. First, it went beyond the issues in the instant case and alerted litigants to a potential new basis for jurisdiction—making clear that the Court had not completely ceded jurisdiction in federal habeas cases. Second, it told Congress that if it really wanted to strip jurisdiction, it had to repeal the 1789 Judiciary Act. *McCardle* thus gave Congress time to think about whether it really wanted to strip jurisdiction. The upshot was that Congress blinked. Instead of going further and partially repealing the 1789 Act, Congress left the Act in place. This inaction permitted

507. *Id.* at 113-14. A recent House of Representatives General Counsel observed that lawyers have "an incredible degree of ignorance as to how the legislative branch operates, and in the legislative branch as to how the judiciary operates." Katzmann, *supra* note 203, at 163.

508. See Frank M. Coffin, *The Federalist Number 86: On Relations Between the Judiciary and Congress*, in JUDGES AND LEGISLATORS, *supra* note 76, at 21, 25-28. For example, Congress considered vesting the courts of appeal with jurisdiction over veterans' cases without ever thinking to consult the courts about the potential burden. Ultimately, the Judicial Conference of the United States did make its views known. See KATZMANN, *supra* note 500, at 83-84 (explaining how Congress fails to consider the judicial consequences of certain laws).

509. 74 U.S. (7 Wall.) 506 (1869) (*McCardle II*).

510. See *Ex parte McCardle*, 73 U.S. (6 Wall.) 318 (1868) (*McCardle I*).

511. See *McCardle II*, 74 U.S. (7 Wall.) at 512-14.

512. See *id.* at 515; see also *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 104-06 (1869) (finding that 1789 habeas corpus jurisdiction under the 1789 Act was not repealed by the 1867 or 1868 Acts).

the Court to hear federal habeas cases; the next year, the Court held that it had jurisdiction under the 1789 Act to do so.<sup>513</sup> By communicating, the Court informed and aided Congress' determinations and apprised Congress of its interpretation, instead of surprising them with it in a future case.

Another argument in favor of advicegiving is that it can enhance, rather than detract from, the legitimacy of the Court because it encourages judicial candor. As Justice Souter remarked in *Glucksberg*, courts in constitutional battles often engage in exaggeration. This article has provided several examples of this tendency.<sup>514</sup> By permitting the Court to acknowledge its uncertainty, the advicegiving option can augment its credibility by letting the Justices write opinions that remain true to text, history, and precedent. And instead of grabbing power for itself by striking down acts in the first instance, advicegiving might make the Court not more political, but less so.

On the other hand, some might contend that advicegiving is too novel and that we should not risk tinkering with the stability of the government and political representation. The criticism raises the question of what the American tradition really is. Although judges have often focused on the narrow facts of a case, their opinions and commentary have also explored much broader issues. From Wilson's grand jury charge to Justice O'Connor's *New York* opinion, from Jay's Neutrality Proclamation advice to Taft's advice on just about everything, courts have not been content to decide only the case in front of them.

A comparison with other nations might help Americans understand how more formalized advicegiving might work and how it can be consistent with American tradition.<sup>515</sup> England today has a Lord Chancellor who serves as an explicit advicegiver<sup>516</sup> and has permitted advisory opinions (indeed, an advisory opinion is one of the most famous precedents in criminal law ever—*M'Naughten's Case*<sup>517</sup>). The German Bundesverfassungsgericht, the

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513. See *Yerger*, 75 U.S. (8 Wall.) at 104-106.

514. See text accompanying notes 225-240, 245, 262-263, 324, 374-376 & 429-430 *supra*.

515. See *Printz v. United States*, 117 S. Ct. 2365, 2404 (1997) (Breyer, J., dissenting) (arguing that the experience of other nations' federalism may serve to inform our own).

516. The Lord Chancellor is a judge, cabinet minister, and member of the legislature, "and there is no doubt that relations between the judiciary and the legislature revolve around his position to a very substantial degree." Patrick S. Atiyah, *Judicial-Legislative Relations in England*, in *JUDGES AND LEGISLATORS*, *supra* note 76, at 129, 130. The Lord Chancellor is president of the Supreme Court and also presides over the House of Lords sitting in its legislative and judicial capacity. He is responsible for almost all judicial appointments, including those to the high court. The Chancellor can use his judicial expertise to persuade the legislature about various matters of judicial reform and also heads the Office of Parliamentary Counsel. See *id.* at 130-33. Because these counsel understand the way judges interpret statutes, they have a significant advantage over American drafters and write statutes in light of canons of interpretation. See *id.* at 156.

517. 8 Eng. Rep. 718 (1843). The decision did not arise from pending litigation. Rather, it resulted from a proceeding in which certain judges were asked questions by the House of Lords. See *id.* at 720-22. And though one judge protested against the proceeding, the court ultimately held that it was proper to ask for opinions on "abstract questions of existing law." *Id.* at 718, 723-24.



federal constitutional court, acts as an advisor when the federal government, a Land government, or one third of the Bundestag members so requests.<sup>518</sup> India's Constitution permits the President to ask the Supreme Court for an advisory opinion, but the Court may decline to answer.<sup>519</sup> As one would expect, the Court's advisory opinion power in India is weakest when the political branches attempt to duck their difficult political decisions by trying to force the Court to make them.<sup>520</sup> In suggesting a comparative approach, I am not arguing that the experience of any one country is itself determinative; the unique peculiarities of the American system preclude such a claim. Understanding these other systems may permit us to ponder their differences and advantages and ask whether advicegiving allows us to take the best aspects of their systems and incorporate them into ours.

Despite what other countries may do, however, our constitutional structure and political system places broad and practical limits on the propriety of advicegiving. It should be used only in circumstances where the Justices can aid politicians in their understanding of constitutional law and values or can focus popular accountability on a constitutional issue. The failure to observe this constraint naturally could hurt the Court, and some may feel that even the potential of abuse is enough to throw out advicegiving altogether. But all doctrines can be abused (judicial review is a prime example), and advicegiving's advantages are sufficiently weighty to outweigh the doubly speculative prospect that the Court will abuse it and that such abuse will harm its legitimacy.

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518. See Article 93(1)(2) of the Basic Law, as amended by the Unification Treaty of 31 Aug. 1990 and Federal Statute of 23 Sept. 1990, *translated in* PRESS AND INFORMATION OFFICE OF THE FEDERAL GOVERNMENT (F.R.G.), BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY 54 (1991). The matters heard are quite political, involving abortion, university admissions, and campaign finance. See DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 53-54 (2d ed. 1997) (explaining how the German Constitutional Court uses advisory opinions to guide or instruct—depending on the circumstances—the German legislature). In volatile matters, the Court often delays its opinion until passions subside and then issues an opinion that lets the political organs work the matter out themselves. See *id.* The Italian Constitutional Court has also used exemplification strategies in its written opinions. See *Cass.*, sez. un., 4 May 1960, n.29, 5 *Giur. Cost.* 497, 522-23 (explaining constitutional limitations for rules governing labor relations and lockouts); Vigoriti, *supra* note 148, at 408.

519. INDIA CONST. art. 143. For additional historical discussion, see M.V. PYLEE, INDIA'S CONSTITUTION 28-40 (3d ed. 1979).

520. In my opinion, this is the lesson of the Indian Supreme Court's decision not to issue an advisory opinion in the religious dispute over ownership of the Ayodha Temple. The President asked the Supreme Court to decide the ownership question and stated it would hold the land "until such time as the Supreme Court gives its opinion in the matter. Thereafter the rights of the parties shall be determined in light of the Court's opinion." White Paper on Ayodha, ch. VIII, para. 8.11. The Court was therefore assured that if it resolved the issue, the entire government would abide by the decision. It was this *ex ante* declaration over a political matter, I believe, that explains why the Court did not issue an advisory opinion in the matter. See *generally* Neal Kumar Katyal, A Note on the Indian Advisory Opinion Power (unpublished manuscript, on file with author).

A second constraint in this post-Watergate age is that such advice should be given openly and candidly in judicial opinions, not behind the scenes. In this respect, a comparison between two very different sentencing schemes is illustrative. One is the federal Sentencing Guidelines: At the outset, Congress, by statute, required federal judges to be part of the Sentencing Commission that drafted the Guidelines.<sup>521</sup> The other is the California "Three Strikes" Initiative:<sup>522</sup> After the initiative had been approved, the involvement of three state court judges in its drafting came to light and led to a popular outcry against the judicial involvement.<sup>523</sup> The participation of judges in crafting statutes they will later interpret is somewhat worrisome; it is made particularly troubling when their role is concealed from the public. If the public understands the level of judicial involvement at each stage of a proposal's journey into law and the voters approve the statute, the public may be assuming the risk. But there is no such guarantee with the back-room deal.

If courts are forbidden from giving open advice, however, they will do so surreptitiously. History has demonstrated this point with considerable force. Although such hidden contacts did not irrevocably damage the legitimacy of the government in the past, in this day and age there is no doubt that they could. Even more problematic, if courts do not feel comfortable engaging in behind-the-scenes advice, they might be tempted to usurp the authority of the political branches by striking down legislation with which they do not agree and dressing their policy decisions in constitutional garb—thereby undermining both the Court's legitimacy and separation of powers.<sup>524</sup> An open tradition of advicegiving, calibrated to this post-Watergate age, could minimize the chance of back-room deals and encourage judicial candor in opinion writing.

### CONCLUSION

Contemporary constitutional theory is unduly rigid in its conception of the nature of both judicial review and separation of powers. First, binary vision has led many to assume that courts either exercise full judicial review or do nothing at all. In this article, I have attempted to show just how courts can—and do—use advicegiving to exercise a range of intermediate options that confounds this conventional idea. Carving out this separate area of judicial activity unmask a range of new questions about the role of courts, such

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521. See *Mistretta v. United States*, 488 U.S. 361, 363-68 (1989).

522. CAL. PENAL CODE § 1170.12 (West 1997) (codifying Prop. 184).

523. See Tom Kertscher, *Fresno Judge Opts Not to Hear Three Strikes Case in Courtroom*, FRESNO BEE, Nov. 7, 1994, at B1 (stating that concerns about ethics and fairness were raised after disclosure of the judge's participation in formulating the law).

524. See, e.g., *McCray v. United States*, 195 U.S. 27, 54 (1904) (arguing that if courts voided legislation on the basis of policy concerns, it would "overthrow the entire distinction between the legislative, judicial and executive departments").

as what countermajoritarian difficulties courts may face even in the context of advicegiving. It also leads to new questions about the way in which courts use their power of judicial review. Should courts soften the countermajoritarian difficulties inherent in judicial review through exemplification? Should they warn legislators of the potential constitutional infirmity of certain legislation? Are the steps a court takes to ensure that judicial review is seen as popularly legitimate justified under advicegiving? Or for those worried about the countermajoritarian difficulty, is the problem with decisions such as *Brown*, if any, not the use of judicial review itself but rather the Court's crafting of the opinion (and coercing of individual Justices) to make sure that it was unanimous, and thereby palatable to the public?<sup>525</sup>

Second, many read the Constitution as building rigid walls around the branches, as well as around the federal government and states. This idea slights the structural relationships among the branches and governments and creates bad constitutional law. The balances and synergy created by the Constitution allow governments and branches to act cooperatively, not just independently or adversarially. In this article, I have suggested how the judiciary can play a role that aids state and federal legislatures and executives and that serves state courts as well. The logic of our system—a constitutional federalist republic—supports this reconceptualization.

There is some evidence that we are rediscovering the tradition of synergy and cooperation between branches. In one of the first writings of the 1997 Term, Justice Stevens, joined by three other Justices, issued an opinion in *Brown v. Texas*<sup>526</sup> that embraced many of the advicegiving concepts advocated in this article. An inmate sentenced to death asked the Court to consider whether a Texas law, which prevented capital defendants (but not non-capital defendants) from giving truthful information about their parole ineligibility to a sentencing jury, violated the Constitution. Justice Stevens'

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525. A similar argument can be made against those who believe that *Roe v. Wade*, 410 U.S. 113 (1973), was problematic because it was too bold and created a backlash. See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 375 (1985) (making a version of this argument); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199 (1992) (same). Critics who believe that the Court usurped the legislative role should ask whether a weaker opinion, calculated to minimize opposition, might have masked the potential usurpation problem, and might thereby have been worse for democratic principles than the transparent *Roe* decision. For example, suppose that *Roe* had been written to set forth the *Casey* plurality's "undue burden" test in lieu of the trimester framework. See *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992) (plurality opinion). In that case, the result on abortion law might have been the same if lower courts treated bans on first and second trimester abortions as impermissible undue burdens, but the imposition of the undue burden system would have been less visible—and therefore less a subject of democratic debate and potential constitutional amendments. The decision in *Roe*, therefore, ironically may have been more democratic than this *Casey* hypothetical for precisely the reasons that have led critics to term it transparently undemocratic.

526. 118 S. Ct. 355 (1997) (statement of Stevens, J., respecting denial of certiorari). Justices Souter, Ginsburg, and Breyer joined the statement.

opinion explained that there was "obvious tension" between the Texas law and previous Supreme Court holdings.<sup>527</sup> It went on to state that the "situation in Texas is especially troubling" because noncapital defendants are afforded more protection than capital ones, a situation Stevens labeled "pervers[e]" and one that "unquestionably tips the scales in favor of a death sentence that a fully informed jury might not impose."<sup>528</sup> Stevens concluded by "reiterat[ing] the important point that the Court's action in denying certiorari does not constitute either a decision on the merits . . . or an appraisal of their importance."<sup>529</sup> To the contrary, "the likelihood that the issue will be resolved correctly may increase if this Court allows other tribunals 'to serve as laboratories in which the issue receives further study before it is addressed by this Court.'"<sup>530</sup> The opinion, in two short pages, combined self-alienation (making clear that the Court's denial of certiorari was not a legitimization of the policy), demarcation (stating that the Texas law closely resembled other statutes deemed unconstitutional), prescription (explaining the "pervers[ity]" of the Texas law), and decentralization (encouraging states to examine such claims and signaling the Court's interest in the question). The opinion reinforces my optimism for the future of advicegiving.<sup>531</sup>

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527. *Id.* at 355.

528. *Id.* at 356.

529. *Id.* at 357 (citations omitted).

530. *Id.* (quoting *McCray v. New York*, 461 U.S. 961, 962-63 (1983)).

531. The legislative front offers similar hope with the passage of recent acts such as the Sentencing Guidelines Act of 1986, Pub L. No. 99-363, 100 Stat. 770 (codified as amended at 18 U.S.C. § 3351 (1994)), and the Line Item Veto Act of 1996, *see* note 258 *supra* and accompanying text. The line-item veto enables the executive and Congress to engage in a dialogue about the need to make particular expenditures. The final authority over the spending power remains with Congress. The line-item veto only changes the default rule so that the President has the power to strike an individual appropriation. Once he does so, the legislature is free to repass the appropriation and exempt it from the Act, thus restoring the status quo ante. It thus creates an opportunity for advice between branches and permits the President to draw popular attention and accountability to pork barrel projects. Congress is always free to make a clear statement that it wants the particular item, and the item then remains. The line-item veto thus enshrines a mechanism to create executive-legislative dialogue over the budget in a way that mirrors the advisory role of courts.

In another display of advicegiving, the line-item veto itself has been criticized by members of the judiciary. In testimony before a joint hearing, then Chief Judge of the Sixth Circuit Gilbert Merritt told Congress that the line item veto would be a "serious threat to the even-handed administration of justice." *Line Item Veto Legislation Raises Separation of Powers Concerns*, 28 THIRD BRANCH, Apr. 1996, at 4; *see also* 142 CONG. REC. S2947 (daily ed. Mar. 27, 1996) (Letter from Leonidas Ralph Mecham, Director of the Administrative Office of the U.S. Courts) (noting the "potential constitutional implications" of the Line Item Veto).

An additional way for the Court to voice criticism of the Act would be through a judicial opinion. Last Term, the Court decided that individual members of Congress did not have standing to bring a suit to challenge the Act. *See Raines v. Byrd*, 117 S. Ct. 2312 (1997). If the Justices strongly believed that the Act raised concerns about the separation of powers, they could have given such advice to the legislature in the course of their opinion, thereby subtly suggesting that the Congress rethink its decision.

The three branches of government were designed to work in harmony. By creating the conditions for productive conversation between the political branches and the judiciary, advicegiving can aid our governments in the task of serving their master—the American people. Instead of alternating between hostility and deference, courts should self-consciously set out to work in partnership with other branches and other governments. Doing so will enhance democratic decisionmaking, popular accountability, federalism, and judicial candor.