

Judicial Advisory Opinions and Legislative Outcomes in Comparative Perspective

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High courts in eleven U.S. states (and a number of countries) provide advisory opinions on pending legislation when requested by the executive or legislative branch of the government. To examine the implications of the advisory mechanism for institutional behavior and for policy outcomes, we develop and compare results from two incomplete-information models of judicial-legislative interaction. One game models judicial-legislative interaction with “ordinary” judicial review, the other models the interaction with an advisory option. We show how the advisory mechanism alters policy outcomes relative to outcomes that would be realized without the advisory option. We then identify the conditions under which legislatures request advisory opinions and when they choose to legislate without them. Finally, we consider whether the advisory mechanism is a welfare-enhancing or welfare-diminishing institution, and identify conditions that explain why some courts are willing to offer advisory opinions while others refuse to do so.

In a well-known episode, President George Washington asked John Jay and the other U.S. Supreme Court justices to advise him on the nation’s treaty obligations in light of continuing conflicts among European powers. The justices famously declined, citing their concern with violating the separation-of-powers principle.¹ Less well known is that many U.S. states rejected the Court’s concern and instead created an advisory role for their judiciaries. At one time or another, high courts in nineteen states have given advisory opinions when requested by coordinate branches of government. While some of these courts ultimately turned against their advisory role, the high courts of eleven states continue to serve in an advisory capacity today. Opinion over whether the judiciary should serve in an advisory role has been divided for centuries. Notable legal commentators, including Lord Coke, Alexander Hamilton, and Felix Frankfurter, have opposed judicial advisory opinions. They argue that the abstract setting of advisory proceedings—particularly the absence of detailed factual records as exist in ordinary litigation—undermines a crucial informational component of judicial decision making. In contrast, other commentators claim that early judicial review is the advantage of advisory opinions. They argue that when legislatures solicit judges’ opinions on pending legislation, it reduces the number of enacted laws that courts will have to strike down in the future. As a result, advisory opinions decrease transaction and reliance costs created by the length of time—often many years—it takes legislation in ordinary litigation to reach high courts for a decision.

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¹For the exchange of letters, see Jay (1970, 486–488).

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To evaluate these arguments we must first understand the impact that the advisory option has on judicial and legislative behavior, as well as the impact it has on policy outcomes. To do this, we develop two game-theoretic models of legislative-judicial interaction. We begin with a baseline model in which the court plays no advisory role. We then develop a second model that allows the legislature to request an advisory opinion from the court prior to enacting a bill. Importantly, the advisory opinion model is constructed with a behavioral assumption that the *critics* of the mechanism assert and under which, they argue, the advisory opinion cannot be a welfare-enhancing institution. Comparing the results of the two models permits us to address important facets of advisory opinions. At a descriptive level, we can characterize the impact that the availability of the advisory mechanism has on legislative behavior and outcomes. This in turn permits us to consider the opposition of many judges and legal scholars to an advisory function for the judiciary. First, we show that even under the behavioral assumption of advisory-opinion opponents, advisory opinions can be welfare-enhancing institutions. Second, we account for why courts will differ in their willingness to provide advisory opinions, and we account for the historically decreasing number of high courts that are willing to hand down advisory opinions.

The next section reviews the current state of the debate about advisory opinions. We then develop a baseline model of judicial review and develop a second model that incorporates an advisory option. Next, we compare the predictions of the two models. We consider how the advisory option affects legislative behavior and outcomes relative to systems without the option, and use the comparative results to suggest answers to the puzzles and questions raised above.

To Advise or Not to Advise?

Advisory opinions are answers provided by the members of a high court to questions posed by the executive or a legislative body on a legal question pending before that authority (Carberry 1975, 81).² Currently in the United States, the constitutions of Colorado, Florida, Maine, Massachusetts, Michigan, New Hampshire, Rhode Is-

²While we focus on U.S. high courts, the impact of advisory opinions is of broader comparative interest. National courts in Great Britain, Canada (Hogg 1996), and in several Latin American countries have provided advisory opinions. Until the mid 1950's, the German Constitutional Court also handed down advisory opinions.

land, and South Dakota authorize their supreme courts to give advisory opinions. In Alabama and Delaware, judicial advisory opinions are authorized by statute.³ North Carolina's court gives advisory opinions without express statutory or constitutional authorization. (See Table 1.) Eight other state supreme courts provided advisory opinions at one time but do so no longer.⁴ (See Table 2.) Only Michigan and Delaware have changed their advisory practices recently. Michigan's limited advisory option was authorized only in 1963.⁵ In 1983, Delaware amended its authorizing statute to permit each legislative chamber to request advisory opinions by majority-vote resolution. Prior to this amendment, only the governor could request advisory opinions.

In ten of the eleven U.S. states that currently employ advisory opinions, the members of the court provide advice only in their individual capacities rather than in their official capacity as a court. (Colorado is the sole exception.) Theoretically, this means that, for these ten states, the determination announced in an advisory opinion is not binding on the requesting authority or on the court itself (should the matter be litigated at a later time). Nevertheless, commentators have concluded that courts treat advisory opinions as binding precedent—a crucial issue to which we return shortly.⁶

In nine states, advisory opinions may be requested by the governor or by either house of the legislature. In the remaining two states, only the governor can request advice. Executive councils can also request opinions in two states. We focus on legislative requests for advisory opinions for several reasons. First, in practice legislatures request twice as many advisory opinions as governors (Carberry 1975, 94, 109–113). Secondly, in the eight U.S. states whose courts initially chose to provide advisory

³Some commentators include Oklahoma as a state authorizing judicial advisory opinions. Those opinions, however, are confined to appellate court review, at the request of the governor, of the legal and evidentiary sufficiency of a capital conviction made in a trial court (22 Okl. St. §§ 1002–1003). This is not an example of the type of advisory opinion that we consider in this article.

⁴The high courts of ten other states refused from the outset to provide advisory opinions. They are Louisiana, Maryland, Michigan, Minnesota, Mississippi, North Dakota, Ohio, Texas, Tennessee, and Wisconsin (Stevens 1959, 9 fn 47). (Michigan later authorized limited advisory opinions in 1963.)

⁵Michigan's constitution limits advisory opinions to the period after a law has been enacted, but before its effective date (Mich. Const. Art. III, § 8).

⁶The German Constitutional Court confronted this issue during a controversial advisory opinion proceeding in the early 1950's. The court explicitly asserted the principle that it would treat advisory opinions as binding in future litigation in order to discourage "forum shopping" between the two senates that comprise the court (for a full discussion, see Vanberg 2000).

TABLE 1 State High Courts that Currently Grant Advisory Opinions

State	Who May Request	Authorization for Advisory Opinion	No. of Opinions (1975–Aug., 2001)
Alabama	L, G	Statute	133
Colorado	L, G	Constitution	10
Delaware	L, G	Statute	11
Florida	G, AG	Constitution	43
Maine	L, G	Constitution	24
Massachusetts	L, G, E	Constitution	60
Michigan*	L, G	Constitution	12
New Hampshire	L, G, E	Constitution	87
North Carolina**	L, G	Judicial Initiative	1
Rhode Island	L, G	Constitution	40
South Dakota	G	Constitution	8

L = Either legislative chamber may request advisory opinions

G = Governor may request advisory opinions

E = Executive council may request advisory opinions

AG = Attorney general may request advisory opinions

*Michigan limits advisory decisions to challenges made after a law's enactment, but prior to its effective date.

**Use of the advisory opinion appears to be atrophying in North Carolina, being "disfavored" by current members of the state's high court (Bledsoe 1992). The court, however, has yet to reject the practice in principle.

TABLE 2 State High Courts that Do Not Currently Issue Advisory Opinions but Issued them in the Past

State	Date of Last Advisory Opinion	Date the Practice "Officially" Ended or Officially Declared Ended
Connecticut	1865	1867
Kentucky	1881	1895
Missouri	1874	1875
Nebraska	1893	1894
New Jersey	1912	1951
New York	1845	1913
Pennsylvania	1808	—
Vermont	1864	1915

opinions but subsequently ended the practice, the legislature could request the opinions. Finally, the most sensitive separation-of-powers questions created by advisory mechanisms arise when the legislature asks the court to consider the constitutionality of proposed legislation (Field 1949, 204).

Legislative chambers request advisory opinions by majority-vote resolutions.⁷ It is important to note that

⁷ This is a requirement when advisory opinions are authorized by constitutional or statutory provisions. In states without express legal authorization, courts on rare occasion have entertained advisory

requests from legislative committees (see, e.g., *In re Appropriations for Deputies*, 25 Neb. 662 (1889)).

legislative minorities cannot request advisory opinions from state high courts in the United States. In this way, advisory opinions differ from "abstract judicial review" common in most European countries. In abstract review, parliamentary *minorities* may compel an expedited constitutional review of legislation (Stone 1992). As a result, the institution significantly increases the power of minorities in those legislatures (Vanberg 1998). Among U.S. states, however, the advisory mechanism is a purely majoritarian institution.

As can be seen from Table 1, there is a wide variation in the number of advisory opinions handed down by state high courts. The Alabama high court averages almost five advisory opinions per year, while North Carolina's high court has handed down only one in the last twenty-five years. State high courts have averaged around two advisory opinions per year since 1975. While this may sound like a small number relative to the total number of bills that legislatures consider, it should be kept in mind that because the mechanism is costly to legislatures in terms of delaying action on active bills, legislatures solicit advisory opinions only on the most important pieces of legislation. Further, the number compares favorably with the number of laws that state high courts actually strike down every year.

sory requests from legislative committees (see, e.g., *In re Appropriations for Deputies*, 25 Neb. 662 (1889)).

TABLE 3 Distribution of Advisory Opinion Subjects (1975–Aug. 2001)

Separation of Powers and Constitutional Processes	Government Revenues	Criminal and Judicial Process	Municipal Corporations	Economic Rights	Social and Political Rights	Public Education Funding
44.5%	20.5%	11.7%	10.3%	5.8%	4.9%	2.3%

In the interest of time, courts considering an advisory request usually do not accept briefs or hold hearings. In an early study of the question, courts handed down advisory opinions an average of one month after they were requested (Field 1949, 207). This compared to the seven-year average the study reported for courts to decide the constitutionality of laws challenged in the course of ordinary judicial review (Field 1949, 207). A “sample” of forty-three opinions from more recent opinions with identifiable request dates showed an average of 10.9 weeks between a request for an advisory opinion and the opinion being handed down. (The median period was eight weeks.) The variation was sizeable, with answers being provided to advisory requests any where from a few days after the request to up to nine months later.

The topics of bills subject to advisory requests tend to concern questions of “inter-governmental relations, structure of government, taxation and finance, and other phases of public policy . . .,” with legislatures soliciting judicial advice mainly related to “proposals which affect governmental policies in their broader signification” (Field 1949, 211). This is still true today. As can be seen from Table 3, almost two-thirds of advisory opinions since 1975 have answered questions pertaining to the separation of powers (e.g., legislative delegation to the executive branch), constitutional processes (e.g., single-subject restrictions on bills), and government revenue sources (e.g., imposition of taxes, excises, issuing bonds, and incurring debt). An additional ten percent of opinions answered questions related to local government authority. Individual rights, however, were not entirely neglected. Roughly half of the cases we grouped in the category “criminal and judicial process” dealt with criminal rights, and around ten percent of advisory opinions answered questions related to economic rights (e.g., takings) and social and political rights (e.g., free speech and religious free exercise).

Scholars have long debated the advantages and drawbacks of advisory opinions. The arguments fall along two main lines. Arguments in support of advisory opinions emphasize the advantages of allowing courts to intervene early in the legislative process. Early interven-

tion arguably avoids social costs that arise when statutes are struck down by courts in the ordinary course of litigation. As noted above, it might be years after enactment that a law is finally challenged, and then it might take additional years before the law reaches a high court for final determination. As one commentator argued:

By providing an early determination of the constitutionality of legislation, an advisory opinion can avoid the harm which is frequently caused by unconstitutional statutes. Such statutes may be in effect for years before they are struck down . . . Before it is successfully challenged, an unconstitutional statute may discourage legitimate activity; or, conversely, it may encourage reliance which, when the statute is invalidated, will prove to have been ill-founded, thus causing injury to those who have based action upon it. (Note 1956, 1305)

In addition to reducing social costs, advisory opinions can reduce internal governmental costs that may accrue “when the government sets up elaborate machinery to implement a statute later held unconstitutional” (Note 1956, 1305). If a legislature knows before enactment that the state’s high court will “veto” the law as proposed, the legislature itself can kill or alter the bill at an early stage, thereby avoiding legislative transaction and opportunity costs, litigation costs, and administrative costs that would arise if the original proposal were passed and implemented. Other commentators have offered much the same argument (Stevens 1959, 13; Field 1949, 221; Carberry 1975, 106).

Commentators who oppose advisory opinions do not disagree that the advisory mechanism offers an early form of judicial review. Rather, they argue that judgments made in an advisory proceeding will be made in the absence of key informational factors that are crucial to the proper exercise of judicial review. Without this informative context, they argue, the early review afforded by advisory proceedings will produce more costs than benefits. These commentators rely on a subtle conception of the role the judiciary plays in the legislative pro-

cess. They argue that judging the constitutionality of a law often turns on specific empirical facts that are revealed *after* a statute has been passed. This information, which emerges only as a law is applied and its concrete consequences become apparent, is not and cannot be available to judges during advisory proceedings. In the absence of this information, judges risk arriving at constitutional judgments opposite those they would have reached had they delayed their judgment until challenges to those laws had reached them in the ordinary course of litigation. Frankfurter put the argument this way:

Constitutionality is not a fixed quality; in crucial cases it resolves itself into a judgment upon facts... Legislation is largely empirical, based on probabilities . . . and not on demonstration. . . . [Further] the history of modern legislation amply proves that facts may often be established in support of measures after enactment, although not in existence previously.

... Experience has shown that whatever provision may be made on paper, advisory opinions are bound to move in an unreal atmosphere. In the attitude of court and counsel, in the availability of facts which underlie litigation, there is a wide gulf between opinions in advance of legislation or executive action, and decisions in litigation after such proposals are embodied into law or carried into execution. (1930, 478)⁸

In short, opponents argue that ordinary judicial review involves a crucial informational dimension that derives from its sequence in the policy process. Under ordinary judicial review, judges consider statutes in light of accumulated experience and the facts of concrete disputes. This informational advantage is lost when judges are asked to provide an advisory opinion. In an advisory proceeding, the only information that is available to the court is the same *ex ante* information generally also available to the legislature at the time of passage.

As a plausible argument against advisory opinions, however, the “Frankfurter Objection” requires an additional, crucial assumption. Recall that, as a doctrinal matter, the opinions that judges provide in their advisory capacity are *not* binding precedent should the law be challenged subsequently in the course of ordinary litigation. That is, formally, an advisory opinion simply polls the judges’ approval of a policy (or their assessment of the facial constitutionality of a proposed law), but it does not require them to commit themselves on empirically based

questions concerning the law’s constitutional reasonability. If necessary, judges could simply change their minds about the conclusions reached in a prior advisory opinion in light of the new facts revealed during the course of ordinary litigation. If the advisory opinion mechanism does in fact provide this flexibility, the informational objection to advisory opinions loses much of its force.

Opponents of advisory opinions, however, deny that courts will behave this flexibly. Frankfurter, for example, contended that while advisory opinions may not be formally binding, as a matter of basic human psychology, judges will feel constrained to reach the same conclusions in later litigation and will not approach the legal issues *de novo*:

[W]hile the technical doctrine of *stare decisis* is not applicable, the views expressed in an advisory opinion not only receive careful consideration in subsequent litigation but in fact exercise a powerful influence psychologically upon adjudication. (1930, 478)

Important commentators share this assessment. Lord Coke, the famous British jurist, objected to judicial advisory opinions on the same grounds. “For how can [judges] be indifferent [in a case], who have delivered their opinions beforehand without hearing of the party, when a small addition, or subtraction may alter the case” (quoted in Ellingwood 1918, 12–13, footnote 42). So, too, Alexander Hamilton objected to judicial participation in the law-making process for the “strong reason” that “judges, who are to be the interpreters of the law, might receive an improper bias from having given a previous opinion in their revisionary capacities” (*The Federalist* No. 73, 1788/1999, 414). These commentators all assume that even if not technically binding, judges will *in practice* treat advisory opinions as binding, and this will lead them to ignore new information that may be revealed in later proceedings.⁹ This inflexibility would undermine the unique informational contribution that judicial review makes to the policy process.

At bottom, the centuries-old argument over the wisdom of advisory opinions can be summarized as a disagreement over the balance between the advantages and disadvantages of early judicial review. On the one hand,

⁹Other commentators agree as well: “[T]he opinions appear to have precedential effect in the courts similar to that of litigated decisions. Thus, the advisory opinion has become in substance a device for accelerating judicial review of constitutional questions” (Note 1956, 1304, citation omitted). Carberry similarly observed that courts in practice do not “distinguish the precedential weight of justices’ advisory opinions from court holdings” (1975, 83). See also Stevens (1959, 6–7) and Field (1949, 216).

⁸See also Frankfurter (1924) and Stevens (1959, 13).

if a high court opposes a proposed law (or believes that the law is facially unconstitutional), it would be advantageous for the legislature to discover that the court would strike down the law before enacting it. This would decrease social, legislative, and administrative costs. On the other hand, asking for an advisory opinion entails a risk. Under ordinary (*ex post*) judicial review, a court may *agree* with the policy objectives of a law yet still strike it down in light of its empirical consequences for not achieving that objective in a reasonable fashion—a judicial act that may, under these conditions, be in the interest of the legislative majority that enacted the law (Rogers 2001). But by reviewing a bill in an advisory opinion, a court makes its decision in an information-poor environment relative to reviewing the enacted law after it has been thoroughly vetted in an adversary context of interested parties with particularized and provable injuries. If courts feel constrained by their advisory decisions in support of challenged laws (the Frankfurter/Coke/Hamilton assumption), then advisory opinions may lead courts to provide “false positives” by approving laws at the advisory stage that are later revealed to be empirically unreasonable. When this occurs, the advisory mechanism imposes social costs because courts will feel constrained to uphold unreasonable laws that they would have struck down in the course of ordinary judicial review.

This is the current state of the debate. The arguments on each side have at least facial plausibility. As Morton (1999, 68) has recently argued, formalizing the competing arguments in an equivocal situation such as this can sharpen our understanding of the disagreement and the implications of the different positions. That is the goal of the current article. We build a model that incorporates the essential features of *both* sets of arguments. Our model grants the Frankfurter/Coke/Hamilton objection that judges will be unwilling to alter judgments they make regarding a law in an advisory capacity if the same law later appears before them in the course of ordinary litigation. We then consider whether (and if so, under what circumstances) the cost of “early judicial review” outweighs the benefits of the advisory opinion mechanism.

A Baseline Model

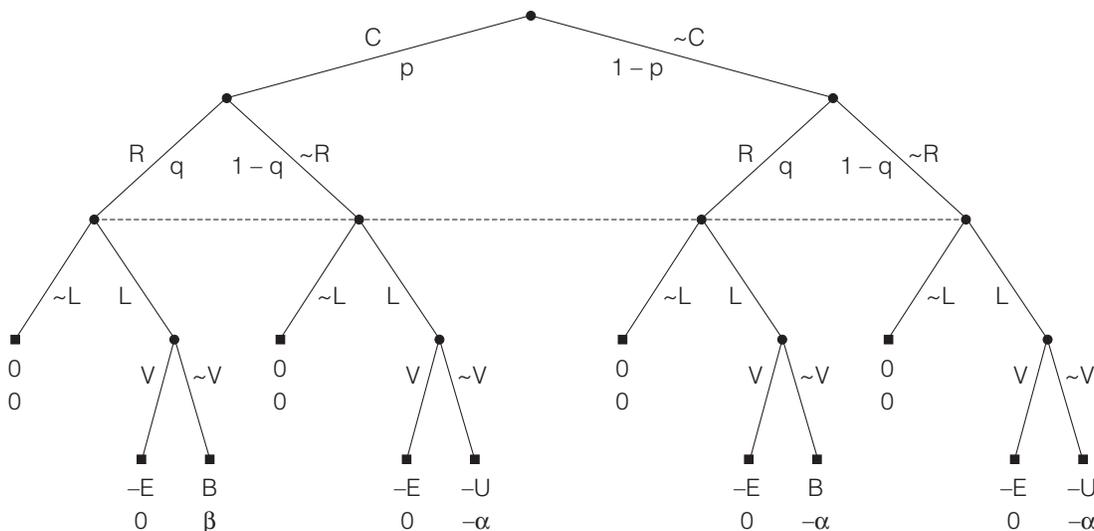
We begin by developing a model of judicial-legislative interactions in which no advisory opinion is available. This model provides a “baseline” against which we can evaluate the effects of the availability of advisory opinions. The basic legislative-judicial game, depicted by the game

tree in Figure 1, involves three players: Nature, a legislature, and a court. For modeling purposes, we treat the court and the legislature as unitary actors. While both institutions are collegial bodies, the assumption can be justified by the “single-subject requirement” governing most advisory opinions which limits requests for advice to single issues. As a result, we can think of the “court” or the “legislature” as the median judge or legislator in a unidimensional policy space. The sequence of play in the basic game is as follows. At the outset of the game, nature makes two (independent) moves in selecting the “type” of the court. It first selects the substantive policy preference of the court over the law (more on this below), and then selects a “state of the world” (more on these states below). After nature has selected these two components of the court’s type, the legislature decides whether to pass a bill (L) or to maintain the status quo ($\sim L$). The legislature’s action set at this stage is given by $A_L^1 = \{L, \sim L\}$. The legislature makes its choice while uncertain of court’s type (i.e., the legislature is uncertain of the court’s policy preferences and is uncertain regarding the true state of the world). If the legislature chooses not to pass a bill, the game ends. If it chooses to legislate, the court reviews the constitutionality of the law in the next stage. The court can strike down (“veto”) the law (V) or it can sustain it ($\sim V$). The court’s action set is given by $A_C^2 = \{V, \sim V\}$. For reasons that will be apparent shortly, the court makes its choice with perfect knowledge of its own type.

As mentioned, the legislature has incomplete information regarding the court’s preferences toward the proposed law and the state of the world. Recall the “Frankfurter Objection” that the constitutional reasonability of a statute is, at least in part, a function of empirical consequences that can be observed only after the law has been enacted and implemented. The model captures this by differentiating between two states of the world in the court’s type set. In the first state of the world (R), the bill is constitutionally reasonable *ex post*, i.e., it achieves its intended purpose in a reasonable fashion.¹⁰ In the second state ($\sim R$), the law turns out to be unreasonable *ex post*,

¹⁰U.S. courts engage in “reasonability” inquiries whenever they weigh the costs and benefits of legislation (Bennett 1979). In many different areas, federal and state courts weigh the significance of the government’s purpose and the “fit” between the statutory end and the statutory means, in determining whether a challenged statute is constitutionally reasonable. An “unreasonable” law is one in which the realized social cost is greater than the realized social benefit or the costs are imposed on nonbenefited parties (see, e.g., Bennett 1979 and Rogers 1999, 1103–1104). State courts tend to be less deferential toward legislatures than federal courts in reviewing the reasonability of ordinary socio-economic legislation (Note 1979).

FIGURE 1 Legislative-Judicial Game Without Advisory Opinion Option



i.e., it does not achieve its intended purpose in a reasonable manner. Since the legislature cannot know with certainty *ex ante* whether a law will be empirically reasonable or unreasonable, the legislature does not know the state of the world at the legislative stage. The common prior belief that the law is empirically reasonable is given by $\Pr(R) = q$. Conversely, the prior belief that the law is unreasonable is given by $\Pr(\sim R) = 1 - q$. Since the court reviews the law *after* it has been implemented and in the context of a concrete dispute, the court has access to more information about the state of the world.¹¹ We capture this fact in the model by assuming that when engaging in *ex post* judicial review, the court knows with certainty whether a law is empirically reasonable in achieving its intended purpose or not. This modeling choice captures the unique informational advantage enjoyed by courts in the course of ordinary judicial review.

The other component of incomplete information in the court's type set concerns the relation of the court's preferences to the legislature's preferences on the reviewed bill. First, the court may prefer the legislature's

bill relative to the status quo. This type of court is designated "convergent" (C). If the bill achieves its intended purpose, the court would like to see the bill implemented. Importantly, however, because the convergent court shares the legislature's policy preference on the bill or law it also shares the legislature's concern regarding the empirical reasonability of the law. If the law is revealed to be unreasonable *ex post*, the court would prefer to strike it down rather than uphold it (even though the court agrees with the *intended* purpose of the statute). The convergent court's preferences are therefore characterized as follows. The court earns a benefit of $\beta > 0$ if the bill is empirically reasonable and is implemented (i.e., it is not struck down by the court). If, however, the bill turns out to be empirically unreasonable but is implemented nevertheless, the court pays a cost of $\alpha > 0$. Finally, if the status quo is maintained (either because the legislature does not pass a bill or because the court vetoes the law), the court's payoff is simply 0.

The court's preferences on a law or bill may also be "nonconvergent" ($\sim C$) with the legislature's preferences (again, relative to the status quo). Specifically, if the statute is enacted and not struck down by the court, the nonconvergent court pays the cost $\alpha > 0$ regardless of the empirical reasonability of the law.¹² It receives a payoff of 0 if the status quo is maintained (either because the legislature does not pass a bill or because the court vetoes

¹¹See Rogers (2001, 86–88). Judicial rules, such as the standing doctrine, ensure that litigants before courts have incentives to provide the court concrete *ex post* information about the reasonability of a statute. Further the doctrine limits access to the judicial forum to plaintiffs with special informational characteristics, for example, to plaintiffs with injuries that are "actual or imminent," not "conjectural" or "hypothetical" (*Lujan v. Defenders of Wildlife* 1992, 560, see also, *Friends of the Earth v. Laidlaw* 2000, 180–181). Justice Kennedy, in his concurrence in *Lujan*, lists both an incentive rationale as well as an asymmetric information rationale for the standing doctrine's requirement that plaintiffs must show that the injuries are both concrete and personal (504 U.S. 555, 581 (1992)).

¹²In other words, since the nonconvergent court does not agree with the purpose of the bill, the question of reasonability of the means becomes moot. In terms of the two-pronged review that U.S. courts engage in, the bill fails the first "ends" prong. No further inquiry is then needed.

the law). The common prior belief that the court is convergent is given by $\Pr(C) = p$ while the prior belief that the court is nonconvergent is given by $\Pr(\sim C) = 1 - p$.

It is worth emphasizing that we follow Rogers (2001) in identifying two distinct components to judicial preferences. First, as in conventional formal models of judicial behavior, the court has preferences over the substantive policy purpose of a law, i.e., it has preferences over a (proposed) law relative to the status quo. Critically, however, there is a second component to judicial preferences that becomes relevant when a court agrees with the purpose of a law: the empirical, often unintended and unforeseen, consequences that a law generates once implemented. Because it also cares about the actual consequences of a policy, a court that agrees with the purpose of a law might still prefer to veto the law if it is not accomplishing its intended purpose in a reasonable fashion. (Importantly, as Rogers shows, and is key to our analysis below, the legislature can actually benefit from this type of judicial veto.)¹³

Legislative preferences are determined by the following considerations. First, the legislature has policy goals that it attempts to achieve through legislation. But if after enactment a statute turns out to be empirically unreasonable and does not achieve its intended purpose, the legislature prefers to see the bill struck down. That is, policymakers care not only about the intended purposes of their preferred policies, but also whether those policies actually achieve their intended purpose. Policymakers in both legislatures and courts care about the empirical (ex post) reasonability of legislation.¹⁴ The legislature's preferences have the following components.

¹³It is not necessary to assume that the court is policy motivated. Under a "legal" interpretation, the court's "types" might be represented as whether the court would hold a law unconstitutional on "legal" criteria, and uncertainty then pertains to the inability of the legislature to know which set of legal criteria the court will apply, i.e., the legislature may still be uncertain whether the judges on a court would decide that a proposed law falls within or without the prohibited category. Readers might also note that the two components of judicial review modeled here map almost directly onto the two-pronged means/ends inquiry of traditional reasonability review.

¹⁴Because the legislature cares about the empirical consequences of a policy, the judicial veto can be "informative" and therefore can advance the legislature's own policy goals. Rogers (2001, 86–88) identifies several reasons why courts can be in a better position relative to legislatures to judge the realized consequences of a law, and why it is easier for courts to "veto" inappropriate legislation after its enactment than it is for legislatures to repeal the legislation. It is important to stress, however, that this does *not* mean that the legislature *always* prefers the judicial veto. When a law is empirically reasonable but is struck down because the court disagrees with the law's purpose (a nonconvergent court), the legislature would prefer to see the bill upheld.

The legislature derives a benefit of $B > 0$ if the statute is empirically reasonable and implemented (i.e., not struck down by the court).¹⁵ If the law is enacted and turns out to be unreasonable when implemented, the legislature must pay a cost of $U > 0$.¹⁶ Further, enacting a law imposes opportunity and transaction costs on the legislature, which is represented by $E > 0$. Finally, if the legislature chooses not to legislate and maintains the status quo, its payoff is 0.

In this game, a strategy for a player specifies the action that will be taken by each of the player's types at each information set at which that type must potentially take an action. Since the legislature must act at only one information set, its strategy set is equivalent to its action set: $S_L = \{L, \sim L\}$

The court's strategy is more complicated. There are four information sets at which the court could potentially act. A convergent court can review a reasonable law (CR), a convergent court can review an unreasonable law ($C\sim R$), a nonconvergent court can review a reasonable law ($\sim CR$), and a nonconvergent court can review an unreasonable law ($\sim C\sim R$). The court's type space is thus given by $T_C = \{CR, C\sim R, \sim CR, \sim C\sim R\}$. The court's strategy is a mapping from its type space into its action set, $S_C: T_C \rightarrow \{V, \sim V\}$. For example, one strategy for the court is given by $(V|CR, V|C\sim R, V|\sim CR, V|\sim C\sim R)$, in which all four types of court would veto the law if enacted.¹⁷ The set of strategy profiles for the game is given by the cross product of the legislature's and the court's strategy sets, or $S: S_L \times S_C$. For example, under the strategy profile $\{L, (V|CR, V|C\sim R, V|\sim CR, V|\sim C\sim R)\}$, the legislature enacts the law, which is struck down by each type of court.

For any given configuration of exogenous parameters, the basic game has a unique pure-strategy, Perfect Bayesian Equilibrium (PBE)¹⁸ characterized by the following lemmata.

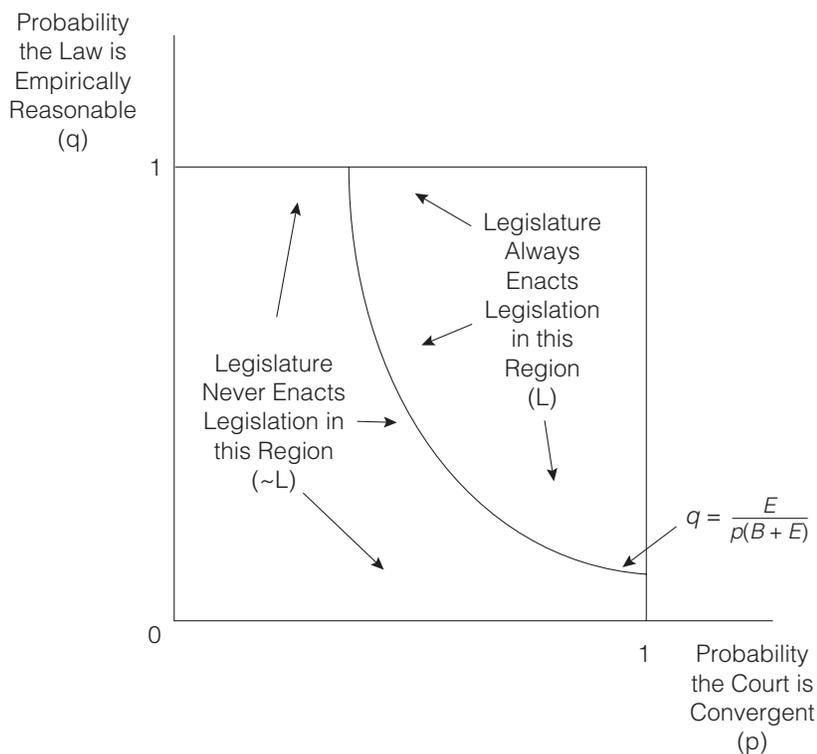
¹⁵ B is net the cost to the legislature of enacting the law. Let B' be the legislature's gross policy benefit from enacting a reasonable law, then $B = B' - E$, where E captures legislative transaction costs for passing a bill.

¹⁶ $-U$ is the net cost to the legislature of enacting the law, $-E$. Let U' is the legislature's gross policy cost from enacting an unreasonable law, then $-U = -U' - E$. Note then that $-U < -E$.

¹⁷Technically the null set, \emptyset , is also an element of the action set, representing the case in which the legislature does not enact a law, in which case the court takes no action.

¹⁸The appendix states several "tie-breaking" assumptions to eliminate two equilibria at "knife-edge" parametric values. These assumptions have no implications for the substantive implications of the results.

FIGURE 2 Equilibrium Legislative Choices Without an Advisory Opinion Option



Lemma 1. For $pq \geq \frac{E}{B + E}$, the following strategy profile constitutes a PBE of the basic game:

$$\{L, (\sim V | CR, V | C \sim R, V | \sim CR, V | \sim C \sim R)\}.$$

Lemma 2. For $pq < \frac{E}{B + E}$, the following strategy profile constitutes a PBE of the basic game:

$$\{\sim L, (\sim V | CR, V | C \sim R, V | \sim CR, V | \sim C \sim R)\}.$$

In this equilibrium, the court sustains the law if it has convergent preferences and the law is empirically reasonable. Otherwise, it vetoes the law.¹⁹ Given this judicial strategy, the legislature is willing to bear the cost of legislating only if the joint probability that the law is empirically reasonable *and* the court has convergent preferences (pq) is sufficiently high. Figure 2 illustrates the equilib-

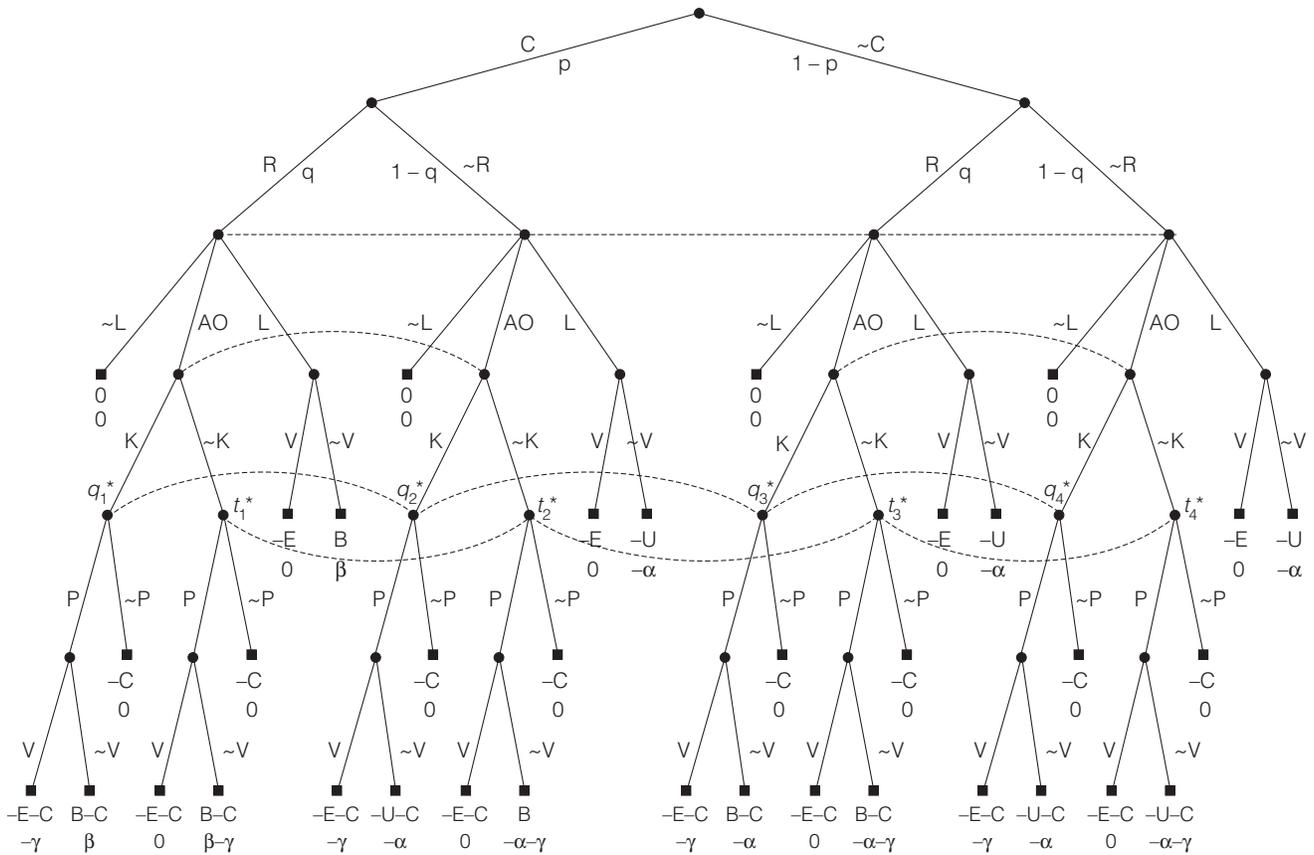
rium conditions and actions. The probability that the court is convergent (p) is drawn along the horizontal axis, and the probability that the law is empirically reasonable (q) is drawn along the vertical axis. Sensibly, bills with prior probabilities toward the northeast of the probability space—the region in which the law is most apt to be reasonable and the court is most apt to share the legislature’s preferences—are those that are more likely to be enacted relative to bills with prior probabilities toward the southwest region of the figure.

An Incomplete Information Model of Advisory Opinions

Now, consider the baseline model with the following change. The legislature may request (at a cost) an advisory opinion from the court prior to legislating. Figure 3 presents this new “advisory opinion game” (AOG). The legislature’s period 1 action set now has three elements, $A_L^1 = \{L, \sim L, AO\}$. If the legislature requests an advisory opinion, the court either advises that the bill is acceptable (K) or is not acceptable ($\sim K$). Thus, the court’s action set in period 1 is $A_C^1 = \{K, \sim K\}$. After receiving the judicial

¹⁹Importantly, however, when the C~R-type court vetoes the law, it is advancing the legislature’s (and its own) interests by eliminating an unreasonable law. With informative judicial review, judicial vetoes may assist the legislature in achieving its own policy goals, but they do not necessarily do so (see also Rogers 2001).

FIGURE 3 Legislative-Judicial Game with Advisory Opinion Option



recommendation, the legislature decides whether to enact the legislation. The legislature’s action set at this stage is $A_L^2 = \{P, \sim P\}$. If the legislature enacts the bill, the court reviews the enacted law, determining whether to veto it. The court’s action set in period 2 is $A_C^2 = \{V, \sim V\}$.

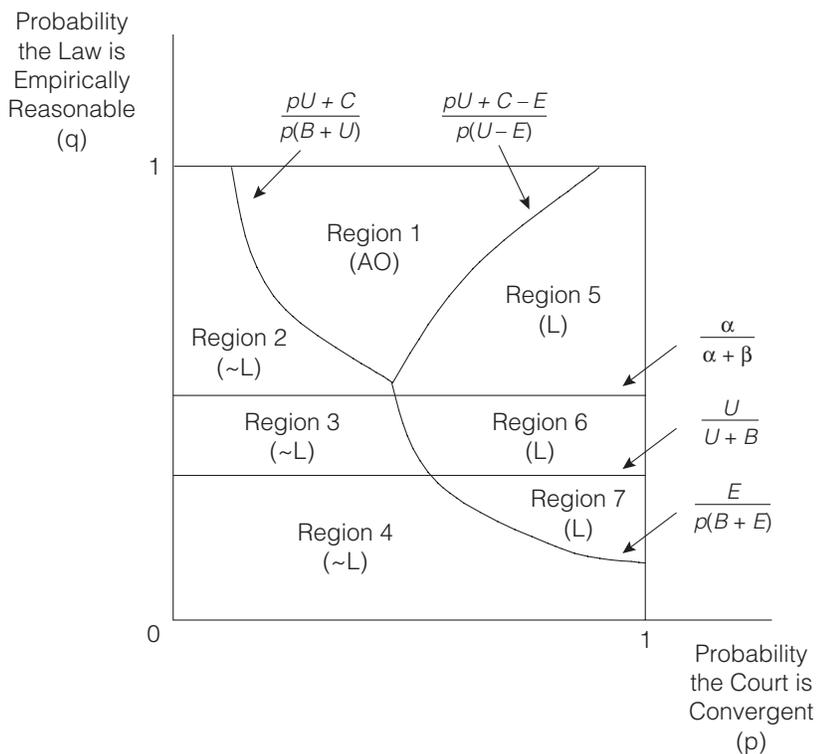
The legislature’s payoffs are identical to its payoffs in the baseline model with one addition. The legislature assumes a cost of $C > 0$ when it requests an advisory opinion. This cost represents the (variable) transaction and opportunity costs to the legislature of requesting advice. To analyze the impact of advisory opinions on the legislative process we assume that $B > C > 0$ (i.e., the benefit of successful legislation to the legislature exceeds the costs of an advisory opinion).²⁰ Similarly, the court’s payoff function also features an additional component. Recall the Frankfurter/Coke/Hamilton objection that justices so value consistency that a prior conclusion reached in an advisory opinion would constrain them from considering

²⁰ If $C > B > 0$, the legislature never asks for an advisory opinion and the AOG becomes identical to the baseline game analyzed above.

the validity of a law afresh in light of new information revealed in the course of ordinary adjudication. We incorporate this argument by assuming that the court pays an “inconsistency” cost of $\gamma > 0$ if its decision at the review stage diverges from its decision at the advisory opinion stage, and that this consistency cost overwhelms the policy payoff to the court (i.e., $\gamma > \beta > 0$ and $\gamma > \alpha > 0$). We should underscore that we make this assumption *not* because we embrace it, but because it is an assumption that plays a pivotal role in objections to the advisory mechanism. Thus, we make the assumption in order to construct the strongest case against advisory opinions. As we show below, even with this assumption in place, advisory opinions can be a welfare-enhancing practice.

Because the players in this game have only imperfect information about the state of the world, their beliefs are crucial. First, we need to identify the beliefs of each type of court over the empirical reasonableness of the bill at the advisory opinion stage. Since the court cannot derive any information from the legislature’s initial decision to request an advisory opinion, its beliefs are always given by its priors. Next, we need to identify the legislature’s beliefs over the court’s type contingent on the advisory

FIGURE 4 Equilibrium Legislative Choices With an Advisory Opinion Option



opinion received from the court. The formal definitions for these beliefs (represented by q_i^* and t_i^* in Figure 3) are reported in the Appendix.

The formal statement and proof of the equilibrium, as well as the equilibrium beliefs supporting the equilibrium strategies, are reported in the Appendix. The appropriate solution concept for this game is Perfect Bayesian Equilibrium (PBE). In brief, PBE requires that each player’s strategy and beliefs must constitute an optimal response to the strategies of the other players. We also assume that players do not play weakly dominated strategies.²¹

The legislature’s strategy set is given by $S_L = A_L^1 \times A_L^2$, with elements composed of three-tuples. For example, under the strategy (AO; $P|K, \sim P|\sim K$), the legislature requests an advisory opinion (AO) and subsequently passes the bill if the advisory opinion is favorable ($P|K$) and not otherwise ($\sim P|\sim K$). Because there are fourteen information sets for the court, the court’s strategy set is larger than the legislature’s. As a result, we truncate expression of the

court’s equilibrium strategies stating only the advisory recommendation made by each type of court if requested.²² For example, the strategy, ($K|C, \sim K|\sim C$) reports that if the court’s preferences converge with those of the legislature on the proposed bill it would approve the bill in an advisory opinion, but if the court had divergent preferences it would not approve the bill.

The AOG has a unique Perfect Bayesian Equilibrium in which strategies are conditioned on the exogenous parameters. Figure 4 shows the parametric regions over which the different equilibrium actions are predicted. As with Figure 2, the probability that the court is convergent is on the horizontal axis and the probability that the law is empirically reasonable is on the vertical axis. Discussion of the regions are grouped by the three actions the legislature takes in period 1: asking for an advisory opinion on a bill and then following the court’s advice; enacting a law

²¹As already mentioned, the appendix also specifies several “tie-breaking” assumptions we impose on player’s actions when indifferent. These assumptions ease statement of equilibrium conditions and do not impact the substantive implications of the results.

²²That is, we do not report the court’s decision on vetoing the law. As shown in the appendix, the Frankfurter assumption implies that the court does not change its decision relative to its advisory opinion recommendation. Therefore, actions for the eight information sets at which the court passes on a law’s validity after making an advisory recommendation are in effect reported in the substance of the advisory recommendation. If a bill is enacted without an advisory opinion, the court behaves as in the basic game.

without asking for an advisory opinion; and not enacting a proposed law without asking for an advisory opinion. We present the equilibrium and the parametric conditions while highlighting only notable technical details. (To reduce visual clutter, beliefs supporting the equilibrium are reported only in the Appendix.) We then discuss the implications of the AOG equilibrium outcomes by comparing them to the outcomes in the basic game.

Region 1. The legislature solicits an advisory opinion before deciding whether to enact the bill.

The legislature's and the court's equilibrium actions are given by $\{(AO; P|K; \sim P|\sim K), (K|C, \sim K|\sim C)\}$. The conditions that support these actions are:

$$\begin{aligned} \text{[i]} \quad q &\geq \text{Max} \left[\frac{U}{U+B}; \frac{\alpha}{\alpha+\beta} \right]; \\ \text{[ii]} \quad (1-pq)E &\geq p(1-q)U+C \\ \text{[iii]} \quad pqB &\geq p(1-q)U+C. \end{aligned}$$

As illustrated in Figure 4, the legislature requests an advisory opinion when it is relatively uncertain of the court's policy preferences (or legal judgment) toward the law. If the legislature is relatively certain that the court's preferences converge with its own (a "high" p) or if it is fairly sure that the court's preferences diverge from its own (a "low" p), it does not waste legislative resources by soliciting an advisory opinion. In addition, the legislature requests advisory opinions only on bills that are relatively likely to be empirically reasonable (a "high" q). The reason for this is that the legislature wants to minimize the probability of receiving a false "positive" from the court—i.e., it wants to minimize the chance that the court will approve a law at the advisory stage that turns out to be empirically unreasonable after its enactment. Recall that advisory opinion opponents claim that courts so prefer consistency that if they approve a law at an advisory opinion stage they will also approve the law in subsequent reviews even if the law turns out to be empirically unreasonable. As we see in Region 1, however, the legislature adapts its behavior in equilibrium to reduce the damage of this scenario. The legislature requests advisory opinions only when it will be better off *on average* with them than without them (and this is true even with the certainty that the court will provide some "false positives" at the advisory stage). This is an important result to which we return below.

There are three parameter regions in which the legislature does not solicit an advisory opinion and does not enact the bill.

Regions 2, 3, and 4. The legislature does not enact the bill and does not ask for an advisory opinion.

[A] **Region 2.** The legislature's and the court's equilibrium actions are given by $\{(\sim L; P|K; \sim P|\sim K), (K|C, \sim K|\sim C)\}$. The conditions that support these actions are:

$$\begin{aligned} \text{[i]} \quad q &\geq \text{Max} \left[\frac{U}{U+B}; \frac{\alpha}{\alpha+\beta} \right]; \\ \text{[ii]} \quad pqB &< (1-pq)E; \text{ and} \\ \text{[iii]} \quad pqB &< p(1-q)U+C. \end{aligned}$$

[B] **Region 3.** The legislature's and the court's equilibrium actions are given by $\{(\sim L; P|K; \sim P|\sim K), (\sim K|C, \sim K|\sim C)\}$. The conditions that support these actions are:

$$\begin{aligned} \text{[i]} \quad \frac{U}{B+U} &\leq q < \frac{\alpha}{\alpha+\beta} \\ \text{[ii]} \quad (1-pq)E &> pqB. \end{aligned}$$

[C] **Region 4.** The legislature's and the court's equilibrium actions are given by $\{(\sim L; \sim P|K; \sim P|\sim K), (K|C, \sim K|\sim C)\}$. The conditions that support these actions are:

$$\begin{aligned} \text{[i]} \quad q &< \frac{U}{U+B}; \\ \text{[ii]} \quad (1-pq)E &> pqB. \end{aligned}$$

Figure 4 illustrates the parameter conditions that imply "no legislation" ($\sim L$) and shows that they are rather more intuitive than their abstract statement might suggest. (The different conditions for these regions result from perfection requirements pertaining to off-the-equilibrium-path actions.) The union of the $\sim L$ parameter regions in this game constitutes a subset of the $\sim L$ region in the basic game. That is, whenever the legislature chooses not to legislate in the AOG game it would also not have legislated in the basic game. (The converse, however, is not true.) There are also three parameter regions in which the legislature *enacts* legislation in equilibrium without asking for an advisory opinion from the court.

Regions 5, 6, and 7. The legislature enacts the bill without requesting an advisory opinion.

[A] **Region 5.** The legislature's and the court's equilibrium actions are given by $\{(L; P|K; \sim P|\sim K), (K|C, \sim K|\sim C)\}$. The conditions that support these actions are:

- [i] $q \geq \text{Max} \left[\frac{U}{U+B}; \frac{\alpha}{\alpha+\beta} \right];$
- [ii] $pqB \geq (1-pq)E;$ and
- [iii] $(1-pq)E < p(1-q)U + C.$

[B] **Region 6.** The legislature’s and the court’s equilibrium actions are given by $\{(L; P|K; \sim P|\sim K), (\sim K|C, \sim K|\sim C)\}$. The conditions that support these actions are:

- [i] $\frac{U}{B+U} \leq q < \frac{\alpha}{\alpha+\beta}$
- [ii] $(1-pq)E \leq pqB.$

[C] **Region 7.** The legislature’s and the court’s equilibrium actions are given by $\{(L; \sim P|K; \sim P|\sim K), (K|C, \sim K|\sim C)\}$. The conditions that support these actions are:

- [i] $q < \frac{U}{U+B};$
- [ii] $(1-pq)E \leq pqB.$

As can be seen in Figure 4, these regions are also contiguous and constitute a subset of the region for the “legislate” (*L*) equilibrium in the basic game. As with the $\sim L$ action, the different equilibrium parameter conditions result from the perfection requirement for off-the-equilibrium path actions.

It is worthwhile noting that the models actually predict different actions in equilibrium under identified parameters. Unlike many earlier models of judicial review that assume complete information (and thus, for example, never had the courts actually vetoing legislation because their actions were perfectly anticipated by the legislature), in our model the court strikes down some legislation in equilibrium under identified parameters. Under other parameters, it sustains legislation. Similarly, under specified equilibrium conditions, the legislature both enacts some bills and kills others without asking for an advisory opinion. Under other identified parameters, the legislature requests advisory opinions before enacting or killing bills. In the next section, we investigate this complexity in more detail, which will allow us to understand the implications of advisory opinions for legislative outcomes and to illuminate the traditional reticence of many courts to offer advisory opinions.

Discussion

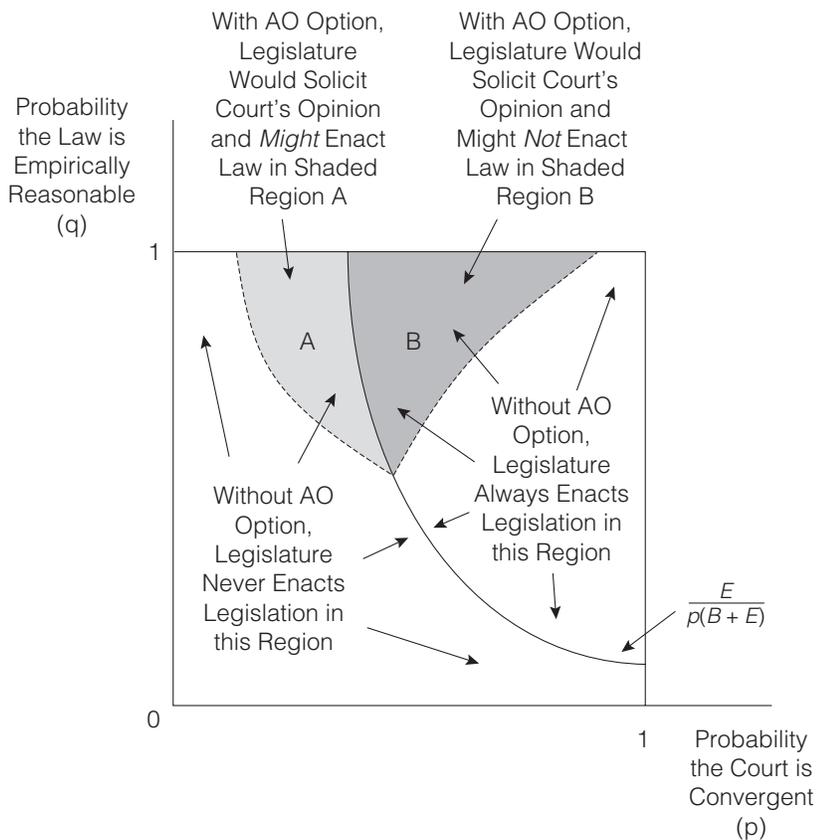
We organize our discussion around a series of observations. We first characterize the impact of the advisory

mechanism on legislative outcomes. Given the characterization of those outcomes, we then consider why courts tend to be reluctant to embrace the mechanism on their own. The observations draw on Figure 5, which projects Figure 2 onto Figure 4. (To avoid visual clutter, Figure 4 has been cleansed of the off-equilibrium path parameter conditions). The thick line that partitions the probability space in Figure 5 from the northwest to the southeast graphs the condition illustrated in Figure 2 that separates the regions in which the legislature enacts or kills legislation in the basic game. The region to the right of the line represents the conditions under which the legislature would enact legislation; the region to the left of the line represents the conditions under which the legislature would not enact a proposed bill. The shaded regions at the top of Figure 5 (A and B) identify the conditions under which the legislature requests an advisory opinion in the AOG. (The union of regions A and B in Figure 5 are identical to region 1 in Figure 4.)

Observation 1. The advisory opinion mechanism induces the legislature to *reject* some laws that it would have *enacted* without the mechanism, and to *enact* some laws that it would have *rejected* without the mechanism.

The bisection of the shaded advisory opinion region in Figure 5 illustrates how the availability of the advisory mechanism changes the pattern of legislative enactments. Region B on the right-hand side captures the set of laws that the legislature would have enacted with certainty in the absence of an advisory mechanism. In this region, when an advisory opinion is available, the legislature will first solicit the court’s opinion. It will enact laws that receive the court’s approval and kill laws to which the court objects. Laws in this region will be rejected with probability $1 - p$ (the probability that the court is divergent). Region A is more interesting. In region A, the legislature requests advice on bills (and may enact some of them) that it would have *rejected* outright in the absence of the advisory mechanism. In this region, the availability of an advisory opinion *increases* legislative output. The intuition behind this result is that the advisory mechanism permits the legislature to poll the court regarding whether it objects to the proposed legislation. This reduces the risk that the legislature is wasting its time and resources if it enacts bills in region A. Put differently, in this region, the advisory mechanism reduces the cost of legislating, thereby inducing the legislature to enact legislation that it would have rejected with certainty in the absence of the mechanism. This result underscores the fact that the judiciary does not simply have a static influence on the legislative process. As with judicial review

FIGURE 5 Comparing Enactments With and Without an Advisory Opinion Mechanism



more generally (Vanberg 2001; Rogers 2001), the advisory option does more than provide an additional “veto point” in the legislative process. It also shapes the dynamics of the legislative process in fundamental ways.

Because the advisory mechanism reduces legislative output in region B and increases legislative output in region A, the availability of the advisory mechanism may decrease *or* increase the *net* amount of legislation. That we derive an indeterminate result is actually pertinent to the historical debate over advisory opinions. The important implication of this result is that the *positive* effect that the AO mechanism has on legislative production appears to have escaped Frankfurter and other critics who regarded advisory opinions merely as a veto mechanism that could only deter legislation and preserve the status quo. (That is one reason that political Progressives opposed advisory opinions.) Frankfurter commented, for example, that “It must be remembered that advisory opinions are not merely advisory opinions. They are ghosts that slay” (1924, 1008). He meant by this that advisory opinions only kill or obstruct legislation and do not foster it. In contrast, while our models demonstrate

that the advisory mechanism does kill some legislation that would otherwise have been enacted, it also results in the passage of some legislation that would not have been enacted without the availability of the mechanism.

Observation 2. Legislative majorities are unequivocally better off with the advisory mechanism than without it.

This observation follows directly from the equilibrium conditions. Nonetheless, it merits emphasis in light of the argument of advisory opinion opponents that the mechanism induces judges to ignore information revealed subsequent to a law’s enactment and simply reaffirm the judgment they made in an earlier advisory opinion. This argument neglects the fact that legislative majorities can anticipate and react to the judges’ behavior. As a result, they will solicit advisory opinions only when it is optimal to do so *given* the judges’ decisional intransigence. As illustrated in Figure 5, the legislature solicits advice from the court only when the *ex ante* probability that the law is empirically reasonable (q) is so

high that, on average, the legislature gains more from the court’s advice than it loses in the form of subsequent intransigence when the law appears before the court in ordinary adjudication.

To see how these anticipatory reactions work, it is useful to consider the conditions for region 1 in Figure 4, which ensure that the legislature asks for an advisory opinion only when its expected payoff is greater than the expected cost (which includes the potential “cost” of judicial intransigence). Consider each condition in turn. Condition [i] of Region 1,

$$q \geq \text{Max} \left[\frac{U}{U+B}; \frac{\alpha}{\alpha+\beta} \right],$$

requires that the expected payoff of enacting the law (for the legislature) and not vetoing the law (for the court) are both greater than zero. Condition [ii] requires that the expected payoff of soliciting the advisory opinion be greater than the payoff of enacting the law without an advisory opinion. Crucially, it incorporates the cost of judicial intransigence. The condition requires that $(1-pq)E \geq p(1-q)U + C$. The left-hand side captures the *gain* to the legislature of an advisory opinion (the expected enactment costs that can be saved by an AO). The right-hand side is the *full* expected cost to the legislature from requesting advice. It includes the transaction cost and opportunity cost of the request (C). It also includes the cost $p(1-q)U$, which is the expected cost to the legislature of enacting a law that turns out to be empirically unreasonable but which the court will not strike down because it approved it at the advisory opinion stage. Thus, in the AO equilibrium, the legislature incorporates the possibility of a judicial “false positive” in its decision to ask for an advisory opinion and requests advice only when the expected cost of the false positive is low enough relative to the expected gain of the AO. Similarly, the last condition, $(pqB \geq p(1-q)U + C)$, represents region A in which the expected gain of enactment with the AO exceeds the expected cost of the “false positive,” or $p(1-q)U$.

This analysis reveals that the main Frankfurter/Coke/Hamilton objection to advisory opinions is incomplete in a fundamental way. The objection assumes that justices who have rendered an advisory opinion are likely to feel constrained by that opinion (for legal or psychological reasons) should they later encounter the same statute in an ordinary proceeding. From this observation, the critics conclude that the advisory mechanism must be suboptimal, since it can lead justices to ignore relevant information that becomes available only in the course of

ordinary review. This argument, however, relies on a second, unstated assumption, namely that legislative majorities will not or cannot respond to the court’s anticipated behavior when *requesting* advice. The objection, in effect, assumes that the legislature will not optimally react to the court’s behavior. The analysis developed here, however, shows that legislatures will use their discretion in requesting advice to ensure that the mechanism on average will improve the position of the legislature relative to systems without advisory opinions.

While the legislature is strictly better off with an advisory opinion option, the same is not true for the court. While (as we will see) the court gains as a result of an advisory mechanism in region A, it is a net loser in region B. Whether the availability of an advisory opinion improves the position of the court on balance therefore depends on the distribution of bills between region A and region B. Further, given the offsetting gains and losses for the court, even relatively minor transaction and opportunity costs stemming from advisory opinions may be sufficient to induce many (but not necessarily all) courts to reject the mechanism when they have choice over the matter. As a result, we would expect to see some variation in the willingness of courts to hand down advisory opinions with, possibly, some empirically predictable influences that might increase the probability that a given court would oppose the practice.

Observation 3. Different courts in different states will expect varying net payoffs from the advisory mechanism. Some will anticipate a net positive payoff (and will volunteer the mechanism) others will anticipate a net negative payoff (and will refuse to offer advisory opinions unless constitutionally required).

Corollary. Over time, the opportunity costs to U.S. state high courts of rendering advisory opinions have increased. As a result, the number of courts that volunteer to provide advice has decreased over time.

Note that the payoff for the divergent court is always zero in the basic game and in the AOG, so we need consider only the convergent court. First, the court’s expected payoff in region B of Figure 5—the region in which the legislature would certainly enact legislation in the basic game—when there is *no* advisory opinion mechanism is given by:

$$q\beta - (1-q)0. \tag{1}$$

Without an advisory mechanism, the law is reasonable (and so would be sustained by the court) with probability

q , resulting in a payoff of β for the court. It is unreasonable (and so would be struck down) with probability $(1 - q)$. When an advisory mechanism exists, the court's expected payoff for bills in region B is given by:

$$q\beta - (1 - q)\alpha. \quad (2)$$

Comparing the expected payoff in (1) with the payoff in (2), it is immediate that advisory opinions *always* make the court a net loser in region B.

The court gains from the advisory mechanism in region A of Figure 5. Recall that the legislature would enact no bills in region A if the advisory mechanism did not exist. So the payoff to the court in this region *without* the advisory mechanism is zero. But *with* the advisory mechanism, the legislature will now request advice and will enact those bills that the court approves. With an advisory mechanism, the court's expected payoff is therefore given by:

$$q\beta - (1 - q)\alpha > 0. \quad (3)$$

As a condition of equilibrium, this expected payoff must be positive (otherwise the court would not recommend that the legislature enact the bill). Hence, in region A, the court is better off.

While the advisory mechanism is unequivocally welfare enhancing for legislatures, we can make no unequivocal statement about the welfare implications of the advisory mechanism for courts. Whether a particular court would expect a net gain or net loss from offering advisory opinions depends on the number of bills it expects to fall in region A relative to the number falling in region B. Different high courts may thus reasonably come to different conclusions regarding whether their participation in an advisory procedure will leave them better off or not. At first glance, this equivocal conclusion may not seem particularly interesting. It does, however, explain the ambivalence that courts show toward advisory opinions in approving them in some states and objecting to them in others. First, it explains why policy-oriented courts *sometimes* refuse to offer advisory opinions, a practice that would appear calculated to maximize their policy influence. Our model suggests that some (perhaps even many) policy-oriented courts will be reluctant to offer advisory opinions because the mechanism denies them the important informational advantage they enjoy in the policy process, an informational role that courts use to achieve their own policy goals. At the same time, our model identifies a reason for the variation in judicial willingness to offer advisory opinions. The continuing willingness of the North

Carolina supreme court to provide advisory opinions without statutory or constitutional authorization (Edsall 1949), the willingness of the high courts of Alabama and Delaware to consent to a statutory grant of the advisory power, as well as the fact that ten state high courts and the U.S. Supreme Court refused from the outset to offer advisory opinions (Stevens 1959, 8), all fit within the model. Our model accounts for the variation between courts in their willingness to offer advisory opinions.

Our model further suggests an answer to the question regarding the eight state supreme courts that once offered advisory opinions but now refuse to do so (Stevens 1959, 7). What can account for the change of mind by these courts? Given the empirical variation in judicial openness to the advisory opinion among U.S. state judiciaries—a set of judiciaries that vary relatively little, at least by comparative national standards—it would appear that for many judiciaries the range between the expected payoff of providing advisory opinions and not providing them is relatively narrow. Thus, even the addition of relatively minor transaction or opportunity costs to courts for providing advisory opinions might be enough to make offering advice unattractive. For example, the Nebraska supreme court initially entertained advisory opinions on its own prerogative, i.e., without constitutional or statutory authorization. By the 1890s, however, one of the high court's judges began to argue that the court should “call a halt” to the practice because advisory opinions were taking too much time away from the court's regular business, time that it should devote to ordinary litigation. Within a few years he had persuaded a majority on the court, and in 1894 the court promulgated a rule that denied itself the power to answer “hypothetical questions” (Ellingwood 1918, 75–76).

Of course, the fact that advisory opinions impose transaction and opportunity costs on courts does not in itself imply the dynamic prediction that state high courts that were once willing to offer advisory opinions gradually would become less willing to do so. But, as suggested in the Nebraska case, the size of these costs is a function of caseload and other demands on a court's time. Given the increasing case loads and other demands facing courts as a result of economic and political modernization, it appears plausible that the transaction and opportunity costs to state high courts of offering advisory opinions have risen over time. As these costs have increased, we would predict that some high courts that were once willing to offer advisory opinions would turn again the mechanism. In summary, our model shows that legislative gains from advisory opinions are relatively clear while judicial gains are tentative. This explains both the willingness of legisla-

tures to solicit advisory opinions from courts as well as the reluctance of many state high courts to reciprocate the enthusiasm.

Conclusion

The judicial veto can serve a “distributive” as well as an “informative” role in the policy process (Rogers 2001). To the extent that judicial and legislative policy preferences diverge, the judicial veto is distributive as it moves expected policy outcomes away from the legislature’s preferences and toward the court’s. One way to conceive of the advisory mechanism is as a mechanism that permits legislatures (and society) to economize on the distributive costs of judicial review. Through the advisory mechanism a legislature can ask a court whether it approves of a proposed law. If the court does not, the advisory opinion communicates its opposition to the proposed law early, preventing the legislature from wasting time and resources considering the bill any further. In addition to saving legislative resources, early review economizes on administrative costs and prevents reliance costs from being imposed on society at large.

But early judicial review also has a cost. For sequential and institutional reasons, litigation ordinarily occurs after the consequences of a law are revealed, meaning that ordinary judicial review occurs in a situation in which the court has more information available to it concerning the law’s impact than the legislature did when considering whether to enact the law. By inducing early judicial review, the advisory mechanism vitiates the informative value of judicial review. For this reason, notable legal and constitutional commentators such as Frankfurter, Coke, and Hamilton argued against an advisory capacity for judges. Contrary to their conclusion, however, our analysis shows that when considering whether to request an advisory opinion, the legislative decision accounts for the conditions under which the informational cost of early judicial review would likely be greater or less than the distributive savings of the request. Legislatures request the opinions only when the expected savings are greater than the costs, and so they benefit on average from the availability of the mechanism. We also show that unlike legislatures, courts are not always better off with the mechanism. Whether the advisory mechanism is welfare enhancing or welfare diminishing for a court depends on the relative number of “false positives” the court would expect to provide relative to the court’s gain from laws that the legislature would not have en-

acted but for the existence of the advisory mechanism. Our analysis thus suggests that the advisory opinion is a legislative (and likely social) welfare-enhancing mechanism while it also explains the reluctance of many judiciaries to accept the mechanism voluntarily.

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Appendix Illustrative Proof

This appendix provides a sample proof for one of the equilibrium regions of the AOG game. The proofs for the other regions follow the same logic and are available from the authors. All necessary definitions, lemmata, and tie-breaking assumptions are contained in the appendix.

Definition: Let the legislature’s beliefs be denoted by:

$$P(CR | K) = q_1; P(C \sim R | K) = q_2; P(\sim CR | K) = q_3$$

$$P(CR | \sim K) = t_1; P(C \sim R | \sim K) = t_2; P(\sim CR | \sim K) = t_3$$

Lemma A1: If the court issued an advisory opinion, its ruling at the review stage will be consistent with its advisory opinion regardless of the reasonability of the bill.

Proof: Since $\gamma > \beta$ and $\gamma > \alpha$, the cost of inconsistency outweighs any possible benefit to overturning the advisory opinion.

Lemma A2: The legislature will always choose not to pass the bill at the legislative reaction stage if the court raised constitutional objections at the advisory stage.

Proof: Since the court will always annul a statute after an unfavorable advisory opinion (see Lemma A1), passing the bill will result in the payoff $-E - C$. Not passing the statute results in payoff $-C$. Thus, not passing the bill strictly dominates passing.

Lemma A3: For the nonconvergent court, raising constitutional objections at the advisory stage weakly dominates upholding the bill.

Proof: Given Lemma A2, the payoff to raising constitutional objections is 0. Given Lemma A1, the payoff to upholding the bill at the advisory stage is either $-\alpha$ (if the legislature responds by passing the bill) or 0 (if the legislature responds by not legislating). Thus, raising constitutional objections weakly dominates upholding the bill for the nonconvergent court.

Lemma A4: If the legislature passes a bill at the initial legislative stage without requesting an advisory opinion, the court will uphold the bill at the final review stage only if it is

empirically reasonable and the court is convergent. Otherwise, the court will annul the bill.

Proof: Annulling the bill results in a payoff of 0 for the court. Upholding it generates a payoff of β for the convergent court if the bill is empirically reasonable. Otherwise, upholding it results in a payoff of $-\alpha$.

Lemma A5: If the legislature chooses not to pass legislation at the legislative reaction stage regardless of the court's opinion, the legislature will not request an advisory opinion at the initial legislative stage.

Proof: Consider the legislature's initial decision. Given the remainder of its strategy, the payoff to requesting an advisory opinion and to simply not legislating in the first place are given by:

$$\begin{aligned} U_L(AO) &= -C \\ U_L(\sim L) &= 0 \end{aligned}$$

Clearly, playing $\sim L$ dominates requesting an advisory opinion.

To simplify the analysis and the statement of equilibrium conditions, we impose several "tie-breaking" assumptions. Imposing these conditions does not impact the substance of the results. Most significantly, these assumptions eliminate two additional, but substantively insignificant, pure-strategy equilibria.

Assumption 1: If the court is indifferent over raising constitutional objections or upholding the proposed bill at the advisory stage, it will uphold the bill.

Assumption 2: If the legislature is indifferent over passing the bill and not passing the bill at the legislative reaction stage, it will choose to pass the bill.

Assumption 3: If the legislature is indifferent between requesting an advisory opinion and not doing so at the initial legislative stage, it will choose to request advice.

Assumption 4: If the legislature is indifferent between legislating and not legislating at the initial legislative stage, it will choose to legislate.

Sample Proof for Region 1:

Region 1: The strategy profile

$\{\{AO, P|K, \sim P|\sim K\}; \{K|C, \sim K|\sim C\}\}$ constitutes a PBE of the AOG if the following conditions are met:

$$[i] \quad q \geq \text{Max} \left[\frac{U}{U+B}; \frac{\alpha}{\alpha+\beta} \right];$$

$$[ii] \quad (1-pq)E \geq p(1-q)U + C$$

$$[iii] \quad pqB \geq p(1-q)U + C.$$

The legislature's beliefs along the path of play are given by $q_1 = q; q_2 = 1 - q; q_3 = 0$ and $t_1 = t_2 = 0; t_3 = q$.

Proof: Using Bayes' Rule, the beliefs of the legislature along the PoP are given by: $q_1 = q; q_2 = (1 - q); q_3 = 0; t_1 = t_2 = 0; t_3 = q$.

A) Consider the legislature at the legislative reaction stage:

Subcase i): The court has objected to the bill at the advisory stage.

Lemma A2 applies, so playing $\sim P$ is optimal.

Subcase ii): The court has not objected to the bill.

$$\begin{aligned} U_L(P|K) &= q(B - C) - (1 - q)(U + C) \\ U_L(\sim P|K) &= -C \end{aligned}$$

Given Assumption 2, this implies that the bill is passed if and only if:

$$q \geq \frac{U}{B+U}$$

B) Consider the court at the advisory stage:

Subcase i) The court is convergent.

$$\begin{aligned} U_C(K) &= q\beta - (1 - q)\alpha \\ U_C(\sim K) &= 0 \end{aligned}$$

Given Assumption 1, the court will play K if and only if:

$$q \geq \frac{\alpha}{\alpha+\beta}$$

Subcase ii) The court is nonconvergent.

Lemma A3 applies, so playing $\sim K$ is optimal.

C) Consider the legislature at the initial legislative stage:

$$\begin{aligned} U_L(L) &= pqB - (1 - pq)E \\ U_L(\sim L) &= 0 \\ U_L(AO) &= pq(B - C) - p(1 - q)(U + C) - (1 - p)C \end{aligned}$$

Given Assumption 3, the legislature will request advice if and only if:

$$i) \quad U_L(AO) \geq U_L(L)$$

which implies that $(1 - pq)E \geq p(1 - q)U + C$

$$ii) \quad U_L(AO) \geq U_L(\sim L)$$

which implies that $pqB \geq p(1 - q)U + C$

QED.

All other proofs follow the same pattern.

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