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Rhode Island’s Public Importance Exception for Advisory Opinions: The Unconstitutional Exercise of a Non-Judicial Power

Thomas R. Bender

INTRODUCTION

“[W]hile [the] unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon [a supreme court’s] exercise of power is [its] own sense of self-restraint.”¹ That sense of self-restraint promotes “confidence in the men and women who administer the judicial system [which] is the true backbone of the rule of law”² – a confidence that is both a “public treasure,” and “a vitally necessary ingredient of any successful effort to protect basic liberty.”³

The Rhode Island State Constitution confers two distinct powers upon the state’s highest court and the justices appointed to it. The court itself owns a “judicial power,” while the individual justices are endowed with a separate “advisory power,” permitting them to render nonbinding legal advice to the two remaining branches of the state government. This article is concerned with the advisory power conferred by article 10, section 3 of the Rhode

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3. Id. at 157-58 (Breyer, J., dissenting).
Island Constitution, which declares: "The judges of the supreme court shall give their written opinion upon any question of law whenever requested by the governor or by either house of the general assembly." The broad question posed herein is whether the justices have exercised the necessary "sense of self restraint" in determining the limits of the advisory power conferred by the State Constitution. The more specific query is whether the justices have the constitutional authority, as they reasserted most recently in In re Advisory Opinion to the Governor (Casino), to render an advisory opinion under the "public importance" exception they have described. The answer to both questions, it seems clear, is no.

The advisory power, unique to only a small handful of states, challenges the separation of powers and the independence of the judiciary. It possesses the potential to empower the legislature to engage the justices in the cause of directing or influencing the executive's exercise of its constitutional duties, and for the executive to do likewise with regard to the legislature's exercise of its own constitutional duties. In the 1960's, the justices met this challenge, however, by narrowly construing the phrase "any question of law" to limit their obligation to answer questions involving interbranch disputes. Since that time they have consistently maintained that the phrase "any question of law", when construed in light of the separation of powers, obliges them to answer questions from the legislature only with respect to proposed or pending legislation, and from the governor only with respect to enacted legislation he or she has a present constitutional duty to implement. In that way the justices may assist both branches in the exercise of their own constitutional duties, but may not be used by the governor to regulate the legislature when it is considering legislation, or by the legislature to regulate the governor's execution of the laws. It is the thesis of this article, however, that the justices' judicial interpretation of "any question of law" not only limits their obligation to answer questions not falling within that interpreta-

4. R.I. CONST. art. X, § 3.
5. 856 A.2d 320 (R.I. 2004).
8. See In re Advisory Opinion to the Governor (Casino), 856 A.2d at 324.
tion, but also necessarily limits their constitutional authority to answer them.

The Rhode Island Constitution is the source of all power devolving to the judiciary. Article 10, section 3 is the source of the justice's authority to render advice. No one would seriously argue that in the absence of the advisory clause the justices could step out of their judicial robes and offices, and in their capacity as individual citizens licensed to practice law, give legal advice and opinions to the governor or the legislature regarding the legality of their actions or legislation. And, in point of fact, they do not purport to do so. The justices consider briefs, take the bench, hear argument and issue written advisory opinions specifically in their capacity as judicial officers under the authority of article 10, section 3. Consequently, they may only exercise this power if authorized by that section, and they may only advise on questions to which the advisory clause pertains. By interpreting the phrase, "shall give their written opinion upon any question of law," to limit the questions they are obliged to answer, the justices have also limited the questions they are constitutionally authorized to answer. The same separation of powers considerations that limit their obligation to provide advisory opinions should limit their constitutional authority to provide them as well.

It seems, however, the justices do not see it that way. In recent years, they have asserted that the textual interpretation they have given to "any question of law" limits only their obligation to provide advice, and constitutes a mere procedural limitation they

10. Aside from the separation of powers issues implicated by a justice, as a member of the Court and an officer of the judicial branch, acting as legal counsel for either the Governor or General Assembly, the Code of Judicial Conduct prohibits a judge from practicing law, R.I. SUP. CT. R. art. VI, canon 4(G); conducting his or her "extra-judicial activities" in a manner that would "cast reasonable doubt on the judge's capacity to act impartially as a judge," R.I. SUP. CT. R. art. VI, canon 4(A)(1); unnecessarily displaying a "premature judgment," R.I. SUP. CT. R. art. VI, canon 3(B)(5)(iii); and participating in a case where he or she has "served as a lawyer in the manner in controversy." R.I. SUP. CT. R. art. VI, canon 3(E)(1)(b). In the absence of the advisory clause, the justice would be giving legal advice concerning a matter that could very well later come before him or her in his or her judicial capacity. Except in the limited circumstances of the advisory clause, both systemic constitutional considerations and ethical considerations would prohibit a justice of the court from providing legal counsel to either the executive or legislative branches.
can waive if the question is of significant public importance. In short, the justices have asserted their textual interpretation limits only the justices' obligation, not their authority. I will argue that the fashioning of a discretionary "public importance" exception is an internally inconsistent interpretation of both the text of article 10, section 3 and the justices' own prior opinions, and that on every occasion the justices issue an advisory opinion pursuant to that exception they act outside their constitutional authority; that is, they themselves engage in an unconstitutional exercise. I will respectfully suggest the justices reexamine the constitutional and interpretative foundation for the public importance exception and discard it. No discretionary advisory authority can plausibly issue from the constitutional text, and fidelity to both the constitution and its reasonable judicial interpretation are issues of the greatest public importance.

This article begins with a brief explanation of the two distinct powers the Rhode Island Constitution confers on the Rhode Island Supreme Court and its justices.

I. JUDICIAL POWER VS. ADVISORY POWER

Article 10, section 1 of the Rhode Island Constitution states "[t]he judicial power of this state shall be vested in one supreme court, and in such inferior courts as the general assembly may, from time to time, ordain and establish." The language is virtually identical to the first sentence of Article III, Section 1 of the United States Constitution, but the text of the federal constitution goes on to specifically limit the judicial power to cases and controversies. Although the Rhode Island Constitution does not explicitly place a case or controversy limitation on the exercise of judicial power, the Rhode Island Supreme Court long ago concluded the "whole idea of judicial power" is limited to the power to

11. See In re Advisory Opinion to the Governor (Casino), 856 A.2d at 324-25.
13. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").
apply laws to "cases and controversies" within the court's jurisdiction.\textsuperscript{15} In \textit{G. & D. Taylor & Co. v. Place}\textsuperscript{16}, the court stated:

Indeed, laws and courts have their origin in the necessity of rules and means to enforce them, to be applied to cases and controversies within their jurisdiction; and our whole idea of judicial power is, the power of the [courts] to apply the [laws] to the decision of those cases and controversies.\textsuperscript{17}

The case or controversy concept defines and limits the proper exercise of judicial power, and "is used to embrace a number of related but different problems of judicial authority, including the requirement of a concrete dispute between adversaries, standing, ripeness, mootness and limitations relating to political questions."\textsuperscript{18} Standing is the first step in the pathway to a case or controversy empowering a court to act in a judicial capacity. It is not only "an access barrier that calls for the assessment of one's credentials to bring suit;"\textsuperscript{19} it is an access barrier calling for an assessment of the court's credentials to exercise its constitutionally conferred judicial power.\textsuperscript{20} Standing entitles a party to an adjudication and empowers the court to adjudicate: "The essence of the question of standing is whether a party seeking relief has alleged a personal stake in the outcome of the controversy as to ensure concrete adverseness that sharpens the presentation of the issues upon which the court depends for an illumination of the questions presented."\textsuperscript{21} Under Rhode Island law, standing exists to commence a suit and invoke the judicial power when the claimant al-

\begin{itemize}
\item \textsuperscript{15} Sullivan v. Chafee, 703 A.2d 748, 752 (R.I. 1997) (citing G. & D. Taylor & Co. v. Place, 4 R.I. 324, 337 (1856)).
\item \textsuperscript{16} 4 R.I. 324 (1856).
\item \textsuperscript{17} \textit{Id.} at 337 (emphasis added). The case or controversy requirement was more recently reaffirmed in \textit{In re Stephanie B.}, 826 A.2d 985, 999 (R.I. 2003): "This Court has previously concluded that 'our whole idea of judicial power' is entailed within the concept of courts applying laws to cases and controversies within their jurisdiction."
\item \textsuperscript{18} Neely v. Benefits Review Bd., 139 F.3d 276, 279 (1st Cir. 1998) (citing ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.1, at 41 (1989)).
\item \textsuperscript{20} See Blackstone Valley Chamber of Commerce, 452 A.2d at 932.
\item \textsuperscript{21} \textit{Id.} at 933.
\end{itemize}
leges "an injury in fact resulting from the challenged act."\textsuperscript{22}

The related concepts of "standing," "case or controversy" and "judicial power" are all "built on a single basic idea – the idea of separation of powers."\textsuperscript{23} They reflect the "overriding and time-honored concern about keeping the judiciary's power within its proper constitutional sphere," and counsel against a court acceding to the natural urge to proceed directly to the merits of important disputes and settle them simply for the sake of convenience and efficiency.\textsuperscript{24} The constitutional elements of a court's authority to exercise judicial power – such as a case or controversy – "are an essential ingredient of separation and equilibrium of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects."\textsuperscript{25} In sum, constitutionally conferred judicial power does not permit advisory opinions; that is, decisions when there is no case or controversy presenting an injured party seeking redress for an injury. Advisory opinions are beyond the "judicial power."\textsuperscript{26}

\begin{itemize}
  \item 24. \textit{Id.}
  \item 26. The Rhode Island Supreme Court has relaxed the case or controversy requirement in the limited circumstances where a case has met the prerequisites of case or controversy when initiated, but has subsequently been rendered moot because "events occurring after the filing have deprived the litigant of a continuing stake in the controversy." \textit{In re Christopher B.}, 823 A.2d 301, 319 (R.I. 2003) (quoting Cicilline v. Almond, 809 A.2d 1101, 1105 (R.I. 2000)). In that limited circumstance the court will adjudicate the case – that is, decide it as part of an exercise of its judicial power – despite its mootness when the issues are of "extreme public importance," "capable of repetition," "but are likely to "evade judicial review." \textit{In re Christopher B.}, 823 A.2d at 319; see also Fiore v. Town of South Kingstown, 783 A.2d 944, 946 (R.I. 2001); State ex. rel. Town of Middletown v. Anthony, 713 A.2d 207, 211 (R.I. 1998); Edward A. Sherman Publ'g Co. v. Goldberg, 443 A.2d 1252, 1256 n.6 (R.I. 1982); Morris v. D'Amario, 416 A.2d 137, 139 (R.I. 1980).
  \item Standing, however, "admits of no similar exception; if a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complaint to a judicial forum." Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc., 528 U.S. 167, 191 (2000). Mootness and standing are distinct concepts. Where a party has no standing a court has no right to exercise the judicial power granted to it and the power does not extend to such a case. Where a case that has fulfilled the standing requirement has become moot because of post-filing circumstances, to abandon the case may prove more wasteful than frugal, and
\end{itemize}
Unlike the federal and vast majority of state constitutions, the Rhode Island Constitution confers an additional power on the members of the court distinct from, and not included in, the judicial power. As previously stated, article 10, section 3 provides: "The judges of the supreme court shall give their written opinion upon any question of law whenever requested by the governor or by either house of the general assembly." This constitutional grant of power has been characterized by the court as a "constitutional exception to the case and controversy predicate to the exercise of our judicial power." In truth, it is not an exception permitting use of the court's judicial power in the absence of a case or controversy; rather, it bestows a nonjudicial power in the absence of a case or controversy on each of the individual men and women sworn in as justices of that court – the power to render legal advice to the two remaining branches of government. When rendering such advice the justices speak in their "individual capacity as legal experts rather than Supreme Court justices," and give non-binding advice which "carries no mandate." The advisory opinion is "not an exercise of judicial power," and is distinctly "extra-judicial."
A. The Origins of the Advisory Power of Rhode Island Justices

The justices of the Rhode Island Supreme Court have themselves noted that many authorities consider the advisory power incompatible with the judicial function. The separation of powers considerations defining and limiting the exercise of judicial power also challenge the exercise of the advisory power. How did the advisory power end up in a constitution ostensibly built on separation of powers and a defined judicial power? A partial explanation may be found in the English origins of the advisory clause which seeped into Rhode Island's colonial and early state governmental organization — where there was no separation of powers, no independent judiciary, and no judicial review as we know it today — and in the struggle to enact a state constitution.

The advisory opinion has its roots in English history. "By the 14th century it was a well-established practice of the King's Bench, a body of legally trained judges, to issue advisory opinions to the King and his Council" who exercised all three powers of government: legislative, executive, and judicial. While most royal inquiries concerned the King's legislative and executive duties, some inquiries also required advice on matters that were due to come before the judges themselves:

The judges [of the King's Bench] were also required to act as counselors to the House of Lords, ... called upon to render their advice when the House acted in either its judicial capacity, as final arbiter of cases arising before Parliament, or in its legislative capacity ... render[ing] advice on existing law and on pending legislation.

"In its early history the House of Lords summoned the judges at the beginning of each Parliament" to give advice on legal questions; the advice was nonbinding but virtually always followed by the Lords. Up to the time of the American Revolution, "both the

Note, Advisory Function] (describing the rendering of an advisory opinion as "a distinctly extrajudicial function").
King and the House of Lords regularly requested advice from the justices on judicial, as well as executive, and legislative matters.  

By the middle of the 1600's, English constitutionalism was premised on the theory of a "mixed" government, different from the principle of separation of powers that would become the hallmark of American constitutionalism. The English Parliament was composed of the "three estates of the realm – Crown, Lords and Commons – who, together, represent[ed] the sovereignty of the people." Each were thought to make a valuable and effective contribution to law-making, and "roughly corresponded to Aristotle's ideal form of 'mixed government,' . . . each of which had virtues that would act as a check on the vices of the other." “Because the entire realm was represented in it, Parliament was considered both ‘omnipotent’ and ‘omnicompetent’ with its own internal system of checks and balances. In this system the highest judicial power was in the House of Lords, not the King's judges, and “[t]he Lords were ‘the supreme court of judicature in the kingdom, both for final appeals from lower courts and as the original court for trials of peers and impeachments.” The advisory power, therefore, arose in the context of a constitutional system that did not separate judicial power from the legislative or executive power, and in which the ultimate judicial power rested not in the judges, but in the body that also exercised legislative power. The judges acted in the capacity of legal counselors to the persons exercising ultimate executive, legislative and judicial authority, and did not possess the power of judicial review over legislative and executive actions.

Similar to the English system, “American colonial governments did not separate the legislative, executive and judicial functions” either, and “judges in the colonial structure were by their

40. Calogero, supra note 6, at 335.  
41. JAY, supra note 33, at 22.  
43. Id. at 58.  
44. Id.  
45. Id. at 61.  
46. JAY, supra note 33, at 25 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *56).  
47. See id. at 52.  
48. See Note, Advisory Function, supra note 33, at 807-08.
very positions continually involved in the process of advising executive and legislative bodies."\textsuperscript{49} Under the Royal Charter of 1663, Rhode Island was governed by a General Assembly consisting of a governor, a deputy governor and ten assistants elected annually.\textsuperscript{50} Those same men also constituted the colony's highest court; thus, legislative and judicial functions were combined in the same body and the General Assembly exercised extensive control over the judicial affairs of the colony.\textsuperscript{51} In 1746 the governor and assistants were removed from the court and replaced by annually appointed justices, one chief and four associate justices.\textsuperscript{52} The judges could still be members of the General Assembly, however, and the General Assembly itself had the power to decide petitions praying for relief from decisions of the court, powers similar to those possessed by the English House of Lords.\textsuperscript{53} The petition process and the annual appointment of judges existed under the Charter throughout the colonial period and during statehood up until the establishment of the state's first constitution in 1843.\textsuperscript{54} As the Rhode Island Supreme Court later noted in \textit{Gorham v. Robinson},\textsuperscript{55} under the Charter the General Assembly:

had the power to remove any of the judges at any time; and, as to the principles of separation of powers and of the independence of the judiciary, we cannot see that they were given much recognition under a system of government in which all the judges of the highest court were annually elected by the General Assembly, which also claimed and, whenever it chose, \textit{exercised} the power to adjudicate cases and to reverse the decisions and judgment of the [state's highest court].\textsuperscript{56}

Under the Charter, therefore, no "independent" judiciary ex-

\textsuperscript{49} J\textsc{ay}, \textit{supra} note 33, at 52.
\textsuperscript{50} P\textsc{atrick} T. \textsc{Conley}, \textsc{Democracy in Decline: Rhode Island's Constitutional Development: 1776-1841} 24 (1977).
\textsuperscript{51} P\textsc{atrick} T. \textsc{Conley}, \textsc{Liberty and Justice: A History of Laws and Lawyers in Rhode Island: 1636-1998} 18-19, 21 (1998) [hereinafter \textsc{Conley, Liberty and Justice}].
\textsuperscript{52} \textit{Id.} at 21-22.
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{Id.} at 22.
\textsuperscript{55} 186 A. 832 (R.I. 1936).
\textsuperscript{56} \textit{Id.} at 841.
isted under any meaningful definition of that term, nor was there any meaningful separation of powers. Consequently there was no real doctrinal or political discordance with the judges acting in an advisory capacity as opposed to a judicial capacity.

The celebrated 1786 case of Trevett v. Weeden provides some evidence of Rhode Island's high court judges' practice of giving advice and counsel to the General Assembly. Public accounts of the trial persuaded the General Assembly that the justices had declared a statute unconstitutional and void, causing the General Assembly to summon the judges to appear to explain themselves. Contemporary accounts reported the testimony of one of the judges, Judge Howell:

He observed that, the order by which the judges were before the House might be considered as calling upon them to assist in matters of legislation, or to render the reasons for their judicial determination, as being accountable to the legislature for their judgment. That in the former view, the court was ever ready, as constituting the legal counselors of the state, to render every kind of assistance to the legislature, in framing new or repealing former laws: but that for reasons of their judgment upon any question judicially before them, they were accountable only to God and their own conscience.

Howell freely admitted the judges could be called upon in the legislative process, a service which "fit precisely within the job description of a British judge commanded to assist the House of Lords in legislative affairs."

The idea that the judiciary would be subject to the control of the legislature, as reflected in Rhode Island's Charter government, was not an exceptional or novel idea in the time immediately fol-

57. Id.
58. CONLEY, LIBERTY AND JUSTICE, supra note 51, at 244.
60. Harrington, supra note 42, at 80.
61. JAY, supra note 33, at 55 (quoting The Case, Trevett against Weedon & Co. (Providence, John Carter, 1787)) (emphasis added).
62. Id.
following the American Revolution. Although the doctrine of separation of powers would eventually become what James Madison would call “a first principle of free government,”63 professor and historian Gordon S. Wood has written that “Americans in 1776 gave only a verbal recognition to the concept of separation of powers in their Revolutionary constitutions, since they were apparently not concerned with a real division of departmental functions.”64 Some historians believe that separation of powers in the 1776 state constitutions meant “nothing more than a prohibition of plural office holding.”65 Wood goes on to explain:

Despite John Adam’s warnings in his *Thoughts on Government* that “an upright and skillful administration of justice” required the judicial power “to be distinct from both the legislative and executive, and independent upon both,” most of the early constitution-makers had little sense that judicial independence meant independence from the people .... [C]onstitutional provisions giving control of the courts and judicial tenure to the legislatures actually represented the culmination of what the colonial assemblies had been struggling for in their eighteenth century contests with the Crown. The Revolutionaries had no intention of curtailing legislative interference in the court structure, and in fact they meant to increase it.66

According to Wood, “[t]he expanded meaning of separation of powers, ... along with a new conception of judicial independence, had to await the experience of the years ahead.”67 In the years after 1776, concerns about “the effects of legislative sovereignty and [its] unanticipated excesses” caused the invocation of “the principle of separation of powers in order to unscramble what seemed to be a dangerous blurring of the three major functions of government,”68 and “[n]early all of the proposals for constitutional change being put forward in these years could be explained as a means of

64. Id. at 153-54.
65. Id. at 156.
66. Id. at 161.
67. Id.
68. Id. at 451.
separating the three functions of government." 69

Despite the evolution of the principle of separation of powers and the importance of an independent judiciary that may have been occurring in other parts of America at the time, however, Rhode Island’s Charter government resisted embracing that evolution. By 1841, however, “the omnipotence and adamancy of the legislature” – along with limited suffrage and increasing malapportionment – became grievances severe enough for the establishment of a new constitutional document. 70 The “agitation [for reform eventually] prompted the General Assembly to authorize a constitutional convention” for November 1841. 71 The reformers, however, “exhorted the adult male citizenry to disregard the landholding qualifications [for voting] and to go to the polls to elect delegates to a ‘People’s Convention,’ which would meet in October.” 72 While the Landholders Convention authorized by the Charter government did not produce a draft constitution, the People’s Convention presented a proposed constitution to the white male population for ratification, regardless of whether they were landholders. 73 It emphatically called for a separation of power between the legislature and the judiciary, and the independence of the judiciary, providing:

Article III

Of the Distribution of Powers

1. The powers of the Government shall be distributed into three departments, the Legislative, the Executive and the Judicial.

2. No person or persons connected with one of these departments shall exercise any of the powers belonging to either of the others, except in cases herein directed or permitted.

69. Id. at 452.
70. CONLEY, LIBERTY AND JUSTICE, supra note 51, at 205.
71. Id. at 245.
72. Id. at 246.
73. Id.
Article IV
Of the Legislative Department

1. The Legislative power shall be vested in two distinct Houses, the one to be called the House of Representatives, the other the Senate, and both together the General Assembly.

.

Article IX
General Provisions

1. This Constitution shall be the supreme law of the State; and all laws contrary to, or inconsistent with the same, which may be passed by the General Assembly, shall be null and void.

.

4. No jurisdiction shall hereafter be entertained by the General Assembly in cases of ... appeal from judicial decisions, nor in any other matters appertaining to the jurisdiction of Judges, and Courts of law. But the General Assembly shall confer upon the Courts of the State all necessary powers for affording relief in the cases herein named; and the General Assembly shall exercise all other jurisdiction and authority, which they have heretofore entertained, and which is not prohibited by, or repugnant to this Constitution.

.

Article XI
Of the Judiciary

1. The Judicial power of this State shall be vested in one Supreme Court, and in such other Courts, inferior to the Supreme Court, as the Legislature may, from time to
The new constitutional scheme envisioned by the People's Constitution represented a dramatic departure from the Charter, providing for a clear separation of judicial and legislative power, and prohibiting the judiciary from exercising legislative powers and the General Assembly from exercising judicial power. Perhaps because of this clean break from the Charter's melding of judicial and legislative power in the General Assembly, and the introduction of the separation of powers into Rhode Island's constitutional scheme, the People's Constitution made no provision for the justices to act as legal counselors to render advice to the coordinate branches of the proposed government.

In response the Landholder's Convention was reconvened and produced a draft of an alternative constitution, sometimes referred to as the Landholder's or Freeman's Constitution. Although this proposed constitution, drafted by a convention convened by the General Assembly, ostensibly called for a separation of powers, it effectively rejected separation of judicial and legislative power and instead proposed a continued co-mingling of those powers in the General Assembly as had been the practice under the Charter. This Freeman's Constitution provided:

Article Third

(To be inserted)

[Of the Distribution of Powers.

Section 1. The powers of the government shall be distributed into three distinct departments: the Legislative, Executive and Judicial.

Sec. 2. No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in cases herein expressly directed or permitted.]

74. R.I. CONST. art. III, §§ 2, 3; art. IV, § 1; art. IX, §§ 1, 4; art. XI, § 1 (Proposed Draft 1841), reprinted in 2 ELISHA R. POTTER, RHODE ISLAND CONSTITUTION (1843). These proposals were finally adopted by the Convention of the People. See POTTER, supra.

75. See CONLEY, LIBERTY AND JUSTICE, supra note 51, at 249-50.
Article Fourth

Of the Legislative Power

Section 1. This Constitution shall be the supreme law of the State, and all laws enacted contrary thereto, shall be void.

Sec. 2. The Legislative power, under this Constitution, shall be vested in two distinct Houses, or Branches, ... the one to be styled the Senate, the other the House of Representatives; and both together, the General Assembly.

... .

Sec. 10. The General Assembly shall continue to exercise the judicial power, ... and all other powers they have heretofore exercised not inconsistent with this Constitution.

... .

Article Eleventh

Of the Judicial Power

Sec. 1. The Judicial power of this state shall be vested in one Supreme Judicial Court, and in such other inferior Courts as the General Assembly may from time to time ordain and establish;

... .

Sec. 6. The Judges of the Supreme Judicial Court, shall in all trials instruct the Jury in the law, and it shall be the duty of said Judges, to give their opinions upon questions of law, when required by the Governor, or either House of the General Assembly.76

The Landholders' proposed constitution essentially called for a continuation of the relationship the supreme court justices and

76. R.I. CONST., art. III, §§ 1, 2; art. IV, §§ 1, 2, 10; art. XI, §§ 1, 6 (Proposed Draft 1842), reprinted in 2 POTTER, supra note 74.
the General Assembly had had under the Charter. The justices would not possess any independent power, ultimate judicial authority would remain in the General Assembly, and as a consequence the justices could, and would, continue to act as counselors rendering legal advice to the General Assembly as well as the Governor.

After the Freeman’s Constitution was narrowly defeated at the polls, two rival governments were subsequently elected – one under the People’s Constitution and a “Law and Order” government under the Charter – which gave rise to a period of turmoil known as the Dorr Rebellion.77 When the Law and Order party prevailed, it convened another constitutional convention in the fall of 1842 which substantially framed the present constitution.78 That constitution was remarkable for its ambiguity with respect to the separation of judicial and legislative power, and the independence of the judiciary. Whereas the People’s Constitution and the Freeman’s Constitution took clearly opposed but clearly expressed positions on the appropriate political and governmental structure, the constitution that was ultimately enacted seems to have been deliberately ambiguous, leaving the question unresolved. The Law and Order Constitution provided:

Article Third

Of the Distribution of Powers

The powers of government shall be distributed into three departments; the Legislative, Executive, and Judicial.

Article Fourth

Of the Legislative Powers

Section 1. The Constitution shall be the supreme law of the State, and any law inconsistent therewith shall be void. The General Assembly shall pass all laws necessary to carry this Constitution into effect.

Sec. 2. The Legislative power, under this Constitution, shall be vested in two Houses, the one to be called the

77. See CONLEY, LIBERTY AND JUSTICE, supra note 51, at 251-66.
78. Id. at 266.
Senate, the other the House of Representatives; and both together the General Assembly.

....

Sec. 10. The General Assembly shall continue to exercise the powers they have heretofore exercised, unless prohibited in this constitution.

....

Article Tenth

Of the Judicial Power

Section 1. The Judicial power of this State shall be vested in one Supreme Court, and in such inferior courts as the General Assembly may, from time to time, ordain and establish.

....

Sec. 3. The Judges of the Supreme Court shall, in all trials, instruct the jury in the law. They shall also give their written opinion upon any question of law whenever requested by the Governor, or by either House of the General Assembly.\footnote{79}{R.I. CONST. art. III; art. IV, §§ 1, 2, 10; art. X, §§ 1, 3 (Proposed 1842), reprinted in 2 POTTER, supra note 74. These provisions were adopted by the Convention assembled at Newport. See POTTER, supra.}

The People's Constitution specifically removed the ultimate judicial power from the General Assembly and placed it solely in the Supreme Court; it also provided for a clear demarcation between legislative and judicial power, and omitted the justices' pre-constitutional role as legal advisors to the executive and legislative elements of government.\footnote{80}{See supra note 74 and accompanying text.} The Freeman's, or Landholder's, Constitution, however, specifically reserved ultimate judicial power to the General Assembly; in addition, it blurred the line between judicial and legislative power; and, not surprisingly, continued the justices' obligation to act extra-judicially as legal advisors and counselors for the government.\footnote{81}{See supra note 76 and accompanying text.}
timately adopted in 1842, however, did not specifically address the General Assembly's exercise of judicial power. While it clearly called for the separation of legislative and judicial power, it simultaneously permitted the General Assembly to continue to exercise all the powers it had previously exercised, and called for the justices to act in a non-judicial advisory capacity as they had under the pre-separation of powers Charter.

Left open by the text was the question of whether the principle of separation of powers and the vesting of judicial power in the Supreme Court deprived the General Assembly of the judicial power it had "heretofore exercised"? There is evidence the General Assembly thought it did not. The first digest of laws enacted after the constitution became effective, the General Laws of 1844, contained an act modernizing the method of petitioning the General Assembly for review of decisions of the Court. Thus it seems evident the General Assembly was preparing to continue its pre-constitutional position as the state's ultimate appellate authority, and if it did, there would be nothing remarkable about continuing the justices' advisory and counseling role or about them remaining in a role essentially subservient to a General Assembly which could overrule their decisions as a court, or reject their advice as counselors. As we shall soon see, however, the Supreme Court itself viewed the new constitutional order, in particular the relationship of the judiciary and the legislators, quite differently.

The tension between the command of separate powers with ultimate judicial power being in the supreme court, and the General Assembly's view that it could continue to exercise judicial appellate power — eventually began its path to the Rhode Island Supreme Court in 1854 with the case of *Taylor v. Place*. The General Assembly had ordered a new trial for garnishees of a company indebted to another firm; prior to this order the courts had rejected a claim for a new trial. This exercise of judicial

82. See supra note 79 and accompanying text.
83. See id.
84. See Patrick T. Conley, Article VI, Section 4: A Case Study in Constitutional Obsolescence, 53 R.I. BAR J. 2, at 10.
86. See id. at *12 n. 1.
power was then challenged under the new constitution. The Supreme Court's subsequent interpretation of the constitution's separation of powers, in a decision authored by Chief Justice Ames, fundamentally altered the constitutional arrangement of judicial and legislative roles.\textsuperscript{87} Ames held that the General Assembly's action constituted the exercise of judicial power, and that the constitution's distribution of powers:

was . . . made for the special purpose of depriving the general assembly of their long exercised judicial power, which, rightly or wrongly, that body had assumed under the Charter . . . . It was the assumption of judicial power by the general assembly, which must have been specially aimed at by this clause of distribution.\textsuperscript{88}

Chief Justice Ames asserted that "[a]n independent, responsible judiciary is the only safeguard of our property, lives, and liberties,"\textsuperscript{89} and as historian Patrick Conley has written, "[t]he legislature acquiesced in this bold decision in 1857, when its new digest of general laws revised the petition process to exclude the traditional review of court cases."\textsuperscript{90} Thus the separation of powers and independence of the judiciary were imbued with a significantly stronger character in the constitutional scheme.

Given this invigoration of the separation of powers and the independence of the judiciary, the post-\textit{Taylor} advisory power necessarily required a greater sensitivity to such concerns than did the pre-\textit{Taylor} advisory power. In fact, it seems this was at least considered. On two occasions, first in 1899 and then in 1915, two separate commissions created by the General Assembly recommended numerous revisions to the state constitution which included, among other changes, a proposed revision to the advisory clause that would have given the justices discretion to decline to answer questions submitted to them.\textsuperscript{91} The revised clause would have provided: "The justices of the Supreme Court shall give their

\footnotesize{87. See Magrath, \textit{supra} note 85, at 310.  
89. \textit{Id.} at *10.  
90. Conley, \textit{supra} note 84, at 10.  
91. \textit{JOINT SPECIAL COMM. ON CONST. AMENDS. REPORT TO R.I. GEN. ASSEMBLY}, at 27 (Jan. 1899) (on file with author); \textit{REPORT OF COMM'N TO CONSIDER THE AMEND. AND REVISION OF THE CONST.}, at 37 (Jan. 1915) (on file with author).}
written opinion upon any question of law whenever requested by the governor or by either house of the general assembly: *provided, that they may decline to answer such questions as in their opinion they cannot properly decide.*" The entire 1898 proposed revised constitution, however, was rejected by the electorate, and the proposed revisions of the 1915 draft constitution were never submitted to the voters. Nevertheless, the justices themselves would, over time, begin imposing limitations on the advisory power, and would give constitutional recognition to the tension caused by including a pre-separation of powers advisory function in a constitutional document premised on the separation of legislative, executive, and judicial power.

B. The Rhode Island Justices' Interpretation of the Constitutional Grant of Advisory Power

The most notable limitations on the advisory power were conceived in the 1960's to accommodate the separation of powers and its corollary, the independence of the judiciary. The limitations, however, eventually came to be focused only on the justices' *obligation* to advise under article 10, section 3. As asserted earlier, however, the phrase "*shall give their written opinion upon any question of law whenever requested*" is not only the source of the justices' obligation to act as legal advisors, it is also the source of their authority to do so. The source of both authority and obligation is plainly the same; authority and obligation are indivisible and coextensive. Where there is authority there is obligation; where there is obligation there is authority. In interpreting section 3, however, the justices have described when they are "constitutionally required" to give a written opinion to one of the coordinate branches, and limited their discussions to the "constitutional mandate" of article 10, section 3 and the circumstances

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93. Conley, supra note 84, at 11.


95. R.I. CONST. art. X, § 3 (emphasis added).

96. In re Advisory Opinion to the Governor (Casino), 856 A.2d 320, 324 (R.I. 2004).

97. In re Request for Advisory Opinion from the Governor (Warwick Station Project), 812 A.2d 789, 790 (R.I. 2002).
in which they are "constitutionally obligated"98 to give advisory opinions. Their power to advise extra-judicially and the obligation for them to do so, however, are two sides of the same coin; when the justices interpreted section 3 to limit and frame their obligation to give advisory opinions, they also limited and framed their constitutional authority to do so as well. The two seminal cases interpreting the constitutional text to include limits on the obligation to give advisory opinions, Opinion to the Governor99 and Opinion to the House of Representatives,100 demonstrate the proposition that obligation and authority are indivisible.

In the 1963 Opinion to the Governor,101 the justices acknowledged the advisory power was a "peculiar obligation"102 distinct from the exercise of judicial power.103 The justices asserted it was included in the constitution "to enable the executive and legislative departments to more effectively discharge particular duties that are textually committed to them by the constitution."104 The justices reasoned the framers of the provision must have believed effective legislative and executive performance "require[d] from time to time assistance from the judges of [the] court upon questions of law, assistance which the framers contemplated as being best provided through the device of an advisory opinion."105 Consequently, when the advisory clause is "read in this light:"106

it becomes clear that the requirement that such an opinion be given "upon any question of law" was intended to be exclusory in effect. It was intended primarily to exclude the requirement that such opinions be given upon questions of law that do not challenge the consistency of law, enacted or proposed, with pertinent constitutional provisions. . . . [W]e are of the opinion that the pertinent constitutional provision [article 10, section 3] requires that the judges of this court furnish advisory opinions only

100. 208 A.2d 126 (R.I. 1965).
101. 191 A.2d 611.
102. Id. at 614.
103. Id. at 613.
104. Id. at 614 (emphasis added).
105. Id.
106. Id.
with respect to the consistency with constitutional provisions of legislation enacted or proposed.\textsuperscript{107}

Stated differently, the justices concluded the phrase "any question of law" was not intended by the framers to mean any question of law, but rather only questions of law concerning the constitutionality of proposed or enacted legislation. They reached this interpretation because of the separation of powers principle.

The justices have reasoned that "article 5 of the Rhode Island Constitution provides for a tripartite form of government, stating: 'The powers of the government shall be distributed into three departments: the legislative, executive and judicial,'\textsuperscript{108} and the justices have adhered to the view that this separation of powers "is an integral element of the republican form of government."\textsuperscript{108} It acts to limit one branch of government from "interfer[ing] impermissibly with the other's performance of its constitutionally assigned function."\textsuperscript{110} In the 1963 advisory, the justices concluded the advisory power must be interpreted so as to not disturb this fundamental characteristic of American constitutional government.\textsuperscript{111} The justices considered whether the questions propounded to them in that instance could reasonably be held "to come within the scope of sec. 2 of art. XII of the amendments."\textsuperscript{112} In determining the scope of the state constitution's advisory clause, the justices noted their "reluctance to subvert the principle of the separation of powers by translating the obligation to give advisory opinions upon request into a grant of authority to give such opinions where the inquiry is not such as to reasonably be within the purview of the constitutional provisions."\textsuperscript{113} The justices believed limits on the advisory opinion clause were necessary because of its "obvious repugnance. . . . to the principle of separation of pow-

\textsuperscript{107} Id. (emphasis added).
\textsuperscript{108} In re Advisory Opinion to the Governor (Ethics Comm'n), 612 A.2d 1, 15 (R.I. 1992).
\textsuperscript{109} Id. at 18; see also In re Advisory from the Governor, 633 A.2d 664, 674 (R.I. 1993).
\textsuperscript{111} Opinion to the Governor, 191 A.2d at 613.
\textsuperscript{112} Id. (emphasis added). Note that article III, section 2 the justices referenced in 1963 is now article X, section 3.
\textsuperscript{113} Id. (emphasis added).
ers,“114 and that they had a “duty, in view of the separation of the executive, legislative and judicial departments of government, to abstain from [giving an advisory opinion] in any case which does not fall reasonably within the constitutional clause.”115 Stated succinctly, the justices determined the text of article 10, section 3 was to be strictly construed in light of the fundamental principle marking both the federal and state constitutional systems – namely, the separation of powers – and that this limited the “grant of authority to give such opinions.”116

Two years later the same justices made explicit what was implicit in the separation of powers limitation. In the 1965 advisory Opinion to the House of Representatives117, the justices declared the purpose of the advisory clause – to assist the executive and legislative branches in the performance of their own constitutional duties – was both “narrow” and “substantially limited.”118 The justices warned “undue expansion of that purpose by judicial fiat” would have an “obvious adverse effect” on the “constitutional separation of powers” by injecting the justices into the governmental functions constitutionally committed to other branches of government.119 Considering the principle of separation of powers persuaded the justices that the scope of the constitutional advisory power was limited to rendering opinions to either House of the General Assembly only on proposed legislation, and to the executive branch only when the question concerned the constitutionality of legislation that was already enacted.120 In other words, the advisory clause authorized the court to give assistance to the legislature when it was considering whether to enact legislation, and to the executive when he or she was called to execute enacted legislation. Later justices would refine the interpretation of article 10, section 3 to explicitly state that its application to questions from the governor was also limited to occasions in which the statute at issue required implementation by the executive,121 and had

114. Id. at 614.
115. Id. (quoting To Certain Members of the Senate in the General Assembly, 191 A. 518, 520 (R.I. 1937)).
116. Id. at 613.
117. 208 A.2d 126 (R.I. 1965).
118. Id. at 127-28.
119. Id. at 127.
120. See id. at 127-28.
121. See In re Request for Advisory Opinion to the Governor (Rhode Island
a bearing upon a present constitutional duty awaiting the executive's performance.122

The justices have recognized that in light of these limitations it follows that neither the governor nor the legislature possess "standing to propound questions which are clearly the prerogative of the other."123 That means the constitutional advisory clause does not permit justices to advise the governor concerning the constitutionality of proposed legislation being considered by the general assembly, or to advise either House of the General Assembly concerning the governor's obligation to implement already enacted legislation. As interpreted by the justices, the purpose of the advisory clause permits the justices to provide advice to either the legislative or executive branch about the constitutionality of its own action, not about the actions of the other branch. It was not intended as a means for one branch to supervise the other.124 Questions from one branch seeking "advice" concerning how the remaining branch is fulfilling its constitutional duties "are almost always highly political;"125 the agenda of an advisory opinion is more political than adjudicatory because it is not brought by a private litigant challenging legislation that has brought them injury, but instead by one branch of government which is attempting to use the court to influence the other.126 Permitting such questions

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123. See id. (citing In re Request for Advisory Opinion Regarding House Bill 83-H-5640, 472 A.2d 301, 302 (R.I. 1984)). Although this strict interpretation of the text of article 10, section 3 has only occurred in the context of "nonbinding" advisory opinions, the justices' interpretation of the constitutional enabling language should be entitled to stare decisis, and in fact, subsequent justices have accorded the interpretation such status and overwhelmingly agreed with it. See Robert H. Kennedy, Advisory Opinions: Cautions About Non-Judicial Undertakings, 23 U. RICH. L. REV. 173, 182 & n. 31 (1989); see also In re Advisory to the Governor (Casino), 856 A.2d 320 (R.I. 2004); In re Request for Advisory Opinion from the Governor (Warwick Station Project), 812 A.2d 789, 790 (R.I. 2002); In re Advisory Opinion to the Governor, 732 A.2d at 59; In re Advisory Opinion to the House of Representatives (Impoundment of State Aid to Cities and Towns), 576 A.2d 1371, 1372 (R.I. 1990); In re Advisory Opinion (Chief Justice), 507 A.2d 1316, 1318-19 (R.I. 1986); Opinion to the Governor, 284 A.2d 295 (1971).
125. Kennedy, supra note 122, at 197.
126. Id. at 179.
poses two dangers. First, it allows the legislature or the executive, with the assistance of the judiciary, to subtly interfere with the constitutional duties entrusted to a separate branch. Second, it embroils the justices in a political power contest generally "at the height of its political tension,"\textsuperscript{127} and "risks an appearance of an active political engagement that may be perceived as contrary to the work of an independent judiciary."\textsuperscript{128} The justices recognized these dangers and limited the application of the advisory clause to neutralize them, and to preserve the integrity of both the separation of powers and independence of the judiciary.

II. THE AUTHORITY AND OBLIGATION TO RENDER ADVISORY OPINIONS ARE COEXTENSIVE

Other than referring to the "grant of authority" to render advisory opinions in \textit{Opinion to the Governor},\textsuperscript{129} the justices have not explicitly acknowledged the coextensive nature of the authority and obligation to give advice to the coordinate branches. It is, however, a necessary corollary of strictly construing the phrase "any question of law." The justices of New Hampshire's, Maine's and Massachusetts's highest courts have been more explicit in acknowledging this inevitable proposition. The Maine State Constitution provides that its justices "shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required" by the coordinate branches.\textsuperscript{130} Both the New Hampshire and Massachusetts constitutions declare that the coordinate branches "shall have authority to require the opinions of the justices . . . upon important questions of law and upon solemn occasions."\textsuperscript{131} Like Rhode Island's constitutional clause, these provisions obligate the justices to provide advisory opinions. Unlike Rhode Island's clause which obligates the justices to do so "upon any question of law,"\textsuperscript{132} these other provisions obligate the justices to do so only "upon important questions of law and upon solemn occasions."\textsuperscript{133} Rhode Island justices have, however, placed an in-

\textsuperscript{128} Kennedy, \textit{supra} note 122, at 197.
\textsuperscript{129} 191 A.2d 611, 613 (R.I. 1963).
\textsuperscript{130} ME. CONST. art. 6, § 3.
\textsuperscript{131} N.H. CONST. pt. 2. art. 74; MASS. CONST. pt. 2, ch. 3, art. 2.
\textsuperscript{132} R.I. CONST. art. X, § 3.
\textsuperscript{133} See \textit{infra} note 143 and accompanying text.
terpretive gloss on the “any question of law” text that essentially limits its meaning to important questions and solemn occasions as they have defined them. But the New Hampshire, Maine and Massachusetts justices have also characterized the “important question of law” and “solemn occasions” qualifiers as limits, not only upon their duty to render advisory opinions, but upon their constitutional authority to do so as well.

New Hampshire Supreme Court justices opine that their state constitution “empowers the justices of the supreme court to render advisory opinions . . . only in carefully circumscribed situations.”¹³⁴ The Maine justices have acknowledged that the “on important questions of law” and “upon solemn occasions” qualifiers define the scope of the “constitutional authority” as well as duty to advise the Governor, the Senate, or the House of Representatives.¹³⁵ When the Maine justices receive a request for advice they must first “determine whether [they] have the constitutional authority to answer the questions,”¹³⁶ and “refrain from issuing an opinion that is . . . [not] within the constitutional grant of [the] advisory power.”¹³⁷ The Maine justices once explained, in language that should apply in Rhode Island:

_Only subject to carefully confined conditions_ does the Maine Constitution give the Justices of the Supreme Judicial Court the _extraordinary_ responsibility of rendering their opinion. . . . An advisory opinion, which represents the views of the individual Justices and is not the decision of the Supreme Judicial Court sitting as the Law Court, is _constitutionally permissible_ only “on important questions of law, and upon solemn occasions.”. . . “[T]he boundaries set by the Constitution on our duty to furnish opinions are _jurisdictional in nature and must be strictly observed_ in order to preserve the fundamental principle of

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¹³⁵ _Opinion of the Justices_, 460 A.2d 1341, 1345 (Me. 1982) (emphasis added).
¹³⁶ _Opinion of the Justices_, 709 A.2d 1183, 1185 (Me. 1997) (citing _Opinion of the Justices_, 682 A.2d 661, 663 (Me. 1996); _see also_ _Opinion of the Justices_, 674 A.2d 501, 502 (Me. 1996) (citing _Opinion of the Justices_, 623 A.2d 1258, 1261 (Me. 1993))).
¹³⁷ _Opinion of the Justices_, 674 A.2d at 502.
the separation of the judicial from the executive and legislative branches of government.”\textsuperscript{138}

Massachusetts Supreme Judicial Court justices also recognize that the advisory clause in their state constitution is “[t]he source of the authority and the duty of the Justices to render advisory opinions.”\textsuperscript{139} The Massachusetts Constitution not only “define[s] the extent of the duty of the Justices to furnish opinions, \textit{but it also limits their right to express them}. . . . The Justices must adhere strictly to the jurisdictional boundaries established . . . in order to safeguard the separation of powers embodied in art. 30 of the Massachusetts Declaration of Rights.”\textsuperscript{140} If no “solemn occasion” exists, as that term is interpreted by the justices, they “are constitutionally constrained from rendering an advisory opinion regardless of the importance of the particular questions.”\textsuperscript{141} They acknowledge that while “[t]here is always present the desire on the part of the Justices to comply with the request for an opinion . . . the duty of conformity to the meaning of [the] clause is a continuing one and cannot be avoided.”\textsuperscript{142} Justices on Massachusetts’s Supreme Judicial Court in the 19\textsuperscript{th} century stated:

While it is our duty to render opinions in all those cases in which either branch of the legislature or the governor and council may properly require them, \textit{it is not the less our duty, in view of the careful separation of the executive, legislative, and judicial departments of the government, to abstain from doing so in any case which does not fall within the constitutional clause.}\textsuperscript{143}

Therefore, despite at least three of her sister states’ ready and continued observance of the distinction between the constitutional authority and obligation to render an advisory opinion, Rhode Is-
land has declined, as of yet, to follow suit.

III. RHODE ISLAND'S PUBLIC IMPORTANCE EXCEPTION

While some might debate whether the "any question of law" text of the advisory clause can legitimately be interpreted as narrowly as the justices have interpreted it,\textsuperscript{144} even in light of separation of powers considerations, if the construed limitations are accepted one would reasonably believe they are not only constitutional limits on the questions the justices are obliged to advise on, but limits on their constitutional authority to do so as well. If the question meets the criteria declared by the justices, they have both the authority and obligation to answer it. If it does not, they do not have either. One could reasonably believe the justices would adhere to the view that neither the text of the advisory clause nor the justices' interpretation of it admit of any discretion. But the justices have in fact asserted a discretionary authority to answer questions falling outside of the constitutional parameters they themselves have declared.

When article 10, section 3 was first interpreted in 1965 to apply only to both questions from either house of the General Assembly as to the constitutionality of proposed legislation, and from the Governor on the constitutionality of legislation already enacted, the justices counseled against "undue expansion" of the scope of the advisory power by "judicial fiat" because to do so it would have an "obvious adverse effect" on the constitutional separation of powers.\textsuperscript{145} The limitations were necessary to permit the command of the separation of powers of article 5 to constitutionally coexist with advisory power of article 10, section 3.\textsuperscript{146} In 1971 they opined they would "scrupulously avoid giving advisory opinions in circumstances not constitutionally mandated" because to

\textsuperscript{144} Former Justice Robert G. Flanders, Jr. has described the language of article 10, section 3 as "unequivocal, preemptory, and without qualification." \textit{In re Advisory Opinion to the Governor (Rhode Island Ethics Comm'n – Separation of Powers)}, 732 A.2d 55, 74 (R.I. 1999) (Flanders, J.). He has opined that none of the limitations that other justices have gleaned from the text of the advisory section in light of the separation of powers principle "have any basis in the constitution." \textit{In re Request for Advisory Opinion from the Governor (Warwick Station Project)}, 812 A.2d 789, 792 (R.I. 2002) (Flanders, J.).

\textsuperscript{145} Opinion to the House of Representatives, 208 A.2d 126, 127 (R.I. 1965).

\textsuperscript{146} See supra note 132 and accompanying text.
do so "would amount to inexcusable gratuitousness."  

The description "inexcusable gratuitousness" is perplexing. Rather than declaring they had no constitutional authority to act when a question propounded to them was outside the limitations imposed by their interpretation of the text, they instead claimed it would be gratuitous to act. Rather than clearly defining the limit of their authority, they left it opaque. This began the justices’ focus on the limits on their constitutional obligation to render an advisory opinion, while neglecting consideration of the limits of their constitutional authority to do so. They would "scrupulously avoid" giving advisory opinions on questions that did not meet the criteria they had set forth, not because it would be unconstitutional or beyond their constitutionally conferred advisory authority, but merely because it would be inexcusably gratuitous to do so. Thus, the justices chose language implying they had no obligation to render advice on questions that did not meet the constitutional parameters they had placed on the advisory authority, but refrained from explicitly declaring they had no constitutional authority to answer such questions. The subtle implication was that obligation and authority were severable, without explaining why or where their advisory authority then purported to come from.

The severance of authority from obligation lay dormant for a time, but the implied assertion of an extra-constitutional discretionary power to advise began to bloom fifteen years later in In re Advisory Opinion (Chief Justice).  

At issue was a request for an advisory opinion regarding a resolution, proposed in the Senate, to vacate the seat held by the Court’s Chief Justice. The request for the advisory came, however, from the Governor, the Speaker of the House of Representatives and the Majority Leader of the Senate. The justices noted the Governor had no present constitutional duty awaiting performance, and consequently, his request was outside the scope of the advisory clause as it had been construed. They also noted both the request of the Speaker and of the Senate Majority Leader were brought by the leaders only, and were not the result of formal action taken collectively by either

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148. 507 A.2d 1316 (R.I. 1986)
149. Id. at 1317.
150. Id. at 1318.
151. Id. at 1319.
house of the General Assembly. Notwithstanding the fact that the justices had many years earlier opined that the advisory clause could be triggered only by the collective action of either house, they labeled this a mere "procedural deficiency . . . in view of the fact that either branch of the Legislature could independently, by majority vote, propound the same question to this court." Because the question concerned the legality of a proposed legislative action, and a request by either house of the general assembly would have substantively been within the scope of the constitutional advisory authority had the legislators followed through to make it a collective action, the justices declared they had the discretion to waive the "procedural" defect because of "the constitutional and public importance of the question propounded to [the] court."

As Chief Justice Weisberger later described, the request did involve the constitutionality of pending legislation and "[i]t was obvious that a request propounded by the leaders of both Houses of the General Assembly was technically defective but that such a question could have rapidly been transformed into a request by either House." Accepting the presumption that the Majority Leader and Speaker's wishes would have been rapidly granted by the Senate and the House, the deficiencies in In re Advisory Opinion (Chief Justice) may plausibly be described as procedural. A procedurally sufficient request by either house of the general assembly would have satisfied the substantive limitations the justices had placed on the reach of the advisory power. Thus, the discretion the justices determined they could exercise in In re Advisory Opinion (Chief Justice) was not a discretion to "waive" the advisory power's substantive limitations in the name of public importance; it was simply a discretion to waive a procedural insufficiency when the substantive limitation would have been satisfied. The "procedural" appellation, however, would soon be inexplicably transported to the substantive limitations.

Four years later, in In re Advisory Opinion to the House of

152. Id.
153. Id.
154. Id. at 1319-20.
Representatives (Impoundment of State Aid to Cities and Towns), a majority of the justices agreed to provide advice to the House because of the "public importance" of the question. However, as then Chief Justice Weisberger pointed out in a dissenting opinion:

[T]he House of Representatives clearly propounds a question that has nothing to do with the constitutionality of pending legislation. The request seeks an advisory opinion concerning a duty to be performed by the Governor in respect to legislation already enacted. Such a question under our cases should not be answered pursuant to article X, section 3, of the 1986 Rhode Island Constitution or its predecessor article XII, section 2, of the Amendments to the Constitution of 1843.

Any reply from this court to an advisory request made by the House of Representatives in respect to a duty to be performed by the Governor is particularly inappropriate in light of the undisputed fact that the Governor does not seek our advice on this question. Indeed, the Governor has filed a brief clearly indicating that he feels that at this time our answer to such a question propounded by the House of Representatives would be a violation of our precedents. With this position I wholeheartedly agree.

The remaining justices relied on In re Opinion (Chief Justice) as the sole authority for waiving "procedural defects" in cases of public importance, effectively enlarging the procedural label to encompass the substantive limitations that had previously limited their constitutional authority to issue an advisory opinion. The justices did not discard the limitations, or repudiate the reasoning that led prior justices to interpret the text of the advisory clause to include them. Instead, they simply masked them with a label that would imply they were something they were not. As one former justice of the court might have said of such an effort, you

157. Id. at 1372.
158. Id. at 1376 (Weisberger, J. dissenting).
159. 507 A.2d 1316.
160. In re Advisory Opinion to the House of Representatives (Impoundment of State Aid to Cities and Towns), 576 A.2d at 1372.
can call a cat a dog, but that won't make it bark.\textsuperscript{161} Nevertheless, the transmutation of the substantive limitations on the advisory powers, limitations intended to protect the principle of separation of powers, was now complete. The substantive interpretation of “any question of law,” to be limited to questions from either house of the General Assembly concerning the constitutionality of pending legislation, or to questions from the Governor concerning the constitutionality of existing statutes requiring his or her implementation, would subsequently be called mere “procedural infirmities”\textsuperscript{162} or “procedural deficiencies”\textsuperscript{163} that the justices had the discretion to waive. In effect, what had been constitutional boundaries on the justices’ authority to issue advisory opinions were now waivable. The justices elected to breach the wall previously erected to protect, enforce and strengthen the separation of powers, agreeing to offer advisory opinions to the Governor on legislation that was pending in the legislature\textsuperscript{164} and to the General Assembly on questions concerning previously enacted legislation that was then the constitutional responsibility of the Governor to execute.\textsuperscript{165} In sum, the justices elected to exercise a discretion to advise one branch about what the other branch was doing or should be doing, based on the justices’ assessment of the public importance of the question presented.\textsuperscript{166}

The “public importance” exception reached its zenith, however, in the 2004 advisory opinion to the Governor concerning the constitutionality of the Casino Act.\textsuperscript{167} Although neither house of

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\item \textsuperscript{161} See, e.g., Cohen v. Harrington, 722 A.2d 1191, 1195 (R.I. 1999) (Bourcier, J.) (“Labeling a cat a dog certainly will not cause a cat to bark.”); Peerless Ins. Co. v. Viegas, 667 A.2d 785, 789 (R.I. 1995) (Bourcier, J.) (“A plaintiff, by describing his or her cat to be a dog, cannot simply by that descriptive designation cause the cat to bark.”).
\item \textsuperscript{162} In re Advisory Opinion to the Governor (Casino), 856 A.2d 320, 324 (R.I. 2004).
\item \textsuperscript{163} In re Advisory Opinion to the Governor (Rhode Island Ethics Comm’n - Separation of Powers), 732 A.2d 55, 59 (R.I. 1999); In re Advisory from the Governor, 633 A.2d 664, 667 (R.I. 1993).
\item \textsuperscript{164} See In re Advisory Opinion to the Governor (Casino), 856 A.2d at 327; In re Advisory Opinion to the Governor, 732 A.2d at 59; In re Advisory From the Governor, 633 A.2d at 667.
\item \textsuperscript{165} See In re Advisory Opinion to the House of Representatives, 576 A.2d 1371, 1372 (R.I. 1990).
\item \textsuperscript{166} E.g., In re Advisory Opinion to the Governor (Casino), 856 A.2d at 324-25.
\item \textsuperscript{167} Id. at 320; see also The Rhode Island Gaming Control and Revenue
the General Assembly sought the justices’ advice concerning the constitutionality of the Act, and the justices acknowledged the Governor had no present obligation to implement the legislation for which he sought an advisory opinion, that fact was merely a “procedural hurdle[] that must be cleared before [the court’s] duty to issue an advisory opinion [arose],” and this “procedural infirmity[]” meant only that they were “not constitutionally required to issue an advisory opinion.” As other justices had done before them, they proceeded to issue an advisory opinion claiming the discretion to issue such an opinion upon any request raising “important constitutional or social questions,” discretion to be exercised on a “case by case basis” with no “clearly defined test” for when they would or should exercise it. The idea of constitutional limits on the authority to issue an advisory opinion was now completely divorced from the constitutional limits on the obligation to issue them. The parameters that, in the name of separation of powers, limited the “standing” of the legislative and executive branches to seek advice concerning the exercise of their own constitutional duties now only limited what questions the justices were obligated to answer, not their authority to answer them. 

No analysis, however, addressed the source of the justices’ authority to render non-judicial written advice to the legislature or the governor outside the parameters they had found in the constitutional text, and whether that authority was limited by article 10, section 3 and the separation of powers. What had been (and are) substantive constitutional limitations on the justices’ advisory power were now labeled mere procedural technicalities the justices could waive at their discretion, unfettered by any articulated standards as to when the discretion should be exercised. That is a long way from “shall give their written opinion upon any question of law whenever requested.”

In fashioning the public importance exception, the justices focused exclusively on whether they should answer a question that

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168. Id. at 324 (first emphasis added).
169. Id. at 324-25.
170. See id. at 324.
171. See id. at 324-25.
172. R.I. Const. art. X, § 3.
does not come within their own interpretation of article 10, section 3, but not at all on whether they could answer such a question.\textsuperscript{173} The justices have effectively asserted that article 10, section 3 gives them the authority to answer all questions propounded by the Governor and the Legislature, but limits only the questions they are obligated to answer.\textsuperscript{174} In asserting this extraordinary interpretation of the advisory clause text, the justices offered no interpretive analysis or explanation, nor did they address the implications of their expansive view of extrajudicial advisory power on the principle of separation of powers.\textsuperscript{175} In a 1990 advisory opinion, Chief Justice Weisberger characterized the resort to the public importance exception as “inappropriate” and “a violation of our precedents.”\textsuperscript{176} He was respectfully restrained; the public importance exception is outside the Rhode Island Supreme Court justices’ constitutionally conferred authority and is a breach of “an inherent and integral element of the republican form of government:”\textsuperscript{177} the separation of powers. It is the unconstitutional exercise of the non-judicial power.

IV. UNCONSTITUTIONAL AND DANGEROUSLY POLITICAL

As stated earlier with respect to limits on the judicial power, “a single basic idea – the idea of separation of powers,”\textsuperscript{178} reflects the “overriding and time-honored concern about keeping the Judiciary’s power within its proper constitutional sphere,”\textsuperscript{179} and counsels against a court acceding to the urge to decide “the merits of [] important dispute[s] and to ‘settle’ [them] for the sake of convenience and efficiency.”\textsuperscript{180} Limits on a court’s authority to act “are an essential ingredient of separation and equilibrium of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain

\begin{itemize}
\item \textsuperscript{173} See \textit{In re Advisory Opinion to the Governor (Casino)}, 856 A.2d at 324.
\item \textsuperscript{174} \textit{Id}.
\item \textsuperscript{175} \textit{Id.} at 324-25.
\item \textsuperscript{176} \textit{In re Advisory Opinion to the House of Representatives}, 576 A.2d 1371, 1376 (R.I. 1990) (Weisberger, J., dissenting).
\item \textsuperscript{177} \textit{In re Advisory Opinion From the Governor}, 633 A.2d 664, 674 (R.I. 1993).
\item \textsuperscript{179} \textit{Id}.
\item \textsuperscript{180} \textit{Id}.
\end{itemize}
These same considerations must apply with respect to limits on the advisory power as well. Past justices of the Rhode Island Supreme Court have in fact defined the constitutional limits to the exercise of the advisory power. Those limits flow from the idea of separation of powers—an idea that recognizes the limits of the court's powers and restrains one branch from interfering with another's exercise of its constitutional responsibilities. These limits must be respected even where the justices are urged, in the name of efficiency and convenience, to advise on important public and, virtually always, political disputes.

Moreover, there are advantages to waiting to adjudicate the constitutionality of legislation in the usual exercise of the court's constitutionally conferred judicial power rather than in the accelerated procedure of an advisory opinion. Waiting "serves '[t]he value of having courts function as organs of the sober second thought of the community appraising action already taken, rather than as advisers at the front line of governmental action at the stage of initial decision." Respect for separation of powers requires the Judicial Branch to exercise restraint in deciding constitutional issues by resolving those implicating the powers of the three branches of Government as a 'last resort." United States Supreme Court Justice David Souter has written in a somewhat different context that:

The counsel of restraint... begins with the fact that a dispute involving only officials, and the official interests of those, who serve in the branches of the... Government lies far from the model of the traditional common-law cause of action at the conceptual core of the case-or-controversy requirement.... It is in substance an inter-branch controversy.... Intervention in such a controversy would risk damaging the public confidence that is

182. See, e.g., Opinion to the House of Representatitives, 208 A.2d 126, 127-28 (R.I. 1965); Opinion to the Governor, 191 A.2d 611, 614 (R.I. 1963); see also supra Part I.B.
183. See Opinion to the House of Representatives, 208 A.2d at 127; Opinion to the Governor, 191 A.2d at 613-14.
184. JAY, supra note 33, at 5 (quoting Allen v. Wright, 478 U.S. 737, 750 (1984)).
185. Raines, 521 U.S. at 833 (Souter, J., concurring).
vital to the functioning of the Judicial Branch.\textsuperscript{186}

Waiting to resolve the constitutionality of a legislative act until a challenge is brought by a party from outside the government would, in Justice Souter's view, "expose the Judicial Branch to a lesser risk [because deciding] a suit to vindicate an interest outside the Government raises no specter of judicial readiness to enlist on one side of a political tug-of-war."\textsuperscript{187} Souter continued to explain that "just as the presence of a party beyond the Government places the Judiciary at some remove from the political forces, the need to await injury to such a plaintiff allows the courts some greater separation in time between the political resolution and the judicial review."\textsuperscript{188} Over 180 years ago at a Massachusetts constitutional convention, Justice Story argued for removal of the advisory opinion provision from that state's constitution because of the great danger that the justices would give opinions in circumstances "exclusively of a political character," believing that such an obligation would be destructive of an independent judiciary.\textsuperscript{189}

Advisory opinions are at odds with both the court's constitutional exercise of judicial power and with the constitutional design of separation of powers, but it is, for better or worse, a constitutional obligation of the justices of the Rhode Island Supreme Court.\textsuperscript{190} In the 1960's, however, the justices interpreted that obligation in a manner that took the separation of powers into consideration, making the advisory opinion fit more comfortably with the concepts of judicial power, an independent judiciary and separation of powers.\textsuperscript{191} These limitations permitted the justices to assist each of the coordinate branches by giving legal advice concerning the performance of their own constitutional duties, and removed any temptation for the Legislature to conscript the jus-

\textsuperscript{186} Id.
\textsuperscript{187} Id. at 833-34.
\textsuperscript{188} Id. at 834.
\textsuperscript{189} Opinion of the Justices of the Supreme Judicial Court Given Under the Provisions of Section 3 of Article VI of the Constitution, 343 A.2d 196, 200 n. 3 (Me. 1975) (quoting the Journal of Debate and Proceedings in the Massachusetts Constitutional Convention: 1820-1821 489-90 (1853)).
\textsuperscript{190} R.I. CONST. art. X, § 3.
\textsuperscript{191} See Opinion to the House of Representatives, 208 A.2d 126, 127 (R.I. 1965); Opinion to the Governor, 191 A.2d 611, 613-14 (R.I. 1963); supra Part I.B.
tices into service in a dispute with the Governor, or for the Governor to likewise enlist them against the Legislature. As a result, the executive and legislative departments had access to the justices' expert legal advice if they wanted their counsel. Both were prevented from interfering with the duties constitutionally committed to the other branch, and the Judiciary was permitted an important measure of independence and distance from political disputes between the other two constitutional departments.

This constitutionally desirable, permissible and defensible interpretation of article 10, section 3 was accomplished by construing the constitutional phrase “any question of law . . . requested by the governor or by either house of the general assembly” in light of article 5's separation of powers command. But that very same language is the only source of the justices' authority to render advice to a coordinate branch of state government. They are not constitutionally authorized to render such advice outside of article 10, section 3, and whatever limitations their interpretation of its language places on their obligation to provide advice also apply to limit their constitutional authority as members of the judicial branch to render nonbinding, non-judicial advice to the Governor and the Legislature. If their interpretation of the text limits their obligation to respond, it also limits their authority to respond. If their interpretation places some questions beyond their constitutional obligation, it places those questions beyond their constitutional authority.

The justices' discretionary exercise of the "public importance" exception wholly ignores the question of the Court's authority. While it effectively neutralizes the abilities of the other branches to conscript the justices into an inter-branch dispute, it is far worse that they voluntarily join such a battle and take sides. Even more troubling, no attempt is made to fit this purported discretionary authority into the justices' prior interpretation of the constitutional text or its rationale, nor is such a fit readily imaginable. An appellate court:

is limited in its interpretation of the constitution only by self-restraint responding to legal tradition and the claims of moral duty. . . . The legitimacy of judicial decrees de-
pends... in considerable part on public confidence that the judges are predominantly engaged not in making personal political judgments but in applying a body of law.¹⁹⁴

The "public importance" exception does not fit at all with the justice's interpretation and definition of "any question of law." Either a question meets the criteria for a question of law under article 10, section 3 as defined by the justices, or it does not. To effectively interpret any "question of law" to mean any question of law that meets the constitutional criteria the justices have declared and any other question the justices might think is important, risks the perception, true or not, of the justices "making personal political judgments" rather than applying a body of law in a judicial manner.¹⁹⁵ Justice Rehnquist has written of the United States Supreme Court's exercise of its judicial power:

Much as "Caesar had his Brutus; Charles the First his Cromwell," Congress and the States have this Court to ensure that their legislative Acts do not run afoul of the limitations imposed by the United States Constitution. But this Court has neither a Brutus nor a Cromwell to impose a similar discipline on it. While our "right of expounding the Constitution" is confined to "cases of a Judicial Nature," we are empowered to determine for ourselves when the requirements of Art. III are satisfied. Thus, "the only check upon our own exercise of power is our own sense of self-restraint." I do not think the Court, in deciding the merits of appellant's constitutional claim, has exercised the self-restraint that Art. III requires in this case.¹⁹⁶

The same could be said of the Rhode Island justices' exercise of the advisory power of article 10, section 3 under the public importance exception.

V. CONCLUSION

Advisory opinions, like all opinions, "are only as long and as

¹⁹⁴. Topf, supra note 94, at 249.
¹⁹⁵. Id.
strong as the reasoning that props them up." There is virtually no reasoning propping up the justices' claim that the state constitution's declaration — "[t]he judges of the supreme court shall give their written opinion upon any question of law whenever requested" — obligates them to answer some questions, but gives them discretion to answer others. If the "question[s] of law" referred to in article 10, section 3 are limited, as the justices have said they are, then both obligation and authority are limited.

The public importance exception applies only when one branch of government seeks an advisory opinion about what the other branch should have done or should be doing. When the exception is exercised the justices voluntarily inject themselves into a highly political contest — the precise result the initial limitations were meant to avoid. The justices would be better off to interpret "any question of law" to mean any question of law without limitation, because then it would be their constitutional duty to participate in such a dispute, rather than their choice.

Because of the nonbinding nature of advisory opinions, however, the justices "are at liberty to change their minds, to follow a different path in later cases . . . and to become better educated about what they themselves have said about the subjects addressed in these opinions when future matters arise concerning these same legal issues." Although the justices, as members of the court of last resort and final arbiter of the meaning of the state constitution, have the power to continue to utilize the public importance exception, it is respectfully submitted they have not demonstrated the constitutional authority to do so. It has no place under the constitutional clause, and, therefore, in the state's constitutional scheme. To continue to exercise a power with no discernable constitutional authorization in politically sensitive circumstances, no matter how valuable and useful it may be, risks the Court's reputation for integrity and candor, and thus the public's confidence — its most vital assets. That is too steep a price for the public importance exception.

To borrow a phrase from the justices of the Commonwealth of Massachusetts, "[n]ot only does the Constitution define the extent

198. R.I. CONST. art. X, § 3.
199. Id.
of the duty of the Justices to furnish opinions, but it also limits their right to express them,"200 and Justices are constitutionally obligated to respect those limits "in order to safeguard the separation of powers."201 If the question falls without those limitations, "the [j]ustices are constitutionally constrained from rendering an advisory opinion regardless of the importance of the particular questions."202 Fidelity to constitutional limitations on the exercise of power must be maintained even, and especially, by the judiciary; for if the judiciary will not, who will?

201. Id.