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COMMENTS

THE STATE ATTORNEY GENERAL'S DUTY TO ADVISE AS A SOURCE OF LAW

INTRODUCTION

*The work of writing opinions for the various state officials is probably the most important, though less appreciated from the standpoint of the work involved, than any of the duties of the Attorney General's office. Every opinion is the product of considerable research and is often as extensive in research as the preparation of a brief for argument in the Supreme Court.*¹

—William C. Marland,
Attorney General of West Virginia, 1949–1952

Every state of the United States employs an attorney general, who fills the role of chief legal officer for the state.² Unlike the federal attorney general—who is appointed by, and serves at the pleasure of, the President—the state attorney general is largely an independently elected position, and the occupant of the office is not beholden to the will of the governor.³ This independence, coupled with the multitude of powers of the office, makes it one of the most powerful political offices in America.⁴

While the powers and duties of the office vary slightly from state to state,⁵ all state attorneys general share a common duty to issue

1. 50 Op. W. Va. Att'y Gen. 185, 189 (1963).

2. See Arlen C. Christenson, *The State Attorney General*, 1970 WIS. L. REV. 298, 298.

3. See William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448 (2006).

4. See generally Mark R. Herring, *Foreword: The People's Lawyer: The Role of Attorney General in the Twenty-First Century*, 53 U. RICH. L. REV. 1, 1 (2018) (discussing the duties and undertakings of the Virginia Attorney General).

5. Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL'Y 1, 3 (1993).

written advisory opinions on matters of law to state officials who request them.⁶

This duty to issue advisory opinions—also known as “the duty to advise”—is among the state attorney general’s most important obligations.⁷ State officials—most of whom are not lawyers—seek the guidance of the state attorney general in much the same way that a traditional client would seek out an attorney to assist with a legal matter.⁸ But unlike a traditional attorney-client interaction, this assistance has far greater import because it functions as a source of state law by altering the legal rights, duties, and relations of all persons affected by the opinion—not just the official who requests it.

The opinions of the state attorneys general function as a source of law in different ways. The reliance of state administrators on the advice provided in these opinions has a direct effect on the administration of state government,⁹ and if the issue is a novel one—not having yet been addressed by the courts—the attorney general’s opinion “may stand as controlling precedent, and ‘at least until attacked, [it is an] expression[] of the law.’”¹⁰ Thus, while the attorney general’s duty to advise is “legal in essence” like a traditional attorney-client interaction, it is also “administrative in its character, and quasi-judicial in effect.”¹¹

Despite the broad importance of the function, scholarship examining the state attorney general’s duty to advise is remarkably thin.¹² This could be due to the fact that state law has generally

6. Henry J. Abraham & Robert R. Benedetti, *The State Attorney General: A Friend of the Court?*, 117 U. PA. L. REV. 795, 799–800 (1969).

7. See Thomas R. Morris, *State Attorneys General as Interpreters of State Constitutions*, 17 PUBLIUS 133, 151 (1987).

8. See Emily Myers & Andy Bennett, *Opinions*, in STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 74, 74–75 (Emily Myers ed., 3d ed. 2013).

9. See James G. Dickson, Jr., *Vital Crucible of the Law: Politics and Procedures of the Advisory Opinion Function of the Texas Attorney General*, 9 HOUS. L. REV. 495, 495–96 (1972).

10. Robert Toepfer, *Some Legal Aspects of the Duty of the Attorney General to Advise*, 19 U. CIN. L. REV. 201, 202 (1950).

11. Dea Ashley Akers, *The Advisory Opinion Function of the Attorney General*, 38 KY. L.J. 561, 571 (1950).

12. See Kevin L. Long, *Distinctive Competence: The Role of Virginia Attorney General Opinions in State and Local Governance* 23 (Oct. 2004) (unpublished Ph.D. dissertation, Virginia Polytechnic Institute and State University) (on file with author).

received less acknowledgment and importance in modern legal education and academia.¹³ Additionally, when looking for sources of law, legal academic discourse typically places a heavy emphasis on statutes and judge-made law, at the cost of examining all other sources of law.¹⁴

This Comment seeks to help fill that gap by considering how a state attorney general's duty to advise functions as a source of law, by proposing six general models of how the opinions of a state attorney general can alter the legal rights, duties, and relations of persons.¹⁵ In doing so, this Comment still seeks to acknowledge and respect the fact that each state's individual constitution and traditions will create a unique role for its attorney general's duty to advise in shaping state law.¹⁶

13. See JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 194–97 (2018).

14. See DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW, at ix–x (2010) (“One peculiarity of the modern law school curriculum is that we do not give much reflection now to the sources of law in contemporary legal culture, and law students reflexively assume that all law must be derived from a legislature passing statutes or judges deciding cases.”); Abraham & Benedetti, *supra* note 6, at 796 (“Americans are thought to stand in awe of the law as explicated by any court, and most particularly by the Supreme Court.”).

15. The *federal* attorney general's duty to advise is outside the scope of this Comment. Unlike the state executive branches where the attorney general is largely an independent elected official, the federal attorney general reports directly to the President and is accountable to him. See Matheson, *supra* note 5, at 5. The state power structure has a direct impact on how state attorneys general carry out their duty to advise, in which they can issue opinions that are at odds with positions taken by state governors. See, e.g., Michael Signer, *Constitutional Crisis in the Commonwealth: Resolving the Conflict Between Governors and Attorneys General*, 41 U. RICH. L. REV. 43, 43–44 (2006).

16. Constitutional issues such as separation of powers and what constitutes “legislative action” will be explored at length in this Comment. When doing so, this Comment will refer mainly to ideas expounded on by the Supreme Court of the United States. This is not done to ignore the rich—and often neglected—history and discourse of state constitutional law. See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 1 (1998) (“Legal scholars announce constitutional theories that actually encompass only the federal Constitution—the rough equivalent of propounding a literary theory that pertains to a single novel.”). Rather, this Comment uses statements from the Supreme Court of the United States to illustrate *generally accepted* constitutional concepts—like separation of powers and exclusive vesting of legislative power in the legislative branch—that are present in the Federal Constitution, as well as in state constitutions. See *infra* Part III. In using the decisions of the Supreme Court in an illustrative fashion, this Comment is *not* seeking to promote the idea that state constitutions *should* be read to be “co-extensive” with similarly worded provisions in the Federal Constitution. Under the “co-extension” jurisprudence, state courts look to the rulings of the Supreme Court of the United States as the interpretive authority for similarly worded provisions in state constitutions. See Stephen R. McCullough, *A Vanishing Virginia Constitution?*, 46 U. RICH. L. REV. 347, 349–50 (2011). That debate is an extremely interesting one, but one that is beyond the scope of this Comment. For further reading, see Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323 (2011);

Part I of this Comment will explore the history of the attorney general's duty to advise, from medieval England through twentieth-century America. Part II will discuss what the modern American state attorney general's duty to advise looks like today, and how it may be affected by the increasingly political nature of the office. Part III will argue that a "source of law" is something that alters the legal rights, duties, and relations of persons and will explore generally how the opinions of state attorneys general fit into that framework. Finally, Part IV will propose six distinct models of how state attorney general opinions alter the legal rights, duties, and relations of persons and thus function as a source of law. In doing so, this Comment hopes to bring to light the role that these opinions play in American state law—a topic that has been far too neglected in legal academic discourse.

I. THE HISTORY OF THE ATTORNEY GENERAL'S DUTY TO ADVISE

For seven hundred years, attorneys general have been advising government officials in legal matters.¹⁷ The earliest accounts of a lawyer specifically charged with representing a government date back to medieval England in 1254, when Laurence de Brok received the appointment to be the "King's Attorney" and represent the crown.¹⁸ The title of "attorney general" for a lawyer representing the government began to be used in official documentation in 1285.¹⁹

Throughout the medieval era, the powers and duties of the attorney general grew.²⁰ By the sixteenth century, the House of

Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

17. Emily Myers, *Origin and Development of the Office*, in STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES, *supra* note 8, at 1, 1.

18. Rita W. Cooley, *Predecessors of the Federal Attorney-General: The Attorney-General in England and the American Colonies*, 2 AM. J. LEGAL HIST. 304, 304–05 (1958).

19. Anton-Hermann Chroust, *The Legal Profession During the Middle Ages: The Emergence of the English Lawyer Prior to 1400*, 31 NOTRE DAME LAW. 537, 596 (1956). *But see* Hugh H.L. Bellot, *The Origin of the Attorney-General*, 25 L. Q. REV. 400, 403 (1909) (stating the date of the first use of the term "attorney general" as 1398).

20. *See* Cooley, *supra* note 18, at 307.

Lords was summoning the English attorney general by writs of attendance to consult him on points of law.²¹ These writs of attendance were the genesis of the modern American state attorney general's duty to advise.²²

When England established colonies in North America in the seventeenth century, each colony set up their own office of attorney general.²³ Richard Lee received the earliest known appointment to an office of attorney general in North America when he was appointed as Attorney General of the Colony of Virginia in 1643.²⁴ The duties of the colonial attorneys general included prosecuting criminals, adjudicating disputes regarding shipping, and preparing proclamations of the governor.²⁵

Additionally, just as they did in England, colonial attorneys general gave legal advice and advised colonial government officials.²⁶ Part of this duty included explaining instructions from the English government regarding colonial affairs.²⁷

Throughout the course of the seventeenth century, it was the King of England who would appoint a colony's attorney general.²⁸ Due to this, the colonial attorneys general were, at first, seen as delegates of the English government.²⁹ As discontent grew with the government of England, conflicts between the colonial attorneys general and the colonial governors also grew, and the advice of the attorneys general was ignored.³⁰ Thus, in the eighteenth century, it became the governor of the colony who appointed and commissioned the colony's attorney general.³¹

21. See W.S. Holdsworth, *The Early History of the Attorney and Solicitor General*, 13 ILL. L. REV. 602, 602, 606–07 (1919).

22. See Cooley, *supra* note 18, at 309, 311–12.

23. Sewall Key, *The Legal Work of the Federal Government*, 25 VA. L. REV. 165, 169 (1938).

24. Lewis W. Morse, *Historical Outline and Bibliography of Attorneys General Reports and Opinions from Their Beginning Through 1936*, 30 L. LIBR. J. 39, 226 (1937); Myers, *supra* note 17, at 4.

25. PERCY SCOTT FLIPPIN, *THE ROYAL GOVERNMENT IN VIRGINIA 1624–1775*, at 322–23 (1966).

26. *Id.* at 322.

27. *Id.*

28. *Id.* at 321.

29. See Key, *supra* note 23, at 169.

30. See *id.* at 171–73; see also Cooley, *supra* note 18, at 310–11.

31. See FLIPPIN, *supra* note 25, at 321.

After the Revolutionary War, the new states reestablished the office of attorney general in their new state governments and clothed the office with additional constitutional and statutory duties and powers to go along with the office's existing common law duties and powers—which included the duty to advise governmental officials.³²

At the federal level, under the Articles of Confederation, the Continental Congress submitted a recommendation in 1781 that an attorney general be appointed—one of the powers of the proposed office being “to give his advice on all such matters as shall be referred to him by Congress.”³³ This proposal was found to be unnecessary and instead a “procurator” in each state was appointed.³⁴ However, under the Constitution of 1789, one of the first actions of the First Congress of the new federal government was to establish the office of a Federal Attorney General of the United States,³⁵ the first holder of which was Edmund Randolph.³⁶ Though not spelled out explicitly in statute at the time, the federal attorney general was also given common law powers—including the duty to advise federal officials.³⁷

When the southern states seceded to form the Confederate States of America, they set up an office of the Confederate Attorney General, which was first occupied by Judah P. Benjamin.³⁸ The Confederate Attorney General's duty to advise took on even greater import for the Confederate government because the Confederacy lacked a centralized judicial body.³⁹ While the Constitution of the Confederate States called for the establishment of a Supreme Court with power like that of the Supreme Court of the United

32. See Myers, *supra* note 17, at 1; see also Key, *supra* note 23, at 174 n.34 (citing state supreme court decisions ruling that the state attorneys general had common law powers that were not enumerated in state constitutions or statutes).

33. Cooley, *supra* note 18, at 312 n.28.

34. *Id.*

35. See Key, *supra* note 23, at 173.

36. *Id.* at 175.

37. See *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 280 (1888) (holding that the federal attorney general had common law powers that were not enumerated in the Federal Constitution or statutes). Today, it is spelled out in statute that the federal attorney general must give opinions to heads of executive departments. 28 U.S.C. § 512.

38. WILLIAM M. ROBINSON, JR., *JUSTICE IN GREY: A HISTORY OF THE JUDICIAL SYSTEM OF THE CONFEDERATE STATES OF AMERICA* 33 (Russell & Russell 1968) (1941).

39. Harold L. Sebring, *Foreword* to *THE OPINIONS OF THE CONFEDERATE ATTORNEYS GENERAL 1861–1865*, at v (Rembert W. Patrick ed., 1950).

States, the Confederate Congress refused to pass the legislation that would create such a body.⁴⁰ Thus, the opinions of the Confederate Attorney General were not just *a* legal authority to be considered regarding Confederate laws, they were *the only* existing legal authority entitled to consideration on Confederate laws.⁴¹

During the time of westward expansion, the federal government provided an attorney for new territories in their organizing laws.⁴² Though the office was occasionally abolished within these territories, this was only ever done for short periods of time.⁴³ When these territories became states, they themselves set the office up in their new state governments.⁴⁴

An attorney general's duty as the chief legal officer of the government to advise government officials can be traced back through the common law to medieval England. Though it has taken different forms through American history, an attorney general's duty to advise has always been present where the office has existed. That history informs the function and purpose of the duty to advise today.

II. THE STATE ATTORNEY GENERAL'S DUTY TO ADVISE TODAY

Today, a state attorney general's duty to advise looks largely the same as it has throughout American history.⁴⁵ While it is one of the common law powers of the office of the attorney general, most states explicitly list the duty in their state constitutions or statutes.⁴⁶

40. *Id.*

41. *Id.*

42. *See, e.g.*, Act of Mar. 2, 1861, ch. 83, §§ 10–11, 12 Stat. 209, 213 (providing for an attorney for the newly organized territory of Nevada, to be appointed by the President and serve a four-year term).

43. *See, e.g.*, Morse, *supra* note 24, at 45 (stating that, as a territory, Arizona had two periods of time without an attorney general).

44. *See, e.g., id.*

45. *See* Peter E. Heiser, Jr., *The Opinion Writing Function of Attorneys General*, 18 IDAHO L. REV. 9, 9 (1982).

46. *See, e.g.*, TEX. CONST. art. IV, § 22; ALA. CODE § 36-15-19; WASH. REV. CODE § 43.10.030(5), (7).

State attorneys general can be called upon to answer nearly any question of law that a valid requestor is curious about.⁴⁷ Different states have different rules for who can request opinions, but the general rule is that state legislators and executive officials may request opinions about any legal questions that they may have, and local officials can request opinions on a more limited and enumerated range of topics.⁴⁸ All state attorneys general go about the process of issuing opinions in different ways,⁴⁹ but there are many overall common characteristics.⁵⁰

The opinions usually take three different forms.⁵¹ First, the attorney general may give his or her advice orally through personal phone calls or conversations, which are not publicly available.⁵² Second, the attorney general may issue an “informal opinion,” which is a letter sent to the requesting official, but is also not available to the general public.⁵³ Oftentimes, these are delegated to an assistant attorney general with specialized knowledge on the subject and are not sent bearing the attorney general’s signature.⁵⁴ Third, and most importantly, there are “official opinions,” which are sent bearing the attorney general’s signature, are available to the public, and—in many states—are published in a periodic report of the office of the attorney general.⁵⁵ It is this third type of opinion on which this Comment is mainly focused.

State attorneys general will decline to answer certain requests in certain situations. The most common basis for denying an opinion request is that it will affect ongoing litigation.⁵⁶ A state attorney general will also deny requests relating to matters that are

47. See, e.g., 1989–1990 Op. Mich. Att’y Gen. 51, 52 (1989) (answering a question relating to bear hunting licenses by stating that “any person who pursues a bear with dogs must have a valid bear hunting license in his or her possession”).

48. Myers & Bennett, *supra* note 8, at 74–75, 75 n.4.

49. See generally Dickson, *supra* note 9, at 495 (giving a detailed explanation of the office of the Texas Attorney General’s procedure for preparing opinions).

50. See Heiser, *supra* note 45, at 9.

51. See Robert L. Larson, *The Importance and Value of Attorney General Opinions*, 41 IOWA L. REV. 351, 353 (1956) (describing the opinions issued by the Iowa Attorney General).

52. *Id.* at 353–54.

53. See Dickson, *supra* note 9, at 499–500.

54. *Id.*

55. *Id.* at 500.

56. See, e.g., No. 92-204, Op. Ark. Att’y Gen. (1992).

best reserved for another governmental entity,⁵⁷ and will usually refuse to answer any question that is not a matter of law.⁵⁸

While the state attorney general's duty to advise has remained largely the same throughout the course of American history, the office of the state attorney general has undergone significant changes recently. The most striking of these has been that the office has become increasingly political.⁵⁹ In most states, the attorney general is independently elected from the governor, and operates independently as well.⁶⁰ Nowadays, state attorneys general are increasingly seen as using their power to advance their own political careers—not as simply carrying out their duties as the chief legal officer for the state.⁶¹ This increased politicization has a direct effect on how state attorneys general fulfill their duty to advise state officials, by issuing opinions that are sometimes written to further their own political and policy preferences.⁶²

The mere fact that state attorneys general use the duty to advance their policy preferences is evidence of the power that their opinions hold to influence and shape state law. The remainder of this Comment will explore how state attorney general opinions function as a source of law.

III. HOW STATE ATTORNEY GENERAL OPINIONS FUNCTION AS A SOURCE OF LAW

When it comes to the question “What is law?” the legal theorist H.L.A. Hart has said that “[f]ew questions concerning human soci-

57. See, e.g., 2013 Op. Va. Att'y Gen. 267, 268 (2013).

58. See, e.g., 1958 Op. Ind. Att'y Gen. 127, 128 (1958).

59. See Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2150–51 (2015).

60. *Id.* at 2124–25. This is in contrast to the federal attorney general, who serves subordinate to the President as part of a unified executive. See Matheson, *supra* note 5, at 5.

61. See Devins & Prakash, *supra* note 59, at 2144 (“Attorneys general frequently seek higher office, so much so that the ‘AG’ label has been described as shorthand for ‘Aspiring Governor.’”).

62. *Id.* at 2145 (“Elected attorneys general sometimes use their opinions to assert and advance their legal policy preferences.”). An illustrative example of this was outgoing Republican Virginia Attorney General Kenneth T. Cuccinelli II, who—in his final days in office—issued two opinions regarding benefits that the Commonwealth and employers were required to afford same-sex couples. See 2014 Op. Va. Att'y Gen. 31, 31–32 (2014); 2014 Op. Va. Att'y Gen. 59, 60 (2014).

ety have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways.”⁶³ Indeed, the debate over defining “law” dates back to Ancient Greece, when natural law theorists like Aristotle, Plato, and Cicero posited that law is the embodiment of universal principles that emanate from a higher power.⁶⁴

However, though the endeavor to define “law” has been ongoing since Ancient Greece, no universally satisfactory definition has ever been proposed and accepted.⁶⁵ The never-ending nature of this quest has driven some of the most eminent legal philosophers—like the aforementioned H.L.A. Hart—to reject it altogether.⁶⁶ Other legal theorists, like Justice Oliver Wendell Holmes, Jr., have come to a similar conclusion, stating that “[t]he truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other.”⁶⁷

It is no surprise, then, that there is a similarly unresolved and ongoing debate about where law comes from. Legal realists like Holmes believed that law is the product of traditions and experience accumulated over the course of a nation’s development.⁶⁸ Others have argued that sources of law are all around us, such as social norms⁶⁹ and customs.⁷⁰

The complexity of defining what law is and where it comes from has led American courts to largely stay out of it, instead preferring to be content with the idea that the United States Constitution is the embodiment of the “supreme Law of the Land.”⁷¹ The Supreme Court did, however, find itself confronted with the related question of defining what “legislative action” is in the case of *Immigration*

63. H.L.A. HART, *THE CONCEPT OF LAW* 1 (3d. ed. 2012).

64. See M.D.A. FREEMAN, *LLOYD’S INTRODUCTION TO JURISPRUDENCE* 97 (8th ed. 2008); HOWARD P. KAINZ, *NATURAL LAW: AN INTRODUCTION AND RE-EXAMINATION* 3–11 (2004).

65. FREEMAN, *supra* note 64, at 33.

66. See HART, *supra* note 63, at 16 (“[I]t seems clear . . . that nothing concise enough to be recognized as a definition could provide a satisfactory answer to” the question of “What is law?”).

67. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 36 (1881).

68. *Id.* at 1.

69. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 280 (1991).

70. See BEDERMAN, *supra* note 14, at 168.

71. *E.g.*, *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (quoting U.S. CONST. art. VI).

& *Naturalization Service v. Chadha*.⁷² In that case, the Court defined “legislative action” as “action that had the purpose and effect of altering the legal rights, duties, and relations of persons.”⁷³ This definition—coupled with a recent, seemingly simple, pronouncement of the Court that “the legislative power is the power to make law”⁷⁴—gives us a statement that “the power to make law is the power to take action that alters the legal rights, duties, and relations of persons.” It is within this framework that this Comment will consider state attorney general opinions as a source of law.

By their own admission, opinions of the state attorney general do not create new law,⁷⁵ nor are their interpretations of law binding upon the judicial branch of the state.⁷⁶ The fact that the determinations of an officer who generally resides in the executive branch are not binding on the judicial branch is consistent with the separation of powers principles of state constitutions.⁷⁷ These separation of powers principles existed in state constitutions even before the Federal Constitution was drafted.⁷⁸

The fact that the opinions neither create new law nor represent ultimate statements of “what the law is,” however, does not mean that they cannot alter the legal rights, duties, and relations of persons and thus function as a source of law.

Though on its face this claim is an apparent contradiction, one must consider that the separation of powers is not absolute; rather, there is a limited degree of interdependence among the operation

72. 462 U.S. 919 (1983).

73. *Id.* at 952.

74. *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018).

75. *See, e.g.*, 1994 Op. S.C. Att’y Gen. 122, 123 (1994) (“This Office [of the South Carolina Attorney General] cannot create law which does not exist.”).

76. *See, e.g.*, 1996 Op. Va. Att’y Gen. 194, 195 n.1 (1996) (“Opinions of the Attorney General, while entitled to due consideration, are not binding on courts and do not operate as a substitute for a judicial determination.”); *see also* *Morris*, *supra* note 7, at 140 (“State courts have uniformly held that they are not bound by an attorney general’s opinion.”).

77. *See* *Heiser*, *supra* note 45, at 16. Under these separation of powers principles, it has long been held that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). This statement has oft been quoted approvingly by state supreme courts interpreting their own state constitutions. *See, e.g.*, *Howell v. McAuliffe*, 788 S.E.2d 706, 724 (Va. 2016); *League of Educ. Voters v. State*, 295 P.3d 743, 753 (Wash. 2013); *Bourgeois v. A.P. Green Indus.*, 783 So. 2d 1251, 1260 (La. 2001).

78. SUTTON, *supra* note 13, at 11 (quoting Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 911 (1993)).

of the three branches.⁷⁹ In his famous concurring opinion in *The Steel Seizure Case*, Justice Jackson stated that “[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”⁸⁰ A government actor does not violate separation of powers principles unless they “usurp” the power of another branch by adopting such power fully as their own.⁸¹

State attorney general opinions illustrate this point extremely effectively. Though they do not come from the legislative branch, they can still stand as statements of legislative intent.⁸² Though they are not judicial pronouncements, they can still stand as “expressions of the law.”⁸³

The criticism of this theory of state attorney general opinions as a source of law would stem from the fact that, in most states, the requestor is not bound to follow them,⁸⁴ and in all states, the judicial branch is not bound to adopt their reasoning.⁸⁵ This criticism would fail for three reasons.

First, the Supreme Court of the United States has—since 1858—consistently and explicitly acknowledged that the opinions of a state’s attorney general bear serious consideration when deciding

79. See, e.g., *Immigration & Naturalization Servs. v. Chadha*, 462 U.S. 919, 951 (1983) (“Although [the executive, legislative, and judicial powers are] not ‘hermetically’ sealed, [they are nonetheless] functionally identifiable [from one another].”); THE FEDERALIST NO. 48 (James Madison) (“[T]he degree of separation [of powers] . . . as essential to a free government, can never in practice be duly maintained.”). This limited interdependence is also acknowledged across state constitutions as well. See Stanley H. Friedelbaum, *State Courts and the Separation of Powers: A Venerable Doctrine in Varied Contexts*, 61 ALB. L. REV. 1417, 1458 (1998).

80. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

81. See, e.g., *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323 (2016) (holding that Congress may not pass a law that decides ongoing litigation); *Clinton v. City of New York*, 524 U.S. 417, 446–47 (1998) (holding that a President may not unilaterally change enacted statutes); *Nixon v. United States*, 506 U.S. 224, 238 (1993) (holding that the judicial branch may not involve itself in an issue that the Constitution has wholly assigned to another branch).

82. See *infra* section IV.B.

83. Toepfer, *supra* note 10, at 202; see also *infra* section IV.E.

84. For a discussion of the small handful of states in which the opinions are binding upon the requestor, see *infra* section IV.C.

85. See Morris, *supra* note 7, at 140.

matters of state law.⁸⁶ In more recent years, the Court has been more specific and has stated that federal courts must consider state attorney general opinions to the same extent as they would be considered in state courts when deciding a diversity jurisdiction case under state law.⁸⁷

Second, the opinions of the state attorney general are rarely challenged in court.⁸⁸ Even when they are challenged in court, state courts are reluctant to overturn them.⁸⁹ When the opinions are left unchallenged, they stand as functional expressions of law because they may be the only existing interpretive authority on the subject that they are addressing.⁹⁰

Third, state attorney general opinions often play key roles in directing the administration of state government in matters that, for various reasons, will never be litigated in state courts.⁹¹ Their general effect on the administration of government can also have profound effects on how state government is administered to state citizens.⁹²

These are the multitudes of reasons why state attorney general opinions should be considered a source of law in general. The next

86. *See* *Union Ins. Co. v. Hoge*, 62 U.S. (21 How.) 35, 66 (1859) (“[A]lthough this [opinion of the New York Attorney General] cannot be admitted as controlling, it is not to be overlooked, and perhaps should be regarded as decisive in a case of doubt, or where the error is not plain.”); *see also* *Broadrick v. Oklahoma*, 413 U.S. 601, 617–18 (1973) (“[T]he State’s Attorney General [issued an opinion on the state statute at issue in the case]. Surely a court cannot be expected to ignore these authoritative pronouncements in determining the breadth of a statute.”); *Phyle v. Duffy*, 334 U.S. 431, 441 (1948) (“The attorney general is the highest non-judicial legal officer of California, and is particularly charged with the duty of supervising administration of the criminal laws. His statement on this question is entitled to great weight in the absence of controlling state statutes and court decisions.”).

87. *See* *Harris Cty. Comm’rs Court v. Moore*, 420 U.S. 77, 87 n.10 (1975) (citing *Jones v. Williams*, 45 S.W.2d 130, 131 (Tex. 1931)) (describing the standard of deference that an opinion of the Texas Attorney General should receive, as articulated by the Texas Supreme Court); *cf.* *Stenberg v. Carhart*, 530 U.S. 914, 940–41 (2000) (stating that a federal court cannot consider itself bound by a state attorney general opinion when a state court would not be bound by such an opinion and that the federal court must give the same level of consideration to the state attorney general opinion as it would receive in state court); *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236–37 (1940) (stating that there are many rules of decision in state courts that have not been explicitly endorsed by the state’s highest court, but that federal courts are nonetheless bound to follow them in the same way that a state court would be when deciding a diversity jurisdiction case).

88. *See* *Abraham & Benedetti*, *supra* note 6, at 803.

89. *See id.* at 799.

90. *See* *Toepfer*, *supra* note 10, at 201–02.

91. *See* *Abraham & Benedetti*, *supra* note 6, at 799–800.

92. *See* *Long*, *supra* note 12, at 12.

Part seeks to explore in greater detail *how* in particular they function as a source of law by proposing six specific ways state attorney general opinions alter the legal rights, duties, and relations of persons.

IV. SIX MODELS OF HOW THE STATE ATTORNEY GENERAL'S DUTY TO ADVISE SHAPES LAW

The power of state attorney general opinions to alter the legal rights, duties, and relations of persons takes six different and distinct forms. As will be explored in this Part, these different powers result from different traditions and the constitutional and statutory workings of state governments. Not all six of these models are present in every state, and the models do not look exactly the same in every state, but together they cover the general ways that state attorney general opinions function as a source of law.

A. “*Entitled to Deference and Due Consideration*” in State Courts

The opinions of state attorneys general have the power to alter the legal rights, duties, and relations of parties before state courts because even though their conclusions are not binding, state courts have universally made clear that the opinions bear some consideration when the courts decide cases.⁹³

As discussed *supra* in Part III of this Comment, state attorney general opinions are not binding upon state courts. This is consistent with constitutional separation of powers principles as it would be a usurpation of judicial power for an executive officer like an attorney general to be able to bind the courts to his or her interpretation of the law.⁹⁴

On the other hand, state courts have universally stated that state attorney general opinions should receive *some* amount of deference and due consideration.⁹⁵ The terminology for the level of deference and due consideration varies from state to state.⁹⁶ As

93. See, e.g., *Camara v. Attorney Gen.*, 941 N.E.2d 1118, 1119 (Mass. 2011).

94. See *supra* note 80 and accompanying text.

95. See Heiser, *supra* note 45, at 34–35.

96. See, e.g., *Carter v. Smith*, 366 S.W.3d 414, 419 n.2 (Ky. 2012) (“While not binding on courts, Opinions of the Attorney General are considered highly persuasive and have been accorded great weight.”); *Dupree v. Hiraga*, 219 P.3d 1084, 1110 n.32 (Haw. 2009) (“Attorney

noted above, the Supreme Court of the United States has stated that federal courts, when deciding a question of state law, must give the same amount of deference and due consideration to attorney general opinions as they would receive in state courts.⁹⁷

However, due to the fact that state courts tend to use ambiguous and flexible language when describing the amount of deference and due consideration that attorney general opinions should receive,⁹⁸ it is difficult to formulate any concrete rules for exactly how state courts must treat them when making their decisions.⁹⁹

Some state courts have articulated rules for when the amount of deference and due consideration accorded to the opinions of the state attorney general increases. As discussed in the next section, this is especially true when courts come to see the opinions as indicia of legislative intent due to the fact that the opinion is longstanding or was issued around the time that the statute was passed.

So, while the level of deference and due consideration afforded to opinions of the state attorney general by state courts is somewhat ambiguous, it is clear that they do carry some weight in litigation—even though they are not binding on courts and thus not

General's opinions are highly instructive"); *Burris v. White*, 901 N.E.2d 895, 899 (Ill. 2009) (“[A] well-reasoned opinion of the Attorney General is entitled to considerable weight, especially in a matter of first impression in Illinois.”); *Bradley v. Iowa Dep’t of Pers.*, 596 N.W.2d 526, 530 (Iowa 1999) (“[T]he opinion [of the Iowa Attorney General] is entitled to the court’s respectful consideration.”).

97. See *supra* note 87 and accompanying text.

98. The Supreme Court of New Mexico has issued the bluntest articulation that there is no standard that it is bound to give attorney general opinions. See *First Thrift & Loan Ass’n v. State ex rel. Robinson*, 304 P.2d 582, 588 (N.M. 1956) (“If we think them right, we follow and approve, and if convinced they are wrong . . . we reject and decline to feel ourselves bound.”).

99. See Heiser, *supra* note 45, at 35. Though the opinions of the federal attorney general are beyond the scope of this Comment, it is interesting to note that federal courts are much clearer about how they treat the opinions of the federal attorney general. Federal courts give opinions of the federal attorney general *Chevron* deference, meaning that the court follows the conclusion of the opinion if Congress has not already spoken to the precise question at issue and if the interpretation is reasonable. See, e.g., *Bragdon v. Abbott*, 524 U.S. 624, 642, 646 (1998); see also Sonia Mittal, *OLC’s Day in Court: Judicial Deference to the Office of Legal Counsel*, 9 HARV. L. & POL’Y REV. 211, 217 (2015). Justice Scalia, however, made the argument—in concurrence—that the opinions should not be given such deference. See *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring).

dispositive—and when they are the subject of litigation, state courts are reluctant to overturn them.¹⁰⁰

Thus, it is clear that the opinions of state attorneys general have some capacity to alter the legal rights, duties, and relations of parties in litigation—even though the extent to which they have this power to influence the courts is somewhat ambiguous.

B. *Indicia of Legislative Intent*

The opinions of the state attorneys general can also alter the legal rights, duties, and relations of persons when—in the absence of legislative action—they become indicia of legislative intent.

Courts have stated that state legislatures are “presumed to be cognizant” of the attorney general’s construction of a statute.¹⁰¹ When a state legislature does not take action following the issuance of an attorney general opinion, state courts see this as evidence of the legislature “acquiescing” to the attorney general’s interpretation.¹⁰² Additionally, the older an opinion, the more weight courts tend to give it because it is presumed that the legislature has had more time to overturn it if they disagree with it.¹⁰³

The level of deference afforded to the opinion by state courts is even higher when the opinion is consistent with past attorney general opinions on a subject that the legislature has not acted upon.¹⁰⁴ The inference being drawn by the courts is that the attorney general opinion has become a reflection of legislative intent, because the legislature is said to have “implicitly approved” of the interpretation when they take no action regarding it.¹⁰⁵

100. See Abraham & Benedetti, *supra* note 6, at 799.

101. *E.g.*, Cal. Bldg. Indus. Ass’n v. State Water Res. Control Bd., 416 P.3d 53, 60 (Cal. 2018).

102. See, *e.g.*, Citizens All. for Prop. Rights Legal Fund v. San Juan Cty., 359 P.3d 753, 758–59 (Wash. 2015) (adopting the conclusions of an attorney general opinion because it was thirty years old and the state legislature had not amended or clarified the statutory language since).

103. See, *e.g.*, Minn. Voters All. v. Anoka-Hennepin Sch. Dist., 868 N.W.2d 703, 707 n.2 (Minn. 2015); Cal. Ass’n of Psychology Providers v. Rank, 793 P.2d 2, 10–11 (Cal. 1990).

104. See, *e.g.*, Five Corners Family Farmers v. State, 268 P.3d 892, 899 (Wash. 2011).

105. *E.g.*, Hilton v. N.D. Educ. Ass’n, 655 N.W.2d 60, 65 (N.D. 2002). The concept is similar to the idea of the legislature acquiescing to judicial or administrative interpretations of statutes through legislative inaction. See generally William N. Eskridge, Jr., *Interpreting*

On its face, the presumption of legislative acquiescence appears to raise separation of powers concerns about the ability of the state attorney general—who sits in the executive branch—to define the intent of the legislative branch. As has already been noted, however, the idea of absolute separation of powers is a fiction, and there will always be a degree of interdependence among the three branches of government.¹⁰⁶ Additionally, legislative acquiescence is a presumption and not a set rule, and state courts are never bound to make a finding of legislative intent based upon a long-standing attorney general opinion.¹⁰⁷

However, similar to the regular “deference and due consideration” that is accorded to any attorney general opinion by a state court, and even though the presumption of legislative acquiescence to an attorney general opinion is not dispositive, opinions can still alter the legal rights, duties, and relations of persons by serving as evidence of legislative intent regarding a law’s purpose and meaning.

C. *Effect Upon the Requestor*

State attorney general opinions also alter the legal rights, duties, and relations of persons through the effect that they have upon the state officials who request them and subsequently the citizens who are affected by the actions that those state officials take in response to the advice that they receive.

When a state attorney general issues an opinion, they are acting in their capacity as chief legal advisor for the state by giving legal advice to state officials.¹⁰⁸ The relationship between the attorney general and the requestor is that of an attorney and a client, and the opinions represent legal advice that is customarily followed by

Legislative Inaction, 87 MICH. L. REV. 67 (1988). The concept has its critics though, including the late Justice Scalia who once wrote—in response to the Supreme Court’s decision to assume that Congress had acquiesced to the interpretations of three district court decisions—that “[m]embers [of Congress] have better uses for their time than poring over District Court opinions.” *Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring).

106. See *supra* notes 78–80 and accompanying text.

107. Cf., e.g., *Galesburg Constr. Co. v. Bd. of Trs.*, 641 P.2d 745, 750 n.9 (Wyo. 1982) (stating that attorney general opinions are entitled to even greater weight “when they have been weathered by time and where the legislature has failed over a long period to make any change in a statute following its interpretation” but not stating that the court is bound to adopt the conclusions of the long-standing opinions).

108. Heiser, *supra* note 45, at 9.

the state officials.¹⁰⁹ This advice ranges from advising local officials on whether specific local ordinances can be adopted,¹¹⁰ to helping legislators correct legislative defects,¹¹¹ to advising whether entire state statutes are unconstitutional and thus unenforceable.¹¹²

The general rule among the states is that the requestor is free to follow the advice of the opinion if he or she chooses.¹¹³ There are a myriad of reasons for which the requestor *should* follow the attorney general's legal advice, such as taking advantage of a well-reasoned analysis or of the legal and political cover that an opinion can afford for some unpopular course of action.¹¹⁴ The requestor must also be cognizant of the fact that if they do not follow the advice and their actions give rise to a lawsuit, the attorney general will most likely be the one representing them in court.¹¹⁵

A small number of states *require* that the requestor follow the advice given by the attorney general in an opinion. For example, the Supreme Court of Oklahoma has stated that “it is the duty of public officers . . . with notice thereof to follow the opinion of the Attorney General until relieved of such duty by a court of competent jurisdiction or until this Court should hold otherwise.”¹¹⁶ In other words, an opinion of the Oklahoma Attorney General is binding upon *all* state officials affected by it—not just the requestor.¹¹⁷ However, the Supreme Court of Oklahoma has still noted that Oklahoma courts are not bound by the opinions.¹¹⁸

Montana has a similar rule, although the Montana Supreme Court has held that only “state-employed attorneys” are bound by

109. *Id.* at 32–33.

110. *See, e.g.*, 2013–2014 Op. Mich. Att’y Gen. 45, 45–46, 51 (2014).

111. *See, e.g.*, 1948–1949 Op. S.C. Att’y Gen. 167, 167–68 (1949).

112. *See, e.g.*, 1985 Op. Md. Att’y Gen. 43, 71–73 (1985).

113. *See Myers & Bennett, supra* note 8, at 78.

114. *See State ex rel. Johnson v. Baker*, 21 N.W.2d 355, 372 (N.D. 1946) (“[Attorney General] opinions, if followed in good faith, relieve [the requestor] from responsibility and protect them. If they fail or refuse to follow [the] opinions they do so at their peril.”); *see also Heiser, supra* note 45, at 40.

115. *See Abraham & Benedetti, supra* note 6, at 799.

116. *Pan Am. Petroleum Corp. v. Bd. of Tax-Roll Corr.*, 510 P.2d 680, 681 (Okla. 1973).

117. *See, e.g.*, *Edwards v. Bd. of Cty. Comm’rs*, 378 P.3d 54, 60 (Okla. 2015).

118. *Id.*

attorney general opinions.¹¹⁹ In contrast, other states, like Delaware, have explicitly rejected such a rule.¹²⁰

Pennsylvania has a limited version of the rule. By statute, the requestor—except if they are the governor—must follow the opinion but may seek a declaratory judgment in Commonwealth Court invalidating the opinion.¹²¹ While the declaratory judgment is under advisement, however, the requestor is still bound to follow the opinion.¹²²

Whether the opinions are binding or not, the attorney general opinions are “instrumental in controlling the administration of government.”¹²³ When “there is a need for state government officials to know the duties imposed on them by the law and a need for the people as a whole to understand the law,” they turn to the state attorney general to clarify the law and to give direction.¹²⁴ This, in turn, affects how government is administered to the general public.¹²⁵

Thus, whether the requestor is bound to follow the advice or not, the opinions do not just alter the legal rights, duties, and relations of the requesting state officials, but also all those who are affected by the laws that those state officials must administer.

D. *Immunity from Liability for the Requestor*

In a small number of states, the legal rights, duties, and relations of the requesting state officials can also be altered by state attorney general opinions by providing a shield from liability for their actions, if taken in accord with an opinion of the state attorney general.

119. *Mont. Immigrant Justice All. v. Bullock*, 371 P.3d 430, 438 n.2 (Mont. 2016) (citing MONT. CODE ANN. § 2-15-501(7)).

120. *See Sullivan v. Local Union 1726 of AFSCME*, 464 A.2d 899, 901 n.3 (Del. 1983) (“[A]n opinion of the Attorney General is advisory and not binding on those to whom it is given.”).

121. *See* 71 PA. CONS. STAT. § 732-204(a).

122. *See id.*

123. Toepfer, *supra* note 10, at 202.

124. Abraham & Benedetti, *supra* note 6, at 805.

125. Heiser, *supra* note 45, at 17; *see also* Long, *supra* note 12, at 165 (“Virginia Attorney General Opinions represent an advicegiving device through which the attorney general can give persuasive advice that administrators, legislators, and judges will hear; and which will ingrain itself in the laws and policies of the Commonwealth.”).

For example, in Mississippi, by statute, any “officer, board, commission, department or person” who follows an opinion of the attorney general in good faith is not subject to either civil or criminal liability for those actions.¹²⁶

Other states have articulated similar rules. In Nevada, if a government official relies on an attorney general opinion in good faith, then the official is “not responsible in damages to the governmental body they serve if the Attorney General is mistaken.”¹²⁷ In North Dakota, if a government official relies on an attorney general opinion in good faith, then the official is “relieve[d] . . . from responsibility and protect[ed].”¹²⁸ In Alabama, if a government official relies on an attorney general opinion in good faith, then the opinion “serve[s] to offer protection from liability [for the official] to whom the opinion is directed.”¹²⁹

Oregon has the same rule, and the Oregon Supreme Court stated the reason for adopting the rule, saying, “[i]f the law were otherwise few responsible administrative officers would care to assume the hazards of rendering close decisions in public affairs.”¹³⁰

Such protection from liability clearly alters the legal rights, duties, and relations of the state officials who receive the protection. It also alters the legal rights, duties, and relations of persons who may seek damages against state officials for actions that they take pursuant to advice contained within an attorney general opinion that the official requests.¹³¹

126. MISS. CODE ANN. § 7-5-25.

127. Cannon v. Taylor, 493 P.2d 1313, 1314 (Nev. 1972).

128. State ex rel. Johnson v. Baker, 21 N.W.2d 355, 372 (N.D. 1946).

129. State Dep’t of Revenue v. Arnold, 909 So. 2d 192, 194 (Ala. 2005) (citing ALA. CODE § 36-15-19).

130. State ex rel. Moltzner v. Mott, 97 P.2d 950, 954 (Or. 1940). The Arkansas Supreme Court has also adopted the rule under a similar rationale. State ex rel. Smith v. Leonard, 95 S.W.2d 86, 88 (Ark. 1936) (stating that if state officials were not shielded from liability when following the advice of the Attorney General, then “[s]tate officials could not afford to accept the advice of the Attorney General. They would be compelled to act upon such advice at their peril. Such is not the law.”).

131. See, e.g., Lee v. Wash. Cty., No. 4:10-CV-16-MPM-DAS, 2011 U.S. Dist. LEXIS 69272 (N.D. Miss. June 28, 2011) (granting summary judgment to a county board of supervisors in part due to the protection from civil liability afforded to them by following the advice of an opinion of the Mississippi Attorney General).

E. *Stating the Law and How It Should Be Put into Effect*

State attorney general opinions also alter the legal rights, duties, and relations of persons by stating what the law is and pragmatically explaining how laws passed by the legislature should best be put into effect. This is the “quasi-judicial” role that state attorney general opinions play.¹³²

In *Federalist No. 22*, Alexander Hamilton wrote that “[l]aws are a dead letter without courts to expound and define their true meaning and operation.”¹³³ Hamilton recognized the need for a judicial department to take legislative acts—which are often cumbersome and difficult to understand—and apply them to real life situations and disputes.

The problem with this, though, is that American courts have extremely high barriers to entry. First, and most practically, is cost. Bringing matters before courts is immensely costly for parties in terms of time, money, and resources, and those costs often far outweigh the benefits received from adjudication.¹³⁴ Second, courts have standing requirements to initiate suit. Since standing is a constitutional requirement, all states differ slightly in their standing requirements.¹³⁵ A general rule, however, is that a party must show an “injury-in-fact” to show standing.¹³⁶ This is not present when state officials are seeking advice on what course of action to take, not action that has already been taken and resulted in an injury.¹³⁷

Thus, those seeking guidance when confronted with a statute that is so convoluted that it is essentially a “dead letter” may be practically or actually prohibited from accessing the function of

132. Akers, *supra* note 11, at 571.

133. THE FEDERALIST NO. 22, at 67 (Alexander Hamilton) (Green Neck Publ'g ed., 2017).

134. See, e.g., DEBORAH L. RHODE, ACCESS TO JUSTICE 79–80 (2004).

135. See James W. Doggett, Note, “Trickle Down” Constitutional Interpretation: Should Federal Limits on Legislative Conferral of Standing Be Imported into State Constitutional Law?, 108 COLUM. L. REV. 839, 866 (2008).

136. See *id.* at 855 n.100. This is particularly important as all but a handful of state supreme courts have done away with the practice of issuing “advisory opinions,” which are opinions issued by a single justice in their individual capacity about hypothetical situations and which do not require standing for issuance. See Charles M. Carberry, Comment, *The State Advisory Opinion in Perspective*, 44 FORDHAM L. REV. 81, 81 (1975).

137. See Long, *supra* note 12, at 179–80.

courts to “expound and define their true meaning and operation” of which Hamilton wrote.¹³⁸

In contrast, state officials who are authorized to request an opinion from the state attorney general do not have to pay to do so, nor do they have to have any sort of injury-in-fact or standing.¹³⁹ They are simply asking a legal question. It also takes significantly less time to receive an opinion from a state attorney general than it does to litigate a dispute in court.¹⁴⁰ Yet, state attorney general opinions still functionally stand as “expressions of the law” once issued.¹⁴¹

Often when issuing an opinion, a state attorney general must employ the same statutory interpretation techniques as a judge in the judicial branch would when making a decision. For instance, in their opinions state attorneys general analyze the plain meaning of statutes,¹⁴² look to legislative history for guidance as to legislative intent,¹⁴³ and opine on the legislative purpose of a statute.¹⁴⁴ They also seek to avoid absurd results in their readings of statutes,¹⁴⁵ and employ traditional canons of statutory construction like the canon against surplusage,¹⁴⁶ *ejusdem generis*,¹⁴⁷ and *expressio unius*.¹⁴⁸ The attorney general also applies judicial precedent when issuing an opinion, just as a judge would when making a decision.¹⁴⁹

In short, the state attorney general steps into the shoes of a judge when issuing opinions. Thus, the attorney general states what the law is, by adopting judicial rules of decisionmaking and applying them to situations without having to go through the process of formal adjudication. In doing so, attorneys general still re-

138. THE FEDERALIST NO. 22, *supra* note 133 (Alexander Hamilton).

139. *See* Morris, *supra* note 7, at 134.

140. *Id.*

141. Toepfer, *supra* note 10, at 202.

142. *See, e.g.*, 2002 Op. Va. Att’y Gen. 18, 19 (2002).

143. *See, e.g.*, 80 Op. Wis. Att’y Gen. 264, 272 (1992).

144. *See, e.g.*, 1982 Op. Alaska Att’y Gen. 364, 367 (1982).

145. *See, e.g.*, 1998 Op. Nev. Att’y Gen. 118, 121 (1998).

146. *See, e.g.*, 1995–1996 Op. Mich. Att’y Gen. 116, 117 (1995).

147. *See, e.g.*, 1982 Op. Ohio Att’y Gen. 2-171, 2-172 (1982).

148. *See, e.g.*, 1986 Op. Fla. Att’y Gen. 280, 285 (1986).

149. *See, e.g., id.*

spect the constitutional maxim that “[i]t is emphatically the province and duty of the judicial department to say what the law is,”¹⁵⁰ because they still respect the fact that the judicial branch has ultimate interpretive authority and is not bound by the conclusions set forth in their opinions.

There is, however, another duty state attorneys general fulfill when issuing opinions that the judicial branch does not have, which is the task of advising the requestor on an appropriate course of action under an ambiguous statute.

When a requestor comes to a state attorney general for an opinion, often they are seeking advice on what course of action to take, but when a judge hears a case, it is almost always about a course of action that has already been taken.¹⁵¹ Thus, how an attorney general interprets statutes often involves recommending action, whether due to ambiguous language or lack of language in the statute.¹⁵² On the other hand, a judge recommending action to parties is restricted to opining on what *should* have been done,¹⁵³ but a state attorney general, through an opinion, can “fill[] the policy gaps caused by lack of clarity in legislation, absence of executive leadership, and the intermittent, time-consuming processes of conflict resolution in the courts” before a state official takes action that the courts might determine to be unlawful.¹⁵⁴ Attorney general opinions are also more concerned with solving the requestor’s problem, so they are written in more accessible language, rather than delving into complex discussions of legal theory—which court opinions often do.¹⁵⁵

In sum, the opinions of state attorneys general affect the legal rights, duties, and relations of persons by resolving issues using the same tools as a judge would—without the costs or barriers of litigation—and also by using the tools of judicial interpretation to recommend courses of action to the requestor. This function is both

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

151. *Cf. Long*, *supra* note 12, at 179–80.

152. *See, e.g.*, 2008 Op. Idaho Att’y Gen. 42, 46–48 (2008) (providing a recommendation for corrective action as to how open meetings of governmental bodies should be conducted under an ambiguous statute).

153. *See Long*, *supra* note 12, at 186.

154. *Dickson*, *supra* note 9, at 495.

155. *See Long*, *supra* note 12, at 176.

judicial and administrative in nature and affects not just the requestor, but any persons that will be affected by the action taken by the requestor.

F. *Ensuring State Compliance with Federal Mandates*

Similarly, state attorney general opinions alter the legal rights, duties, and relations of persons by helping state officials understand how to comply with federal mandates.

Under the United States Constitution, the Federal Constitution and federal laws are “the supreme Law of the Land.”¹⁵⁶ This means that new federal legislation can affect state law, through mechanisms such as preemption,¹⁵⁷ and new decisions of the Supreme Court of the United States can also affect state law, such as when the Court finds a state law to be unconstitutional under the Federal Constitution.¹⁵⁸ These new federal laws and new decisions of the Supreme Court can be quite convoluted and difficult for laymen to understand.¹⁵⁹

State officials—who must understand how federal law has impacted the laws of the state that they are bound by and administer—turn to the state attorney general for guidance on exactly how state laws have been impacted by new federal law. For example, there were a multitude of state attorney general opinions issued in the wake of the passage of the Patient Protection and Affordable Care Act¹⁶⁰ as state officials struggled to understand how the new federal health care act impacted existing state health care laws.¹⁶¹ A similar bout of opinions came after the federal government passed the No Child Left Behind Act¹⁶² as state officials sought guidance on how state education law had been impacted.¹⁶³

156. U.S. CONST. art. VI, cl. 2.

157. *See, e.g.*, Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 225–26 (2000).

158. *See, e.g.*, *Dombrowski v. Pfister*, 380 U.S. 479, 496 (1965).

159. *See, e.g.*, Jamal Greene, *Constitutional Rhetoric*, 50 VAL. U. L. REV. 519, 521 (2016).

160. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

161. *See, e.g.*, No. 2014-033, Op. Ohio Att’y Gen. (2014); No. 12-07, Op. N.M. Att’y Gen. (2012); No. AN2009102500, Op. Alaska Att’y Gen. (2012).

162. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

163. *See, e.g.*, No. 2005-184, Op. Ark. Att’y Gen. (2005); Letter to Patricia Willoughby, Op. N.C. Att’y Gen. (2005); No. 04-004, Op. Tenn. Att’y Gen. (2004).

When issuing opinions regarding new decisions of the Supreme Court of the United States, state attorneys general are not just assisting the state officials in understanding how the law has changed and how they must respond to it; they are also assisting the Supreme Court itself by helping to give actual effect to its decisions at the state level. In its opinions, the Supreme Court rarely gives substantive discussion regarding the enforcement of its decision.¹⁶⁴ For high-profile and politically charged decisions, enforcement and compliance is not as automatic as the Court would like to think it is, but compliance is essential to the effect of the decision.¹⁶⁵ Practically, “[i]f the Court announces a policy and no compliant behavior ensues, then there is no decision.”¹⁶⁶

Even if state officials are eager to comply with a new decision, oftentimes they don’t know how to do so. For guidance, they turn to the state attorney general. For example, when the Supreme Court issued its decision in *Obergefell v. Hodges*,¹⁶⁷ it did not list out which state laws were affected by the decision and how. It was state attorneys general who issued opinions on how the decision affected their states’ laws.¹⁶⁸ The state attorneys general also issued opinions back in the 1960s as to how state schools must respond to the Supreme Court’s decisions in *School District of Abington Township v. Schempp*¹⁶⁹ regarding school prayer,¹⁷⁰ and in the years following *Brown v. Board of Education*¹⁷¹ regarding school desegregation.¹⁷²

Thus, the opinions of state attorneys general affect the legal rights, duties, and relations of persons by putting federalism into practice. Where the federal government has not discussed how

164. *But see* *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 298–301 (1995) (holding that federal district courts may—and must—enforce the Court’s decision in *Brown I* that racial discrimination in public education is unconstitutional).

165. *See* Abraham & Benedetti, *supra* note 6, at 796.

166. RICHARD M. JOHNSON, *THE DYNAMICS OF COMPLIANCE: SUPREME COURT DECISION-MAKING FROM A NEW PERSPECTIVE* 8 (1967).

167. 576 U.S. 644 (2015).

168. *See, e.g.*, 2017 Op. Va. Att’y Gen. 212, 217–19 (2017); 100 Op. Md. Att’y Gen. 105, 117–19 (2015); No. 2015-00226, Op. Miss. Att’y Gen. (2015).

169. 374 U.S. 203 (1963).

170. *See* Abraham & Benedetti, *supra* note 6, at 805–09.

171. 347 U.S. 483 (1954).

172. *See* William N. Thompson, *Transmission or Resistance: Opinions of State Attorneys General and the Impact of the Supreme Court*, 9 VAL. U. L. REV. 55, 65–68 (1974).

states must respond to new federal mandates, state attorneys general provide that guidance through issuing opinions. Without these opinions, the federal government would have to issue state-by-state guidance itself, or else its exercise of the Supremacy Clause would have no practical power whatsoever.

CONCLUSION

The state attorney general's duty to advise has been far too neglected in academic discourse for far too long. In proposing these six models of how the opinions of state attorneys general affect the legal rights, duties, and relations of persons, this Comment seeks to provide a framework to understand how the opinions function as a source of law. The opinions have a dramatic effect on administration of state government, how state law is given meaning, and how federalism is put into practice at the state level. These important functions cannot be ignored, and must be considered in order to more fully understand the workings of American state government.

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