

B524: Representing the State

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Short Description: State attorneys general have long represented and advised government officials, handled criminal appeals, and protected consumers from unfair trade practices. Nowadays, in many states they are expected to play a role in any social crisis that arises. This course will offer a systematic treatment of how and why state attorneys general function as they do. This is a writing class (satisfying the writing course graduation requirement) where, in lieu of a final exam, students will write two short papers (1000-1500 words) and participate in 2-3 all-class projects.

Instructor's General Approach: The class is designed both to provide instruction as to the various tasks and roles of state attorneys general and to promote skeptical thought and discussion about what those tasks and roles should be. I intend to use a variety of modes to convey relevant information, including not only traditional reading materials but also brief audio and video presentations in class. My objective is to approach the subject from a national perspective. That said, in my view the Indiana experience provides useful examples of some common attorney general undertakings, and in some cases yields pioneering work with respect to emerging issues. Consequently, the course will probably feature texts and examples from Indiana more than any other single state, but that is not meant to suggest an Indiana-centric view. On the other hand, I am the Solicitor General of Indiana, so I suppose some level of Indiana-centrism is inevitable.

Readings: All assigned readings aside from the main textbooks will be supplied electronically on the class web page. Because this is a writing class, we will review various types of writings that lawyers can be expected to master both as writers and as readers, including judicial opinions, scholarly writings, advisory opinions, statutes, regulations, and legal pleadings.

The class features a fair amount of reading, though nothing beyond what upper-class law students should be able to handle for weekly two-hour sessions. Where possible, I have indicated particular pages to read rather than an entire case or text.

Note that some readings are listed under “Further Reading.” Each class will cover multiple topics, and my recommendation is that you complete all assigned readings, then select additional pieces from the “Further Reading” list that focus on one or two particular topics for that week that you will be especially well prepared to discuss. I will often draw upon the “Further Reading” in class lectures and discussions.

I encourage students to supplement the assigned readings even further by reviewing the James Tierney memo and web sites listed below and perhaps by discovering, and sharing with the class, other Internet sites or blogs that touch on relevant issues. Since this class encompasses issues that are frequently in the news, students should also make a habit of reading the Wall Street Journal on a daily basis, particularly the op-ed page, which mentions state AG activities with moderate frequency.

Writing Assignments: The individual writing assignments include a white paper and portions of a hypothetical Supreme Court multi-state amicus brief. The intent is that significant further research besides the texts supplied will be unnecessary for each paper, though it is possible that some fairly limited external research will be helpful. Students should bear in mind that the assigned writings are to be independent thought pieces rather than exhaustive scholarly treatments. Please submit all writing assignments in Microsoft Word format so that I can easily make comments and edits.

Class Projects: We will take advantage of our small class size by incorporating all-class projects into the syllabus. Below are brief descriptions of class projects:

1. **Advisory Opinion:** Ideally, the class will consider, analyze, and draft an actual advisory opinion responding to a request from an OAG client. N.B.: Students will be expected to disclose any legally significant conflicts of interest (though the instructor anticipates none), maintain appropriate confidentiality, and otherwise conduct themselves according to the rules and norms of professional responsibility. Given the nature of this type of document, the very existence of

Required Texts:

1. STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES (Emily Meyers ed., 3d ed. 2013);
2. Paul Nolette, FEDERALISM ON TRIAL (2015) (University Press of Kansas)

Helpful Summary of AG Powers and Collection of Further Readings: Memo to Attorneys General-Elect from James E. Tierney, Director, National State Attorney General Program at Columbia Law School (November 20, 2008).

SCHEDULE OF MEETINGS AND COURSE ASSIGNMENTS

UNIT ONE

INTRODUCTIONS

August 17, 2017: **Introduction to the role of State Attorneys General Part I:** The history of AGs and their powers and duties; common law authority; constitutional v. statutory offices; *parens patriae*.

Assigned Reading

State Attorneys General: Chapters 1-3 & pp. 95-97

Paul Nolette, *Federalism on Trial* Chapter 1 (2015)

Felix Morley, *Freedom and Federalism* 10-11 (1959)

Samuel H. Beer, *To Make a Nation: The Rediscovery of Federalism* 292-95 (1993)

Michael S. Greve, *The Upside-Down Constitution* 50-62 (2013)

Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266, 268-70, 273-74 (5th Cir. 1976)

Massachusetts v. Mellon, 262 U.S. 447, 485-86 (1923)

August 24, 2017:

Introduction to the Role of State Attorneys General Part II: Responsibility for developing legal policy for the state; exclusive litigation authority.

Assigned Reading

State Attorneys General: Chapter 4

Authority Over Litigation

Hollingsworth v. Perry, 133 S. Ct. 2652 (2013), **Majority Opinion Part III, Dissent Parts II.A., II.B.**

State ex rel. Sendak v. Marion County Superior Court, 373 N.E.2d 145, **149** (Ind. 1978)

Perdue v. Baker, 586 S.E.2d 606, **607-10, 612-13, 617-18** (Ga. 2003)

In re Opinion of Justices (Requiring Attorney General To Join Lawsuit), 27 A.3d. 859, **865-71** (N.H. 2011)

Authority over Legal Policy

Sec’y of Admin. & Fin. v. Attorney General, 326 N.E.2d 334, **338** (Mass. 1975)

Feeney v. Commonwealth, 366 N.E.2d 1262, **1265-67** (Mass. 1977)

Alliance, AFSCME/SEIU, AFL-CIO v. Commonwealth, 682 N.E.2d 607, **610-11** (Mass. 1997)

Terry v. Wilder, 29 Va. Cir. 418 , 1992 WL 885093 (Va. Cir. Ct. 1992)

Further Reading

Letter from California Department of Justice to California Supreme Court, *Joshua Beckley v. Arnold Schwarzenegger (Perry)*, No.S186072 (Cal. Sept. 8, 2010)

Arizona State Legislature v. Arizona Indep. Redistricting Comm., 135 S. Ct. 2652 (2015)

August 31, 2017:

Introduction to the Role of State Attorneys General Part III: Attorney-client relationships; ethical implications of professional and political independence; summary discussion of AG's role and AG independence.

Assigned Reading

State Attorneys General: Chapter 4

Attorney-Client Privilege and other Professional Responsibility Issues

State ex rel. Leslie v. Ohio Hous. Fin. Agency, 824 N.E.2d 990, **992-99** (Ohio 2005)

James E. Tierney, *The Ethics of Positional Conflicts for State Attorneys General*; "Do the Model Rules Provide Meaningful Guidance?" (June 18, 2009)

Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 Wash. U. L.R. 1033, **1034-39, 1049-73, 1085-91** (2007)

People ex rel. Salazar v. Davidson, 79 P.3d 1221, **1229-31** (Colo. 2003) (en banc)

Commonwealth ex rel. Beshear v. Commonwealth ex rel. Bevin, 2016 Ky. LEXIS 435 (Ky., Sept. 22, 2016).

The Independence of State AGs

Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. Fla. J.L. & Pub. Pol'y 1, **2-15** (1993)

Timothy Meyer, Comment, *Federalism and Accountability: State Attorneys General, Regulatory Litigation and the New Federalism*, 95 Cal. L. Rev. 885, **Part II** (2007)

William P. Marshall, *Break up the Presidency? Governors, State Attorneys General and Lessons from the Divided Executive*, 115 Yale L.J. 2442, **2451-63** (2006)

Justin G. Davids, *State Attorneys General and the Attorney-Client Relationship: Establishing the Power to Sue State Officers*, 38 Colum. J.L. & Soc. Probs. 365, **Introduction, Parts III, IV.A.1, IV.B, IV.C.1, IV.C.3, V, VI** (2005)

Written Opinion on Remand Order, *Sanford v. McMaster*, No. 3:09-cv-01322-JFA (D.S.C. June 12, 2009)

Further Reading

Commonwealth ex rel. Hancock v. Paxton, 516 S.W.2d 865, **867-68** (Ky. Ct. App. 1974)

September 6, 2017: Paper 1 due on the following topic:

To what extent has development of the Anglo-American rule of law benefitted from the advent of the role of attorney general? What implications does that relationship have for the debate over whether state attorneys general should be elected by a state's voters or appointed by a state's governor?

UNIT TWO

CORE FUNCTIONS

September 7, 2017: **Advisory, Consumer Protection:** Reviewing proposed contracts and regulations, producing legal opinions; deceptive consumer sales, CIDs.

Assigned Reading

State Attorneys General: Chapters 5 & 13

Advisory

Ind. Att’y Gen. Op. No. 2010-2 (July 12, 2010) (School bus rider fees)

North Carolina Board of Dental Examiners v. FTC, 135 S. Ct. 1101 (2015)

Consumer Protection

Indiana Code § 24-5-0.5, Deceptive Consumer Sales

Nu-Sash, Inc. v. Carter, 887 N.E. 2d 92 (Ind. 2008)

Announcement of off-label marketing settlement v. GSK (2014)

State ex rel. Suthers v. Tulips Invs., LLC, No. 11-ca-2367, 2012 WL 5871442 (Colo. App. Nov, 21, 2012)

Mississippi ex rel. Hood v. AU Optronics Corp., 134 S.Ct. 736 (2014)

September 8-29: Advisory Opinion

September 14, 2017: **Litigation Part I:** The varied roles of state attorneys general in criminal and civil cases; parallel proceedings; torts and common law sovereign immunity; federal claim immunities.

Assigned Reading

State Attorneys General: pp. 84-88; Chapter 17

Parallel Proceedings

Deferred Prosecution Agreement, *Commonwealth v. Power Fasteners, Inc.*, No. 2007-10802 (Suffolk County Super. Ct. Dec. 17, 2008)

State of Hawai'i v. Henry Ha'Alilio Peters, Findings of Fact, Conclusions of Law and Order Denying Defendant Jeffrey R. Stone's Motion to Dismiss

New Mexico Attorney General's Parallel Proceedings Policy

Torts

Ind. Code §§ 4-6-2-1

Indiana Tort Claims Act, Ind. Code §§ 34-13-3-3; 34-13-3-5(e)

Campbell v. State, 284 N.E.2d 733, **734-35, 737** (Ind. 1972)

Am. Dry Cleaning & Laundry v. State, 725 N.E.2d 96 (Ind. App. 2000)

Sovereign and Absolute Immunity in Federal Court

Alden v. Maine, 527 U.S. 706, **727-735, 741-754** (1999)

Ex Parte Young, 209 U.S. 123, **149-50, 155-56, 159-60** (1908)

Lapides v. Bd. of Regents of Univ. Sys. of Ga., 535 U.S. 613, **619-23** (2002)

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, **97-106** (1984)

Stump v. Sparkman, 435 U.S. 349, **355-60** (1978)

Imbler v. Pachtman, 424 U.S. 409, **422-30** (1976)

Tenney v. Brandhove, 341 U.S. 367, **372-77** (1951)

September 21, 2017: **Litigation Part II:** Civil rights/immunities; habeas corpus.

Assigned Reading

Civil Rights

42 U.S.C. §§ 1983, 1988

Ind. Code §§ 4-6-2-1.5

Will v. Mich. Dep't of State Police, 491 U.S. 58, **62-68** (1989)

Gonzaga Univ. v. Doe, 536 U.S. 273, **283-84** (2002)

Armstrong v. Exceptional Child Center, 135 S. Ct. 1378 (2015) (**highlighted portions**)

Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, **601, 605** (2001)

Harlow v. Fitzgerald, 457 U.S. 800, **807-11, 817-18** (1982)

Habeas corpus

28 U.S.C. § 2254

Heck v. Humphrey, 512 U.S. 477, **483-87** (1994)

Wilson v. Corcoran, 131 S. Ct. 13 (2010) (per curiam)

Metrish v. Lancaster, 133 S. Ct. 1781, **1788-92** (2013)

Parker v. Mathews, 132 S. Ct. 2148, **2155-56** (2012)

Further Reading

Thomas M. Fisher & Winston Lin, Order-of-Battle and Judicial Incentives: *How Camreta May Encourage Constitutional Articulation by Lower Courts* (2012)

State v. Evans, 810 N.E.2d 335, **337-38** (Ind. 2004)

September 28, 2017: **Litigation Part III:** Judicial review of agency action; duty to defend against claims of unconstitutionality; amicus and Supreme Court practice.

Assigned Reading

State Attorneys General: pp. 88-91, Chapter 22

Judicial Review

Developmental Servs. Alternatives, Inc. v. IFSSA, 915 N.E.2d 169, **176-81, 185-87, 189** (Ind. Ct. App. 2009)

People ex rel. Madigan v. Burge, 981 N.E.2d 1058, **1063-65** (Ill. App. Ct. 2012)

Constitutional Litigation

Gregory F. Zoeller, *Duty to Defend the Rule of Law*, 90 Ind. L.J. 513 (2015)

Amicus/Supreme Court

FRAP Rule 29

Supreme Court Rule 37.4

Ind. Code §§ 34-14-1-1, -11

Ind. Code § 34-33.1-1-1

Dan Schweitzer, Cert Petitions Filed by States (Terms 2007-2015)

Top 16 Cert Stage Amici (chart)

Further Reading

James Layton, *The Evolving Role of the State Solicitor: Toward the Federal Model?*, 3 J. App. Prac. & Process 533 (2001)

Symposium Transcript, *The Rise of Appellate Litigators and State Solicitors General*, 29 Rev. Litig. 545, **633-700** (2010)

Sendak v. Debro, 343 N.E.2d 779, **781-82** (Ind. 1976)

New Hampshire Right to Life v. Director, New Hampshire Charitable Trusts Unit, 2016 N.H. LEXIS 55 (N.H. June 2, 2016)

and

October 4, 2017: Paper 2 due on the following topic:

Write the interest of amicus curiae and summary of argument for a State Amicus Brief in a case identified by the instructor pending before the Supreme Court this term.

UNIT THREE

CUTTING EDGE

October 5, 2017: Regulation by Other Means: Attorneys general as social police agencies; multistate activity; tobacco MSA and enforcement; lead paint.

Assigned Reading

State Attorneys General: Chapter 21

Paul Nolette, *Federalism on Trial*, Chapter 2

Multistate Litigation

Jason Lynch, Note, *Federalism, Separation of Powers and the Role of State Attorneys General in Multistate Litigation*, 101 Colum. L. Rev. 1998 (**highlighted portions**) (2001)

Tobacco

National Association of State Budget Officers, Update on the Tobacco Master Settlement Agreement and Its Impact on States (2013)

Grand River Enters. Six Nations, Ltd. v. Pryor, 425 F.3d 158, **163-64, 168-70, 173** (2d Cir. 2005)

Lead Paint

State v. Lead Indus. Ass'n, 951 A.2d 428, **474** (R.I. 2008)

David J. Owsiany, *The Rise and Fall of Lead Paint Litigation in Ohio*, State AG Tracker, Vol. 1 (2009)

John O'Brien, *Indiana Attorney General Makes Public Nuisance Claim, Wins Lead Paint Case*, Legal Newsline.com, Feb. 22, 2011

Further Reading

National Tobacco Master Settlement Agreement (1998)

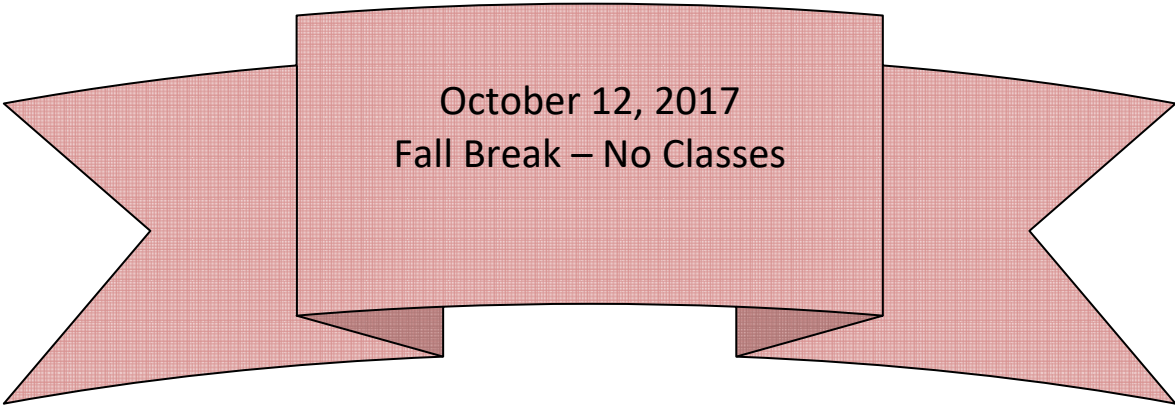
A.D. Bedell Wholesale Co. v. Philip Morris, Inc., 263 F.3d 239, **241-49, 252, 254-56, 259-66** (3d Cir. 2001)

Tritent Int'l Corp. v. Kentucky, 467 F.3d 547, **553-58** (6th Cir. 2006)

Curtis v. Altria Group, Inc., 813 N.W.2d 891, **895-901** (Minn. 2012)

Andrew J. Haile and Matthew W. Krueger-Andes, *Landmark Settlements and Unintended Consequences*, 44 U. Tol. L. Rev. 145 (2012)

October 6-27: Save the World



October 19, 2017: **Regulation by Other Means, Cont.:** Pharmaceuticals; credit markets and financial institutions; special problems related to using outside counsel.

Assigned Reading

Paul Nolette, *Federalism on Trial*, Chapters 3-5

Financial Institutions

In RE Standard & Poor's Rating Agency Litigation, 2014 WL 2481906 (June 6, 2014) (**Highlighted portions**)

Wall Street Reform and Consumer Protection Act, NAAG

Lauren Saunders, *The Role of the States Under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010* (Dec. 2010)

Contingency Fees

Ind. Code § 4-6-3-2.5

Leah Godesky, *State Attorneys General Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?*, 42 Colum. J. L. & Soc. Probs. 587 (2009)

Susan Beck, *Trophy Fees: A Behind-the-Scenes Account of the Controversial Awarding of \$13 Billion to the Plaintiffs' Tobacco Bar*, *The American Lawyer*, Dec. 2002

October 26, 2016:

Emerging Issues Part I: States v. feds: preemption; policing boundaries of federalism.

Assigned Reading

State Attorneys General: Chapter 15

John Choon Yoo, Federalism and Judicial Review, from The Tenth Amendment and State Sovereignty (2002), pp. 131-134, 141-147, 168-179

Preemption:

NAGTRI, *The Law of Preemption* **1-20** (2d ed. 2011)

First Nat'l Bank v. Missouri, 263 U.S. 640, **656, 659-60** (1924)

Watters v. Wachovia Bank, N.A., 550 U. S. 1, **10-15, 20-21** (2007)

Cuomo v. Clearing House Ass'n., L.L.C., 557 U.S. 519, **526-29, 533-35** (2009)

Arizona v. Inter Tribal Council of Arizona, Inc., 133 S. Ct. 2237, **2251-52, 2256-60** (2013)

Policing Boundaries of Federalism

NFIB v. Sebelius, 132 S. Ct. 2566, **2576-78, 2601-07, 2646-50, 2658-66** (2012)

Complaint, Texas et al. v. HHS (ACA HIP Fee)

West Virginia ex rel. Morrissey v. U.S. Dept. of Health and Human Services, 2016 WL 3568089 (D.C. Cir. 2016)

Texas et al. v. U.S. (DACA CA5 opinion (15-40238), S.Ct. one-line affirmance and U.S.A. petition for rehearing) (15-674)

Petition for Review, *Wisconsin et al. v. FCC*, No. 16-1219

Further Reading

Arthur E. Wilmarth, Jr., *Cuomo v. Clearing House: The Supreme Court Responds to the Subprime Financial Crisis and Delivers a Major Victory for the Dual Banking System and Consumer Protection* (The George Washington University Law School, Public Law & Legal Theory Research Working Paper No. 479, 2010)

October 27-November 18: Policing Federalism

November 2, 2017: Emerging Issues Part II: States v. Feds: Environmental Cases.

Assigned Reading

State Attorneys General: 121-29; 141-43; 144-53; 162-68

Paul Nolette, *Federalism on Trial*, Chapters 6-8

State v. Texas Co., 7 So.2d 161, **850-52** (La. 1942)

Massachusetts v. EPA, 549 U.S. 497, **518-21** (2007)

Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, **2538-39** (2011)

Utility Air Regulatory Group v. EPA, 134 S.Ct. 2427 (2014)

Coal. for Responsible Regulation, Inc. v. EPA, 684 F.3d 102, **147-48** (D.C. Cir. 2012) (per curiam)

New York v. U.S. Army Corps of Eng'rs, 896 F. Supp. 2d 180, **188-91, 194-95, 197** (E.D.N.Y. 2012)

Michigan v. U.S. Army Corps of Eng'rs, 758 F.3d 892 (7th Cir. 2014)

Michigan v. U.S. Environmental Protection Agency, 135 S. Ct. 2699 (2015)

Complaint, *Georgia et al v. McCarthy*, No. 2:15-cv-00079-LGW-RSB (filed June 6, 2015) (WOTUS)

Petition for Review, *W.Va. et al. v. EPA*, No. 15-1363 (Challenge to Clean Power Plan 111(d) rule respecting existing power plants)

Petition for Review, *W.Va. et al. v. EPA*, No. 15-1399 (consolidated with 15-1381) (Challenge to Clean Power Plan 111(b) rule respecting new power plants)

November 9, 2017: Emerging Issues Part III: States v. Feds, cont.

Assigned Reading

Paul Nolette, *Federalism on Trial*, Chapter 9

David Frosch and Jacob Gershman, *Abbott's Strategy in Texas: 44 Lawsuits, One Opponent: Obama Administration*, Wall Street Journal, June 24, 2016

Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, **11-13, 16** (1st Cir. 2012) (DOMA)

Petition for Writ of Certiorari, *In re Chrysler LLC, Ind. State Police Pension Trust v. Chrysler LLC*, No. 09-285 (U.S. Sept. 3, 2009) (Chrysler Bankruptcy Asset Sale)

State Nat'l Bank of Big Spring v. Lew, 795 F.3d 48 (D.C. Cir. 2015) (Dodd-Frank)

Complaint, *State of Texas, et al. v. U.S.*, No. 7:16-cv-00054-O (Title IX guidance)

Complaint, *State of Nebraska, et al. v. U.S.*, No. 4:16-cv-03117 (Title IX guidance)

States' U.S. Treasury Bond Complaint (unclaimed property escheat)

Washington v. Trump, 2017 U.S. Dist. LEXIS 16012 (W.D. Wash. Feb. 3, 2017) (Travel Ban)

State of Hawai'i v. Trump, No. 1:17-cv-00050 (D. Haw. March 15, 2017) (Travel Ban)

SUMMARY

November 16, 2017: **Discussion:** Have state AGs become flexible, responsive forces for the public good, or officious intermeddlers who impose regulatory costs disproportionate to the benefits they bring? The impact of attorney general activism on consumers and businesses; on constitutional law; AG politics and accountability.

Assigned Reading

Paul Nolette, *Federalism on Trial*, Chapter 10

John W. Suthers, No Higher Calling, No Greater Responsibility **123-35, Ch. VII** (2008)

Michael S. Greve, *Government by Indictment: Attorneys General and Their False Federalism* (American Enterprise Institute, Working Paper No. 110, 2005)

Timothy Meyer, Comment, *Federalism and Accountability: State Attorneys General, Regulatory Litigation and the New Federalism*, 95 Cal. L. Rev. 885, **Part V** (2007)

Alan Greenblatt, *The Story Behind the Prominent Rise of State AGs*, *Governing* (June 2015)