

***State Parens Patriae* Authority: The Evolution of the  
State Attorney General's Authority**

**Jay L. Himes**

**Chief, Antitrust Bureau**

**Office of the New York Attorney General**

**Prepared for**

**The Institute for Law and Economic Policy Symposium**

**Protecting the Public:**

**The Role of Private and Public Attorneys' General**

**Miami, Florida  
April 23-24, 2004**

March 25, 2004

**STATE *PARENS PATRIAE* AUTHORITY: THE EVOLUTION OF  
THE STATE ATTORNEY GENERAL'S AUTHORITY**

**Jay L. Himes<sup>1</sup>**

Representing the public interest in affirmative litigation is a central mission of a state attorney general today. This authority, as the sovereign's chief legal officer, to pursue litigation on behalf of the people is frequently referred to a "*parens patriae*" authority. What exactly is this authority, and where does it come from?

In this paper, I will explore this part of the work of the state attorneys general. By way of an overview, I will first describe the features of *parens patriae* authority, as it has developed and come to be recognized in this country. Thereafter, I will trace the roots of the attorney general's *parens patriae* authority – from medieval England, to the American colonies, to the newly independent states. I will detail, more specifically, the constitutional and statutory evolution of the New York attorney general's authority. Finally, I will briefly summarize the conditions of the federal attorney general's office at the birth of the nation.

**A. Historical Origins and Early Development of the *Parens Patriae* Doctrine**

*Parens patriae* "means literally 'parent of the country'" and "refers traditionally to [the] role of [the] state as sovereign and guardian of persons under legal disability."<sup>2</sup>

Conceptually, the doctrine is derived from the king's royal prerogative as "the general

<sup>1</sup> Chief, Antitrust Bureau of the Office of the New York Attorney General. The views expressed in this paper are my own, and do not reflect those of the Attorney General's Office, or of its Antitrust Bureau.

<sup>2</sup> Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600 & n.8 (1982) ("Snapp") (quoting BLACK'S LAW DICTIONARY 1003 (5<sup>th</sup> ed. 1979)).

guardian of all infants, idiots and lunatics . . . .”<sup>3</sup> The individual’s inability to protect his or her own interests was, historically, the central justification for recognizing the sovereign’s prerogative to act on the individual’s behalf.<sup>4</sup> Thus, in this country, *parens patriae* authority has devolved to each state as “inherent in the supreme power of every State.”<sup>5</sup>

While of historic interest, “[t]his common-law approach,” the Supreme Court has noted, “has relatively little to do with the concept of *parens patriae* standing that has developed in American law.”<sup>6</sup> The doctrine “has been greatly expanded in the United States beyond that which existed in England.”<sup>7</sup> This expansion is commonly thought to begin in 1900, with *Louisiana v. Texas*,<sup>8</sup> where Louisiana sought to enjoin Texas from using its quarantine regulations to prevent Louisiana merchants from sending goods into Texas. Recognizing that “the matters complained of affect [Louisiana’s] citizens at large,”<sup>9</sup> the Supreme Court upheld Louisiana’s *parens patriae* authority, although it dismissed because it found no actual controversy between Louisiana and Texas.<sup>10</sup>

<sup>3</sup> *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972) (“Hawaii”) (quoting 3 W. BLACKSTONE, COMMENTARIES \*47). See generally Jack Ratliff, *Parens Patriae: An Overview*, 74 TULANE L. REV. 1847, 1850-51 (2000) (“Ratliff, *An Overview*”); Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 FORD. L. REV. 361, 366-71 (1999) (“Farmer, *Cy Pres Distributions*”).

<sup>4</sup> See *Rivers v. Katz*, 67 N.Y.2d 485, 496, 504 N.Y.S.2d 74, 80 (1986).

<sup>5</sup> *Late Corp. of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1, 57 (1890).

<sup>6</sup> *Snapp*, 458 U.S. at 600.

<sup>7</sup> *Hawaii*, 405 U.S. at 257. See generally Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859 (2000) (“Ieyoub & Eisenberg, *State Attorney General Actions*”).

<sup>8</sup> 176 U.S. 1 (1900).

<sup>9</sup> *Id.* at 19 n.11.

<sup>10</sup> Louisiana challenged the failure of Texas’ governor to exercise statutory authority to ameliorate the impact of the quarantine regulations, which a state health official had issued. The Court held that, to establish a controversy between one state and another, the injury must be more than one due to “maladministration of the laws of another. . . . [T]he acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one state to a distinct collision with a sister State.” *Id.* at 22.

In the years that followed, *parens patriae* doctrine developed largely as result of actions by one state against another based on the latter's use of land, water or other natural resources in ways that injured the health or safety of the plaintiff state's citizens.<sup>11</sup> There were occasional state suits against private parties as well. For example, in *Georgia v. Tennessee Copper Co.*,<sup>12</sup> Georgia sought to enjoin pollution by copper companies located in Tennessee. Justice Holmes emphasized that "[t]his is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."<sup>13</sup> Accordingly, Georgia was entitled to sue as *parens patriae*.<sup>14</sup>

The Supreme Court's early development of the *parens patriae* doctrine was derived from aspects of our nation's federal system. As the Court explained in *Missouri v. Illinois*,<sup>15</sup> where Missouri sought to enjoin pollution of the Mississippi River from Illinois:

If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy . . . .<sup>16</sup>

Similarly, in *Tennessee Copper*, Justice Holmes wrote that, "[w]hen the states by their

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<sup>11</sup> See, e.g., *Wisconsin v. Illinois*, 278 U.S. 367 (1929) (diversion of Lake Michigan); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (denial of access to natural gas); *New York v. New Jersey*, 256 U.S. 296 (1921) (proposed discharge of sewage into New York harbor); *Kansas v. Colorado*, 185 U.S. 125 (1902) (diversion of river); *Missouri v. Illinois*, 180 U.S. 208 (1901) (river sewage). See also *New Jersey v. City of New York*, 283 U.S. 473 (1931) (discharge of sewage in the Atlantic Ocean).

<sup>12</sup> 206 U.S. 230 (1907).

<sup>13</sup> *Id.* at 237.

<sup>14</sup> See also *Oklahoma v. Atchison, T. & S. F. R. Co.*, 220 U.S. 277 (1911) (action challenging railroad shipping rates).

<sup>15</sup> 180 U.S. 208 (1901).

<sup>16</sup> *Id.* at 241.

union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. . . . [T]he alternative to force is a suit in this court.”<sup>17</sup> In other words, in exchange for relinquishing some elements of sovereignty, including the authority to resort to war to resolve disputes, individual states, in return, have recourse to the judicial power of the United States.<sup>18</sup> Moreover, the Supreme Court’s own original jurisdiction was “one of the mighty instruments . . . provided so that adequate machinery might be available for the peaceful settlement of disputes between States and between a State and citizens of another State.”<sup>19</sup>

Equally important, however, early development of the *parens patriae* doctrine rejected its application where the suit, although “in the name of the State,” was “in reality for the benefit of particular individuals . . . .”<sup>20</sup> Thus, the state could not be simply a “nominal” party in the case. *New Hampshire v. Louisiana*<sup>21</sup> is illustrative. New Hampshire and New York laws enabled their own citizens, who held overdue bonds issued by another state, to assign the obligation owed to the state attorney general. The state attorney general then was authorized to sue in the states’ name, to recover costs of suit, and to remit the balance recovered to the bond owners. Having taken such assignments, New Hampshire and New York sought to sue “as the sovereign and trustee

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<sup>17</sup> 206 U.S. at 237. *See also* *New Hampshire v. Louisiana*, 108 U.S. 76, 90-91 (1883).

<sup>18</sup> *See* U.S. Const., Art. I, § 8, cl. 11-13, and § 10, cls. 1, 3; Art. III, § 2; 28 U.S.C. §§ 1251(a) (granting original and exclusive jurisdiction in the Supreme Court over controversies between two states), (b)(2) and (3) (granting original but not exclusive jurisdiction over controversies between the United States and a state, and between a state and citizens of another state or against aliens).

<sup>19</sup> *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 450 (1945).

<sup>20</sup> *Oklahoma v. Cook*, 304 U.S. 387, 394 (1938) (action by state official against insolvent bank for the benefit of bank creditors). *See also* *Oklahoma v. Atchison, T. & S.F.R. Co.*, 220 U.S. 277 (1911) (action for the benefit of rail shipper of identified commodities).

<sup>21</sup> 108 U.S. 76 (1883).

of [their] citizens. . . .”<sup>22</sup>

Although the federal judicial power extends to “controversies between two or more states,” and “between a state and citizens of another state,”<sup>23</sup> the Eleventh Amendment directs that the judicial power “shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State.”<sup>24</sup> Thus, the Supreme Court held that “one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens.”<sup>25</sup> Accordingly, the Court rejected New Hampshire and New York’s effort to invoke the Court’s original jurisdiction.<sup>26</sup>

As the Court further explained in *Pennsylvania v. New Jersey*:

[A] State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens. . . .

The rule is a salutary one. For if, by the simple expedient of bringing an action in the name of the State, this Court’s original jurisdiction could be invoked to resolve what are, after all, suits to redress private grievances, our docket would be inundated. And, more important, the critical distinction, articulated in Art. III, 2, of the Constitution, between suits brought by “Citizens” and those brought by “States” would evaporate.<sup>27</sup>

Bearing in mind the underlying policies here, it is questionable whether this “nominal party” consideration should apply at all when a state sues a private party in a federal or

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<sup>22</sup> *Id.* at 89.

<sup>23</sup> U.S. Const., Art. III, § 2.

<sup>24</sup> U.S. Const., Amend. XI.

<sup>25</sup> 108 U.S. at 91.

<sup>26</sup> *See also* Hawaii, 405 U.S. at 258 n. 12; *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 450, 451-52 (1945).

<sup>27</sup> 426 U.S. 660, 665-66 (1976) (citing authorities). *See also* *Oklahoma v. Cook*, 304 U.S. 387, 396 (1938).

state trial level court.<sup>28</sup> Nevertheless, occasionally if the number of potential beneficiaries of the case is small, *and* if only monetary recovery specifically for those potential beneficiaries is sought, a court may find the dispute unsuitable for *parens patriae* representation.<sup>29</sup>

Federalism considerations may also limit a state's authority to enforce its citizens' rights vis-a-vis the federal government. In *Massachusetts v. Mellon*,<sup>30</sup> the Supreme Court held that Massachusetts could not sue as *parens patriae* to declare an act of Congress unconstitutional. Although the Court noted that "we need not go so far as to say that a State may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress,"<sup>31</sup> in the next breath it wrote that "it is no part of [a state's] duty or power to enforce [the state's citizens'] rights in respect of their relations with the Federal Government."<sup>32</sup> The Supreme Court has since reiterated the bar against state *parens patriae* litigation challenging the constitutionality of federal statutes.<sup>33</sup> However, lower courts have upheld state *parens* suits against federal agencies or agency officials on several occasions.<sup>34</sup> Summarizing the disparate case law, the D.C. Circuit has

<sup>28</sup> See *Snapp*, 458 U.S. at 603 n.12 & 611 (Brennan, J., concurring).

<sup>29</sup> See *People v. Seneci*, 817 F.2d 1015 (2<sup>nd</sup> Cir. 1987) (declining to allow the attorney general to recover monetary relief under RICO for 79 persons, in light of a parallel court case granting an injunction against defendants and awarding restitution); *People v. Operation Rescue National*, 80 F.3d 64, 71 (2<sup>nd</sup> Cir. 1996) (denying recovery of compensatory damages by the attorney general on behalf of two health clinics injured by defendants' violations of a court order enjoining obstruction of access to facilities offering abortions).

<sup>30</sup> 262 U.S. 447 (1923).

<sup>31</sup> *Id.* at 485.

<sup>32</sup> *Id.* at 485-86. See also *Florida v. Mellon*, 273 U.S. 12, 18 (1927).

<sup>33</sup> See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) (rejecting state challenge to federal voting rights act). But see *New York v. United States*, 65 F. Supp. 856 (S.D.N.Y. 1946) (upholding *parens patriae* authority to enjoin ICC orders, but dismissing the case on other grounds), *aff'd without addressing issue*, 331 U.S. 284 (1947).

<sup>34</sup> See, e.g., *Washington Utilities & Transportation Commission v. FCC*, 513 F.2d 1142 (9<sup>th</sup> Cir.), *cert. denied sub nom. National Association of Regulatory Utility Commissioners v. FCC*, 423 U.S. 836 (1975); *Alabama v. TVA*, 467 F. Supp. 791, 793 (N.D. Ala. 1979) (citing authorities), *aff'd in relevant part, rev'd on other grounds*, 636 F. 1061 (5<sup>th</sup> Cir.), *cert. denied*, 454 U.S. 837 (1981). See generally

thus noted:

[T]he cases evidence an extreme reluctance to recognize state *parens patriae* standing against a federal defendant. There is some basis for reading the preponderance of case law as flatly prohibiting such actions on the basis that there can be no quasi-sovereign interest in the state as a matter of constitutional allocation of powers. Whatever one's view of that proposition, however, *it is at least clear that suits against the Federal Government raise an important argument against standing which is not relevant where other types of defendants are involved*. That is because wherever there is a federal defendant, a degree of disruption of asserted federal powers at the hands of a plaintiff state is unavoidable.<sup>35</sup>

Thus, this remains an unsettled area.

### **B. Modern Expression of the *Parens Patriae* Doctrine**

The leading modern decision on the elements of *parens patriae* authority is *Alfred L. Snapp & Son, Inc. v. Puerto Rico*.<sup>36</sup> There, the Supreme Court noted that:

In order to maintain such an action, the State must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party. The State must express a quasi-sovereign interest. Although the articulation of such interests is a matter for case-by-case development – neither an exhaustive formal definition nor a definitive list of qualifying interests can be presented in the abstract – certain characteristics of such interests are so far evident. These characteristics fall into two general categories. First, a State has a quasi-sovereign interest in the health and well-being – both physical and economic – of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.<sup>37</sup>

In evaluating whether a state has *parens patriae* authority in the context of a specific claim, the court may consider: (a) “whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers,<sup>38</sup> and (b)

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Pennsylvania v. Kleppe, 533 F.2d 668, 676-79 (D.C. Cir.) (discussing authorities), *cert. denied*, 429 U.S. 977 (1976).

<sup>35</sup> Kleppe, 533 F.2d at 678 (emphasis in original).

<sup>36</sup> 458 U.S. 592 (1982).

<sup>37</sup> *Id.* at 607.

<sup>38</sup> *Id.*

whether the challenged conduct affects, either directly or indirectly, a “sufficiently substantial segment of its population.”<sup>39</sup>

The Supreme Court has not, however, “attempted to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior.”<sup>40</sup> Even a small number of identified victims may be sufficient if similar injury to others is foreseeable,<sup>41</sup> or where the wrongful conduct has “a destructive societal effect . . . .”<sup>42</sup> Moreover, “the indirect effects of the injury” – as well as the direct effects – “must be considered . . . in determining whether the State has alleged injury to a sufficiently substantial segment of its population.”<sup>43</sup>

Recognizing *parens patriae* authority is particularly appropriate where injury is sufficiently small or diffuse as to make it unlikely that individuals could or would pursue litigation to obtain the relief to which they are entitled.<sup>44</sup> Thus, in *Maryland v. Louisiana*,<sup>45</sup> the Supreme Court upheld the *parens patriae* authority of several states to

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<sup>39</sup> *Id.* See also *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (action by Pennsylvania and Ohio to enjoin a West Virginia statute, which denied natural gas to “a substantial portion of the state’s population,” as well as to public institutions of the plaintiff states).

<sup>40</sup> *Snapp*, 458 U.S. at 607. See also *People v. Peter & John’s Pump House*, 914 F. Supp. 809, 812 (N.D.N.Y. 1996) (“There is no numerical talisman to establish *parens patriae* standing”).

<sup>41</sup> See, e.g., *People v. Mid Hudson Medical Group, P.C.*, 877 F. Supp. 143 (S.D.N.Y. 1995) (one identified victim, but state’s entire hearing impaired population was affected); *Support Ministries for Persons with AIDS v. Village of Waterford*, 799 F. Supp. 272 (N.D.N.Y. 1992) (15 identified victims, but similarly situated persons would be affected in the future).

<sup>42</sup> *People v. Peter & John’s Pump House*, 914 F. Supp. 809, 813 (N.D.N.Y. 1996). See also *People v. 11 Cornwell Co.*, 695 F.2d 34 (2<sup>nd</sup> Cir. 1982), *vacated in part on other grounds*, 718 F.2d 22 (2<sup>nd</sup> Cir. 1983) (en banc) (injury to less than a dozen individuals was sufficient where similarly situated persons in the future, and members of the community at large, would be affected).

<sup>43</sup> *Snapp*, 458 U.S. At 607.

<sup>44</sup> See, e.g., *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981) (stating that “individual consumers cannot be expected to litigate the validity of the First-Use Tax given that the amounts paid by each consumer are likely to be relatively small”); *People v. 11 Cornwell Co.*, 695 F.2d 34, 40 (2d Cir. 1982) (noting that *parens patriae* “standing also requires a finding that individuals could not obtain complete relief through a private suit”), *modified on other grounds*, 718 F. 2d 22 (2d Cir. 1983) (en banc).

<sup>45</sup> 451 U.S. 725 (1981).

enjoin a Louisiana tax on natural gas use as a means to protect the rights of “a substantial portion of the State’s population” who bore the cost of the tax.<sup>46</sup> The Court emphasized that the tax did not “fall on a small group of citizens who are likely to challenge the Tax directly.”<sup>47</sup> Rather:

[A] great many citizens in each of the plaintiff States are themselves consumers of natural gas and are faced with increased costs aggregating millions of dollars per year . . . . [I]ndividual consumers cannot be expected to litigate the validity of the First-Use Tax given that the amounts paid by each consumer are likely to be relatively small.<sup>48</sup>

Thus, a state *parens patriae* action envisions representation of “otherwise unconnected people [who] share a common concern but [who] would be unlikely to sue on their own – perhaps for want of standing in their own right, perhaps for lack of resources or unifying leadership, or perhaps . . . in fear of retaliation.”<sup>49</sup> Or, as one leading commentator has put it, a state may bring a *parens patriae* action “to challenge allegedly illegal business activities on behalf of citizen consumers as a statewide ‘class’ of sorts – a group whose members may lack a sufficient economic stake to justify bringing suit as individuals or who may have insufficient incentive, or may otherwise be unable to meet the criteria, to sue as a Rule 23 class.”<sup>50</sup> The Second Circuit has similarly written that, in deciding whether *parens patriae* authority may be pursued, a relevant question is whether individuals “would pursue litigation on the scale necessary to obtain the full relief to

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<sup>46</sup> *Id.* at 739.

<sup>47</sup> *Id.* at 739.

<sup>48</sup> *Id.*

<sup>49</sup> Larry W. Yackle, *A Worthy Champion for Fourteenth Amendment Rights: The United States in Parens Patriae*, 92 NW. L. REV. 111, 143 (1997) (footnote omitted).

<sup>50</sup> 1 Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 3-20, at 454 (3d ed. 2000). For a less hospitable view of *parens patriae* authority, see generally Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 510-14 (1995).

which the State thinks its citizens are entitled.”<sup>51</sup>

A state may also invoke its *parens patriae* authority to vindicate its sovereign, as well as quasi-sovereign, interests. Thus, in a leading decision – *Pennsylvania v. Porter*<sup>52</sup> – the Third Circuit upheld Pennsylvania’s authority to sue local officials to protect its citizens from unconstitutional police misconduct. Judge Gibbons described the essence of the case:

[T]he Commonwealth is in this suit advancing significant sovereign interests of its own in the prevention of future violations of constitutional rights of its citizens, in circumstances in which it cannot reasonably anticipate that private enforcement will achieve the protection of those sovereign interests. Any description of a *parens patriae* remedy, even the narrowest, includes the state of facts alleged in the Commonwealth’s complaint.<sup>53</sup>

As noted, most of the Supreme Court’s early *parens patriae* decisions concerned efforts by states to protect the physical well being of their residents from the effects of out-of-state natural resource use or pollution. That approach has essentially become institutionalized in the area of environmental protection: “[m]ost federal environmental

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<sup>51</sup> *Connecticut v. Physicians Health Services of Connecticut, Inc.*, 287 F.3d 110, 120 n.14 (2<sup>nd</sup> Cir. 2002). *See also* *People v. 11 Cornwell Co.*, 695 F.2d 34 (2<sup>nd</sup> Cir. 1982) (difficulties that individuals would have alleging facts sufficient to state a claim are relevant to demonstrating that private litigants could not obtain complete relief), *vacated in part on other grounds*, 718 F.2d 22 (2<sup>nd</sup> Cir. 1983) (en banc); *People v. Town of Wallkill*, 2001 U.S. Dist. LEXIS 13364, at \*19-20 (S.D.N.Y. March 16, 2001) (upholding attorney general’s *parens patriae* authority where legal standards and practical difficulties made it unlikely that individual victims of police misconduct could secure the sort of systemic, prophylactic injunctive relief sought); *Massachusetts v. Bull HN Information Systems, Inc.*, 16 F. Supp. 2d 90, 101-02 (D. Mass. 1998) (state was not a “nominal” party where it sought broader injunctive or declaratory relief than a private party would seek).

<sup>52</sup> 659 F.2d 306 (3<sup>rd</sup> Cir. 1981) (en banc), *cert. denied*, 458 U.S. 1121 (1982).

<sup>53</sup> 659 F.2d at 316. *See also id.* at 317 n. 15 (noting that *parens patriae* authority is derived from “the government’s obligations to secure proper law enforcement, and to protect the general welfare”); *Alaska Sport Fishing Assn. v. Exxon Corp.*, 34 F.3d 769, 773 (9<sup>th</sup> Cir. 1994) (“State governments may act in their *parens patriae* capacity as representatives for all their citizens in a suit to recover damages for injury to a sovereign interest”); *Kelley v. Carr*, 442 F. Supp. 346, 356 (W.D. Mich. 1997). *Cf.* *In re Debs*, 158 U.S. 564, 584 (1895) (“[e]very government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other. . . . The obligations which it is under to promote the interest of all and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court”).

statutes . . . provide for extensive state involvement in environmental protection. . . . Implementation of federal environmental law is thus routinely a matter of shared sovereign power.”<sup>54</sup> In other areas – such as pharmaceutical antitrust litigation,<sup>55</sup> and tobacco litigation<sup>56</sup> – protection of the citizens’ physical well-being through *parens patriae* lawsuits is commonplace.

Another line of *parens patriae* cases have sought to protect the economic well-being of the states’ citizens, and the states’ economic interests generally. These actions build on such decisions as *Pennsylvania v. West Virginia*<sup>57</sup> and *Georgia v. Pennsylvania Railroad Co.*<sup>58</sup> In the former, the Supreme Court upheld Pennsylvania and Ohio’s challenge to West Virginia legislation that denied its sister states’ citizens and institutions natural gas needed for heating. In the latter case, the Supreme Court permitted Georgia to

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<sup>54</sup> Robin Kundis Craig, *Will Separation of Powers Challenges “Take Care” of Environmental Citizen Suits? Article II, Injury-In-Fact Private “Enforcers,” and Lessons from Qui Tam Litigation*, 72 U. COLO. L. REV. 93, 102-03 (2001). See also David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not be a Crowd When Enforcement Authority is Shared by the United States, the States, and Their Citizens*, 54 MD. L. REV. 1552, 1571 (1995) (“essentially all the modern major environmental laws provide uniform, minimum national standards with the states ‘deputized,’ to a greater or lesser degree, to do the permitting and enforcing for the federal government”) (footnote omitted).

<sup>55</sup> See, e.g., *In re Cardizem CD Antitrust Litigation*, Case No. 01-CV-71835 (NGE), MDL No.1278 (E.D. Mich.) (approving settlement); *In re Buspirone Antitrust Litigation*, 185 F. Supp. 2d 340 (S.D.N.Y. 2002) (denying motion to dismiss, on Noerr-Pennington grounds, claim alleging fraud on FDA); *FTC v. Mylan Laboratories, Inc.*, 62 F. Supp. 2d 25, *modified*, 99 F. Supp. 2d 1 (D.D.C. 1999) (denying motion to dismiss state claims under various consumer protection statutes), *approving settlement sub. nom* *In re Lorazepam & Clorazepate Antitrust Litigation*, 205 F.R.D. 369 (D.D.C. 2002); *Ohio v. Bristol-Myers Squibb Co.*, Civ. No. 1:02 CV 01080 (EGS) (D.D.C.).

<sup>56</sup> *Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 962 (E.D. Tex.) (holding that the state’s quasi-sovereign interest in the physical well being of its citizens, and in the efficient and cost-effective operation of its health care system, conferred *parens patriae* standing to sue tobacco companies for cigarette hazards on non-antitrust claims), *reconsidered in other respects*, 1997 U.S. Dist. LEXIS 23289 (E.D. Tex. December 9, 1997). The multistate tobacco litigation itself produced a 46 state \$206 billion settlement with the nation’s major tobacco companies. However, the case alleged injury to the states’ own proprietary interests. See generally Ieyoub & Eisenberg, *State Attorney General Actions*, *supra* n. 7, 74 Tul. L. Rev. 1859.

<sup>57</sup> 262 U.S. 553 (1923)

<sup>58</sup> 324 U.S. 439 (1945).

assert an antitrust claim against various railroads who conspired to fix rates, thus injuring commercial activity in the state. *Georgia* established the states' authority, as a matter of common law, to sue as *parens patriae* for injunctive relief under Section 16 of the Clayton Act,<sup>59</sup> based on injury to state consumers or to state commercial activity.<sup>60</sup>

During the past roughly 30 years, states have regularly brought *parens patriae* actions to redress consumer deception<sup>61</sup> and antitrust violations.<sup>62</sup> Indeed, after the courts

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<sup>59</sup> Section 16, 15 U.S.C. § 26, provides in pertinent part that:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue . . . .

Congress adopted only the damage provision of the Hart-Scott-Rodino Act – and not a provision authorizing injunctive relief as well – because Congress recognized, at the time, “that state attorneys general suing as *parens patriae* clearly have standing to seek injunctive relief under Section 16 of the Clayton Act.” *Burch v. Goodyear Tire & Rubber Co.*, 554 F.2d 633, 635 (4th Cir. 1977).

<sup>60</sup> See, e.g., *California v. Frito-Lay, Inc.*, 333 F. Supp. 977, 979 (C.D. Cal. 1971) (“That a State can sue *parens patriae* under the antitrust laws seems clear since the decision of *Georgia*”), *rev'd on other grounds*, 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973); *Hawaii v. Standard Oil Co.*, 301 F. Supp. 982, 984 (D. Haw. 1969) (“Defendants moved to dismiss Count II – maintaining . . . ‘there can never be a *parens patriae* suit for damages; such a suit lies only in equity, and only for preventive relief’”), *rev'd*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251, 259 (1972) (“The question in this case is *not* whether Hawaii may maintain its lawsuit on behalf of its citizens” under Clayton Act § 16, “but rather whether the injury for which it seeks to recover is compensable under § 4 of the Clayton Act,” the treble damage provision) (emphasis added).

<sup>61</sup> See, e.g., *In re Edmonds*, 934 F.2d 1304, 1310-13 (4th Cir. 1991) (state attorney general, as *parens patriae*, may litigate dischargeability of bankruptcy debt as a means to enforce consumer protection statute on behalf of deceived consumers); *New York v. General Motors Corp.*, 547 F. Supp. 703, 705 (S.D.N.Y. 1982) (action alleging vehicle transmission defects); *In re DeFelice*, 77 B.R. 376, 380-81 (Bankr. D. Conn. 1987) (holding that State had *parens patriae* authority to sue to establish that a judgment providing consumer restitution on account of fraud was not dischargeable in bankruptcy); Jason Lynch, Note, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 2006 (2001) (“Lynch, *Federalism*”); Ratliff, *An Overview*, *supra* n. 3, 74 TULANE L. REV. at 1855-57.

<sup>62</sup> See, e.g., *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000), *aff'd in part, rev'd in part*, 253 F.3d 34 (D.C. Cir.) (en banc) (monopolization, exclusive dealing, and tying claims against the world's largest software company), *cert. denied*, 534 U.S. 952 (2001), *on remand denying dismissal as to certain plaintiffs sub nom.* *New York v. Microsoft Corp.*, 209 F. Supp. 2d 132 (D.D.C. 2002), *approving settlement as to certain plaintiffs*, *New York v. Microsoft Corp.*, 231 F. Supp. 2d 203 (D.D.C. 2002), *ruling on remedies hearing as to certain plaintiffs*, 224 F. Supp. 2d 76 (D.D.C. 2002); *New York v. Reebok International, Ltd.*, 96 F.3d 44 (2d Cir. 1996) (approving *cy pres* settlement distribution); *Louisiana v. Borden, Inc.*, No. 94-3540, 1995 U.S. Dist. LEXIS 1921 at \*6 (E.D. La.

held that states could not sue as *parens patriae* to recover treble damages under Section 4 of the Clayton Act,<sup>63</sup> Congress enacted Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.<sup>64</sup> Title III, codified as Section 4C of the Clayton Act, confers statutory *parens patriae* authority on state attorneys general to seek treble damages on behalf of natural persons injured by federal antitrust violations. In sum, the States' *parens patriae* authority to maintain the integrity of their markets is settled.<sup>65</sup> The courts similarly have recognized *parens patriae* authority outside the economic sphere in many civil rights contexts, for example.<sup>66</sup>

Two other background points may be made. First, although the *parens patriae* doctrine was developed in equitable actions, where injunctive relief typically was sought,

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February 10, 1995) (antitrust action on behalf of schools and students arising from pricing-fixing of milk); *Pennsylvania v. Milk Indus. Mgmt. Corp.*, 812 F. Supp. 500 (E.D. Pa. 1992) (antitrust action on behalf of schools arising from bid-rigging of milk contracts); Lynch, *Federalism*, *supra* n. 61, 101 COLUM. L. REV. at 2007.

<sup>63</sup> *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 259 (1972); *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9<sup>th</sup> Cir. 1973), *cert. denied*, 412 U.S. 908 (1973); *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 309 F. Supp. 1057 (E.D. Pa. 1969). *See generally* Farmer, *Cy Pres Distributions*, *supra* n. 3, 68 FORD. L.REV. at 370-79.

<sup>64</sup> Pub. L. No. 94-435, 90 Stat. 1394 (codified as amended 15 U.S.C. §§ 15c-15h). *See* 15 U.S.C. § 15c (1), which provides in pertinent part that:

Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title.

<sup>65</sup> *See also* *New York v. Brown*, 721 F. Supp. 629 (D.N.J. 1989) (action challenging New Jersey's regulation of price of milk, a vital state industry); *Minnesota v. Standard Oil Co.*, 568 F. Supp. 556 (D. Minn. 1983) (action to recover for product overcharges that violated federal law); *Kelley v. Carr*, 442 F. Supp. 346 (W.D. Mich. 1977) (action to enjoin violation of the Commodities Exchange Act, 7 U.S.C. §§ 1 *et seq.*). *But see* *Land O'Lake's Creameries v. Louisiana State Board of Health*, 160 F. Supp. 387, 388 (E.D. La. 1958) (rejecting effort by state sought to represent "the interests of all dried milk manufacturers in Minnesota not already parties").

<sup>66</sup> *See, e.g.,* *People v. Town of Wallkill*, 2001 U.S. Dist. LEXIS 13364, at \*5 (S.D.N.Y. March 16, 2001) (citing authorities recognizing the state attorney general's authority to sue under the Civil Rights Act of 1871, the Civil Rights Act of 1964, and the Fair Housing Act of 1968 "in cases seeking protection for a variety of different groups (including, racial and religious minorities, women, and persons with disabilities).") (footnotes omitted); *Massachusetts v. Bull HN Informations Systems, Inc.*, 16 F. Supp. 2d 90, 102 (D. Mass. 1998) (action to enforce Age Discrimination in Employment Act).

the law today recognizes that monetary damage awards may issue in *parens* actions.<sup>67</sup> Second, although states of the United States have inherent *parens patriae* authority, prevailing case law rejects comparable suits by foreign nations.<sup>68</sup>

### C. The State Attorney General's Common Law and Statutory Authority to Represent the Public Interest

The state attorney general's *parens patriae* authority has roots that reach beyond the king's own royal prerogative to act on behalf of persons in need of protection under law. In addition, the attorney general's historic powers and duties as the sovereign's chief legal officer are another part of the evolutionary process that aid understanding the derivation and scope of the contemporary American *parens patriae* doctrine.

#### 1. The English Connection

"The office of attorney general is older than the United States . . . ."<sup>69</sup> Its origins go back to the ancient practice by which a principal appointed another to act on his behalf in a particular disputed matter.<sup>70</sup> From this practice, in the thirteenth and fourteenth

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<sup>67</sup> See, e.g., *In re Insurance Antitrust Litigation*, 938 F.2d 919, 927 (9<sup>th</sup> Cir. 1991) (the "state's interest in preventing harm to its citizens by antitrust violations is, indeed, a prime instance of the interest that the *parens patriae* can vindicate by obtaining damages and/or an injunction"), *aff'd in part, rev'd in part sub. nom.* *Hartford Fire Ins. Co. v. California*, 509 U.S.764 (1993); *Maine v. M/V Tamano*, 357 F. Supp. 1097, 1101-02 (D. Me. 1973) (state may recover damages for environmental injury); *Selma Pressure Treating Co., v. Osmose Wood Preserving Co. of America, Inc.*, 221 Cal. App. 3d 1601, 271 Cal. Rptr. 596, 606 (1990) ("[w]here confronted with the issue, the courts have accorded the State the right to seek money damages based upon such interest").

<sup>68</sup> *Estados Unidos v. DeCoster*, 229 F.3d 332 (1<sup>st</sup> Cir. 2000); *Pfizer, Inc. v. Lord*, 522 F.2d 612 (8<sup>th</sup> Cir. 1975), *cert. denied*, 424 U.S. 950 (1976). *But see* *Coordination Council for North American Affairs v. Northwest Airlines, Inc.*, 891 F. Supp. 4, 7 n.3 (D.D.C. 1995) (ruling, without discussion, that "[f]oreign sovereigns are equally entitled to protect their citizens and may claim *parens patriae* standing to the same extent as a state"). See generally Kenneth Juan Figueroa, Note, *Immigrants, and the Civil Rights Regime: Parens Patriae Standing, Foreign Governments and Protection From Private Discrimination*, 102 COLUM. L. REV. 408 (2002).

<sup>69</sup> *Florida v. Exxon Corp.*, 526 F.2d 266, 268 (5<sup>th</sup> Cir.), *cert. denied*, 429 U.S. 829 (1976).

<sup>70</sup> Hugh H.L. Bellot, *The Origin of the Attorney-General*, 25 LAW. Q. REV. 400, 401-03 (1909) ("Bellot, *Origins*"); Sewall Key, *The Legal Work of the Federal Government*, 25 VIR. L. REV. 165, 166 (1939) (footnote omitted) ("Key, *Legal Work*").

centuries, the appointment authority expanded, especially among “great landowners,”<sup>71</sup> so that the agent could represent his principal in “all suits which might arise during a specified period or during the life of the appointor, or in a particular county or court. Such an agent was known at first as a general attorney, later as an attorney general.”<sup>72</sup> Those acting as “attorney” were not necessarily lawyers, however – much less government officers. Rather, they were “simply agents of an absent principal.”<sup>73</sup>

The king himself caught onto the idea, which fit nicely with the prevailing principle making it “inconceivable” for the king himself to appear before the very courts that sat in his name.<sup>74</sup> At least as early as the thirteenth century, he appointed his own agents – described in various ways – to act on his behalf.<sup>75</sup> These agents acted for the king “independently of each other, each appointed to care for litigation of a certain type, in certain courts or perhaps in certain areas.”<sup>76</sup> The first such individual has been said to be Laurence del Brok, appointed “King’s Attorney” in 1243.<sup>77</sup> By the end of the fifteenth

<sup>71</sup> Bellot, *Origins*, *supra* n. 70, 25 LAW Q. REV. at 403; Scott Van Alstyne & Larry J. Roberts, *The Powers of the Attorney General in Wisconsin*, 1974 WIS. L. REV. 721, 723-24 (“Van Alstyne & Roberts, *The Wisconsin AG*”).

<sup>72</sup> Bellot, *Origins*, *supra* n. 70, 25 LAW Q. REV. at 403. *See id.* (tracing the first use of the term “attorney general” to the Duke of Norfolk in 1398).

<sup>73</sup> Michael Herz, *Washington, Patton, Schwarzkopf and . . . Ashcroft*, 19 CONST. COMMENTARY 663, 666 (2002) (“Herz, *Washington et al.*”). *See also* Bellot, *Origins*, *supra* n. 70, 25 LAW Q. REV. at 404-05.

<sup>74</sup> J. Ll. J. Edwards, THE LAW OFFICERS OF THE CROWN 15 (1964) (“Edwards, *Law Officers*”); David Edward Dahlquist, Comment, *Inherent Conflict: A Case Against the Use of Contingency Fees by Special Assistants in Quasi-Governmental Prosecutorial Roles*, 50 DePAUL L. REV. 743, 750 (2000) (“Dahlquist, *Inherent Conflict*”).

<sup>75</sup> 6 William S. Holdsworth, A HISTORY OF THE ENGLISH LAW 458 (1924) (“Holdsworth, *English History*”) (“[t]here were ‘attornati regis,’ ‘narratores pro rege,’ men ‘qui sequuntur pro rege,’ and the king’s serjeants”) (footnote omitted). *See generally id.* at 458-61, 467; Edwards, *Law Officers*, *supra* n. 74, at 20-21; Lynne M. Ross, STATE ATTORNEYS GENERAL 4 (1990) (“Ross, *State Attorneys General*”); Bellot, *Origins*, *supra* n. 70, 25 LAW Q. REV. at 406-09; Key, *Legal Work*, *supra* n. 70, 25 VIR. L. REV. at 166.

<sup>76</sup> Key, *Legal Work*, *supra* n. 70, 25 VIR. L. REV. at 166 (footnote omitted). *See also* Bellot, *Origins*, *supra* n. 70, 25 LAW Q. REV. at 408; Edwards, *Law Officers*, *supra* n. 74, at 15-20; Dahlquist, *Inherent Conflict*, *supra* n. 74, 50 DePAUL L. REV. at 750-51.

<sup>77</sup> Edwards, *Law Officers*, *supra* n. 74, at 15-16; Oliver W. Hammonds, THE ATTORNEY GENERAL IN

century, the practice of multiple agents with limited authority had morphed into one of appointing “a single attorney with much wider powers, and to give this single attorney the power to appoint deputies . . . .”<sup>78</sup> John Herbert, appointed by 1461, is frequently said to be the first attorney general of England,<sup>79</sup> although some maintain that William Husee, whose appointment in 1472 empowered him to appoint deputies to act in all courts of record, is the more appropriate choice.<sup>80</sup> In all events, the “general” in the title reflected “a general capacity to act for the king.”<sup>81</sup>

During the Tudor reign of the sixteenth century, the king’s attorney general also assumed an important role in matters of government. He was consulted by the House of Lords on points of law, and “conduct[ed] important state trials, not only in court, but also in their preliminary stages.”<sup>82</sup> Under Henry VIII, he not only delivered bills from the Lords to the House of Commons, but also amended and finalized them.<sup>83</sup> Still, the attorney general was not the king’s only advocate in court, nor his only representative in the House of Lords, as the king also appointed serjeants to act on his behalf.<sup>84</sup> But over

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THE AMERICAN COLONIES 2 (1939) (“Hammonds, *The AG in the Colonies*”).

<sup>78</sup> 6 Holdsworth, *English History*, *supra* n. 75, at 461. See also Edwards, *Law Officers*, *supra* n. 74, at 26.

<sup>79</sup> Edwards, *Law Officers*, *supra* n. 74, at 26-27; Rita W. Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 AM. J. LEG. HIST. 304, 306 (1958) (“Cooley, *Predecessors of the Federal AG*”); G.W. Keeton, *The Office of Attorney General*, 58 JURIDICAL REV. 107, 108 (1946) (“Keeton, *The AG’s Office*”); Ross, *State Attorneys General*, *supra* n. 70, at 5.

<sup>80</sup> Bellot, *Origins*, *supra* n. 70, 25 LAW Q. REV. at 410; Hammonds, *The AG in the Colonies*, *supra* n. 77, at 2; Herz, *Washington et al.*, *supra* n. 73, 19 CONST. COMMENTARY at 667; William S. Holdsworth, *The Early History of the Attorney and Solicitor General*, 13 ILL. L. REV. 602, 606 (1919) (“Holdsworth, *The Attorney General*”); Key, *Legal Work*, *supra* n. 70, 25 VIR. L. REV. at 167.

<sup>81</sup> Herz, *Washington et al.*, *supra* n. 73, 19 CONST. COMMENTARY at 667.

<sup>82</sup> 6 Holdsworth, *English History*, *supra* n. 75, at 462. See also Dahlquist, *Inherent Conflict*, *supra* n. 74, 50 DePAUL L. REV. at 752.

<sup>83</sup> Key, *Legal Work*, *supra* n. 70, 25 VIR. L. REV. at 167; Edwards, *Law Officers*, *supra* n. 74, at 34; Keeton, *The AG’s Office*, *supra* n. 79, 58 JURIDICAL REV. at 109.

<sup>84</sup> 6 Holdsworth, *English History*, *supra* n. 75, at 470-71; Edwards, *Law Officers*, *supra* n. 74, at 30; Bellot, *Origins*, *supra* n. 70, 25 LAW Q. REV. at 409; Commonwealth v. Margiotti, 325 Pa. 17, 22, 188

time – as the commercial activity of the nation increased and expanded globally – the king’s attorney general came to have a breadth of training, experience and authority beyond that of the serjeant: he “could do all and more than all that a king’s serjeant could do.”<sup>85</sup> During the sixteenth century, the king’s attorneys general “ousted” the serjeants, and “thus became preeminently the law officers of the crown.”<sup>86</sup>

With the power of the House of Commons rising in the late sixteenth and early seventeenth centuries, there developed a corresponding need for the king’s legal advisers to explain legal matters to that body. The first attorney general to sit in the Commons probably was Sir Henry Hobart, in 1606.<sup>87</sup> When Sir Francis Bacon – a member of the Commons – was appointed attorney general in 1613, a political deal was struck: Bacon was allowed to keep his seat in Commons, but only on the understanding that successor attorneys general would be barred as members. As a result, it was not until 60 years later that the practice of attorneys general sitting in the House of Commons was regularized.<sup>88</sup> By the end of the eighteenth century, the attorney general’s presence in Commons “was regarded as well nigh indispensable.”<sup>89</sup>

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A. 524, 526 (1936).

<sup>85</sup> 6 Holdsworth, *English History*, *supra* n. 75, at 471. *See also* Edwards, *Law Officers*, *supra* n. 74, at 30-31; Key, *Legal Work*, *supra* n. 70, 25 VIR. L. REV. at 167; Van Alstyne & Roberts, “*The Wisconsin AG*,” *supra* n. 71, 1974 WIS. L. REV. at 724 n. 17.

<sup>86</sup> 6 Holdsworth, *English History*, *supra* n. 75, at 470. *But see* Keeton, *The AG’s Office*, *supra* n. 79, 58 JURIDICAL REV. at 111-12 (attributing the primacy of the attorney general to the seventeenth century political struggle between the Stuart monarchs and Parliament).

<sup>87</sup> Keeton, *The AG’s Office*, *supra* n. 79, 58 JURIDICAL REV. at 111; Edwards, *Law Officers*, *supra* n. 74, at 36.

<sup>88</sup> 6 Holdsworth, *English History*, *supra* n. 75, at 464-65; Edwards, *Law Officers*, *supra* n. 74, at 36-38; Ross, *State Attorneys General*, *supra* n. 75, at 5; Cooley, *Predecessors of the Federal AG*, *supra* n. 79, 2 AM. J. LEG. HIST. at 307; Key, *Legal Work*, *supra* n. 70, 25 VIR. L. REV. at 167-68. *See also* Keeton, *The AG’s Office*, *supra* n. 79, 58 JURIDICAL REV. at 111, 113-16 (describing the period of Sir Francis North, who began the practice of continuous presence in Commons in 1673).

<sup>89</sup> Edwards, *Law Officer*, *supra* n. 74, at 45. *See also* Holdsworth, *The Attorney General*, *supra* n. 80, 13 ILL. L. REV. at 610.

Thus, by the beginning of the seventeenth century, the king's attorney general held an office of numerous and varied powers and duties – one that approximated the modern position. He was the chief legal officer of the crown, and the one person authorized to represent the crown before all tribunals – “the only person who could take the initiative in legal proceedings on behalf of the crown.”<sup>90</sup> As power in England shifted from the king to Parliament during the seventeenth century, the attorney general, in turn, “ceased to be a royal agent and became an adviser to the government as a whole . . . .”<sup>91</sup>

## 2. The Colonial Heritage

Meanwhile, across the Atlantic, the office of attorney general was created in each of the colonies, beginning in the mid-seventeenth century.<sup>92</sup> The exact manner of appointment of the early attorneys general differed, depending on the particular colony or the particular time period. For example, Thomas Manning Gent was appointed attorney general in Maryland in 1660 on commission of the colony's lord proprietor, while Rhode Island's general court ordered an attorney general to be appointed in 1650.<sup>93</sup> New York's first attorney general probably was appointed in the late seventeenth century in response to a royal order to the colony's governor.<sup>94</sup> However, to facilitate central administration

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<sup>90</sup> 6 Holdsworth, *English History*, *supra* n. 75, at 470. *See also id.* at 461-63; Holdsworth, *The Attorney General*, *supra* n. 80, 13 ILL. L. REV. at 602-06, 616; Cooley, *Predecessors of the Federal AG*, *supra* n. 79, 2 AM. J. LEG. HIST. at 304, 306, 308-09; Key, *Legal Work*, *supra* n. 70, 25 VIR. L. REV. at 167-68; Lynch, *Federalism*, *supra* n. 61, 101 COLUM. L. REV. at 2002 n. 12 (2001).

<sup>91</sup> Cooley, *Predecessors of the Federal AG*, *supra* n. 79, 2 AM. J. LEG. HIST. at 307. *See also* Key, *Legal Work*, *supra* n. 70, 25 VIR. L. REV. at 167-68; Ross, *State Attorneys General*, *supra* n. 75, at 5-6; Dahlquist, *Inherent Conflict*, *supra* n. 74, at 753-54; Van Alstyne & Roberts, *The Wisconsin AG*, *supra* n. 71, 1974 WIS. L. REV. at 724-26.

<sup>92</sup> Key, *Legal Work*, *supra* n. 70, 25 VIR. L. REV. at 169 & n.13 (identifying Richard Lee, attorney general of Virginia, as the first recorded appointment); Van Alstyne & Roberts, *The Wisconsin AG*, *supra* n. 71, 1974 WIS. L. REV. at 726-27.

<sup>93</sup> Hammonds, *The AG in the Colonies*, *supra* n. 77, at 3, 15-16. *See generally* Dahlquist, *Inherent Conflict*, *supra* n. 74, 50 DePAUL L. REV. at 754.

<sup>94</sup> Hammonds, *The AG in the Colonies*, *supra* n. 77, at 8.

of the crown's legal matters in the colonies, in the early eighteenth century, the king made the colonial attorneys general his own appointees.<sup>95</sup> The caliber of individual acting as attorney general was uneven, however. Thus, Governor Earl of Bellomont is said to have commented of one New York attorney general that "10 pieces of eight would bribe him at any time."<sup>96</sup>

As in England, the colonial attorney general's powers "were not definitely defined by statute," but were derived instead from "the common law powers and duties of his prototype in England, except as changed by specific statute or charter."<sup>97</sup> The attorney general came to assume "complete and exclusive power over all legal affairs of the Government, an authority that no one save the sovereign himself could question."<sup>98</sup> Although the colonial attorneys general all traced their authority to "the English common law . . . , no clear guide existed as to the extent of the office's duties."<sup>99</sup> Thus, the duties that a particular colonial attorney general assumed differed from colony to colony, depending on local needs.<sup>100</sup>

In *People v. Miner*,<sup>101</sup> Justice Mullin wrote that, in the colonies, the attorneys

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<sup>95</sup> *Id* at 8. See also Cooley, *Predecessors of the Federal AG*, *supra* n. 79, 2 AM. J. LEG. HIST. at 309-11; Key, *Legal Work*, *supra* n. 70, 25 VIR. L. REV. at 172-73; 2 Charles Z. Lincoln, THE CONSTITUTIONAL HISTORY OF NEW YORK 526-27 (1906) ("Lincoln, *New York History*").

<sup>96</sup> Hammonds, *The AG in the Colonies*, *supra* n. 77, at 8. See also Key, *Legal Work*, *supra* n. 70, 25 VIR. L. REV. at 171-72.

<sup>97</sup> Key, *Legal Work*, *supra* n. 70, 25 VIR. L. REV. at 169 (footnotes omitted). See also Ross, *State Attorneys General*, *supra* n. 75, at 6 ("[s]ketchy statutes left the definition of the job to the common law"); Cooley, *Predecessors of the Federal AG*, *supra* n. 79, 2 AM. J. LEG. HIST. at 309 ("little attempt was made to define or enumerate duties"); Dahlquist, *Inherent Conflict*, *supra* n. 74, 50 DePAUL L. REV. at 754.

<sup>98</sup> Key, *Legal Work*, *supra* n. 70, 25 VIR. L. REV. at 173.

<sup>99</sup> Dahlquist, *Inherent Conflict*, *supra* n. 74, 50 DePAUL L. REV. at 759. See also Key, *Legal Work*, *supra* n. 70, 25 VIR. L. REV. at 169-70 (the authority of colonial attorneys general "devolved mainly as a matter of custom and usage").

<sup>100</sup> See Hammonds, *The AG in the Colonies*, *supra* n. 77, at 5-22; Ross, *State Attorneys General*, *supra* n. 75, at 6-8; Dahlquist, *Inherent Conflict*, *supra* n. 70, 50 DePAUL L. REV. at 755-56, 760-61.

<sup>101</sup> 2 Lans. 396 (N.Y. 5<sup>th</sup> Dist. 1868).

general “were understood to be clothed, with nearly all the powers, of the attorney-generals of England . . . .”<sup>102</sup> Justice Mullin also set out what has been called “[t]he most comprehensive statement of the common law duties of the Attorney General of England,”<sup>103</sup> as they had evolved over hundreds of years:

The attorney-general had the power, and it was his duty:

1st. To prosecute all actions, necessary for the protection and defence of the property and revenues of the crown.

2d. By information, to bring certain classes of persons accused of crimes and misdemeanors to trial.

3d. By “*scire facias*,” to revoke and annul grants made by the crown improperly, or when forfeited by the grantee thereof.

4th. By information, to recover money or other chattels, or damages for wrongs committed on the land, or other possessions of the crown.

5th. By writ of *quo warranto*, to determine the right of him who claims or usurps any office, franchise or liberty, and to vacate the charter, or annul the existence of a corporation, for violations of its charter, or for omitting to exercise its corporate powers.

6th. By writ of *mandamus*, to compel the admission of an officer duly chosen to his office, and to compel his restoration when illegally ousted.

7th. By information to chancery, to enforce trusts, and to prevent public nuisances, and the abuse of trust powers.

8th. By proceeding *in rem*, to recover property to which the crown may be entitled, by forfeiture for treason, and property, for which there is no other legal owner, such as wrecks, treasure trove, &c. . . .

9th. And in certain cases, by information in chancery, for the protection of the rights of lunatics, and others, who are under the protection of the crown.<sup>104</sup>

Indeed, the Court further emphasized that its “enumeration, probably does not embrace all the powers of the attorney-general at common law . . . .”<sup>105</sup>

Significantly, “[t]he Revolution had little effect on these officers,”<sup>106</sup> as their

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<sup>102</sup> *Id.*

<sup>103</sup> *Commonwealth v. Margiotti*, 325 Pa. 17, 22, 188 A. 524, 526 (1936).

<sup>104</sup> *Id.* at 398-99 (citations omitted).

<sup>105</sup> *Id.* at 399.

powers “were left largely undefined.”<sup>107</sup> Upon independence and establishment of state governments, the individual states typically imported English common law to give content to their legal systems.<sup>108</sup> In consequence, the office of attorney general “became endowed with the powers and duties appertaining to it at common law . . . . It became one of the institutions of the common law brought by the early settlers to these shores, and its functions constituted a part of . . . our jurisprudence.”<sup>109</sup> Those prerogatives of the crown in England are, of course, “here vested in the people.”<sup>110</sup> Accordingly, the state attorney general in America became the chief legal officer for both the government and the people of the states.<sup>111</sup>

Accordingly, from the Revolutionary War forward, the attorney general became possessed of the common law powers of its English counterpart, except as changed by

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<sup>106</sup> Cooley, *Predecessors of the Federal AG*, *supra* n. 79, 2 AM. J. LEG. HIST. at 311.

<sup>107</sup> *Id.* at 312. *See also* Darling Apartment Co. v. Springer, 25 Del. Ch. 420, 433, 22 A.2d 397, 403 (1941) (“[t]he powers and duties of the office of the Attorney General are so numerous and varied that neither the framers of our several constitutions nor the legislatures have ever undertaken exhaustively to enumerate them”).

<sup>108</sup> *See, e.g.*, N.Y. Const. (1777), art. XXXV (providing that the common law of England, the statutory law of England and Great Britain, and the acts of the legislature of the colony of New York “shall be and continue the law of this state, subject to such alterations and provisions as the legislature of this state shall, from time to time, make concerning the same”). *See also* Murphy v. Yates, 276 Md. 475, 480, 348 A.2d 837, 840 (1975) (quoting article 3 of the 1776 Maryland Declaration of Rights); Darling Apartment Co. v. Springer, 25 Del. Ch. 420, 442, 22 A.2d 397, 407 (1941) (concurring opinion) (quoting Del. Const. (1777), art. 25).

<sup>109</sup> Commonwealth v. Kozlowsky, 238 Mass. 379, 386, 131 N.E. 207, 210 (1921).

<sup>110</sup> Hunt v. Chicago & Dummy Railway Co., 20 Ill. App. 282, 287 (1<sup>st</sup> Dist. 1886), *aff’d in relevant part on the opinion below, rev’d on other grounds*, 121 Ill. 638, 642, 13 N.E. 176, 176 (1887). *See also* People v. Long Island Railroad & Staten Island Rapid Transit Railroad, 113 Misc. 700, 707, 185 N.Y.S. 594, 598 (Kings Co. Sup. Ct. 1920), *rev’d on other grounds*, 195 A.D. 897, 186 N.Y.S. 589 (2<sup>nd</sup> Dep’t 1921); Ross, *State Attorneys General*, *supra* n. 75, at 30.

<sup>111</sup> *See, e.g.*, People v. Kramer, 33 Misc. 209, 213-14, 68 N.Y.S. 383, 386 (N.Y. Cty. Ct. Gen. Sess. 1900) (“[t]he Attorney-General, at common law, was the chief legal representative of the sovereign in the courts, and it was his duty to appear for and prosecute in behalf of the crown any matters, criminal as well as civil . . . . [T]he Attorney-General became the representative of the people of the State, and was the only officer who, by virtue of his common-law powers, could represent the people”); Commonwealth v. Margiotti, 325 Pa. 17, 23-24, 188 A. 524, 527 (1936); Key, *Legal Work*, *supra* n. 70, 25 VIR. L. REV. at 168.

constitution or statute.<sup>112</sup> Rather than detailing the attorney general’s powers and duties, the framers of the early American constitutions and statutes relied on “the long common law history of the office [that] had given it a connotation which made this unnecessary and impracticable as a matter of good draftsmanship.”<sup>113</sup> Absent contrary legislative action, the attorney general “typically may exercise all such authority as the public interest requires. And the attorney general has wide discretion in making the determination as to the public interest.”<sup>114</sup> Thus, “the common law is a vital source of power for Attorneys General who seek to protect public interests in recently developing areas of the law.”<sup>115</sup>

So much for the view of the state attorney general’s authority from 30,000 feet up. If one lands on the ground of any particular state, the attorney general’s turf authority may well turn out to look somewhat different, depending on the particular constitutional and statutory provisions, and the judicial decisions interpreting them. I will briefly outline the background in New York as a means of framing a core issue relating to the attorney general’s authority: the extent to which there exist common law powers and duties

<sup>112</sup> Hammonds, *The AG in the Colonies*, *supra* n. 77, at 3; Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 J. LAW & PUB. POL’Y 1, 2 (1993); Lynch, *Federalism*, *supra* n. 61, 101 COLUM. L. REV. at 2002 (“in most states attorneys general are recognized as possessing all powers exercised by the office at common law”) (footnote omitted).

<sup>113</sup> Hammonds, *The AG in the Colonies*, *supra* n. 77, at 1.

<sup>114</sup> *Florida v. Exxon Corp.*, 526 F.2d 266, 268-69 (5<sup>th</sup> Cir.) (footnotes omitted), *cert. denied*, 429 U.S. 829 (1976). *See also id.* at 268 (5<sup>th</sup> Cir.) (the attorney general’s “duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law”) (footnote omitted); *Secretary of Administration and Finance v. Attorney General*, 367 Mass. 154, 163, 326 N.E.2d 334, 338 (1975) (the attorney general “has a common law duty to represent the public interest”); *Superintendent of Insurance v. Attorney General*, 558 A.2d 1197, 1200 (Me. 1989).

<sup>115</sup> Ross, *State Attorneys General*, *supra* n. 75, at 27. *See generally id.* at 27-39; *Minnesota v. Ri-Mel, Inc.*, 417 N.W.2d 102, 112 (Minn. 1987) (the attorney general was authorized, by common law, to sue as *parens patriae*, alleging a statutory right of action available to individuals who were injured by deceptive practices). As examples of commentary critical of this view, *see* Michael DeBow, *Restraining State Attorneys General, Curbing Government Lawsuit Abuse* (May 10, 2002), at <https://www.cato.org/pubs/pas/pa437.pdf>; Bill Aleshire, Note, *The Texas Attorney General: Attorney or General?*, 20 REV. LITIG. 187 (2000).

inherent in the office, which are independent of those powers and duties expressly conferred by constitutional and statutory provisions.

### **3. The Evolution of the New York Attorney General's Authority**

In New York, the first recorded action by an attorney general dates from 1657.<sup>116</sup> Before the state government itself was organized in 1777, the office existed “as the Attorney General of the colony, and was clothed with certain rights and powers derived from the common law.”<sup>117</sup> Although New York’s first constitution in 1777 made no reference to an attorney general, an ordinance adopted by the Council of Appointment within weeks thereafter to create the machinery of the new state government appointed Egbert Benson as the state’s first attorney general.<sup>118</sup> Benson and his immediate successors in New York derived their authority from the common law and the “importation” provision of the 1777 constitution, cited earlier.<sup>119</sup> The attorney general thus “became the representative of the people of the State, and the only officer who, by virtue of his common-law powers, could represent the people, and in their name conduct prosecutions for crime.”<sup>120</sup>

In 1801, the New York legislature enact a law entitled “An Act for the more easy pleading in certain suits,” which provided in pertinent part as follows:

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<sup>116</sup> Hammonds, *The AG int the Colonies*, *supra* n. 77, at 7-8. See generally VIII New York State Constitutional Convention Committee, PROBLEMS RELATING TO THE EXECUTIVE ADMINISTRATION AND POWERS 113-20 (1938) (“1938 Report”); Robert Abrams, *The Role of Attorneys General in New York State’s Constitutional History*, 61 N.Y.S.B.J. 26 (No. 2, Feb. 1989).

<sup>117</sup> *People v. Kramer*, 33 Misc. 209, 213, 68 N.Y.S. 383, 386 (N.Y. Cty. Ct. Gen. Sess. 1900) (citing *People v. Miner*, 2 Lans. 396, 397 (N.Y. 5<sup>th</sup> Dist. 1868)).

<sup>118</sup> See 1 Lincoln, *New York History*, *supra* n. 95, at 564 (quoting Ordinance, dated May 8, 1777); 2 Lincoln, *New York History*, *supra* n. 95, at 527.

<sup>119</sup> See n. 108, *supra*.

<sup>120</sup> *People v. Kramer*, 33 Misc. 209, 214, 68 N.Y.S. 383, 386 (N.Y. Co. Ct. Gen. Sess. 1900) See also Hammonds, *The AG in the Colonies*, *supra* n. 77, at 10.

[I]n all cases where the people of this State shall be interested in the event of any suit, the same shall be defended by or under the direction of the attorney general, at the expense of this State, and he may employ such counsel to assist in and concerning every such defence, as the person administering the government of this State shall from time to time deem necessary.<sup>121</sup>

This early statute recognizes an overarching feature of the state attorney general’s authority – to assume legal representation “in all cases where *the people* of this State shall be interested . . . .” A similar provision was included in New York’s 1829 revised statutes,<sup>122</sup> and later in the first version of the state’s Executive Law, enacted in 1892.<sup>123</sup> The provision was amended in 1895 to give the attorney general responsibility over the departments, bureaus and offices of the state “in order to protect the interests of the State. . . .”<sup>124</sup> The modern counterpart of these early laws, Executive Law § 63(1), is substantially identical to the 1895 version. Courts have held that Section 63(1)<sup>125</sup> and similar provisions in other states establish the attorney general’s *parens patriae* authority.<sup>126</sup>

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<sup>121</sup> N.Y. L. 1801, ch. 47, ¶ 3.

<sup>122</sup> I N.Y. Revised Statutes, ch. VIII, tit. V, § 1 (1829) (“It shall be the duty of the attorney general to prosecute and defend all actions, in the event of which, the people of this state shall be interested”).

<sup>123</sup> N.Y. L. 1892, ch. 683, art. V, § 52(1) (authorizing the attorney general to “[p]rosecute and defend all actions and proceedings in which the state is interested”).

<sup>124</sup> N.Y. L. 1895, ch. 821.

<sup>125</sup> *In re Cardizem CD Antitrust Litigation*, Master File No. 99-MD-1278, MDL No. 1278, 2003 WL 22407160 at \*13 (E.D. Mich. October 10, 2003). Section 63(12) of the state’s Executive Law – which authorizes the attorney general to seek, “in the name of the people of the state of New York . . . restitution and damages,” as well as injunctive relief, from persons engaged in repeated or persistent “fraudulent or illegal” acts – has also been construed to confer the “functional equivalent” of *parens patriae* authority. *In re Lorazepam & Clorazapate Antitrust Litigation*, 205 F.R.D. 369, 386 (D.D.C. 2002).

<sup>126</sup> *See Pennsylvania v. Mid-Atlantic Toyota Distributors, Inc.*, 704 F.2d 125, 130-31 (4<sup>th</sup> Cir. 1983), construing the following provisions to establish *parens patriae* authority:

- The Maryland constitution, which authorized the attorney general to “commence, and prosecute . . . any civil . . . action . . . on the part of the State or in which the State may be interested.” Md. Const., art. V, § 3(a)(2).
- The Delaware antitrust act, which empowered the attorney general to institute proceedings “on behalf of the State and its public bodies, for suspected antitrust violations. Del. Code Ann., tit. 6, § 2105.

New York state's second constitution, adopted in 1821, expressly recognized the office of attorney general. The constitutional convention's committee on the appointment power proposed to make the attorney general the governor's appointee, and to have the attorney general serve at the governor's pleasure.<sup>127</sup> However, the eventual result was to provide for the attorney general's appointment by the state senate and assembly to a three-year term, unless sooner removed by the legislative bodies.<sup>128</sup> With the ascendancy of Jacksonian democracy, the position became an elective one in New York's third constitution, adopted in 1846,<sup>129</sup> and it has been that way ever since. Other states similarly abandoned appointment in favor of election so that, today, most state attorneys general are chosen by the voters.<sup>130</sup> The preference for election reflects a judgment that, in those states, the attorney general ought to represent the people – not simply the governor, or even the government. As a corollary, the state attorney general ought to have the independence and accountability that comes from popular election – something

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- The District of Columbia law, which provided that the corporation counsel shall “have charge and conduct all law business” of the District. D.C. Code Ann. § 1-361.
  - The Pennsylvania attorneys act, which provided that the attorney general “shall represent the Commonwealth and its citizens in any action brought for violation of the antitrust laws.” 71 Pa. Cons. Stat. Ann. § 732-204(c).

*See also* Texas v. Scott & Fetzer Co., 709 F.2d 1024, 1026 (5<sup>th</sup> Cir. 1983) (construing Texas Business and Commerce Code § 15.40, which authorized the attorney general to sue on behalf of “the state or any of its political subdivisions”); Louisiana v. Borden, Inc., 1995 U.S. Dist. LEXIS 1921, 1995 WL 59548 (E.D. La. February 10, 1995) (construing Louisiana state constitution, which authorized the attorney general “to institute, prosecute, or intervene in any civil action or proceeding”). Compare Illinois v. Bristol-Myers Co., 470 F.2d 1276, 1278 (D.C. Cir. 1972) (construing Illinois statute empowering the attorney general to “protect the public and private purse as a matter of general welfare” to confer *parens patriae* authority) with Illinois v. Daicel Chemical Industries, Ltd., 02 CH 19575 (Cook Co. Cir. Ct., Ch. Div. September 23, 2003) (holding that, absent express statutory authority, the attorney general lacks *parens patriae* authority to seek damages for injury to individuals).

<sup>127</sup> Nathaniel H. Carter & William L. Stone, REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821, at 160-61, 302 (1821) (“1821 Debates”).

<sup>128</sup> N.Y. Const. (1821), art. IV, § 6. *See generally* 1821 Debates, *supra* n. 127, at 395, 593-94, 601-02, 634, 644, 662-63.

<sup>129</sup> N.Y. Const. (1846), art. V, § 1.

<sup>130</sup> Ross, *State Attorneys General*, *supra* n. 75, at 15-20.

that appointment by the governor or by another part of the government could not so well assure.<sup>131</sup>

The 1846 New York constitution also declared, for the first time, that “the powers and duties” of the attorney general and various other state officers “shall be such as now are or hereafter may be prescribed by law.”<sup>132</sup> This sort of constitutional provision also was common in other states: “[i]n the new state constitutions the duties of the Attorney General were left largely undefined. Such powers as were exercised stemmed from the common law, colonial custom and legislative act.”<sup>133</sup>

This prescriptive provision was re-enacted in the New York’s 1894 constitution,<sup>134</sup> and remained there until 1925, when it was dropped entirely in an amendment designed to reorganize generally the state’s many departments, commissions and officers.<sup>135</sup> The 1925 amendment also gave the legislature the responsibility of assigning duties to the government’s newly-created organizational units, including the department of law, which the attorney general headed. This part of the amendment was “purely temporary;”<sup>136</sup> its purpose ceased once the legislature made the necessary assignments. Accordingly, to

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<sup>131</sup> See, e.g., Annual Message of Governor John Young (January 5, 1847) (noting that under the new constitution if the people “err to-day” in their elected choice, “they will correct the error to-morrow”), reprinted in IV MESSAGES OF THE GOVERNORS 363, 364 (Lincoln ed. 1909); 2 Lincoln, *New York History*, supra n. 95, at 345-46 (debating election versus appointment), 528 (“[t]he attorney general has not been, and clearly should not be, a mere creature of the governor”); *1938 Report*, supra n. 114, at 114-19 (recounting debates on the issue over the years).

<sup>132</sup> N.Y. Const. (1846), art. V, § 6.

<sup>133</sup> Cooley, *Predecessors of the Federal AG*, supra n. 79, 2 AM. J. LEG. HIST. at 312 (footnote omitted).

<sup>134</sup> N.Y. Const. (1894), art. IV, § 1. For the evolution of this provision, see REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 149-50, 536-37, 1070-71 (1846); 1 & 2 NEW YORK STATE CONSTITUTIONAL CONVENTION OF 1846, at Doc. Nos. 32 and 75 (1846).

<sup>135</sup> See generally II New York State Constitutional Convention Committee, AMENDMENTS PROPOSED TO NEW YORK CONSTITUTION 1895-1937, at 327, 336-38 (1938).

<sup>136</sup> *1938 Report*, supra n. 114, at 145.

implement the amendment, the following year the legislature enacted a law that assigned “to the department of law all the functions, powers and duties of the attorney-general, as now prescribed by law,”<sup>137</sup> and further provided that “[t]he attorney-general . . . shall exercise and perform all the powers and duties conferred or imposed on him by law.”<sup>138</sup>

The 1925 amendment was the direct outgrowth of a proposal to reorganize state government, adopted during by the 1915 constitutional convention.<sup>139</sup> This effort was designed to rationalize and simplify the state’s bloated executive branch, which had over 180 departments, bureaus, boards and commissions, some with overlapping or conflicting jurisdiction.<sup>140</sup> The objective of the 1915 proposal and the subsequently approved constitutional amendment “was to secure economy and efficiency in the administration of government.”<sup>141</sup> Thus, there was no intention to change the attorney general’s substantive powers and duties.<sup>142</sup> Since then, there has been no significant change in the constitutional treatment of the attorney general’s authority.<sup>143</sup> The statutory provision,

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<sup>137</sup> N.Y. L.1926, ch. 347.

<sup>138</sup> *Id.*

<sup>139</sup> *See generally* IV REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 4255, 4257-58, 4352-54 (1916) (“*1915 Convention Record*”); New York State Constitutional Convention Committee, NEW YORK STATE CONSTITUTION ANNOTATED 82-87 (1938); II PROPOSED AMENDMENTS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, Amend. No. 803, Intro. No. 716, dated August 11, 1915 (1915).

<sup>140</sup> *1938 Report, supra* n. 114, at 126-27, 146-47.

<sup>141</sup> *Id.* at 146.

<sup>142</sup> *See 1915 Convention Record, supra* n. 139, at 3319 (remarks of Delegate Tanner on the report of the committee on the governor and other state officers: under the proposed reorganization, “the Attorney General is continued as a constitutional officer, the head of the Law Department, in a department about which there has been very little discussion as to jurisdiction. We simply define him as a constitutional officer at the head of that department, and matters of minor regulation under our proposal we are going to leave to the legislature”). *See generally* N.Y. L.1926, ch. 343, art. I, § 7 (providing generally for continuity of authority from predecessor government units to departments and other units established in the reorganization); N.Y. L.1926, ch. 347, § 1, art. V, § 182 (providing that “[t]he organization of the present office of the attorney-general is continued as the organization of the department of law, except as it may be changed pursuant to law”).

<sup>143</sup> The current provision is N.Y. Const. (1961) art. V, § 4. *See also* N.Y. Const. (1938) art. V, § 3.

recognizing the attorney general as the head of the state department of law, similarly has gone through various non-substantive changes.<sup>144</sup>

The express affirmation of the attorney general’s powers and duties, contained in the 1846 constitution and in successor constitutional and statutory provisions, is typical of similar provisions adopted in many states.<sup>145</sup> Over the years, courts throughout the country have considered whether this language – acknowledging that the attorney general has the powers and duties “prescribed” or “imposed” by “law” – imports to the office common law authority that devolves from the office’s historical origins – or whether, instead, the language refers only to those powers and duties that the legislature, by statute, confers.

Most courts conclude that “prescriptive” provisions like the one in the 1846 New York constitution confer on the attorney general common law powers, to which the legislature may add or subtract.<sup>146</sup> These jurisdictions recognize that the state attorney general’s extensive authority to represent the people have thus come to be expressed in general constitutional and statutory provisions declaring the responsibilities of the office, without abrogating the historic common law powers of the office.<sup>147</sup> Indeed, a small

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<sup>144</sup> See N.Y. L.1951, ch. 800, art. 5, § 1, currently N.Y. Exec. L. § 60 (“There shall continue to be in the state government a department of law. The head of the department of law shall be the attorney general”).

<sup>145</sup> See generally Ross, *State Attorneys General*, *supra* n. 75, at 31-35.

<sup>146</sup> See, e.g., *Johnson v. Commonwealth*, 291 Ky. 829, 839-40, 165 S.W.2d 820, 826-27 (1942) (citing authorities); *State v. Boeckler Lumber Co.*, 302 Mo. 187, 205-06, 257 S.W. 453, 456 (1924); *State v. Young*, 54 Mont. 401, 403-04, 170 P. 947. 948 (1918); *Commonwealth v. Meadow Gold Dairies, Inc.*, 1993-2 Trade Cas. (CCH) ¶ 70,385, at 71,025 (W.D. Va. 1993) (construing Virginia law). See generally Van Alstyne & Roberts, “*The Wisconsin AG*,” *supra* n. 71, 1974 WIS. L. REV. at 729 & nn. 49-51 (citing breakdown of states); Robert C Howison, Jr., *Attorney General – Common Law Powers Over Criminal Prosecutions and Civil Litigation of the State*, 16 N.C. L. REV. 282, 284-85 nn.18-23 (1938).

<sup>147</sup> See, e.g., *People v. Santa Clara Lumber Co.*, 126 A.D. 616, 618 110 N.Y.S. 280, 281 (3<sup>rd</sup> Dep’t 1908) (the attorney general, “as the chief legal officer of the State, has performed certain duties and exercised certain authority which in terms may not definitely be prescribed by statute”); *State v. Robinson*, 101

number of courts hold that, because the attorney general's common law powers are confirmed by constitutional provision, the legislature may not reduce those powers at all.<sup>148</sup> On the other hand, a minority of jurisdictions construe such prescriptive provisions to refer only to statutes enacted by the legislature.<sup>149</sup>

#### 4. The Office of the Attorney General of the United States at Inception

Discussion of the evolution of the powers of the attorney general would be incomplete without brief reference to that office in the government of the United States. Therefore, I will round out the picture here by describing the office of the federal attorney general at the nation's founding.

At the "federal" level, such as it was during the nation's formative years, there was no attorney general at all under the Articles of Confederation.<sup>150</sup> The office is similarly unmentioned in the United States constitution. Congress, however, created the position in three sentences tacked on to the end of the Judiciary Act of 1789.<sup>151</sup> The

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Minn. 277, 288, 112 N.W. 269, 272 (1907) ("[t]he duties [of the attorney general] are so numerous and varied that it has not been the policy of the legislatures of the states of this country to attempt specifically to enumerate them . . . . [I]t is generally held that the office is clothed, in addition to the duties expressly defined by statute, with all the power pertaining thereto at the common law"). *See also* *New York v. Local 1115 Joint Board*, 56 A.D.2d 310, 318, 392 N.Y.S.2d 884, 890 (3<sup>rd</sup> Dep't 1977) (the attorney general "enjoys common-law authority" as well as statutory powers) (citing *Matter of Bennett v. Merritt*, 173 Misc. 355, 18 N.Y.S.2d 146 (Orange Co. Sup. Ct. 1940), *aff'd*, 261 A.D. 824, 25 N.Y.S.2d 784 (2<sup>nd</sup> Dep't), *aff'd*, 286 N.Y. 647 (1941), and *People v. Miner*, 2 Lans. 396 (N.Y. 5<sup>th</sup> Dist. 1868)).

<sup>148</sup> *See, e.g.*, *Lyons v. Ryan*, 201 Ill.2d 529, 535-36, 780 N.E.2d 1098, 1102-03 (2002) (citing *Fergus v. Russel*, 270 Ill. 304, 342, 110 N.E. 130, 145 (1915)); *In re House of Representatives*, 575 A.2d 176, 179 (R.I. Sup. Ct. 1990).

<sup>149</sup> *See, e.g.*, *Shute v. Frohmiller*, 53 Ariz. 483, 488-90, 90 P.2d 998, 100-02 (1939) (citing authorities); *State v. City of Oak Creek*, 232 Wis.2d 612, 625-28, 605 N.W.2d 526, 532-33 (2000); *State v. Burning Tree Club, Inc.*, 301 Md. 9, 32, 481 A.2d 785, 797 (Ct. App. 1984). *See generally* Ross, *State Attorneys General*, *supra* n. 75, at 38 & n.59.

<sup>150</sup> Key, *Legal Work*, *supra* n. 70, 25 VIR. L. REV. at 173-74 n.31. *See also* Hammonds, *The AG in the Colonies*, *supra* n. 77, at 22-23 (noting that the Continental Congress never acted on a 1781 committee report recommending appointment of an attorney general for the United States).

<sup>151</sup> Judiciary Act of September 24, 1789, ch. 20, § 35, 1 Stat. 73, 92-93.

office's primary duties were to prosecute suits in the Supreme Court in which the United States was interested, and to provide legal advice to the President and department heads, if asked.<sup>152</sup> The position, however, was weak – “a part-time job with a low salary and few prerequisites.”<sup>153</sup> There was no Department of Justice to run, no staff, no office – not even pencils or paper.<sup>154</sup> In fact, for years the attorney general was “an absentee, coming to the seat of the Government only when called on specific business.”<sup>155</sup> Nevertheless, nearly a hundred years later, however, the Supreme Court held that, in creating the office of “attorney general,” Congress imbued it with with the powers of “the similar office with the same designation existing under the English law.”<sup>156</sup> From its inauspicious beginnings, the federal attorney general developed in a manner distinct from that of the attorneys general in the individuals states.

### Conclusion

The state attorney general has extensive powers and responsibilities that have evolved over several hundred years. This authority includes the right and the obligation to protect the public interest by affirmative litigation, as well as to defend the state's legal

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<sup>152</sup> See generally Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L. J. 561, 567 (“Bloch, *The Early Role*”).

<sup>153</sup> *Id.* See also *id.* at 618-19 (“[a]fter more than thirty years, the Attorney General received a clerk, government office space and a five-hundred dollar fund for office supplies”) (footnote omitted); Key, *Legal Work*, *supra* n. 70, 25 VIR. L. REV. at 175.

<sup>154</sup> Bloch, *The Early Role*, *supra* n. 152, 1989 DUKE L. J. at 619. See also *id.* at 583-89 (recounting difficulties that President Washington had persuading individuals to take the position, and Congress' refusal to expand the duties of the office); Key, *Legal Work*, *supra* n. 70, 25 VIR. L. REV. at 175-77 (similarly describing the office's dismal early years); Hammonds, *supra* n. 77, at 23-24; Ross, *State Attorneys General*, *supra* n. 75, at 10-11.

<sup>155</sup> Key, *Legal Work*, *supra* n. 70, 25 VIR. L. REV. at 176.

<sup>156</sup> *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 280 (1888) (upholding the attorney general's authority to sue to set aside a land patent). *But see id.* at 307 (Field, J., concurring) (arguing that federal executive officers have only those powers granted by law).

interests. Indeed, evolution of the office in England long ago established that the attorney general is “the proper person to take legal proceedings where the interests of the public are endangered or acts tending to public injury are done without authority.”<sup>157</sup> Thus, the energy, dedication and vision that contemporary state attorneys general bring to this task is but a modern expression of a time-honored tradition.

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<sup>157</sup> Elwyn Jones, *The Office of Attorney General*, 27 CAMB. L. J. 43, 52 (1969).