

The Citizen's Advocate: A Perspective on the Historical and Continuing Role of State Attorneys General

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State attorneys general have been both praised and criticized for going beyond what has been characterized as their “traditional” role representing state agencies and issuing advisory opinions interpreting state law. Whether acting individually, using the resources of their own office, with or without the assistance of outside counsel, or collectively with other state attorneys general on multi-state cases, state attorneys general have effected significant results both in monetary and public policy terms. Those results, in turn, have garnered added attention to an office largely misunderstood in terms of its obligations as a protector of the rights and interests of the citizens of each respective state.

This paper will focus on the rationale for the progressive measures being taken by many state attorneys general for the benefit of citizens, using specific cases and issues involving a particular attorney general’s office, representative of those criticized as exercising powers beyond their authority. We will begin with a summary explanation of the historical and current bases of attorney general legal authority, as a predicate to establishing the proposition that “activist” attorneys general are doing precisely what those in their position are required to do to fulfill their obligations to the public.

I. HISTORICAL BASES OF ATTORNEY GENERAL AUTHORITY

The position of attorney general is rooted in the English legal system. For centuries, lawyers were appointed by the king to represent his legal interests in courts of law.¹ As early as the mid-thirteenth century, the “King’s Attorney” was assigned by the sovereign to represent the crown in various civil and criminal matters of law.² Indeed, by 1400, the King’s Attorney could appear in all courts regarding any matter concerning the crown.³ The ability of the King’s Attorney to appear in any court in England

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¹ STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 3 (Lynne M. Ross ed., BNA Books, 1990).

² JOHN EDWARDS, THE LAW OFFICERS OF THE CROWN 14-16 (Sweet and Maxwell, 1964).

³ *Id.* at 35.

gave rise to the title “attorney general” and, with it, life tenure and the recognition of the position as the “leading officer in the legal department of the state.”⁴ As well, in 1461, the Attorney General of England was authorized to appoint subordinates to assist in his broad representational obligations.⁵

From the early 1500’s through the pre-American Revolutionary War period came an expansion of the powers of the Attorney General of England. With it, a constitutional and institutional struggle developed to define the role of the attorney general. Both houses of Parliament and the King and his ministers vied to have the attorney general as their advocate. As a result, by the mid-1700’s, the Attorney General of England “emerged as legal advisor to the Crown’ and ‘appeared on behalf of the Crown in the courts,’ but also gave legal advice to all departments of state and appeared for them if they wished to take action in the courts.’ The Attorney General of England thereby, over time, became less of the ‘King’s lawyer’ and more a public official responsible for justice.”⁶

As England colonized the Americas, the legal matters of the Crown were handled by attorneys general appointed in each of the colonies. These New World lawyers complained of scant resources, ill-defined statutory frameworks, and lack of direction from England.⁷ English common law, naturally, provided the basis for much of their authority. The unique nature of the settlers in each of the colonies, such as their countries of origin and the political philosophies of their colonial leaders, also influenced the laws of the various colonies. Accordingly, “the wide variety of duties undertaken by colonial attorneys general resulted in different development of the office from colony to colony.”⁸

The differences in the institutional authority of attorneys general among the states remain today. While all fifty states, and the jurisdictions of the District of Columbia, Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and Samoa, now have attorneys general, the powers of these attorneys general and the institutional means by which their authority is derived differ. Moreover, the individual priorities of the attorneys general vary greatly as well.⁹

The office of attorney general is constitutionally established in forty-four of the fifty states. The remaining states have offices established by statute. The authority granted state attorneys general by their state constitutions differs between states. As well, that authority has been interpreted differently by the various state courts. Many constitutions, for example, charge attorneys general to perform duties “prescribed by law.”¹⁰ In some states, such as Illinois, this language has been interpreted to give the attorney general broad common law powers that may not be limited by the courts or the legislature. In most states, however, courts recognize legislative limits on constitutional grants of common law authority.¹¹ Some states, such as Wisconsin, specifically preclude use of common law authority by the attorney general. State statutes and

⁴ *Id.* at 27.

⁵ *Id.* at 26-27.

⁶ Rita Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 AM. J. LEGAL HIST. 304, 307-311 (1958).

⁷ Sewall Key, *The Legal Work of the Government*, 25 VA. L. REV. 165, 169-73 (1938).

⁸ See Ross, *supra* note 1, at 8.

⁹ *Id.* at Appendix A.

¹⁰ *Id.* at 34.

¹¹ *Mem’l Hosp. Ass’n, Inc. v. Knutson*, 239 Kan. 663, 722 P.2d 1093 (Kan. 1986).

court decisions also shape the parameters of each attorney general's ability to act. Again, this creates disparities in the powers granted individual attorneys general.

Despite the differences in the authority of attorneys general, there exists a certain commonality in the duties assigned to the office. In virtually all states, attorneys general control most, if not all, litigation concerning the state and act as the state's chief legal officer.¹² In addition, attorneys general have the ability to opine on issues that require a clarification of law. Modern attorneys general often provide programs for public education and outreach, as well. The criminal enforcement obligations of attorneys general vary greatly from state to state; however, most have some primary prosecutorial authority and the ability to investigate matters of legal concern. Simply stated, while these duties may differ, every attorney general has an obligation to enforce the law.

II. POLICY REASONS FOR CURRENT USE OF EXISTING AUTHORITY

“The existing system has many powerful friends because the status quo always has powerful friends. Those who benefit from the status quo never want change.” These are among the remarks of then-New York Attorney General Eliot Spitzer at the National Press Club in January 2005. His speech focused on the role of government in defining the boundaries of ethical business conduct. In his remarks, Spitzer referred to the controversy surrounding the efforts of President Theodore Roosevelt to combat business cartels, a success story that paved the way for the economic expansion the United States experienced in the last century. Noting that Roosevelt was reviled by business leaders who invoked free market principles to defend their illegal practices, Spitzer pointed out that government intervention was essential then, as it is now, to enforce the law and safeguard the integrity of the marketplace.¹³

In that context, not much has changed since Roosevelt's era, except that the role of enforcing the law, including instances when such enforcement has nationwide implications, is one increasingly abandoned by federal authorities and thus assumed, necessarily, by the states. For example, state attorneys general, not the United States Justice Department, spearheaded the effort to recover billions of taxpayer dollars spent on health care for those suffering from the myriad ills related to cigarette smoking. Antitrust specialists working in state justice departments meet regularly to coordinate review, and possible litigation, involving corporate mergers, an area where federal enforcement has fallen off dramatically. Witness that colossal mergers between 1998 and 2002 halved the number of oil refiners supplying our national thirst for gasoline, the retail price of which has skyrocketed along with oil company profits.¹⁴ No wonder state attorneys general have responded with efforts to investigate whether unlawful collusion might explain those spikes as well as historical highs in the price of natural gas.

Perhaps most telling is the failed attempt by the United States Environmental Protection Agency to assert that it *lacked* authority to regulate noxious emissions

¹² See Ross, *supra* note 1, at 12.

¹³ Eliot Spitzer, New York Attorney General, Business Ethics, Regulation and the “Ownership Society,” Address Before the National Press Club, Washington, D.C. (Jan. 31, 2005) (transcript available from State of New York, Office of the Attorney General, 120 Broadway, New York, NY 10271).

¹⁴ Mark N. Cooper, *The Role of Supply, Demand, Industry Behavior and Financial Markets in the Gasoline Price Spiral*, May 2006, at 13, available at <http://www.doj.state.wi.us/docs/gasoline.pdf> (last visited May 16, 2007) (Prepared for Wisconsin Attorney General Peggy A. Lautenschlager).

emanating from motor vehicle exhaust.¹⁵ Citizens trusting in the nation's chief steward of our air and water should revisit any confidence placed in that agency to safeguard our vital resources, given its willingness to plead to the United States Supreme Court that a major source of air contamination is not its concern. State attorneys general, a few cities and environmental groups brought the case, and in so doing won a pivotal decision confirming that states have standing to take legal action to enforce protection of natural resources falling within their domain.¹⁶

Lately, when the federal government has moved to regulate a certain type of activity, its efforts have often countermanded state measures aimed at protecting citizens. For example, when states passed laws allowing citizens to stop most types of telephone solicitation—the wildly popular “No Call” laws—state attorneys general banded together to oppose federal legislation that could have pre-empted, and weakened, the state statutes.¹⁷ State attorneys general are also increasingly vocal about international treaties, designed and negotiated by federal authorities, that have the incidental effect of overriding state laws, such as those restricting illegal gambling.¹⁸

Those favoring a status quo reflected by current federal action, or inaction, tend to disparage the individual and collective efforts of state attorneys general as unconstitutional violations of the separation of powers doctrine, improper usurpation of the legislative prerogative to effect public policy, and wholly incompatible with the notion of federalism.¹⁹ The first and third arguments, concerning separation of powers and federalism, have been refuted quite persuasively.²⁰ Succinctly put, the doctrine of separation of powers pertains to the division of authority among the three federal branches; it does not apply to the states.²¹ Federalism precludes state action that is either permanently limited by the Constitution or contingently limited by congressional grants of authority to states in otherwise constitutionally prohibited areas, or in areas where the states and federal government share authority.²² A thorough discussion of federalism as it pertains to cases brought by state attorneys general is outside the scope of this paper.²³ However, at base, federalism prohibits states from usurping power bestowed upon the federal government, and vice-versa. As will be discussed in the next section, state attorneys general are, individually and in partnership, exercising powers in areas long recognized as matters legitimately within state control, or in

¹⁵ *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. ___, 127 S.Ct. 1438 (2007).

¹⁶ *Envtl. Prot. Agency*, 127 S.Ct. at 1454. Notably, the Court quoted extensively from *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907), which held that a state has standing to protect its citizens from air pollution originating beyond its borders.

¹⁷ Comments from National Association of Attorneys General to the Federal Trade Commission (Apr. 2002), available at <http://www.ftc.gov/os/comments/dncpapercomments/04/naag.pdf> (last visited May 16, 2007).

¹⁸ In 2005, the World Trade Organization ruled that the General Agreement on Trade in Services (GATS) overrides federal, state and local restrictions on gambling. Just recently, the United States Government announced that it would withdraw its global trade agreement to open United States markets to foreign gaming services.

¹⁹ See, e.g., Robert J. Gaglione, *The Modern Role of State Attorneys General: A New Activism*, THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES, Jan. 16, 2007, available at: http://www.fed-soc.org/publications/pubID.41/pub_detail.asp (last visited May 16, 2007).

²⁰ Jason Lynch, *Federalism, Separation of Power, and the Role of State Attorneys General in Multi-State Litigation*, 101 COLUM. L. REV. 1998 (2001).

²¹ *Id.* at 2027, n. 165 (citing Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51, 53 (1998)).

²² *Id.*

²³ See Lynch, *supra* note 20.

areas such as antitrust, where federal and state authority is concurrent. Contrary to what one might expect, if the claims of critics had any merit, the overwhelming majority of cases brought by state attorneys general are not falling victim to constitutional challenges based on federalism.

The remaining criticism concerns policymaking: are state attorneys general appropriating traditionally legislative functions by effecting changes in public policy through lawsuits? This complaint arises most likely, although not exclusively, from successes achieved in the long standing practice of several states coordinating their individual cases, legal theories and resources to effect a common enforcement objective. These collective actions are known as multi-state litigation.²⁴ Those interested in maintaining a system where powerful, moneyed interests are able to overwhelm individual state efforts to enforce the law despise the leveled playing field created when states work cooperatively. Yet multi-state cases differ only to the degree that they bring greater efficiency and more resources to bear upon an issue than states acting alone. The actions of each and every attorney general remain constrained by the grant of authority his or her state law confers, as permitted by the federal Constitution. Law enforcement involves the effectuation of public policy, as reflected in the law; it is not the genesis of public policy. A much better argument could be made that those who have authority to enforce the law, but who choose not to exercise that authority, are thwarting the objectives of policymakers.

Attorneys general have an obligation to the citizens they represent to enforce the law. Moreover, states on their own often lack the ability to act against a well-financed offender; and for individual citizens, that ability is much less, particularly when faced with jurisdictional hurdles requiring proof of substantial monetary losses and causes of action available to the sovereign, but not the citizen.²⁵ Nonetheless, those with interests in maintaining the status quo continue to describe such efforts to enforce the law as “overreaching,” and misrepresent the significance of individual cases brought by attorneys general. The following is a sampling of cases and issues involving our own state, Wisconsin, which inspired cries of attorney general activism similar to those levied against other state attorneys general.

III. ACTION (RATHER THAN ACTIVISM) IS THE OPPOSITE OF DORMANCY

The claim that one is an activist attorney general, meant in an accusatory fashion, spawns the rhetorical rejoinder: who, besides lawbreakers, favors an inactive attorney general? Activism is a relative term, measured in the context of authority conferred and resources available. Thus, comparisons of the actions taken by attorneys general from state to state must factor in the recognition that the offices share many similarities, but also some profound differences, as outlined above.

²⁴ Just this month, in his presidential inaugural remarks to the National Association of Attorneys General, Idaho Attorney General Lawrence Wasden reminded the audience of the historic role played by state attorneys general in multi-state actions in the last century. “In 1907 the first multi-state was directed at the Standard Oil monopoly. One hundred years later, one of our more common citizen complaints is the ‘price of gas,’” Wasden noted. Lawrence Wasden, Idaho Attorney General, NAAG President’s Inaugural Remarks, Atlanta, GA (June 21, 2007) (transcript available at <http://www.naag.org>).

²⁵ For example, citizens seeking redress in federal court based on diversity of citizenship must allege damages exceeding \$75,000. See 28 U.S.C. § 1332; *Envtl. Prot. Agency*, *supra* note 16, at 1453-54 (stressing that states have special standing to protect their broad sovereign interests, whereas citizen litigants must establish more concrete, particularized harms).

A. GLOBAL WARMING

Environmental protection cases are a lightning rod for those opposed to enforcement actions brought by attorneys general. One such case was cited in an article critical of the “modern” role of attorneys general.²⁶ There, Wisconsin’s attorney general, in conjunction with attorneys general from seven other states, and the City of New York, brought an action against the five largest coal burning utilities in the United States. One opponent of the case described it as follows:

... The most aggressive state attorneys general such as New York’s Eliot Spitzer “have become nationally prominent as a result of their enforcement activism.” Recently, Spitzer and seven of his fellow state AGs sued the nation’s five largest public utilities, even though none of the utilities are located in their states. The lawsuit sought a three percent annual reduction in carbon dioxide emissions over the next decade. “Never mind that the AGs have neither the authority nor the responsibility to act in the broader national interest,” writes Cato Institute Senior Fellow Robert Levy. Indeed, the state AGs are increasingly performing the function that Congress and federal regulatory agencies are supposed to carry out as well as saddling the general public with tax and regulatory burdens that were never voted on by elected representatives.²⁷

The case was brought on the grounds that these utility companies run coal-fired power plants that emit grossly excessive amounts of carbon dioxide, a byproduct of burning coal unhealthy to human beings and almost universally accepted as a major contributor to global warming. The defendants’ conduct, it was alleged, constituted a public nuisance—a common law cause of action steeped in hundreds of years of jurisprudence and defined in this context as an activity having an injurious effect on the health or welfare of the public.²⁸ The plaintiff states and city sought to effect relatively minor reductions in these emissions over the course of a decade, allowing the defendants considerable latitude in determining how that could be accomplished.

Ultimately, the need to bring the case arose because the federal government and coal burning utility companies failed to implement any meaningful measures to address a matter of worldwide significance. The reality and impact of global warming need not be reiterated here; it is significantly troubling that state attorneys general, while attempting to employ a well-established legal practice as the basis of an action brought to safeguard the health and welfare of their own constituents, would be accused of improperly interfering with a matter of purely national interest.²⁹ As an example, one of the defendant utility companies does operate a coal-fired power plant

²⁶ See Gaglione, *supra* note 19.

²⁷ Gaglione, *supra* note 19, at 10, quoting John Fund, Cash In, Contracts Out: The Relationship Between State Attorneys General and the Plaintiff’s Bar, Report of the United States Chamber of Commerce’s Institute for Legal Reform (Oct. 14, 2004).

²⁸ See, e.g., 66 C.J.S. Nuisances § 4 (1998 ed.) (Public nuisance “includes conduct that significantly interferes with public health, safety, peace, comfort or convenience....”).

²⁹ *State of Connecticut, et al. v. American Elec. Power, et al.* 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (finding that the issue presented a political question, and thus dismissed the case). Whether that holding survives an appeal, and Supreme Court authority recognizing the right of states to protect their citizens from internally and externally generated air pollution, remains to be seen.

in Wisconsin,³⁰ and each of the plaintiff states and city suffers from the documented impacts of air polluted by coal burning power plants. The recent United States Supreme Court decision regarding automobile emissions³¹ should serve as reminder that air pollution does not respect political boundaries, and that state attorneys general have the legal authority and moral responsibility to take action to address unlawful conduct that is harmful to the public.

B. IN FACT, ALL POLITICS IS CRANBERRIES ...

... in Wisconsin, at least. The cranberry is Wisconsin's state fruit, and Wisconsin produces more cranberries, at last count, than any other state. Doubtless that is why cranberry operations in Wisconsin are allowed by statute to impact state waters in certain ways others may not,³² in addition to rights all farmers enjoy under the state Right to Farm Act.³³ Wisconsin's constitution, however, recognizes public ownership of navigable waters (the Public Trust Doctrine), which converges with the doctrine of public nuisance, essentially prohibiting substantial interference with the public's use of its waterways. The state attorney general is authorized to take action to enforce the Public Trust Doctrine and combat public nuisances.

In 2004, the state filed suit against a single cranberry grower whose operations, the state alleged, had badly polluted a large area of the state's eighth largest lake, creating a public nuisance and depriving the public of waterway use. The case was tried to a judge, who issued written findings that the defendant had intentionally polluted the lake and that he had interfered with the public's use of its waterway. The judge stopped short of finding that a public nuisance existed; however, he warned the defendant that he was well on the way to creating one.³⁴ As of this writing, the case is on appeal.

The case became a major political issue, with members of the Republican-controlled legislature threatening to rescind the attorney general's authority to bring nuisance cases. To many, it apparently was irrelevant that the judicial opinion affirmed nearly all of the contentions made by the state, or that this particular cranberry grower's operation was woefully out of line with current practices employed by the vast majority of those in the business. Elements dedicated to insulating the larger business community from the enforcement of state laws, particularly environmental laws, asserted that the attorney general had overstepped her role and should be replaced.

This case illustrates how well-financed opposition to a public servant's efforts to protect public resources can succeed in creating the impression that a singular civil prosecution of an alleged lawbreaker amounts to an assault on an entire industry, and that laws must be changed for fear that any person or business could be next in the crosshairs. The lesson to politicians in Wisconsin is clear: cranberry growers, and no doubt others with sufficient financial and political clout, can do no wrong, even if they do.

³⁰ Xcel Energy, Inc., one of the five defendant utility companies, controls Northern States Power of Wisconsin, and operates a coal burning plant in Ashland County, Wisconsin. See <http://www.xcelenergy.com> (last visited Jun. 1, 2007).

³¹ See *Envtl. Prot. Agency*, *supra* note 16.

³² In general, cranberry growers are allowed to construct ditches and divert water to their bogs. See Wis. Stat. § 94.26.

³³ Wis. Stat. § 823.08.

³⁴ *State v. Zawistowski*, Case No. 04-CV-75 (Sawyer County (Wis.) Circuit Court 2006).

C. STRONG CAPITAL MANAGEMENT CO.

The New York Attorney General is among the relatively few state attorneys general empowered with a staff sufficiently large and experienced in certain specialty areas to handle multiple complex cases with little or no outside assistance. This ability, coupled with the fact that New York is the hub of financial markets in the United States, allowed then-Attorney General Eliot Spitzer to pursue simultaneous investigations of several mutual funds for a variety of regulatory violations, including market timing and late trading. Given the targets, it was no surprise that his efforts drew acclaim in some circles and considerable ire in others. Among the critics, the *Wall Street Journal* labeled Spitzer the “Lord High Executioner” and considered his pursuit of mutual fund executives “overzealous prosecution.”³⁵

One of the mutual funds investigated by Spitzer’s office and the Securities Exchange Commission was Strong Capital Management Co. (“SCM”), headquartered in Menomonee Falls, Wisconsin. SCM not only was a large employer and significant presence in the Milwaukee area, it also managed funds invested through EdVest, Wisconsin’s program allowing parents to establish accounts to pay for their children’s higher education. The announcement of Spitzer’s investigation, which focused on the unlawful trading activities of SCM’s founder, chairman and primary owner, Richard Strong, triggered grave concern in Wisconsin that SCM might vanish, and with it the jobs and college savings of many Wisconsin residents.

In early 2004, recognizing the significance of this investigation to Wisconsin citizens, the state attorney general directed lawyers from the Wisconsin Department of Justice to contact Spitzer’s staff and join forces in the SCM investigation. The resulting teamwork, along with the cooperation of the SEC, culminated in a civil settlement with SCM and Richard Strong involving \$140 million in disgorged profits and fines, along with reduced fees to SCM investors valued at an additional \$35 million. Richard Strong agreed to a lifetime ban from the securities industry. Moneys generated from the settlement are to be disbursed to investors, while the swift disposition enabled SCM to remain in business under new ownership.

Clearly, the work of these state lawyers and their investigators, under the direct supervision of two state attorneys general, remedied corrupt practices in a company trusted with the investment funds of thousands of families and removed a repeated violator from the investment business. Fortunately, the unabashed criticism of such cases did not succeed in undermining measures necessary to clean up the mutual fund industry and restore integrity to that vital financial market.

IV. OPINIONS, AMICUS BRIEFS AND OTHER WAYS TO GET BRANDED AN “ACTIVIST”

Issuing advisory opinions on questions of state law is a responsibility shared by all state attorneys general.³⁶ Statutory or constitutional requirements as to whom opinions must be given or what subjects may be addressed differ among states, but the duty of issuing opinions is considered an inherent aspect of every attorney general’s job.³⁷

State attorneys general also frequently participate as *amicus curiae* in federal cases, particularly when the issues before a court somehow impact state agencies or state

³⁵ Editorial, *Thanksgiving News: American is a lucky country. Here are five reasons why.*, WALL ST. J., Nov. 23, 2005.

³⁶ See ROSS, *supra* note 1, at 61.

³⁷ *Id.*

laws. It is a common practice that a single state will author an *amicus* brief and circulate it among other state justice departments, through the National Association of Attorneys General, for other state attorneys general to sign on. State attorneys general engage in a similar practice involving letters to federal agencies or Congress on topics deemed significant to their states.

Attorneys general have varying responsibilities when reviewing pending legislation or proposed amendments to the state constitution. For example, in Wisconsin the attorney general may be asked for an opinion on the constitutionality of a bill, but must provide a written explanation of the meaning and legal impact of a referendum to amend the state constitution.³⁸ Of course, the fulfillment of any one of these or many other authorized duties may subject an attorney general to criticism and charges that she is using the office improperly to pursue a personal agenda.

Over the past four years the Wisconsin Attorney General's Office issued countless formal and informal opinions, signed on to dozens of *amicus* briefs and letters to federal officials, and provided written explanations regarding two proposed amendments to the state constitution. A handful of these actions sparked statewide attention, and in some quarters, criticisms such as: "We have an activist attorney general on the loose!" Three examples will suffice.

A. THE MARRIAGE AMENDMENT

In 2006, the Wisconsin legislature, both houses then firmly in the hands of partisan conservatives, maneuvered two referenda onto the November ballot that would amend the state constitution. One of those provisions was intended to outlaw any marriage other than one between a man and a woman, already a feature of a state statute defining marriage accordingly. However, the referendum went further, stating: "(a) legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state."³⁹

What, exactly, did that clause mean? Would the amendment affect guardianships? Powers of attorney? Authorizations to make health care decisions? What competent attorney would not envision a host of legal issues arising from that clumsy and wholly unnecessary provision? That, in essence, is how the state Justice Department considered that language, which is why the attorney general's written explanation of the amendment pointed out that the scope of that clause "would be left to further legislative or judicial interpretation."⁴⁰

The objective legal observation that the proposed amendment raised questions inviting judicial or legislative review was attacked by gay marriage opponents as a calculated attempt to torpedo the referendum. Ironically, those pushing for the amendment's passage rationalized their position using the theory that activist judges could misinterpret or override the existing state law limiting marriage to heterosexual couples. But, if the attorney general's assessment proves correct, state courts and/or the new legislature now will have ample opportunity to clarify what voters now have approved.

³⁸ Wis. Stat. § 10.01(2)(c).

³⁹ 2005 Enrolled Joint Resolution 30 (Wis.).

⁴⁰ Letter from Peggy A. Lautenschlager, Wisconsin Attorney General, to Kevin J. Kennedy, Executive Director of the State of Wisconsin Elections Board (Aug. 4, 2006) (on file with State of Wisconsin Elections Board, 17 West Main Street, Suite 310, Madison, WI 53703).

B. NO CHILD LEFT BEHIND

Amicus briefs often are the subject of discussion among attorneys general and their staff because a pointed concern exists regarding the use of briefs to advance views on politically-charged issues, some of which are of arguable relevance to inherent state interests.⁴¹ By contrast, federal cases that impact state spending, the enforcement of state laws, or the health and welfare of all citizens logically invite input from state attorneys general.

One of the latter cases involved the federal No Child Left Behind Act (NCLB), a controversial measure directing states to comply with unfunded educational mandates in matters previously within state and local purview only. In 2004, in response to a state senator's request for an opinion, the Wisconsin Attorney General responded that NCLB's own provisions rendered it unenforceable, since the federal law included no federal funding yet precluded states and localities from having to pay for compliance costs.⁴² In 2006, Wisconsin joined Connecticut in an *amicus* brief, filed in *Pontiac School District v. Secretary of Education*, arguing that NCLB was unconstitutional.⁴³

The arguments against NCLB seemingly reinforced fiscal and social conservatives' long-held opposition to federal interference with matters of state and local concern. Nonetheless, forces favoring public financing of private education, among them many of today's conservative politicians and commentators, argued that NCLB opponents were carrying water for the teachers unions and propping up unsuccessful public school systems. Ironically, it was the state attorneys general—those attacked as “activists”—who were taking a traditionally conservative stance while costly systemic changes and increased federal control found support on the political right.

C. HEALTH CARE IN EMPLOYMENT SITUATIONS

In 2004, the Secretary of the Wisconsin Department of Health and Human Services requested an opinion on whether excluding contraceptives from an employer-sponsored benefits program covering prescription drugs violated Wisconsin laws prohibiting sex discrimination. Many states have so called “contraceptive equity” laws in place; Wisconsin does not, but that does not mean that Wisconsin law permits inequity. Thus, the attorney general issued an opinion that because the Wisconsin Fair Employment Act (WFEA)⁴⁴ essentially prohibited employment discrimination in terms, conditions or privileges of employment on the basis of sex, it also did not allow employers to exclude prescription contraceptives from benefit plans that provide prescription drug coverage.⁴⁵

Despite the reality that many employers in Wisconsin were including contraceptives in the benefit plans they provided, and that case law interpreting WFEA had long disapproved of gender-related disparities in employer-sponsored health care plans,

⁴¹ See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004). One might claim, for example, that the input of state attorneys general, alongside the United States Department of Justice, was not vital to an informed analysis of whether the “under God” language in the nation's Pledge of Allegiance withstood First Amendment scrutiny.

⁴² Letter from Peggy A. Lautenschlager, Wisconsin Attorney General, to Senator Fred Risser (May 12, 2004) (on file with Wisconsin Department of Justice, 17 West Main Street, Madison, WI 53703).

⁴³ *School Dist. Of City of Pontiac v. Spellings*, 2005 WL 3149545, (E.D. Mich., Nov. 23, 2005).

⁴⁴ Wis. Stat. §§ 111.31-111.395.

⁴⁵ Op. Wis. Att'y Gen. (Dec. 27, 2006).

the attorney general's opinion was headline news in the state. Supporters of reproductive rights hailed the advisory opinion, while in this instance vocal opposition to it was more muted. Nonetheless, adherence to clearly established legal precedents, as in this opinion, did not stop political opponents from making broad allegations during the ensuing years that a political agenda drove the attorney general's decision-making, contrary to the duty of that office to enforce the law.

V. CONCLUSION

There is little doubt that the efforts by state attorneys general to enforce the law, through both criminal and civil proceedings, are having a substantial—and positive—impact on business conduct, civil rights protections and the public welfare. Those whose interests may be threatened by these efforts sometimes attack them as “activism.” However, upon closer inspection, the conduct that is attacked is no more than the exercise by state attorneys general of their lawful authority to do exactly what public servants in their position ought to do: protect law-abiding businesses from unfair advantages obtained by law-breaking competitors; recover taxpayer and consumer dollars from those marketing dangerous products or engaging in fraudulent conduct; and safeguard the rights, interests and health of citizens. Performing these functions is not “activism” in the pejorative sense intended by critics; it is the proactive fulfillment of the traditional duty of attorneys general to enforce the law. The good people of a state expect and deserve no less.

