AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 5: The Jacksonian Era – Judicial Power and Constitutional Authority

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Massachusetts Constitutional Convention, Debate on Advisory Opinions (1853)[1]

The influential Massachusetts state constitution of 1780 included a provision that "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." The legislature and executive made frequent use of the provision to question the justices on matters of law and constitutionality that arose in legislative debates. The provision formalized a system of advisory opinions, in which judges gave their legal opinions on a question outside the context of a case or controversy. Such advisory opinions did not resolve any legal dispute or affect the legal rights of any party, and they were not generally regarded as having the force of precedent. The politicians could choose to ignore or follow the judicial advice as they saw fit. A handful of state constitutions, primarily in New England, followed the Massachusetts example and adopted a system of advisory opinions.

Advisory opinions were an ongoing source of controversy in Massachusetts. Politicians tended to like such constitutional provisions because they allowed legislators to anticipate better the actions of the supreme court. Judges tended to dislike such provisions because they forced judges to take a stance on legal issues without the assistance of legal argumentation or a factual record. The Massachusetts constitutional convention of 1820 recommended that the practice of advisory opinions be ended, but the voters rejected that recommendation. The constitutional convention of 1853 made the same recommendation but received the same answer from the voters.

The proposed revision of 1820 was sponsored by Francis Dana, a signer of the Articles of Confederation and an influential chief justice on the state supreme court, and Joseph Story, a founder of Harvard Law School and associate justice on the U.S. Supreme Court. Story emphasized that advisory opinions were inconsistent with the independence of the judiciary and tended to drag the judges into political disputes. The proposed revision of 1853 was recommended by a judiciary committee as composed of an all-star cast of legal talent in the state, including Marcus Morton, a perennial Democratic candidate for governor and a former justice on the state supreme court; Otis P. Lord, a future state supreme court justice; U.S. Senator Charles Sumner; and Simon Greenleaf, Story's successor at Harvard Law School and the leading American authority on the law of evidence.

How might the practice of advisory opinions interfere with the independence of the judiciary? Does the ability of the legislature to pose questions directly to judges risk tainting the court with politics? Can an attorney general serve the same purpose as the supreme court in providing advisory opinions? Do advisory opinions cause the same problems for the attorney general? Could a practice of advisory opinions help the legislature resolve constitutional difficulties more easily and efficiently than would otherwise be the case?

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Mr. MORTON. . . . It will be recollected that the present Constitution provides that the legislature or the executive may call upon the supreme court for their opinion on questions of law, or matters of great importance and interest. This provision the [Judiciary] Committee thought ought to be expunged from the Constitution . . .

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[1] Excerpt taken from *Official Report of the Debates and Proceedings in the State Convention*, vol. 2 (Boston: White & Potter, 1853).

There are several reasons which induced the Committee to come to that conclusion. In the first place, you provide that the several departments of government – the executive, judicial and legislative – shall be kept entirely distinct, and that the officers belonging to one department shall never exercise the powers belonging to the others. . . . Wherever free governments exist, it is deemed important that these several departments should be kept entirely separate and independent of each other. The object of the introduction of this provision is to carry out that principle. The provision of the Constitution as it now stands, is inconsistent with the other clause of the Constitution, because it authorizes one branch to call upon another for their opinion in relation to matters which come before the first branch, and therefore we thought that there should be a change made in that respect, so that there should be no interference whatever between one branch of the government and the others.

Another reason . . . was that the courts of the Commonwealth, and above all the highest court, ought never to be made liable to be drawn into the vortex of politics, and that it should be so removed from all political transactions, that the whole community might be satisfied, that in appealing to them, they were appealing to a tribunal so constituted, as to be as far removed from such influences, as it is possible to remove them, in the nature of things. The judiciary is now exposed to be drawn into the discussion of great and important interests which excite the community. The experience of our legislature shows, that upon many occasions the opinion of the court has been asked upon subjects greatly exciting either to a section, or to the whole, of the Commonwealth. The importance of avoiding such discussion on the part of the court, presented itself as one worthy of the consideration of the Convention.

Again, there was another consideration . . . . The court is liable to be called upon to decide questions of law, without there being a full and proper hearing of both side of them, -- to decide questions of law, affecting private rights, without the parties who may be affected by them, having an opportunity of being heard in relation to those rights. Any one who has had as much as experience as I have had upon the subject, can fully appreciate the importance of having all questions, which the court are called upon to decide, discussed by individuals having diverse interests to be affected by the decision. Therefore, it seemed to the Committee highly inexpedient that the court should be placed in such a situation . . . .

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Mr. FRENCH. . . . I have had occasion to know that in one case, at least, this provision has been beneficial to the whole State. There was a time when the standard of the qualification of voters was different in almost every town in the State, and it arose out of the different constructions, which different parts of the State put upon a constitutional provision, and it seems to me that there should be some mode provided by which the selectmen should be able to ascertain what the Constitution requires so that they might know how to perform their duties. . . . The decision of the judges of the supreme court was taken upon the question, and uniformity of action followed. Now I put it to the Committee, if that was not a case in which this provision was not beneficial. Why shall we strike it out of the Constitution? It certainly cannot do any injury by remaining in the Constitution. . . .

Mr. WARNER. . . . I quite agree . . . that the supreme court of the State can render no better service to the Commonwealth than in answering such questions as may be propounded to them by the legislature. The questions which that court have already answered, which have been thus propounded, have been of great service . . . .

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Mr. HOOPER. . . . I am inclined to think that these decisions have not infrequently relieved municipal officers from positions of embarrassment; and they have now the power of settling all these questions without the necessity of parties having recourse to protracted and expensive litigation. I have heard of no injury resulting from the exercise of this power, and therefore hope that it may be retained.

Mr. LORD. . . . [T]he retention of this provision in the Constitution permits the legislative or executive department of the government to put, in many important instances, the whole responsibility of their action upon the judicial department, while a fundamental provision of the Constitution is, that these several departments shall be independent of each other, and that neither of them shall undertake to exercise the powers of the other. But, Sir, as the thing is now, it seems to me to be liable, also, to this further objection – that it is very little different from permitting the judiciary to control the legislative and executive powers. We have now a law-officer, an attorney-general, and I hope from the experience we have had of the advantage of such an officer, the Commonwealth will sustain the office. That officer is the proper person to whom application should be made in all cases of doubt or uncertainty. The attorney-general . . . is the proper officer to give opinions upon doubtful questions of law. If it is important for the governor in many cases to have the opinion of the supreme court to regulate his action, the same importance equally attaches to many other important offices. Take the office of sheriff, for example. We all know that sheriffs have urgent and difficult duties to perform, involving great liability and responsibility. They must very often act to the peril of themselves and their sureties upon their bonds; and they cannot take the opinion of the supreme court so as to protect themselves. And so I might enumerate other officers to whom it is important that there should be some protection; and if the legislature and the executive may have an *ex parte* hearing before the supreme court, why not administrative officers.

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Mr. GRAY. . . . Such an office [of attorney general] is the proper adviser of the governor and his council, or of the legislature, in all cases of doubt or contest. I know that it has been convenient to have recourse to the supreme court; but that was partly because there was no other source to which to go. . . . I think it is by no means proper to take the opinion of the judges of the supreme court on questions which have not been argued before them. . . . I recollect the first instance in my day – a very important instance too – in which the opinion of the judges of the supreme court was taken. The question and the times were both exciting. It was a question as to granting the militia in compliance with the wish of the general government. It was a question of great difficulty, and the court was requested to answer it, and they put the militia in opposition to the general government. . . . [I]f those judges had heard the question argued by able counsel, they might or might not have come to the same decision. . . . Whether that decision was correct or not, it placed the State and the government in a very delicate position towards each other. This was an actual case.[2]

. . . . I think . . ., and, as a friend to the judiciary, I will say it, that they should not be called upon to decide . . . without argument on important and exciting questions, these being the questions of all others, most likely to be pressed upon them for their opinion.

And, Sir, there is this other objection. No man can tell, when a question is proposed, how far the decision may affect private rights; and nothing is more likely than that the judges should give an opinion when required by either of the other branches of the government, that they may give such an opinion as they may be called upon to revise in their judicial capacity on a question of private rights. . . . With all the question of right on the one hand, there is nothing on the other but that of having a legal functionary to whom the executive and legislative branches of the government may have recourse. I think, when we have our attorney-general, we have such a functionary. . . .

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Mr. BRIGGS. . . . [N]o doubt, cases have occurred where these departments of the government might be influenced by a double motive. One is to simply get a judicial opinion upon an important question, and the other is to throw off the responsibility, which naturally and properly devolves upon them, which should rest upon their own shoulders, upon the shoulders of another department of government.

[2] See Opinion of the Justices, 8 Mass. 548 (1812).

Sir, the judiciary is the weakest branch of the government, and the most defenseless. The judges can have no will, no action, but can merely exercise judgment and pronounce opinions. For this reason, it seems to me, that it places it in the power of one of your departments of government to require another to perform duties and assume responsibilities, which should rest upon their own shoulders. . . . I would say, to each department of the government, as these questions come up, you must take the responsibility upon yourselves. You must judge for yourselves, in all matters which properly come before you, and not throw the responsibility for your action upon the supreme court of Massachusetts.

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I remember, during the last session of the legislature, there was a movement made to submit the question to the supreme court with regard to the constitutionality of what is called the "Maine Law" [a liquor license law]. Now, I ask gentlemen to look at the difficulties which must have arisen, if the legislature had submitted that law for the decision of the court, as to its constitutionality. It could not be argued before them, yet there were, at that time, many cases of indictments against individuals, pending all over the Commonwealth, under that law, which would have to be tried, ultimately, by that court. Well, Sir, suppose the court had given a decision in favor of the constitutionality of the law. The judges go upon their several circuits in the different portion of the Commonwealth, and decide suits brought against individuals, resting upon the constitutionality of the law. What will these courts say? Will they say they have settled this question? . . . They must either say, they have given an opinion to posterity which they cannot change, or else they must say, that, inasmuch as that opinion was given without a hearing, without argument, they do not feel themselves bound by it, but will hear the cases of the people as they are presented. If they took this latter course, it would not be very unlikely . . . that, upon a solemn argument, upon discussion, views might be presented to them which would change their opinions, and they would give their decisions in accordance with that change. . . .

Now, sir, I would not expose this tribunal to any such inconsistency as this. . . .

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Mr. BUTLER. . . . Let me here refer to the court of New Hampshire, by way of an illustration, not by any means wishing to throw any odium upon that learned court . . . who had that question presented to them in a bill of seventeen sections, and was asked, what is there in it contrary to the principles of law and the constitution. Without argument, and without research, any more than they could give in the short time allotted them, they gave an opinion in which they said this, among other things, that the clause of the law which permitted a master to be punished for the criminal acts of his servant, in the course of his business, was unheard of in the laws of any civilized people; whereas, it turns out, that that has been the common law of England and of this State, ever since 1740. . . and yet the learned court of New Hampshire declared that such a provision was unheard of in the laws of any civilized people. I only give this illustration to show how easy it is for men to make mistakes under such circumstances, and that they are not omniscient. . . .

Mr. HOOPER . . . . Some gentlemen say that we should take the opinion of the attorney-general. The attorney-general may be a wise and a learned man; his opinion may be given as a lawyer, but it is not conclusive. Other men may differ from him, and the question may still have to be brought before the supreme court, to be settled at last. . . .

Mr. MORTON. . . . The gentleman . . . speaks of the importance of the decisions of the courts on these questions. They cannot make any decision. . . . They are called upon to give an opinion, when loaded down with labor, and almost always under circumstances when the question requires to be immediately answered. . . . They feel bound to give an opinion, but that is not a decision. One the contrary, it is possible they may often give an opinion which may lead people into errors and involve them in lawsuits, which result in great expense to them. . . .