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**The Constitutional Feedback Loop: Why No State Institution Typically Resolves Whether a Law Is Constitutional and What, If Anything, Should Be Done about It**

# THE CONSTITUTIONAL FEEDBACK LOOP: WHY NO STATE INSTITUTION TYPICALLY RESOLVES WHETHER A LAW IS CONSTITUTIONAL AND WHAT, IF ANYTHING, SHOULD BE DONE ABOUT IT

DANIEL D. DOMENICO<sup>†</sup>

## INTRODUCTION

It is hardly novel to note that the federal and state constitutions are the supreme law of their respective domains.<sup>1</sup> In practice, however, that supremacy may be largely theoretical. The goal of this Article is to explain why that is so and to briefly examine the implications of that conclusion. The questions explored here underlie some of the most controversial issues surrounding the interplay of the three branches of government.<sup>2</sup> While the legal and policy implications of a particular decision often generate much analysis—not to mention vitriol, how the structural and institutional framework that guides the decision-making of each of the various branches affects those outcomes is not often examined in a systematic way. This Article seeks to do so.

Although legislators, judges, and executive branch officials, including governors and attorneys general, take oaths to defend the state and federal constitutions,<sup>3</sup> rarely will any of the institutions of state government prevent a statute whose constitutionality they question—or even doubt—from going into or remaining in effect. Instead, they will defer to the statute over the constitution. This Article seeks to explain why that is so, and what, if anything, should be done about it. While these issues arise in every jurisdiction, both state and federal, because Colorado has had a number of recent experiences that illustrate these issues particularly well, and because of the author's close familiarity with the practice in Colorado, the Article uses Colorado as its example.

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1. See U.S. CONST. art. VI, cl. 2; Colo. State Civil Serv. Emps. Ass'n v. Love, 448 P.2d 624, 628 (Colo. 1968) ("An amendment to the constitution is the solemn final exercise of the sovereignty which belongs to the People of the State of Colorado. Neither executive order, nor legislative enactment, nor judicial decision can be permitted to render futile this expressed will of the People."); *People v. W. Union Tel. Co.*, 198 P. 146, 148 (Colo. 1921).

2. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 765–66 (2008); *Doe v. Bush*, 323 F.3d 133, 142–44 (1st Cir. 2003); Letter from Eric Holder, U.S. Attorney Gen., to Hon. John Boehner, Speaker of the U.S. House of Representatives (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> [hereinafter Holder Letter].

3. See, e.g., COLO. CONST. art. V, § 2(2) (legislators); *id.* art. XII, §§ 8–9 (civil officers and judges).

It is worth emphasizing what this Article is *not* about. It is not about which substantive theory of constitutional interpretation courts or others should use when they go about answering what this Article will refer to as “constitutional questions”—questions about whether a law is contrary to the constitution. That is, the Article does not argue for or against textualism, originalism, original meaning, original intent, living constitutionalism, active liberty, or any other theory of substantive constitutional interpretation.<sup>4</sup> The Article is about what burden of proof or persuasion institutions do and should apply when using whichever method of substantive interpretation they choose to resolve constitutional questions. In other words, the Article explores how much deference state institutions give to sister institutions, and how much doubt institutions can have about a law’s constitutionality before they will use their authority to prevent its going into or remaining in effect.

First, the Article introduces the idea of a continuum of constitutionality—a graphical representation of the various levels of doubt or deference that a reviewing institution (or individual) could apply in drawing the line at which its concerns about a law’s constitutionality will outweigh its reasons for letting the law go into effect. The Article next explains the current practice of the institutions that typically address constitutional questions: the courts, the Attorney General’s Office, the general assembly, and the governor. For a number of reasons, each of these institutions generally takes a deferential view of the constitutional questions they face, applying a high burden of persuasion on anyone posing the question.<sup>5</sup> Each of these institutions thus will typically enact, sign, enforce, defend, and uphold a law about which they may harbor even fairly serious constitutional doubts. Only when those doubts cross a high threshold will one of these institutions seek to impose the stated superiority of the constitution.

Having described the current practice, the last part of the Article turns to the normative question of whether each institution’s practice is appropriate given a goal of minimizing constitutional error. The Article posits that the current situation can, and often does, create something of a feedback loop: the judiciary and attorney general defer to the policy branches’<sup>6</sup> judgments, and the policy branches take that deference into

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4. This is a heavily-tread path of scholarship. *See generally, e.g.*, STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* (Jack Rakove, ed., 1990); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

5. *See discussion infra* Part II. Courts and others use different terms, including “burden of proof” or “standard of review” to describe the concept of how convinced an institutional actor must be about a law’s unconstitutionality before taking action against it, but I believe “burden of persuasion” is the most accurate phrase, and will generally use it in this Article.

6. *See infra* note 12 and accompanying text (discussing the reasons to group the governor and legislature together as the “policy branches”).

account in making their judgments, and thus, in effect, give themselves deference. Rarely does anyone in these institutions ask the fundamental question, “Is this law constitutional?” Instead, in most instances, they give laws the benefit of the doubt over the ostensibly supreme constitution.

The Article concludes, however, that for the most part this is entirely proper. The judiciary and attorney general could, theoretically, be less deferential, but for many reasons the costs would outweigh the benefits. On the other hand, the policy branches should be encouraged to make their decisions truly independent of the deference the rest of the system gives them. In fact, those branches should consider adopting something close to an inverse of the standard the others apply to them: the more deference they get from other institutions, the less they should give themselves. The Article suggests one small but potentially important concrete institutional change that could help them to do so. But for the most part, the Article recognizes that viable, concrete, enforceable measures are few. Perhaps the best that can be hoped for is that members of the policy branches will recognize the problem, resolve to take less deference for themselves, and give more to the constitution, a parchment barrier though it may be.

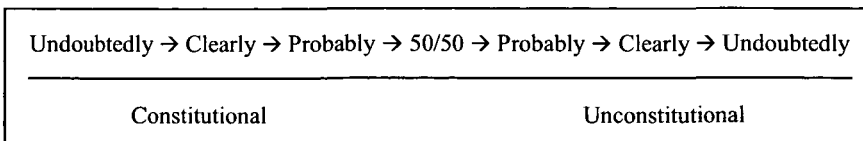
#### I. THE CONTINUUM OF CERTAINTY AND DEFERENCE: WHAT GOVERNMENTAL INSTITUTIONS ACTUALLY ASK WHEN THEY FACE A CONSTITUTIONAL QUESTION

Is a particular law constitutional? While in some theoretical sense every law is either constitutional or unconstitutional, the human beings and human institutions that have to answer this question often have to operate in an area of doubt, as many statutes raise at least some question about their compatibility with various constitutional commands.<sup>7</sup> In all but the simplest of cases, the real world of constitutional analysis does not fit into a simple binary paradigm. It therefore will be useful to posit a “continuum of constitutionality”. This continuum seeks to make graphical some fairly common concepts about how the legal system resolves constitutional questions.

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7. See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473–75 (1987) (describing the general debate about whether law is determinate at all and noting that while there may be some easy questions, the law is often either indeterminate or underdeterminate; that is, that the law leaves room for debate and doubt about how to properly resolve a case). Whether law is determinate at all is a question that need not be resolved here—simply noting that there are at least some hard cases is enough. This is particularly true given the complex and expansive body of federal constitutional case law that has developed over the last century, and the complex and expansive body of codified constitutional law that is the Colorado Constitution.

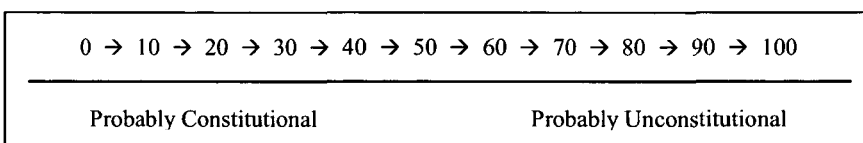
The continuum would look something like this:



At either end of the continuum are the easy cases in which there can be no doubt regarding constitutionality: the law is *undoubtedly* constitutional or *undoubtedly* unconstitutional. At the next step toward the center are laws that may raise a minimal doubt, but one that can be dismissed as *unreasonable* on closer inspection. A step nearer the center are *clearly* constitutional or *clearly* unconstitutional laws. Further toward the middle are laws for which the answer can only be given as a preponderance: the law is *probably* constitutional or *probably* unconstitutional. Dead in the middle would be a true 50-50 question.

As a theoretical matter, an institution or individual could choose to draw the line at which it will deem the law unconstitutional anywhere along this continuum.<sup>8</sup> And in fact, in actual practice, our system applies different standards or burdens in different circumstances. In criminal law, for example, juries may not convict unless the defendant has been proven guilty beyond a reasonable doubt.<sup>9</sup> This high burden would be at the far right on a similar continuum, but with “Innocent” and “Guilty” replacing “Constitutional” and “Unconstitutional.” In other situations, the tipping point is further to the left. Terminating the parent-child legal relationship, for example, requires “clear and convincing” evidence.<sup>10</sup> Even nearer to the middle is the standard used in typical civil suits: preponderance of the evidence, or more probable than not.<sup>11</sup>

The continuum could also be couched in probabilities:



Here, one would understand that the number represents the likelihood that a given law would be found unconstitutional, or perhaps that it represents the percentage of neutral observers who would find the law unconstitutional.

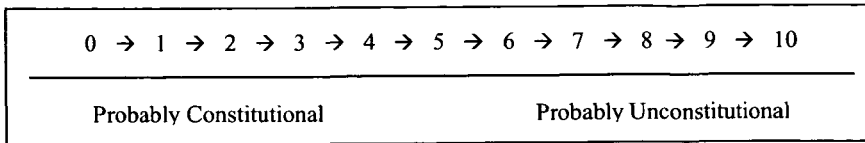
8. Of course, the implications of such a decision will differ based on the institution. If it is one of the policy branches, it would mean not enacting or not signing an unconstitutional law. For the attorney general, it might mean publicly denouncing a law or even challenging one in court. *See, e.g.,* *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1231 (Colo. 2003). For the courts, it would mean issuing a declaratory judgment and perhaps an injunction.

9. *In re Winship*, 397 U.S. 358, 364 (1970).

10. *People ex rel. A.J.L.*, 243 P.3d 244, 251 (Colo. 2010).

11. *See id.* (“The clear and convincing evidence standard requires proof by more than a ‘preponderance of the evidence,’ but it is more easily met than the ‘beyond a reasonable doubt’ standard used in criminal proceedings.” (citing *People v. Taylor*, 618 P.2d 1127, 1136 (Colo. 1980))).

Another way to picture the continuum is purely numerically:



Here, the number could be viewed as representing the likelihood that the law in question is unconstitutional. A “1 case” would be something that nobody could doubt is constitutional. A “2 case” might have some very minimal questions, but nothing remotely serious. For example, a law declaring that slavery is forbidden would be a 1 or 2 at most. A “5 case” would, again, be a toss-up in which the arguments weigh equally in favor and against constitutionality. A “6 case” would be a preponderance of the weight in favor of a finding of unconstitutionality. An “8 case” might correspond to having no reasonable doubt that the law is unconstitutional, and a “10 case” would correspond to having absolutely no doubt at all that it is unconstitutional (for example, a law that declares the voting age to be 30).

Whichever continuum one finds most useful, they all reflect that the higher the standard (the further to the right), the more doubt about a law’s constitutionality one will be accepting. In the familiar language of criminal law, an institution that applies a high burden is electing to let some number of guilty defendants (or, in our case, unconstitutional laws) go free, and the further to the right on the continuum one chooses to draw the line, the more guilty men, or laws, will go free. Any line to the right of a “1” will mean that there is *some* doubt about a law’s compatibility with a constitutional provision. Where our various institutions choose to draw their lines—how they choose to deal with that doubt—and why, is the subject of the next section.

## II. THE STATUS QUO: HOW GOVERNMENT INSTITUTIONS ANSWER CONSTITUTIONAL QUESTIONS

There are four institutions in state government that generally are or can be involved in assessing the constitutionality of a proposed or enacted law: the courts, the Attorney General’s Office, the general assembly, and the governor. This section discusses the way each of these institutions goes about making these assessments. Since the general assembly and the governor generally have similar institutional concerns and constraints, and use the same standards, and since the same arguments discussed below apply equally to them, they will be treated together as the “policy branches.”<sup>12</sup>

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12. The phrase “political branches” is commonly used to describe the legislative and executive branches in the federal system (and often the state system). *See, e.g.,* Stop the Beach Renour-

## A. The Courts

### 1. Post-enactment

The standard that Colorado's judiciary declares that it applies to constitutional challenges to laws that have been enacted by the policy branches is well-established, clearly-stated, and highly deferential: "It is an axiom of our judicial system that legislative enactments are presumed to be constitutional. Parties attacking their validity carry a heavy burden of proof: invalidity must be established clearly and beyond a reasonable doubt."<sup>13</sup> "The beyond-a-reasonable-doubt showing necessary to overcome that presumption 'acknowledges that declaring a statute unconstitutional is one of the gravest duties impressed upon the courts.'<sup>14</sup>

As the continuums above highlight, the implication of this, however, is that our courts *do not* in fact declare that laws *are* constitutional. It is more accurate to view a decision upholding a law as *acquitting* the law of the allegation that it is unconstitutional. And just as a not guilty verdict does not necessarily mean the jury found that the defendant was innocent,<sup>15</sup> an "acquittal" of a statute does not necessarily mean the court believes the law does not violate the constitution; it simply means that

ishment, Inc. v. Fla. Dep't of Env'tl. Prot., 130 S. Ct. 2592, 2614 (2010); *Carlson v. Landon*, 342 U.S. 524, 537 (1952); *Keating v. Johnson*, 918 P.2d 51, 59 (Okla. 1996). I have decided to instead use "policy branches" for two reasons. First, it is important for purposes of this Article to keep in mind that Colorado has a non-unitary executive branch. The attorney general, while part of the executive branch, is independent and has little policy-making role. The general assembly and the governor are the institutions that make policy. And to the extent "political branches" might carry a pejorative connotation that the activities of those branches are motivated by cynical political motives above all else, I hope the new phrase makes clear that no such criticism is intended. (I do not believe there should be such a connotation even with "political" branches; that phrase should be read as a recognition that the executive and legislative branches are politically accountable, not an accusation that they necessarily act out of purely electoral motives.)

Even "policy branches" is an imperfect appellation, of course, since only part of the executive "branch"—the governor (and not the attorney general, secretary of state, or treasurer)—is actually covered by the phrase as used here. I have not been able to develop a better metaphor for a part of the branch, however, ("political twigs" seems inappropriate) so "policy branches" it is herein.

13. *People v. Beaver*, 549 P.2d 1315, 1316 (Colo. 1976) (citing *People v. Summit*, 517 P.2d 850, 852 (Colo. 1974); *People v. Prante*, 493 P.2d 1083, 1085 (Colo. 1972)); see also *Walton v. Walton*, 278 P. 780, 790 (Colo. 1929) (Butler, J., dissenting) ("This court declares that the provision is unconstitutional, which means, of course, that its conflict with the Constitution is so clear as to be beyond any reasonable doubt.").

14. *Mesa Cnty. Bd. of Cnty. Comm'rs v. State*, 203 P.3d 519, 527 (Colo. 2009) (quoting *City of Greenwood Vill. v. Petitioners for the Proposed City of Centennial*, 3 P.3d 427, 440 (Colo. 2000)).

15. See *People v. Allee*, 740 P.2d 1, 6 (Colo. 1987) ("[A]n acquittal establishes a legal status of innocence that conceptually can be distinct from a factual status of innocence. . . . 'A verdict of acquittal does not establish a status of innocence. Innocence, while it entitles one to an acquittal, is not always present where a verdict of not guilty is returned. If the jury has a reasonable doubt of guilt under all the evidence, even if defendant is in fact guilty, it is its duty to acquit. Innocence is a factual status. Nonliability to account resulting from acquittal is a legal status.'" (quoting *Roberts v. People*, 87 P.2d 251, 255 (Colo. 1938))). One could likewise say that constitutionality is a factual status while validity (or non-invalidity) is a legal status. Courts resolve the legal status of validity, but not the factual status of constitutionality. If the defense can create reasonable doubts, a law can violate the constitution without being overturned, just as one can commit a crime without being convicted.



the party challenging the law failed to meet the high burden of showing the law is unconstitutional “beyond a reasonable doubt.”

Precisely what “beyond a reasonable doubt” means can be difficult to define,<sup>16</sup> and to my knowledge, the Colorado Supreme Court has not articulated what it means in the constitutional context. Researchers have in fact attempted to quantify the concept of “reasonable doubt” as used in criminal cases.<sup>17</sup> Other scholars, however, believe the concept cannot be quantified.<sup>18</sup> Courts have generally agreed with the latter view and resisted attempts to quantify the concept.<sup>19</sup> In the criminal context, it has been defined as “such a doubt as would cause reasonable people to hesitate to act in matters of importance to themselves.”<sup>20</sup> The U.S. Supreme Court has “repeatedly approved” this formulation.<sup>21</sup> One could, perhaps, imagine a higher standard in theory. If the continuum were converted to a numerical one, for example, “beyond a reasonable doubt” would rate perhaps an 8, with 9 being “moral certainty” and 10 being absolute scientific or mathematical certainty.<sup>22</sup> But it is not necessary for purposes of this Article to settle upon a definition of reasonable doubt. Suffice to say that “beyond a reasonable doubt” is, as the continuum above shows, “the highest standard of proof” in the law.<sup>23</sup> In other words, it is the most deferential standard a court could realistically apply to constitutional questions.

The courts’ stated standard is therefore as near to the right of the continuum of constitutionality as any standard used in the law. There is some dispute, even within the supreme court itself, about how high the “reasonable doubt” standard is in state constitutional challenges, and whether the court actually applies the standard consistently in practice.<sup>24</sup> There is also some dispute about whether reasonable doubt is the proper

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16. See *supra* note 5 and accompanying text.

17. See, e.g., Rita James Simon & Linda Mahan, *Quantifying Burdens of Proof: A View from the Bench, the Jury, and the Classroom*, 5 LAW & SOC’Y REV. 319, 319 (1971); Katie Evans, David Osthus & Ryan G. Spurrier, *Distributions of Interest for Quantifying Reasonable Doubt and Their Applications*, <http://www.valpo.edu/mcs/pdf/ReasonableDoubtFinal.pdf> 3–4 (last visited Sept. 22, 2011) (advocating for a new method to quantify reasonable doubt because of deficiencies in previous studies that have concluded that juries typically will convict if the probability of guilt is above .70–.74).

18. See CHARLES REMBAR, *THE LAW OF THE LAND: THE EVOLUTION OF OUR LEGAL SYSTEM* 412 (1980) (“Proof beyond a reasonable doubt is a quantum without a number.”).

19. See, e.g., *United States v. Hall*, 854 F.2d 1036, 1039 (7th Cir. 1988). Courts likewise have been reluctant to quantify the important concepts of “reasonable suspicion” and “probable cause.” See, e.g., *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). It seems safe to say that the two are fairly near the center of this continuum and may straddle it.

20. COLO. JURY INSTRUCTIONS, CRIMINAL § 3:04 (1993).

21. *Victor v. Nebraska*, 511 U.S. 1, 20 (1994).

22. *Cf. id.* (appearing to hold that a doubt need not be “substantial” or “grave” to be reasonable).

23. *Colorado v. Connelly*, 479 U.S. 157, 186 (1986) (Brennan, J., dissenting).

24. See *Mesa Cnty. Bd. of Cnty. Comm’rs v. State*, 203 P.3d 519, 539 (Colo. 2009) (Eid, J., dissenting) (discussing “major concerns . . . about the majority’s application of the presumption of constitutionality” because the highly deferential approach may not always apply in practice).

standard at all.<sup>25</sup> But if we take the court at its word, then it is applying a very high standard, as high as any used anywhere in the law. As it has been imported from the criminal law, it is a standard in fact designed so that some guilty men (or laws, in this case) will go free.<sup>26</sup>

This presumption of constitutionality flows from the deference the court affords the legislature in its law making functions. While the extent of that deference is perennially debated,<sup>27</sup> there is little dispute that some judicial deference is necessary in a democratic society.<sup>28</sup> A reviewing court must assume that the “legislative body intends the statutes it adopts to be compatible with constitutional standards.”<sup>29</sup>

Alexander Bickel’s book, *The Least Dangerous Branch*, provides the classic explanation of the problems that a less deferential standard can create. Judicial review, he states, has a “tendency over time seriously to weaken the democratic process.”<sup>30</sup> Bickel quotes James Bradley Thayer’s statement:

[T]he exercise of it [the power of judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors. The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf

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25. See, e.g., *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 636 n.15 (10th Cir. 1998) (“The court below, and the plaintiffs themselves, assumed . . . that the plaintiffs must prove the unconstitutionality of [the law in question] ‘beyond a reasonable doubt.’ This circuit has never applied such a standard of proof to a purely legal question of whether a statute is facially unconstitutional.” (citations omitted)). *But see United States v. LaHue*, 261 F.3d 993, 1004 (10th Cir. 2001) (“When reviewing a statute alleged to be vague, courts must indulge a presumption that it is constitutional, and the statute must be upheld unless the court is satisfied beyond all reasonable doubt that the legislature went beyond the confines of the Constitution.” (quoting *United States v. Day*, 223 F.3d 1225, 1228 (10th Cir. 2000)) (internal quotation marks omitted)).

26. See Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173, 174–78 (1997) (containing an amusing but fascinating attempt to catalogue and put in historical context the various numbers that have been chosen to fill in the blank in the hoary statement: It is better that \_\_\_ guilty men go free than one innocent man be convicted).

27. See David M. Burke, *The “Presumption of Constitutionality” Doctrine and the Rehnquist Court: A Lethal Combination for Individual Liberty*, 18 HARV. J.L. & PUB. POL’Y 73, 75–77 (1994) (arguing against judicial deference); Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1090 (2005) (arguing against Professor Randy Barnett’s argument that “a law should only be invalidated by courts as unconstitutional if it represented a clear mistake”).

28. See ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* 22–26 (1989); ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 230–31 (2006).

29. *Mesa Cnty.*, 203 P.3d at 527 (quoting *Meyer v. Lamm*, 846 P.2d 862, 876 (Colo. 1993)).

30. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 21 (1962).

the political capacity of the people, and to deaden its sense of moral responsibility.<sup>31</sup>

That is to say, every judicial invalidation of a democratically-approved law has two related problems. First, it is in tension with the fundamental concept that the three branches of government are co-equal. As Chief Justice Marshall recognized in *Marbury v. Madison*,<sup>32</sup> of course, the point of a binding, written constitution is precisely to limit the impulses of pure democracy.<sup>33</sup> Thus, it is nearly universally accepted that judicial review is legitimate despite the problems discussed above. But it is almost as nearly universally accepted that those problems do impose on courts a requirement that they give deference to the democratic branches and presume that the laws they pass are constitutional unless it is not possible to conclude otherwise. No matter how much the other branches may believe a law they have passed to be constitutional, the courts' decisions on such questions are, of course, final.<sup>34</sup>

Second, courts are not democratically selected, though in Colorado there are some democratic means of controlling egregious judicial excess (however rarely that power may be invoked).<sup>35</sup> If democratic laws can be stricken by undemocratic courts, this is fundamentally at odds with the idea that we are a democratic republic. Many have recognized that democratic laws being stricken by undemocratic courts is fundamentally at odds with the idea of a democratic republic. In President Lincoln's words, "[I]f the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."<sup>36</sup> Or as Justice Frankfurter put it, "Because the powers exercised by [the courts] are inherently oligarchic, . . . the implications of that right [of judicial review] and the conditions for its exercise must constantly be kept in mind and vigorously observed."<sup>37</sup>

Finally, Professor Nagel has powerfully argued that a lack of judicial deference to other political institutions "weaken[s] the capacity of the political culture to develop moral understandings and to initiate wise

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31. *Id.* at 22 (second alteration in original) (quoting J. B. THAYER, JOHN MARSHALL 106–07 (1901)).

32. 5 U.S. (1 Cranch) 137 (1803).

33. *Id.* at 176–77.

34. *Id.* at 177–78. *But see* Pequignot v. Solo Cup Co., 640 F. Supp. 2d 714, 724 (E.D. Va. 2009) (describing "the scheme of separation of powers" as that "in which Congress passes laws, the President enforces them, and the judiciary interprets them").

35. COLO. CONST. art. VI, § 25.

36. President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861).

37. *Am. Fed'n of Labor v. Am. Sash & Door Co.* 335 U.S. 538, 555, 557 (1949) (Frankfurter, J., concurring). Frankfurter's opinion also quotes Thomas Jefferson's statements that "the Court [is] 'an irresponsible body' and 'independent of the nation itself'", and provides citations to a number of "similar expressions of Jefferson's alarm at what he felt to be the dangerous encroachment of the judiciary upon the other functions of government." *Id.* at 555 & n.16.

change.”<sup>38</sup> Thus, “to an unexpected extent judicial restraint may be necessary to a stable constitutional order.”<sup>39</sup>

## 2. Pre-enactment: Interrogatories

Another quirk of Colorado’s constitutional structure that distinguishes it from the federal system and highlights the rationale for deferential standards in the typical case is the Colorado Constitution’s approval of advisory opinions. Article VI, § 3 of the state constitution in fact mandates that, “The supreme court shall give its opinion upon important questions upon solemn occasions when required by the governor, the senate, or the house of representatives.”<sup>40</sup>

Given the reasons for deference listed above, it should not be surprising that the supreme court will *not* apply the presumption of constitutionality when its view on proposed legislation is sought via this interrogatory or advisory opinion.<sup>41</sup> Thus, the court in these cases actually engages in a *de novo* review of the constitutional question.

This makes perfect sense: if the political branches have not yet enacted a law—and indeed are themselves so unsure of the law’s constitutionality that they seek the supreme court’s input—most, if not all, of the reasons for the presumption and deference discussed above do not obtain. Because the policy branches themselves have voluntarily sought out the court’s opinion, there is no violation of the concept of three co-equal branches. A judicial ruling on an interrogatory does nothing to diminish the dignity of the other branches.<sup>42</sup> Similarly, because by definition when the courts are asked to answer a constitutional question about a proposed law through the interrogatory process, they will not be overruling a democratically-approved law, and the countermajoritarian concern fades away.

In sum, courts are generally deferential to laws enacted by the political branches. Their position is that they will not strike down a law if its constitutionality is questionable, or even if the judges believe it is proba-

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38. NAGEL, *supra* note 28, at 7.

39. *Id.* at 26.

40. *Id.* art. VI, § 3. Colorado is apparently one of only eight states with such a provision. Mel A. Topf, *State Supreme Court Advisory Opinions as Illegitimate Judicial Review*, 2001 L. REV. MICH. ST. U. DETROIT C.L. 101 n.1 (2001).

41. See *In re Interrogatories on House Bill 99-1325*, 979 P.2d 549, 554 (Colo. 1999) (refusing to give presumption “because the bill in question has not been passed and the legislature has certified to us that they are not certain of its constitutionality”).

42. If the advisory opinion process does not present the same “counter-majoritarian” or “anti-democratic” problems that judicial review of enacted legislation does, it could nevertheless be argued that the process undermines the separation of powers that marks our form of constitutional republicanism. *Vieth v. Jubelirer*, 541 U.S. 267, 302 (2004). But, like the splintered executive, this is another area in which our state constitution strikes a different balance than that of the national constitution. It can also be argued that deference is not proper where the political branches themselves are in dispute about the constitutionality of a law. See *Morrison v. Olson*, 487 U.S. 654, 704–05 (1988) (Scalia, J., dissenting).

bly *unconstitutional*. Only if the law is clearly unconstitutional will courts stand in its way. In other words, the courts have decided that it is better that some number of unconstitutional laws go into effect—go free—than that one constitutional law be invalidated.<sup>43</sup>

This means that, in typical litigation, courts do not declare that laws are constitutional. When a law is upheld, the court is declaring only that it is not undoubtedly unconstitutional. (The triple, perhaps quadruple, negative is, unfortunately, necessary—and, I believe, accurate—here.) If the court is in doubt about a law’s constitutionality, the law generally is to be upheld in court.

### *B. The Attorney General’s Office*

Like the judiciary, the Office of the Attorney General is faced with many difficult constitutional questions.<sup>44</sup> Just in the past few years, for example, our office has had to consider whether a ban on indoor smoking violated the First or Fourteenth Amendments, whether a state residency requirement for concealed weapons permits violates the Second Amendment, whether an effort to ban political contributions from holders of certain government contracts violated the First Amendment, whether efforts to collect taxes on products purchased over the internet violated the so-called Dormant Commerce Clause, whether various new and increased “fees” violated the state Taxpayer’s Bill of Rights, and whether a proposal to appropriate \$500 million from a state-chartered insurance company’s reserves violated the state’s ban on retrospective legislation. In fact, given that not all questionable proposals become law, the Office of the Attorney General confronts constitutional questions *more* often than the courts. It turns out that in the end, however, the office’s approach is similarly deferential in most situations: we defend many laws that, if we were providing an academic analysis of them rather than acting as a constitutional and statutory arm of the government, we would conclude are likely unconstitutional. While, for the reasons explained below, this is inevitable and preferable to any other possible system, it is important for others in the system and for the people of Colorado to understand that it is the case, and why.

Unlike those of the judiciary, the standards applied by the Attorney General’s Office in answering constitutional questions generally have not been clearly spelled out in public documents. But otherwise the two are similar in many ways. The standard the office applies in most cases is highly deferential—indeed, it is usually at least as deferential to the policy branches as the courts’ standard. And also like the courts, the office

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43. Cf. Volokh, *supra* note 26, at 174–78.

44. As Solicitor General, my overarching role is to supervise how the office addresses constitutional and legal questions. This requires extensive oversight of the state’s appellate litigation and, as the following examples show, it occasionally also requires me to get involved in responding to difficult constitutional questions posed during the legislative process.

also generally treats questions about proposed laws differently than those already in effect. It will answer constitutional questions more deferentially (to the right on the continuum above) when the law in question has already been enacted and signed than when it is simply a proposal. As with the courts, all of this turns on the institutional role of the Office of the Attorney General within the overall structure of state government.

Colorado, like many other states but unlike the federal government, separately elects the attorney general rather than allowing him or her to be appointed by the governor.<sup>45</sup> This important fact gives the attorney general some independence which can, in some circumstances, be used to block unconstitutional legislation, or at least make it more difficult for the political branches to enact and enforce legislation. But while this independence is important, the attorney general, like the courts, is constrained by other institutional aspects of the office. And again as with the courts, this means that, in practice, the attorney general is typically not in a position to impede the adoption or execution of legislation he believes may be, or even probably is, unconstitutional.

Under the state constitution, the governor is vested with the “supreme executive power of the state,”<sup>46</sup> but the attorney general is independently elected.<sup>47</sup> The constitution, however, is generally silent about the role of the attorney general within the executive branch; instead, the attorney general’s basic duties are spelled out in statute. Among the most relevant for purposes of this Article, the attorney general and his subordinates<sup>48</sup> are required to “be the legal counsel and advisor of each department [and other agency] of the state government other than the legislative branch.”<sup>49</sup> The office “shall prosecute and defend for the state all causes in the appellate courts in which the state is a party or interested,”<sup>50</sup> and “to prosecute and defend all suits relating to matters connected with” the office of the governor and other major state departments.<sup>51</sup> State agencies are forbidden from hiring “any person to perform legal services” without the involvement of the office.<sup>52</sup> “When requested,” the attorney general is required to give a formal opinion “in writing upon all

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45. See generally NAT’L ASS’N OF ATTORNEYS GEN., STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES, at ix–x (Lynne M. Ross ed., 1990) (containing a useful background on the role of state attorneys general); William P. Marshall (later the solicitor general of Ohio), *Break up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2446 (2006) (containing an interesting comparison of the state and federal executive structures that argues in favor of the independent state attorney general model); Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL’Y 1, 1 (1993) (containing a useful background on the role of state attorneys general).

46. COLO. CONST. art. IV, § 2.

47. *Id.* art. IV, §§ 1, 4.

48. Which number includes the author. See COLO. REV. STAT. §§ 24-31-201(4), -203(1) (2011).

49. *Id.* § 24-31-101(1)(a).

50. *Id.*

51. *Id.* § 24-31-101(1)(b).

52. *Id.* § 24-31-203(2).

questions of law submitted to him by the general assembly or either house thereof or by the governor, lieutenant governor, secretary of state, executive director of the department of revenue, state treasurer, state auditor, or commissioner of education.”<sup>53</sup>

The attorney general also has independent common-law duties “to protect the rights of the public”<sup>54</sup> and to appear in court “as the chief legal officer of the state . . . in the interests of the people to promote the public welfare.”<sup>55</sup> The contours of these duties are not well-defined, but they include things ranging from authoring or joining amicus briefs on behalf of the State of Colorado to oversight of the sale or transfer of ownership of nonprofit entities<sup>56</sup> to, when necessary, suing to block a law passed by the legislative and executive branches.<sup>57</sup>

While this complex regime is fairly well-established and explains *when* the Office of the Attorney General may face a constitutional question, it does not give much guidance about *how* the attorney general is to go about answering it. The many roles the office plays within the governmental structure means that the answer to that question often changes depending on the circumstances. The most important dividing line, as it is as with the judiciary, is between enacted and proposed legislation.

### 1. Enacted Legislation.

After legislation has passed, the attorney general’s obligation to defend the state’s law is the office’s overriding obligation and priority. Thus, we apply a standard similar to the courts’ “beyond a reasonable doubt.” Given the office’s role as part of the executive branch, however, our position is if anything slightly more deferential. If, as suggested above, the courts’ standard is an 8 on the continuum of deference,<sup>58</sup> ours might approach a 9.

We of course will not defend a law that is so clearly unconstitutional that we cannot present ethical arguments on its behalf.<sup>59</sup> From time to time we are put in this position. For example, in a recent challenge to many new aspects of the state’s petition and initiative process, while we continue to defend much of the law, we were forced to confess judgment

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53. *Id.* § 24-31-101(1)(b). In practice, Attorneys General have provided formal opinions to the heads of other state departments besides those listed in statute.

54. *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1229 (Colo. 2003) (quoting *People v. Tool*, 86 P. 224, 227 (1905)).

55. *Id.* at 1230 (quoting *State R.R. Comm’n v. People ex rel. Denver & R.G.R. Co.*, 98 P. 7, 11 (1908)).

56. *See Evans v. Romer*, 854 P.2d 1270, 1271 (Colo. 1993).

57. *See Salazar*, 79 P.3d at 1225.

58. A questionable proposition. *See supra* notes 22–23 and accompanying text. In practice, the courts’ standard seems closer to a 6 or 7.

59. *See COLO. RULES OF PROF’L CONDUCT*, R. 1.16 (stating that “a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of . . . law”).

on one claim was not defensible under existing precedent.<sup>60</sup> We may also refuse to defend, or the governor or other relevant agency may ask us not to defend, a law if we have taken a position privately, or certainly publicly,<sup>61</sup> that would significantly undermine our ability to provide a vigorous defense.<sup>62</sup> In some instances, an ethical, professionally responsible argument might be available, but we would nevertheless consider that argument so unreasonable that we would refuse to advance it. As the U.S. Attorney General recently declared:

[T]he [United States] Department [of Justice] has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense, a practice that accords the respect appropriately due to a coequal branch of government. However, the Department in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because the Department does not consider every plausible argument to be a 'reasonable' one.<sup>63</sup>

But these instances are relatively rare. Few laws are so clearly unconstitutional that an ethical or reasonable argument cannot be put forward in their defense. Thus, we often defend laws about which we have serious constitutional questions. Likewise, even if we have highlighted possible constitutional issues with a proposed law for the policy branches to consider, that will not always require our removal from the defense of the law if it is enacted.

The reasons for this approach—which is generally consistent with that of past Colorado attorneys general as well as with attorneys general

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60. See Order on Preliminary Injunction, *Independence Institute v. Buescher*, No. 10-cv-00609-PAB-MEH (D. Colo. Aug. 13, 2010).

61. See *infra* Part II.D.2 (containing an example of when an attorney general takes the position that a law is unconstitutional).

62. See, e.g., *Mesa Cnty. Bd. of Cnty. Comm'rs v. State*, 203 P.3d 519, 531 (Colo. 2009) (containing an example of when an attorney general takes the position that a law is unconstitutional).

63. Holder Letter, *supra* note 2. This letter, along with the decision of Attorney General Salazar that is at issue in *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003), discussed further below, highlights an important point touched on above, see *supra* note 5 and accompanying text, but that bears further emphasis. Settling on a "tipping point" on a continuum of constitutionality (or declaring a standard to apply) to resolve a constitutional question does not actually resolve the question. The individual or institution answering the question still must apply some substantive inquiry into the meaning of the relevant legal and constitutional provisions and other considerations, such as the weight to give various types of precedents. See *supra* note 5 and accompanying text. Then the level of doubt or confidence with which that substantive inquiry leaves the institution can be measured against the standard to see which side of the selected tipping point the law falls on. This means that even if everyone agreed on the proper standard to apply (or proper level of deference), different individuals will reach different conclusions about where a particular law falls on the continuum. In this instance, for example, given that at the time the attorney general announced the U.S.'s refusal to defend some lawsuits (but not others) challenging a particular federal law no federal court of appeals that had considered the question had used the heightened standard the attorney general felt was required, it seems unlikely that our office would have reached the same conclusion that the law was beyond the appropriate standard. Nevertheless, his efforts to grapple with the proper standard for the government's lawyers to apply is precisely what this Article attempts to do, and his stated standard is similar if not identical to that applied by the Colorado Attorney General's Office.



of other states and of the United States—are essentially the same as the reasons for courts' deference.

Like courts, an attorney general faces institutional constraints on his ability to stand in the way of laws proposed and adopted by the political branches that are of questionable constitutionality. Though the Colorado attorney general is independently elected, the office's role is generally not a policy-making one. That is left to the policy branches. The system can only function if this office applies a strong presumption that the policy branches have carried out their duty to uphold the constitutions. If the attorney general were to block or even simply refuse to defend any laws she believed might be unconstitutional, the office would no longer be able to function as it is required by the constitution and state statute. The office would instead turn into something of preemptive court, arbitrating constitutional questions rather than defending the state's laws. This would be a marked agglomeration of power that traditionally has been understood to rest in the policy branches (particularly the legislative branch).<sup>64</sup> Tempting as this may be for those in the office, it is not a proper use of the office except in the rarest of circumstances.<sup>65</sup> Policy-making must be left to the policy branches, and as long as those branches have carried out their duty to study the constitutionality of a proposed law, the attorney general should defer to that judgment in all but the most extreme cases.

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64. See Holder Letter, *supra* note 2 (stating that the practice of the Attorney General's Office is to defend the "constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense, a practice that accords the respect appropriately due to a coequal branch of government").

65. *Salazar* is the most controversial recent example. Others in Colorado include the claim mentioned in note 60, *supra*, and accompanying text and the position taken in *In re Interrogatories on House Bill 99-1325*, 979 P.2d 549 (Colo. 1999), in which the attorney general, on behalf of the governor, argued that the Supreme Court's decision in *Citizen United* could only be read as invalidating certain portions of Colorado's campaign finance laws. The office, in consultation with the governor and other state agencies, will also often abandon defenses of laws or regulations if they have been invalidated in court. See, e.g., *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1253 (10th Cir. 2008) (holding several Colorado statutes unconstitutional because they violate the First Amendment); see also H.B. 1267, 67th Gen. Assemb., 1st Reg. Sess. (Colo. 2009) (changing the Colorado statutes found unconstitutional in *Colorado Christian University*, 534 F.3d 1245). As noted above, the U.S. attorney general has recently declined to defend a federal law, despite a fairly successful record on the matter previously. See Holder Letter, *supra* note 2. That this move appears to be out of the ordinary, and certainly appears to be based on a different standard than traditionally applied by Colorado attorneys general, may explain at least some of the criticism of the decision. See, e.g., Orin Kerr, *The Executive Power Grab in the Decision Not to Defend DOMA*, THE VOLOKH CONSPIRACY (Feb. 23, 2011, 3:49 PM), <http://volokh.com/2011/02/23/the-executive-power-grab-in-the-decision-not-to-defend-doma/>. Others, however, have pointed out that while rare it is hardly unprecedented for the U.S. Department of Justice to refuse to defend a federal law. Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1074–75 (2001). In any case, these instances highlight the delicate balance that an institution charged with both defending laws and the constitution must strike, and how a slight move in one direction on the continuum can be the catalyst for widespread controversy.

## 2. Proposed Legislation

The attorney general's position when it comes to answering constitutional questions about proposed or pending legislation is even more complicated because of the myriad ways in which the office can be confronted with questions during the pre-enactment period. In analyzing pending legislation, the Office of the Attorney General is obligated to conduct an independent inquiry into a proposed law's constitutionality.<sup>66</sup> In these circumstances, we are not acting as advocates defending existing state law, in which case like courts we give deference to the judgment of the legislators and governor. The office is acting first as an advisor to the policy branches, bringing constitutional questions to their attention. In doing so,<sup>67</sup> we do not apply a presumption of constitutionality to proposed legislation or demand that it be shown to be unconstitutional beyond a reasonable doubt.

Indeed, were the office to analyze pending bills with a presumption in favor of the bill rather than the constitution, we would undermine the very basis for the presumption of constitutionality given by courts; the presumption is rooted in the "foundational premise" that the legislative and executive branches "observe and effectuate constitutional provisions in exercising their power."<sup>68</sup> Therefore, the attorney general's analysis, while guided by court precedents and other input, is not an attempt to predict what a court would do if faced with a challenge to the law or an effort to put forth a defense or attack of the legislation.<sup>69</sup> This is a de novo inquiry into a proposal's constitutionality, and the office's conclusion is my independent understanding of how the constitution applies to the proposed legislation.<sup>70</sup>

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66. See *Salazar*, 79 P.3d at 1229 ("[I]t is the function of the Attorney General . . . to protect the rights of the public . . ." (second and third alteration in original) (quoting *People v. Tool*, 86 P. 224, 227 (Colo. 1905)) (internal quotation marks omitted)).

67. See *infra* Part II.C.

68. *City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 440 (Colo. 2000).

69. See Dawn E. Johnsen, Symposium, *Constitutional "Niches": The Role of Institutional Context in Constitutional Law: Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1604 (2007). Johnsen argues that in providing opinions, lawyers representing the executive branch

should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action.

*Id.*

70. In some instances, people within or without the government suggest that whatever the substantive answer to a constitutional question, the state may be able to effectively avoid liability by asserting various technical arguments based on the rules of standing. Such arguments are of course quite proper when defending the state in litigation, but consideration of ways to evade review are inappropriate at the stage of trying to determine, and assist the other representatives of the people determine, whether a proposal would violate the constitution. To the contrary, when there is a chance that legislative action could evade the check of judicial review, it is incumbent on those involved in

With no presumption, we are essentially putting the standard in the middle of the continuums shown in Part I above. (We often will also note other constitutional questions that a proposal may present, even if we think they fall further to the left of the continuum.)

Even if our best judgment is that the law may violate a constitutional provision, in the ordinary case we will nevertheless advise the executive branch officials or legislators involved that it is their decision to make, and that we will defend the law if they do enact it. At first glance this may be surprising, but in our view there is no better alternative. The alternative—refusing to defend any law about which we have strong doubts—would, as discussed above, put the Attorney General's Office in an institutional position that conflicts with the role as envisioned by the constitution and state statutes. Our role is generally to provide candid advice and then to defend the judgment of the policy branches.

There are, however, exceptions to this usual course. One is if we conclude that the law is so clearly unconstitutional that it is simply indefensible as written. If we would refuse to defend the law if it were to be passed (under the highly-deferential standards discussed in II.B.1 above), then we believe we have an obligation to notify the policy branches of that fact before they pass the law. We generally provide this information behind the scenes; our hope is that this would cause those branches to reconsider their efforts to pass a law of such dubious constitutionality. And indeed more often than not the constitutional difficulties are removed from bills before they go forward.

The second exception occurs in more difficult, closer cases when we believe the proposed law is more likely than not unconstitutional, but not so defective as to be completely indefensible. In terms of the continuums above, these might fall somewhere between 6 and 8. These are proposals that we likely would defend if they were already law, but that we feel are likely to transgress some constitutional provision. Normally, we will not make this position public, for the reasons discussed above: our job is normally to advise the policy branches, and then to defend the choices they make.

Sometimes, however, we feel it is necessary to make our position public. Given that the attorney general also owes a duty to the public—indeed a duty that the supreme court has noted can supersede its duty to

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the legislative process to be *more* careful that their action complies with constitutional requirements, not less. See *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 618 (2007) (Kennedy, J., concurring) (“It must be remembered that, even where parties have no standing to sue, members of the Legislative and Executive Branches are not excused from making constitutional determinations in the regular course of their duties. Government officials must make a conscious decision to obey the Constitution whether or not their acts can be challenged in a court of law and then must conform their actions to these principled determinations.”).

the policy branches and the government<sup>71</sup>—the office sometimes decides that its conclusion that a proposed law is flawed must be exposed to the public.

This could happen if we receive a request for a formal opinion on the constitutional question from one of the institutional “clients”—other state agencies—the office serves.<sup>72</sup> It also may happen if, in effect, the people of Colorado—which the *Salazar* Court recognized are the attorney general’s other clients<sup>73</sup>—are entitled to our opinion. Where the office determines that its role as counsel to the government so conflicts with its *Salazar* duty to protect the rights of the public, then it must give no deference or apply no presumptions in favor of the policy branches. Rather, it will carry out its duty to its ultimate client—the People—by announcing its determination that a proposed law is unconstitutional.

This has come to pass only a handful of times in recent years. One involved the bill seeking to lift a cap on property taxes that became law and ultimately the subject of *Mesa County Board of County Commissioners v. State*,<sup>74</sup> the case studied in more depth in subsection D below. Another example was a proposal to take \$500 million from the reserves of a state-chartered insurance company and use it to balance the state budget.<sup>75</sup> That bill ultimately did not become law, at least in part because the attorney general had declared that it was beyond what the office could defend.<sup>76</sup>

Probably the most famous example of a Colorado attorney general stepping in this manner is the subject of *People ex rel. Salazar v. Davidson*.<sup>77</sup> There, Attorney General Salazar not only opposed a bill passed by the general assembly and signed by the governor, he took the extraordinary step of suing the institutions that normally were his office’s clients to block the law. The current office may not have agreed with his analysis of the legal issue, or with his decision to take that extraordinary step of suing to overturn a state law—the office has never done so since, even when we have disagreed with a law—but we do believe Attorney

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71. See *Salazar*, 79 P.3d at 1229 (“[I]t is the function of the Attorney General . . . to protect the rights of the public . . . .” (second and third alteration in original) (quoting Tool, 86 P. at 227 (Colo. 1905))) (internal quotation marks omitted).

72. See *supra* note 53 and accompanying text. This can also occur if we are asked to testify before the legislature on a constitutional question. This has happened on numerous occasions, involving issues such as voting for paroled felons. See *Danielson v. Dennis*, 139 P.3d 688, 689 (Colo. 2006).

73. See *Salazar*, 79 P.3d at 1229.

74. 203 P.3d 519 (Colo. 2009).

75. See Tim Hoover, *Pinnacol Blasted for Pay, Offices, Legislators Press to Seize \$500 Million, Challenging Spending by the Workers’ Comp Fund in a Fight Growing Uglier*, DENVER POST, Apr. 15, 2009, at A1.

76. See Tim Hoover, *AG Says Pinnacol Assets Off-Limits a Lawsuit over Efforts to Balance the Budget May Be Inevitable*, DENVER POST, Apr. 11, 2009, at A1.

77. 79 P.3d 1221 (Colo. 2003).

General Salazar had the authority to make that decision, as the supreme court held.<sup>78</sup>

In practice, there is probably something of a sliding scale involving both these factors at work: the more debatable the constitutional question (the closer to the center or left side of the continuums above), the more powerful the public's claim to our counsel must be before we make public our position. On the other end of the scale, the more indefensible a law (the further right it falls on the continuums), the more likely we are to make our position public. However the calculation is made, it is only in rare circumstances that this office has or will take steps to block proposed legislation unless it is well to the extreme right of the constitutionality continuums.

In sum, both courts and the Attorney General's Office generally apply two standards to constitutional questions that are very much alike, if not identical. When the political branches have passed a law, both the attorney general and the judiciary presume that those branches have made a serious constitutional inquiry and found no deficiencies. The attorney general and the judiciary therefore will only disagree and refuse to defend or refuse to uphold an existing law if in their judgment the law falls so far to the unconstitutional end of the continuum discussed above that there can be no doubt about its violation. On the other hand, before a proposal or bill has become law, both courts and the attorney general have no reason to apply a presumption of constitutionality, and should therefore answer constitutional questions with no deference to the beliefs of the political branches.

This makes sense. There would be little benefit to the attorney general publicly declaring that an existing law is likely unconstitutional. The law is already in place and is unlikely to be repealed. The courts are well-positioned—much better positioned than the Attorney General's Office—to review such laws and make the ultimate decision about their constitutionality. But when the law is still being debated, it can be amended to fix any flaws the Attorney General's Office finds, or dropped entirely, or passed, but at least with the understanding that it may cause costly litigation.

While ethical rules and case law make clear that the attorney general has a bit more freedom to take positions contrary to his institutional "clients" wishes,<sup>79</sup> the system would cease to function if the attorney general could block or refuse to defend any law he questions. The countermajoritarian problem is not present—or at least lessened<sup>80</sup>—since

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78. See *id.* at 1229–30; see also *supra* notes 54–57 and accompanying text.

79. See *Salazar*, 79 P.3d at 1231; COLO. RULES OF PROF'L CONDUCT, R. 1.13 cmt. 9 (2011).

80. Of course, if the attorney general is ever in disagreement with a majority of the legislature and the governor, it could be said there is a countermajoritarian aspect to his behavior. But the more serious countermajoritarian problem is not where government institutions may act contrary to the

the attorney general is elected. But there are other problems that prevent us from vigorously standing against those branches, even if we think their laws may be, or even likely should be, considered to transgress the constitution.

First, unlike courts, whose nature essentially requires them to “say what the law is” and thus declare statutes unconstitutional,<sup>81</sup> the nature of the attorney general does not require it to play such a role. Instead, the office’s main roles are to be the chief law enforcement officer of the state, to assist the rest of the executive branch to understand and execute the laws, and to defend those laws when challenged. While one could devise a system in which the attorney general was something of an advisory court, empowered to issue public opinions on the constitutionality of every proposed or existing law, and to apply a non-deferential standard in arriving at those opinions, it is not the system we have here. Such a system would be hard to square with the attorney general’s obligation to defend the laws of the state and serve as the legal advisor to most state agencies.<sup>82</sup> To carry further the analogy to criminal trials discussed above in Part I, like individuals accused of violating the law, laws accused of violating the constitution deserve a vigorous defense. The institution on

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wishes of an elected branch of government in a given instance, which would describe this situation. The more serious problem decried by Bickel and Nagel arises where a majority of the people has little or no recourse to check the government actors or institutions in question, who therefore may continually flout majority will. See BICKEL, *supra* note 30, at 31; NAGEL, *supra* note 28, at 22–26. That problem exists for courts much more so than for an elected attorney general, although there is at least some theoretical democratic check in Colorado even on our state courts, which have to stand for retention elections. See Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1339–40 (2001) (“The countermajoritarian difficulty surfaces in Court decisions because the Justices have little competence at discerning popular views and no accountability for the judgments they render.”).

81. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

82. One irony, or at least one surprising result of this conclusion is that in many ways a separate elected attorney general such as that in Colorado may have *less* ability to exert control over potentially unconstitutional (or otherwise unwise) actions of the policy branches (in particular the executive) than would an appointed attorney general in the federal system. Where the attorney general is appointed by the chief executive, the attorney general is typically empowered with the final say on legal matters, including whether and how to interpret and implement statutes, rules, and regulations, and whether to proceed with litigation. See, e.g., 28 U.S.C. § 519 (2006) (“[T]he Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party . . .”). In the divided executive system, however, while the attorney general may offer advice and occasionally refuse to defend a law or regulation, for the reasons explained here, that is unlikely to happen except in very rare circumstances. And even when the attorney general does so, the governor may hire her own counsel to carry on without the attorney general. Of course, in the unitary executive model, to the extent the chief executive and attorney general actually disagree on major matters, the chief executive’s opinion will carry the day. See John O. McGinnis, *Principle Versus Politics: The Solicitor General’s Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799, 803–04 (1992) (reviewing CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION* (1991), and discussing the solicitor general’s role which is analogous to the attorney general’s position). But many legal decisions are made at lower levels than the chief executive, and in those situations the unitary executive may, paradoxically, allow for the attorney general’s legal advice to be more independent and carry more weight than it does in the divided system discussed herein. See *Defense of Marriage Act: Hearing on Defending Marriage Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 112th Cong. 3–4 (2011) (statement of Edward Whelan, President, Ethics and Public Policy Center).

whom it falls to provide that defense in Colorado is the Attorney General's Office, whether the attorney general thinks the law may be "guilty" or not.<sup>83</sup>

And perhaps most importantly, there is no societal consensus that the attorney general should take a more active role in serving as a constitutional gatekeeper; for the most part, the office's ultimate client—the people of Colorado—appears to prefer the current system, in which the office steps in only in the very rare circumstances described above. This institutional balance is not ideal, but it is in our view the best among nonideal options. But it must be acknowledged that it means that, like the courts, the Attorney General's Office is rarely in a position to block or even to refuse to defend laws that it may believe are unconstitutional. It is only when the law is well to the extreme right of the continuum described above that the office will seek to do so. Thus, the office will defend many laws and proposals that the office finds of questionable, or even doubtful, constitutionality.

### C. *The Policy Branches*

It is, of course, when the policy branches consider and act upon legislative proposals that constitutional questions first arise. And because the other institutions are so deferential, it is also within the policy branches that careful scrutiny of those questions is perhaps most important. But as with the attorney general and unlike the judiciary, how those branches answer those questions is, not well-known or remarked upon. In part this is due to the fact that, just as in some sense it is impossible to say there is any uniform intent behind a legislative act,<sup>84</sup> it is probably impossible to declare that there is any one standard used by the members of the policy branches in answering constitutional questions. Every legislator and every governor answers the questions in her own way. Members of the policy branches also have no obligation to put into writing the standards they use. And it seems likely that even individuals may use different standards at different times.<sup>85</sup>

Nevertheless, we can make at least a few assertions about the process as it often occurs. First, unlike either the judiciary or the attorney general, the policy branches typically only confront constitutional ques-

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83. See, e.g., COLO. REV. STAT. § 13-51-115 (2011) ("[I]f the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard.").

84. See Dan Domenico, *Deference and Legislative Intent*, DULR ONLINE (Feb. 16, 2011, 1:02 PM), <http://www.denverlawreview.org/practitioners-pieces/2011/2/16/deference-and-legislative-intent.html>.

85. Cf. *Victor v. Nebraska*, 511 U.S. 1, 19–21 (1994) (holding that there are multiple acceptable definitions of a "reasonable doubt").

tions before a bill becomes law.<sup>86</sup> Second, some members of those branches appear to believe that it is the role of others (especially the courts) to answer constitutional questions while the policy branches concern themselves only with policy.<sup>87</sup> It is worth noting that this phenomenon does not appear to be one limited to a particular party or to Colorado,<sup>88</sup> or even to the modern era.<sup>89</sup>

Finally, we know that in Colorado, when the legislature does seek legal advice on constitutional questions, the answers it receives are based upon applying a somewhat deferential standard. The legislature has its own lawyers in the Office of Legislative Legal Services (OLLS). These lawyers are among the few attorneys authorized by law to provide legal services to state entities who do not work in the Office of the Attorney General.

OLLS reviews various legal questions for the legislature, including constitutional questions. At least when it makes its decisions public, the standard OLLS applies is stated as follows: "OLLS legal memoranda generally resolve doubts about whether the general assembly has authority to enact a particular piece of legislation in favor of the general assembly's plenary power."<sup>90</sup> Taken to its extreme this could mean that OLLS's standard falls at the far right of the continuums above—that it defers to the legislature unless it has absolutely *no* doubt about a law's unconstitutionality. This seems unlikely to be the actual case, and in practice it appears more likely that OLLS's standard mirrors that of the courts, and in fact, the standard appears to incorporate the courts' standard by seeking to predict how courts would treat the law if it went into effect.<sup>91</sup>

The stated reasons for using this deferential standard include that it is "[c]onsistent with the OLLS' position as a staff agency of the general

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86. It could be said that the governor will face different questions when implementing a law that has been passed, but to the extent that is so, the governor and the attorney general will typically be working together.

87. See Neomi Rao, *The Constitution: Not Just for Courts*, WALL ST. J., Jan. 10, 2011, at A15; Katyal, *supra* note 80, at 1350–51 (arguing that Congress is the best institution for abstract constitutional interpretation).

88. See, e.g., Akhil Reed Amar & Vikram David Amar, *Breaking Constitutional Faith: President Bush and Campaign Finance Reform*, FINDLAW (Apr. 5, 2002), <http://writ.news.findlaw.com/amar/20020405.html> (criticizing President George W. Bush for signing into law a bill he had repeatedly stated contained provisions violating the First Amendment).

89. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) ("In 1789, . . . a Member of the House of Representatives objected to a debate on the constitutionality of legislation based on the theory that 'it would be officious' to consider the constitutionality of a measure that did not affect the House . . . ." (quoting 1 ANNALS OF CONGRESS 500 (1789))).

90. Memorandum from Office of Legislative Legal Servs. to Keith King, Colo. House Representative 1 n.1 (April 7, 2004) [hereinafter 2004 OLLS Memo], available at [www.lobbycolorado.com/FileRepository/documents/AttachmentA.pdf](http://www.lobbycolorado.com/FileRepository/documents/AttachmentA.pdf).

91. See, e.g., Memorandum from Office of Legislative Legal Servs. to Sue Windels, Colo. State Senator 2 (March 28, 2007) [hereinafter 2007 OLLS Memo], available at <http://www.lobbycolorado.com/FileRepository/documents/LegalServicesMemo.pdf> ("If enacted, the [law in question] would be presumed constitutional and, if challenged, the [law] would have to be proven unconstitutional beyond a reasonable doubt.")



assembly.”<sup>92</sup> Moreover, OLLS’s “analysis starts with the general principle that the general assembly has plenary authority to legislate.”<sup>93</sup> It also is inspired by the very deferential stance that the courts give to the legislature’s enactments.<sup>94</sup> Whatever the reasons, it leads to legislators basing decisions not on the law’s constitutionality, but on its “riskiness”—that is, they effectively, if not explicitly ask, themselves not if a law is constitutional but if it will be upheld by the courts.<sup>95</sup>

This means that, like the judiciary and attorney general, OLLS takes a deferential stance on constitutional questions. And again, by applying a deferential standard—by putting the tipping point on the right side of the continuum—these institutions are not actually asking if laws are constitutional. This is certainly not to say that the legislators or the governor often will intentionally vote for or sign laws they know to be unconstitutional,<sup>96</sup> but just to point out that they do not formally ask that question. By asking instead whether doubts can be resolved in favor of the policy branches, this deferential standard (just as it does when the institutions discussed above apply deferential standards) ensures that some number of bills about which significant constitutional doubt exists within the policy branches will nevertheless be “approved” for passage.

#### D. Case Study: Mesa County Board of Commissioners v. State

The principles and practices all came to the fore in the recent case of *Mesa County Board of Commissioners v. State*. Taking a closer look at the development of that case and the statute it involved can highlight how the actions of the various entities in question were guided by the standards they have chosen to apply and how those standards can alter the outcome of a constitutional question.

The details of the law in question are fairly complex and are described in detail in the various memoranda and opinions cited below.<sup>97</sup> For purposes of this Article, however, the following is relevant:

□ Colorado’s constitution, in the Taxpayer’s Bill of Rights (TABOR), declares that “[D]istricts must have voter approval in advance for . . . any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or ex-

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92. See 2004 OLLS Memo, *supra* note 90, at 1 n.1.

93. 2007 OLLS Memo, *supra* note 91, at 4.

94. See 2004 OLLS Memo, *supra* note 90, at 6–8 (analyzing the question by asking how the court would analyze this issue).

95. See, e.g., Tim Hoover, *Lawmakers Scrap Plan to Tap Pinnacol Funds*, DENVER POST (Apr. 15, 2009, 9:43 AM), [http://www.denverpost.com/ci\\_12147139?source=pkg](http://www.denverpost.com/ci_12147139?source=pkg) (quoting lawmaker explaining his decision not to pursue a questionable bill because “we’ve all come to the conclusion that it . . . would be risky”).

96. See *Mesa Cnty. Bd. of Comm’rs v. State*, 203 P.3d 519, 525 (Colo. 2009).

97. See, e.g., *id.* at 524–27.

tension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to any district.”<sup>98</sup>

□ Prior to 2007, a state statute effectively capped local school district property tax revenue.

□ When property values rose quickly, as they often did, the statute thus resulted over time in local districts having to lower their property tax rates (called “mill levies”) so as not to exceed the revenue limits.

□ In 2007, the state legislature and the governor proposed repealing the state statutory limit on property tax revenue. Under this proposal, tax rates that would have been forced downward under the existing statute would remain the same, and revenues would thus increase.

After a short debate, the policy branches passed the bill (SB 199) and signed it into law. Soon thereafter, a group of citizens, businesses, taxpayers, and local governments sued, alleging that the removal of the state property tax limit violated TABOR. The plaintiffs prevailed at the district court level.<sup>99</sup> On appeal, however, the supreme court reversed and upheld the law.<sup>100</sup>

In this process, each of the institutions examined in this Article carried out its role and applied the standards described above. In many ways, therefore, the case was highly typical. In three ways, however, it was atypical: first, where in the usual case only the courts make their analysis of a constitutional question explicit and public, in this case each institution did so; second, and even more unusually, in this case the Attorney General’s Office was so certain that the proposed law was unconstitutional that it went even beyond the very lenient standard we adopt on the constitutional continuum; finally, the reviewing courts disagreed on the proper standard to apply to the law, with the district court applying a lower bar for the challengers (that is, a more stringent review of the law’s constitutionality) than the usual highly deferential beyond-a-reasonable-doubt standard that the supreme court applied. All of these unusual circumstances put into relief how choosing a particular standard can alter the outcome of an institution’s analysis of a constitutional question, and can show how the usual standards can interact with each other to create a feedback loop.

### 1. The Policy Branches

When the bill was proposed, legislators sought the advice of the OLLS. That office specifically answered the question. In doing so, it

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98. COLO. CONST. art. X, § 20(4)(a).

99. *Mesa Cnty. Bd. of Comm’rs v. Colo. Dep’t of Educ.*, No. 07CV12064, at 14 (Colo. Dist. Ct. May 30, 2008), [http://www.coloradoattorneygeneral.gov/sites/default/files/press\\_releases/2008/06/02/.pdf](http://www.coloradoattorneygeneral.gov/sites/default/files/press_releases/2008/06/02/.pdf).

100. *Mesa Cnty.*, 203 P.3d at 522–23.

applied the deferential standard noted above: its “position [was] to resolve doubts about whether the general assembly has authority to enact a particular piece of legislation in favor of the general assembly’s plenary power” and that “if challenged, the repeal would have to be proven unconstitutional beyond a reasonable doubt.”<sup>101</sup> That is, it applied at least a somewhat deferential standard—a 6 or 7 on the continuum, perhaps. OLLS noted that at least one issue was a close call: whether SB 07-199 constituted a “tax policy change.”<sup>102</sup>

The governor’s counsel also provided an analysis of the question, which mirrored the OLLS analysis fairly closely. It too appeared to apply a deferential standard.<sup>103</sup> These analyses tracked a prior OLLS memorandum on the same basic question.<sup>104</sup>

## 2. The Attorney General

Given the high-profile and controversial nature of the proposed law, the attorney general assigned me to analyze the bill’s constitutionality. It was in setting out to do so that the questions that this paper seeks to answer began to crystallize. When the attorney general asked for my analysis, I had to ask him what precisely he wanted me to analyze—that is, what question was I to answer. In reading the memoranda of the policy branches, I was struck that they did not seem to be answering directly the important question: is the bill constitutional? Instead, the question seemed to be whether the law was likely to be upheld in court. This can be an important question, but it is not the only question one can ask in these situations, as already discussed.<sup>105</sup> The attorney general and I discussed the possible approaches and he instructed me to proceed without any presumptions or weighted deference, answering simply whether I believed the law was constitutional or not. This is what I did.<sup>106</sup>

Thus, though we were not quite thinking in these terms at the time, our office applied essentially the neutral, 50/50 tipping point on the continuum, a five out of ten, while the policy branches used more deferential standards common to litigation, perhaps in the 7–9 range.<sup>107</sup> This may have made the difference in our different conclusions.

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101. 2007 OLLS Memo, *supra*, note 91, at 2.

102. *Id.* at 9.

103. Letter from Thomas M. Rogers III, Chief Counsel to the Colo. Governor to Sue Windels, Colo. State Senator 6 (Mar. 20, 2007) (on file with author).

104. 2004 OLLS Memo, *supra* note 90, at 1 n.1.

105. *See, e.g.*, Holder Letter, *supra* note 2.

106. *See* Memorandum from Dan Domenico, Colo. Solicitor Gen. to John Suthers, Colo. Attorney Gen. 11 (April 27, 2007) (on file with author) [hereinafter Suthers Memo].

107. *See* 2007 OLLS Memo, *supra* note 91, at 2 (“If enacted, the [law in question] would be presumed constitutional and, if challenged, the [law] would have to be proven unconstitutional beyond a reasonable doubt.”); *see also* 2004 OLLS Memo, *supra* note 90, at 6 (“Only when the state constitution directly or indirectly addresses the limits of legislative power or when the judiciary defines the extent of that power in the context of a particular decision are the boundaries precisely known.”).

Like those branches, I concluded that SB 07-199 did not appear to transgress most of the potentially relevant provisions of TABOR.<sup>108</sup> In my view, while there might have been colorable claims under those provisions, they would not have reached the middle of our continuum. Both OLLS and I acknowledged that there was one constitutional question that was truly problematic: the provision of TABOR barring a “tax policy change directly causing a net revenue gain to any district.”<sup>109</sup> OLLS noted that this was a close question, but concluded that because the law was being changed mainly in order to address school finance issues, it was not a “tax policy” and thus TABOR did not apply. The governor’s counsel advanced a somewhat different analysis, acknowledging that the law in question involved “tax policy” but arguing that the bill did “not constitute a ‘change’ in tax policy.” Our conclusion was that this was indeed a close case—particularly under the presumptions OLLS applies. That is, I would have agreed that it would be a very difficult call to say whether the law’s questionable constitutionality surpassed the 8 or 9 or so that the policy branches were using as their standard. But at the more stringent 5, that the attorney general and I determined was appropriate for our analysis, it was clear that SB 07-199 was beyond our standard. Thus, I concluded in my memorandum to him that “[m]y best judgment is that this proposal requires voter approval under the Constitution.”<sup>110</sup>

The attorney general concurred. The next, and more difficult, question for us was what to do with our analysis. As discussed above, we often provide such analyses of constitutional questions confidentially to the governor’s office or to relevant legislators. Here, however, we decided that would be inappropriate. This was the unusual situation where our obligations to the people of the state prevailed over our obligation to institutional clients such as the governor, the legislature, or any state agency.

A number of factors were weighed in this decision. First, the very short timeline in which the proposal was to be considered before the end of the legislative session meant that it was highly unlikely that our office could have time to conduct the sort of back-and-forth efforts to clear up constitutional problems with bills that typically takes place with the policy branches.<sup>111</sup> The fact that the policy branches had each already con-

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108. See, e.g., 2007 OLLS Memo, *supra* note 91 at 1–2 (“The [law in question] clearly does not constitute a new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax for purposes of the voter approval requirement of section 20(4)(a) of article X of the state constitution.”).

109. See COLO. CONST. art. X, § 20(4)(a). I also concluded that the law may have been a weakening of “[o]ther limits on district revenue, spending, and debt” that required voter approval. See Suthers Memo, *supra*, note 106, at 9. It is unnecessary for purposes of this article to analyze that question.

110. See *id.* at 11.

111. The author would like to note, perhaps a bit defensively, that because of the sudden introduction of the bill, our analysis (that of the Solicitor General’s office) was undertaken beginning on

ducted their own legal analyses and made them public also suggested that they were not relying on our office to provide this function in this instance. The people, on the other hand, were quite interested in the issue, as calls and other correspondence to the Office of the Attorney General revealed, but had no independent institutional legal representation. Given all these factors, the attorney general decided we were obligated in this case to provide our analysis to the public.

The result was that, after providing the governor with a copy of our analysis<sup>112</sup> and a day's notice, we released our conclusion to the public. This set off something of a controversy, with some support and some criticism, as was to be expected. Of course, much of the controversy was over the substantive analysis, which is understandable though not particularly relevant to this Article. Much of the controversy, however, was based on a failure to understand two things this Article seeks to help explain: the different legal standards state institutions can and do apply to constitutional questions, and the role of the Office of the Attorney General as both counsel to the state government and as legal representative of the state's citizens. Other similar decisions by other attorneys general have likewise triggered much criticism, also at least in part due to confusion about these structural issues.<sup>113</sup>

### 3. The Courts

Not surprisingly, the law was swiftly challenged in court. The plaintiffs prevailed in the district court. Importantly, the district court's view of a particular interpretive guide included in TABOR itself altered the usual judicial standard of review it should apply:

Further, TABOR itself includes the provision requiring that [i]ts preferred interpretation shall reasonably restrain most the growth of government.

Inclusion of this interpretation expressly in TABOR removes this case, in the Court's view, from the generally accepted standard of review requiring that those advancing the unconstitutionality of a given statute must prove its unconstitutionality "beyond a reasonable doubt." However, as the Colorado Supreme Court has noted that while ordinarily a party challenging a statute as unconstitutional bears the burden of establishing the unconstitutionality beyond a rea-

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a Tuesday and was released on Thursday. I stand by the analysis and conclusions, but simply note that with a bit more time, they could have been fleshed out and perhaps more elegantly expressed.

112. Letter from John W. Suthers, Colo. Attorney Gen. to Bill Ritter, Colo. Governor (Apr. 27, 2007) (on file with author).

113. See, e.g., Holder Letter, *supra*, note 2 (notifying Speaker Boehner that the Department of Justice believes Section 3 of the Defense of Marriage Act is unconstitutional, and therefore will no longer be defended by the Department of Justice); see also *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1225 (Colo. 2003) (stating that the Colorado Attorney General's interpretation of the general assembly's redistricting power is contrary to that of the secretary of state and general assembly).

sonable doubt, the “type of constitutional challenge, the nature of the challenged statute, and the standing of the parties determine how we approach judicial review in a particular case, such as the one before us.” Accordingly, this Court concludes that the relevant standard of review requires the Court to give preference to interpretations of TABOR that “restrain most the growth of government.”<sup>114</sup>

Applying this standard—perhaps a 5 or even lower on the constitutional continuum described above—the district court concluded that SB 07-199 violated TABOR.<sup>115</sup> The supreme court reversed, the majority emphasizing that its disagreement with the district court was as much about the proper standard to apply as about the merits of the constitutional question:

When it issued its declaratory judgment order, the district court did not have the benefit of our recent decision in *Barber v. Ritter*, in which we held that a statute challenged under article X, section 20 must be proven to be unconstitutional beyond a reasonable doubt. The trial court erroneously held that the relevant test of SB 07-199’s constitutionality came from the interpretive guideline included in the text of article X, section 20 to “reasonably restrain most the growth of government.”<sup>116</sup>

Applying the more deferential standard, the supreme court upheld SB 07-199.

#### 4. The Feedback Loop in Practice

The purpose of highlighting the *Mesa County* case in this Article is not to relitigate the case, or to call into question the various standards applied by the institutional players. The dual purposes are rather to show the different standards institutions use in answering difficult constitutional questions—the different locations on the continuum they choose to draw their lines, and to emphasize the often-pivotal impact that where they choose to draw those lines can have on the outcome of their analysis and thus on the constitutional fate of a legislative proposal or law. Ultimately, the case shows how those choices can cause what this Article calls the constitutional feedback loop.

In this case, the policy branches and the supreme court applied highly deferential standards to the question of SB 07-199’s compatibility with TABOR. As discussed above, these standards could translate into points on the continuum in the 7–9 range. The Attorney General’s Office

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114. *Mesa Cnty. Bd. of Comm’rs v. Colo. Dep’t of Educ.*, No. 07CV12064, at 11 (Colo. Dist. Ct. May 30, 2008), [http://www.coloradoattorneygeneral.gov/sites/default/files/press\\_releases/2008/06/02/.pdf](http://www.coloradoattorneygeneral.gov/sites/default/files/press_releases/2008/06/02/.pdf) (citations omitted).

115. *Id.* at 14.

116. *Mesa Cnty. Bd. of Comm’rs v. State*, 203 P.3d 519, 523 (Colo. 2009); see also *id.* at 527, 536 (emphasizing the beyond a reasonable doubt standard); *id.* at 539 (Eid, J., dissenting) (discussing the “the highly deferential approach articulated by the majority”).

and the district court (for different reasons) applied less deferential standards, in the 4–5 range. It should be no surprise then that in a difficult case, the standards may have made the difference. If we (surely counterfactually) assume that every institution involved here objectively believed the law was slightly more likely unconstitutional than constitutional—a 6.5, say, on the continuum—then each of the institutions would still have arrived at the same conclusion it did. The policy branches, resolving their “1.5 points worth” of doubt into their presumption would still have concluded that the bill could proceed. The supreme court’s beyond-a-reasonable-doubt standard has at least that much room for doubt, and would have upheld the law. The attorney general and the district court, giving no benefit of the doubt, would still have concluded that the law went beyond their standards.

On the other hand, had the supreme court elected to follow the district court’s analysis of the interpretive language of TABOR and had chosen to resolve doubts *against* the bill rather than in its favor, or even to apply a neutral “5” or minimally deferential “6” on our continuum, the result would have been different. Under those standards (given our assumed objective 6.5 level of doubt) the supreme court, without changing its actual analysis of the merits at all, would have affirmed the district court and held the law unconstitutional.

Thus we see the practical importance of where institutions elect to draw their lines, and we have seen how and why they choose the various points on the continuum at which they typically draw those lines. In the next section of this Article, I will attempt to explain some of the second-level effects of those choices, and move into a short normative analysis of whether the system should be and could be improved.

### III. THE CONSTITUTIONAL FEEDBACK LOOP

#### *A. How the Feedback Loop Works*

The end result of all these standards is that every institution’s standard falls to the right side of the continuum of deference. Every institution, in other words, asks not whether a law is constitutional, but whether it is clearly or undoubtedly unconstitutional. This results in a feedback loop: the attorney general and the courts will defer to the policy branches’ constitutional judgments, but the policy branches then take that deference into account in making that judgment themselves. The former two institutions assume the policy branches have asked the constitutional question and will uphold the law even if their independent judgment is that the law is probably (though not undoubtedly) unconstitutional. Meanwhile, the policy branches look to how the courts will assess the constitutional question, and thus do not directly ask the constitutional question, but essentially ask whether the others will block the law if they enact it.

The result of the feedback loop is that laws that all three branches might agree have serious constitutional problems—perhaps even some that all would agree are *probably unconstitutional*—will be passed by the legislature, signed by the governor, defended by the attorney general, and upheld by the courts.

In mathematical terms, if the “beyond a reasonable doubt” line falls around 75%,<sup>117</sup> then the feedback loop works like this: Imagine that a neutral body of legal minds, applying no deference or heightened burden, would assess that Law X is 80% likely to be unconstitutional.<sup>118</sup> The policy branches, in considering whether to pass and sign the law, first would resolve doubts in their own favor. If that alone were the question the policy branches asked, this would likely result in these branches *not* passing the law. As discussed above, even a presumption of constitutionality does not mean resolving *all* doubts, even extreme doubts, and we can assume 80% is beyond even the level of doubt the policy branches would accept. But, as just discussed, the policy branches do not actually ask what is the likelihood a law is unconstitutional; they ask what is the likelihood the courts will strike it down. And since the courts ask only whether a law has been proven unconstitutional beyond a reasonable doubt, the deference essentially gets multiplied. The legislature will take the .80 chance the law is unconstitutional and multiply it by the .80 chance that the courts will find it unconstitutional, and arrive at .64. Thus, a law that would have fallen outside even the highly deferential “beyond a reasonable doubt” standard (set here at .75) is now within the standard and would likely be passed by the policy branches.

The 2007 OLLS Memo from the *Mesa County* case study appears to make this feedback loop explicit. As noted above, OLLS began with a deferential standard (“to resolve doubts about whether the general assembly has authority to enact a particular piece of legislation in favor of the general assembly’s plenary power”). This is questionable in itself. But then OLLS went on to incorporate into its analysis the additionally deferential standard that court apply (“if challenged, the repeal would have to be proven unconstitutional beyond a reasonable doubt”). Thus, it seems that the question the legislature is asking is not whether the law is unconstitutional, or even whether it is clearly unconstitutional, but whether there are doubts about whether the courts will uphold the law. Thus, the deference the courts grant the legislature itself becomes part of the policy branches’ analysis, and they ask not whether the law is constitutional, but whether the courts will uphold it. As explained above, these are very different things in our deferential world.

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117. See *supra* text accompanying notes 22–23.

118. One might imagine arriving at such an assessment by polling the group, and having 80% declare the law is unconstitutional while 20% declare it constitutional.



So even if everyone agrees that the issues discussed in subpart I(B) above justify a generally deferential approach to constitutional questions—that indeed, some unconstitutional laws be allowed to go “free” lest one constitutional one be blocked; this feedback loop shows that the current system may allow more to go free than anyone suggests is optimal. The section below discusses what, if anything, can be done about it.

*B. Can the Loop be Broken?*

The ultimate goal of the system as a whole should be to minimize two types of errors: erroneously allowing unconstitutional laws to become and remain law (which may be referred to as “mistaken lenity”), and erroneously preventing laws that would be constitutional from taking effect (“mistaken obstruction”). Of course, there is a tradeoff among the two—the more careful one is about the former, the harder it is to protect against the latter and vice versa.

Part II shows that all of the actors in our system have arrived, by design or otherwise, at points on the continuum of constitutionality that heavily protect against mistaken obstruction; the inevitable conclusion is that they thereby will make mistakes of lenity more often. As that discussion shows, there are powerful reasons in our democratic society to prefer this outcome—to be more worried about erroneously blocking laws than about erroneously allowing them to pass, and therefore, this bias may be proper.

At the same time it is worrisome that only rarely does any state actor actually ask if a law is constitutional before they enact, sign, defend, or uphold it. In general, however, there is little that can be done, particularly by the courts or the attorney general, to alter this imperfect system without causing more harm than it would prevent. Given the author’s position as solicitor general, it is hardly surprising that I do not believe there is much that can be done to alter the role of the attorney general in this process. If I did, I would have sought to do so internally. It is certainly tempting to argue that our office should take a more forceful role in challenging and questioning the other branches’ constitutional judgment. And given the institutional independence of the state attorney general, doing so would not be entirely without constitutional justification. But the position described in subpart II(B) is a delicate balance of that independence and the fundamental role of the office as counselor and advocate for the state’s laws and agencies. Without additional constitutional changes further empowering the attorney general to make independent constitutional judgments, there is little that our office can do to alter the current system.

Similarly, there is little the judiciary can do substantively that would not cause more institutional problems than it would solve. For all the reasons discussed in subpart II(A), the courts simply must give the policy branches some deference and uphold duly-enacted laws unless doubts

about their constitutionality substantially outweigh arguments in their favor. I do believe that the system would benefit, however, if the judiciary were to adopt a stated standard that more closely reflects its actual approach. One need not necessarily agree with Justice Eid that the supreme court selectively applies the beyond a reasonable doubt burden to understand that in practice the court's standard is usually far lower than what it would allow a jury to apply in a criminal case.<sup>119</sup> In most cases, the court seems to apply a standard nearer to a preponderance or, at most, clear and convincing level (in the 5.5–7.5 or 55–75% range on the numerical scales). Making this explicit would not only aid litigants in properly understanding how the courts approach constitutional questions, it would help to alleviate the effects of the feedback loop because the policy branches (and the Office of the Attorney General) would better understand the deference they get from the judiciary.<sup>120</sup> More accurately describing the courts' actual standards would also make easier the more significant recommendations urged upon the policy branches below.

The policy branches could break the feedback loop by making two changes to the way they ask their attorneys to answer constitutional questions. First, they should not ask what the judiciary is likely to do should the law be challenged in court. This aspect of the analysis is simply inappropriate in answering the bare question: Is this proposed law constitutional? Since the judiciary itself will give the policy branches a strong degree of deference, what courts will do is by definition not a guide to actual constitutionality. The combination of the courts' deference with the policy branches' looking to the courts for guidance is what exacerbates the issues that deference itself creates and turns them into a feedback loop. Instead, the policy branches should make an independent analysis of any constitutional questions.

Second, in doing so, the policy branches should not "resolve any doubts in favor of upholding the legislature's action."<sup>121</sup> Given the powerful deference that the other institutions give to the policy branches, those branches should resolve questions instead by resolving significant doubts *against* their own exercise of power. In other words, the policy branches should draw their line at the middle or to the left of center on the continuums above. This is the only way to prevent the number of

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119. See *Mesa Cnty*, 203 P.3d at 539 (Eid, J., dissenting).

120. This question has been explored elsewhere. See, e.g., Michael L. Buenger, *Friction by Design: The Necessary Contest of State Judicial Power and Legislative Policymaking*, 43 U. RICH. L. REV. 571, 603 (2009) ("Too much deference to state legislative power renders constitutional imitations meaningless . . . . Too little deference to state legislative power erodes its presumptively plenary nature and creates ample grounds for political and interbranch conflict over the parameters of particular limitations."); F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447, 1458–59 (2010) ("[C]ourts would overturn legislation only if it was based on a clearly mistaken, irrational interpretation of the Constitution."); Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 715 (2000) (advocating a "contextual approach" to judicial deference).

121. *Contra* Schapiro, *supra* note 120, at 694.

unconstitutional laws that go into effect from outpacing the justifiable number in a polity that can legitimately be said to be governed by a constitution.

Perhaps the best place to draw that line would be as an inverse of the standard used by the courts. If the courts will uphold a law unless it is shown to be *unconstitutional* beyond a reasonable doubt, the policy branches ought to refrain from enacting the law unless they find it is *constitutional* beyond a reasonable doubt. Again in terms of the continuums, if the courts put the number at an 8 on the right side of the continuum, the policy branches should use something close to the 2 on the left.

In practice, this would not affect the great run of constitutional questions that are asked and resolved within these various institutions. But it would alter the conclusion of something like the 2007 OLLS Memo. There, the policy branches were told by OLLS that the proposed law presented a “close question”,<sup>122</sup> but that “if challenged, the [law] would have to be proven unconstitutional beyond a reasonable doubt,” and therefore, OLLS concluded that the law would be upheld.<sup>123</sup> Under this proposal, OLLS would not ask whether the courts were likely or not to uphold the law, nor would it resolve doubts in favor of constitutionality. Instead, the analysis would begin by asking whether there were significant constitutional questions. Here, since OLLS admitted there were “close” questions, the answers to the constitutional questions would be yes. The next question would simply be which side of the selected tipping point on continuum of constitutionality the proposed law fell on. Assuming that “close” means near to 50/50, then under the “clear and convincing” standard, OLLS would have to conclude that the law should not be passed. Only if OLLS could say that the question is “clearly” answered in favor of constitutionality would it recommend passage. Under the “preponderance” standard it isn’t clear what the result would have been. The analysis would have had to be more specific and robust to resolve what side of the line the “close” question fell.<sup>124</sup> If those branches concluded that the law was probably constitutional, then they would proceed. But if the doubts weighed on the right side of the continuum, then the conclusion would have to be not to allow the bill to become law. Were they to do so, it would result in at least one institution asking whether a law is constitutional—a result that seems entirely to be desired.

If the policy branches refuse to adopt these alterations, it may be reasonable to conclude that they not only understand the feedback loop but take advantage of it to implement policies they know may well be

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122. See 2007 OLLS Memo, *supra* note 91, at 2.

123. *Id.* at 2, 7.

124. This requirement of more specificity and robustness itself is a benefit of this proposed change, even if it would not alter the ultimate conclusion in any instance.

unconstitutional. This would undermine the very basis for the deferential postures the other institutions take to the policy branches' enactments.<sup>125</sup> Therefore, the courts and attorney general might have to consider moving their tipping points to the left on the continuums above, asserting a more rigorous method of review.<sup>126</sup>

This should not be necessary. Unlike with the judiciary and the attorney general, there are no institutional limitations that prevent the policy branches from adopting and applying this more stringent standard. Instead, those branches are constrained only by political considerations: after all, at least in theory, the reason a bill would be passed is because a majority of citizens or their representatives want it to be. Asking the policy branches to adopt a proposed standard that would prevent them in some instances from enacting laws that they or their constituents desire is of course asking for a significant and perhaps unrealistic amount of self-restraint. After all, the reason we have constitutions at all is because relying on the self-restraint of those in power is a fool's errand.<sup>127</sup>

So ultimately it may be that the public itself will have to be the "institution" that applies an undeferential standard to constitutional questions and will have to restrain their legislators—and themselves—from seeking laws that transgress the constitution. As Publius recognized, "A dependence on the people is, no doubt, the primary control on the government."<sup>128</sup> Nevertheless, the current system is generally unremarked

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125. See *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) ("When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution. This has been clear from the early days of the Republic. In 1789, when a Member of the House of Representatives objected to a debate on the constitutionality of legislation based on the theory that 'it would be officious' to consider the constitutionality of a measure that did not affect the House, James Madison explained that 'it is incontrovertibly of as much importance to this branch of the Government as to any other, that the constitution should be preserved entire. It is our duty.' Were it otherwise, we would not afford Congress the presumption of validity its enactments now enjoy." (quoting 1 ANNALS OF CONGRESS 500 (1789))).

126. This question has been explored elsewhere. See, e.g., Michael L. Buenger, *Friction by Design: The Necessary Contest of State Judicial Power and Legislative Policymaking*, 43 U. RICH. L. REV. 571, 603 (2009) ("Too much deference to state legislative power renders constitutional imitations meaningless . . . Too little deference to state legislative power erodes its presumptively plenary nature and creates ample grounds for political and interbranch conflict over the parameters of particular limitations."); F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447, 1458–59 (2010) ("[C]ourts would overturn legislation only if it was based on a clearly mistaken, irrational interpretation of the Constitution."); Schapiro, *supra* note 120, at 715 (advocating a "contextual approach" to judicial deference). See also Clark Neily & Dick M. Carpenter II, *Government Unchecked: The False Problem of "Judicial Activism" and the Need for Judicial Engagement*, Institute for Justice, at 3, 10 (2011) (arguing that the job of "keeping the other branches within the bounds of the Constitution and ensuring individual rights are not trampled by over-reaching government . . . cannot be left to policymakers themselves" but that "instead of judgment, courts often show reflexive deference to other branches of government").

127. See THE FEDERALIST NO. 51, at 252 (James Madison) (Cambridge University Press ed., 2003) ("If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.")

128. *Id.*

upon, and these minor but potentially important alterations are at least worth considering and discussing.<sup>129</sup> If they are rejected, the discussion would be worthwhile for the institutions of the government and for the people they represent and serve.

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129. *Id.* (“[E]xperience has taught mankind the necessity of auxiliary precautions.”).

