



State Attorneys General Powers and Responsibilities

Edited by
Emily Myers
National Association of Attorneys General



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Courtesy Chapter

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*This book is dedicated to Attorneys General
and the men and women who work for them in the
56 jurisdictions. They continue to make an important
contribution to state government and the American legal
system. Without them, there would be no book to write.*

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CHAPTER 3

Common Law Powers

By Emily Myers, Antitrust Chief Counsel, NAAG

The common law is the origin of the attorney general's authority to represent, defend, and enforce the legal interests of state government and the public. Notwithstanding relatively recent constitutional and statutory enumerations of attorney general powers, traditionally recognized prerogatives of the state's chief law officer, enforced by court decisions, continue to shape and expand the role of the modern attorney general. Contemporary experience reaffirms that the common law is a vital source of power for attorneys general who seek to protect public interests in new and developing areas of the law.

COMMON LAW AUTHORITY

Perhaps the most thorough discussion of the common law powers of a state attorney general is the authoritative judicial opinion in *State of Florida ex rel. Shevin v. Exxon Corp.*¹ The court thoroughly analyzed the origins and continued strength of the common law as the basis for attorney general actions.

In *Shevin*, the Florida attorney general brought an antitrust enforcement action in federal court against many major oil companies. The defendants challenged the attorney general's authority under Florida law to bring the action on behalf of state departments, agencies, and political subdivisions without the express consent of those public bodies. The appeals court flatly rejected that

¹ 526 F.2d 266 (5th Cir. 1976), *reh. den.* 529 F.2d 523 (5th Cir. 1976), *cert. den.* *Standard Oil Co. v. Florida*, 429 U.S. 829 (1976).

challenge. The court concluded that, in light of the common law, the issue of the attorney general's authority "simply is not an extremely close question."²

The court discussed, in general terms, the interplay between common law and constitutional and statutory delineations of the powers of attorneys general.

[T]he attorneys general of our states have enjoyed a significant degree of autonomy. Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such legislative action, he 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.³

Having determined that the common law granted the state attorneys general the authority and discretion to act in the public interest, the court concluded that the type of action challenged by the defendants would be within the common law authority of an attorney general's office "as it 'typically' exists in the United States."⁴

The *Shevin* court then turned its attention to whether the Florida attorney general's action was authorized by Florida law. On this point, the court concluded that the attorney general retained his common law powers.⁵ The court found it significant that the Florida statute enumerating the attorney general's powers (Fla. Stat. Ann. § 16.01) did not purport to be comprehensive and, in fact, provided that "the attorney general shall . . . have and perform all powers and duties incident or usual to such office."⁶ Moreover, the court reaffirmed the principle originally announced in a 19th century Florida case:

The Attorney-General is the attorney and legal guardian of the people, or of the crown, according to the form of government. His duties pertain to the Executive Department of the State, and it is his duty to use means most effectual to the enforcement of the laws, and

2 *Id.* at 274.

3 *Id.* at 268-69 (citations omitted).

4 *Id.* at 269.

5 *Id.*

6 *Id.* at 269-70.

the protection of the people, whenever directed by the proper authority, or when occasion arises . . . *Our legislature has not seen fit to make any change in the common law rule.* The office of the Attorney-General is a public trust. It is a legal presumption that he will do his duty, that he will act with strict impartiality. In this confidence he has been endowed with a large discretion, not only in cases like this, but in other matters of public concern. The exercise of such discretion is in its nature a judicial act, from which there is no appeal, and over which the courts have not control.⁷

Finally, after concluding that the Florida attorney general has common law powers, the federal appeals court ruled that those powers included the initiation of an antitrust action on behalf of state instrumentalities in federal court.⁸ The court's reasoning was based on the premises that the attorney general's common law power undoubtedly included the authority to initiate a suit and that the attorney general had common law authority to prosecute actions to protect and defend state property and revenue.⁹ The court confirmed that the attorney general was empowered by common law to institute litigation on his own initiative if he determined that the public interest so required.¹⁰ In the court's view, "the law on this issue [is] fairly clear."¹¹

Although each jurisdiction varies in the extent to which the attorney general's common law authority is recognized, cases affirming the attorney general's use of those traditional powers are legion.¹² The court's decision in *Shevin* exemplifies the majority rule.

7 *State ex rel. Attorney General v. Gleason* 12 Fla. 190, 212 (1869), cited and quoted in *State of Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266.

8 *Shevin* at 270, 274.

9 *Id.* at 270-71 (citing cases).

10 *Id.* at 272-74.

11 *Id.* at 276.

12 See, e.g., *Commonwealth ex rel. Beshear v. Bevin*, 498 S.W. 3d 355 (Ky. 2016) (the attorney general's common-law authority to represent the interests of the people derives from the broad powers that office initially possessed in representing the legal interests of the English crown); *Hussey v. Say*, 139 Haw. 181 (Hawaii 2016) ("[the office of attorney general] is clothed with all the powers and duties pertaining thereto at common law"); *In re Opinion of the Justices of the Supreme Judicial Court*, 2015 ME 27 (Me. 2015) (Maine constitution does not describe attorney general authority, it is defined by statutes and common law); *Dunivan v. State*, 466 S.W.3d 514 (Mo. 2015) (the attorney general is vested with all of the powers of the attorney general at common law); *Reams v. Foster*, 2014 N.H. Super. LEXIS 5 (Apr. 10, 2014) (Attorney general is the chief law enforcement officer of the State and retains all of his common law powers); *Ciardi v. F. Hoffman-La Roche Ltd.*,

Judge Made Law

The common law itself is rooted in three major English sources: general customs of the kingdom; special customs of particular districts; and certain laws or rules of courts of relatively general jurisdiction.¹³ According to Dean Roscoe Pound

[The common law] is essentially a mode of judicial and juristic thinking, a mode of treating definite legal problems rather than a fixed body of definite rules. [I]t succeeds everywhere in molding rules, whatever their origin, into accord with its principles and in maintaining those principles in the face of formidable attempts to overthrow or to supersede them.¹⁴

One basic tenet that shaped common law development was the principle that a chief law officer should represent the sovereign's legal interests.

The history of the office of the English attorney general, outlined in Chapter 1, tracks the path of common law development described by Dean Pound. In 1461, when the king's attorney first was appointed as attorney general of England, parliamentary documents were recording the attorney general's "rapid evolution"

762 N.E.2d 303 (Mass. 2002) ("The Attorney General has both a common-law duty and a specific statutory mandate to protect the public interest and enforce public rights."); *Botelho ex rel. Members of Alaskan Sports Bingo Joint Venture v. Griffin*, 25 P.3d 689 (Alaska 2001) (Under the common law, the attorney general has the power to bring any action which he thinks necessary to protect the public interest, a broad grant of authority which includes the power to act to enforce Alaska's statutes), *State ex rel. Nixon v. Amer. Tobacco Co., Inc.* 34 S.W.3d 122 (Mo. 2000) ("The attorney general of Missouri is the only constitutional officer whose powers and duties are not specifically provided for or limited by the constitution. . . . The absence of a provision for specific powers for the attorney general in our constitution vests the office with all of the powers of the attorney general at common law." (citations omitted)); *State v. Robertson*, 886 P.2d 85 (Utah Ct. App. 1994), *aff'd* 924 P.2d 889 (Utah 1996) ("We conclude that under common law the attorney general is the chief legal officer in the state and, as such, has the authority to intervene in any prosecution brought by a city attorney in the name of the State of Utah. Such authority existed at common law and continues unless modified by constitution or statute."); *Michigan ex rel. Kelley v. C.R. Equip. Sales, Inc.*, 898 F. Supp. 509 (W.D. Mich. 1995) (attorney general "has statutory and common law authority to act on behalf of the people of the State of Michigan in any cause or matter, such authority being liberally construed."); *Manchester v. Rzewnicki*, 777 F. Supp. 319 (D. Del. 1991), *aff'd* 958 F.2d 364 (3d Cir. 1992) ("Under Delaware law, the Attorney General has broad powers, exercised as public interest requires, absent an express legislative restriction to the contrary."), *See also* National Association of Attorneys General, *Common Law Powers of the State Attorneys General* (rev. ed. 1980).

13 1 W. Blackstone, *Commentaries on the Laws of England* 62 (G. Tucker ed. 1969).

14 R. Pound, *The Spirit of the Common Laws* (1921).

to a position as the sovereign's chief law officer, although "[m]any more years were to pass before the attorney general achieved unqualified recognition as the leading officer in the legal department of state"¹⁵

The attorney general of England had achieved recognition as legal advisor to the Crown and all departments of state before the American Revolutionary War.¹⁶ Although this traditional function remains,

[T]he passage of time has seen increasing emphasis on the other facet of the office of Attorney General, in which the holder is viewed, and views himself, as the great officer of state to whom the responsibility of safeguarding and representing the public interest is entrusted. This aspect of the first Law Officer's duties has, we have seen, a long history in relator actions, but not until the present century do we find positive evidence of a wider interpretation being accorded to the role of protector of the public interest generally.¹⁷

When the common law powers of the attorney general took root in America, "[l]ittle attempt was made to define or enumerate duties, for the American Attorney General became possessed of the common law powers of the English Attorney General, except as changed by constitution or statute."¹⁸ One authority has noted that American courts have not formulated an accepted delineation of common law powers of the attorney general in this country.

Although many courts in the United States have agreed that the Attorney General of the contemporary American state is endowed with the common law powers of his English forebearer . . . the application from one jurisdiction to another of this seemingly simple principle has produced an astonishing array of mutations which make it altogether impossible to reach any sweeping generalization on the matter.¹⁹

15 Edwards, *The Law Offices of the Crown* 27 (1964).

16 Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 Am. J. Legal Hist. 307 (1958).

17 *Id.* at 295.

18 Cooley, *supra* note 16, pp. 309.

19 DeLong, *Powers and Duties of the State Attorney General in Criminal Prosecutions*, 25 J. Crim. L. 392 (1934).

Nonetheless, preservation and protection of the public interest is the principle that typically governs a court's decision to recognize an attorney general's exercise of a power or prerogative that is claimed to have its source in the common law. For example, in a Mississippi case in which the attorney general sued a pharmaceutical manufacturer for alleged false statements, the court stated, "the Attorney General is a constitutional officer possessed of all the power and authority inherited from the common law as well as that specifically conferred upon him by statute. This includes the right to institute, conduct and maintain all suits necessary for the enforcement of the laws of the State, preservation of order and the protection of public rights."²⁰ Florida courts have also reiterated their view that the attorney general has common law powers to protect the public interest, holding, "The organic and statutory law are not the only sources of authority of the Attorney General; the common law provides the Attorney General the authority to intervene in matters of "compelling public interest . . ."²¹ The Rhode Island Supreme Court pointed to the attorney general's unique role in protecting the public, noting that unlike other attorneys who are engaged in the practice of law, the attorney general "has a common law duty to represent the public interest."²²

State attorneys general now derive their power from constitutional and statutory mandates, as well as the common law. No clear lines separate the three sources of authority, for each often supplements the others. In fact, many

20 *Hood ex rel. Mississippi v. AstraZeneca Pharms., LP*, 744 F. Supp. 2d 590, 595 (N.D. Miss. 2010). See also, *Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152 (Ky. 2009) ("[u]nder the common law, the attorney general has the power to bring any action which he or she thinks necessary to protect the public interest, a broad grant of authority which includes the power to act to enforce the state's statutes."); *People ex rel. Devine v. Time Consumer Mktg., Inc.*, 782 N.E.2d 761 (Ill. App. Ct. 2002) (the common law powers of the office of attorney general are " 'as broad as the 'protection and defense of the property and revenue of the state,' and, indeed, the public interest requires," citing *People ex rel. Hartigan v. E & E Hauling, Inc.*, 607 N.E.2d 165 (Ill. 1992); *Ciardi v. F. Hoffmann-La Roche Ltd.*, 762 N.E.2d 303 (Mass. 2002) (The attorney general has both a common-law duty and a specific statutory mandate to protect the public interest and enforce public rights.); *Attorney Gen. v. Michigan Pub. Serv. Comm'n*, 625 N.W.2d 16 (Mich. Ct. App. 2000) (attorney general has the paramount duty as a constitutional officer possessed with common law as well as statutory powers and duties to protect the interest of the general public); *Berger v. State Dept. of Revenue*, 910 P.2d 581 (Alaska 1996) (attorney general has common law power to bring any action which he thinks necessary to protect the public interest). But see *Arizona State Land Dep't v. McFate*, 348 P.2d 912 (Ariz. 1960) (attorney general's initiation of litigation in furtherance of the interests of the public in general, instead of the policies or practices of a particular department, was not appropriate).

21 *Barati v. Florida*, 2016 Fla. App. LEXIS 2648 (Fl. Ct. App. 1st Dist. Feb. 23, 2016).

22 *State v. Lead Indus. Ass'n*, 951 A.2d 428, 471 (R.I. 2008) (citing *Newport Realty, Inc. v. Lynch*, 878 A.2d 1021, 1032 (R.I. 2005)).

constitutional provisions and state statutes are merely declaratory of the common law,²³ and courts have adopted broad interpretations of constitutional provisions to preserve the attorney general's common law power.²⁴

State Constitutional Law

The constitutions of 44 states establish an office of attorney general, and many of these constitutions direct the attorney general to perform duties “prescribed by law.”²⁵ The supreme court of Illinois, as have other courts, has construed this constitutional term as fully vesting the Illinois attorney general with common law powers.²⁶ In Illinois, those powers cannot be limited by statute.²⁷ Moreover, the Illinois Supreme Court has ruled that the force and effect of this constitutional provision is “that neither the legislature nor the judiciary may deprive the attorney general of his common law powers under the Constitution,”²⁸ Similarly, in Rhode Island, the Constitution provides “The duties and powers of the . . . attorney-general . . . shall be the same under this constitution as are now established, or as from time to time may be prescribed by law.” Rhode Island

23 National Association of Attorneys General, COMMON LAW POWERS OF THE STATE ATTORNEYS GENERAL 4 (rev. ed. 1980). See, e.g., CAL. CONST. Art V, § 13 (AG has broad powers derived from the common law, and in the absence of any legislative restriction, has the power to file any civil action or proceeding which he deems necessary for the protection of public rights and interests); DEL. CODE. ANN. tit. 29 § 2504 (Delaware attorney general shall “continue to exercise the powers and perform the duties by the Constitution, statutes and common law vested in and imposed upon the Attorney General prior to January 1, 1969”); KY. REV. STAT. ANN. § 15.255 (attorney general shall exercise the common-law powers of the attorney general in protecting the environment); MICH. COMP. LAWS ANN. § 493.81 (“The powers and duties of the attorney general provided in this act are in addition to his existing powers and duties provided by statutes and common law, and nothing in this act shall impair or restrict the jurisdiction of any court in any action or proceeding by the attorney general under any other statute or common law”).

24 *State of Ohio v. United Transportation*, 506 F. Supp. 1278 (S.D. Ohio 1981) (although the Ohio Constitution does not specifically list the attorney general's powers, it nonetheless was “adopted with a recognition of established contemporaneous common law principles, and . . . did not repudiate but cherished the established common law.”)

25 National Association of Attorneys General, COMMON LAW POWERS OF THE STATE ATTORNEYS GENERAL at 25.

26 ILL. CONST. art. V, § 1 (1870); *People ex rel. Sprague v. Finnegan*, 66 N.E. 2d 690 (Ill. 1946).

27 *State ex rel. Beeler, Schad & Diamond, P.C. v. Burlington Coat Factory Warehouse Corp.*, 860 N.E.2d 423 (Ill. App. Ct. 2006); *Lyons v. Ryan*, 780 N.E.2d 1098 (Ill. 2002), *People ex rel. Scott v. Briceland*, 359 N.E.2d 149 (Ill. 1976); *Dept. of Mental Health v. Coty*, 232 N.E.2d 686 (Ill. 1967); *Fergus v. Russel*, 110 N.E. 130 (Ill. 1915).

28 *EPA v. Pollution Control Bd.*, 372 N.E.2d 50 (Ill. 1977).

courts have voided a statute that “severely infringe[d] upon the fundamental powers of the Attorney General.”²⁹

In most states that recognize the attorney general’s common law authority as a matter of constitutional law, courts have determined that the legislature nevertheless may prescribe changes in the attorney general’s common law powers. For example, the Kansas Supreme Court stated the general rule in the following terms: “[T]he Attorney General’s powers are as broad as the common law unless restricted or modified by statute.”³⁰ The Tennessee Court of Appeals articulated a similar standard: “[T]he Attorney General has both extensive statutory power and the broad common-law powers of the office except where these powers have been limited by statute.”³¹

Near the other end of the continuum, the Idaho Supreme Court has made it clear that the attorney general has no common law powers that are not subject to modification by statute,³² and in Wisconsin, Article VI, § 3, of the state constitution provides that the powers and duties of the attorney general “shall be prescribed by law,” which has been construed by the state supreme court in a long line of cases to confer only those powers and duties granted by statute, thus specifically denying the existence of common law powers.³³

In some states, the legislature’s power to restrict the common law authority of a constitutionally founded office of attorney general is not plenary. The Kentucky Court of Appeals has adopted the following constitutional standard:

[W]e are of opinion that, while the Attorney General possesses all the power and authority appertaining to the office under common law and naturally and traditionally belonging to it, nevertheless the General Assembly may withdraw those powers and assign them to others or may authorize the employment of other counsel for the

29 *In re House of Representatives*, 575 A.2d 176, 180 (R.I. 1990) See also, *Morley v. Berg*, 226 S.W.2d 559 (Ark. 1950) (the Legislature has placed on the attorney general certain statutory duties, and also ‘all duties now required of him under the common law’).

30 *State v. Finch*, 280 P. 910, 913 (1929).

31 *State ex rel. Comm’r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734 (Tenn. Ct. App. 2001); see also, II A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 665-66 (“In most states where the constitution says that the attorney general’s duty shall be ‘as prescribed by law,’ this is taken to mean that he has such common law powers as have not been specifically repealed by statute—a conclusion sometimes bolstered by reference to early statutory adoption of the common law.”)

32 See *Padgett v. Williams*, 348 P.2d 944 (Idaho 1960).

33 *In re Estate of Sharp*, 217 N.W. 2d 258 (Wis. 1974), see also *Shute v. Frohmiller*, 90 P.2d 998, 1001 (Ariz. 1939).

departments and officers of the state to perform them. This, however, is subject to the limitation that the office may not be stripped of all duties and rights so as to leave it an empty shell, for obviously, as the legislature cannot abolish the office directly, it cannot do so indirectly by depriving the incumbent of all his substantial prerogatives or by practically preventing him from discharging the substantial things appertaining to the office.³⁴

In a North Dakota case, the court addressed the attorney general's authority to retain special assistant attorneys general on a contingency fee basis. In determining that the attorney general had authority to hire such counsel, the court said,

[T]he legislature has no constitutional power to abridge the inherent powers of the attorney general despite the fact that the constitution provides that the 'duties of the ... attorney general ... shall be as prescribed by law.' (Const.Sec.83)." ... The Legislature may not strip officers "'imbedded in the Constitution' ... of a portion of their inherent functions."³⁵

Furthermore, as a general rule, a limitation on the exercise of common law powers by a constitutionally founded office of attorney general must be express, rather than implied.

It is the general consensus of opinion that in practically every state of this Union whose basis of jurisprudence is the common law, the office of attorney general, as it existed in England, was adopted as a part of the governmental machinery, and that in the absence of express restrictions, the common-law duties attach themselves to the office so far as they are applicable and in harmony with our system of government.³⁶

34 *Johnson v. Commonwealth ex rel. Meredith*, 165 S.W. 2d 820 (Ky.1942).

35 *State v. Hagerty*, 580 N.W.2d 139, 146 (N.D. 1998) (citations omitted).

36 *Terry v. Wilder*, 29 Va. Cir. 418 (Va.Cir. Ct. Chancery No. HC-1307-2, December 29, 1992). See also, *State ex rel. Ford v. Young*, 170 P. 947 (Mont. 1918); *State v. Finch*, 128 Kan. 665, 670 (Kan. 1929); *State ex rel. Derryberry v. Kerr-McGee Corp.*, 516 P. 2d 813 (Okla. 1973).

Thus, in most jurisdictions in this country it is settled law that the attorney general exercises broad common law powers pursuant to constitutional mandate

State Statutory Law

State statutes describing the authority and duties of attorneys general often expressly refer to the common law powers of the state's chief law officer. For example, the New Jersey attorney general's enabling legislation characterizes the common law as one of three sources of authority when it invests the attorney general with "the powers and duties now or hereafter conferred upon or required of the Attorney General either by the Constitution or by the common law or statutory law . . ."³⁷ Similarly, the statute listing the responsibilities of the attorney general of Hawaii mandates that "The attorney general shall be charged with such other duties and have such authority as heretofore provided by common law or statute."³⁸

On the other hand, some statutes, such as the law which outlines the functions of the Maine attorney general refer to the common law to make it clear that a statutory delineation of official responsibilities does not modify the attorney general's inherent powers. The Maine statute provides, "The authority given under this section shall not be construed to deny or limit the duty and authority of the Attorney General as heretofore authorized, either by statute or under common law."³⁹ Similarly, the statute describing the scope of the Alabama attorney general's powers states, "Nothing contained in this article shall be construed so as to in any way restrict, limit or abridge the powers, duties, or authority of the attorney general as heretofore authorized by the constitution, statutory law, or the common law."⁴⁰

Even in the absence of a specific statutory reference to the common law authority of an attorney general, courts have recognized that this authority may be conferred by a more general statutory directive, such as "The Attorney General shall have all the power and authority usually appertaining to such office and shall perform the duties otherwise required by law."⁴¹ The Missouri Supreme

37 N.J. STAT. ANN. § 52-17A-4.

38 HAW. REV. STAT. § 26-7.

39 ME. REV. STAT. ANN. tit. 5 § 199.

40 CODE OF ALA. § 36-15-1.1.

41 ORE. REV. STAT. § 180.060(6); *cf. State ex rel. Thornton v. Williams*, 336 P.2d 68 (Ore. 1959) (acknowledging that statute conferring on the attorney general "all the power and authority usually appertaining to that office" would bestow the common law powers and duties of the attorneys general of England, except as the legislature otherwise expressly provided); *see also People of Oregon v. Debt Reducers*, 484 P.2d 869, 874 (Or. App. 1971) ("in civil matters the Attorney General of Oregon

Court held that even in the absence of a statute specifically referencing the attorney general's common law powers, an enactment generally acknowledging the application of the common law supplemented a constitutional provision granting the attorney general the authority "prescribed by law."⁴² The court subsequently held that although the attorney general's common law powers are not limitless, they can only be restricted by a statute enacted specifically for the purpose of limiting the common law power.⁴³

When the attorney general's common law power is based solely on statutory law, the legislature of course has the prerogative to restrict the attorney general's claim to inherent authority.⁴⁴ However, as the Florida experience outlined in *Shevin* demonstrates, legislatures typically have not changed the common law authority of state attorneys general.⁴⁵ State statutory law thus retains its vitality as a source of common law power for attorneys general.

SCOPE OF COMMON LAW POWERS

In *Shevin*, the Florida attorney general successfully extended a traditionally recognized common law power of the attorney general of England, *i.e.*, the power to prosecute all actions necessary for the protection and defense of property and revenue of the state, to bring an antitrust action on behalf of state and local governing bodies.⁴⁶ The Florida attorney general's action may have been, in the words of Professor Edwards, "a far cry" from the activities of the medieval King's Attorney,⁴⁷ but the action, to paraphrase Dean Pound, molded a rule in accordance with a principle that the attorney general maintained in the face of a formidable attempt to overthrow it. Florida is one of many states to modernize the attorney general's common law power.

has the common law powers of that office, except where they are limited by statute or conferred upon some other official").

42 *State ex rel. Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d 122 (Mo.2000) (absence of a constitutional provision specifying powers for the attorney general and statute adopting the common law of England vests office with all of the powers of the attorney general at common law").

43 *Dunivan v. Missouri*, 466 S.W.3d 514 (Mo. 2015).

44 See note 6, *supra*.

45 See text at note 7, *supra*.

46 *Id.*

47 See Edwards, *supra* note 15, and Pound *supra* note 14.

State Attorneys General Powers and Responsibilities

Although it is not possible to make a sweeping generalization about the attorney general's common law powers,⁴⁸ attempts have been made to catalogue those powers as developed by American courts. The most frequently cited listing of the attorney general's common law powers, as transplanted from England, is found in *People v. Miner*, a New York case decided in 1868.

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

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

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

3rd. 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 in chancery, to enforce trusts, and to prevent public nuisances, and the abuse of trust powers.

8th. By proceedings 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. (3 Black. Com., 256-7, 260 to 266; *id.*, 427 and 428; 4 *id.*, 308, 312.)

⁴⁸ DeLong, *supra* note 22.

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.⁴⁹

Although the early New York court noted that “this enumeration probably does not embrace all the power of the attorney-general at common law,”⁵⁰ its decision recognized basic powers of the attorney general in criminal prosecutions and in civil actions regarding trusts, escheats, public nuisances, and public wards.

The principles embodied in such a listing of specific common law powers of the state attorney general were summarized by the Mississippi Supreme Court in *State v. Warren*, which held the attorney general had the authority to bring an action for an accounting for misappropriated public funds by local public officials.

At common law the duties of the attorney general, as chief law officer of the realm, were numerous and varied. He was chief legal adviser to the crown, was entrusted with management of all legal affairs, and prosecution of all suits, civil and criminal, in which the crown was interested. He had authority to institute proceedings to abate public nuisances, affecting public safety and convenience, to control and manage all litigation on behalf of the state, and to intervene in all actions which were of concern to the general public.⁵¹

The National Association of Attorneys General catalogued specific common law powers of attorneys general, with annotations, in *Common Law Powers of State Attorneys General* (May 1980). Modern courts, however, have analyzed challenges to an attorney general’s authority, not by referring to ancient prerogatives, but by focusing on the principles that define the scope of the attorney general’s duty to represent the public interest.

In 1974, the Kentucky Court of Appeal held that the attorney general lawfully could question the constitutionality of a state law, and the court rejected a contention that the attorney general’s duties were limited to representing the “Commonwealth,” that is, the hierarchy of officers, departments, and agencies heading the executive branch of government. The court said:

49 *People v. Miner*, 2 Lans. 396 (N.Y. App. Div. 1868).

50 *Id.*

51 180 So. 2d 293, 299 (Miss. 1965).

State Attorneys General Powers and Responsibilities

It is true that at common law the duty of the Attorney General was to represent the King, he being the embodiment of the state [citation omitted]. But under the democratic form of government now prevailing the people are the King, so the Attorney General's duties are to that sovereign rather than to the machinery of government.⁵²

Recognition of this principle has prompted courts to refine and redefine the common law powers and responsibilities of the attorney general.

The broadest formulation of the attorney general's common law powers is the power to "protect the public interest." In a recent Kentucky case in which the attorney general's standing to challenge actions by the governor was at issue, the Kentucky supreme court held that although defining the attorney general's common law powers is difficult, the attorney general is clearly empowered to bring any action thought "necessary to protect the public interest." The court further held that the attorney general "appears to have the duty to" bring suit when he or she "believes the public's legal or constitutional interests are under threat..."⁵³ Courts have sometimes held that the attorney general must be able to bring actions through their common law authority because otherwise "wrongs to the public interest would not be able to be vindicated by the state."⁵⁴

Another important common law right of the attorney general is the control of litigation and appeals on behalf of the state.⁵⁵ For example, in *Memorial*

52 *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865 (Ky. 1974). *But see City of New Haven v. Conn. Siting Council*, 2002 Conn. Super. LEXIS 2753 (Conn. Super Ct. Aug. 21, 2002) (because attorney general in England represented the state, "the Attorney General, in claiming that there is common-law authority to sue the state or state agencies, is claiming the antithesis of the common law.)

53 *Commonwealth ex rel. Beshear v. Commonwealth ex rel. Bevin*, 2016 Ky. LEXIS 435 (Ky., Sept. 22, 2016). *See also, Barati v. Florida*, 2016 Fla. App. LEXIS 2658 (Fla. Ct. App. Feb. 23, 2016) (common law provides attorney general authority to intervene in matters of compelling public interest); *Ciardi v. F. Hoffmann-La Roche*, 762 N.E.2d 303 (mass. 2002) (attorney general "has both a common-law duty and a specific statutory mandate to protect the public interest and enforce public rights);

54 *State ex rel. Whitehouse v. Lead Industries Association*, 2001 R.I. Super. LEXIS 31 (R.I. Sup. Ct. April 2, 2001); *see also People ex rel. Harris v. Rizzo*, 214 Cal. App. 4th 921 (Cal. Ct. App. 2013) (in case where attorney general sued members of municipal government, "Certainly, an argument can be made that, when a municipality is under the control of individuals who would pay themselves excessive salaries and grant themselves exceptional benefits, without any apparent regard for the city's inability to meet these financial obligations, the "preservation of order" and "protection of public ... interests" permit, if they do not affirmatively require, action by the Attorney General.")

55 *See Chapter 6 for more detail.*

Hospital Association Inc. v. Knutson,⁵⁶ the Kansas Supreme Court held that the attorney general could assume control over the appeal of a case, involving the state's open meeting law, which was handled at the trial level by a county attorney. The court stated, on the basis of *State v. Finch*,⁵⁷ that the attorney general had broad common law power, and consequently "[w]henver the public interest is involved or the state is a party, the attorney general is primarily the proper counsel to appear." In light of the attorney general's statutory authority to enforce the open meeting law and the statewide interest, the attorney general had inherent authority to appeal a lower court resolution of an open meeting law issue. Similarly, the Minnesota attorney general could bring suit against insurers, despite objections from the state's Insurance Commissioner, because, "The attorney general's discretion to bring suit is plenary and is beyond the control of any other state department or officer."⁵⁸ An Illinois appellate court thoroughly analyzed the attorney general's authority to control litigation in *People v. Time Consumer Marketing Inc.*⁵⁹ In that case, a local prosecutor challenged the attorney general's authority to settle claims brought by the local prosecutor alleging violations of the Illinois Consumer Fraud Act. The court held that the attorney general's common law powers included control of all litigation on behalf of the State including "intervention in and management of all such proceedings."⁶⁰

On the other hand, in Washington, the attorney general was required to appeal a condemnation action on behalf of the state's Commissioner of Public Lands, even though the attorney general had earlier declined to do so. The state supreme court held that the attorney general did not have common law powers, and that his statutory duties included the duty to represent state agencies.⁶¹

Another aspect of this right to control litigation is the attorney general's duty to appear for and to defend the state and its agencies. For example, in *Martin v. Thornburg*,⁶² the North Carolina Supreme Court ruled on a declaratory judgment action to determine the duties of the governor and the attorney general in connection with lawsuits filed against the State. The governor and the attorney general of North Carolina took different legal positions. The court held that as the attorney general of England had the duty to prosecute all actions necessary for

56 722 P.2d 1093 (Kan. 1986).

57 280 P. 910 (Kan. 1929).

58 *State ex rel. Hatch v. Amer. Fam. Mut. Ins. Co.*, 609 N.W.2d 1 (Minn. 2000).

59 782 N.E.2d 761 (Ill. App. 2002).

60 782 N.E.2d at 767.

61 *Goldmark v. McKenna*, 172 Wn.2d 568; 259 P.3d 1095 (Wash. 2011).

62 320 N.C. 533, 546, 359 S.E.2d 472, 479 (1987).

the protection and defense of the property and revenue of the Crown, the North Carolina attorney general has “the common law duty to prosecute all actions necessary for the protection and defense of the property and revenue of the sovereign people of North Carolina.” The court reasoned that this duty included “the duty to appear for and to defend the State or its agencies in all actions in which the State may be a party or interested.” Therefore, the attorney general could determine the procedural steps necessary to protection of the state’s interest in the action.⁶³

In contrast, the Alabama Supreme Court held that the governor, not the attorney general, controlled a Gambling Task Force established by executive order. Although the court stated that the attorney general had broad common law powers, it held that the governor’s supreme executive powers are paramount. The court held, “We conclude that the common-law powers that have been “prescribed” to the attorney general do not include the right to countermand the “chief magistrate” where the chief magistrate is acting within the bounds of the power given to him.” The court concluded, “[T]he statutes discussing the powers and duties of the attorney general do not authorize the attorney general to interfere with or to direct and control litigation being pursued by officers who are acting pursuant to directions from the governor [under the applicable statutes].”⁶⁴

Yet another aspect of the attorney general’s common law powers is the power to determine the state’s legal policy. In *Feeney v. Commonwealth*,⁶⁵ the Massachusetts supreme court held that in representing state officials, the attorney general is empowered to decide legal policy matters which would be reserved to the client in the ordinary attorney-client relationship. At common law the attorney general has the duty to represent the public interest, as well as the commonwealth and its officers, and the authority to assume primary control over litigation involving the commonwealth’s interests. Consequently, the court ruled that the attorney general lawfully could prosecute an appeal to the U.S. Supreme Court over the objections of state officials represented by the attorney general.

The attorney general also has the right to intervene in legal proceedings on behalf of the public interest, under his common law authority. For example,

63 See also *Humphrey v. Kleinhardt*, 157 F.R.D. 404 (W.D. Mich. 1994) (“It has been long established that the Attorney General is the sole and proper legal representative of the State and its officers”); *Manchester v. Rzewnicki*, 777 F. Supp. 319 (D.Del. 1991), *aff’d*, 958 F.2d 364 (3d Cir. 1992) (attorney general has not only power but also the duty to represent the State and its several departments in all litigation where the public interests are concerned).

64 *Riley v. Cornerstone Cmty. Outreach*, 57 So. 3d 704 (Ala. 2010).

65 366 N.E.2d 1262 (Mass. 1977).

relying on the attorney general's duty to protect the public interest, the Alaska Supreme Court held that the attorney general's common law powers permitted him to pursue claims against a third party on behalf of several charities, none of which had sought to pursue the claims themselves.⁶⁶ Similarly, the attorney general of Minnesota was authorized to sue an insurance company although the state's Department of Commerce had not done so because "[t]he attorney general's discretion to bring suit is plenary and is beyond the control of any other state department or officer."⁶⁷ In California, the Supreme Court held that the attorney general could intervene as of right in an environmental case brought against the federal government because although state statutes did not authorize suit against the federal government, "the attorney general does retain authority under common law to sue the federal government to protect the State's interests."⁶⁸ Waiver of the state's immunity from suit under the Eleventh Amendment is also within the attorney general's common law powers to protect the public interest.⁶⁹

In the absence of express legislative restrictions, the attorney general also has the authority to prosecute criminal activity in particular, by intervening in legal proceedings brought by local attorneys. In *State v. Jiminez*,⁷⁰ the Utah Supreme Court ruled that applicable common law authorized the attorney general to prosecute a crime of statewide, as opposed to purely local, proportions. The court noted that at common law, the government's top legal advisor was invested with criminal prosecutorial authority and that this principle had not been restricted expressly by state legislation. In *State v. Robertson*,⁷¹ a Utah appellate court held "prosecutions by city attorneys are subject to the common law authority of the attorney general to intervene in the interest of the public. In this

66 *Botelho v. Griffin*, 25 P.3d 689 (Alaska 2001) ("Under the common law, the attorney general has the power to bring any action which he thinks necessary to protect the public interest.") The Alaska attorney general's common law authority even extends to waiving the state's immunity under the Eleventh Amendment to the Constitution: "[T]he Attorney General, in filing the State of Alaska's motion to intervene, has acted within his broad statutory authority to represent the Alaska's interest. Such authority includes waiving Alaska's Eleventh Amendment immunity to the extent necessary for the present litigation.").

67 *State ex rel. Hatch v. Amer. Fam. Mut. Ins. Co.*, 609 N.W.2d 1 (Minn. 2000).

68 *Defenders of Wildlife v. Johanns*, 2005 U.S. Dist. LEXIS 34455 (N.D. Cal. 2005).

69 *Akiachak Native Cmty. v. DOI*, 584 F. Supp. 2d 1 (D.D.C. 2008). The attorney general's power to intervene and control *qui tam* suits as a protection of the public interest is discussed in more detail in Chapter 6.

70 588 P.2d 707 (Utah 1978).

71 886 P.2d 85 (Utah App. 1994), *aff'd* 924 P.2d 889 (Utah 1996).

way, every prosecution in the name of the state is subject to the authority of a public prosecutor, who is elected and thereby accountable to the people . . .”⁷²

Other common law powers of the attorney general that have been recognized by courts in various states include the power to seek abatement of a public nuisance⁷³ the power to seek writs of prohibition against judicial actions⁷⁴ and the power to enforce charitable trusts.⁷⁵

The office of attorney general, throughout the centuries of its development, has maintained broad common law authority, in most states, along with powers and duties that specifically are assigned by constitutions and statutes. Attorneys general in very few states expressly lack common law authority.⁷⁶

72 See also *Ex parte King*, 59 So. 3d 21 (Ala. 2010) (attorney general has authority to dismiss suit filed by district attorney when district attorney declined to dismiss); *Fiieger v. Cox*, 274 Mich. App. 449 (Mich. Ct. App. 2007) (“The Attorney General’s broad authority includes ‘all the powers of a prosecuting attorney unless . . . specifically withdrawn by the Legislature.’”); *People v. Marrero*, 2005 NY Slip Op 25125 (N.Y. Sup. Ct. 2005) (statute is declaratory of common law provisions recognizing that power to prosecute crime and control the prosecution reposed in prosecuting officer, Attorney-General or District Attorney). But see *Williams v. State*, 2014 Miss. LEXIS 599 (Miss. Dec. 11, 2014) (common law does not authorize attorney general to intervene in a criminal case where intervention is opposed by district attorney); *West Virginia ex rel. Morrissey, v. West Virginia Office of Disciplinary Counsel*, 2014 W.Va. LEXIS 1067 (W.V. Oct. 15, 2014) (attorney general’s common law criminal prosecution powers had been abolished by state constitution and statutes, attorney general could not assist local district attorneys).

73 *DeWine v. Shadyside Party Ctr.*, 2013 Ohio Misc. LEXIS 141 (Ohio C.P. Sept. 5, 2013); *Attorney General v. PowerPick Players’ Club of Mich., LLC*, 287 Mich. App. 13, 44 (Mich. Ct. App. 2010); *State ex rel. Rogers v. Marshall*, 2008 Ohio 6341, P16 (Ohio Ct. App., Scioto Cty 2008); *Whitehouse v. New England Ecological Dev.*, 1999 R.I. Super. LEXIS 154 (R.I. Super. Ct. 1999); *Masterson v. State ex rel. Bryant*, 329 Ark. 443, 447 (Ark. 1997); *Div. of Health, Dep’t of Health & Welfare v. Rogers*, 179 N.J. Super. 389, 396 (Ch. Div. 1981); *State v. Joint Board, Nursing Home & Hospital Employees Div.*, 56 A.D.2d 310, 318 (N.Y. App. Div. 2d Dep’t 1977).

74 *State ex rel. Cordray v. Marshall*, 123 Ohio St. 3d 229, 915 N.E.2d 633 (Ohio 2009); *State ex rel. Pruitt v. Steidley*, 2015 OK CR 6, P14 (Okla. Crim. App. Apr. 22, 2015)

75 *DeGiacomo v. Quincy*, 476 Mass. 38 (Mass. 2016); *Matter of Schneiderman v Tierney*, 2015 N.Y. Misc. LEXIS 1732 (N.Y. Sup. Ct. May 18, 2015); *Anderson v. Suthers*, 2013 COA 148 (Colo. Ct. App. Nov. 7, 2013); *Wilson v. Dallas*, 403 S.C. 411, 455 (S.C. May 8, 2013) (“It goes almost without saying that the AG, like the attorneys general of most states, has common law and statutory authority to enforce trusts domiciled in the State of South Carolina”); *Patton v. Sherwood*, 152 Cal. App. 4th 339, 342 (Cal. App. 2d Dist. 2007) (“Under the common law, the state, as *parens patriae*, superintends the management of charitable trusts and acts through its attorney general.”); *Blumenthal v. Sharon Hosp., Inc.*, 2003 Conn. Super. LEXIS 1657 (Conn. Super. Ct. June 3, 2003); *Gilmore v. Tauber*, 40 Va. Cir. 56, 57-58 (Va. Cir. Ct. 1995); *Attorney General v. Rochester Trust Co.*, 115 N.H. 74, 76 (N.H. 1975).

76 Those states are Arizona, *State ex rel. Woods v. Block*, 189 Ariz. 269, 272, 942 P.2d 428, 431 (1997); Connecticut, *Blumenthal v. Barnes*, 261 Conn. 434, 804 A.2d 152 (Conn. 2002); Indiana,

The principles of the inherent power of an attorney general may be very ancient, but the traditional doctrine is highly relevant to the activities of today's attorneys general. The workings of the common law principle are evident in cases broadly construing the traditional role to authorize a wide variety of enforcement activities, ranging from enforcement of professional licensing laws⁷⁷ to the exercise of "common law powers of the attorney general to protect the environment."⁷⁸

In sum, the common law, if not expressly limited by constitution, statute, or judicial decision, provides power crucial to the fulfillment of an attorney general's responsibility. Courts have expanded the role of the state attorney general beyond representation of governmental entities to protection of the public's legal interest. As legislative and judicial recognition of the public interest has developed, the common law will continue to stand, as a firm basis for refinement of the attorney general's role as chief law officer of a sovereign state.

Courtesy Chapter

State ex rel. Steers v. Criminal Court of Lake County, 232 Ind. 443; 112 N.E.2d 445 (Ind. 1953) (*but see Zoeller v. E. Chi. Second Century, Inc.*, 904 N.E.2d 213, 218 (Ind. 2009) (subsequent adoption of the trust code enumerating the attorney general's role with regard to charitable trusts did not abrogate the common law view of the attorney general's authority, but codified it.); Iowa, *Motor Club of Iowa v. Department of Transp.*, 251 N.W.2d 510, 513 (Iowa 1977); Louisiana, *Saint v. Allen*, 172 La. 350, 358 (La. 1931); Maryland, *Philip Morris, Inc. v. Glendening*, 349 Md. 660, 674 (Md. 1998); New Mexico, *State v. Block*, 2011 NMCA 101 (N.M. Ct. App. 2011); Washington, *Goldmark v. McKenna*, 172 Wn.2d 568; 259 P.3d 1095 (Wash. 2011) and Wisconsin, *State v. City of Oak Creek*, 232 Wis. 2d 612, 626, 605 N.W.2d 526 (Wisc. 2000).

77 *Michigan State Chiropractic Ass'n v. Kelley*, 79 Mich. App. 789, 262 N.W.2d 676 (1978).

78 *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1406 (D.N.H. 1985).