
NOTE

STATE COURT ADVISORY OPINIONS: IMPLICATIONS FOR LEGISLATIVE POWER AND PREROGATIVES

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INTRODUCTION

As conflicts in Europe raged in July 1793, President George Washington's administration was confronted with a series of complex questions regarding American rights and responsibilities toward those belligerents that might make contact with American territory.¹ Because the resolution of those questions required an analysis of the construction of the treaties and laws of the United States, Secretary of State Thomas Jefferson drafted a letter to the justices of the Supreme Court, seeking their assistance in answering twenty-nine specific questions of law.² To the administration's surprise, the Court declined to "extrajudicially decid[e] the questions alluded to."³ It reasoned that the Constitution's explicit authorization for the President to "require the Opinion, in writing, of the principal Officer in each of the *executive* Departments"⁴ implied that the President did not have the authority to request opinions from *non-executive* departments, such as the judiciary.⁵ This marked a divergence from the practice at Westminster, where English courts had commonly issued such "advisory opinions" to assist the King in discharging his duties.⁶

The Supreme Court's attitude during the Washington administration has since hardened into a firm prohibition on federal courts issuing advisory opinions that "has been termed 'the oldest and most consistent thread in the federal law of justiciability.'"⁷ This stems from the modern reading of Article III as *limiting* "[t]he judicial Power" to deciding only "[c]ases" and "[c]ontroversies."⁸ Because a "case" or "controversy" "implies the existence of . . . *adverse parties* whose contentions are submitted to the court for adjudication," Article III is

¹ See RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 50-51 (7th ed. 2015).

² See *id.* at 50-52 (quoting 3 Correspondence and Public Papers of John Jay 486-89 (Johnson ed. 1891)).

³ *Id.* at 51-52 (quoting Draft of Questions to Be Submitted to Justices of the Supreme Court (July 18, 1793), in 15 *THE PAPERS OF ALEXANDER HAMILTON* 110, 111 n.1 (Harold C. Syrett ed., 1969)).

⁴ U.S. CONST. art. II, § 2, cl. 1 (emphasis added).

⁵ FALLON ET AL., *supra* note 1, at 52.

⁶ See *id.* The Supreme Court has since acknowledged this departure. See *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (contrasting Article III's prohibition on advisory opinions with "power of English judges to deliver advisory opinions" that was "well established" at time of founding).

⁷ FALLON ET AL., *supra* note 1, at 52 (quoting CHARLES A. WRIGHT & MARY K. KANE, *LAW OF FEDERAL COURTS* 65-66 (7th ed. 2011)); see Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1844 (2001) ("No rule of federal justiciability doctrine is more entrenched than the ban on advisory opinions.").

⁸ U.S. CONST. art. III, § 2, cl. 1. This limiting construction of Article III has long been established. See, e.g., *Muskrat v. United States*, 219 U.S. 346, 356 (1911) ("[T]he exercise of the judicial power is limited to 'cases' and 'controversies.'").

understood to prohibit advisory opinions, which lack such adverseness.⁹ This understanding pervades modern federal justiciability doctrine and has led the Supreme Court to similarly reject collusive or feigned suits (which lack adverse parties)¹⁰ while permitting declaratory judgment actions (where the parties are adverse).¹¹ Article III's status as a limiting instrument also derives from separation of powers considerations.¹² Its limitations "define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government."¹³ Although the precise scope of this federal advisory opinion prohibition remains unclear,¹⁴ its existence is thus beyond serious dispute.¹⁵

⁹ *Muskrat*, 219 U.S. at 357 (emphasis added); see also *Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) ("We do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us."); FALLON ET AL., *supra* note 1, at 94 ("A proper Article III 'case' or 'controversy' requires genuine adversity.").

¹⁰ See, e.g., *United States v. Johnson*, 319 U.S. 302, 303-05 (1943) (instructing lower court to dismiss "friendly suit" brought by plaintiff at defendant's request, which made suit impermissibly "collusive because it is not in any real sense adversary").

¹¹ See *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-41 (1937). In *Aetna*, the Court first explicitly distinguished impermissible advisory opinions from permissible cases or controversies that entailed "an immediate and definitive determination of the legal rights of the parties in an *adversary proceeding* . . ." *Id.* at 241 (emphasis added). It then upheld the Declaratory Judgment Act, partially on the grounds that such disputes involved "parties who face each other in an adversary proceeding." *Id.* at 242; see also FALLON ET AL., *supra* note 1, at 56-57.

¹² See, e.g., *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014); *Flast v. Cohen*, 392 U.S. 83, 96-97 (1968) (explaining that Article III's "rule against advisory opinions implements the separation of powers" and also ensures adversarial presentation of issues).

¹³ *Flast*, 392 U.S. at 95.

¹⁴ See FALLON ET AL., *supra* note 1, at 52-58, 94-101. Over the years, stray language in a variety of Supreme Court opinions has hinted that several common judicial doctrines may be rooted, at least in part, in the advisory opinion prohibition. For instance, Justice Jackson suggested that this prohibition animated the Court's refusal to entertain appeals of state court decisions supported by an independent and adequate state ground. See *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."); see also *Foster v. Chatman*, 136 S. Ct. 1737, 1763 (2016) (Thomas, J., dissenting) ("If an adequate and independent state-law ground bars [petitioner's] claim, then the Court today has done nothing more than issue an impermissible advisory opinion."). The advisory opinion prohibition has also been offered as a justification for mootness doctrine. See *Cty. of L.A. v. Davis*, 440 U.S. 625, 633 (1979). Finally (and perhaps predictably), dissenting justices sometimes characterize majority opinions that they believe reach a constitutional question unnecessarily as impermissible advisory opinions. See, e.g., *Hayes v. Florida*, 470 U.S. 811, 820 (Brennan, J., dissenting) (1985).

¹⁵ Hershkoff, *supra* note 7, at 1845 ("[T]he ban on advisory opinions has acquired near

State courts are not subject to Article III's case or controversy limitations. Although most have nevertheless adopted the federal advisory opinion ban,¹⁶ statutory or constitutional provisions in Alabama, Colorado, Delaware, Florida, Maine, Massachusetts, Michigan, New Hampshire, Oklahoma, Rhode Island, and South Dakota allow their highest courts to issue advisory opinions in some circumstances.¹⁷ Pursuant to this authority, courts in these states have produced a corpus of advisory opinions adjudicating countless matters that are well beyond the reach of the federal courts.¹⁸

Academic interest in state advisory opinions dates as far back as the 1890s.¹⁹ Although some research has been targeted and investigative,²⁰ much of the existing literature has engaged advisory opinions on a normative level, focusing

mythical status . . .").

¹⁶ See, e.g., *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) ("[W]e have construed our separation of powers article to prohibit courts from issuing advisory opinions because such is the function of the executive rather than the judicial department."); *Utah Transit Auth. v. Local 382 of the Amalgamated Transit Union*, 2012 UT 75, ¶ 23, 289 P.3d 582, 588 ("[W]hatever else the judicial power clause [of the Utah Constitution] may imply, it incorporates a prohibition on the issuance of advisory opinions by our courts."); *Doria v. Univ. of Vt.*, 589 A.2d 317, 318 (Vt. 1991) ("Unless an actual or justiciable controversy is present, a declaratory judgment is merely an advisory opinion which we lack the constitutional authority to render.").

¹⁷ FALLON ET AL., *supra* note 1, at 58. Several other states, including Kentucky, Minnesota, Missouri, and Vermont, once allowed for advisory opinions by statute or constitution, but have since abandoned the practice. Jonathan D. Persky, Note, "Ghosts that Slay": A Contemporary Look at State Advisory Opinions, 37 CONN. L. REV. 1155, 1168-69 (2005). Also, "in a few other states, courts once treated advice as a matter of inherent power, without constitutional or statutory authorization." Hershkoff, *supra* note 7, at 1846. Chief among these states is North Carolina, which regularly issued advisory opinions until 1985. See *id.* at 1846 n.70 (citing Margaret M. Bledsoe, Comment, *The Advisory Opinion in North Carolina: 1947 to 1991*, 70 N.C. L. REV. 1853, 1854, 1860-61 (1992)). And finally, in one case, the Minnesota Supreme Court assumed "a spontaneous advisory role" and issued an advisory opinion without explicit authority to do so. *Id.* (citing *Scheibel v. Pavlak*, 282 N.W.2d 843, 844 (Minn. 1979)).

¹⁸ Nevertheless, courts in these states do impose restrictions on the questions they will consider in advisory opinions. See *infra* Part I.

¹⁹ See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 153-54 (1893) (discussing significance of advisory opinions in Colorado and Maine in context of general prohibition on advisory opinions in American jurisprudence); Note, *Extra-Judicial Opinions*, 10 HARV. L. REV. 49, 50-51 (1896).

²⁰ See generally, e.g., Thomas R. Bender, *Rhode Island's Public Importance Exception for Advisory Opinions: The Unconstitutional Exercise of a Non-Judicial Power*, 10 ROGER WILLIAMS U. L. REV. 123 (2004) (discussing limitations of and exceptions to advisory opinion power in Rhode Island); Mel A. Topf, *The Jurisprudence of the Advisory Opinion Process in Rhode Island*, 2 ROGER WILLIAMS U. L. REV. 207 (1997) (discussing broad jurisprudential issues raised by advisory opinion process, but largely focusing on Rhode Island); Persky, *supra* note 17 (conducting broad analysis of advisory opinions issued between 1990 and 2004).

broadly on their social and jurisprudential features and implications.²¹ There is good reason for this approach, as advisory opinions challenge deeply-rooted understandings of the proper scope of the judicial power, and thus have received criticism on several grounds. For example, in contrast to the typically deliberative pace of litigation, courts tend to issue advisory opinions fairly quickly,²² which has raised questions about their quality.²³ Further, as advisory opinions, by their nature, involve pure questions of law, they frequently must be decided in a “factual vacuum.”²⁴ Often, this requires courts to preemptively intuit the manner in which a law is likely to be applied.²⁵ Also, because such questions are decided outside of the normal adversarial process, the opportunity to aggressively vet an issue through zealous advocacy may be lacking.²⁶ But courts typically allow requestors and amici to file briefs with the court,²⁷ and

²¹ See generally Phillip M. Kannan, *Advisory Opinions by Federal Courts*, 32 U. RICH. L. REV. 769 (1998); Mel A. Topf, *State Supreme Court Advisory Opinions as Illegitimate Judicial Review*, 2001 L. REV. M.S.U.-D.C.L. 101.

²² See Topf, *supra* note 21, at 109-10; see also, e.g., *In re Submission of Interrogatories on House Bill 99-1325*, 979 P.2d 549, 551 (Colo. 1999) (answering three discrete questions less than one month after legislature had requested advisory opinion).

²³ See Topf, *supra* note 21, at 110 (quoting *In re Opinion of the Justices*, 138 A. 284, 291 (N.H. 1927)); see also, e.g., *In re Interrogatories Propounded by Governor Ritter*, 227 P.3d 892, 894 (Colo. 2010) (using only one sentence of analysis each to conclude that two provisions of Colorado Constitution were unconstitutional).

²⁴ Topf, *supra* note 21, at 110.

²⁵ E.g., *Interrogatories on House Bill 99-1325*, 979 P.2d at 554 n.3 (“We are unable to review the legislation as applied. Therefore, we answer the interrogatories in light of how it appears that the bill is likely to be applied.”).

²⁶ Topf, *supra* note 21, at 110-11. The Supreme Court of Alabama has noted, for instance, that “[i]n issuing an advisory opinion, the members of this Court consider the question submitted without the benefit of briefing from adverse parties. Were we deciding an actual case or controversy, with opposing arguments and briefs, we might reach a different conclusion than the conclusion reached in this advisory opinion.” *Opinion of the Justices No. 381*, 892 So. 2d 375, 376 (Ala. 2004); see also *In re Interrogatory Propounded by Governor Hickenlooper*, 2013 CO 62, ¶ 48, 312 P.3d 153, 165 (Márquez, J., dissenting) (criticizing majority’s decision to issue advisory opinion that had been considered “swiftly on the basis of minimal briefing” and using only federal district court ruling as precedent).

²⁷ See, e.g., FLA. CONST. art. IV, § 1(c) (“The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented . . .”); ALA. CODE § 12-2-11 (2017) (“The justices of the Supreme Court may request briefs from the Attorney General, and may receive briefs from other attorneys as amici curiae as to such questions as may be propounded to them for their answers.”); DEL. CODE ANN. tit. 10, § 141(b) (2016) (“The Justices of the Supreme Court may appoint 1 or more members of the Delaware Bar, duly qualified to practice before said Court, for the purpose of briefing or arguing the legal issues submitted by the Governor or General Assembly.”); *In re Interrogatories Relating to the Great Outdoors Colorado Trust Fund*, 913 P.2d 533, 546-47 (Colo. 1996) (Lohr, J., concurring in part and dissenting in part) (recognizing and responding to contentions made in several amicus briefs).

some even hold oral arguments,²⁸ thus providing some substitute for direct adversarial clash. Finally, commentators have noted the potential for the advisory opinion process to upset the separation of powers between the judiciary and the political branches.²⁹

Despite—or perhaps because of—this interest in the normative implications of advisory opinions, there has been relatively little direct discussion of their functional implications for the power of the legislative branch.³⁰ What investigation has occurred has primarily been theoretical and not specifically focused on the states.³¹ This is unfortunate, as one of the purported benefits of advisory opinions is that they allegedly foster a more efficient lawmaking process. This efficiency is supposedly achieved by facilitating greater inter-branch collaboration to determine the constitutionality of a disputed statute *ex ante*, rather than wasting resources on its enactment, only to have it invalidated in court *ex post*.³² If this is so, an analysis of the impact that these opinions may have on state legislatures that is neither theoretical nor normative seems appropriate.

Thus, this Note explores the myriad ways in which the advisory opinion process affects the dynamics of the state legislative process. Although a lively discussion of this issue could take place strictly at the normative level, this Note presumes the acceptance of advisory opinions, and instead explores the ways in which their use, now and in the future, can affect legislative prerogatives. Part I

²⁸ See FLA. R. APP. P. 9.500(b)(2) (“[T]he court may permit persons . . . to be heard on the questions presented through briefs, oral argument, or both. If the court determines to receive briefs or hear oral argument, it shall set the time for filing briefs, the date of argument, and the time allotted.”); Submission of Interrogatories on Senate Bill 93-74, 852 P.2d 1, 3 (Colo. 1993) (stating that court heard oral argument); *In re* Request of the Governor for an Advisory Opinion, 12 A.3d 1104, 1108 (Del. 2009) (same); Advisory Opinion to the Governor—1996 Amendment 5 (Everglades), 706 So. 2d 278, 281 (Fla. 1997) (same).

²⁹ See Persky, *supra* note 17, at 1158-59, 1177-79 (noting “significant consternation” that advisory opinions engender “among separation of powers advocates” while also noting “disagreement among critics over whether advisory opinions over-strengthen or over-weaken the judiciary”).

³⁰ Although not specifically focused on the legislature and no longer current, Jonathan Persky’s treatment of opinions issued between 1990 and 2004 is the most detailed empirical analysis I have found. See generally Persky, *supra* note 17.

³¹ See, e.g., Note, *Advisory Opinions and the Influence of the Supreme Court over American Policymaking*, 124 HARV. L. REV. 2064, 2064-65 (2011) (arguing that federal prohibition on advisory opinions expands judicial power by creating disincentive for Congress to pass legislation of questionable constitutionality due to fear of expending effort to enact legislation that could be struck down).

³² See Hershkoff, *supra* note 7, at 1851 (“Advisory opinions thus allow state courts to articulate constitutional principles, while effectively ‘remanding’ disputes back to the other branches . . . [constituting a] dialogic process . . .”). For a broad discussion of the merits of developing a more dialogic relationship between the legislature and the courts, see generally Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1 (1998).

examines the structural and procedural features that govern various states' advisory opinion processes. Part II examines the substantive areas that are most frequently the subject of advisory opinions. Finally, Part III outlines the implications that these procedural and substantive features have for the use of legislative power.

This Note argues that although advisory opinions do not inherently expand or contract legislative power *in vacuo*, they nevertheless have the potential to be employed as powerful tools for reorienting power dynamics both within the legislature and between the branches of state government. Both majority and minority political parties can readily use advisory opinions to validate their prerogatives. Further, advisory opinions can be used to either weaken or strengthen the legislature's relationship with the executive. Finally, they can be used to facilitate either cooperation or antagonism between the legislature and the courts. Thus, the ultimate effect of the advisory opinion process is inherently situational and depends both upon the character and interests of the entities that use them and the features states have developed to govern their use.

I. STRUCTURAL FEATURES OF THE ADVISORY OPINION PROCESS

The advisory opinion process is shaped by several important structural features that govern their use and delineate their scope.³³ Although these features are numerous and varied, three specific limitations are especially common and significant. First, states strongly limit, either by statute or constitution, the entities that may request advisory opinions. Second, state courts limit the circumstances in which advisory opinions may be requested. Third, state case law circumscribes the legal status of advisory opinions—including their value as precedent. Because these features limit the role of advisory opinions, they directly impact their utility to the legislative and executive branches of state governments. This Part will examine each of these features.

A. *Entities that May Request Advisory Opinions*

There is substantial consistency among the relevant states regarding the entities that are permitted to request advisory opinions. First, all advisory opinion states allow governors to request advisory opinions in certain circumstances.³⁴ Second, Alabama, Colorado, Delaware, Maine, Massachusetts,

³³ Many structural features serve as threshold limitations on the courts' authority to proceed to an adjudication on the merits, akin to justiciability doctrine in adversarial litigation. *See, e.g., In re Advisory Opinion to the Governor (Casino)*, 856 A.2d 320, 324 (R.I. 2004) ("There are, however, certain procedural hurdles that must be cleared before our duty to issue an advisory opinion arises."). Although some such limitations are binding on the courts, others are effectively discretionary. *See id.* at 324-27.

³⁴ *See* COLO. CONST. art. VI, § 3; FLA. CONST. art. IV, § 1(c); ME. CONST. art. VI, § 3; MASS. CONST. pt. 2, ch. 3, art. II; MICH. CONST. art. III, § 8; N.H. CONST. pt. 2, art. 74; R.I. CONST. art. X, § 3; S.D. CONST. art. V, § 5; ALA. CODE § 12-2-10 (2017); DEL. CODE ANN. tit. 10, § 141(a) (2016); DEL. CODE ANN. tit. 29, § 2102 (2016).

Michigan, New Hampshire, and Rhode Island allow their legislatures to do the same.³⁵ But in Florida and South Dakota, there is no mechanism for the legislature to request an advisory opinion. Third, Massachusetts and New Hampshire each allow an independent council that both states use to vet judicial nominees to request advisory opinions.³⁶ Finally, Florida allows its attorney general to seek advisory opinions in certain narrow circumstances.³⁷ Save for the councils in Massachusetts and New Hampshire and the Florida attorney general, advisory opinion requests of a state's highest court are thus exclusively limited to coequal branches of government. Because of this consistency, the structural implications of such arrangements are highly generalizable.

³⁵ COLO. CONST. art. VI, § 3; ME. CONST. art. VI, § 3; MASS. CONST. pt. 2, ch. 3, art. II; MICH. CONST. art. III, § 8; N.H. CONST. pt. 2, art. 74; R.I. CONST. art. X, § 3; ALA. CODE § 12-2-10; DEL. CODE ANN. tit. 10, § 141(a).

³⁶ MASS. CONST. pt. 2, ch. 3, art. II; N.H. CONST. pt. 2, art. 74. Such a council is known as the "Governor's Council" or "Executive Council," which is an independent entity consisting of, in the case of Massachusetts, eight elected councilors and the lieutenant governor as an ex officio member. *See Governor's Council*, MASS.GOV, <https://www.mass.gov/orgs/governors-council> [<https://perma.cc/6XEY-GGRM>] (last visited Nov. 16, 2017). A uniquely New England institution, the Governor's Council performs a variety of functions, including providing advice and consent on gubernatorial judicial appointments. Although an investigation of the history of advisory opinions involving the Council would be illuminating, such opinions typically involve battles between the Council and the executive, not the legislature, and as such are beyond the scope of this Note. *See, e.g.*, Opinion of the Justices to the Governor, 964 N.E.2d 941, 943 (Mass. 2012) (considering lieutenant governor's ability to vote in Council proceedings when governor is absent).

³⁷ FLA. CONST. art. IV, § 10 ("The attorney general shall, as directed by general law, request the opinion of the justices of the supreme court as to the validity of any initiative petition circulated pursuant to Section 3 of Article XI."). Such review of initiative petitions is exclusively procedural, rather than substantive. It is limited to considering three issues: "[1] whether the proposed amendment satisfies the single-subject requirement of . . . the Florida Constitution . . . [2] whether the ballot title and summary satisfy the requirements of [Florida law] . . . [and 3] whether the Financial Impact Statement complies with" Florida law. Advisory Opinion to the Attorney General re Rights of Electricity Consumers Regarding Solar Energy Choice, 188 So. 3d 822, 825 (Fla. 2016). Such review is highly deferential. *Id.* at 827 ("[I]t is this Court's duty to uphold a proposal unless it can be shown to be clearly and conclusively defective."). Most Florida advisory opinions are issued pursuant to this provision. In other states that allow for a citizen initiative process, this technical review function is performed by another entity, such as the attorney general. *See, e.g.*, MASS. CONST. amend. art. XLVIII, pt. II, § 3. Although it would be wrong to conclude that the court's review of such petitions is merely a ministerial function, the impact of the court's actions do not directly implicate the legislature and are thus beyond the scope of this Note.

1. The Legislature

With narrow exceptions,³⁸ the legislature may request an advisory opinion either when doubts arise regarding the constitutionality of pending legislation, or when it is unsure of the proper application of a constitutional provision that regulates legislative action itself.³⁹ This allows the legislature to legislate more efficiently by providing a mechanism for it to obtain an *ex ante* opinion⁴⁰ on the constitutionality of legislation that it is poised to pass or an action it is about to take.⁴¹ One can thus ostensibly frame the advisory opinion process as cooperative and collegial—oil for the gears of government.⁴²

But the legislature is not monolithic. It is composed of individual legislators, political parties, houses, and committees, each with separate agendas and constituencies. As such, the advisory opinion process importantly gives *either* branch of the legislature the authority to independently seek an advisory opinion in all states except Delaware.⁴³ Typically, one house requests an advisory opinion by passing a resolution to that effect.⁴⁴ Further, each house can seek advisory opinions not just on matters affecting that house, but also on matters affecting the whole legislature.⁴⁵ Equally important, the houses need not take the same position on the merits of questions under consideration. As a result, the

³⁸ The primary exception is Michigan, where advisory opinions may only be requested after legislation “has been enacted into law but before its effective date.” MICH. CONST. art. III, § 8.

³⁹ See *infra* Section I.B (discussing circumstances under which advisory opinions may typically be requested).

⁴⁰ It should be noted, however, that advisory opinions, at least technically, do not constitute binding precedent. See *infra* Section I.C.

⁴¹ Cf. Note, *supra* note 31, at 2065 (discussing how federal ban on advisory opinions forces Congress to factor in possibility that legislation it wishes to pass may be unconstitutional when making decisions about which bills it wishes to consider).

⁴² For example, the Alabama Supreme Court has explained that it “provide[s] advisory opinions as an aid to legislators in fulfilling their constitutional responsibilities.” Opinion of the Justices No. 380, 892 So. 2d 332, 333-34 (Ala. 2004).

⁴³ See, e.g., Opinion of the Justices, 673 A.2d 693, 695 (Me. 1996) (taking up four questions posed by Maine House of Representatives); Opinion of the Justices (Requiring Attorney General to Join Lawsuit), 27 A.3d 859, 863 (N.H. 2011) (taking up three questions posed by New Hampshire Senate). *But see* DEL. CODE ANN. tit. 10, § 141(a) (2016) (requiring concurrence of each house of legislature to request advisory opinion).

⁴⁴ See, e.g., S. 2226, 189th Gen. Ct. (Mass. 2016) (constituting official request from Massachusetts Senate for advisory opinion regarding constitutionality of House Bill pending in Senate); H.R. 6396aa, 2005 Sess. (R.I. 2005). In fact, Alabama law expressly provides that “either house of the Legislature, by a resolution of such house, may obtain a written opinion of the justices of the Supreme Court” ALA. CODE § 12-2-10 (2017).

⁴⁵ See S. 2226; Opinion of the Justices to the House of Representatives, 32 N.E.3d 287, 299 (Mass. 2015) (resolving interpretation dispute regarding Massachusetts Origination Clause between House and Senate that arose in context of deliberations on annual budget).

advisory opinion can be used as a mechanism for adjudicating intra-legislative disputes.

For example, during consideration of the 2015 Massachusetts state budget, a dispute arose between the houses over whether the Senate had unconstitutionally originated a “money bill” in violation of the Massachusetts Constitution’s Origination Clause⁴⁶ when it adopted two amendments to the House budget bill concerning excise taxes on flavored cigars and the personal income tax.⁴⁷ The House argued that the bill it passed was not a money bill and that the Senate thus unconstitutionally originated a money bill when it passed the budget after adopting those two amendments.⁴⁸ The Senate, in contrast, argued that the bill as passed by the House was already a money bill, thus giving the Senate the right, under the Origination Clause, to add additional revenue-raising amendments to the bill.⁴⁹ The House requested an advisory opinion after the Senate had approved its version of the bill and a conference committee had been formed to reconcile the differing versions of the bill.⁵⁰ The Massachusetts Supreme Judicial Court concluded that the bill, as passed by the House, was a money bill, and thus the Senate’s amendments did not violate the Origination Clause.⁵¹

Similarly, because an advisory opinion request only requires majority support in a single chamber,⁵² it is possible that the question of whether to seek an advisory opinion could itself become a contentious or partisan issue. However, just because the advisory opinion process *can* be used in such an adversarial manner, it does not necessarily follow that the advisory opinion *will* be deployed

⁴⁶ MASS. CONST. pt. 2, ch. 1, § 3, art. VII (“All money bills shall originate in the house of representatives; but the senate may propose or concur with amendments, as on other bills.”).

⁴⁷ See *Opinion of the Justices*, 32 N.E.3d at 290-91.

⁴⁸ Brief for the House of Representatives of the Commonwealth of Massachusetts as Amicus Curiae at 17-20, Opinion of the Justices to the House of Representatives, 32 N.E.3d 287 (Mass. 2015) (No. SJC-11883) (arguing that Senate amendments constituted money bill that would raise revenue to tune of \$948 million in case of income tax amendment and between \$3 million and \$7 million in case of cigar amendment).

⁴⁹ Brief for the Senate of the Commonwealth of Massachusetts as Amicus Curiae at 11-12, Opinion of the Justices to the House of Representatives, 32 N.E.3d 287 (Mass. 2015) (No. SJC-11883).

⁵⁰ *Opinion of the Justices*, 32 N.E.3d at 291-92.

⁵¹ *Id.* at 299.

⁵² Except, of course, for Delaware, where majority support in *both* chambers is required. See *supra* note 43 and accompanying text. Delaware is also unique in that its majority support requirement is statutory. See DEL. CODE ANN. tit. 10, § 141(a) (2016) (“The Justices of the Supreme Court, whenever the Governor of this State or a majority of the members elected to each House may by resolution require it for public information, or to enable them to discharge their duties, may give them their opinions in writing . . .”). In other states, the majority vote requirement is simply a function of the fact that advisory opinions are requested by the adoption of a resolution or order to that effect, which typically requires a majority vote.

in such a way.⁵³ In Colorado, for instance, although the plain language of the Colorado Constitution gives each house independent authority to request an advisory opinion,⁵⁴ standard practice is for a request to be made by joint resolution of the legislature as a whole.⁵⁵

2. The Executive

There is a fundamental asymmetry between the roles of the executive and legislative branches in the advisory opinion process. With the minor exceptions discussed above, the governor is the sole agent within the executive branch that has the authority to request an advisory opinion. And as a largely unitary entity, the executive typically lacks the shifting power centers and resultant fluidity present in the legislature.⁵⁶ At the same time, the governor's ability to request advisory opinions is much more circumscribed. In Massachusetts, the governor may only request an advisory opinion on questions that implicate an imminent

⁵³ See, e.g., *Opinion of the Justices*, 2004 ME 54, ¶¶ 2-4, 850 A.2d 1145, 1147 (responding to advisory opinion request submitted jointly by Maine House and Senate).

⁵⁴ COLO. CONST. art. VI, § 3 (“The supreme court shall give its opinion upon important questions upon solemn occasions when required by the governor, the senate, *or* the house of representatives . . .” (emphasis added)).

⁵⁵ See, e.g., *In re Submission of Interrogatories on House Bill 99-1325*, 979 P.2d 549, 551 (Colo. 1999); *In re Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1, 2 (Colo. 1993). Further, rather than being represented by counsel representing the interests of individual chambers or political parties in these proceedings, the Colorado General Assembly as a whole is generally represented by the Colorado Office of Legislative Legal Services, whose attorneys prepare briefs submitted to the court regarding advisory opinions. See, e.g., Brief of the Colorado General Assembly at 1-2, *In re Interrogatory Propounded by Governor Romer on House Bill 91S-1005*, 814 P.2d 875 (Colo. 1991) (No. 91SA225), 1991 WL 11034786, at *1-2 (“The General Assembly appears in this matter pursuant to the Court’s order dated June 14, 1991, represented by attorneys in the Office of Legislative Legal Services as directed by the Committee on Legal Services . . .”). “The Office of Legislative Legal Services is the non-partisan, in-house counsel for the Colorado General Assembly and writes laws, produces statutes, reviews administrative rules, comments on initiated measures, and serves as a resource of legislative information for the public.” *About the Office of Legislative Legal Services*, OFFICE OF LEGISLATIVE LEGAL SERVS., http://tornado.state.co.us/gov_dir/leg_dir/olls/ [<https://perma.cc/LL7C-3JVA>] (last visited Nov. 16, 2017). However, outside counsel has occasionally been used to supplement the representation of the Office of Legislative Legal Services. See Opening Brief of the General Assembly at i, *In re Interrogatories Submitted by the General Assembly on House Bill 04-1098*, 88 P.3d 1196 (Colo. 2004) (No. 04SA64), 2004 WL 2339310, at *i (listing four attorneys from Office of Legislative Legal Services and one outside attorney as counsel to General Assembly).

⁵⁶ However, unlike the executive branch at the federal level, most state executive branches are not fully unitary entities. Many state constitutions include a variety of independently elected positions under the aegis of the executive branch, each with their own enumerated powers. See, e.g., MASS. CONST. pt. 2, ch. 2, § 2. These may include secretaries of state, attorneys general, treasurers, and the like.

duty that he is required to perform.⁵⁷ In Florida, the governor's request must concern a "question affecting the governor's executive powers and duties."⁵⁸ The governor of Rhode Island has even more limited authority.⁵⁹ Thus, while the legislature generally has the broad ability to request an advisory opinion on any subject upon which it is permitted to legislate, the governor's authority is more passive—typically limited to matters that cross his desk in the course of operating the government.⁶⁰

As a result, although exceptions do exist,⁶¹ it is not uncommon for an executive advisory opinion request to concern only quasi-ministerial duties or matters of limited import outside of the executive branch.⁶² At the same time, some governors have claimed broader authority by citing the take care clause⁶³ as imposing a present duty sufficient to justify advisory opinions.⁶⁴ They have claimed that their duty to "take care that the laws be faithfully executed" allows them to request advisory opinions regarding any laws that they have roles in implementing.⁶⁵ This approach dramatically expands the potential scope of gubernatorial requests. The malleability of the take care clause as a vehicle for

⁵⁷ See *Answer of the Justices to the Governor*, 829 N.E.2d 1111, 1114 (Mass. 2005) (quoting *Answer of the Justices to the House of Representatives*, 367 N.E.2d 793, 795 (Mass. 1977)) ("Where there has been no duty imminently confronting the body requesting the advisory opinion . . . we have said that it was not within our province or our power to render such advice.").

⁵⁸ FLA. CONST. art. IV, § 1(c).

⁵⁹ See *Watson v. Fox*, 44 A.3d 130, 136 (R.I. 2012) (quoting *In re Advisory Opinion* (Chief Justice), 507 A.2d 1316, 1318-19 (R.I. 1986)) ("We are constitutionally obligated to give advisory opinions . . . to the Governor only when the questions propounded concern the constitutionality of existing statutes which require implementation by the Chief Executive.").

⁶⁰ In Alabama, by contrast, the governor has routinely been allowed to seek advisory opinions concerning legislation pending in the legislature. See, e.g., *Opinion of the Justices No. 381*, 892 So. 2d 375, 375-76 (Ala. 2004); *Opinion of the Justices No. 380*, 892 So. 2d 332, 333 (Ala. 2004).

⁶¹ See, e.g., *In re Interrogatory Propounded by Governor Hickenlooper*, 2013 CO 62, ¶ 17, 312 P.3d 153, 157 (discussing Colorado Constitution's required procedures for administration of state's first recall election of state legislators).

⁶² See, e.g., *Opinion of the Justices to the Governor*, 964 N.E.2d 941, 943 (Mass. 2012) (considering whether lieutenant governor was entitled to vote in meeting of Executive Council in which governor was not present); *Answer of the Justices to the Governor*, 829 N.E.2d at 1113 (considering governor's request to provide advisory opinion as to whether governor had authority to de-designate Chairperson of the Massachusetts Turnpike Authority).

⁶³ All advisory opinion states have take care clauses in their constitutions. See, e.g., FLA. CONST. art. IV, § 1(a); ME. CONST. art V, pt. I, § 12; MICH. CONST. art V, § 8; R.I. CONST. art IX, § 2.

⁶⁴ See, e.g., *In re Advisory Opinion to the Governor—State Revenue Cap*, 658 So. 2d 77, 78 (Fla. 1995) (quoting letter from governor in which he cited, inter alia, Take Care powers in requesting advisory opinion regarding constitutional amendment capping growth of state revenues).

⁶⁵ *Id.*

obtaining advisory opinions has clearly troubled courts,⁶⁶ although it has been accepted in certain cases as a valid authority for rendering advisory opinions.⁶⁷ Finally, courts have been quick to deploy their discretion to accept requests from the executive branch that do not otherwise meet established threshold requirements.⁶⁸

B. *Limitations on the Circumstances in Which Advisory Opinions May Be Requested*

States have also developed a wide range of devices to limit the circumstances in which opinions may be requested. The core of these limitations flows directly from specific textual provisions. Specifically, the constitutions of Colorado, Maine, Massachusetts, Michigan, New Hampshire, and South Dakota each contain explicit language limiting the use of advisory opinions to “important questions” of law and “solemn occasions.”⁶⁹ Over time, most courts have enlivened and sharpened these vague textual requirements by crafting specific jurisprudential doctrines to facilitate their practical application. For instance, many states now require a request to concern a present,⁷⁰ specific,⁷¹ and non-

⁶⁶ For example, the Rhode Island Supreme Court has noted that “[a]rguably, every request for [an] advisory opinion requiring statutory interpretation relates back to [the governor’s] constitutional duties.” *In re Request for Advisory Opinion from the Governor (Warwick Station Project)*, 812 A.2d 789, 790 (R.I. 2002) (denying request on other grounds).

⁶⁷ See, e.g., *Advisory Opinion to the Governor—1996 Amendment 5 (Everglades)*, 706 So. 2d 278, 280-81 (Fla. 1997) (issuing advisory opinion on request from governor because question directly concerned his “duty as governor to see that the law is faithfully executed”); *Opinion of the Justices*, 2015 ME 107, ¶¶ 6-11, 123 A.3d 494, 501 (justifying advisory opinion requested by governor concerning whether several bills were validly enacted into law on grounds that decision was necessary for governor to faithfully execute laws).

⁶⁸ See, e.g., *In re Advisory from the Governor*, 633 A.2d 664, 667 (R.I. 1993) (granting advisory opinion request even though “it is evident that the governor has no present constitutional duty awaiting performance”).

⁶⁹ See COLO. CONST. art. VI, § 3; ME. CONST. art. VI, § 3; MASS. CONST. pt. 2, ch. 3, art. II; MICH. CONST. art. III, § 8; N.H. CONST. pt. 2, art. 74; S.D. CONST. art. V, § 5.

⁷⁰ See, e.g., *Opinion of the Justices*, 653 A.2d 840, 840-41 (Del. 1994) (declining to render advisory opinion submitted shortly before general election by members of 137th session of Delaware Legislature on ground that 138th Delaware Legislature would be sworn in prior to issuance of opinion); *In re Advisory Opinion to the Senate (Beacon Mutual)*, 911 A.2d 276, 277 (R.I. 2006) (declining to issue advisory opinion because it would not be completed before composition of legislature changed); *In re Advisory Opinion to the House of Representatives*, 272 A.2d 925, 926 (R.I. 1971) (declining to issue advisory opinion on question requested by House because, inter alia, House’s adjournment *sine die* rendered question moot); see also *Opinion of the Justices*, 674 A.2d 501, 502 (Me. 1996) (declining to render advisory opinion where failed bill was submitted to electorate on ground that matter was no longer of “present concern” to Maine Legislature).

⁷¹ In New Hampshire, for example, the court has essentially adopted a per se rule requiring entities requesting an advisory opinion on the constitutionality of pending legislation to specify the specific areas of the constitution they would like the court to review. See, e.g.,

hypothetical⁷² right or duty of the requestor.⁷³ Further, the issue to be decided must be clear.⁷⁴ Outside of these textual limitations, courts have frequently expressed their reticence to opine on matters that implicate pending litigation⁷⁵ or private rights,⁷⁶ or are of narrow applicability.⁷⁷ Finally, courts have

Opinion of the Justices (Domicile for Voting Purposes), 115 A.3d 257, 258-59 (N.H. 2015) (declining to answer question submitted by House asking whether proposed bill violated any provisions of New Hampshire or U.S. constitutions on ground that “[h]istorically, we have declined to answer general inquiries on constitutional infirmity”).

⁷² See, e.g., Answer of the Justices to the Senate, 780 N.E.2d 444, 446 (Mass. 2002) (declining to opine on Senate President’s duties should joint session of legislature reconvene because it was “based on a series of hypothetical intervening events that may or may not occur”).

⁷³ See, e.g., In the Matter of the Construction of Article III, Section 5, of the South Dakota Constitution, 464 N.W.2d 825, 826 (S.D. 1991) (declining to render advisory opinion requested by governor regarding state’s legislative reapportionment process, partially because “[t]he request relates to the duties of the legislature—not the executive”).

⁷⁴ See, e.g., Opinion of the Justices to the Senate, 52 N.E.3d 1011, 1013 (Mass. 2016) (declining to issue advisory opinion regarding constitutionality of pending bill because certain term used in legislation was unclear and court declared itself “reluctant to opine on the important question posed without a specific understanding of what is meant by the Legislature when it uses the term in this particular context”). *But see In re* Request of the Governor for an Advisory Opinion, 12 A.3d 1104, 1108 (Del. 2009) (proceeding to consider advisory opinion request regarding pending legislation even after expressing concern that specifics of proposal were “in flux”).

⁷⁵ See, e.g., Opinion of the Justices (Domicile for Voting Purposes), 115 A.3d 257, 260 (N.H. 2015) (declining to issue advisory opinion because “there is pending before the court a litigated case, with a factual record developed over two years, that raises legal issues that are similar, if not identical, to those implicated” by question presented). *But see In re* Advisory Opinion to the House of Representatives (Impoundment of State Aid to Cities and Towns), 576 A.2d 1371, 1372 (R.I. 1990) (providing advisory opinion notwithstanding pendency of litigation over issue in state trial court).

⁷⁶ See Answer of the Justices to the Governor, 829 N.E.2d 1111, 1117 (Mass. 2005) (“Consistent with our established practice, we refrain from rendering advisory opinions which might ‘seriously, even if indirectly, affect private rights.’” (quoting Answer of the Justices to the House of Representatives, 376 N.E.2d 554 (Mass. 1978))); *In re* Opinion of the Justices (Appointment of Chief Justice of the Supreme Court), 842 A.2d 816, 818-19 (N.H. 2003) (requesting excuse from answering questions posed on grounds that reaching merits of question would involve addressing private rights of fellow justices of New Hampshire Supreme Court); *In re* Daugaard, 2016 S.D. 27, ¶¶ 5-10, 884 N.W.2d 163, 166.

⁷⁷ Alabama is the primary example of this, which has essentially developed a per se rule against rendering advisory opinions on legislation that only affects specific local units of government. See Opinion of the Justices No. 387, 95 So. 3d 6, 8 (Ala. 2012). The court has justified this rule by noting that such bills are not “of a general public nature.” Opinion of the Justices No. 383, 925 So. 2d 193, 196 (Ala. 2006).

occasionally framed decisions to either grant or deny requests as a function of their inherent discretionary authority.⁷⁸

States vary widely with respect to the breadth and depth of doctrine they have developed to establish and apply these limitations. Florida advisory opinions, for example, typically contain little analysis regarding limitations that may exist on the court's authority to answer the questions posed.⁷⁹ Similarly, in Michigan the court's majority opinions regularly provide only conclusory analysis when denying a request for an advisory opinion.⁸⁰ As a result, concurring and dissenting opinions are the sole windows into understanding the justices' thought processes.⁸¹ Recent opinions in Alabama have followed this same pattern.⁸² Alternatively, some courts, like the Massachusetts Supreme Judicial Court, routinely engage in extended discussions about their authority to issue advisory opinions.⁸³ This practice has allowed significant case law to develop on this threshold issue in those states. Further, the frequency with which requests for advisory opinions are denied varies dramatically among states. The Florida

⁷⁸ See, e.g., *In re* Request of the Governor for an Advisory Opinion, 12 A.3d 1104, 1108 (Del. 2009) ("It is well within the Justices' discretion to decide whether and to what extent to answer questions the Governor presents."); *In re* Request for Advisory Opinion Regarding Constitutionality of 2016 PA 249, 885 N.W.2d 470, 470 (Mich. 2016) (denying advisory opinion request "because we are not persuaded that granting the request would be an appropriate exercise of the Court's discretion").

⁷⁹ See, e.g., *In re* Advisory Opinion to the Governor re Commission of Elected Judge, 17 So. 3d 265 (Fla. 2009) (including no discussion of threshold issue whether court could or should provide an answer to question posed); *In re* Advisory Opinion to the Governor re Judicial Vacancy Due to Mandatory Retirement, 940 So. 2d 1090 (Fla. 2006) (same).

⁸⁰ See, e.g., *Constitutionality of 2016 PA 249*, 885 N.W.2d at 470 (providing only the following analysis justifying its denial of advisory opinion request from governor: "because we are not persuaded that granting the request would be an appropriate exercise of the Court's discretion"); *In re* Advisory Opinion Regarding Constitutionality of 2012 PA 348, 832 N.W.2d 391, 391 (Mich. 2013); *In re* Request for Advisory Opinion Regarding Constitutionality of 2002 PA 678, 658 N.W.2d 124, 124 (Mich. 2003) (denying advisory opinion request "because the Court concludes that under the circumstances it would be an inappropriate exercise of its discretion to grant the request"). *But see In re* 2002 PA 48, House of Representatives' Request for an Advisory Opinion, 652 N.W.2d 667, 667 (Mich. 2002) (explaining court's decision to vacate earlier order granting advisory opinion request).

⁸¹ See, e.g., *In re* Request for Advisory Opinion Regarding Constitutionality of 2012 PA 348 and 2012 PA 349, 829 N.W.2d 872, 873-76 (Mich. 2013) (Markman, J., dissenting) (providing extensive analysis of six reasons he found it appropriate for court to immediately issue opinion).

⁸² See *In re* Opinion of the Justices No. 392, 178 So. 3d 849, 849 (Ala. 2015) (mem.) (declining to issue advisory opinion without providing reasoning); Opinion of the Justices No. 388, 148 So. 3d 58, 58 (Ala. 2014) (mem.).

⁸³ See, e.g., Answer of the Justices to the Governor, 829 N.E.2d 1111, 1113-16 (Mass. 2005) (discussing "solemn occasion" requirement in detail, as well as court's reluctance to issue opinions touching on matters of private rights).

Supreme Court, for example, rarely, if ever, denies requests,⁸⁴ while the South Dakota Supreme Court has declared that requests are to be limited to the “rarest instances.”⁸⁵

Three broad categories of circumstantial limitations on advisory opinion authority are particularly relevant to the legislature. The first—timing limitations—concerns when an advisory opinion may be requested, and is similar to traditional ripeness and mootness doctrines. The second category—“occasion” limitations—attempts to limit requests to concrete questions directly bearing on some duty of the requestor. And the third category—legal limitations—consists of doctrinal restrictions courts derive from deeply rooted jurisprudential principles, such as the classic directive to avoid unnecessary adjudication of constitutional questions.

1. Timing Limitations

As is true in conventional litigation, many states require that advisory opinions present live disputes as opposed to ones that are hypothetical, speculative, or moot. As applied to the legislature, this means that requests must not simply be academic inquiries into the constitutionality of statutes, but instead must concern the constitutionality of some action the legislature proposes to take.⁸⁶ Some states, such as Alabama,⁸⁷ Massachusetts,⁸⁸ New Hampshire,⁸⁹ and

⁸⁴ This is apparent based on both a recent review of Florida advisory opinions, as well as historical analysis. See Persky, *supra* note 17, at 1182 tbl.2 (showing that Florida Supreme Court did not decline a single advisory opinion request, in whole or in part, between 1990 and 2004).

⁸⁵ *In re Daugaard*, 2016 S.D. 27, ¶ 3, 884 N.W.2d 163, 165 (quoting *In re House Resolution No. 30*, 72 N.W. 892, 892 (S.D. 1897)).

⁸⁶ See Opinion of the Justices, 2012 ME 49, ¶¶ 2-7, 40 A.3d 930, 932 (citing Opinion of the Justices, 709 A.2d 1183, 1185 (Me. 1997)) (stating that “the question propounded must concern a matter of ‘live gravity’ and ‘unusual exigency,’ which means that the body asking the question requires judicial guidance in the discharge of its obligations”).

⁸⁷ In Alabama, all advisory opinion requests, even those from the governor, must concern pending legislation. See Opinion of the Justices No. 375, 823 So. 2d 1274, 1275 (Ala. 2002) (declining to issue advisory opinion at governor’s request on grounds that bill in question had recently passed legislature and thus was no longer pending); see also Opinion of the Justices No. 384, 49 So. 3d 1181, 1187 (Ala. 2010) (noting consistent restriction of advisory opinions to proposed legislation).

⁸⁸ In *Opinion of the Justices to the Senate*, the Massachusetts Supreme Judicial Court gave seemingly dispositive weight to the fact that a bill that was the subject of an advisory opinion request would remain pending after the termination of the first annual session and beginning of the second annual session of the 1999-2000 legislative session due to a recent rules change. 723 N.E.2d 1, 4 (Mass. 2000) (“[I]t is clear that the bill will carry over into the second annual session of the 1999-2000 General Court and will remain pending. Therefore, a solemn occasion exists and it is proper to answer the question.”).

⁸⁹ “First, [a]dvisory opinions required by this constitutional provision are limited to advise upon important legal questions pending in, and awaiting consideration and action by, the body

Rhode Island,⁹⁰ require advisory opinion requests involving legislation to concern only *pending* legislation.⁹¹ Slightly different restrictions apply to questions not involving legislation.⁹² The Michigan Constitution explicitly establishes a unique exception to this prevailing requirement that advisory opinion requests concern presently pending legislation. It permits an advisory opinion to be issued only after a bill “has been enacted into law but before its effective date.”⁹³ Further, states have occasionally allowed the governor to seek advisory opinions regarding the constitutionality of legislation that has passed the legislature and is awaiting his signature or veto.⁹⁴

Courts’ desire to opine only on live issues has led them to decline to issue opinions where a given legislative session has officially ended,⁹⁵ the legislation at issue has been indefinitely postponed,⁹⁶ or the legislature has adjourned *sine die*.⁹⁷ Even when the legislature theoretically retains the capacity to act on a response, some courts have declined requests when the court is unlikely to have

entitled to the advice in the course of its duty.” Opinion of the Justices (School Financing), 712 A.2d 1080, 1084 (N.H. 1998) (quoting Opinion of the Justices, 340 A.2d 112, 114 (N.H. 1975)).

⁹⁰ The Rhode Island Supreme Court has stated that it is “constitutionally obligated to give advisory opinions to either House of the General Assembly only when the questions propounded concern the constitutionality of pending legislation” *Watson v. Fox*, 44 A.3d 130, 136 (R.I. 2012) (quoting *In re Advisory Opinion* (Chief Justice), 507 A.2d 1316, 1318-19 (R.I. 1986)).

⁹¹ Other states routinely opine on the constitutionality of pending legislation as well. *See, e.g., In re Interrogatories Submitted by the General Assembly on House Bill 04-1098*, 88 P.3d 1196, 1197 (Colo. 2004); Opinion of the Justices, 2004 ME 54, ¶¶ 4-9, 850 A.2d 1145, 1148.

⁹² One example of this would be when the governor requests an advisory opinion regarding powers or duties of the executive branch. In such cases, courts generally ask whether the subject of the advisory opinion request concerns a “present duty” of the governor. *See Answer of the Justices to the Governor*, 829 N.E.2d 1111, 1113-14 (Mass. 2005).

⁹³ MICH. CONST. art. III, § 8.

⁹⁴ *See, e.g., In re Janklow*, 530 N.W.2d 367, 370 (S.D. 1995) (issuing advisory opinion regarding legislation awaiting governor’s signature). *But see In re Daugaard*, 2016 S.D. 27, ¶ 19, 884 N.W.2d 163, 169 (refusing advisory opinion concerning constitutionality of two bills awaiting governor’s signature because they apparently did not involve subjects that directly impacted governor’s exercise of executive power).

⁹⁵ *See Opinion of the Justices No. 374*, 826 So. 2d 109, 111 (Ala. 2002) (declining to render opinion regarding bill introduced in 2001 Special Session of legislature because Special Session had ended).

⁹⁶ *See Opinion of the Justices No. 386*, 69 So. 3d 859, 860 (Ala. 2011) (“Since we have received the resolution asking this question, we have become aware of . . . the fact that [the bill] has been indefinitely postponed from further consideration. We therefore conclude that [the bill] is no longer pending before the Senate.”); Opinion of the Justices No. 350, 665 So. 2d 1387, 1388 (Ala. 1995) (same).

⁹⁷ *See In re Advisory Opinion to the House of Representatives*, 272 A.2d 925, 926 (R.I. 1971).

sufficient time to produce a reasoned opinion prior to the end of a given legislative session.⁹⁸

The requirement that legislation actually be pending forces legislators to publicly file legislative proposals prior to seeking an advisory opinion.⁹⁹ This saves courts from expending judicial resources opining on unintroduced legislation that could be a moving target. The issue is less clear with respect to legislation that has been introduced but may not be in its final form. In such circumstances, some courts have similarly been reluctant to issue advisory opinions.¹⁰⁰ But despite their concerns, courts have largely deferred to the legislature in these circumstances, issued opinions anyway, and refused to fashion strict rules regarding how far in the legislative process a bill must proceed to become worthy of an advisory opinion.¹⁰¹ However, in practice, most advisory opinions are not requested until legislation is effectively in or near final form.¹⁰²

⁹⁸ See *supra* note 70 and accompanying text. This results from courts' refusal to assume that successive legislatures will necessarily concur with their predecessors regarding the need for an opinion on a given issue. See *Opinion of the Justices*, 653 A.2d 840, 840-41 (Del. 1994) ("Whether or not the 138th General Assembly would likewise concur [with the 137th General Assembly] regarding the need for the Opinions of the Justices on the same question . . . remains to be seen.").

⁹⁹ I found one exception to this general principle that occurred in Delaware. See *In re Request of the Governor for an Advisory Opinion*, 12 A.3d 1104, 1106 (Del. 2009). On March 19, 2009, the governor sought an advisory opinion regarding the constitutionality of a proposal to create a sports lottery in the state. *Id.* at 1106-07. The initial request merely included a summary of the proposal, and an actual copy of introduced legislation was not forwarded to the court until March 31st. *Id.* at 1107. Thus, the initial advisory opinion request did not concern pending legislation, although the court's actual opinion on the question referenced the formal legislative proposal, not the governor's summary. *Id.* at 1114. Further, the request came from the governor, not the legislature. See *id.* at 1106.

¹⁰⁰ For example, the Delaware Supreme Court expressed concern when asked to render an advisory opinion regarding legislation that had changed since the initial request had been received and was still subject to active amendment. See *id.* at 1107-08 (noting that circumstances regarding legislation had "significantly changed and were in flux"). The Rhode Island Supreme Court expressed a similar sentiment when asked to opine on a bill that had just been introduced and referred to committee in the House, but remained "in a largely underdeveloped and inchoate state" and in need of technical revisions. *In re Advisory Opinion to the House of Representatives (Casino II)*, 885 A.2d 698, 701-02 (R.I. 2005).

¹⁰¹ See, e.g., *Opinion of the Justices (School Financing)*, 712 A.2d 1080, 1084 (N.H. 1998) ("While it is suggested that an advisory opinion should not be allowed to proceed until the senate's consideration of the bill has reached the 'penultimate stage' and is ready for an 'ought to pass' vote, the constitution contains no such requirement."); see also *In re Request of the Governor for an Advisory Opinion*, 12 A.3d 1104, 1107-08 (Del. 2009) (issuing opinion on bill, despite court's concerns that legislation was in flux which could render matter moot).

¹⁰² See, e.g., *Opinion of the Justices*, 601 A.2d 610, 617 (Me. 1991) (considering constitutionality of proposed legislation after it had passed House and awaited final passage in Senate).

2. Occasion Limitations

Deeply intertwined with timing limitations are requirements that advisory opinions may only be issued for “important questions” of law on “solemn occasions,”¹⁰³ along with similar provisions in other states.¹⁰⁴ Many state constitutions use this language, although there is disagreement over how it ought to be applied. Massachusetts, for example, will render an advisory opinion only if the question presented is *both* an important question of law *and* a solemn occasion.¹⁰⁵ In South Dakota, by contrast, the requirement is that *either* an important question of law *or* a solemn occasion exist.¹⁰⁶ As a result, the courts’ analyses differ in these states when considering advisory opinion requests.

Most importantly, states have developed divergent doctrines regarding what constitutes an “important question” of law or a “solemn occasion.” Some states, such as Colorado, have expressly embraced a fluid understanding of the “solemn occasion” requirement and explicitly disclaimed the suitability of bright-line rules.¹⁰⁷ Similarly, South Dakota has developed an eight-part balancing test to determine whether a “solemn occasion” exists.¹⁰⁸ Alternatively, Maine formulates the inquiry more simply: “[f]or a solemn occasion to exist, the question propounded must concern a matter of ‘live gravity’ and ‘unusual

¹⁰³ See *supra* note 69 and accompanying text.

¹⁰⁴ In Alabama, the law requires that advisory opinions be issued only for “important constitutional questions.” ALA. CODE § 12-2-10 (2017).

¹⁰⁵ See Opinion of the Justices to the House of Representatives, 32 N.E.3d 287, 292 (Mass. 2015) (“[T]he Constitution . . . imposes on us an obligation *not* to respond unless we are first satisfied that . . . an important question of law and a solemn occasion—exist.”); Answer of the Justices to the Governor, 829 N.E.2d 1111, 1113 (Mass. 2005) (“[T]he Constitution does not permit us to answer even important questions unless they are presented to us in the context of ‘solemn occasions.’” (citing Answer of the Justices to the Governor, 302 N.E.2d 565 (Mass. 1973))).

¹⁰⁶ See *In re Daugaard*, 2016 S.D. 27, ¶¶ 7-14, 884 N.W.2d 163, 166-67 (“[The South Dakota Constitution] presents two situations in which this Court has the discretion to answer gubernatorial requests for an advisory opinion. The first is ‘upon important questions of law involved in the exercise of his executive power.’ The second is ‘upon solemn occasions.’” (citation omitted) (citing S.D. CONST. art. V, § 5)).

¹⁰⁷ See *In re Interrogatory Propounded by Governor Hickenlooper*, 2013 CO 62, ¶ 7, 312 P.3d 153, 156 (“It is impossible to state any absolute rule by which the sufficiency of this importance and the degree of this solemnity can be determined.” (quoting *In re Senate Resolution Relating to Senate Bill No. 65*, 21 P. 478, 479 (Colo. 1889))).

¹⁰⁸ This test “weighs [1] whether an important question of law is presented, [2] whether the question presents issues pending before the Court, [3] whether the matter involves private rights or issues of general application, [4] whether alternative remedies exist, [5] whether the facts and questions are final or ripe for an advisory opinion, [6] the urgency of the question, [7] whether the issue will have a significant impact on state government or the public in general, and [8] whether the Court has been provided with an adequate amount of time to consider the issue.” *Daugaard*, 2016 S.D. 27, ¶ 13, 884 N.W.2d at 167 (citing *In re Janklow*, 530 N.W.2d 367, 369 (S.D. 1995)).

exigency,' which means that the body asking the question requires judicial guidance in the discharge of its obligations."¹⁰⁹ Further, the requestor must have "serious doubts" about its authority to take a particular action.¹¹⁰ Also, the facts supporting the solemn occasion must be "clear and compelling."¹¹¹ Massachusetts takes a very similar approach,¹¹² although without Maine's "clear and compelling" requirement.¹¹³ Courts typically do not inquire deeply into whether "serious doubt" is actually present,¹¹⁴ as the standard inherently speaks to the subjective opinion of the requestor. The standard is thus pointedly deferential.¹¹⁵ The key requirement running throughout these various approaches is the condition that the propounded question must arise in the context of the requestor's contemplated exercise of some authority or duty that it possesses.¹¹⁶ The primary value of this restriction is to prevent one branch of government from seeking an advisory opinion regarding the affairs of another.¹¹⁷

¹⁰⁹ Opinion of the Justices, 2012 ME 49, ¶ 6, 40 A.3d 930, 932 (citing Opinion of the Justices, 709 A.2d 1183, 1185 (Me. 1997)).

¹¹⁰ See Opinion of the Justices, 2015 ME 107, ¶¶ 1-5, 123 A.3d 494, 500.

¹¹¹ *Id.* at ¶ 5, 123 A.3d at 500 (quoting Opinion of the Justices, 2015 ME 27, ¶¶ 17-21, 112 A.3d 926, 934).

¹¹² See Opinion of the Justices to the Governor, 964 N.E.2d 941, 943 (Mass. 2012) ("A 'solemn occasion' arises when a branch of government, 'having some action in view, has serious doubts as to [its] power and authority to take such action, under the Constitution, or under existing statutes.'" (quoting Answer of the Justices to the Council, 962 N.E.2d 166, 166 (Mass. 2012))); see also Opinion of the Justices to the House of Representatives, 32 N.E.3d 287, 293 (Mass. 2015).

¹¹³ However, the Massachusetts Supreme Judicial Court does purport to construe the "solemn occasion" requirement "strictly." See *Opinion of the Justices*, 32 N.E.3d at 293.

¹¹⁴ See Opinion of the Justices, 2004 ME 54, ¶ 7, 850 A.2d 1145, 1148 ("We take [the legislature] at their word that an opinion on the constitutionality of the initiated bill by the justices would assist and inform the Senate and House in their deliberations.").

¹¹⁵ As a result, entities requesting an advisory opinion in Massachusetts will typically proactively declare that they have "grave doubt" regarding an action they are about to take when submitting an advisory opinion request. See, e.g., Opinion of the Justices to the Senate, 764 N.E.2d 343, 345 (Mass. 2002).

¹¹⁶ There is a difference across the case law of the various states as to whether a solemn occasion requires a present duty only or may also be found where the requestor possesses the *authority* to take some kind of action, but does not necessarily have a direct *duty* to undertake some action. Compare Opinion of the Justices, 2015 ME 107, ¶¶ 6-11, 123 A.3d 494, 501 (discussing both "duties and authorities"), with Opinion of the Justices to the House of Representatives, 32 N.E.3d 287, 293 (Mass. 2015) (speaking only in terms of "present duty"). The difference between these two regimes appears largely academic, as I have found little that actually turns on the distinction. In any event, the terms "duty" and "authority" would appear to be elastic enough themselves as to allow for significant substantive overlap.

¹¹⁷ See *Opinion of the Justices*, 2015 ME 107 at ¶ 7, 123 A.3d at 501 ("[W]e will not answer 'questions from one branch of the government inquiring about the power, duty, or authority of another branch . . .'" (citing Opinion of the Justices, 709 A.2d 1183, 1185 (Me. 1997))).

The “important question of law” requirement is much less strictly enforced. For instance, in Massachusetts, the question is frequently dismissed after only cursory discussion.¹¹⁸ As with the “solemn occasion” requirement, Colorado has disclaimed any bright-line rule relevant to its analysis here.¹¹⁹ Indeed, one is hard-pressed to find any recent instances in which a court has declined to render an advisory opinion because the question presented was deemed insufficiently “important.”¹²⁰ This is perhaps not surprising—if the “important question of law” requirement was given any teeth, courts would effectively be forced to divide their state’s jurisprudence into “important legal questions” and “unimportant legal questions.” As such a practice could arguably corrode the rule of law, it is understandable why courts may be reluctant to embark on such a venture, especially given that most advisory opinion requests pose *constitutional* questions that the legislature itself deem important enough to warrant an advisory opinion request.

Despite these well-established doctrines, courts have not been consistently rigorous in conducting overt inquiries into the presence of a “solemn occasion” and “important question of law” when considering advisory opinion requests. Even within the same state, courts sometimes engage in a lengthy discussion of these threshold questions,¹²¹ while in other cases, the same court will not mention these issues at all.¹²² Thus, a high level of flexibility exists in the application of these rules.

3. Legal Limitations

Finally, states limit the kinds of legal questions that may be resolved through advisory opinions. For example, all states allow advisory opinions to be issued

¹¹⁸ See *Opinion of the Justices*, 32 N.E.3d at 293 (remarking that “[t]here is no doubt that the questions presented by the House are ‘important questions of law’” before very briefly commenting on several ad hoc considerations that prompted this conclusion); *Opinion of the Justices to the Governor*, 964 N.E.2d 941, 943 (Mass. 2012) (“Because we have no doubt that the question of law presented here is important, we turn immediately to whether it comes to us in the context of a ‘solemn occasion.’”).

¹¹⁹ See *supra* note 107 and accompanying text.

¹²⁰ South Dakota has come closest to establishing a justiciable standard for “important question[s] of law.” See *In re Daugaard*, 2016 S.D. 27, ¶ 9, 884 N.W.2d 163, 166 (quoting *In re Opinion of the Supreme Court Relative to the Constitutionality of Chapter 239, Session Laws of 1977*, 257 N.W.2d 442, 447 (S.D. 1977) (Wollman, J., concurring specially)) (holding that court should limit advisory opinions requested by governor to instances where “the Governor’s executive power will result in immediate consequences having an impact on the institutions of state government or on the welfare of the public”).

¹²¹ See, e.g., *Opinion of the Justices*, 32 N.E.3d at 292-94 (discussing “important questions of law” and “solemn occasion” requirements over five paragraphs before finally deciding court had authority to issue opinion).

¹²² See, e.g., *Opinion of the Justices to the Senate*, 764 N.E.2d 343 (Mass. 2002) (including no explicit discussion of either “solemn occasion” or “important question of law” requirements).

interpreting their state constitutions. Some allow this by constitution,¹²³ others by statute,¹²⁴ and still others by judicial interpretation.¹²⁵ Courts also routinely issue advisory opinions interpreting various provisions of the U.S. Constitution.¹²⁶ Further, although some states textually limit advisory opinions to questions involving constitutional issues,¹²⁷ several states' constitutional provisions authorizing advisory opinions theoretically would permit advisory opinions concerning pure questions of statutory interpretation.¹²⁸ In practice, such requests have materialized only very rarely.¹²⁹

Courts have also imposed several limitations on the legislature's ability to obtain advisory opinions, even for these questions. These restrictions derive

¹²³ FLA. CONST. art. IV, § 1(c); MICH. CONST. art. III, § 8.

¹²⁴ ALA. CODE § 12-2-10 (2017); DEL. CODE ANN. tit. 10, § 141(a) (2016); DEL. CODE ANN. tit. 29, § 2102 (2016).

¹²⁵ See, e.g., Opinion of the Justices to the Acting Governor, 780 N.E.2d 1232, 1233-34 (Mass. 2002) (considering request from acting governor about nature of her constitutional obligation to reconvene joint session of legislature); see also *In re* Interrogatories Submitted by the General Assembly on House Bill 04-1098, 88 P.3d 1196, 1197 (Colo. 2004); Opinion of the Justices, 2015 ME 107, ¶¶ 1-5, 123 A.3d 494, 500; Opinion of the Justices (Requiring Attorney General to Join Lawsuit), 27 A.3d 859, 862-63 (N.H. 2011); *In re* Request for Advisory Opinion from the House of Representatives (Coastal Resources Management Council), 961 A.2d 930, 932 (R.I. 2008); *In re* Daugaard, 2011 S.D. 44, ¶¶ 2-4, 801 N.W.2d 438, 439.

¹²⁶ See, e.g., *In re* Interrogatory Propounded by Governor Hickenlooper, 2013 CO 62, ¶ 18, 312 P.3d 153, 157 (interpreting First and Fourteenth Amendments); Opinion of the Justices to the Senate, 723 N.E.2d 1, 2 (Mass. 2000) (interpreting First Amendment's Free Speech and Free Assembly Clauses); *In re* Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444, 469 (Mich. 2007) (interpreting First and Fourteenth Amendments); Opinion of the Justices (Voting Age in Primary Elections II), 973 A.2d 915, 919-20 (N.H. 2009) (same).

¹²⁷ See, e.g., ALA. CODE § 12-2-10 ("The Governor, by a request in writing, or either house of the Legislature, by a resolution of such house, may obtain a written opinion of the justices of the Supreme Court of Alabama or a majority thereof on important constitutional questions.").

¹²⁸ See, e.g., MASS. CONST. pt. 2, ch. 3, art. II ("Each branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions.").

¹²⁹ See Opinion of the Justices, 2015 ME 27, ¶ 9, 112 A.3d 926, 932 ("Here, the Governor's questions seek the interpretation of statutory—not constitutional—language."). Theoretically, one could argue that only constitutional questions are "important questions of law," and thus conclude that pure statutory questions are textually prohibited. However, modern courts have not made such an argument. Further, the Michigan Constitution includes both an "important questions of law" restriction and language explicitly limiting advisory opinions to questions concerning "the constitutionality of legislation." MICH. CONST. art. III, § 8. Given the existence of both clauses, it would seem unlikely that the framers, at least the Michigan Constitution's framers, intended "important questions of law" to exclusively mean constitutional questions.

from familiar legal principles, such as judicial restraint, the desire to avoid *ex parte* adjudication of private rights, and the duty to avoid unnecessarily deciding constitutional issues. First, when the legislature seeks an opinion regarding the constitutionality of legislation with respect to several constitutional clauses at once, courts frequently refrain from unnecessarily opining on all questions after they find the legislation violates a single clause.¹³⁰ Contrarily, courts have also *sua sponte* raised and decided constitutional questions on occasion.¹³¹ Second, where a question implicates both the state and federal constitutions, courts may refuse to reach the federal questions where the matter can be decided solely on state constitutional grounds.¹³² Third, some courts refuse omnibus requests from the legislature that ask the court to evaluate the constitutionality of a proposal with respect to any and all relevant constitutional provisions instead of proactively enumerating specific clauses for the court to consider.¹³³ Finally, courts look poorly on advisory opinion requests that implicate pending litigation or private rights matters, although these limitations are somewhat inconsistently defined and applied.¹³⁴

¹³⁰ *See, e.g.*, Opinion of the Justices No. 384, 49 So. 3d 1181, 1190 (Ala. 2010) (refusing to reach questions concerning constitutionality of proposal under Privileges and Immunities and Equal Protection Clauses of U.S. Constitution after finding proposal violated the dormant Commerce Clause of U.S. Constitution); Opinion of Justices to the House of Representatives, 702 N.E.2d 8, 16 (Mass. 1998) (same).

¹³¹ *See* Opinion of the Justices No. 373, 795 So. 2d 630, 633 (Ala. 2001) (finding that bill violated constitutional prohibition on lotteries when legislature had only asked court to consider Origination Clause question); *In re* Advisory Opinion to the House of Representatives (Casino II), 885 A.2d 698, 707-08 (R.I. 2005) (raising question of bill's constitutionality under nondelegation doctrine *sua sponte* and finding it deficient on those grounds).

¹³² In Delaware, for instance, the governor submitted a request first asking whether language in the Delaware Constitution "that no person shall be appointed to an office within a county who has not resided in that county one year next prior to appointment" applied to the Chief of Police or Public Safety Director of New Castle County. *In re* Request of the Governor for an Advisory Opinion, 905 A.2d 106, 106 (Del. 2006). Because the court concluded that the language did not apply, it refused to reach the governor's second question asking whether such application was unconstitutional under the Equal Protection and Privileges and Immunities Clauses of the U.S. Constitution. *Id.* at 115; *see also* Opinion of the Justices (Eliminating Requirement for Additional Breath Test Samples), 2 A.3d 1102, 1107 (N.H. 2010) (finding legislation related to breath tests for DWI suspects unconstitutional under Due Process Clause of New Hampshire Constitution and therefore refusing to reach question of proposal's constitutionality under Due Process Clause of U.S. Constitution).

¹³³ *See, e.g.*, Opinion of the Justices No. 360, 692 So. 2d 106, 106-07 (Ala. 1997) (declining to provide advisory opinion and declaring "overbroad" advisory opinion request on whether bill violated "any provision of the Constitution"); Opinion of the Justices (Domicile for Voting Purposes), 115 A.3d 257, 259 (N.H. 2015) ("Historically, we have declined to answer general inquiries on constitutional infirmity . . .").

¹³⁴ *See supra* notes 75-76 and accompanying text.

C. *Legal Status of Advisory Opinions*

The legal status of advisory opinions differs from traditional court rulings in two respects. First, with limited exceptions,¹³⁵ courts formally characterize advisory opinions as nonbinding.¹³⁶ In fact, courts technically do not issue advisory opinions in an institutional capacity at all. Instead, they are formally issued by justices in their individual capacities.¹³⁷ Thus, if a court hears a case concerning a matter that has previously been the subject of an advisory opinion, it officially remains free to re-examine the issue *de novo*, unburdened by *stare decisis*.¹³⁸ But in practice, advisory opinions have long been treated as *de facto* legal precedent by attorneys, judges,¹³⁹ and the press.¹⁴⁰ This is not surprising. When a state's highest court issues an opinion on a matter of law, it is reasonable to assume that lower state courts, federal courts, and society generally will likely treat that pronouncement as a valid statement of the law despite its technical lack of precedential value.¹⁴¹ Indeed, state and federal courts routinely cite advisory opinions in non-advisory decisions.¹⁴² The idea that a ruling by a state's highest

¹³⁵ Colorado is the major exception, as it has declared its advisory opinions to have the force of binding precedent since 1889. Topf, *supra* note 21, at 108 (quoting *In re Senate Resolution Relating to Senate Bill No. 65*, 21 P. 478, 479 (Colo. 1889)).

¹³⁶ *See id.* at 102 (“[Advisory opinions] are not binding on those requesting the advice, on the justices themselves, or on anyone else, and they are without precedential force or effect on future advisory opinions or on litigated cases.”).

¹³⁷ *See, e.g., In re Advisory Opinion to the Governor (Casino)*, 856 A.2d 320, 323 (R.I. 2004) (citing *In re Request for Advisory Opinion Regarding House Bill 83-H-5640*, 472 A.2d 301, 302 (R.I. 1984)) (declaring that justices issue advisory opinions “in [their] individual capacities as legal experts rather than Supreme Court justices”).

¹³⁸ *See Opinion of the Justices No. 289*, 410 So. 2d 388, 392 (Ala. 1982) (“It is also instructive to note that advisory opinions are not binding precedents as are decisions on appeal to this Court. Therefore, it is possible that this Court could render an advisory opinion offering its belief that a bill does not violate the Alabama Constitution but later declare the same act unconstitutional . . .” (citation omitted)).

¹³⁹ *See Topf, supra* note 21, at 129-30 (“Like that which looks like a duck, walks like a duck and quacks like a duck, advisory opinions have looked, behaved and sounded like adjudicated decisions, and they have, not unreasonably, been perceived and employed, as such.”); *see also Ray v. Mortham*, 742 So. 2d 1276, 1285 (Fla. 1999) (“[A]lthough our advisory opinions are not strictly binding precedent in the most technical sense, only under *extraordinary* circumstances will we revisit an issue decided in our earlier advisory opinions.”).

¹⁴⁰ *See C. Dallas Sands, Government by Judiciary—Advisory Opinions in Alabama*, 4 ALA. L. REV. 1, 15 (1951) (“[T]he terminology commonly used in the press when advisory opinions come in for mention reflects the notion that such opinions are just as official as any other action of the court.”).

¹⁴¹ *See Topf, supra* note 21, at 130-32 (explaining that this is particularly true for advisory opinions, which are often indistinguishable from regular judicial opinions in terms of their communicative structure and issuing process).

¹⁴² For example, the Massachusetts Supreme Judicial Court cited advisory opinions in three separate cases in October 2017 alone. *See, e.g., Smith v. City of Westfield*, 82 N.E.3d

court could be in any way negotiable or optional would seem to be both contrary to and corrosive of basic American understandings of the role of the judiciary.¹⁴³ Therefore, in practice, “[t]he nonbinding doctrine is little more than a jurisprudential figleaf.”¹⁴⁴ Accordingly, absent some unusual exigency, requestors ought not be lulled into believing that the stakes in having a matter adjudicated through an advisory opinion are any lower than in traditional adversarial litigation.

Second, in several states, proposed statutes presented to a court through an advisory opinion do not enjoy the standard presumption of constitutionality they would enjoy in the context of traditional litigation.¹⁴⁵ In these states, it is thus possible that some statutes could be upheld if subject to only *ex post* litigation but struck down if an advisory opinion is requested.¹⁴⁶ Other states, however, afford statutes reviewed in an advisory opinion the traditional presumption of constitutionality.¹⁴⁷ In all cases, however, a statute reviewed *ex ante ipso facto*

390, 401 (Mass. 2017) (citing Massachusetts advisory opinion in case concerning state constitutional restriction on disposal of government-owned conservation land). The manner in which courts typically reference advisory opinions in these cases gives no indication that the advisory opinions are anything other than fully-functioning legal precedent. Federal courts also routinely cite advisory opinions issued by constituent state courts. *See, e.g.*, *Penobscot Nation v. Mills*, 861 F.3d 324, 349 (1st Cir. 2017). Even more revealing is the fact that some federal court opinions have cited advisory opinions produced by state courts outside their jurisdiction. *See, e.g.*, *In re Gawker Media LLC*, 571 B.R. 612, 633 (Bankr. S.D.N.Y. 2017) (referencing New Hampshire advisory opinion regarding SLAPP lawsuits in attempt to characterize law in that state). When choosing to cite these opinions, these faraway federal courts are unlikely to be intimately familiar with the contours of the “nonbinding” doctrines accompanying the advisory opinions they reference.

¹⁴³ This reality was noted as long ago as 1896 when a commentator observed that although an advisory opinion “is purely advisory, it is an official act, and can hardly fail to be prejudicial to parties adversely interested, and to influence the officials of lower tribunals, as well as to bias the subsequent opinions of the judges themselves if the question comes up for actual decision.” *See Note, supra* note 19, at 50.

¹⁴⁴ Topf, *supra* note 21, at 134; *see also* Sands, *supra* note 140, at 16 (“[I]f layman, lawyer, and judge alike exhibit the common tendency to ascribe official authority to [advisory opinions], then the [nonbinding] theory must be regarded as fictional.”).

¹⁴⁵ *See In re Submission of Interrogatories on House Bill 99-1325*, 979 P.2d 549, 554 (Colo. 1999) (finding no presumption of constitutionality “because the bill in question has not been passed and the legislature has certified to us that they are not certain of its constitutionality”); *Opinion of the Justices to the House of Representatives*, 702 N.E.2d 8, 11 (Mass. 1998) (“We note at the outset that ‘[t]here is no presumption of validity when we consider a proposed statute in an advisory opinion.’” (quoting *Opinion of the Justices*, 333 N.E.2d 388, 396 (Mass. 1975))).

¹⁴⁶ *See* Topf, *supra* note 21, at 135 (finding that court reviewing statute in advisory opinion context is more likely to find statute unconstitutional than when court reviews it in context of live case or controversy).

¹⁴⁷ *See, e.g.*, *Opinion of the Justices*, 2004 ME 54, ¶ 10, 850 A.2d 1145, 1149 (granting proposed citizen-initiated legislation “heavy presumption of constitutionality”); *In re Request*

does not enjoy the benefit of the societal reliance interests that sometimes attach to duly enacted statutes, especially those in effect for a significant period of time before they are litigated. Because courts do not take cognizance of these interests when issuing advisory opinions, some statutes may be more likely to be invalidated. As such, there is inherently far less inertia militating against invalidating a statute during advisory opinion review.

II. SUBSTANTIVE CONTENT OF ADVISORY OPINIONS

The structural features of the advisory opinion process discussed in Part I provide essential rules that govern its use. As long as the legislature or executive follow these requirements, they may seek an advisory opinion regarding any of the substantive areas in which they may act. However, certain substantive categories of questions tend to appear in recent advisory opinion requests more than others. To understand this reality and its implications, this Part analyzes the use of advisory opinions across three broad substantive categories.

The first category concerns questions involving the procedures for operating state governments. These questions primarily concern structural constitutional provisions that define and limit the powers of the legislature or governor. The second category involves what I term “regulatory questions.” These questions primarily concern the constitutionality of complex or novel statutory schemes that the legislature wishes to enact, usually based on a desire to regulate some new area or create a new program. The third, less common category consists of questions involving personal rights. That is, questions that impact the rights of individuals within a given state.

A. *Structural and Procedural Questions*

For more than two centuries, state legislatures and governors have commonly used advisory opinions to better understand the scope of their own powers and duties.¹⁴⁸ These opinions ask three types of questions: those that solely implicate the governor’s authority, those that solely implicate the legislature’s authority, and those that implicate both legislative and gubernatorial authority. Examples of opinions that only involve questions of gubernatorial authority are somewhat limited, but include topics such as the governor’s: judicial appointment

for Advisory Opinion Regarding Constitutionality of 2011 PA 38, 806 N.W.2d 683, 692 (Mich. 2011); Opinion of the Justices (Requiring Attorney General to Join Lawsuit), 27 A.3d 859, 864 (N.H. 2011) (observing that advisory opinions grant proposed statutes same presumption of constitutionality that exists in traditional litigation).

¹⁴⁸ For example, the earliest known advisory opinion, issued in 1781, concerned the proper construction of the Origination Clause of the Massachusetts Constitution. Topf, *supra* note 21, at 103.

authority,¹⁴⁹ appointment authority of local officials,¹⁵⁰ election administration,¹⁵¹ service on various boards and commissions,¹⁵² and various other day-to-day executive duties.¹⁵³

Questions concerning the legislature's authority that do not directly implicate the governor are less common. These include questions concerning the origination clauses,¹⁵⁴ petitions for legislation,¹⁵⁵ the proper application of

¹⁴⁹ See, e.g., *In re* Request of the Governor for an Advisory Opinion, 950 A.2d 651, 651 (Del. 2008) (concerning constitutionality of pending nomination for office of Family Court Commissioner); Advisory Opinion to the Governor re Judicial Vacancy Due to Resignation, 42 So. 3d 795, 795 (Fla. 2010) (concerning gubernatorial appointment power for vacant county court judgeship); Advisory Opinion to the Governor re Judicial Vacancy Due to Mandatory Retirement, 940 So. 2d 1090, 1090 (Fla. 2006) (concerning gubernatorial appointment power when judge was facing mandatory retirement); *In re* Advisory to the Governor (Judicial Nominating Commission), 668 A.2d 1246, 1247 (R.I. 1996) (concerning governor's powers to fill state supreme court vacancy); *In re* Daugaard, 2011 S.D. 44, ¶¶ 2-4, 801 N.W.2d 438, 439 (concerning residency requirements for appointment to state supreme court seats).

¹⁵⁰ See, e.g., *In re* Request of the Governor for an Advisory Opinion, 905 A.2d 106, 115 (Del. 2006) (concerning residency requirements for county appointees for Chief of Police and Public Safety Director); Advisory Opinion to the Governor re Sheriff and Judicial Vacancies Due to Resignations, 928 So. 2d 1218, 1218 (Fla. 2006) (concerning governor's duties after sheriff's resignation); *In re* Advisory Opinion to the Governor—School Board Member—Suspension Authority, 626 So. 2d 684, 687-90 (Fla. 1993) (holding that governor's ability to suspend "county officers" for malfeasance in office extended to school board members).

¹⁵¹ See, e.g., *In re* Interrogatory Propounded by Governor Hickenlooper, 2013 CO 62, ¶ 17, 312 P.3d 153, 157 (concerning certain voters' eligibility to participate in Colorado's first-ever recall elections); Opinion of the Justices, 2002 ME 169, ¶¶ 1-2, 815 A.2d 791, 792 (interpreting constitutional requirement that governor certify apparent winner of legislative elections by specified date); Opinion of the Justices, 578 A.2d 183, 186 (Me. 1990) (concerning scope of gubernatorial duties relating to administration of elections).

¹⁵² See, e.g., *In re* Request of the Governor for an Opinion of the Justices, 997 A.2d 668, 669 (Del. 2010) (concerning governor's ability to hold advisory position to Federal Commissioner of Education Statistics); Opinion of the Justices, 647 A.2d 1104, 1104 (Del. 1994) (concerning governor's ability to serve on Amtrak Board of Directors).

¹⁵³ See, e.g., Opinion of the Justices to the Governor, 964 N.E.2d 941, 943 (Mass. 2012) (concerning whether governor needed to be physically present at meeting of Governor's Council in order for Lieutenant Governor to vote).

¹⁵⁴ See Opinion of the Justices No. 373, 795 So. 2d 630, 631-32 (Ala. 2001); Opinion of the Justices to the House of Representatives, 32 N.E.3d 287, 288 (Mass. 2015).

¹⁵⁵ See Opinion of the Justices to the Senate, 712 N.E.2d 83, 84 (Mass. 1999) (considering whether City of Gloucester's petition to Senate to enact legislation followed state constitutional procedures requiring both mayoral and city council approval of such petition).

supermajority requirements for passage of specific bills,¹⁵⁶ voting procedures,¹⁵⁷ the imposition of term limits,¹⁵⁸ legislative attempts to direct the judiciary,¹⁵⁹ and other administrative and procedural questions.¹⁶⁰

Advisory opinions that implicate both legislative and gubernatorial prerogatives are most relevant to legislative power. These include numerous opinions concerning the governor's veto power,¹⁶¹ the line-item veto,¹⁶² the governor's power to convene the legislature,¹⁶³ gubernatorial control of

¹⁵⁶ See Opinion of the Justices No. 371, 756 So. 2d 23, 25-26 (Ala. 1999) (regarding application of constitutional supermajority requirements for legislation to affiliated amendments); Opinion of the Justices, 682 A.2d 661, 662-66 (Me. 1996) (clarifying whether legislature needed majority or supermajority vote to pass bill that would compete with pending citizen-initiated referendum question to be submitted to voters).

¹⁵⁷ See Opinion of the Justices No. 352, 672 So. 2d 1290, 1293 (Ala. 1996) (concerning proper procedures for adopting conference committee report).

¹⁵⁸ See Opinion of the Justices, 623 A.2d 1258, 1258 (Me. 1993) (indicating that legislating term limits for attorney general, treasurer, and secretary of state "would pass constitutional muster").

¹⁵⁹ See, e.g., Opinion of the Justices (Judicial Salary Suspension), 666 A.2d 523, 525 (N.H. 1995) (finding proposal to suspend salary of judge suspended for disciplinary reasons unconstitutional under separation of powers provision).

¹⁶⁰ See Opinion of the Justices No. 368, 716 So. 2d 1149, 1150-51 (Ala. 1998) (involving interpretation of constitutional provision prohibiting legislators from voting on matters in which they had personal or private interest); Hershkoff, *supra* note 7, at 1850 n.93.

¹⁶¹ See, e.g., Opinion of the Justices, 2015 ME 107, ¶¶ 11-34, 123 A.3d 494, 502-06 (concerning timeline for gubernatorial vetoes when legislature has adjourned subject to call of chair at end of legislative term instead of adjourning *sine die*); *In re* Request of Governor Janklow, 2000 S.D. 106, ¶¶ 1-6, 615 N.W.2d 618, 619-20 (explaining difference between legislature being "in session" versus "adjourned or recessed" for purposes of governor's veto power); *In re* Request of Governor Janklow, 1999 S.D. 27, ¶¶ 3-7, 589 N.W.2d 624, 626-27 (defining meaning of term "days" as used in establishing timeline for issuing gubernatorial vetoes).

¹⁶² See Opinion of the Justices, 673 A.2d 1291, 1297-1300 (Me. 1996) (concerning joint request from legislature and governor for interpretation of governor's line-item veto authority and related constraints on legislature's ability to override such vetoes).

¹⁶³ See, e.g., Opinion of the Justices, 680 A.2d 444, 448-49 (Me. 1996); Opinion of the Justices to the Acting Governor, 780 N.E.2d 1232, 1233-34 (Mass. 2002) (considering request from acting governor about nature of her constitutional obligation to reconvene joint session of legislature before its termination to consider pending citizen petitions).

appropriations,¹⁶⁴ legislative attempts to direct parts of the executive branch,¹⁶⁵ and constitutional amendments limiting state revenue growth.¹⁶⁶ These disputes frequently involve implicit or explicit attempts at self-aggrandizement by one branch.

For example, in 2004 the Colorado General Assembly sought an advisory opinion¹⁶⁷ concerning a bill it was considering¹⁶⁸ that would limit the governor's authority to unilaterally expend funds the state received under the federal Jobs and Growth Tax Relief Reconciliation Act of 2003.¹⁶⁹ The legislature sought to establish a line separating federal aid that the governor could immediately distribute upon receipt from federal aid that required a legislative appropriation before being expended.¹⁷⁰ The General Assembly questioned whether the bill conflicted with provisions of the Colorado Constitution concerning separation of powers.¹⁷¹ Ultimately, the Colorado Supreme Court concluded that the legislature could choose to restrict the governor's ability to unilaterally expend funds received pursuant to the Act by making them subject to legislative appropriation.¹⁷² Thus, the court's opinion played a direct role in clarifying separation of powers principles in Colorado.

¹⁶⁴ See, e.g., Opinion of the Justices to the Senate, 717 N.E.2d 655, 655-57 (Mass. 1999) (holding legislation that would require, inter alia, finding of "defined fiscal emergency" by governor before money could be appropriated from Commonwealth Stabilization Fund to be unconstitutional violation of separation of powers); *In re* Advisory Opinion to the House of Representatives (Impoundment of State Aid to Cities and Towns), 576 A.2d 1371, 1371 (R.I. 1990) (regarding gubernatorial impoundment authority).

¹⁶⁵ See, e.g., Opinion of the Justices No. 380, 892 So. 2d 332, 339 (Ala. 2004) (opining on legislation repealing governor's authority to transfer appropriations between programs within single agency and establishing one-house legislative veto of all agency contracts); Opinion of the Justices (Requiring Attorney General to Join Lawsuit), 27 A.3d 859, 862 (N.H. 2011) (considering constitutionality of legislation directing Attorney General to intervene as plaintiff in pending federal litigation challenging portions of federal Affordable Care Act).

¹⁶⁶ See, e.g., Submission of Interrogatories on Senate Bill 93-74, 852 P.2d 1, 4 (Colo. 1993) (holding that certain state lottery proceeds are subject to limitations on state fiscal year spending and general assembly may not enact certain revenue collection limitations); *In re* Advisory Opinion to the Governor—State Revenue Cap, 658 So. 2d 77, 78 (Fla. 1995) (excluding certain premiums, policy surcharges, and assessments from state revenues within certain context).

¹⁶⁷ *In re* Interrogatories Submitted by the General Assembly on House Bill 04-1098, 88 P.3d 1196, 1197 (Colo. 2004).

¹⁶⁸ H.B. 04-1098, 64th Gen. Assemb., Second Reg. Sess. (Colo. 2004).

¹⁶⁹ Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752.

¹⁷⁰ *Interrogatories Submitted by the General Assembly on House Bill 04-1098*, 88 P.3d at 1198-99.

¹⁷¹ *Id.*

¹⁷² *Id.* at 1197.

Three realities make the advisory opinion especially suited to resolving these structural and procedural requirements imposed by state constitutions. First, unlike the U.S. Constitution, most state constitutions are extremely prescriptive documents that impose detailed limitations on the political branches' abilities to act.¹⁷³ The volume of these limitations creates potentially nuanced constitutional implications for even the most routine legislative and executive actions, such as setting revenue and appropriations policy.¹⁷⁴ The ease and frequency with which most state constitutions are amended, often as a result of citizen-initiated actions, exacerbates this uncertainty.¹⁷⁵ Over time, this has tended to transform some state constitutions into a patchwork of citizen-initiated amendments. Accordingly, courts are often called upon to clarify how these amendments interact with each other.¹⁷⁶ As a result, many state officials confront genuine constitutional questions concerning their powers and duties more frequently than do their federal counterparts. Thus, the design of state constitutional regimes appears to encourage increased participation from the judiciary.¹⁷⁷

Second, many state constitutions contain stricter separation of powers provisions than those that exist at the federal level. Generally, the vesting clauses of the U.S. Constitution¹⁷⁸ are not understood to definitively allocate specific powers or functions to the three branches of government; rather, each branch must simply adhere to the structural and procedural provisions the Constitution assigns to it.¹⁷⁹ But, as commentators have observed,¹⁸⁰ analogous clauses in state constitutions sometimes do attempt to textually bind the "legislative

¹⁷³ See Hershkoff, *supra* note 7, at 1889-93 (comparing state constitutions to "administrative codes" and discussing specific examples of procedural restrictions state constitutions impose on state legislatures).

¹⁷⁴ See *infra* Section II.B (discussing detailed restrictions state constitutions impose on ability to issue debt, raise revenues, and the like). At the federal level, by contrast, "there are few serious procedural or substantive constitutional impediments on congressional power in enacting tax legislation." MICHAEL J. GRAETZ & DEBORAH H. SCHENK, *FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES* 54 (7th ed. 2013).

¹⁷⁵ See Hershkoff, *supra* note 7, at 1888.

¹⁷⁶ See, e.g., *Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1, 4-5 (Colo. 1993) (considering interaction between two constitutional amendments approved by Colorado voters in 1992).

¹⁷⁷ See Hershkoff, *supra* note 7, at 1890-91 (explaining that state constitutions "depend on judicial involvement for their interpretation and enforcement").

¹⁷⁸ U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . ."); U.S. CONST. art. II, § 1, cl. 1 (Executive Vesting Clause); U.S. CONST. art. III, § 1 (Judicial Vesting Clause).

¹⁷⁹ See Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 470 (2011) ("The [United States Supreme] Court has never decided separation of powers controversies by determining the nature of a power and then assigning it to the appropriate branch as specified in the Vesting Clauses.")

¹⁸⁰ See, e.g., Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 335-36 (2002).

power” to the legislature, the “executive power” to the executive, and the “judicial power” to the judiciary.¹⁸¹ As a result, structural and procedural restrictions on a branch’s power that pose few burdens at the federal level, such as the nondelegation doctrine,¹⁸² can be much more significant obstacles to the states.¹⁸³ The aggressive enforcement of separation of powers doctrine in some states may make it more worthwhile for the legislature or governor to seek an advisory opinion before undertaking an action that could run afoul of separation of powers. Ex ante adjudication may thus reduce uncertainty and save the requestor significant time and resources.

Finally, state justiciability doctrines,¹⁸⁴ coupled with limitations on the use of the mandamus remedy against legislatures¹⁸⁵ and governors,¹⁸⁶ sharply curtail the public’s legal recourse if the governor or legislature fails to comply with

¹⁸¹ For example, the Alabama Constitution provides that “the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them” ALA. CONST. art. III, § 43. The Massachusetts Constitution contains virtually identical language. *See* MASS. CONST. pt. 1, art. XXX.

¹⁸² *See* *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474 (2001) (“In the history of the Court we have found the [nondelegation doctrine’s] requisite ‘intelligible principle’ lacking in only two statutes”); Beermann, *supra* note 179, at 493 (stating that federal nondelegation doctrine borders on being “nonjusticiable”).

¹⁸³ For example, in a 1999 advisory opinion, the Massachusetts Supreme Judicial Court declared unconstitutional a bill prohibiting the legislature from appropriating funds from the Commonwealth Stabilization Fund unless the governor had first made a finding of fiscal emergency. *Opinion of the Justices to the Senate*, 717 N.E.2d 655, 657 (Mass. 1999). It did so because “the requirement would impermissibly delegate the power of appropriation from the legislative branch to the executive branch of government and thus violate the separation of powers provision of the Massachusetts Constitution.” *Id.* at 656. The Rhode Island Supreme Court has used its nondelegation doctrine equally aggressively. *See In re Advisory Opinion to the House of Representatives (Casino II)*, 885 A.2d 698, 707-08 (R.I. 2005).

¹⁸⁴ Generally, state justiciability doctrines are more lenient than what exists at the federal level. Hershkoff, *supra* note 7, at 1863. For instance, “[s]tate courts . . . afford legislators an opportunity to test the constitutionality of legislation after its enactment, but before enforcement begins.” *Id.* at 1857. Further, almost all states allow some form of taxpayer standing. *Id.* at 1854-55. Still, “very few states have considered how they may construct their own justiciability doctrines to meet the special needs of state and local governance.” *Id.* at 1841.

¹⁸⁵ *See, e.g.,* *LIMITS v. President of the Senate*, 604 N.E.2d 1307, 1310 (Mass. 1992) (“[A] judicial remedy is not available whenever a joint session fails to perform a duty that the Constitution assigns to it When the purpose of art. 48 has been frustrated, the only remedy may come from the influence of public opinion, expressed ultimately at the ballot box.”); *Lamson v. Sec’y of the Commonwealth*, 168 N.E.2d 480, 484 (Mass. 1960) (“Mandamus of course does not lie against the Legislature.”).

¹⁸⁶ *See, e.g.,* *Rice v. Draper*, 93 N.E. 821, 822-23 (Mass. 1911) (disallowing mandamus against governor).

specific constitutional procedural provisions. Thus, legislators may feel empowered to use the advisory opinion process based on the belief that a constitutional question may otherwise never be adjudicated in court and ambiguity will remain.

B. *Regulatory Questions*

Legislatures (and occasionally governors) also commonly use the advisory opinion process when considering “regulatory legislation.” These bills seek to create or change substantive areas of law that do not directly implicate individual rights. Examples include legislation related to environmental regulation,¹⁸⁷ debt issuance,¹⁸⁸ taxation,¹⁸⁹ economic development,¹⁹⁰ school finance,¹⁹¹ industry-

¹⁸⁷ See Advisory Opinion to Governor—1996 Amendment 5 (Everglades), 706 So. 2d 278, 279-80 (Fla. 1997) (examining, inter alia, whether legislation was necessary to effectuate recently-approved “polluter pays” amendment to Florida Constitution).

¹⁸⁸ See *In re* Submission of Interrogatories on House Bill 99-1325, 979 P.2d 549, 551-52 (Colo. 1999) (analyzing constitutionality of new method for issuing bonds to fund transportation projects); *In re* Interrogatories by Colorado State Senate (Senate Resolution No. 13) Concerning House Bill No. 1247, 566 P.2d 350, 354-55 (Colo. 1977) (analyzing whether bonds issued by state authority qualified as “debt of the state” for purposes of Colorado Constitution); Opinion of the Justices (Municipal Bonds), 765 A.2d 706, 707 (N.H. 2001) (analyzing legislation that would change required approval process for municipalities seeking to issue debt).

¹⁸⁹ See, e.g., Opinion of the Justices, 2004 ME 54, ¶¶ 1-4, 850 A.2d 1145, 1147 (analyzing legislation that would tax property based on “full-cash value” instead of “appraised value”); *In re* Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38, 806 N.W.2d 683, 688 (Mich. 2011) (analyzing legislation that would alter statutory income tax exemption for public-pension incomes and determine eligibility for income tax exemptions “on the basis of total household resources, or age and total household resources”); Opinion of the Justices (Municipal Tax Exemption for Electric Utility Personal Property), 746 A.2d 981, 983 (N.H. 1999) (analyzing legislation authorizing municipalities to grant local property tax exemptions for personal property used to generate and produce electric power); Opinion of the Justices (Property Taxation of Telephone Poles), 697 A.2d 125, 127 (N.H. 1997) (analyzing legislation relating to taxation of certain poles and wires used in television and cable transmission); Opinion of the Justices, 584 A.2d 1342, 1344 (N.H. 1990) (analyzing legislation involving business profits taxation).

¹⁹⁰ See, e.g., *In re* Interrogatory Propounded by Governor Romer on House Bill 91S-1005, 814 P.2d 875, 878 (Colo. 1991) (analyzing legislation allowing state to enter into agreements with local governments to provide incentives for establishing new business facilities); Opinion of the Justices, 601 A.2d 610, 617-20 (Me. 1991) (analyzing emergency legislation to stabilize dairy industry).

¹⁹¹ See, e.g., Opinion of the Justices (Reformed Public School Financing System), 765 A.2d 673, 675-76 (N.H. 2000) (analyzing constitutionality of new public school finance proposal considered by legislature).

specific regulation,¹⁹² interpretation of citizen-initiated constitutional amendments,¹⁹³ and regulation of local governments.¹⁹⁴

Often, the legislation involved in these opinions is extremely complex, and concerns novel regulatory approaches. For example, in 1999, the Colorado General Assembly sought an advisory opinion regarding a new method of financing transportation projects by taking advantage of recent changes in federal law.¹⁹⁵ The proposal allowed the state to issue transportation “revenue anticipation notes” (“RANs”), which were bonds backed by a pledge of a portion of the state’s expected future federal highway aid.¹⁹⁶ The legislature asked if this scheme was per se unconstitutional, and if not, whether the Colorado Constitution would require voter approval before the state could issue RANs.¹⁹⁷ In its response, the court acknowledged the “novel questions of constitutional law” that were raised, as well as the legislature’s “good faith” effort to comply with the constitution, given this novelty.¹⁹⁸ The court ultimately concluded that, although RANs were not per se unconstitutional, voter approval was required before they could be issued.¹⁹⁹ This ruling allowed the legislature to fully understand the details of this complex scheme before enacting the legislation.

Many regulatory questions for which advisory opinions are sought have potentially significant fiscal implications. For instance, had Colorado simply enacted its best approximation of constitutional RAN legislation without seeking an advisory opinion, ex post litigation could have jeopardized the state’s anticipated revenue from the issuance of RANs, undermining its budget. Further,

¹⁹² See, e.g., *In re* Request of the Governor for an Advisory Opinion, 12 A.3d 1104, 1106 (Del. 2009) (analyzing new proposal to create sports lottery); Opinion of the Justices to the House of Representatives, 702 N.E.2d 8, 10-11 (Mass. 1998) (analyzing legislation relating to surcharge imposed on vehicle rentals in Boston); *In the Matter of the Request for an Advisory Opinion Concerning the Construction of H.B. 1255, H.B. 1132, and H.J.R. 1004*, 456 N.W.2d 546, 547 (S.D. 1990) (analyzing proper construction of recently-enacted statutes involving agricultural processing facilities).

¹⁹³ See, e.g., *In re* Interrogatories Relating to the Great Outdoors Colorado Trust Fund, 913 P.2d 533, 536 (Colo. 1996) (interpreting recently-enacted amendment to Colorado Constitution requiring state lottery revenue to be deposited into Great Outdoors Colorado Trust Fund).

¹⁹⁴ See Opinion of the Justices (Materials in Solid Waste Stream), 608 A.2d 870, 871 (N.H. 1992) (considering whether proposed recycling legislation imposed unconstitutional unfunded mandate on local units of government); Opinion of the Justices (Weirs Beach), 598 A.2d 864, 866 (N.H. 1991) (addressing constitutionality of legislative proposal to create new town from territory within existing city); Opinion of the Justices, 592 A.2d 180, 187-88 (N.H. 1991) (analyzing legislation involving limitations on tort liability for municipalities).

¹⁹⁵ *In re* Submission of Interrogatories on House Bill 99-1325, 979 P.2d 549, 552 (Colo. 1999).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 551.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 559.

such a threat of litigation could have hampered the RAN underwriting process and dampened their reception by the market. Similarly, in 2009, the governor of Delaware sought an expedited advisory opinion on legislation creating a new sports lottery, explicitly because of the need “to craft and pass a balanced budget”²⁰⁰ The court acknowledged that the governor’s proposed budget relied on the potential revenue from the lottery,²⁰¹ granted review, and upheld the lottery.²⁰² The significance of this budgetary motive for seeking advisory opinions is further evidenced by the sheer volume of requests involving tax issues.²⁰³

That revenue-related issues play such a prominent role in the advisory opinion process is not surprising. State constitutions often impose a wide range of prescriptive limitations on the legislature’s budgetary powers.²⁰⁴ Thus, when states attempt to enact budgets involving new programs or regulatory schemes, perhaps in an attempt to stretch these limitations,²⁰⁵ they necessarily face greater litigation uncertainty than do their federal counterparts.²⁰⁶ The challenges that these budgetary restrictions impose on lawmakers seeking to enact innovative revenue policies are made particularly acute by the fact that, unlike the federal government, most states have statutory or constitutional balanced budget requirements.²⁰⁷ Thus, accurate revenue projections are indispensable to the process of crafting a viable state budget, as a budget based on provisions of questionable constitutionality forces additional uncertainty onto the state’s balance sheet.²⁰⁸ Similarly, while the Uniformity Clause of the U.S. Constitution

²⁰⁰ *In re* Request of the Governor for an Advisory Opinion, 12 A.3d 1104, 1108 (Del. 2009).

²⁰¹ *See id.* (issuing advisory opinion “to better enable” governor and legislature “to discharge [their] constitutional duties to present and enact a balanced budget”).

²⁰² *Id.* at 1114.

²⁰³ *See supra* note 189 and accompanying text.

²⁰⁴ For example, the Colorado constitutional provision implicated in the RAN legislation requires voter approval for the “creation of any multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever without adequate present cash reserves pledged irrevocably and held for payments in all future fiscal years,” subject to certain exceptions. COLO. CONST. art. X, § 20(4)(b).

²⁰⁵ *See* Hershkoff, *supra* note 7, at 1855 n.118 (“Legislatures have responded in creative ways to state constitutional finance limits.”).

²⁰⁶ This is especially true given the advent of particularly restrictive limitations on state spending and revenue-raising activities, approved by some states beginning in the 1990s. Colorado’s 1992 Taxpayer’s Bill of Rights (“TABOR”) initiative is but one example of this, and has since become a model for other states. *See* COLO. CONST. art. X, § 20.

²⁰⁷ *See generally* NAT’L CONFERENCE OF STATE LEGISLATURES, NCSL FISCAL BRIEF: STATE BALANCED BUDGET PROVISIONS (Oct. 2010), <http://www.ncsl.org/documents/fiscal/StateBalancedBudgetProvisions2010.pdf> [<https://perma.cc/EL9J-JZPN>].

²⁰⁸ Courts have referenced the need to mitigate budgetary uncertainty as justifying the issuance of advisory opinions. *See, e.g.*, Opinion of the Justices, 2004 ME 54, ¶¶ 1-9, 850 A.2d 1145, 1147-48 (explaining that there was “no question” that certain tax legislation raised

has become a virtual nullity in the modern era,²⁰⁹ state constitutional provisions requiring uniform taxation remain extremely relevant and robustly litigated, creating additional budgetary uncertainty for legislatures.²¹⁰ The legislature's ability to receive advisory opinions concerning revenue-related proposals it is considering prior to finalizing a budget can help alleviate this uncertainty significantly.

Another area of regulatory questions where advisory opinions are sought involves situations in which the legislature is forced to act in response to a court ruling. For example, in 1997, the New Hampshire Supreme Court issued a landmark ruling in *Claremont School District v. Governor (Claremont II)*,²¹¹ declaring the state's funding system for K-12 education unconstitutional.²¹² The court's opinion included a directive to the legislature: "We are confident that the legislature and the Governor will act expeditiously to fulfill the State's duty to provide for a constitutionally adequate public education and to guarantee adequate funding in a manner that does not violate the State Constitution."²¹³ After the legislature prepared a bill to remedy the matter, it sought the court's opinion *ex ante* through an advisory opinion.²¹⁴ The legislature partially framed its request in terms of the budgetary uncertainty inherent in *ex post* litigation of its reforms, as discussed above.²¹⁵ But it also attempted to justify *ex ante* adjudication by noting that the bill would impose "great impacts on the traditional relationships among school districts throughout the state, and between the state and local governments, all on the assumption that" its changes would be consistent with *Claremont II*.²¹⁶ While the court did not approve the

serious issues justifying issuance of advisory opinion because bill "makes a major structural change in the valuation of property for property tax purposes, and it is the property tax upon which municipalities rely for revenue").

²⁰⁹ See GRAETZ & SCHENK, *supra* note 174, at 53 (citing *United States v. Ptasynski*, 462 U.S. 74 (1983)) ("In 1983, the Supreme Court performed an . . . evisceration of the uniformity clause of Article I, Section 8 . . .").

²¹⁰ "All states impose a requirement that taxation be uniform throughout the taxing jurisdiction." LYNN A. BAKER, CLAYTON P. GILLETTE & DAVID SCHLEICHER, *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* 559 (5th ed. 2015). The continued vitality of state uniformity clauses as functioning checks on governmental power is demonstrated by the sheer volume of cases state appellate courts continue to hear interpreting them and courts' demonstrated readiness to use these clauses to invalidate taxation schemes. *See id.* at 554-62.

²¹¹ 703 A.2d 1353 (N.H. 1997).

²¹² *See id.* at 1360.

²¹³ *Id.* at 1360-61.

²¹⁴ Opinion of the Justices (School Financing), 712 A.2d 1080 (N.H. 1998).

²¹⁵ *Id.* at 1083 ("[T]he *Claremont II* decision called into question the constitutional validity of the entire local property tax system for the periods after 'the 1998 tax year' thereby creating an imminent risk of fiscal crisis for local school budgets throughout the state, which places a great premium on ensuring that any legislative solution adopted be consistent with the *Claremont II* decision prior to its implementation . . .").

²¹⁶ *See id.*

state's remedy, it commended the legislature's good faith effort to develop an expeditious solution.²¹⁷ In the following years, the court issued two additional advisory opinions regarding legislative attempts to comply with *Claremont II*.²¹⁸

A similar process was used in Massachusetts. There, after the Supreme Judicial Court issued a landmark ruling construing "civil marriage to mean the voluntary union of two persons as spouses,"²¹⁹ it ordered the Commonwealth to allow same-sex marriages, but stayed the entry of judgment for one hundred eighty days to allow the legislature to enact legislation necessary to comply with the opinion.²²⁰ The legislature then drafted a bill to allow same-sex couples to obtain civil unions and sought the court's approval through an advisory opinion.²²¹ The court rejected the legislature's proposal.²²² Its opinion included little discussion of the propriety of issuing an advisory opinion in this situation, seemingly suggesting that it was obvious.²²³

In both Massachusetts and New Hampshire, the legislatures sought advisory opinions regarding remedial legislation that was complex and sensitive. Indeed, the fact that the legislatures' initial bills were rejected by the courts in both states speaks to the difficulties legislatures face when forced to react to court decisions that invalidate existing statutes. Due to the significance of both issues, it is highly likely that the proposals would have been challenged *ex post* had the legislatures not had access to the advisory opinion process. In these circumstances, advisory opinions appear to improve legislative efficiency by

²¹⁷ See *id.* at 1088 ("[W]e note the commendable steps taken by the Governor and legislature in reaching their definition of a constitutionally adequate education We applaud the Governor and legislature for the work accomplished to date and in advance for that yet to be undertaken.").

²¹⁸ See Opinion of the Justices (Reformed Public School Financing System), 765 A.2d 673 (N.H. 2000); Opinion of the Justices (Tax Plan Referendum), 725 A.2d 1082 (N.H. 1999). New Hampshire has used the advisory opinion process to address adverse court rulings in other contexts as well. For example, in 1990, the New Hampshire Supreme Court struck down a statute granting municipalities immunity from liability for injuries suffered as a result of faulty maintenance of public sidewalks, streets, or highways. See *City of Dover v. Imperial Cas. & Indem. Co.*, 575 A.2d 1280, 1286-87 (N.H. 1990). The next year, the legislature sought an advisory opinion regarding the sufficiency of proposed remedial legislation to address the court's ruling. Opinion of the Justices, 592 A.2d 180, 182 (N.H. 1991).

²¹⁹ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

²²⁰ See *id.* at 970.

²²¹ See Opinion of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004) (rejecting adequacy of proposed civil union scheme as remedy to *Goodridge*).

²²² *Id.* After receiving this opinion, the legislature took no further action on the issue prior to the expiration of the court's stay in *Goodridge*, and the processing of marriage licenses began on May 17, 2004. Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES, May 17, 2004, at A1.

²²³ See *Opinion of the Justices*, 802 N.E.2d at 567 ("The pending bill involves an important question of law and the Senate has indicated 'grave doubt' as to its constitutionality. We therefore address the question.").

allowing the legislature to determine the constitutionality of a proposal prior to passage.²²⁴ Presumably, this means that the state will have the opportunity to come into compliance with a court order sooner than if it had to wait for ex post litigation.

C. *Personal Rights Questions*

A final substantive area in which advisory opinions are often sought relates to matters involving personal rights, such as those guaranteed by the First, Fourth, Sixth, Seventh, and Fourteenth Amendments. Because of the social significance of personal rights, these situations are often highly fraught. In this area, proposals involving criminal law and procedure have received significant attention in advisory opinions,²²⁵ while opinions on civil litigation issues have been much rarer.²²⁶ Opinions have also been requested on many other subjects,

²²⁴ This is particularly true when multiple court orders are involved. For instance, in 1999 the Supreme Court declared Alabama's franchise tax laws unconstitutional. S. Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160, 162 (1999). On remand, the Alabama Supreme Court noted that the legislature was considering remedial legislation. S. Cent. Bell Tel. Co. v. State, 789 So. 2d 133, 134 n.1 (Ala. 1999). As such, it issued an interim order "for the guidance of the Legislature in its discharge of its duties necessary for prospective taxation in light of *South Central Bell*." *Id.* at 146. Given these detailed instructions from the court, the Governor subsequently sought an advisory opinion on the remedial legislation prior to passage in an attempt to ensure compliance with the interim order. Opinion of the Justices No. 370, 756 So. 2d 21, 22 (Ala. 1999).

²²⁵ See, e.g., *In re* Request for an Opinion of the Justices, 37 A.3d 860, 861 (Del. 2012) (considering constitutionality of legislation that would "permit the State to confine, in most instances, the prosecution, and the defense, of specified traffic offenses to the Justice of the Peace Court" (footnote omitted)); Re: Opinion of the Justices, 840 A.2d 637, 639 (Del. 2003) (regarding constitutionality of legislation "concerning procedures pursuant to which a Court may sentence a defendant to death over a contrary vote of a jury"); Opinion of the Justices to the Senate, 764 N.E.2d 343, 345 (Mass. 2002) (considering constitutionality of proposed legislation that would require proceeds of certain contracts with person convicted of crime to be diverted to state victims' compensation fund); Opinion of the Justices (Eliminating Requirement for Additional Breath Test Samples), 2 A.3d 1102, 1103 (N.H. 2010) (holding unconstitutional legislation that would make various changes related to collection of breath tests for DWI suspects); Opinion of the Justices (Certain Evidence in Sexual Assault Cases), 662 A.2d 294, 295 (N.H. 1995) (considering constitutionality of legislation that would bar defense in sexual assault case from introducing evidence of victim's manner of dress in attempt to imply consent).

²²⁶ See, e.g., Opinion of the Justices No. 356, 692 So. 2d 115, 115 (Ala. 1997) (considering whether proposed bill to allow less "than unanimous jury verdicts in all civil actions" violated Alabama Constitution's protection of right to trial by jury); Opinion of the Justices (SLAPP Suit Procedure), 641 A.2d 1012, 1013 (N.H. 1994) (considering legislation making SLAPP actions easier to dismiss); Opinion of the Justices (Limitation on Civil Actions), 628 A.2d 1069, 1070 (N.H. 1993) (regarding constitutionality of legislation "prohibiting a defendant in a sexual assault case from bringing certain civil actions against the victim").

including same-sex marriage rights,²²⁷ legislation limiting public demonstrations near reproductive health care facilities,²²⁸ campaign finance laws,²²⁹ right to work legislation,²³⁰ voter photo-ID legislation,²³¹ voting rights for minors,²³² and various other subjects. These represent some of the most contentious topics state legislatures have recently considered. The advisory opinion process in these circumstances has thus thrust the judiciary into the crucible of public controversy.

The judicial response to these requests has been inconsistent. Courts in Colorado and Massachusetts have issued opinions on these divisive questions without any hint of concern.²³³ In Michigan, however, there has been a long-running dispute within the judiciary over the propriety of issuing opinions on these subjects. For instance, in 2006, over the dissent of two justices, the Michigan Supreme Court agreed to issue an advisory opinion regarding voter ID legislation.²³⁴ In 2013, the same court, in considering whether to render an advisory opinion regarding right to work legislation, specifically asked the State Solicitor General to address, in his brief, the propriety of issuing an advisory opinion under the circumstances.²³⁵ This order prompted two dissents, one of which engaged in a robust argument in favor of granting the request “without further delay.”²³⁶ Sensing the majority’s disinclination to render an opinion, the dissent argued at length for the need to avoid the delay inherent in subjecting significant legislation, such as the right to work bill, to protracted ex post

²²⁷ See *supra* notes 219-23 and accompanying text.

²²⁸ See Opinion of the Justices to the Senate, 723 N.E.2d 1, 2 (Mass. 2000).

²²⁹ The Colorado Supreme Court was asked to opine on the constitutionality of two campaign finance provisions in the Colorado Constitution in light of *Citizens United v. FEC*, 558 U.S. 310 (2010). See *In re Interrogatories Propounded by Governor Ritter*, 227 P.3d 892, 893-94 (Colo. 2010).

²³⁰ See *In re Request for Advisory Opinion Regarding Constitutionality of 2012 PA 348 and 2012 PA 349*, 832 N.W.2d 391, 391 (Mich. 2013) (denying advisory opinion request regarding right to work legislation after briefs had been received).

²³¹ See *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 447-48 (Mich. 2007) (finding proposed photo-ID bill facially constitutional under both Michigan and U.S. Constitutions).

²³² See Opinion of the Justices (Voting Age in Primaries), 949 A.2d 670, 671 (N.H. 2008) (considering constitutionality of legislation that would allow seventeen-year-olds to vote in state and presidential primaries where seventeen-year-old would have their eighteenth birthday before general election).

²³³ See, e.g., *Interrogatories Propounded by Governor Ritter*, 227 P.3d at 892-94 (engaging in no discussion of propriety of issuing advisory opinion); Opinion of the Justices to the Senate, 802 N.E.2d 565, 566-67 (Mass. 2004) (using only one paragraph to discuss whether court should respond to advisory opinion).

²³⁴ *Constitutionality of 2005 PA 71*, 712 N.W.2d at 450.

²³⁵ *Constitutionality of 2012 PA 348 and 2012 PA 349*, 829 N.W.2d at 872.

²³⁶ *Id.* at 873-76 (Markman, J., dissenting) (offering six specific reasons court should issue opinion immediately).

adversarial litigation.²³⁷ Despite these arguments, the court ultimately refused to issue an advisory opinion.²³⁸

These responses lay bare several inherent difficulties with the use of advisory opinions for legislation concerning personal rights. From the perspective of the judiciary, one could plausibly argue that forcing courts to constantly rule on the most divisive, hot-button issues has the potential to erode the institutional legitimacy of state courts.²³⁹ More germane to this Note, however, are the implications of such advisory opinions for the legislature, which are discussed below.

III. IMPLICATIONS OF THE ADVISORY OPINION PROCESS FOR THE LEGISLATURE

The advisory opinion process has the potential to reshape legislative power by reorienting the manner in which governmental actors interact with each other. This Part will explore the potentially significant impacts that advisory opinions can have on both intra-legislative and inter-branch power dynamics, as well as on the legislative process more generally. This examination reveals that advisory opinions can be used to both expand and suppress legislative power. In either case, their use significantly alters the fabric of government.

A. *Intra-Legislative Implications*

The advisory opinion process has broad implications for the internal operations of the legislature. These are best understood by examining two discrete power dynamics that exist within all legislatures: relationships between chambers and relationships between political parties.

1. Relations Between Chambers

Because a single chamber of the legislature can generally initiate an advisory opinion request without the concurrence of the other, the process necessarily impacts power dynamics between chambers, even when they are both controlled by the same political party. The recent dispute concerning the 2015 Massachusetts state budget illustrates this point.²⁴⁰ Although Democrats controlled both houses of the legislature, the House argued that the Senate improperly added two amendments to the budget bill in violation of the Origination Clause, a position the Senate disputed.²⁴¹ While the bill was being

²³⁷ See *id.* at 874 (“The advisory opinion enables this Court . . . to promptly resolve a dispute that otherwise might languish within the judiciary.”).

²³⁸ *Constitutionality of 2012 PA 348 and 2012 PA 349*, 832 N.W.2d at 391.

²³⁹ *But see* Hershkoff, *supra* note 7, at 1902 (discussing how state court decisions generally enjoy “a greater perception of democratic legitimacy and local responsiveness than that of an unelected Article III ‘outsider’”).

²⁴⁰ See *supra* Section I.A.1.

²⁴¹ See *supra* notes 48-49 and accompanying text.

reconciled by a conference committee, the House sought an advisory opinion on the issue.²⁴² But for the availability of an advisory opinion, the conference committee would have been left to decide how to move forward without conclusive legal guidance on the application of the Origination Clause to the pending budget.²⁴³ House and Senate counsels, as well as perhaps other attorneys, were available to opine on the issue, but none with the definitive legal authority of the Commonwealth's highest court. The desire to avoid uncertainty thus motivated the House's request.²⁴⁴

Had an advisory opinion been unavailable, a variety of factors likely would have been considered by the conference committee as it decided how to proceed: members' own opinions on the bill's constitutionality;²⁴⁵ institutional concerns regarding the desirability of testing the outer limits of the Origination Clause; the likelihood that a plaintiff would have standing to challenge the Senate amendments in court if they were allowed to become law; the fiscal implications of the Senate amendments possibly being invalidated *ex post*; the degree to which the House's opposition to the Senate amendments represented ideological as well as legal opposition; the willingness of the Senate to spend political capital advocating for the inclusion of its amendments in the conference committee report; the comparative strength of the bargaining positions of the two houses; and, finally, their willingness to horse trade on this issue. These considerations are not unique to this situation, but can apply any time two houses have a dispute on a matter of constitutional interpretation, especially in the context of an omnibus budget bill where there are necessarily numerous competing considerations.

Thus, the availability of an advisory opinion significantly reduces the need to spend political capital in inter-chamber negotiations due to legal uncertainty.²⁴⁶

²⁴² Opinion of the Justices to the House of Representatives, 32 N.E.3d 287, 288 (Mass. 2015).

²⁴³ The Supreme Judicial Court appeared to recognize that, while the advisory opinion request came from the House, the intended beneficiaries of its response were specifically the House conferees. The court observed that "the House order is a proper attempt to obtain our advisory views on the constitutionality of *its options in conference*, and we expect that our answers to these questions will therefore *assist the members of the committee* as they go about their present *conference duties*." *Id.* at 294 (emphasis added).

²⁴⁴ "To avoid the procedural, fiscal and legal uncertainty that might ensue from the improper origination of a money bill . . . the House of Representatives sought an advisory opinion . . ." Brief for the House of Representatives of the Commonwealth of Massachusetts as Amicus Curiae at 3, Opinion of the Justices to the House of Representatives, 32 N.E.3d 287 (Mass. 2015) (No. SJC-11883).

²⁴⁵ *Cf.* Note, *supra* note 31, at 2065 ("[B]ecause the legislature cannot know ahead of time whether plausibly unconstitutional statutes will be struck down or left standing, it must discount the expected value of such proposals by the probability of their not being invalidated in deciding how to expend its limited political capital.").

²⁴⁶ *See id.* at 2071-74 (discussing challenges legislature faces when forced to consider statute of questionable constitutionality). While I believe several of the assumptions the note

In the aggregate, this means that more political capital can be spent on non-legal policy issues. Realistically, advisory opinions are only useful in this regard if they are rendered quickly, without unduly disrupting negotiations. Typically, courts can do so²⁴⁷ and may even be responsive to requests for expedited decisions to better assist the legislative process,²⁴⁸ although recent advisory opinion requests concerning complex and divisive legislation may undermine the soundness of this conclusion in the future.²⁴⁹

As a result, advisory opinions reduce the transaction costs associated with consideration of bills of questionable constitutionality, making the legislative process more efficient. When a bill is declared unconstitutional in an advisory opinion, it can quickly be discarded or re-drafted. When a bill is upheld, proponents can pivot away from constitutional questions and hone in on political or policy objections that may exist. This could be particularly useful in budget negotiations or when complex regulatory legislation is considered that involves numerous non-legal considerations that need to be negotiated.²⁵⁰ In these situations, a bill's fate may ultimately turn on proponents' ability to shorten and simplify negotiations between chambers. Thus, by making the process of intra-legislative negotiation more efficient, advisory opinions give advocates of novel proposals an instrument with which to sharpen the focus of negotiations.

2. Relations Between Political Parties

The advisory opinion process also directly affects the balance of power between political parties in the legislature. In many cases, disputes between chambers are simply proxies for disputes between political parties. In such situations, the advisory opinion process may reorient partisan relations simply through its impact on inter-chamber relations.²⁵¹ But the advisory opinion

makes about the legislature's motives when considering potentially unconstitutional legislation do not always apply, its general conceptual framework does provide a starting point for understanding the value of advisory opinions.

²⁴⁷ See *supra* note 22 and accompanying text. For instance, the Massachusetts House of Representatives adopted an order requesting an advisory opinion interpreting the Origination Clause on May 22, 2015, and received an answer from the Supreme Judicial Court on June 15, 2015. *Opinion of the Justices*, 32 N.E.3d at 288. Some courts have even provided initial answers to requests in summary form to avoid delay while they draft full opinions. See, e.g., *In re Request for Advisory Opinion from the House of Representatives (Town of Lincoln)*, 627 A.2d 332, 332 (R.I. 1993) (mem.).

²⁴⁸ See *supra* notes 200-02 and accompanying text.

²⁴⁹ One clear example of this was the Michigan Supreme Court's advisory opinion regarding photo-ID legislation, which took well over a year to complete. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444 (Mich. 2007) (issuing advisory opinion on July 18, 2007, when initial request had been approved on April 26, 2006). Ultimately, the final opinion consumed fifty-nine pages in the North Western Reporter. See *id.* at 444-503.

²⁵⁰ See *supra* Section II.B.

²⁵¹ See *supra* Section III.A.1.

process has implications that uniquely affect partisan relations as well, some of which benefit the majority party and others that benefit the minority party.

Majority parties naturally control much of the legislature's involvement in the advisory opinion process. Two distinct features of this control benefit the majority party. First, because advisory opinions are typically requested by the passage of a resolution—requiring only majority support—the majority party has unilateral authority to decide when to request advisory opinions and what questions to ask.²⁵² This allows the majority to determine which areas of law are clarified by the courts and which may remain opaque or subject to ex post adjudication. This gives the majority control over the legal risk associated with each piece of legislation that it passes.²⁵³ Therefore, where the minority party offers legislation of questionable constitutionality, the majority can perpetuate the associated uncertainty by denying a request for an advisory opinion. The value of this threshold power is most apparent in a state like Massachusetts, which has seen full Democratic control of its state legislature since 1958,²⁵⁴ thus effectively denying Republicans power over the advisory opinion process in perpetuity.

More importantly, employing ex ante advisory opinions allows the majority to destroy the ability of the minority party—and opponents of legislation more broadly—to engage in dilatory ex post litigation to delay the implementation of legislation they oppose. Justice Markman of the Michigan Supreme Court recently took direct notice of this phenomenon, explaining: “it has become an increasingly ubiquitous and routine part [of the policy-making process] that controversial pieces of legislation . . . must, following legislative and executive approval, now make a third stop—at the judiciary—before they are viewed as fully legitimate and enforceable public policies.”²⁵⁵ By resolving legal issues ex ante, an advisory opinion allows courts “to promptly resolve a dispute that otherwise might languish within the judiciary.”²⁵⁶ This is true both because advisory opinions are rendered quickly and because they are not subject to appeal, because they are issued by the state's highest court. As most advisory opinions are technically nonbinding, the majority can never completely immunize a law from ex post litigation; however, advisory opinions come tantalizingly close.²⁵⁷

Putting aside the normative implications of this reality, ex ante adjudication clearly allows the majority party's policy priorities to become enforceable laws

²⁵² See *supra* note 44 and accompanying text.

²⁵³ This ability is analogous to each chamber's ability to control legal risk by unilaterally requesting an advisory opinion. See *supra* Section III.A.1.

²⁵⁴ See Evan Horowitz, *One-Party Rule Comes with Risks and Rewards*, BOS. GLOBE, Sept. 12, 2014, at D7.

²⁵⁵ *In re* Request for Advisory Opinion Regarding Constitutionality of 2012 PA 348 and 2012 PA 349, 829 N.W.2d 872, 874 (Mich. 2013) (Markman, J., dissenting).

²⁵⁶ *Id.*

²⁵⁷ See *supra* Section I.C (discussing “nonbinding” status of advisory opinions).

more quickly. As a result, the majority will see less of a lag between legislative consideration of an initiative and when that initiative begins to impact the public. This is particularly true when the same political party controls both chambers of the legislature and the governorship, thus entirely depriving the minority party of the ability to slow the majority's agenda through the political process. This empowers the majority party by allowing it to implement various pieces of its political agenda sooner. Politically, this allows the majority party to more easily convince voters that it is actually enacting discernable change (and fulfilling campaign promises) that can be felt immediately, rather than at some hypothetical point in the future after litigation ends.²⁵⁸ And if the policies prove popular, the close temporal connection between their passage and implementation may make voters more likely to mentally connect the majority party to favorable policy changes rather than decoupling the two.

Further, by compressing the time between legislative consideration of a bill and its entry into effect statewide, *ex ante* adjudication limits the minority party's ability to foment opposition. For example, it precludes opposition forces from using the headlines associated with attention-grabbing litigation to cultivate awareness and opposition to controversial policies, particularly those that impact personal rights.²⁵⁹ This reduces the minority party's ability to test the majority's resolve, raise campaign funds, or energize its base of supporters through a long war of attrition over controversial legislation. Instead, the political process, in which the minority party may find itself entirely marginalized, becomes the sole battlefield on which to contest policy proposals. Thus, when the advisory opinion is used by the majority to exhaust judicial remedies *ex ante*, partisan policy fights in the legislature may become more inflamed, particularly with respect to inherently divisive issues, because the advisory opinion transforms the political process into Waterloo for the minority party. Over time, repeated decisions by a majority party to use advisory opinions for politically divisive issues, therefore, could increase partisanship.²⁶⁰

Second, the majority party controls the context in which an advisory opinion request is presented to the court. Often, members of the majority party leadership present themselves to the court as representatives of the interests of their chamber as an institution. For example, when a state's speaker of the house or senate president submit briefs, they may frame their argument as "by and on behalf of" their respective chambers, even if the minority party does not concur

²⁵⁸ This could be particularly true when the legislation in question concerns regulatory or budgetary matters that naturally tend to be complex and difficult for the public to understand. *See supra* Section II.B.

²⁵⁹ *See supra* Section II.C.

²⁶⁰ The fact that recent advisory opinion requests have concerned divisive issues, such as voter-ID, same-sex marriage, right to work, and campaign finance suggests that this may be occurring. *See supra* notes 227-32 and accompanying text.

in their argument.²⁶¹ Thus, the majority's position becomes the chamber's official and only position, absent competing briefs from the minority party.²⁶² Further, the majority party may, by virtue of its status, have access to institutional resources (such as House or Senate counsel) that the minority party does not.²⁶³ And even when the minority party chooses to file a competing brief, it may do so without the monetary resources available to the majority.²⁶⁴

The existence of numerous examples of briefs filed by members of the minority party suggests that the majority is not able to completely monopolize the court's attention. However, it would be wrong to conclude that both parties are always able to present their arguments to the court on an equal footing. This is not unique to the advisory opinion process. Adverse parties in traditional litigation are not guaranteed equal resources. And in most aspects of the operation of legislatures—from committee representation, to office selection, to staff allocation, and even parking spots, parity does not exist between the majority and minority parties. However, these mechanical realities belie an understanding of the advisory opinion as a necessarily neutral device. But advisory opinions are also not predestined to function as inherent instruments of majority self-aggrandizement. Where they are used to resolve noncontroversial questions, their effect in this regard may be minimal. Like most aspects of the legislative process, they can be bent to serve the will of the majority to the extent desired.

The advisory opinion process may also benefit the minority party. First, the minority can use the process as a procedural device to delay legislation it

²⁶¹ See, e.g., Brief of the President of the Maine Senate by and on Behalf of the Maine Senate and the Speaker of the Maine House of Representatives by and on Behalf of the Maine House of Representatives at 1, *Opinion of the Justices*, 2015 ME 107, 123 A.3d 494 (No. OJ-15-2).

²⁶² See, e.g., Brief for Representative Kenneth W. Fredette, Maine House Republican Leader, Representative Eleanor M. Espling, Assistant Maine House Republican Leader and Representative Jeffrey L. Timberlake, *Opinion of the Justices*, 2015 ME 107, 123 A.3d at 494 (No. OJ-15-2) [hereinafter Maine House Republican Brief]. These three Republicans submitted a brief to make their opinions known “to the extent their positions differ from that of . . . the Speaker of the House and the President of the Senate.” *Id.* at 4. Their brief alleged that the brief from the Speaker and President had been drafted without their input, had not been voted on by the full legislature, and therefore did “not represent the Legislature speaking with one voice.” *Id.* at 5.

²⁶³ Compare Brief for the Senate of the Commonwealth of Massachusetts as Amicus Curiae, *Opinion of the Justices to the House of Representatives*, 32 N.E.3d 287 (Mass. 2015) (No. SJC-11883) (constituting official brief of Massachusetts Senate, prepared by Senate Counsel), with Brief of Senator Bruce Tarr et al. as Amicus Curiae, *Opinion of the Justices to the House of Representatives*, 32 N.E.3d at 287 (No. SJC-11883) [hereinafter Tarr Amicus Brief] (constituting brief of Massachusetts Senate Republicans prepared by Minority Leader's legal counsel).

²⁶⁴ See Maine House Republican Brief, *supra* note 262, at 5, Ex. 3-4 (documenting Speaker's denial of House Republican Leader's request for funding to file brief).

disapproves of, as happens occasionally.²⁶⁵ By strategically introducing resolutions requesting advisory opinions on such bills, it could place the majority party in the awkward position of either agreeing to request the opinion, thereby delaying passage of the bill, or defeating the resolution, and thereby exposing the majority to political attacks for being ambivalent about the constitutionality of a proposal. Like other delay tactics available to the minority party, this allows the minority to expose legislation to additional public scrutiny and legislative debate.

More importantly, the advisory opinion provides the minority with a critical opportunity to validate its views on important constitutional issues outside of the political branches. Where the minority party can file amicus briefs, it can use these devices to attempt to persuade the court of the validity of its position and thereby undermine the majority party. For example, in the Massachusetts Origination Clause dispute, along with the official competing briefs of the House and Senate, the Senate Republican Caucus filed its own amicus brief on the matter.²⁶⁶ The brief urged the court to adopt the Caucus's "consistently held" interpretation of the Origination Clause "that the Senate may always consider tax policy in the annual budget process, and that if any actions are precluded by the Origination Clause, they are initiatives to increase taxes."²⁶⁷ This position was wholly different from that of the majority in either chamber.

The minority party's ability to file dissenting briefs is especially important when political realities prevent it from having a legitimate hope of vindicating its positions through the political process. For example, in Massachusetts, Republicans in both chambers have been in the minority for decades, and there is no indication that that will soon change.²⁶⁸ Thus, if Senate Republicans are unable to vindicate their positions on issues like the Origination Clause in court, they are unlikely to vindicate them anywhere, as the majority party can easily use its power to dismiss the minority's positions. The Senate Republican brief noted this, lamenting that past "rulings from the [Senate] chair [on the Origination Clause question] prevented Caucus tax decrease proposals from being considered by the Senate"²⁶⁹

This reality becomes particularly grave for the minority party when the disputed issue is not simply the constitutionality of a particular bill, which could

²⁶⁵ See, e.g., Alan Rogers, "Success—At Long Last": *The Abolition of the Death Penalty in Massachusetts, 1928-1984*, 22 B.C. THIRD WORLD L.J. 281, 339 (2002) (explaining how death penalty opponents in Massachusetts delayed passage of 1973 death penalty legislation by requesting advisory opinion).

²⁶⁶ Tarr Amicus Brief, *supra* note 263, at 1 ("Although Counsel to the Senate has submitted a brief in regard to this matter, we respectfully dissent from that document and submit this brief in order to present the analysis and arguments of the Senate Republican Caucus to the court.").

²⁶⁷ *Id.* at 3.

²⁶⁸ See Horowitz, *supra* note 254 (finding that without radical party realignment, Republicans are unlikely to regain control of legislature).

²⁶⁹ Tarr Amicus Brief, *supra* note 263, at 4.

easily be challenged through ex post litigation, but rather the constitutionality of a component of the legislative process itself—such as the proper meaning of the Origination Clause.²⁷⁰ In these circumstances, the majority party's interpretation and application of procedural provisions governing the legislative process impact the chamber's consideration of countless pieces of individual legislation and can ultimately deprive the minority of the ability to advance legislation that it may favor. For example, by rejecting the Senate Republican position that "tax policy," especially tax cuts, could always be considered in the budget, the Democratic majority sharply curtailed Republicans' ability to file and debate tax amendments to *all* future state budgets.²⁷¹ The Senate Republican brief made this point, observing that resolution of the Origination Clause dispute would directly impact their rights during budget processes moving forward.²⁷²

In this context, the advisory opinion allows the court to act as a counter-majoritarian force preventing the minority party's procedural rights in the legislature from being disregarded by the majority. Without it, the minority party would be left with "the inconsistent," and inherently partisan, "positions taken by presiding officers" on disputes over procedural rules like the Origination Clause.²⁷³ Although judges (especially elected state judges) are by no means entirely apolitical, the minority party is more likely to get a fair hearing before a court than before a partisan presiding officer. Further, the minority's ability to file comprehensive amicus briefs to be considered alongside the majority's gives the minority a full opportunity to present the nuances of its opinion. That may not occur in the legislature, where time limits and the general tumult of legislative debate sometimes restrict the minority's ability to fully make its case.

By giving the minority party a neutral venue in which to vindicate its position on important issues, the advisory opinion process can have a stabilizing influence on the legislature generally. Advisory opinions carry the full weight of a pronouncement of the state's highest court and are often quite comprehensive and intelligently reasoned, unlike the impromptu pronouncements of a partisan presiding officer. Further, advisory opinions lack the transitory, nakedly partisan, and occasionally arbitrary aura that may envelop rulings of the chair.²⁷⁴ Thus, when a rule is announced by advisory opinion, the minority party can at least take comfort in knowing that the rule has been clearly articulated and that action can be taken in reliance on it without fearing that the

²⁷⁰ See *supra* Section II.A (discussing numerous examples of use of advisory opinions to decide procedural and administrative questions that bear upon operation of legislature and other units of government).

²⁷¹ See Tarr Amicus Brief, *supra* note 263, at 3-4.

²⁷² See *id.* at 1 ("[T]he Court's advisory opinion in this matter will likely impact the process surrounding the development and adoption of this form of legislation, and the respective roles and responsibilities of the House of Representatives and Senate in that process.").

²⁷³ *Id.* at 2.

²⁷⁴ See, e.g., *id.* at 2-3 (lamenting shifting interpretations of Origination Clause offered by three presidents of Massachusetts State Senate).

rule will be discarded by the majority when politically convenient. Thus, advisory opinions offer the minority party an opportunity to vindicate its prerogatives in court while simultaneously diffusing the partisan tension inherent in the process of interpreting procedural rules.

B. *Implications for the Balance of Power Between the Legislature and the Executive*

The usual ability of both the legislative and executive branches to request advisory opinions ostensibly places them on equal footing, as both branches seemingly have equal access to ex ante adjudication. Nevertheless, the advisory opinion can still be used to alter the balance of power between these two branches. This is true regardless of whether the expounded question directly requires the court to pass upon a constitutional question that overtly implicates separation of powers issues.

Generally, either branch can request an advisory opinion concerning questions that arise as it conducts its normal business.²⁷⁵ For instance, the legislature may inquire about the scope of the origination clause as it considers tax legislation, and the governor may inquire about his appointment authority while contemplating filling a vacancy in the government.²⁷⁶ The “present duty” requirement that many states have adopted generally keeps both branches from meddling in the other’s affairs by requiring advisory opinion questions to concern only matters presently awaiting action by the requesting branch.²⁷⁷ For example, this approach would probably forbid the legislature from inquiring about the governor’s authority to sit on a specific board, because the resolution of such a question would have no impact on contemplated legislative action.

Theoretically, this arrangement prevents the governor from taking away the legislature’s prerogative to seek or refrain from seeking an advisory opinion regarding the constitutionality of legislation while it remains pending in the legislature. At the same time, the legislature is unable to use the advisory opinion as a device to police the executive’s behavior by seeking an opinion of the court every time it believes the executive is acting contrary to some requirement. This approach complements the strict separation of powers provisions found in many state constitutions.²⁷⁸ By preventing the legislature and executive from obtaining advisory opinions on matters other than those that directly concern them, the “present duty” limitation prevents each branch from encroaching upon the other’s exercise of the powers and duties it is constitutionally assigned.

This carefully-balanced framework can be undermined, however, by the mechanics of the lawmaking process in several ways. First, governors can use the advisory opinion to increase their own power at the legislature’s expense

²⁷⁵ See generally *supra* Section I.B.2.

²⁷⁶ See *supra* note 150 (citing advisory opinions examining gubernatorial authority to fill judicial vacancies).

²⁷⁷ See *supra* notes 116-17 and accompanying text.

²⁷⁸ See *supra* notes 178-83 and accompanying text.

when they use state constitutional presentment requirements as the source of their authority to request an opinion. The presentment clauses of state constitutions require bills to be presented to the governor for signature or veto prior to becoming law.²⁷⁹ At that time, the governor assumes a constitutional “present duty” to either sign or veto the legislation. This “present duty” would appear to authorize a governor to request an advisory opinion regarding the constitutionality of any legislation awaiting his signature. If that is so, it follows, *a fortiori*, that the legislature’s exercise of its power to pass legislation will necessarily always subsequently implicate a “present duty” of the governor pursuant to the presentment clause. Although some courts have disclaimed the ability to render an advisory opinion in these circumstances,²⁸⁰ courts in several states have issued advisory opinions requested by governors considering legislation awaiting their signature or veto.²⁸¹ In these circumstances, the legislature’s monopoly on the ability to request an advisory opinion concerning pending legislation does not translate into an ability to definitively foreclose *ex ante* review of the constitutionality of legislation. A legislative decision to forbear from seeking an advisory opinion necessarily remains subject to the will of the governor.

This reality dramatically expands the scope of the governor’s ability to request advisory opinions while substantially reducing the areas in which the legislature has sole authority to determine whether to request an opinion. Admittedly, examples of governors overriding a legislative determination not to seek an advisory opinion on a bill by unilaterally requesting one after presentment but prior to acting on the bill are somewhat scattered.²⁸² Nevertheless, legislators at least ought to contemplate this possibility while considering whether to request an advisory opinion themselves on legislation being considered. The reverse is not true. As the legislature’s ability to request advisory opinions is generally limited to pending legislation,²⁸³ it is unable to seek an advisory opinion regarding executive action that has been taken. Thus, the ability to use advisory opinions in this manner only weakens legislative prerogatives.

Second, the advisory opinion process can be used to expand gubernatorial powers if courts allow governors to request opinions based solely on their duties

²⁷⁹ See, e.g., COLO. CONST. art. IV, § 11 (“Every bill passed by the general assembly shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it, and thereupon it shall become a law; but if he do not approve, he shall return it . . .”).

²⁸⁰ See, e.g., *In re Dugaard*, 2016 S.D. 27, ¶¶ 1-4, 884 N.W.2d 163, 164-65.

²⁸¹ See *In re Interrogatory Propounded by Governor Romer on House Bill 91S-1005*, 814 P.2d 875, 878 (Colo. 1991); *Re: Opinion of the Justices*, 840 A.2d 637, 638 (Del. 2003); *In re Janklow*, 530 N.W.2d 367, 368 (S.D. 1995).

²⁸² See *supra* note 281 and accompanying text.

²⁸³ See *supra* Section I.B.1.

under the take care clause.²⁸⁴ This approach theoretically allows governors to request an advisory opinion on the constitutionality of any current (or even pending) statute because they have the duty to “faithfully execute” the statute (if passed). Like the presentment clause, this allows governors to request an advisory opinion on virtually any law the legislature might pass that requires some execution by the governor. It thus dramatically curtails the legislature’s ability to strategically deny *ex ante* judicial review of a statute.

Some courts have also allowed governors to cite their Take Care powers as a justification for obtaining advisory opinions interpreting constitutional amendments—specifically those enacted by citizen initiatives.²⁸⁵ This ability helps establish parity between the executive and legislative branches. After all, pursuant to the “present duty” requirement, the legislature can obtain an advisory opinion concerning a citizen-initiated amendment to the state constitution simply by considering a bill that implicates the amendment in question. If the governor was unable to do likewise, the legislature would be the sole entity able to obtain review of constitutional amendments outside of the traditional litigation process, except for instances in which a citizen amendment directly concerns gubernatorial powers or duties. As citizen-initiated amendments are neither a product of the legislative nor executive branches, both branches’ ability to request advisory opinions interpreting them prevents the advisory opinion process from distorting the balance of power between the two branches. The take care clause thus plays a Janus-like role in the advisory opinion process—it creates parity between the executive and legislative branches with respect to citizen-initiated constitutional amendments while dramatically circumscribing legislative prerogatives with respect to proposed legislation.

Nevertheless, advisory opinions can be used to expand legislative power at the governor’s expense as well. When the legislature requests an advisory opinion that ultimately validates a bill’s constitutionality, the legislature thereby deprives the governor of the ability to cite constitutional concerns as a reason for vetoing it. This may create a significant power shift, as governors often cite constitutional concerns when vetoing or threatening to veto legislation. Governors may publicize these constitutional concerns prior to the bill’s passage in an attempt to stall the bill in the legislature.²⁸⁶ Or they can cite such concerns in a veto message as a way to justify their veto.²⁸⁷

²⁸⁴ See *supra* notes 63-67 and accompanying text (discussing governors’ use of take care clause to request advisory opinions).

²⁸⁵ See *supra* note 64.

²⁸⁶ See, e.g., Matt Gouras, *Gov. Schweitzer: Unconstitutional Bills Face Veto*, BILLINGS GAZETTE (Feb. 7, 2011), http://billingsgazette.com/news/state-and-regional/montana/gov-schweitzer-unconstitutional-bills-face-veto/article_597361fc-3324-11e0-93e9-001cc4c03286.html [<https://perma.cc/DNH9-Z9YQ>] (threatening to veto at least twenty bills pending in legislature on grounds that they were unconstitutional).

²⁸⁷ See, e.g., Emily Nohr, ‘Unconstitutional, Unelected and Unaccountable’: *Ricketts Vetoes Bill to Revamp How Political Maps Are Drawn*, OMAHA WORLD-HERALD (Apr. 18, 2016), <http://www.omaha.com/news/legislature/unconstitutional-unelected-and-unaccountab>

In either case, the governor's invocation of constitutional concerns has the potential benefit of elevating the legitimacy of his opposition to a bill in the eyes of the public. Voters may instinctively consider a bill's constitutional infirmities to be inherently graver than concerns resting on policy or political foundations. On the surface, calling a bill unconstitutional seems to be a more damning indictment than calling a bill bad policy. Further, citing constitutional concerns when vetoing a bill may offer a governor a way to reduce the backlash from proponents of the legislation. A governor vetoing for policy reasons is hard-pressed to escape the implication that he disagrees with the policy positions of proponents. But by vetoing a bill for constitutional reasons, a governor retains some ability to present himself as sympathetic to the bill's proponents. The governor could plausibly argue that, on a policy level, he does not disagree with the legislation, but he is forced to veto because of the bill's unconstitutionality.

In these situations, the governor can use the constitution as a shield, protecting himself from the political implications of declaring his opposition to the substance of a bill. And because a vetoed bill will naturally never be adjudicated in court, the governor need not be overly concerned with the possibility that his constitutional analysis could be formally discredited, provided that it is at least plausible. Likewise, legislative attempts to question the governor's constitutional pronouncements are likely to appear uncoordinated and inadequate when forced to compete with the megaphone inherent in the office of the executive.

The legislature's successful use of the advisory opinion to affirm a proposal's constitutionality deprives the governor of this ability to cloak his opposition to a bill in the moral authority of the constitution. This should make a governor at least somewhat less likely to veto legislation that he opposes. For example, in 2004, the Colorado legislature considered H.B. 1098, a bill to make federal funds received under the Jobs and Growth Tax Relief Reconciliation Act of 2003 subject to legislative appropriation, thus prohibiting the governor from unilaterally authorizing their expenditure.²⁸⁸ As the bill struck directly at the governor's authority, he predictably argued that it was unconstitutional.²⁸⁹ Given this, one would reasonably expect the governor to veto it and perhaps even chastise the legislature for passing "unconstitutional" legislation. But instead, the legislature obtained an advisory opinion affirming the bill's facial

le-ricketts-vetoes-bill-to-revamp-how/article_a9898dda-23a7-5084-be61-69c773f9b527.html [https://perma.cc/8U7A-97S4] (citing constitutional concerns in vetoing redistricting reform bill).

²⁸⁸ See *supra* notes 167-72 and accompanying text.

²⁸⁹ See Opening Brief of Governor Owens and Attorney General Salazar at 1, *In re* Interrogatories Submitted by the General Assembly on House Bill 04-1098, 88 P.3d 1196 (Colo. 2004) (No. 04SA64), 2004 WL 2339311, at *1.

constitutionality, thus stripping away the basis of the governor's opposition.²⁹⁰ As a result, the governor was ultimately forced to sign the bill into law.²⁹¹

Although this is an example of the legislature's ability to use an advisory opinion to obtain enactment of a law that might otherwise be vetoed, the advisory opinion does carry risk for the legislature. If the court affirms the governor's position that a bill is unconstitutional, the legislature's attempt to undermine the governor will have backfired.²⁹² For example, during the 1970s, the Massachusetts legislature considered several bills authorizing the use of the death penalty as punishment for certain crimes. The legislature passed such legislation three times without obtaining advisory opinions: in 1973, 1974, and 1975.²⁹³ Despite being "under intense pressure from citizens angry about rising crime and murder rates," Governor Francis Sargent and then Governor Michael Dukakis vetoed each of these bills, citing constitutional concerns.²⁹⁴ When the legislature considered similar legislation in 1977, it finally requested an advisory opinion to settle the constitutional issue.²⁹⁵ But the Supreme Judicial Court sided with the governor, declaring the bill unconstitutional.²⁹⁶ Although this did not end the battles over the death penalty in Massachusetts, the court's ruling severely weakened the legislature's position.²⁹⁷

Thus, the advisory opinion is a tool that the legislature can use to attempt to defuse a governor's stated opposition to legislation for constitutional reasons. In this respect, advisory opinions have the same effect on inter-branch relations that they do on inter-chamber relations—they remove legal uncertainty as an impediment to the enactment of legislation and force political or policy objections from the governor to stand on their own bottoms. This gives legislators more freedom to consider legislation of questionable constitutionality by removing the governor's ability to use his bully pulpit to intimidate legislators through unchecked public declarations that a bill being considered is unconstitutional. And it prevents the governor from dodging the political implications of opposing a bill by hiding behind legal arguments. Nevertheless, if it is not used wisely, the advisory opinion may actually undermine the legislature's goals.

²⁹⁰ *In re* Interrogatories Submitted by the General Assembly on House Bill 04-1098, 88 P.3d 1196, 1197 (Colo. 2004).

²⁹¹ H. JOURNAL, 64th Gen. Assemb., 2d Reg. Sess. 1716 (Colo. 2004).

²⁹² In many cases, the governor will have the opportunity to directly assert his position by filing a brief with the court. *See, e.g.*, Opening Brief of Governor Owens and Attorney General Salazar, *supra* note 289.

²⁹³ *See* Rogers, *supra* note 265, at 339-42.

²⁹⁴ *Id.* at 341-42.

²⁹⁵ *Id.* at 350.

²⁹⁶ Opinion of the Justices to the House of Representatives, 364 N.E.2d 184, 186-87 (Mass. 1977).

²⁹⁷ *See* Rogers, *supra* note 265, at 350 (discussing subsequent enactment of death penalty legislation).

C. *Implications for the Legislature's Relationship with the Judiciary*

Perhaps the most far-reaching implications of the advisory opinion lie in its potential to restructure the relationship between legislatures and courts. Paradoxically, it allows the legislature to exert more control over the judiciary and encourages a more dialogic relationship between legislatures and courts. Although these features are not necessarily in tension, their awkward coexistence suggests the net impact of the advisory opinion is heavily dependent upon the ways in which the legislature decides to use it and the ways in which courts allow it to be used.

Because advisory opinions allow the legislature to seek a judicial opinion at its own convenience, outside of the traditional litigation process, they necessarily give the legislature added control over the process of judicial review. Specifically, they allow the legislature to receive an opinion without having to demonstrate standing, as a traditional litigant would.

At the federal level, Article III requires litigants to demonstrate “[1] concrete and particularized ‘injury in fact’ that is [2] fairly traceable to the challenged action of the defendant and [3] likely to be redressed by a favorable judicial decision” before they can gain access to a federal court.²⁹⁸ Even states litigating in federal court to defend their institutional interests must meet these three constitutional prerequisites.²⁹⁹ The standing requirement thus limits the kinds of federal questions that federal courts will resolve. Although state courts are not bound by Article III standing doctrine when adjudicating either federal or non-federal questions, most have adopted parallel state standing doctrines that are similar,³⁰⁰ although in some cases less stringent.³⁰¹

A legislative request for an advisory opinion moots the standing inquiry altogether—neither Article III standing requirements nor analogous state doctrines apply. This allows the legislature to directly undermine the judiciary's power, as a coordinate branch of state government, to police its own docket and institutional prerogatives through carefully-constructed principles of justiciability. The advisory opinion is the legislature's “get out of standing free”

²⁹⁸ *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

²⁹⁹ *E.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 520-26 (2007) (applying these three constitutional standing prerequisites in affirming Massachusetts's standing to challenge EPA's refusal to regulate greenhouse gas emissions under federal Clean Air Act).

³⁰⁰ *See* William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 264 (1990) (“[S]tate courts have been able to decide questions of federal law when, under the standards of article III, a litigant has no standing, or a dispute is moot or unripe.”); *see also* *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (“Although the state courts are not bound to adhere to federal standing requirements, they possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law.”).

³⁰¹ *See* Hershkoff, *supra* note 7, at 1854-59 (discussing several ways in which various states have developed standing doctrines that are less restrictive than Article III standing requirements).

card that it can play at will whenever it might find justiciability doctrine inconvenient.

In fairness, the various threshold circumstantial limitations that state courts have developed to restrict the kinds of questions that can be decided by advisory opinions function in some ways as substitutes for traditional standing doctrine.³⁰² But the application of these doctrines has been tentative and inconsistent at best.³⁰³ Furthermore, as rules limiting the circumstances in which advisory opinions can be requested are ostensibly offered as interpretations of constitutional or statutory language, they leave the judiciary far less discretion than standing doctrine does.

The legislature's power to circumvent standing doctrine by requesting an advisory opinion manifests itself in two ways. First, it allows the legislature to obtain an adjudication of questions that might otherwise be completely nonjusticiable. In these circumstances, the legislature can obtain judicial resolution of an issue that would otherwise be left entirely to the political branches to resolve. This represents perhaps the most intrusive override of judicial prerogatives, as it essentially allows the legislature to override the judiciary's determination that certain categories of legal questions are simply not fit for judicial adjudication.

But it is difficult to see how this increases legislative power in any meaningful way. Typically, the jurisprudential underpinnings of nonjusticiability doctrines, such as the political questions doctrine, for example, are based on judicial *respect* for the prerogatives of the coordinate branches.³⁰⁴ They often represent a determination that the political branches are more institutionally suited to resolve a matter than the courts, or that it would be undesirable for the judiciary to take a position on a matter that undermines the position taken by a coordinate branch.³⁰⁵ If the legislature, notwithstanding these considerations, chooses to direct the judiciary to discard this deferential posture and issue an advisory opinion on a particular matter, it thereby knowingly exposes an otherwise nonjusticiable matter to a risk of judicial invalidation. If an unfavorable result ensues, the legislature can properly be said to have been the author of its own misfortune.

Further, some of the procedural questions that have been most heavily examined through the advisory opinion process are not actually nonjusticiable at all when considered via traditional litigation. For example, the origination clause is justiciable at the federal level,³⁰⁶ and in some states.³⁰⁷ Although there may be some matters at the margins for which this is not true, it thus appears

³⁰² See *supra* Section I.B.

³⁰³ See *especially supra* notes 121-22.

³⁰⁴ See *Baker v. Carr*, 369 U.S. 186, 210, 217 (1962).

³⁰⁵ See *id.* at 211 (explaining that many foreign relations issues often “uniquely demand single-voiced statement of the Government’s views”).

³⁰⁶ *United States v. Munoz-Flores*, 495 U.S. 385, 396 (1990).

³⁰⁷ See, e.g., *Baines v. N.H. Senate President*, 876 A.2d 768, 775 (N.H. 2005).

doubtful that the advisory opinion process substantially shifts the balance of power between the legislature and judiciary simply by allowing the legislature to receive opinions on otherwise nonjusticiable questions.

More importantly, advisory opinions allow a legislature to assert and defend its own prerogatives in court in a way that cannot occur in most traditional litigation. Generally, federal courts have denied standing to state and federal legislators, or groups of legislators, who have sued to vindicate the “institutional” interests of the legislature as a whole.³⁰⁸ Legislators generally must allege that a legislative action has completely nullified their vote in order to file suit to vindicate their interests as legislators.³⁰⁹ And it is unclear whether an individual chamber has standing to assert its own interests in court, for example, by arguing for the constitutionality of a bill it has passed.³¹⁰ Although some state courts have adopted a broader view of legislator standing than federal courts,³¹¹ many have not.³¹² Thus, by removing the need for the legislature to demonstrate standing in order to litigate a matter in court, advisory opinions give the legislature (or a component thereof) a way to directly vindicate its own interests that might otherwise be unavailable. This ensures that the legislature can represent its interests directly as an institutional litigant rather than having to rely exclusively on amicus briefs it might submit in private lawsuits.

The legislature’s ability to force a matter into the judiciary *ex ante* does not come risk-free, especially in those states that do not provide a presumption of constitutionality for statutes examined through advisory opinions. The legislature must weigh the added efficiency of obtaining review *ex ante* against the benefit of slightly more deferential review *ex post*. Because the majority of

³⁰⁸ See *Raines v. Byrd*, 521 U.S. 811, 829-30 (1997) (denying standing to six members of Congress who filed suit to challenge constitutionality of recently-enacted Line Item Veto Act); *Kerr v. Hickenlooper*, 824 F.3d 1207, 1218 (10th Cir. 2016) (denying standing to Colorado state legislators challenging citizen-initiated TABOR amendment to Colorado Constitution).

³⁰⁹ See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2665 (2015) (granting standing to state legislators who sued to invalidate constitutional amendment establishing independent redistricting commission, reasoning that amendment deprived legislators of their ability to vote on new maps).

³¹⁰ See *United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013) (refusing to reach question of whether U.S. House’s Bipartisan Legal Advisory Group would have standing to defend federal Defense of Marriage Act on its “own authority”).

³¹¹ See, e.g., *Grossman v. Dean*, 80 P.3d 952, 959 (Colo. App. 2003).

³¹² See, e.g., *Markham v. Wolf*, 136 A.3d 134, 145 (Pa. 2016) (explaining that both under Pennsylvania caselaw and “analogous federal caselaw . . . legislative standing is appropriate only in limited circumstances”); see also *Alons v. Iowa Dist. Court*, 698 N.W.2d 858, 873 (Iowa 2005) (“It would be strange indeed and contrary to our notions of separation of powers if we were to recognize that legislators have standing to intervene in lawsuits just because they disagree with a court’s interpretation of a statute.”).

a single house can usually determine whether to seek an advisory opinion,³¹³ that majority, in so doing, is able to foreclose the possibility of more deferential post-enactment review of pending legislation, even if other factions within the legislature may prefer to wait.

Absent the advisory opinion process, legislators generally fall into three groups when a bill of questionable constitutionality is proposed. The first group prefers that no action be taken, thus preserving the status quo. The second group prefers passing a bill representing the optimal policy option, even if that means risking invalidation by a court *ex post*. The third group prefers a compromise position—a bill that is sub-optimal (but still acceptable) from a policy perspective, but clearly constitutional. The differing temperaments between the second and third groups may be driven by a variety of factors, including different philosophical, political, or electoral considerations. Philosophically, the second group may believe that it is the judiciary’s job—not the legislature’s—to determine what is constitutional. Legislators thus normatively ought not to dilute otherwise preferable policy proposals by attempting to divine what a court may or may not uphold. Further, by passing a bill and forcing a court to strike it down, the second group may wish to play on the judiciary’s traditional deference for the legislature in an attempt to stretch the outer bounds of the constitution. By contrast, the third group may believe that each branch of government has an independent responsibility to be faithful to the constitution, and the legislature thus ought to make its own judgment about whether a bill complies with the spirit—if not the letter—of the constitution prior to passage.

Advisory opinions are a boon for the third group at the expense of the second. They largely eliminate the need to debate the relative merits of an optimal bill of questionable constitutionality compared to a sub-optimal bill that is clearly constitutional because the bill’s validity can be readily ascertained through an advisory opinion before the bill is finalized and passed. Thus, when the legislature considers a bill of questionable constitutionality, the third group is likely to insist that the legislature make sure the bill is constitutional by seeking an advisory opinion. The second group will have difficulty effectively arguing against this position. As a result, the second group will be deprived of the opportunity to truly push the bounds of the constitution through *ex post* adjudication where the bill would enjoy a presumption of constitutionality. Advisory opinions thus embolden legislators who are temperamentally or philosophically more risk-averse or reluctant to challenge the judiciary.

While the advisory opinion process gives the legislature expanded power to control the judiciary, it simultaneously creates incentives for expanded cooperation between the two branches. For example, the relative ease with which advisory opinions can be obtained compared to traditional litigation allows the legislature to use the judiciary as a partner when considering novel revenue-raising devices or other complex proposals. Instead of being forced to

³¹³ See *supra* Section I.A.1 (discussing ability of majority of single house to request advisory opinion).

swallow legal uncertainty when enacting complex statutes, the legislature can work cooperatively with the courts and the amici who participate in the advisory opinion process to develop new proposals that advocates and the public can firmly rely upon *ab initio*.³¹⁴ This enhances the legislature's ability to experiment with new statutory schemes by preserving the time and political capital that is normally consumed by passing a law and waiting for it to be litigated *ex post*.³¹⁵

One example of how this potential dialogic process occurs is when the legislature legislates in light of a recent court ruling. For example, the New Hampshire legislature used the advisory opinion process to work cooperatively with the New Hampshire Supreme Court in light of the *Claremont II* order demanding revision to the state's public education funding formula.³¹⁶ The court lauded the "commendable steps" taken by the legislature to comply with *Claremont II* as soon as possible.³¹⁷ When used in this manner, the advisory opinion allows the legislature to avoid the potentially lengthy process of formal litigation *ex post* and allows the court to obtain compliance with its orders more quickly.³¹⁸ This is particularly true with regard to personal rights matters, which are frequently challenged shortly after enactment.³¹⁹ Certainly, courts may take longer to decide these matters in advisory opinions than the legislature would like,³²⁰ however, even in such cases, the time saved compared to *ex post* litigation is undeniably significant.

But this more collaborative process between the legislature and the courts can also allow the legislature to hide behind the judiciary and thereby avoid having to make politically fraught decisions on controversial issues. But for the availability of an advisory opinion, legislators would be forced to decide whether to spend time and political capital passing controversial legislation of questionable constitutionality. The availability of an advisory opinion allows legislators to refrain from making this difficult decision until a bill's constitutionality has been decided by the court.³²¹ If the court rules favorably,

³¹⁴ This benefit has long been recognized as a key virtue of the advisory opinion process. *See, e.g.*, Note, *Judicial Determinations in Nonadversary Proceedings*, 72 HARV. L. REV. 723, 723-24, 731 (1959).

³¹⁵ It should be remembered, however, that statutes reviewed in an advisory opinion context do not enjoy a presumption of constitutionality in some states. *See supra* Section I.C. The possibility that the absence of this presumption could doom exotic regulatory statutes evaluated in an advisory opinion should not be discounted by legislators.

³¹⁶ Opinion of the Justices (School Financing), 712 A.2d 1080, 1083 (N.H. 1998).

³¹⁷ *Id.* at 1088.

³¹⁸ *See supra* note 22 and accompanying text.

³¹⁹ *See, e.g.*, *In re Request for Advisory Opinion Regarding Constitutionality of 2012 PA 348 and 2012 PA 349*, 829 N.W.2d 872, 872 (Mich. 2013) (noting pendency of formal litigation regarding right to work legislation).

³²⁰ *See, e.g.*, *supra* note 249 and accompanying text (discussing lengthy advisory opinion process in Michigan involving photo-ID legislation).

³²¹ This is subject, of course, to the officially "nonbinding" nature of advisory opinions. *See supra* Section I.C.

advocates can then use the opinion to diffuse constitutional concerns with the bill, and thus gain momentum by having removed a significant barrier to passage.

At the same time, an unfavorable ruling allows legislators or governors to blame the court for a bill's failure, allowing them to escape the ire of its proponents. By blaming the court, they simultaneously avoid having to pass a controversial bill, avoid having to defend the bill as a policy matter, and have a convenient scapegoat to offer advocates to explain its failure. The political branches can simply point to the court's adverse opinion and say nothing more. For example, during his 1988 presidential campaign, Massachusetts Governor Michael Dukakis was heavily attacked for vetoing legislation that would have fined schoolteachers who refused to lead their students in the pledge of allegiance.³²² President George H.W. Bush used the veto to paint Dukakis as out of touch with core American values.³²³ But Dukakis largely refused to engage the debate on a policy level and instead defended his veto by citing an advisory opinion that the bill was unconstitutional.³²⁴ Thus, the advisory opinion process gives legislatures an additional tool to use to relieve the pressure of divisive legislation. This shield costs the legislature nothing, as it always retains the ability to forego the advisory opinion process altogether if it would prefer that a proposal be litigated ex post through the traditional process.³²⁵

A combative legislature can easily destroy the cooperative environment between the legislature and the judiciary entirely. Such a legislature could use the ease of the advisory opinion process to help it draft legislation that meets only the minimum requirements of a court order. By relieving the legislature of the extended public discussion and scrutiny that comes with passing legislation, having it challenged, and waiting for ex post litigation, the advisory opinion process could induce legislatures to embrace the quickest solution that can win approval by the court.

This prevents the realization of the full value of a remedial court order in sweeping cases like *Claremont II*. Certainly, the core value of such remedial orders lies in their formal legal pronouncements that must be promptly followed.³²⁶ But secondarily, they may also, intentionally or unintentionally,

³²² Steven V. Roberts, *Bush Intensifies Debate on Pledge, Asking Why It So Upsets Dukakis*, N.Y. TIMES, Aug. 25, 1988, at A1.

³²³ *Id.*

³²⁴ *Id.*

³²⁵ As an example, the Massachusetts Senate sought an advisory opinion in 2000 regarding proposed legislation to establish buffer zones around reproductive health care facilities. Opinion of the Justices to the Senate, 723 N.E.2d 1, 2 (Mass. 2000). The court concluded that the proposal was constitutional under both the Massachusetts and U.S. Constitutions. *Id.* at 6. In 2007, Massachusetts proceeded to enact a more stringent buffer zone law, but chose not to seek an advisory opinion. That law was eventually struck down by the Supreme Court. *McCullen v. Coakley*, 134 S. Ct. 2518, 2548-49 (2014).

³²⁶ For example, in *Claremont II*, the court instructed the legislature and governor to promptly act to revise the state's public education funding scheme to comply with the

initiate a broader public debate on the issues at hand³²⁷ and may, over time, develop considerable symbolic value to the parties involved.³²⁸ For these secondary discursive and symbolic values to be fully realized, full public engagement may be necessary to ensure a complete ventilation of the issues. A thorough vetting can be assured through vigorous public engagement at all stages of the legislative process: the legislature's consideration of the bill, the governor's consideration of the bill, administrative implementation, and potential ex post litigation. This is particularly true of complex, multivariable issues like public school finance, where there may not be a single "right" answer.

When the legislature uses the advisory opinion to promptly obtain an affirmation of minimal compliance with a court order ex ante, the process of public engagement on the issue may be prematurely truncated. Once a state's highest court has declared remedial legislation acceptable, the legislature has little incentive to consider further public comment on the matter. In fact, legislators may actively ignore public requests for further changes for fear that such changes may upset the stamp of approval the legislation has received from the court. As advisory opinions are necessarily obtained before the legislative process has fully concluded (and potentially quite early in the process), an advisory opinion may thus prematurely shut the public out of the process of developing remedial legislation. Instead of allowing the process of considering remedial legislation to be a public, statewide activity, the advisory opinion may thus transform the process into a closed dialogue between judges and legislators.

Thus, the value provided by the potentially collaborative nature of the advisory opinion process largely depends upon the attitude of the legislature. When the legislature chooses to use the advisory opinion process to grease the wheels of governance by making the lawmaking process more efficient, it can be a relatively neutral process. But when the legislature chooses to use the advisory opinion to enhance its own power at the expense of the courts or the public, it can become a tool for legislative aggrandizement.

CONCLUSION

This Note has examined the myriad ways in which the advisory opinion process impacts legislative power and prerogatives. Part I examined several structural features of the process across the various states. It discussed the

principles in the court's ruling. *Claremont Sch. Dist. v. Governor (Claremont II)*, 703 A.2d 1353, 1360-61 (N.H. 1997).

³²⁷ See, e.g., *id.* at 1360 (noting "numerous sources of expertise" that legislature could draw upon to fashion remedial legislation).

³²⁸ A classic example of this phenomenon is the landmark Supreme Court ruling in *Brown v. Board of Education*, 347 U.S. 483 (1954). Although that case obviously resulted in an historical desegregation order, its total impact was significantly broader. "*Brown* was at least as important symbolically as it was practically. *Brown* made racial discrimination illegitimate; it set the tone for a very different set of expectations and norms of race relations in the United States." Richard Thompson Ford, *Brown's Ghost*, 117 HARV. L. REV. 1305, 1305 (2004).

entities that may request advisory opinions, the circumstances in which they may be requested, and their legal status. Part II explored the three substantive areas in which advisory opinions are most frequently requested: structural and procedural questions, regulatory questions, and personal rights questions. Finally, Part III discussed the ways in which the advisory opinion process can impact the legislative process and legislative prerogatives. Advisory opinions have pronounced intra-legislative implications, as they may be used to modify the nature of existing relationships between legislative chambers or between political parties. But they may also be used to reorient the legislature's institutional relationships with the executive and with the courts. Their reach thus extends to all branches of state government.

While this has not been a comprehensive treatment of the use of advisory opinions in recent history, it has addressed those aspects of the process that impact legislatures most directly. Understanding advisory opinions from this perspective is necessary to developing a complete understanding of their legal, policy, and political implications. And without such a holistic understanding of this unique legal tool, one cannot fully appreciate the role advisory opinions can play within state government.

This Note has argued that the advisory opinion has the potential to fundamentally alter both the functioning of the legislature and its relationships with the other branches of government. It thus has potentially profound consequences for the separation of powers. But it does not produce these consequences latently. Rather, advisory opinions' disruptive effects primarily occur where they are intentionally used as instruments of disruption. The advisory opinion is thus a device of choice. When the political branches wish to manipulate the courts, or increase their own power, the advisory opinion can be used to those ends. But when the political branches wish to increase inter-branch cooperation and improve the efficiency of the lawmaking process, the advisory opinion is likewise an available tool. Thus, while the advisory opinion is a weapon of great power with the potential to reorient the relations between the various branches of government, it can also be used to blunt such effects. Ultimately, it is perhaps best understood as an accelerant for the ambitions of its users.