
ADVISORY OPINIONS AND THE INFLUENCE OF THE SUPREME COURT OVER AMERICAN POLICYMAKING

The influence and prestige of the federal judiciary derive primarily from its exercise of judicial review. This power to strike down acts of the so-called political branches or of state governments as repugnant to the Constitution — like the federal judicial power more generally — is circumscribed by a number of self-imposed justiciability doctrines, among the oldest and most foundational of which is the bar on advisory opinions.¹ In accord with that doctrine, the federal courts refuse to advise other government actors or private individuals on abstract legal questions; instead, they provide their views only in the course of deciding live cases or controversies.² This means that the Supreme Court will not consider whether potential legislative or executive action violates the Constitution when such action is proposed or even when it is carried out, but only when it is challenged by an adversary party in a case meeting various doctrinal requirements. So, if a legislative coalition wishes to enact a law that might plausibly be struck down — such as the 2010 healthcare legislation³ — it must form its own estimation of whether the proposal is constitutional⁴ but cannot know for certain how the Court will ultimately view the law.

The bar on advisory opinions is typically justified by reference to the separation of powers and judicial restraint: when courts answer legal questions outside the legal dispute-resolution process, they reach beyond the judicial role and assume a quasi-legislative character. But

¹ See *Flast v. Cohen*, 392 U.S. 83, 96 (1968); Helen Hershkoff, *State Courts and the “Passive Virtues”*: *Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1844 (2001).

² The bounds of a case or controversy are delimited by the doctrines of standing, ripeness, and mootness. See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 49 (6th ed. 2009) [hereinafter HART & WECHSLER].

³ See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029. The Act’s “individual mandate,” which will require all Americans to purchase health insurance beginning in 2014, has been challenged in federal court in several districts, and one district court has held both that the individual mandate is unconstitutional and that it is not severable from the rest of the Act, meaning that the entire Act must be struck down. See *Florida v. U.S. Dep’t of Health & Human Servs.*, No. 3:10-cv-91-RV/EMT, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011). The effect of this ruling, if not reversed on review, is that a statute “approximately 2,700 pages long” and containing “several hundred sections,” some of them only tangentially related to healthcare, *id.* at *34, and which was passed only with great expenditure of legislative resources, will be nullified because of constitutional defect in a single provision, and without the legislature’s having been afforded a chance to determine before expending those resources whether the challenged provision would be upheld.

⁴ For convenience, this Note uses the terms “constitutional” and “unconstitutional” in a purely positivist sense: a statute is “constitutional” if the Supreme Court would uphold it at the relevant time and “unconstitutional” if the Court would strike it down.

whatever its rationale, the effect of the bar — and in particular the federal courts’ refusal to provide an *ex ante* evaluation of a proposed law’s constitutionality at the request of the elected branches — is to expand the influence of the judiciary over American policymaking.⁵ First, because the legislature cannot know ahead of time whether plausibly unconstitutional statutes will be struck down or left standing, it must discount the expected value of such proposals by the probability of their not being invalidated in deciding how to expend its limited political capital.⁶ All else equal, this makes legislation that the Court might strike down less attractive to Congress, and so less likely to be enacted, than constitutionally unproblematic legislation. Second, the Court is itself subject to political constraints, especially when issuing countermajoritarian invalidations of the acts of the elected branches. The bar on advisory opinions, by keeping Congress guessing and forcing it to forego some constitutionally problematic legislation while allowing the Court to withhold judgment until enactment and implementation costs have been sunk, allows the Court to reserve its limited political capital for those proposals that surmount legislative doubts about constitutionality and pass through bicameralism, presentment, and other veto-gates to become law. Thus, by refusing to issue advisory opinions, the Court both causes Congress and helps itself to conform American law to the Court’s vision of the Constitution. A doctrine adopted in the name of judicial restraint thereby tilts the balance of power between the Supreme Court and the elected branches in favor of greater influence for the Court.

This Note proceeds in five Parts. Part I briefly examines the history behind the bar on advisory opinions and the doctrinal justifications that have been put forth in support of it. Part II provides a concrete alternative to the status quo by describing a hypothetical practice of Supreme Court advisory opinions. Part III lays out a model of legisla-

⁵ Others have made the parallel suggestion that the constitutional avoidance canon of statutory construction may increase judicial influence despite being most often explained in terms of judicial restraint. See *United States v. Marshall*, 908 F.2d 1312, 1335 (7th Cir. 1990) (en banc) (Posner, J., dissenting) (“Courts often do interpretive handsprings to avoid having even to *decide* a constitutional question [by instead construing statutes to avoid significant constitutional issues]. In doing so they expand, very questionably in my view, the effective scope of the Constitution, creating a constitutional penumbra in which statutes wither, shrink, are deformed.”); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 74 (“[I]t is by no means clear that a strained interpretation of a federal statute that avoids a constitutional question is any less a judicial intrusion than the judicial invalidation on constitutional grounds of a less strained interpretation of the same statute.”).

⁶ In many cases only a single provision of a larger statutory scheme will raise constitutional concerns. If that provision is judged invalid, the question becomes whether it is “severable” from the whole, allowing the remainder of the law to be left standing. See *supra* note 3. For simplicity, this Note will use the term “statute” to mean either a whole law or some provision thereof.

tive behavior, building on a recent article by Professor Matthew Stephenson.⁷ Part IV provides a model of judicial behavior. Part V combines the models to explain why the bar on advisory opinions increases the Court's influence over American legislation.

The federal courts' refusal to issue advisory opinions is and will in all likelihood remain a fixed point in American practice, and it is no part of this Note's purpose to advocate its abandonment or to make normative arguments for or against it. This Note merely offers a positive analysis of the doctrine's effects. Furthermore, this Note primarily compares the current regime with one in which the Court is *required* to issue advisory opinions at the request of the elected branches. Although many of its arguments would also apply to a regime giving the Court certiorari-style discretion to issue or not issue such opinions, a mandatory advisory opinions system is the type most forcefully rejected by the Supreme Court⁸ and in operation in most of the states with advisory opinion practices.⁹

I. FOUNDATIONS: HISTORY AND DOCTRINE

In American law, the bar on advisory opinions dates from 1793, the year of the "Correspondence of the Justices."¹⁰ The Washington Administration was at that time walking a fine line of neutrality between the British and the French, who were engaged in a war that reached across the Atlantic to American ports and coastlines.¹¹ In an effort to resolve disagreements among Washington's advisors — particularly the pro-British Alexander Hamilton and the pro-French Thomas Jefferson — about the proper course of action, the Cabinet prepared a list of twenty-nine very specific questions about America's obligations to the warring powers under its treaties and international law.¹² Jefferson then sent a letter to Chief Justice Jay and his fellow Justices, requesting, "in the first place, their opinion, whether the public may, with propriety, be availed of their *advice on these questions?*"¹³

⁷ Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2 (2008).

⁸ See Part I, pp. 2066–69.

⁹ See *infra* note 33.

¹⁰ See HART & WECHSLER, *supra* note 2, at 50–52. See generally STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES 117–48 (1997).

¹¹ See JAY, *supra* note 10, at 117–25, 143.

¹² See *id.* at 121, 135–36.

¹³ Letter from Thomas Jefferson, Sec'y of State, to Chief Justice Jay and Associate Justices (July 18, 1793), in HART & WECHSLER, *supra* note 2, at 51.

The Jay Court refused.¹⁴ The Justices reasoned that it would be improper for them to answer legal questions “extrajudicially” in light of “[t]he Lines of Separation” between the branches and “their being in certain Respects checks on each other.”¹⁵ Their textual support for the refusal was Article II’s grant to the President of power to require the opinions of executive officers,¹⁶ from which they inferred that the President lacked the same power with respect to judicial officers.¹⁷ Although the Justices — including Chief Justice Jay himself — had in fact offered legal advice to the other branches before 1793 and continued to do so during the early Republic,¹⁸ the words of the Correspondence have proven more influential over the past two centuries than the actual practice of the 1790s: the bar on advisory opinions is today firmly entrenched.¹⁹

This construction of the federal judicial power was not inevitable. In addition to the numerous advisory opinions given by the early Justices, English judges had a longstanding practice of issuing advisory opinions upon the monarch’s request.²⁰ And federal judges and Justices have continued to give opinions informally, including through extrajudicial publications and interviews, dicta in judicial opinions, and ex parte advice to political actors.²¹ Moreover, a number of state courts and foreign and international tribunals readily give advisory opinions on issues arising within their purviews.²² In fact, it has been suggested that the Jay Court was motivated by political rather than doctrinal factors in refusing to address Washington’s queries: the Justices were hoping that Congress would absolve them of their burden-

¹⁴ See Letter from the Justices of the Supreme Court to President George Washington (Aug. 8, 1793), in JAY, *supra* note 10, at 179–80. It is perhaps excusable that the Justices’ renunciation of advisory opinions itself came in the form of an advisory opinion.

¹⁵ *Id.* at 179.

¹⁶ U.S. CONST. art. II, § 2, cl. 1.

¹⁷ See Letter from the Justices of the Supreme Court to President George Washington, *supra* note 14.

¹⁸ See William R. Casto, *The Early Supreme Court Justices’ Most Significant Opinion*, 29 OHIO N.U. L. REV. 173, 192–95 (2002).

¹⁹ HART & WECHSLER, *supra* note 2, at 52–53.

²⁰ See Robert J. Pushaw, Jr., *Why the Supreme Court Never Gets Any “Dear John” Letters: Advisory Opinions in Historical Perspective*, 87 GEO. L.J. 473, 475–77 (1998) (reviewing JAY, *supra* note 10). See generally JAY, *supra* note 10, at 10–50 (discussing English practice); *id.* at 51–112 (discussing American practice up to 1793).

²¹ See, e.g., HART & WECHSLER, *supra* note 2, at 52–53, 55–56.

²² States with advisory opinion practices include Florida, Massachusetts, and Michigan. See Hershkoff, *supra* note 1, at 1845–46. Constitutional courts following the “European model,” as in France and Germany, also provide advisory opinions through “abstract review.” See Sarah Wright Sheive, Note, *Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review*, 26 LAW & POL’Y INT’L BUS. 1201, 1203–04, 1209–10 (1995). Finally, “the European Court of Justice, the European Court of Human Rights, and the Inter-American Court of Human Rights all enjoy explicit grants of jurisdiction to decide certain categories of properly presented abstract questions.” HART & WECHSLER, *supra* note 2, at 58.

some circuit-riding duties and were therefore unwilling to take sides in the neutrality controversy for fear of alienating potential supporters in the legislature.²³ “Jay and his brethren were seasoned political actors, and they were not the type to squander political capital unnecessarily,” so they concocted a doctrinal excuse to avoid giving a direct answer to Washington.²⁴

Although the Correspondence of the Justices only necessarily established that the President lacked power to *compel* the Court to issue advisory opinions,²⁵ the Court has since made clear that it lacks *discretion* to do so under any circumstances. In addition to its now-secure historical pedigree, the bar rests on several constitutional rationales, all of them rooted in the separation of powers and judicial restraint. First, as the Correspondence implied, the federal judiciary is a coequal branch which cannot be required to answer the questions of the other departments.²⁶ Second, and going more directly to the Court’s constitutional *inability* to issue advisory opinions, the judicial power granted by the Constitution is the power to decide only concrete cases, not to pass on abstract legal issues.²⁷ Indeed, *Marbury v. Madison*²⁸ famously justified judicial review by explaining that the judiciary’s duty is to decide the cases that come before it, which necessarily entails following the Constitution rather than other laws when the two come into conflict;²⁹ this justification cannot extend to situations in which the courts are not called upon to decide adversarial cases because in such situations no dispute requires them to apply any laws at all. Third, the institutional capacities of the courts — with much smaller staffs and more limited factfinding capacities than the other branches — leave them ill suited to address hypothetical questions; the courts rely on the adversary process to ensure that both sides of an argument are vigorously represented, and the Supreme Court has been doubtful that vigorous representation will occur in an advisory context.³⁰ The fourth rationale is closely related: constitutional questions

²³ See JAY, *supra* note 10, at 161–67.

²⁴ *Id.* at 166.

²⁵ Casto, *supra* note 18, at 191–92, 201.

²⁶ See Pushaw, *supra* note 20, at 479. A similar concern for the judiciary’s independence and coequality with the other branches is evinced by the Justices’ refusal to make decisions susceptible to reversal by the other branches. See *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 410 (1792).

²⁷ See, e.g., *Flast v. Cohen*, 392 U.S. 83, 96 (1968). In fact, the Constitutional Convention specifically declined to add a provision, akin to one in the Massachusetts Constitution, that would have empowered each house of Congress and the President to require advisory opinions. See Pushaw, *supra* note 20, at 478–79.

²⁸ 5 U.S. (1 Cranch) 137 (1803).

²⁹ *Id.* at 176–80.

³⁰ See, e.g., *Baker v. Carr*, 369 U.S. 186, 204 (1962) (explaining that standing doctrine requires adverse parties with “such a personal stake in the outcome of the controversy as to assure that

cannot be answered in the abstract because they sometimes depend on the application of law to precise real-world facts that cannot be known until the challenged statute is implemented.³¹ A fifth justification lies in the Court's preference for judicial restraint: if judges decide only those cases that meet certain justiciability requirements, they respect the spheres of their coequal branches and minimize the troubling aspects of countermajoritarian judicial review in a democratic society by maintaining a duly limited place in American government.³² It is the project of the balance of this Note to challenge this last-mentioned rationale.

II. THE ROAD NOT TAKEN: ADVISORY OPINIONS IN THE SUPREME COURT

This Note supposes that Supreme Court advisory opinions in judicial review scenarios would operate as follows: The President or a member of Congress would have power to require the Court to pass on the constitutionality of a proposed statute or statutory provision.³³ (The party calling for the opinion might be either a supporter or an opponent of the proposal.) The issue would look much like the "Question Presented" in a typical Supreme Court brief: an abstract question of law stated in a few sentences. Although many statutes are large and complex and go through substantial changes during the legislative process, generally only a single discrete provision (or several such pro-

concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions").

³¹ See Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1002–03 (1924).

³² See *id.* at 1007 (referring to "[t]he grave dangers which are involved in failing to restrict very closely the exercise of the political function implicit in the power of our judiciary to disregard unconstitutional legislation").

³³ Cf. MASS. CONST. pt. 2, ch. 3, art. II ("Each branch of the legislature, as well as the governor and council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions."); COLO. CONST. art. VI, § 3; FLA. CONST. art. V, § 3(b)(10); ME. CONST. art. VI, § 3; N.H. CONST. pt. 2, art. 74; R.I. CONST. art. X, § 3; S.D. CONST. art. V, § 5.

If it happened that this power were widely abused for political ends, for instance by calling for opinions on implausible proposals with the aim of wasting the Justices' time and forcing them to issue unpopular decisions, the power to demand advisory opinions might be circumscribed accordingly. The problem could be alleviated by restricting the power of requiring advisory opinions to the President and only high-ranking legislators (such as committee chairs) or groups of legislators (such as committees or entire houses). Or, the Court could be given channeled discretion as to which questions to address, perhaps by allowing a supermajority of Justices to refuse to issue an opinion (by analogy to current certiorari practice, under which the Court refuses to hear a case where at least six Justices prefer not to do so). For a discussion of the many doctrines that have developed in state court advisory opinion practice to give courts limited discretion in whether to answer a given question, see Jonathan D. Persky, Note, *"Ghosts that Slay": A Contemporary Look at State Advisory Opinions*, 37 CONN. L. REV. 1155, 1184–95 (2005).

visions) will plausibly raise constitutional questions; as with post-enactment judicial review decisions, an advisory opinion would need to focus only on those constitutionally questionable provisions.³⁴ The Court could receive briefing and oral argument from parties supporting and opposing the proposal — including both politicians and private actors — in a process analogous to the Court's use of amicus briefs and calls for the views of the Solicitor General under current practice; the Court might even appoint an advocate to support a view that would otherwise have insufficient representation, as it now does where the government refuses to defend its victory below in the Supreme Court.³⁵

The Court would then decide the question and issue an opinion, which would rely on precedents and legal analysis as current Supreme Court opinions do, and might draw separate concurrences and dissents.³⁶ It would decide whether the proposal was constitutional on its face; a proposal upheld in an advisory opinion could of course be challenged as applied to specific facts after enactment.³⁷ The opinion would be determinative of the question presented, either blocking the proposal or allowing its supporters to go forward in seeking its enactment. Like any judicial opinion, the advisory opinion could explain what alterations, if any, might make an otherwise unconstitutional proposal acceptable. It would be binding upon the lower courts in cases falling within its reasoning and would have standard precedential effect in the Supreme Court.³⁸ Accordingly, the Court could later

³⁴ To the extent that the Court might sometimes need to consider an elaborate piece of complex legislation in its entirety to determine whether it is constitutional, the advisory opinion would have to be issued fairly late in the enactment process, after a substantial portion of the enactment costs had already been expended. But that would be an atypical scenario.

³⁵ Cf. Hershkoff, *supra* note 1, at 1847 & n.77. Another potential analogy is to the processes by which federal administrative agencies conduct notice-and-comment rulemaking.

³⁶ Presumably the Court would act with dispatch on these requests, recognizing that legislative time is precious. The Court has shown itself capable of addressing important questions swiftly where necessary. See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Indeed, a 1972 study of advisory opinion practice in Florida found an average time between the request and the issuance of an advisory opinion of 7.5 days, see William M. Landes & Richard A. Posner, *The Economics of Anticipatory Adjudication*, 23 J. LEGAL STUD. 683, 712 (1994), whereas a 1962 study found an 8.7-year average gap between the enactment of a federal statute and its invalidation by the Supreme Court, see *id.* at 712 n.43.

³⁷ Cf. Mel A. Topf, *State Supreme Court Advisory Opinions as Illegitimate Judicial Review*, 2001 LAW REV. MICH. ST. U. DET. C.L. 101, 110.

³⁸ For practical purposes it would not be relevant whether advisory opinions were technically understood as legally "binding" or merely persuasive. Given judicial supremacy, the elected branches and lower courts could be expected to take the Justices' advisory opinion as an accurate prediction of what the Court would do in a post-enactment judicial review case and act accordingly. And the Court itself is never truly bound by its own decisions. In most state advisory opinion regimes, advisory opinions are technically nonbinding yet "are in effect and in fact a binding constitutional intervention and . . . are perceived and responded to as such." *Id.* at 102–03; see also *id.* at 129–34; Persky, *supra* note 33, at 1205 n.327 (collecting sources demonstrating

overturn the decision, whether in another advisory opinion or in the course of addressing a live case or controversy;³⁹ the President and Congress could ask for new advisory opinions overruling old ones, and the Court, if disinclined to comply, could decline briefing and argument on the question and stand upon its initial decision. An advisory opinion issued by the Court would not be subject to review or revision by any other organ of government, except via constitutional amendment.⁴⁰

III. THE LEGISLATIVE MODEL

Two assumptions are central to this Note's argument regarding the effects of judicial review on Congress's behavior.⁴¹ First, legislators are not interested solely in superficial political posturing: they care whether the proposals they support become law and whether those laws achieve their ostensible aims.⁴² Second, the dominant coalition in the legislature — defined as whatever set of legislative, executive, and private lobbyist actors is required to get proposals enacted⁴³ — is constrained by a scarcity of legislative resources, which can collectively be called "legislative capital," such that not all legislative proposals that, taken alone, would receive sufficient support for passage can be

"substantial academic agreement with the basic premise" that state advisory opinions, though doctrinally nonbinding, are treated as effectively binding in practice by all relevant actors).

³⁹ In general, the Court would not be likely to approve proposals in advisory opinions only to turn around and invalidate them once they had been enacted and implemented: besides being disingenuous and manipulative, such double dealing would impose even greater costs on the Court's reputation than does straightforward countermajoritarian judicial review.

⁴⁰ In other words, it would avoid the problem that the Justices identified as a constitutional defect in *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792).

⁴¹ The model of legislative decisionmaking set forth in this Part draws heavily on Stephenson, *supra* note 7, at 11–16, 24–25, 57–58, which makes the same core assumptions. This Note's thesis, however, is distinct from Stephenson's: He argues that techniques by which the Court increases legislative enactment costs for constitutionally dubious statutes can help the Court gather information on whether a statute's policy benefits sufficiently outweigh its constitutional harms to justify upholding it. By contrast, this Note contends that increasing costs for potentially unconstitutional statutes allows the Court to minimize the number of statutes it has to strike down to achieve its desired political arrangement, helping it to go farther on a limited supply of political capital.

⁴² This may be either because the legislators themselves are ideologically invested in their proposals, *id.* at 25, or because at least some of their constituents are sophisticated enough to determine whether laws supposedly passed for their benefit are actually effective in benefitting them and will respond favorably to more beneficial legislation with votes or campaign contributions, *id.* at 24–25. *See also id.* at 24 ("[I]t seems implausible to suppose that legislators are systematically indifferent to the fate of the statutes they pass.").

⁴³ For brevity, this Note will refer to this dominant legislative coalition simply as "Congress" or "the legislature," even though these terms are both over- and underinclusive. *Cf. id.* at 13 n.25 ("Characterizing the legislature, or the enacting coalition, as a unitary actor that 'knows' the effect of policies on outcomes and chooses the policy that would advance 'its' interest is a shorthand way of describing this more complex collective choice process.").

enacted.⁴⁴ I further assume that legislative behavior in light of these preferences and constraints approximates rationality. When these assumptions are combined, their implication is plain: "Legislation will be enacted only if a sufficient number of influential players believe that the net political and policy benefits associated with the legislation outweigh the opportunity costs of devoting sufficient effort to ensure passage."⁴⁵

What this means is that in formulating its agenda the legislature will give the highest priority to proposals with the highest expected benefits relative to their expected costs. But for proposals of uncertain constitutionality, the legislative calculus requires a further step. A statute will produce little benefit if it is invalidated soon after it is implemented.⁴⁶ Thus, a statute's expected value must be discounted by the probability that it will be left standing by the Supreme Court,⁴⁷ a probability that Congress must estimate from its imperfect collective knowledge of the Court's views, which includes both its understanding of the Court's constitutional preferences regarding what legislation should be struck down and its understanding of the strength of the political constraints operating upon the Court in any given case.⁴⁸ The result is that Congress will place the highest priority on those proposals that have the greatest expected net benefit relative to their expected cost of enactment, accounting for the chance that a law will be rendered worthless through invalidation.⁴⁹ That is to say:

⁴⁴ For instance, drafting, debating, and voting on legislation takes time, an inherently scarce resource. *Id.* at 12. Moreover, decisive legislative factions may condition their support for one proposal on other factions' withdrawing decisive support for a separate proposal in logrolling arrangements, such that either taken alone could be enacted but both together cannot.

⁴⁵ *Id.*

⁴⁶ Furthermore, if implementation is costly, the resources sunk into implementation will have been wasted and further expenditures may be required to "reverse" the program's implementation, compounding the costs created by judicial invalidation. There are, however, some situations in which the legislature may intend a statute to be invalidated. A high-profile example is the federal Flag Protection Act passed in response to *Texas v. Johnson*, 491 U.S. 397 (1989), and predictably struck down the next year in *United States v. Eichman*, 496 U.S. 310 (1990). But it seems safe to assume that in the mine run of cases the legislature does not stand to gain from invalidation and instead prefers its laws to become effective. See *supra* note 42.

⁴⁷ That is, the probability that it either will be upheld or will not be reviewed at all.

⁴⁸ A substantial element of uncertainty is unavoidable in the application of broad constitutional provisions and prior decisions to new factual scenarios. And, as discussed below, the Court can, if it likes, manipulate congressional estimates of the probability that potential legislation is constitutional, to better align with its preferences. The Court can accomplish this by intimating its views on questions not before it, for instance in dicta or in extrajudicial writings and speeches. And it can also manipulate congressional uncertainty about those estimates of the Court's views by announcing ill-defined, ambiguous doctrines. See Stephenson, *supra* note 7, at 55-62.

⁴⁹ Cf. Persky, *supra* note 33, at 1172 ("The legislature that bears uncertainty as to the constitutionality of its enactments may delay or weaken them so as to avoid the political embarrassment or financial cost of a determination of unconstitutionality.").

$$P = jB / C,$$

where j is the expected probability that the Court will let a proposal stand if enacted, B is the expected net benefit of a proposal if it goes into effect, and C is the expected cost of enacting a proposal. Having thus determined which proposals can be expected to give it the best rate of return on its investment of legislative capital, the legislature gives highest priority to those proposals for which P is largest and enacts as many of them as its limited legislative capital will allow (except that it will never enact legislation for which $P < 1$, because in that range costs outweigh expected benefits). The necessary result of this state of affairs is that some constitutionally questionable proposals that would be enacted absent judicial review — because $P = B / C$ is high — will have a lower P once j is accounted for, and will thus be rejected by the legislature in favor of other, more certainly constitutional proposals. In this way, “judicial doctrines can reduce the total quantity of constitutionally problematic legislation by imposing an implicit tax on such legislation.”⁵⁰

But if the legislature could ask for and receive advisory opinions on the constitutionality of proposals before substantial costs were sunk into enacting and implementing them, the calculus would change. In that case, j would not be some congressionally estimated probability between 0 and 1; it would be known with certainty to be either 0 (the advisory opinion would declare the proposal unconstitutional) or 1 (the advisory opinion would uphold the proposal).⁵¹ Unconstitutional proposals would be known to be valueless and could be discarded accordingly, and constitutional proposals could be enacted or not enacted purely on their political merits, with no discount for constitutional uncertainty.⁵² With respect to those proposals that the Court upheld,

⁵⁰ Stephenson, *supra* note 7, at 11; *see also id.* at 55–62 (describing how uncertainty in constitutional doctrine creates such a “tax” by forcing legislators to discount a proposal’s expected net benefit by the probability of its not being struck down).

⁵¹ *Cf.* Landes & Posner, *supra* note 36, at 687.

⁵² Although this Note does not seek to advance any normative claims, it is worth emphasizing here that it would not necessarily be normatively desirable for Congress to know ahead of time whether a proposal of dubious constitutionality — a proposal that would be detrimental to some of the values that the Court sees as embedded in the Constitution — would ultimately be upheld. If Congress is uncertain what the Court will do, it must implicitly account for the proposal’s potential damage to those values in deciding whether to enact it, something it would otherwise do only to the extent that the popular will at the time happened to place value on the affected constitutional principles. There may be reasons to prefer that Congress be forced to undertake such an independent assessment of constitutionality. *See generally* Stephenson, *supra* note 7; Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1593–99 (2000). Regardless, this question does go to the *power of the Court* relative to the elected branches in American politics: given judicial supremacy, to say that Congress should be wary of enacting constitutionally uncertain laws is to say that Congress should consider how *the Court* would likely view a proposal before enacting it, which is exactly what the

then, the only question would be how high B was relative to C — that is, $P = B / C$, the same calculus that would obtain in the absence of judicial review.

IV. THE JUDICIAL MODEL

The model elaborated above makes clear that the bar on advisory opinions has some effect on what legislation gets enacted. But it does not explain why the quantity of constitutionally problematic legislation enacted has any bearing on the Court's power relative to the elected branches: because the Supreme Court can invalidate statutes it views as violating the Constitution, it could reach the same result in terms of the amount of constitutionally dispreferred legislation in effect if it *did* give advisory opinions, or if Congress ignored the possibility of invalidation and therefore passed as much constitutionally dispreferred legislation as it would absent judicial review. In those scenarios the Court would have to strike down more statutes than it currently does to reach the same end state — a state in which no statutes that the Court's majority considers unconstitutional are left standing — but would have no difficulty doing so beyond the extra time required to hear more cases and write more opinions.

The problem with this view lies in the assumption that the Justices' time is the only constraint on their power to strike down statutes repugnant to the Constitution. In fact, the Court is *politically* constrained in its exercise of judicial review: the more it deviates from the nation's political mainstream by striking down democratically enacted legislation, the more it risks an unwelcome backlash that imposes reputational costs on the Court in excess of the benefits it derives from invalidating disfavored legislation.⁵³ In short, the Supreme

bar on advisory opinions forces it to do. It thus increases not the power of the Constitution in the abstract, but the power of the Court as the final arbiter of the Constitution's meaning.

⁵³ See, e.g., ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 9 (5th ed. 2010) (“[T]he mandates of the Supreme Court must be shaped with an eye not only to legal right and wrong, but with an eye to what public opinion would tolerate.”); *id.* at 14 (“[T]he Court, while sometimes checking or at any rate modifying the popular will, is itself in turn checked or modified.”); RICHARD A. POSNER, *HOW JUDGES THINK* 375 (2008) (“What reins in the Justices . . . is an awareness, conscious or unconscious, that they cannot go ‘too far’ without inviting reprisals by the other branches of government spurred on by an indignant public. So they pull their punches”); *cf.* *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (“The Court’s authority — possessed of neither the purse nor the sword — ultimately rests on sustained public confidence in its moral sanction.”). See generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

Although it is hard to imagine the American people and their representatives collectively rejecting or disregarding a judgment of the Supreme Court today, the Court has been on very shaky ground at many points in the past when its median Justice was not as close to the political mainstream as has been the case for the past several decades. Consider, for example, the Federal-

Court,⁵⁴ like Congress, has only so much political capital to expend in realizing its ideal state of American politics.

In assessing the Court's power relative to the elected branches, it is first necessary to be clear about what motivates the Supreme Court. When exercising judicial review, the Court seeks to vindicate its constitutional vision by striking down legislation repugnant to that vision. This is true whether one believes that the Court seeks in good faith to divine the true meaning of the Constitution and impose it on the elected branches, attempts to interpret the Constitution faithfully but subconsciously imports its own policy views, or disingenuously strives to implement its policy preferences in the guise of neutral interpretation. For the purposes of the present argument it is irrelevant which view or combination of views is most accurate, and the phrase "constitutional vision" will stand for any and all of these. Yet as suggested above, the Court is not unconstrained when it seeks to effect its constitutional vision through judicial review: if it strays too far from the political mainstream,⁵⁵ it will face consequences that undermine its con-

ist Marshall Court after the landslide victory of the Jeffersonian Republicans in the 1800 election, which led the Court to accept acts by the elected branches that it considered legally dubious in *Marbury* and *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803), see BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS* 163–98 (2005); the famous "switch in time" of the so-called *Lochner* Court in the New Deal era, when the median Justice abruptly flipped from obstructionism to accommodation after President Roosevelt sought to pack the Court, see MCCLOSKEY, *supra*, at 116–19; and the various punches pulled by the liberal Warren Court in the 1950s and 1960s, such as its dodging of the interracial marriage issue in *Naim v. Naim*, 350 U.S. 891 (1955) (per curiam), that it ultimately resolved over a decade later in *Loving v. Virginia*, 388 U.S. 1 (1967), see MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 321–23 (2004), and the weak "all deliberate speed" formulation with which it met Southern resistance to integration in *Brown v. Board of Education*, 349 U.S. 294, 301 (1955), see KLARMAN, *supra*, at 312–20, 453 ("Brown II was plainly shaped by the justices' awareness that their power is limited." *Id.* at 453.).

⁵⁴ Just as this Note uses "Congress" and "the legislature" as a shorthand for the dominant legislative coalition, it refers to "the Court" or "the judiciary" as a simpler way of indicating a majority of sitting Justices, who collectively wield authority over the rest of the federal judiciary.

⁵⁵ A constraint on the Court's behavior that is preliminary to external political constraints is, of course, the preferences of the Justices themselves: the Court will not seek to implement a constitutional vision that it does not in fact hold. Strong forces tend to prevent this constitutional vision from deviating much to the right or left of the national median: A potential Justice must be not only endorsed by a popularly elected President but also confirmed by a majority of the Senate, which will tend to narrow and moderate the range of possible candidates. Scrutiny of potential candidates by opposing politicians and the press is today very intense, making it difficult for individuals with known views far departing from the mainstream to be confirmed. And, assuming that the President and Senate will tend to appoint Justices who are close to the national political median but will do so only imperfectly, the now quasi-constitutional requirement that cases be decided by a majority of *nine* Justices makes the variance for individual Justices less significant than it would be with a smaller court, because no fewer than five Justices must depart from the mainstream in a given direction before the Court as an institution will do so on any given issue. Moreover, sitting Justices will inevitably be influenced to some extent by the same forces that act on public opinion more broadly, as evidenced, for example, by Justice O'Connor's apparently changed views on the constitutionality of sodomy bans between *Bowers v. Hardwick*, 478 U.S. 186

stitutional vision even more than would the upholding of a disfavored statute.⁵⁶ The upshot is that the Court operates under conditions of scarcity and must economize on its political capital to go as far in implementing its constitutional vision as political realities allow, which sometimes means upholding (or declining to review) government actions that contravene that vision.⁵⁷ And, as a distinct matter, most

(1986), and *Lawrence v. Texas*, 539 U.S. 558 (2003). On most major issues the Court's median Justice has tended to track the national median fairly closely for the past three or four decades. Nonetheless, as described above, *supra* note 53, substantial deviations have occurred in the past and may well occur in the future.

⁵⁶ It is beyond the scope of this Note to develop a sophisticated model of the constraints operating upon the Court, but a brief discussion is in order. Potential constraints take a variety of forms. First, the elected branches could act to limit the Court's power as an institution, for instance by stripping its jurisdiction over certain subject areas, increasing the Court's mandatory jurisdiction and flooding it with appeals, or simply disregarding the Court's orders. Second, the elected branches could act to elide or dilute the powers of individual intransigent Justices, whether through impeachment or Court packing. Third, the Constitution could simply be amended to override an unpopular decision; if the Justices cared only about enforcing the Constitution as it currently existed this would not trouble them, but to the extent that they endorse the values they find in the Constitution on independent grounds, they would presumably prefer not to see those values permanently excised from the founding document. Fourth, the majority of the populace or of the elected branches could react not directly against the Court's decision or the Court itself but instead against related values the Court also holds. For instance, a political backlash instigated by the decisions of a liberal Court could sweep a conservative majority into office, leading to conservative lawmaking on numerous fronts presumably dispreferred by the liberal Justices even if no attempt were made to override the specific decisions that caused the backlash. For an illustration of this last point, see POSNER, *supra* note 53, at 306 (The Warren Court "create[d] new procedural rights for criminal defendants . . . but legislatures could and did offset the effect by increasing the severity of criminal sentences. Maybe fewer innocent people were convicted, but those who were served longer sentences; the total misery of the wrongfully convicted was not lessened." (footnote omitted)). For one recent account of the many ways political realities have constrained the Court throughout American history, see generally FRIEDMAN, *supra* note 53. For empirical analyses of the effect of public opinion and congressional reactions to controversial decisions on the Court's behavior, see generally Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971 (2009); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018 (2004).

⁵⁷ Thus, the Court's decisionmaking process in a judicial review case incorporates its internal preferences and its view of external constraints as follows: $R = B / C$, where B equals the benefits to the Court's constitutional vision of invalidating a given piece of legislation, C stands for the cost the Justices expect to incur in terms of political capital, and R gives the trade-off rate between costs and benefits in any given case, such that the Court will expend its political capital in those cases where R is highest, so long as $R > 1$.

A reasonable objection to the model elaborated in this Part is that although the Court is politically constrained, this "bank account" model in which the Court has finite political capital to "spend" by striking down popular government actions is unrealistic: the Court can also *increase* its prestige — its institutional capital — by exercising judicial review, which has been the effect of *Marbury* and *Brown*, two decisions without which the Court would be much weaker now. Nonetheless, most countermajoritarian decisions do seem to cost the Court rather than increase its capital (*Marbury* was a *refusal* to make the countermajoritarian decision, see FRIEDMAN, *supra* note 53, at 60–62, and *Brown* jeopardized rather than solidified the Court's power over the years immediately following the decision, see KLARMAN, *supra* note 53, at 312–43). This is especially true in the short run, while the decision remains countermajoritarian, and it is the short run that

Justices have displayed a desire to conserve the Court's political capital and maintain its institutional prestige as much as possible even where the Court was not immediately threatened with any hard political constraints.⁵⁸ This conservatism is especially understandable given that the Justices are generally not political experts and lack the sophisticated public relations apparatuses of the elected branches, and that the elected branches have substantial capacity to shift public opinion about the Court if they so choose; these factors make it rational for the Court to be parsimonious with its political capital in order to avoid blind overreaching.

V. THE MODELS COMBINED: THE EFFECT OF THE BAR ON ADVISORY OPINIONS

The bar on advisory opinions enables the Court to exercise a given amount of political influence for less political capital than would be required if advisory opinions were available. This is so because the exercise of judicial review is a more politically salient countermajoritarian action than the complex, low-visibility process by which legislative doubts about constitutionality lead Congress to prefer clearly constitutional proposals over more dubious ones.⁵⁹ Moreover, judicial review is directly attributable to the Court, whereas substantial uncertainty attends legislative decisions not to enact laws: Was Congress's prediction about the Court's response really a but-for cause of the proposal's not being enacted, or would political opposition have derailed the proposal regardless? And if a prediction about the Court's views was a but-for cause, was the prediction correct, or would the Court have actually upheld the law given the opportunity? Where it is not clear whether or to what extent the Court is responsible for legislation's not being enacted, political consequences for the Court will necessarily be much more diffuse than where its explicit invalidation of a

counts for the current Justices: the fact that *Brown* is today sacrosanct did not help the Court when Southern resistance threatened that decision's efficacy in the years immediately after its announcement. Cf. Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 743 (2011) ("Evidently, the Court can build up a savings account of approval that it can then spend down by issuing unpopular decisions without losing public support."). The necessary implication of Levinson's statement is that the "savings account" — and thus the Court's countermajoritarian capacity — is finite. At any rate, the Court's position is no different from that of any other political actor: though the presidency as an institution, for instance, would certainly lose influence as a result of a string of weak, unassertive presidents, and might gain it through the acts of a strong leader, any given President at any given time is undoubtedly limited by political constraints.

⁵⁸ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864–69 (1992) (refusing to overrule *Roe v. Wade*, 410 U.S. 113 (1973), in part on the ground that doing so would lead to "[t]he country's loss of confidence in the Judiciary," *id.* at 867).

⁵⁹ Cf. POSNER, *supra* note 53, at 274 ("[T]he Court is more constrained by public opinion than the lower federal courts are because of its much greater visibility . . .").

law — whether through an advisory opinion or through the current model of post-enactment judicial review — is trumpeted in the news media. Thus, the bar on advisory opinions allows the Court to take advantage of imperfect information, information costs, and rational ignorance: it achieves a given result with far less public awareness of the Court's role than would be produced by judicial review.⁶⁰

Furthermore, the Justices frequently intimate views on the constitutionality of hypothetical legislative actions through avenues that resemble discretionary advisory opinions,⁶¹ such as dicta, separate opinions, and extrajudicial books, speeches, and interviews.⁶² By suggesting that a given type of proposal either would or would not be upheld, the Justices can manipulate the “penumbra of doubt” surrounding constitutionally dubious proposals. They can align that penumbra more closely with their particular constitutional vision either by increasing congressional doubt about a type of action that the relevant Justice would consider unconstitutional or by decreasing such doubt about a type of action that the Justice would consider permissible.⁶³ The Court can thus preempt enactments of dispreferred legislation without having to pass on them directly, and can seek to ensure that legislation it desires will not be derailed by inaccurate legislative fears of invalidation. To be sure, it cannot do so perfectly: intimations and even explicit statements by individual Justices lack the definite-

⁶⁰ This is just one instance of a more general phenomenon: where multiple independent and coequal actors exercise shared political power, difficulties with attributing a given act or omission to a particular actor can make the maintenance of a smoothly functioning representative system more difficult. See, e.g., 2 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 1007–08 (Liberty Fund 1995) (1888); cf. *New York v. United States*, 505 U.S. 144, 168–69 (1992) (discussing an analogous difficulty in assigning responsibility between state and federal governments). These costs of divided government must be weighed against its benefits, including those described in *THE FEDERALIST* NO. 10 (James Madison).

⁶¹ Cf. Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies — and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 681 (2006) (“[F]ederal courts issue unnecessary pronouncements with startling regularity: dicta, alternative holdings, and so forth.” (footnote omitted)).

⁶² See, e.g., *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2815–17 & n.26 (2008) (stipulating that the right to own handguns announced in that case does not extend to possession of “M-16 rifles and the like,” *id.* at 2817, or “the possession of firearms by felons and the mentally ill,” *id.* at 2816–17); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2792 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (suggesting specific methods of integrating public schools that, unlike the method struck down in the case, likely would be constitutional); *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring in the judgment) (suggesting that *Lawrence*'s invalidation of antisodomy laws does not imply a constitutional right to gay marriage); see also Eugene Volokh, *Advisory Opinions*, *THE VOLOKH CONSPIRACY* (Mar. 21, 2011, 12:34 PM), volokh.com/2011/03/21/advisory-opinions/ (discussing methods by which the Justices regularly give informal advisory opinions).

⁶³ See Stephenson, *supra* note 7, at 58 (“[B]y varying the probability with which a given statute will be upheld, the court can vary the effective enactment costs associated with that statute. Doing so will have a screening effect . . .”).

ness of a holding signed by a majority. But these informal methods of communication certainly give the Justices ample opportunity to make Congress aware of their views, whether clearly or only vaguely, if they so desire.

Another context in which this signaling occurs is when the Court construes a statute to avoid a substantial constitutional issue.⁶⁴ By flagging that one plausible interpretation of a statute would raise constitutional issues and then settling on a different interpretation without resolving the issues supposedly raised by the first, the Court can accomplish two goals. First, it can disable a statute from having constitutionally dubious effect, at least unless and until Congress reenacts it with clearer language (at the cost of some quantity of legislative capital). And second, the Court can signal to Congress the Court's doubts about the validity of the first interpretation, thereby making it less likely that Congress will enact proposals implicating such doubts in the future.⁶⁵ And all this is done without actually exercising judicial review and expending the political capital required by that act.

Finally, the Court can chill legislation in certain doctrinal areas by elaborating unnecessarily vague and ambiguous legal standards.⁶⁶ Where the relevant doctrine is unclear, Congress will be more uncertain about the accuracy of its estimates as to whether a given proposal is constitutional, making such fields less attractive for legislation than those in which Congress has greater confidence in its predictions of what the Court will do.

These means of influencing congressional estimates of potential statutes' constitutionality allow the Court to exercise control over legislation by manipulating the degree of congressional uncertainty, and with smaller expenditure of political capital than formal judicial review re-

⁶⁴ See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (internal quotation marks omitted))). For critical accounts of this canon, see Richard A. Posner, *Statutory Interpretation — in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983) ("The practical effect of interpreting statutes to avoid raising constitutional questions is . . . to enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretation of the Constitution — to create a judge-made constitutional 'penumbra' that has much the same prohibitory effect as the judge-made (or at least judge-amplified) Constitution itself."); Schauer, *supra* note 5.

⁶⁵ See Schauer, *supra* note 5, at 88 ("Although it would be possible for Congress to amend the statute after the interpretation in order both to reaffirm (what might have been) its original view and to force the Court to confront unmistakably the constitutional question that it thought it at least partially avoided, the use of [the constitutional avoidance canon of statutory interpretation] is a sufficiently strong signal that it would be quite silly for Congress to engage in this effort only to face a highly likely invalidation.").

⁶⁶ See Stephenson, *supra* note 7, at 55–62.

quires.⁶⁷ If the Court offered to resolve such doubt through advisory opinions, this power would cease to exist and a nonmainstream Court would be forced to accept a much larger quantity of the political process's outputs than it would under current law.⁶⁸ Finally, the Court may have preferences that it would not actually enforce through judicial review were a statute contravening them enacted, but that the Court is glad to have the legislature enforce by screening out such statutes on the incorrect assumption that the Court might invalidate them, thus further increasing the benefit the Court receives from the bar on advisory opinions.

As an illustration, suppose that Congress is giving consideration to three proposals, A, B, and C, and that it favors each so much that it would enact all three absent judicial review. Suppose further that the Supreme Court majority disfavors all three and would strike them all down if they were enacted and if it had the power to do so, but that it feels it only has enough political capital to "get away" with striking down one of the three. Suppose that Congress is doubtful about whether A, B, and C would be upheld ($j < 1$) but is certain that D, E, and F — which it likes somewhat less than A, B, and C — are constitutionally unproblematic ($j = 1$).⁶⁹ Congress has legislative capital sufficient to enact any three of these statutes. If Congress could ask for advisory opinions, it would do so for A, B, and C; this would force the Court to strike down A while upholding B and C; this in turn would allow the legislature to enact B, C, and D, secure that each was consti-

⁶⁷ This is not much different from saying that tax expenditures allow for more substantial congressional wealth transfers to favored constituents because they are less salient than direct spending. See, e.g., STAFF OF THE JOINT COMM. ON TAXATION, 110TH CONG., A RECONSIDERATION OF TAX EXPENDITURE ANALYSIS 2–3 (Comm. Print 2008). In both cases, the distinction would not matter given perfect information, but in the absence of perfect information it matters a good deal.

⁶⁸ Another result of the Court's ability to intimate its beliefs through these surreptitious means where it so desires is that the Court has little reason to formally offer *discretionary* advisory opinions (as through a certiorari-style procedure). Such opinions would be more salient and therefore more costly to the Court, and would also occasion costs arising from the inconsistency of offering to issue such opinions only in the Court's discretion. Of course, formal advisory opinions might offer the Court greater clarity than it can obtain through these informal means, so there will potentially be situations in which the Court would be better off if it could issue formal advisory opinions in its discretion.

⁶⁹ This hypothetical assumes that Congress lacks accurate knowledge of the Justices' view of the Court's political capital, which is probably the case even though Congress has a strong understanding of objective political reality because it has no insight into the Justices' subjective perceptions of that reality. If, instead, Congress had a more accurate understanding of the Justices' view of their own constraints, j would be higher (to account for Congress's knowledge of the Justices' unwillingness to strike down more than one law), with the possible result that Congress's expected benefit for A, B, and C — even discounted by j — would be high enough that it would prefer to enact A, B, and C rather than D, E, and F, even though there would be some chance that one would be struck down.

tutional.⁷⁰ But without advisory opinions, the legislature's doubtfulness as to whether A, B, and C would be upheld might lead it to decide, on balance, to refrain from expending resources and instead to enact D, E, and F, which are slightly less preferred but much more secure, giving it higher expected benefits when the probability of judicial nullification is factored in. Thus, the Court would have precluded all three disfavored proposals under the no-advisory-opinions regime, whereas it would have been able to block only one of them if it offered advisory opinions. This result relies on the assumption, explained above, that the Court expends less political capital in indirectly precluding A, B, and C by creating doubt about their validity than it would if it struck them down explicitly, because the explicit invalidation is a more easily identifiable countermajoritarian political event and so is more likely to arouse opposition, even though the effect is nearly identical.

It is true that the Court might sometimes prefer to be able to issue advisory opinions. This Note has assumed that the political costs of striking down legislation would be roughly equal whether the invalidation occurred prior to enactment via an advisory opinion or post-enactment as in current practice. However, under certain circumstances, the political costs of striking down legislation pre-enactment would be lower than the costs of striking it down several years after enactment in a conventional judicial review case. Such circumstances might arise where enactment and implementation costs are massive, as well as where the costs of undoing a statutory scheme to comply with the Court's judgment would be substantial; both of these factors may well be exemplified by the recent healthcare legislation, and if the Court strikes down that legislation after it has been substantially implemented, it may be forced to internalize some of the costs incurred through damage to its institutional reputation.⁷¹ Post-enactment invalidation may also be costly where legislation will gain substantial political entrenchment because of its value to a certain constituency, as is true of Social Security and farm subsidy programs and, potentially, the recent healthcare law.

⁷⁰ It would generally be quite costly to the Court to later strike down a previously upheld statute. See *supra* note 39.

⁷¹ For discussion of an analogous Great Depression-era case, see Mel A. Topf, *The Jurisprudence of the Advisory Opinion Process in Rhode Island*, 2 ROGER WILLIAMS U. L. REV. 207, 218–19 (1997) (“Before the United States Supreme Court ruled the [National Industrial Recovery Act of 1933] unconstitutional, over one thousand national and local authorities were created under the statute, and for some two years they administered regulations with significant effects throughout the economy. ‘[T]he whole fiasco could have been avoided had the federal supreme court been empowered, or required, to first express an opinion on the constitutionality [of the N.I.R.A.] before it was imposed on a helpless public.’” (footnotes omitted) (quoting R. K. Hoffman, Note, *Why Not Advisory Opinions for Illinois?*, 31 CHI.-KENT L. REV. 141, 141 (1952))).

But the opposite could also be true: the cost of invalidation might be highest when a new law is first proposed, the point when an advisory opinion would be called for. Upon proposal, a new bill often has a substantial coalition behind it, while the attacks of its detractors have yet to take their toll on its support in public opinion; several years later, by contrast, its support may have waned, whether through changing political winds or mere shift of political focus. This, too, might turn out to be the case with the healthcare act. Perhaps the most reasonable generalization is that it is, on average, roughly as costly to invalidate a law upon proposal through an advisory opinion as to invalidate it later, the difference being that the Court would have to exercise judicial review far more often under an advisory opinions regime than it does under current practice. But one could also reasonably expect that *ex ante* advisory opinions would typically be less costly than *ex post* decisions striking down laws. Regardless, because the Court would have to issue far more advisory opinions than it currently issues judicial review decisions, this Note's arguments apply so long as pre-enactment advisory opinions are not, on average, so much less costly than post-enactment judicial review that even a much larger number of advisory opinions amounts to a lower political cost than a smaller number of post-enactment decisions.

CONCLUSION

The bar on advisory opinions is today an immovable attribute of American constitutionalism. If it increases the Court's power vis-à-vis the elected branches rather than serving the ends of judicial restraint, it need not follow that its fixed presence is lamentable; a judiciary with robust countermajoritarian capacities may have much to recommend it, and is at any rate a well-accepted feature of our society, no less fixed than the doctrine that is the subject of this Note. In the issues it implicates — the effects of judicial review on the legislative process, the political constraints on the Court's pursuit of its constitutional ideals, the importance of political salience and information costs in determining the potency of those constraints — the bar on advisory opinions serves as a microcosm of the larger political system, which is characterized by fundamentally representative government with a circumscribed countermajoritarian element. The decision of the Jay Court that the federal judiciary ought not to provide advisory opinions to the elected branches is only one of many choices made in the design of our institutions that amplify or dampen the ability of the Supreme Court to depart from the will of the elected branches. It has been the project of this Note to investigate the effects of that choice.