THE OPINION POWER OF THE STATE ATTORNEY GENERAL AND THE ATTORNEY GENERAL AS A PUBLIC LAW ACTOR

IAN EPPLER*

INTRODUCTION

In recent years, state attorneys general have become increasingly aggressive in their efforts to influence public law and policy through their authority to conduct litigation on behalf of their states.[1] Less attention, however, has been paid to another aspect of the state attorney general's power: their power to issue opinions on questions of law to other governmental entities. This paper attempts to fill that gap and addresses the potential for use of the opinion power to advance the attorney general's policy preferences and influence high-profile public law controversies. Part I surveys the nature and structure of the opinion

* J.D. 2019, Harvard Law School, A.B. 2013, Brown University. This article was initially drafted for the Spring 2018 Federalism and States as Public Law Actors seminar at Harvard Law School; thanks are due to Professor Caitlin Halligan and my fellow seminar participants for their helpful feedback. I also thank my father, David Eppler, for inspiring this article with his work for a state attorney general, as well as in countless other ways.

[1] *See, e.g.*, Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1097 (2014); Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General as Amici*, 90 N.Y.U. L. REV. 1229, 1232 (2015); Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 45–46 (2018).

power across the fifty states. Part II presents a case study of an instance in which an attorney general used the opinion power to advance their policy preferences on a high-stakes, high-profile public law issue. Finally, Part III addresses the strengths and weaknesses of the use of the opinion power in the context of high-salience public law issues and responds to some potential critiques of the practice.

I. THE NATURE OF THE OPINION POWER

The opinion power has deep historical roots. At English common law, the Attorney General had the power to issue opinions to Parliament,[2] and as with many aspects of English common law, this power was imported into the nascent American legal system.[3] Some state supreme courts have recognized the common law power of the state attorney general to issue opinions,[4] but almost all states have expressly codified the opinion power in the state constitution or via statute.[5] While the contours of the opinion power are similar in most states, there are also some significant differences between the states in terms of the nature of the power granted to attorneys general.[6] Norms and customs of the attorney general's office affect the operation of the power in practice as well.[7] This section discusses the state-by-state variation in the operation of the attorney general's opinion power.

A. *Initiating the Opinion Process*

The opinion process must usually be initiated by a request from a person or entity outside of the attorney general's office,[8] but there is significant variation among the states with respect to who qualifies as an appropriate requester.[9] In almost every state, the governor and certain other high-ranking executive branch officials qualify as an appropriate requester under the statute authorizing the issuance of opinions.[10] Similarly, in most other states, the legislature qualifies

---

[2] *See* Elwyn Jones, *The Office of Attorney-General*, 27 CAMBRIDGE L.J. 43–46 (1969) (discussing the traditional role of the Attorney General in England).

[3] *See* Peter E. Heiser, Jr., *The Opinion Writing Function of Attorneys General*, 18 IDAHO L. REV. 9, 10, 14 (1982).

[4] *See, e.g.*, William J. Scott, *The Role of Attorney General's Opinions in Illinois*, 67 NW. U. L. REV. 643, 644 (1973) (discussing a decision by the Illinois Supreme Court).

[5] Heiser, *supra* note 3, at 10–11.

[6] *See, e.g.*, Andy Bennett, *Opinions*, *in* STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 75, 76 (Emily Myers & Lynne Ross, eds., Nat'l Ass'n of Att'ys Gen. 2d. ed. 2007); Heiser, *supra* note 3, at 13–15.

[7] *See* Heiser, *supra* note 3, at 13.

[8] *See* Bennett, *supra* note 6, at 76 (discussing guidelines for issuing opinions).

[9] *See infra* app. A.

[10] *See infra* app. A; *see also* Thomas R. Morris, *State Attorneys General as Interpreters of State Constitutions*, 17 PUBLIUS 133, 135 (1987) ("Opinions are rendered to the governor and executive departments . . . .").

as appropriate requesters under the statute.[11] Beyond this baseline, there is significant divergence among the states. Some state statutes stipulate that, within the executive branch, only certain enumerated high-ranking officials are eligible to request opinions.[12] Other state statutes allow a broader range of executive branch officials to request opinions,[13] with some allowing "any . . . state officer" to request an opinion.[14] There is a similar range with respect to the power of legislative branch entities to request opinions.[15] Statutory schemes that limit the opinion-requesting power to the legislature as a whole or to houses of the legislature are quite common,[16] but several state laws allow individual legislators,[17] elected leaders of houses or committees of the legislature,[18] or legislative committees to request opinions.[19] In certain states, local officials may also request attorney general opinions.[20] Most commonly, state statutes authorize district attorneys to request attorney general opinions,[21] but in a handful of states, other officials such as mayors and county sheriffs are authorized to request opinions.[22] Two states (Virginia and Tennessee) authorize state judges to request opinions under certain circumstances,[23] and Kentucky law

---

[11] *See infra* app. A; *see also* Morris, *supra* note 10, at 135.

[12] *See, e.g.*, S.D. CODIFIED LAWS § 1-11-1(6) (2012) (stating that the governor, auditor, and treasurer are the only executive branch officials who may request opinions).

[13] *See, e.g.*, tit. 71 PA. CONS. STAT. § 732-204(a)(1) (2012) (governor and all agency heads may request opinions).

[14] *See, e.g.*, MICH. COMP. LAWS § 14.32 (2004) ("It shall be the duty of the attorney general, when required, to give his opinion upon all questions of law submitted to him by . . . any other state officer . . . .").

[15] *See infra* app. A.

[16] *See infra* app. A.

[17] *See, e.g.*, KY. REV. STAT. ANN. § 15.025(2) (2013) (The Attorney General . . . shall furnish such opinions . . . [w]hen public questions of law are submitted by . . . any member of the Legislature . . . .").

[18] *See, e.g.*, ALA. CODE § 36-15-1(1)(a) (2013) ("[H]e or she shall also give his or her opinion to the Chairman of the Judiciary Committee of either house . . . .").

[19] *See, e.g.*, MINN. STAT. § 8.05 (2013) ("The attorney general similarly shall give a written opinion upon any question of law submitted by a permanent or interim committee or commission of the legislature . . . .").

[20] *See, e.g.*, MO. REV. STAT. § 27.040 (2019).

[21] *See id.*

[22] *See, e.g.*, ALA. CODE § 36-15-1 (1)(b) ("Judge of probate, clerk of the circuit court, sheriff, city and county boards of education, county commission, register of the circuit court, tax collector, tax assessor, mayor or chief executive officer of any incorporated municipality, city council or like governing body of any incorporated municipality, or any other officer required to collect, disburse, handle, or account for public funds" may request opinions).

[23] VA. CODE ANN. § 2.2-505(A) (2014); Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2126 n.91 (2015) (noting the power of the Tennessee Attorney General to issue opinions upon request from state judges).

authorizes the Attorney General to issue opinions on a discretionary basis on matters of "public interest" in response to requests by members of the general public.[24] Finally, it is common practice for many state attorneys general to issue courtesy opinions to officials or entities that are not authorized requesters, although these opinions may lack the same force as "official" opinions.[25]

B. *Opinion Subject Matter*

There is significant variation among the states with respect to the authorized subject matter of an attorney general opinion. For example, several states limit the attorney general's opinion power to questions of law that are somehow related to the requester's official duties.[26] Some state opinion statutes, such as Washington's, impose different subject matter restrictions for different categories of requester.[27] This opinion statute allows legislative houses and committees to request opinions on all "constitutional or legal questions," but restricts other authorized requesters, such as the governor and individual members of the legislature, to opinions related to their official duties.[28]

Even when state statutes authorizing the issuance of opinions do not impose subject matter restrictions, it is common for attorneys general to informally or formally adopt norms or rules against issuing opinions in certain circumstances.[29] In Ohio, for example, the authorizing statute allows the attorney general to respond to opinion requests from a laundry list of executive branch officials "in all matters relating to their official duties"[30] and from houses of the legislature "on questions of law."[31] Ohio's attorney general, however, has adopted a policy against providing opinions in certain instances, such as in response to questions regarding the constitutionality of a statute, where an issued opinion would otherwise be seemingly permissible under the authorizing statute.[32] Many attorneys general decline to issue opinions when the subject of

---

[24] KY. REV. STAT. ANN § 15.025(4) (2013) ("The Attorney General . . . shall furnish such opinions . . . [w]hen, in the discretion of the Attorney General, the question presented is of such public interest that an Attorney General's opinion on the subject is deemed desirable . . . .").

[25] Heiser, *supra* note 3, 12–14 (discussing "courtesy" opinions).

[26] *See, e.g.*, MONT. CODE ANN § 2-15-501(7) (2015) ("It is the duty of the attorney general . . . to give an opinion in writing . . . upon any question of law relating to their respective offices.").

[27] *See, e.g.*, WASH. REV. CODE § 43.10.030(5), (7) (2018).

[28] *Id.*

[29] *See* Bennett, *supra* note 6, at 76.

[30] OHIO REV. CODE ANN. § 109.12 (West 2019).

[31] *Id.* § 109.13.

[32] *Opinions Frequently Asked Questions*, OHIO ATTORNEY GENERAL, http://www.ohioattorneygeneral.gov/FAQ/Opinion-FAQ (last visited Nov. 23, 2019).

the opinion is also under litigation, when the opinion would address a "policy" issue instead of a legal issue, and when the issue is entirely hypothetical.[33]

C. *Opinion Preparation*

State practice differs less with respect to the actual preparation of opinions. Generally, there are two models for opinion preparation: some attorneys general centralize opinion preparation in a unit or bureau that works largely or exclusively on opinions, while in other offices, the opinion writing task is delegated based on subject matter to the unit also responsible for litigation and enforcement related to that subject matter.[34] In most states, the draft is then reviewed by a more senior official in the office, such as the deputy attorney general or solicitor general, and finally by the attorney general.[35] Some states use a committee to review and discuss opinions, analogous to the post-argument conferences conducted by appellate courts.[36] In all states, the opinions process is a closed, non-adversarial one—operating entirely within the office of the Attorney General.[37] Once opinions are complete, however, most attorneys general make them available to the public by posting them on their websites: in some states, this is a statutory requirement, but in others, it is a norm.[38]

D. *Opinions and Other Branches of Government*

There is no state in which an attorney general's interpretation of law binds the state courts.[39] This is unsurprising, perhaps, given the significant separation-of-powers concerns that would result if an executive branch actor (the attorney general) were able to encroach on the judiciary's "power to say what the law is"[40] through the opinion power.[41] Most state courts, however, tend to treat attorney general opinions as persuasive authority.[42] State supreme courts have described them as "entitled to careful consideration and generally . . . regarded as highly persuasive,"[43] "entitled to great weight,"[44] and "entitled to

---

[33] Bennett, *supra* note 6, at 76.

[34] *Id.* at 77.

[35] *Id.* at 78.

[36] *See* Morris, *supra* note 10, at 136–137; *see also* Heiser, *supra* note 3, at 14 (recommending the use of an opinion committee within the office of the Attorney General to conduct review before submission to the Attorney General for approval).

[37] Morris, *supra* note 10, at 136.

[38] Bennett, *supra* note 6, at 78.

[39] *See, e.g.*, *id.* at 80 (citing 7 AM. JUR. 2D *Attorney General* § 11 (1997); Heiser, *supra* note 3, at 18 n.29 (collecting cases).

[40] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[41] Heiser, *supra* note 3, at 18–19.

[42] *See, e.g.*, American Home Assur. Co. v. National R.R. Passenger Corp., 908 So. 2d 459, 473 (Fla. 2005) (citing State v. Family Bank of Hallandale, 623 So. 2d 474, 478 (Fla. 1993)).

[43] *Id.*

[44] Thurston County v. City of Olympia, 86 P.3d 151, 154 (Wash. 2004).

considerable deference."[45] Some state supreme courts have adopted a doctrine of implied acquiescence to attorney general opinions,[46] similar to the approach to acquiescence adopted by the United States Supreme Court in separation of powers cases.[47] Under this doctrine, if the state attorney general issues an opinion and the legislature does not respond by revising the statute, the opinion is entitled to even more weight, since the legislature has implicitly ratified the attorney general's opinion.[48]

The legal effect of an opinion on the executive branch is an area where there is further divergence among the states. In many jurisdictions, courts have held that executive branch entities are not bound by attorney general opinions.[49] Some state courts have held to the contrary, however, concluding that the executive branch is bound by an attorney general opinion unless it is superseded by statute or court decision.[50] Even in states where attorney general opinions do not explicitly bind the executive branch, there are strong incentives for executive branch officials to follow them.[51] In some states, executive branch officials who act in accordance with an attorney general opinion are immunized against

---

[45] State v. Black, 897 S.W.2d 680, 683 (Tenn. 1995).

[46] *See* Five Corners Family Farmers v. State, 268 P.3d 892, 899 (Wash. 2011) (citing Bowles v. Dep't of Ret. Sys., 847 P.2d 440, 446 (Wash. 1993)).

[47] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring); *see also* Curtis A. Bradley & Trevor Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 418–20 (2012) (discussing Supreme Court decisions where interpretations historically used by the executive branch without opposition from Congress indicated an implied congressional authorization of such interpretations).

[48] *See, e.g.*, Five Corners Family Farmers, 268 P.3d at 899 ("[W]e presume that the legislature is aware of formal opinions issued by the attorney general and a failure to amend the statute in response to the formal opinion may, in appropriate circumstances, be treated as a form of legislative acquiescence in that interpretation."); Hilton v. North Dakota Educ. Ass'n., 655 N.W.2d 60, 65 (N.D. 2002) ("We may give additional weight to an attorney general's opinion implicitly approved by the Legislature).

[49] Heiser, *supra* note 3, at 24 n.49 (collecting cases where courts held that the recipient is bound by the attorney general opinion).

[50] *See, e.g.*, Branch Trucking Co. v. State, ex rel. Oklahoma Tax Com'n, 801 P.2d 686, 690 (Okla. 1990) ("An Attorney General's opinion is binding on state officials until a court of competent jurisdiction renders an inconsistent decision."); O'Shaughnessy v. Wolfe, 685 P.2d 361, 363 (Mont. 1984) ("An attorney general's opinion which conflicts with the legal opinion of the city attorney, county attorney, or state-employed attorney is controlling unless overruled by a District Court or the Supreme Court."); Committee to Recall Menendez from Off. of U.S. Sen. v. Wells, 995 A.2d 1109, 1112–13 (N.J. Super. Ct. App. Div. 2010) ("[T]he Attorney General . . . is charged by law with the obligation to . . . render legal advice . . . which is binding on the Executive Branch until such time as the courts address the issue."), *judgment rev'd on other grounds*, 7 A.3d 720 (N.J. 2010).

[51] Morris, *supra* note 10, at 142.

liability, either by statute[52] or state supreme court decision.[53] Even in states where there is no precedent or statute granting immunity to state officials who abide by attorney general opinions, it is common for executive branch officials to abide by them under the assumption that the state courts will grant them immunity based on their compliance.[54] Finally, strong norms encourage executive branch officials to comply with opinions, including the prospect that complying with an opinion "affords the recipient protection against political criticism," and that "most persons requesting opinions are motivated to abide the law" making them likely to "accept the advice of a well researched, thoroughly documented opinion."[55]

II. THE OPINION POWER AT WORK IN HIGH-STAKES PUBLIC LAW DEBATES: A CASE STUDY

The opinion power is most commonly used to address minor, low-profile issues related to the conduct of state and local government.[56] Recent representative examples include the Texas Attorney General's opinion on the authority of the Department of Agriculture to regulate supermarket scales,[57] and the Massachusetts Attorney General's opinion interpreting the state's open meeting law as applied to a town planning board.[58] There is no inherent reason why this has to be the case, however, and historically, state attorneys general used their opinion power to intervene in high-stakes, high-profile public law conflicts.[59] For instance, in the mid-20th century, many state attorneys general issued opinions on high-profile issues such as school integration and school prayer that interpreted or applied Supreme Court decisions on those issues.[60] In the contemporary era of state attorney general practice, attorneys general are taking on a more significant role as public law actors through aggressive use of

---

[52] *See, e.g.*, ALA. CODE § 36-15-19; MISS. CODE ANN. §7-5-25.

[53] State ex rel. Moltzner v. Mott, 97 P. 2d 950, 954 (Or. 1940).

[54] Morris, *supra* note 10, at 140; *see also* Heiser, *supra* note 3, at 21 n.36 (surveying the states where attorneys general believe there to be immunity for officials who abide by their opinions, but where there has not been an authoritative judicial ruling on the subject).

[55] *See* Morris, *supra* note 10, at 142.

[56] *Id.* at 145 (stating that the two thirds of opinion requests from 1960-1973 were about "(1) internal governmental mechanics... (2) fiscal problems... and (3) governmental powers").

[57] Tex. Att'y. Gen. Op. KP-0193 (2018), 2018 WL 2002933.

[58] 2018 Mass. Op. Att'y Gen. No. 51 (2018), 2018 WL 1790332.

[59] Morris, *supra* note 10, at 147.

[60] Henry J. Abraham & Robert R. Benedetti, *The State Attorney General: A Friend of the Court?*, 117 U. PA. L. REV. 795, 802–805 (1969) (school prayer); William N. Thompson, *Transmission or Resistance: Opinions of State Attorneys General and the Impact of the Supreme Court*, 9 VAL. U. L. REV. 55, 66–67 (1974) (school integration). *See also* Engel v. Vitale, 370 U.S. 421, 444 (1962) (school prayer); Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (school integration).

their authority.[61] This would seemingly also invite increasingly aggressive use of the opinion power, and there is some evidence that this expectation is being borne out in practice.[62] On issues ranging from the recognition of same-sex marriage[63] to the First Amendment right of professionals to discriminate on the basis of sexual orientation in selecting clients,[64] attorneys general from across the political spectrum are using the opinion power to intervene in high-profile public law debates and advance their policy preferences. This Part examines the text and context of one recent example: the New York Attorney General's 2016 opinion (the "Abortion Opinion") concluding that the state's statute prohibiting late-term abortion is unconstitutional as applied in certain circumstances.[65]

A. *The New York Attorney General's Abortion Opinion*

Unlike the vast majority of other states, New York legalized abortion via statute in 1970, prior to the Supreme Court's decision in *Roe v. Wade*.[66] Under New York's abortion statute, which has not been revised since its passage in 1970, abortion is legal for any reason when performed within the first twenty-four weeks of pregnancy, and legal after the twenty-fourth week of pregnancy when a physician reasonably believes it is necessary to preserve the life of the pregnant woman.[67] The New York abortion statute, then, is more restrictive than the federal constitutional abortion right, as announced in *Planned Parenthood v. Casey*.[68] As interpreted by the Supreme Court in *Casey*, the U.S. Constitution protects the right of a pregnant woman to choose abortion until viability, "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb,"[69] and after viability "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[70] This disjunction between the New York criminal law and the holding of *Casey* thus left doctors reluctant to perform abortions in circumstances constitutionally protected by *Casey*, but criminal under New York law: namely, when a woman's

---

[61] *See, e.g.*, Lemos & Quinn, *supra* note 1, at 1236–39 (describing increasingly aggressive, and partisan, litigation activity by state attorneys general, particularly in the United States Supreme Court).

[62] *See, e.g.*, 2004 N.Y. Op. Att'y. Gen. No. 1 (N.Y.A.G.), 2004 WL 551537.

[63] *Id.*

[64] Tex. Att'y. Gen. Op. KP-0123 (Tex.A.G.), 2016 WL 7433186.

[65] 2016 N.Y. Op. Att'y. Gen. No. F1 (N.Y.A.G.), 2016 WL 4708873 [hereinafter "NYAG Abortion Opinion"].

[66] *See generally* LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 127–162 (2012) (describing the events that led to the passage of New York's abortion legalization bill).

[67] N.Y. PENAL LAW § 125.05(3).

[68] Planned Parenthood v. Casey, 505 U.S. 833, 870 (1992) (plurality opinion).

[69] *Id.*

[70] *Id.* at 879 (quoting Roe v. Wade, 410 U.S. 113, 164–165 (1973)).

pregnancy had advanced beyond twenty-four weeks, but posed a threat to her health, or the fetus was not viable due to a pregnancy complication.[71]

For years, abortion rights advocates sought statutory reform of New York's abortion law to bring it in line with *Casey*.[72] Over the course of several legislative sessions, state legislators who supported abortion rights repeatedly introduced the Reproductive Health Act, a bill to codify *Casey*, but these efforts were unsuccessful.[73] These efforts came to a head in 2013 when, with the strong support of Governor Andrew Cuomo[74] and former Attorney General Eric Schneiderman,[75] a group of state legislators introduced the Women's Equality Act.[76] The Women's Equality Act was an omnibus bill that—among other provisions related to women's rights such as a ban on pay discrimination based on sex—codified *Casey* in New York law.[77] Republican legislators strongly opposed the abortion provisions in the Act,[78] and although the Women's Equality Act ultimately passed in 2015, the abortion-related provisions were removed before the bill passed the Republican-controlled New York Senate.[79] Despite the failure of the full Women's Equality Act, pro-choice legislators continued to reintroduce the standalone Reproductive Health Act in subsequent legislative sessions,[80] and proponents of abortion rights continued to advocate for it.[81]

---

[71] *See, e.g.*, Dr. Stephen Chasen, *New York Needs New Abortion Laws*, N.Y. DAILY NEWS (Mar. 15, 2013, 4:31 AM), http://beta.nydailynews.com/opinion/new-york-new-abortion-laws-article-1.1288959 ("Even though federal law requires that a doctor always be able to protect the health of a woman, New York law as written appears to prohibit that unless a woman's life is in danger. As a result, doctors often believe incorrectly that they cannot provide the care that a patient needs.").

[72] *See, e.g.*, Press Release, N.Y. Civil Liberties Union, NYCLU Applauds Introduction of Reproductive Health Act in Assembly (June 18, 2010), https://www.nyclu.org/en/press-releases/nyclu-applauds-introduction-reproductive-health-act-assembly.

[73] *See, e.g.*, S. 5829, 230th Leg., 2007-2008 Reg. Sess. (N.Y. 2007); S. 5808, 2009-2010 Reg. Sess. (N.Y. 2009).

[74] Jesse McKinley, *Women's Rights Plan May Hinge on Abortion Proposal*, N.Y. TIMES, June 5, 2013, at A23.

[75] Conor Skelding, *Schneiderman on New York as 'Model' Pro-Choice State*, POLITICO (Oct. 8, 2014, 5:41 AM), https://www.politico.com/states/new-york/albany/story/2014/10/schneiderman-on-new-york-as-model-pro-choice-state-000000.

[76] Assemb. 8070, 2013-2014 Leg., Reg. Sess. (N.Y. 2013).

[77] *Id.*

[78] McKinley, *supra* note 74.

[79] Laura Nahmias, *Quietly, Most of Women's Equality Act Becomes Law*, POLITICO (June 30, 2015, 5:35 AM), https://www.politico.com/states/new-york/albany/story/2015/06/quietly-most-of-womens-equality-act-becomes-law-023451.

[80] S. 4432, 2015-2016 Leg., Reg. Sess. (N.Y. 2015).

[81] *See, e.g.*, Katharine Bodde & Sebastian Krueger, N.Y. C.L. UNION, CRITICAL CONDITIONS: HOW NEW YORK'S UNCONSTITUTIONAL ABORTION LAW JEOPARDIZES WOMEN'S HEALTH (2017), https://www.nyclu.org/sites/default/files/field_documents/nyclu_critical

In this political context, in September 2016, the New York Attorney General issued its Abortion Opinion in response to a request by the State Comptroller on the question of "whether an abortion can be lawful in New York when performed after twenty-four weeks from the commencement of pregnancy and not necessary to save the life of the pregnant woman."[82] The opinion begins by presenting the conflict between the New York statute and *Casey*, noting that the "New York Penal Law appears to criminalize all abortions performed after 24 weeks . . . unless necessary to save the life of the pregnant woman, but some such abortions—where the fetus is not viable or the procedure is necessary to protect the woman's health—are [Constitutionally] protected. . . ."[83] The opinion goes on to resolve the identified conflict in favor of the broader abortion right adopted in *Casey*, concluding that "New York law cannot criminalize what the federal Constitution protects."[84] To comply with the "long-established principle that statutes should be read where possible to save their constitutionality," the New York statute must be read to include an exception to the ban on abortion after twenty-four weeks when the abortion is necessary to preserve the pregnant woman's health, or when the fetus is not viable after twenty-four weeks.[85]

While the opinion's conclusion is a straightforward resolution of a conflict between state and federal law in favor of federal law, the opinion's text suggests that the Attorney General understood the circumstances surrounding it to be anything but run-of-the-mill.[86] The New York Attorney General's contemporaneous "Shipping Opinion,"[87] issued just weeks later, drew an especially sharp contrast with the Abortion Opinion.[88] The Shipping Opinion responded to a request from the New York Board of Commissioners of Pilots regarding whether certain foreign vessels could be required to comply with requirements of New York navigation law while operating in New York waters, despite the existence of a potentially conflicting federal authority.[89] When read in conjunction with the Shipping Opinion, the text of the Abortion Opinion exhibits far more concern for both the perceived legitimacy of the opinion and for reaching a result in line with the Attorney General's policy preferences,

---

conditions_20170126.pdf (criticizing the legislature's failure to pass the Reproductive Health Act) [hereinafter "N.Y. C.L. UNION"].

[82] NYAG Abortion Opinion, *supra* note 65.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] 2016 N.Y. Op. Att'y. Gen. F2 (N.Y.A.G), 2016 WL 5820151 [hereinafter "NYAG Shipping Opinion"].

[88] *Compare* NYAG Abortion Opinion, *supra* note 65, *with* NYAG Shipping Opinion, *supra* note 87.

[89] NYAG Shipping Opinion, *supra* note 87.

suggesting that the Abortion Opinion was self-consciously an effort to influence a public law and policy debate.[90]

At a high level of generality, both the Abortion Opinion and the Shipping Opinion address similar issues related to conflicts between state and federal law, but they are significantly different in structure. The Abortion Opinion discusses at length why the State Comptroller may properly request an opinion in this context.[91] The opinion notes that—under the New York Constitution and state law—the Comptroller is responsible for auditing state payments to health care providers—including abortion providers—to ensure that they are conducting their practices in compliance with state law.[92] The Shipping Opinion does not include a similar jurisdictional discussion,[93] suggesting that the Attorney General was seeking to avert potential objections to its authority, and, by extension, the Abortion Opinion's legitimacy.

The Shipping Opinion begins by presenting a fairly open-ended question for Attorney General consideration.[94] In contrast, the question presented in the Abortion Opinion is significantly focused on the state-federal conflict at issues.[95] This divergence strongly suggests that, in requesting the opinion, the State Comptroller knew what question the Attorney General wanted to answer. This textual analysis implies that the Abortion Opinion was a means of implementing extant policy preferences shared by the Attorney General and the State Comptroller.

Indeed, the text and context of the Abortion Opinion implies potential coordination between the Attorney General and the requesting agency, wherein the Attorney General worked with the requesting agency to formulate its request in a manner that would allow the Attorney General to advance its policy preferences, or even sought out and encouraged a request from potential agency requestors. Similar coordination has been documented in the analogous federal executive branch interpretive agencies.[96] Informal coordination, of the type that

---

[90] *Id.*

[91] NYAG Abortion Opinion, *supra* note 65.

[92] *Id.* While the so-called "Hyde Amendment" prohibits federal funding for abortion services in most circumstances under the joint federal-state Medicaid program, New York is one of a handful of states that fund abortion under Medicaid out of state funds, thus implicating the comptroller's duties. *State Funding of Abortion Under Medicaid*, GUTTMACHER INSTITUTE (May 1, 2018), https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medica*id.*

[93] NYAG Shipping Opinion, *supra* note 87.

[94] *Id.* ("You have requested an opinion regarding whether certain ships from foreign countries must use a New York-licensed pilot to navigate when entering or departing New York waters.").

[95] NYAG Abortion Opinion, *supra* note 65 ("You recognize that federal constitutional law appears to allow abortions that the New York Penal Law prohibits and you believe that the federal Constitution is controlling.").

[96] *See, e.g.*, Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1710 n.87 (2011) (documenting coordination between the White House Counsel's Office and the

may have occurred here, thus opens additional doors for use of the opinion power to intervene on nearly any issue.[97] Indeed, it potentially transforms the opinion power from one constrained under state law[98] by a requirement analogous to the "case or controversy" requirement of Article III of the United States Constitution to a free-roaming power to issue persuasive advisory opinions on nearly any subject, bound only by the ability to identify a sympathetic authorized requester.

The Abortion Opinion and the Shipping Opinion diverge in the degree to which the Attorney General promoted them, as well. While the Shipping Opinion was released quietly, with no press release or press coverage, the Abortion Opinion was accompanied by a press release from the Attorney General's press office.[99] The press release included a quotation in the name of the Attorney General expressing strong support for abortion rights[100] and words of support—and hope for implementation of further legislative reform—from prominent abortion rights advocacy groups such as the New York Civil Liberties Union[101] and Planned Parenthood.[102] The Abortion Opinion also received press coverage.[103] The Abortion Opinion, then, was self-consciously a salvo in a public controversy, intended not only to influence the conduct of state officials in their official duties, but to take a side in a publicly contested policy debate, demonstrate to certain advocates that their voices had been heard, and influence other branches of government.

III. THE USES AND IMPLICATIONS OF THE OPINION POWER

The Abortion Opinion demonstrates how attorneys general can use their opinion power to advance their policy goals, even when their policy goals involve high-profile issues. The opinion power does this in three ways: by

---

Office of Legal Counsel of the Department of Justice regarding the latter's opinion-writing function).

[97] *See* discussion *supra* Part II.B. for possible concerns regarding the legitimacy of informal coordination.

[98] *See supra* Part I.A.

[99] Press Release, N.Y. St. Off. of the Att'y Gen., A.G. Schneiderman Issues Legal Opinion Clarifying That New York State's Criminal Law Does Not Interfere With Reproductive Health Rights Ensured By Roe v. Wade And Later Cases (Sept. 8, 2016), https://ag.ny.gov/press-release/ag-schneiderman-issues-legal-opinion-clarifying-new-york-states-criminal-law-does-not.

[100] *Id.* ("'No state law can restrict a woman's constitutional right to make her own reproductive health choices,' Attorney General Eric Schneiderman said.").

[101] *Id.* ("We applaud Attorney General Schneiderman's decision to clarify New York law.").

[102] *Id.* ("'[W]e know first-hand how important it is to secure the legal clarity necessary to eliminate confusion surrounding abortion care in New York State,' said Joan Malin, President and CEO, Planned Parenthood of New York City.").

[103] Vivian Yee, *Schneiderman Issues Opinion For Abortion In Late Term*, N.Y. TIMES, Sept. 8, 2016, at A22.

directly influencing primary conduct, by setting the agenda for other branches of government, and by allowing attorneys general to signal their policy commitments to better position themselves for elections to higher office. The Abortion Opinion is an example of this idea at work. The practice, however, raises some questions about institutional legitimacy, although those concerns are ultimately unavailing.

A. *The Value of Attorney General Opinions in Advancing the Attorney General's Policy Goals*

Attorney general opinions lack the same force of law as a statute or a judicial opinion since they usually do not bind entities in other parts of government.[104] Doctrines and norms of executive and judicial deference to attorney general opinions, however, appear to be powerful enough to inspire the same changes in primary conduct from the general public that would result from a change in the law.[105] The Abortion Opinion suggests this is the case even when the opinion involves a controversial, high-stakes public law issue such as the legality of certain abortion procedures, at least when the opinion is viewed as legitimate.[106] The confidentiality surrounding medical procedures, the controversy surrounding abortion, and the history of violence against abortion providers makes data about specific practices difficult to find.[107] Nevertheless, there is some evidence that physicians' practices—and the advice of their legal counsel—have changed as a result of the Abortion Opinion. One physician publicly declared that his practice, and the practice of his colleagues at a prominent hospital, would change in the wake of the opinion.[108] Thus, the Abortion Opinion suggests that, in certain circumstances, an attorney general opinion can achieve the desired policy result without going through the contested legislative or litigation process.

The Abortion Opinion also suggests that attorney general opinions have discursive effects beyond their inherent ability to effect policy change. One effect may be agenda-setting. It is well-documented in other contexts—for instance, in certiorari-stage litigation at the United States Supreme Court—that state attorney general intervention on an issue can signal its importance to other

---

[104] *See supra* Part I.D.

[105] *See supra* Part I.D.

[106] *See infra* Part II.B.

[107] *See, e.g.*, Joe Stumpe & Monica Davey, *Abortion Doctor Slain by Gunman in Kansas Church*, N.Y. TIMES, June 1, 2009, at A1 (describing the murder of a physician who specialized in the late abortion procedures that are the subject of the New York Attorney General's opinion).

[108] Yee, *supra* note 103 (quoting a maternal-fetal medicine specialist at New York-Presbyterian Hospital as stating "this opinion can prevent us from having to go through all those steps [such as waiting for a pregnant woman's medical condition to deteriorate to the point of jeopardizing her life] and just focus on the patient and do what's obviously right.").

government actors, raise its salience, and bring it to the forefront of the agenda.[109]

This agenda-setting effect is apparent from the Abortion Opinion. After the partial failure of the Women's Equality Act, the Abortion Opinion created legal uncertainty,[110] highlighted the issue of the conflict between New York law and *Casey*, and energized advocates.[111] This increased salience and uncertainty appears to have had an effect on elected officials. For instance, a renewed version of the Reproductive Health Act introduced in the state Senate during the legislative session immediately following the release of the Abortion Opinion had twenty-eight co-sponsors, up from twenty-one legislators who co-sponsored a prior version of the bill introduced prior to the release of the Abortion Opinion.[112] Governor Andrew Cuomo incorporated the Reproductive Health Act into his proposed budget as well.[113] To be sure, the increased activity surrounding the Reproductive Health Act in the wake of the Abortion Opinion does not imply that the increased activity was solely the result of the Abortion Opinion. The Abortion Opinion was roughly contemporaneous with the election of President Donald Trump, who has committed to nominating Supreme Court justices who will vote to overturn *Roe* and *Casey*, which may have in part created the impetus to codify *Casey* in state law.[114] Nevertheless, the flurry of activity in the wake of the Abortion Opinion is at least suggestive that it restored the issue to the agenda of state policymakers, and that the opinion power may thus be a valuable tool for attorneys general to set the agenda for other parts of state government.

For two reasons that were not relevant to the abortion opinion, there may be circumstances in which the agenda-setting power of opinions is even more important than they were here. The first is that the doctrine of implied acquiescence in attorney general interpretation explicitly adopted by some state courts—but not explicitly by the New York Court of Appeals—can create legislative urgency.[115] If the legislature does not act to modify or overrule the

---

[109] *See, e.g.*, Greg Goelzhauser & Nicole Vouvalis, *State Coordinating Institutions and Agenda Setting on the U.S. Supreme Court*, 41 AM. POL. RES. 819, 820 (2012) (documenting the success of state attorney general petitions for certiorari at the Supreme Court and arguing that it is an example of attorney general agenda-setting power).

[110] Yee, *supra* note 103, at A22 ("Advocates vowed to continue to press for legislative action, noting that Mr. Schneiderman's interpretation of the law, which came in response to a formal request for an opinion from the state comptroller's office, might not outlast his tenure as attorney general.").

[111] *See, e.g.*, Bodde & Krueger, *supra* note 81 (documenting a renewed campaign for passage of the Reproductive Health Act in the wake of the Abortion Opinion).

[112] *Compare* S. 2796, 2017-2018 Leg., Reg. Sess. (N.Y. 2017), *with* S. 4432, 2015-2016 Leg., Reg. Sess. (N.Y. 2015).

[113] GOV. ANDREW M. CUOMO & ROBERT F. MUJICA, JR., FY 2019 EXECUTIVE BUDGET 75 (2018), https://www.budget.ny.gov/pubs/archive/fy19/exec/fy19book/BriefingBook.pdf.

[114] *See, e.g.*, N.Y. C.L. UNION, *supra* note 111, at 5–6.

[115] *See supra* Part I.D.

attorney general's opinion, the implied acquiescence doctrine means that the state courts may adopt the opinion as binding.

The second is that the opinion power is something of a one-way ratchet. An attorney general opinion can readily conclude that a statute or policy is unconstitutional, but conventional notions of the interpretive power (whether judicial or executive) do not encompass the authority for the interpretive entity to replace the unconstitutional policy regime with a new one. Depending on the subject matter, attorney general opinions can be disruptive of a policy regime in a manner that requires immediate legislative action to avert a situation that no one wants. This occurred recently in Maryland after the legislature had repeatedly failed to act on the issue of bail reform when the attorney general issued an opinion concluding that the state's bail system was unconstitutional.[116] By contending that the state and federal constitutions required individualized, fact-based bail determinations, the opinion implied that a new statewide agency to conduct pretrial assessments would be necessary, but constraints on the interpretive power left the creation of that agency to the legislature.[117] The legislature took up the issue in the subsequent session, but was unable to pass a bill.[118] The rate of detention without bond subsequently increased, as judges with limited ability to conduct the required assessments erred on the side of caution in requiring pretrial detention.[119] While commentators have criticized the attorney general's decision to issue a disruptive opinion due to these undesirable results,[120] the Maryland experience is better understood as an example of the agenda-setting power of opinions in action. Through an issuanced opinion, the attorney general disrupted an extant policy regime and created one that almost no stakeholder found tolerable, which forced the issue onto the legislature's agenda. This pressure ultimately overcame legislative veto points and resulted in lasting change: in 2018, the Maryland legislature enacted a bill to fund a pretrial services program.[121]

Finally, ambitious attorneys general may have reason to use the opinion power beyond immediate benefits in the form of policy change and agenda-

---

[116] Michael Dresser and Justin Fenton, *Maryland Attorney General Brian Frosh Questions Legality of Bail Defendants Can't Afford*, BALT. SUN (Oct. 11, 2016), http://www.baltimoresun.com/news/maryland/crime/bs-md-bail-frosh-20161011-story.html.

[117] *See id.*

[118] CHRISTINE BLUMAUER ET AL, ADVANCING BAIL REFORM IN MARYLAND: PROGRESS AND POSSIBILITIES 5, http://wws.princeton.edu/sites/default/files/content/Advancing_Bail_Reform_In_Maryland_2018-Feb27_Digital.pdf.

[119] Ovetta Wiggins, *Jury Still out on Maryland's New Bail Rules*, WASH. POST (July 5, 2017), https://www.washingtonpost.com/local/md-politics/jury-still-out-on-marylands-new-bail-rules/2017/07/03/db57a084-5a8c-11e7-9b7d-14576dc0f39d_story.html?utm_term=.7565bb39090c.

[120] Walter Olson, *Maryland's Bail Reform Is a Warning for Would-Be Moralizers*, WALL ST. J. (Sept. 23, 2017), https://www.wsj.com/articles/marylands-bail-reform-is-a-warning-for-would-be-moralizers-1506119393?ns=prod/accounts-wsj.

[121] 2018 Md. Laws 771.

setting. The penchant for attorneys general to seek higher office is well known, such that it is common for political commentators to joke that "AG" stands for "Almost Governor."[122] Attorneys general aspiring for higher office benefit from methods of signaling their policy commitments to potential voters. Prior research has shown that attorneys general who ultimately seek higher office are more likely to join highly salient multi-state litigation than attorneys general who do not.[123] Opinions on high-profile public law issues provide means of signaling policy commitments, and thus may be valuable to the myriad attorneys general who intend to move up from the office.[124]

B. *Questions of Legitimacy*

While the opinion power is a valuable tool for advancing the attorney general's policy goals, using it for that purpose—as opposed to acting in a quasi-judicial role of finding the "best" or "correct answer"—raises questions of institutional legitimacy and credibility.[125] In the similar context of the federal executive branch's opinion power, exercised by the Department of Justice's Office of Legal Counsel, scholars have raised questions about the legitimacy and propriety of the use of the opinion power to advance the executive's policy goals.[126] Setting aside the issue of whether, in most cases, there is a "correct" or "best" interpretation of a constitutional or statutory provision distinguishable

---

[122] *See, e.g.*, Ben Wieder, *Big Money Comes to State Attorney-General Races*, THE ATLANTIC (May 8, 2014), https://www.theatlantic.com/politics/archive/2014/05/us-chamber-targets-dems-in-state-attorney-general-races/361874/ (documenting the "Almost Governor" adage).

[123] Colin Provost, *When is AG Short for Aspiring Governor? Ambition and Policy Making Dynamics in the Office of State Attorney General*, 40 PUBLIUS 597 (2010).

[124] *Cf.* Danny Hakim and Vivian Wang, *Reports of Abuse Spur Resignation of Schneiderman*, N.Y. TIMES, May 8, 2018, at A1 (reporting that the Abortion Opinion proved no political benefit to Eric Schneiderman, the attorney general who oversaw its issuance, because in 2018 he was forced to resign after allegations that he assaulted romantic partners).

[125] *See, e.g.*, John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 377 (1993) (discussing models of the attorney general opinion function, including a "court-centered" model that tries to anticipate how the judiciary will rule on a particular issue, an "independent authority" model that advances the executive's jurisprudential views, and a "situational" model that advances the executive's issue-specific interests without regard for a broader jurisprudential vision); Randolph Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1305–06 (2000) (describing the "advocate" and "judge" models of executive branch interpretation).

[126] *See, e.g.*, Moss, *supra* note 125, at 1309–16 (outlining arguments in favor of a "neutral expositor" model of the opinion function of the Office of Legal Counsel); *see also* Bruce Ackerman, *Lost inside the Beltway: A Reply to Professor Morrison*, 124 HARV. L. REV. F. 13 (2011) (criticizing the Office of Legal Counsel as overtly deferential to the executive's preferences). *But see* Trevor W. Morrison, *supra* note 96, at 1713–1717 (arguing that the Office of Legal Counsel generally acts as the idealized neutral expositor).

from an interpretation that is both plausibly correct and aligned with the executive's policy goals,[127] there are several reasons why concerns about the legitimacy of executive branch interpretation in the federal context are not present in the context of state attorneys general interpretation.

First, state attorneys general are far more democratically accountable for their use of the opinion power than their counterparts at the federal level, which reduces some of the legitimacy concerns raised at the federal level.[128] Unlike the U.S. Attorney General and Assistant Attorney General in charge of the Office of Legal Counsel, who are nominated by the president, most state attorneys general are directly elected.[129] While the federal executive branch officials who exercise the opinion power may only be held indirectly accountable via presidential elections or impeachment, state attorneys general may be held directly accountable for their use of the opinion power at the ballot box. This provides both a means, *ex post*, of reversing unpopular opinions (by electing a new attorney general) and serves as an *ex ante* constraint on use of the opinion power, as attorneys general know that their use of the opinion power will be considered by the voters.

Second, the divided nature of state executive branches serves as a constraint on use of the opinion power. While the federal executive branch is (largely) unitary, state executive branches are not.[130] In most states, certain senior executive branch officials, such as the attorney general and others, are elected separately from the governor, and have autonomous powers not subject to control by the governor.[131] This internal executive branch separation of powers

---

[127] *See, e.g.*, Moss, *supra* note 125, at 1321–1326 (discussing the issue of legal indeterminacy in the context of the opinion function of the Office of Legal Counsel). This ignores the issue of the propriety of executive branch interpretation that is clearly incorrect under existing law. The use of clearly incorrect interpretation by interpretive entities in the federal executive branch in order to serve the executive's policy goals has been the subject of a great deal of scholarship on executive branch interpretation. *See, e.g.*, Cornelia Pillard, *Unitariness and Myopia: The Executive Branch, Legal Process, and Torture*, 81 IND. L. J. 1297 (2006). This article takes no position on the propriety or legitimacy of the use of state attorney general opinions to advance policy goals when done in a manner that clearly contravenes existing law.

[128] *See, e.g.*, Moss, *supra* note 125, at 1327–30 (addressing the relevance of democratic accountability to the legitimacy of the Office of Legal Counsel).

[129] *See, e.g.*, Emily Myers, *Qualifications, Selection and Term*, *in* STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 17, 20–23 (Emily Myers & Lynne Ross, eds., Nat'l Ass'n of Att'ys Gen. 2d. ed. 2007).

[130] A discussion of the ideal of the unitary federal executive, its exceptions, and the degree to which it applies in practice is beyond the scope of this paper. *See* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006) (discussing issues of and proposing reforms to unitary executive).

[131] *See, e.g.*, William P. Marshall, *Break up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2453 (2006) (discussing the non-unitary executive at the state level).

present in state governments—which is not mirrored in the federal executive branch—is a constraining force for several reasons. The statutory requirement that opinions be sought by an appropriate requester constrains the attorney general: requesters, who themselves are democratically accountable, are likely to refrain from requesting opinions that reflect overly aggressive views of the law. The possibility of informal coordination only enhances the relevance of internal separation of powers.[132] An attorney general seeking to informally coordinate with a requester to give the attorney general clearance to produce an opinion on a subject of personal interest is unlikely to have much success if that opinion reflects an overly aggressive or incorrect interpretation of the law, since the credibility of both the attorney general and the requester are on the line.

Finally, the unique status of attorney general opinions as persuasive, but not binding authority gives attorneys general a strong incentive to consider concerns of institutional legitimacy and credibility when using the opinion power, even when used to advance their policy preferences. Attorneys general presumably want their opinions to be taken seriously by the courts and other executive branch actors, and issuing opinions that are too aggressive will ultimately defeat the purpose of issuing one in the first place, by undermining that goal. Indeed, this is evident in the Abortion Opinion: relative to other, contemporaneous opinions, the Abortion Opinion does far more to address potential objections related to jurisdiction and authority, suggesting that the drafters considered legitimacy and credibility concerns, even as they sought to advance a certain set of policy preferences.[133]

CONCLUSION

For state attorneys general who wish to influence public policy and high-profile public law disputes, the opinion power is an imperfect, but useful, adjunct to litigation and enforcement. As attorneys general become increasingly aggressive as public law actors, it is reasonable to expect more uses of the opinion power similar to the Abortion Opinion in the years to come.

---

[132] *See supra* Part II.

[133] *See infra* Part II.A.

APPENDIX A

Table 1. 50-State Survey of the Opinion Power

State	**Summary of the Opinion Power (Appropriate Requesters, Any Other Statutory Constraints).**	**Source of Authority**
Alabama	Executive branch, legislative branch (leaders only), local officials. Reliance protects against liability.	Ala. Code §§ 36-15-1; 36-15-19
Alaska	Executive branch, legislative branch	Alaska Stat. § 44.23.020(b)(5)
Arizona	Executive branch, legislative branch, certain local officials (county attorneys)	Ariz. Rev. Stat. Ann § 41-193(A)(7)
Arkansas	Executive branch, legislative branch (constitutionality of proposed legislation), local officials (district attorneys on questions related to criminal law or state finances)	Ark. Code. Ann § 25-16-706(a)
California	Executive branch (named officials), legislative branch (members), local officials (county counsel, DA, sheriff, and city prosecutors re: criminal law issues)	Cal. Gov't. Code § 12519
Colorado	Executive branch (named officials), legislative branch (institutions only, not members)	Colo. Rev. Stat §24-31-101(1)(b)
Connecticut	Executive branch (heads of departments), legislative branch (majority/minority leaders)	Conn. Gen. Stat. §3-125
Delaware	Executive branch	Del. Code Ann. tit. 29, § 2504(2)
Florida	Executive branch (shall issue for certain named officials, may issue for other officials), legislative branch (shall issue for majority/minority leadership, may issue for other members), local officials (may issue)	Fla. Stat. §16.01(3)
Georgia	Executive branch (governor only)	Ga. Code Ann § 45-15-3(1)
Hawaii	Executive branch (governor and department heads), legislative branch (institution or members)	Haw. Rev. Stat. § 28-3
Idaho	Executive branch (named officials), legislative branch (institutions only, not members)	Idaho Code § 67-1401(6)
Illinois	Executive branches (governor and other state officers on questions related to duties), legislative branch (houses and committees)	15 Ill. Comp. Stat. 205/4

State	Summary of the Opinion Power (Appropriate Requesters, Any Other Statutory Constraints).	Source of Authority
Indiana	Governor (any topic), other executive branch officials (related to duties), legislature (houses and legislative agencies on constitutionality of proposed/existing law)	Ind. Code § 4-6-2-5
Iowa	Executive branch (any official), legislative branch (institutions only, not members)	Iowa Code § 13.2(e)
Kansas	Executive branch (named officials), legislative branch (institutions only, not members)	Kan. Stat. Ann. § 75-704
Kentucky	Executive branch (questions of interest by any "state department, agency, board, or commission"), legislative branch (houses or individuals), local governments (questions of law related to local governments), anyone (may issue when "public interest" warrants)	Ky. Rev. Stat. Ann § 15.025
Louisiana	Executive branch (named officials and state agencies), certain other entities (interpretation of public contracting law only)	La. Stat. Ann. § 49.251
Maine	Executive branch (governor, department heads, agencies), legislative branch (houses and members)	Me. Stat. tit. 5, § 195
Maryland	Executive branch (named officials), legislative branch (houses), local officials (state's attorneys)	MD. Const. Art. 5, § 3(a)(4)
Massachusetts	Executive branch (governor and council), legislative branch (houses)	Mass. Gen. Laws ch. 12, § 9
Michigan	Executive branch (all state officers), legislative branch (houses)	Mich. Comp. Laws. § 14.32
Minnesota	Executive branch, legislative branch (houses, committees), local officials (on questions of public importance), education commissioner (issues related to schools)	Minn. Stat. §§ 8.05, 8.07
Mississippi	Executive branch (any state officer or agency), legislature (houses or committees), local officials (lots, enumerated). Explicit prohibition of liability for an official acting in accordance with an opinion.	Miss. Code Ann. § 7-5-25

State	Summary of the Opinion Power (Appropriate Requesters, Any Other Statutory Constraints).	Source of Authority
Missouri	Executive branch (heads of departments), legislative branch (houses), local officials (district attorneys)	Mo. Rev. Stat. § 27.040
Montana	Executive branch (all state officers), legislature (houses), local officials (county attorneys, city attorneys, and county commissioners). AG opinions may overrule opinions of county attorneys/city attorneys/attorneys working for state agencies.	Mont. Code Ann §2-15-501(7)
Nebraska	Executive branch (named officials and heads of agencies), legislature (unclear whether the institution or houses). Also has unique power to file declaratory judgment actions to test the validity of legislation after issuing opinions declaring pieces of legislation unconstitutional.	Neb. Rev. Stat. §§ 84-205(4), 84-215
Nevada	Executive branch (named officials and agency heads), local officials (district and city attorneys)	Nev. Rev. Stat. § 228.150
New Hampshire	Executive branch (any state officer or agency), legislative branch (houses)	N.H. Rev. Stat. Ann §§ 7.7–7.8
New Jersey	No written opinion provision; authorized to give "advice" to governor, legislators, and agencies	N.J. Stat. Ann. § 52:17A-4(b)
New Mexico	Executive branch ("any state official"), legislature (houses, "any state official"), local officials (district attorneys)	N.M. Stat. Ann § 8-5-2(D)
New York	No written opinion provision; "have charge and control of all the legal business of the departments and bureaus of the state". In practice, formal written opinions to state officials and informal opinions to local officials.	N.Y. Exec. Law § 63(1)
North Carolina	Executive branch (any state officer), legislative branch (houses)	N.C. Gen. Stat. § 114-2(5)
North Dakota	Executive branch (any state officer), legislative branch (houses). Explicit statutory statement that an AG opinion declaring certain other statutory provisions unconstitutional (ND's term limit law) is not binding.	N.D. Cent. Code §§ 54-12-01(6), 54-12-01(8), 54-12-01.4

State	Summary of the Opinion Power (Appropriate Requesters, Any Other Statutory Constraints).	Source of Authority
Ohio	Executive branch (officers, boards, commissions, state prison wardens, etc), legislative branch (houses)	Ohio Rev. Code Ann §§ 109.12, 109.13
Oklahoma	Executive branch (any state officer), legislature (houses), local officials (district attorneys)	Okla. Stat. tit. 74, §§ 18b(4)–(5)
Oregon	Executive branch (any officer or agency), legislative branch (any member)	Or. Rev. Stat. § 180.060(2)
Pennsylvania	Executive branch (governor and agency heads)	71 Pa. Cons. Stat. § 732-204(a)(1
Rhode Island	"Advice" to state officers, state agencies, legislators	42 R.I. Gen. Laws § 42-9-6
South Carolina	"Advice" to governor, certain other enumerated state officials, legislative houses	S.C. Code Ann. §§ 2-17-90, 2-17-100, 2-17-110
South Dakota	Executive branch (certain enumerated officials); legislature (houses); local officials (state's attorneys/county auditors)	S.D. Codified Laws §§ 1-11-1(5)–(6)
Tennessee	Executive branch (certain enumerated officials and "other state officials"), legislative branch (all members)	Tenn. Code Ann. § 8-6-109(b)(6)
Texas	Executive branch (long list of enumerated officials), legislature (committees), local officials (auditors, certain authority chairmen)	Tex. Gov't Code Ann. § 402.042
Utah	Executive branch (all state officers), legislature (houses), local officials (county attorneys, district attorneys)	Utah Code Ann. § 67-5-1(7)
Vermont	Executive branch (elected and appointed officers), legislative branch (all legislators)	Vt. Stat. Ann. tit. 3, §§ 158-159
Virginia	Executive branch (governor and heads of agencies), legislature (all members), judiciary (judges may request), local officials (district attorneys, clerks, sheriffs, treasurers). Limited to opinions on exercise of duties except when requested by governor or legislator	Va. Code. Ann. § 2.2-505

State	**Summary of the Opinion Power (Appropriate Requesters, Any Other Statutory Constraints).**	**Source of Authority**
Washington	Executive branch (governor and other officers), legislative branch (houses, committees, individual legislators). Except when requested by legislative houses or committees, limited to opinions related to duties	Wash. Rev. Code §§ 43.10.030(5), 43.10.030(7)
West Virginia	Executive branch (long list of enumerated officials), legislature (leaders of each house)	W.Va. Code. § 5-3-1
Wisconsin	Executive branch (department heads); legislature (houses, certain committees)	Wis. Stat. § 165.015(1)
Wyoming	Executive branch (elected and appointed officers), legislative branch (houses)	Wyo. Stat. Ann. § 9-1-603(vi)