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The Nation's Top Ten Worst State Attorneys General

by Hans Bader

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State attorneys general are among the most powerful office holders in the country. Unlike governors and legislators, each state's top elected lawyer has fewer institutional checks on his or her powers. Yet, with the possible exception of former New York Attorney General Eliot Spitzer, the power wielded by attorneys general receives very little scrutiny from the media, voters, and even tort reform advocates. The following discussion of the nation's worst attorneys general is an effort to trigger much-needed attention to their most egregious abuses of power.

The historic function of a state attorney general (AG) is to defend the state in court and to give opinions to the governor and legislators on pending bills and policy decisions.¹ In some instances, attorneys general have been entrusted by state legislatures with enforcing certain statutes,² assisting district attorneys in prosecuting serious crimes, or disseminating information on legal issues confronting the state.³

Like other government offices, the office of attorney general was designed to have limited powers, set forth by statute and constitution. Under all state constitutions, it is the legislature, not the state attorney general, which is vested with the authority to make laws and prescribe remedies for violations of the law. State constitutions give the attorney general no power to make or rewrite law. In fact, if the legislature has not conferred the authority on an attorney general to enforce a particular law, then the attorney general may well be exceeding his authority by bringing suit under it, violating constitutional checks and balances.⁴

Federal law also limits an attorney general's power.⁵ If he attempts to regulate conduct in another state, that may violate not only state law, but also the Due Process and Commerce clauses of the U.S. Constitution, which forbid any state to impose its laws on another state, or to regulate commerce among states.⁶

Unfortunately, many state attorneys general today find those constraints inconvenient. Over the past decade, attorneys general have increasingly usurped the roles of state legislatures and of Congress by using litigation to impose interstate and national regulations and to extract money from out-of-state defendants who have little voice in a state's political processes.⁷ The worst offenders flaunt such abuse of power, with the most notorious of the lot, Eliot Spitzer, boasting that he "has redefined the role of Attorney General."⁸ This sort of activism may benefit the political and policy ambitions of the officeholder and his allies, but it imposes real costs on consumers, businesses, the economy, and our democratic system.⁹ The wave of lawsuits brought by state attorneys general has fostered corruption, circumvented legislative checks on regulation, taxes, and government spending, made the workings of government less transparent, and diverted attention away from their core responsibilities—enforcing state laws, defending state agencies against lawsuits, and providing legal advice to public officials.

Although these abuses are widespread, some attorneys general are worse than others. Based on a set of explicit criteria—such as encroachment on the powers of other branches of government, meddling in the affairs of other states or federal agencies, encouragement of judicial activism and frivolous lawsuits, favoritism towards campaign contributors, ethical breaches, and failure to provide representation to state agencies or to provide legal advice—the following state attorneys general have earned the dishonor of being the nation's Top Ten Worst:

1. Richard Blumenthal, Connecticut
2. Bill Lockyer, California
3. Eliot Spitzer, New York
4. Zulima Farber, New Jersey
5. Patrick Lynch, Rhode Island
6. Darrell McGraw, West Virginia
7. William Sorrell, Vermont
8. Lisa Madigan, Illinois
9. Peg Lautenschlager, Wisconsin
10. Tom Reilly, Massachusetts

Criteria for AG Ratings

- 1. Dubious Dealings:** Using campaign contributors to bring lawsuits. Using the attorney general's office to promote personal gain or enrich cronies or relatives. Favoritism towards campaign donors and other uneven or unpredictable application of the law. Ethical breaches.
- 2. Fabricating Law:** Advocating that courts, in effect, rewrite statutes or stretch constitutional norms in order to make new law—for example, seeking judicial imposition of new taxes or regulations, or restrictions on private citizens' freedom to contract.
- 3. AG Imperialism /Usurping Legislative Powers:** Bringing lawsuits that usurp regulatory powers granted to the federal government or other state entities, or that are untethered to any specific statutory or constitutional grant of authority.
- 4. Predatory Practices:** Seeking to regulate conduct occurring wholly in other states—for example, preying on out-of-state businesses that have not violated state law and have no remedy at the polls.

Report Card

Subject:	1.	2.	3.	4.
<u>Attorney General:</u>				
Richard Blumenthal, Connecticut:	F	F	F	F
Bill Lockyer, California:	D-	F	F	F
Eliot Spitzer, New York:	D	F	F	F
Zulima Farber, New Jersey:	F	D-	D-	D-
Patrick Lynch, Rhode Island:	D-	F	F	F
Darrell McGraw, West Virginia:	D-	F	F	F
William Sorrell, Vermont:	C-	F	F	F
Lisa Madigan, Illinois:	D+	F	F	F
Peg Lautenschlager, Wisconsin:	D-	D-	D-	D-
Tom Reilly, Massachusetts:	B	F	F	F

1. Richard Blumenthal, Connecticut

The nation's worst state attorney general is Richard Blumenthal, a tireless crusader for growing the power of his own office and spreading largesse to his cronies.

The Tobacco Racket

First came all the shenanigans stemming from the tobacco lawsuits and settlement of the 1990s. While he was not the instigator, Blumenthal, more than anybody else, is responsible for the multi-state act of corruption and cartelism known as the Master Settlement Agreement (MSA).

Wealthy trial lawyers across the nation received \$14 billion nationally in attorneys' fees¹⁰ under a \$246 billion-plus settlement paid for primarily by smokers—the alleged victims of the very fraud that begat the settlement.¹¹

The settlement was structured to allow the major tobacco companies to maintain their market share and raise prices in unison in order to pass settlement costs on to smokers. Together, state attorneys general and major tobacco companies were also able to force smaller tobacco companies that had never been accused of any fraud to join the settlement or pay penalties for not doing so. In a word, the settlement created a cartel, defeating free competition. As the federal appeals court with jurisdiction over Blumenthal's home state of Connecticut observed, had the tobacco company executives entered into a similar settlement without the collusion of the attorneys general, "they would long ago have had depressing conversations with their attorneys about the United States Sentencing Guidelines."¹² By getting a state official such as Blumenthal to sign their settlement, the tobacco companies were able to claim that the cartel was exempt from antitrust laws under a loophole known as "state action" immunity, which exempts many state-recognized cartels under the generous assumption that state officials would not sign off on a cartel unless it promoted the public interest.¹³

The tobacco settlement was joined by 46 states—dubbed "Settling States"—but many of its provisions apply nationally, a major encroachment on state autonomy. The MSA requires tobacco companies that join the settlement to make payments to the Settling States based on their national cigarette sales, including sales in states that did not even join the tobacco settlement. Worse, it requires companies that never joined the settlement agreement to make payments, even though, in the U.S. legal system, court settlements are not supposed to affect the rights of non-parties.¹⁴ Moreover, such companies must make payments on any of their cigarettes which end up in the Settling States, even cigarettes resold *without their knowledge* by third parties in a Settling State.¹⁵

Amid all the sordidness of the tobacco deal, Blumenthal personally steered \$65 million in fees to his own allies and the associates of former Connecticut Governor John Rowland, who was later convicted of corruption in an unrelated matter. Blumenthal had gone through the motions of soliciting letters from firms seeking to represent the state in the lawsuit against major tobacco companies. He selected four of 16 firms that expressed interest. As reported in the local media, the three Connecticut-based firms included:

The nation's worst state attorney general is Richard Blumenthal, a tireless crusader for growing the power of his own office and spreading largesse to his cronies.

As attorney general, Blumenthal has supported meritless, politically driven lawsuits.

- 1) Blumenthal's own former law firm, Silver, Golub & Teitell in Stamford, where he served for six years prior to becoming Attorney General. Partner David S. Golub is a long-time friend and law school classmate of Blumenthal's;
- 2) Emmet & Glander in Stamford, whose name partner, Kathryn Emmet, is married to partner David Golub of Silver, Golub & Teitell; and
- 3) Carmody & Torrance of Waterbury, whose managing partner, James K. Robertson, served as personal counsel and counselor to the later convicted Governor John Rowland.¹⁶

Other firms eager to be considered for the litigation publicly complained that they did not have a fair chance at the contract. For example, Robert Reardon of New London, a former president of the Connecticut Trial Lawyers Association, reportedly could not even get in the door for a meeting, despite repeated efforts.¹⁷

The contingency fees these lawyers received probably violated the Connecticut state constitution and state law.¹⁸ First, the contingency fee was not authorized by the legislature, which has the exclusive power to appropriate funds. Connecticut courts have consistently held that the power to spend or receive state funds rests solely with the legislature.¹⁹ Second, the fees at issue were paid with money that was the property of the State of Connecticut.²⁰ Connecticut law treats all funds recovered in a legal case as the property of the client, not his lawyer.²¹ Thus, the state supreme court held that the costs awarded in a lawsuit belong to the party in whose favor they are taxed, and not to his attorney.²² Finally, the contingency fee arrangement endorsed by Blumenthal was patently unethical because it gave lawyers for the state a mercenary motive for maximizing the state's monetary recovery, regardless of the public interest.²³

As attorney general, Blumenthal has also supported other meritless, politically driven lawsuits. For example, he filed an amicus brief in favor of a lawsuit against gun makers for crimes committed by third parties. The lawsuit backed by Blumenthal would have circumvented limits on tort law by dramatically expanding nuisance law and undermining individual responsibility. Fortunately, the Connecticut Supreme Court didn't heed the advice of the state's top legal advisor and subsequently found the lawsuit to lack merit.²⁴

Blumenthal has further sought to use litigation to usurp legislative powers and circumvent Congressional authority. He filed a lawsuit on behalf of the states of Connecticut, New York, Wisconsin, Massachusetts, California, Vermont, New Jersey, and Iowa against out-of-state utilities for allegedly contributing to global warming through emissions of carbon dioxide (CO₂). He alleged that CO₂ was so contaminating as to be a nuisance in violation of state law, even though it is a colorless, odorless, non-poisonous substance that is naturally consumed by plants. Blumenthal himself admitted that his goal was to "shake up and reshape the way an industry does business" across the nation. Since when is that the role of a state official? It is Congress, not any state attorney general, that has the authority to regulate interstate commerce and set industrial

policy.²⁵ Federal Judge Loretta Preska held that this was a political question that belonged in the legislature, rather than in the courts.²⁶

In addition, Blumenthal joined Massachusetts Attorney General Tom Reilly's lawsuit against the Environmental Protection Agency (EPA) to force the agency to regulate CO₂ emissions from automobiles and other sources on a state-by-state basis, even though global warming cannot possibly be mitigated by unilateral restrictions on American industry. Moreover, addressing issues that affect the public as a whole is a job for the legislative branch, not the courts.²⁷

Blumenthal's global warming lawsuits were also contrary to Congress's rejection of the Kyoto Protocol. If successful, the attorneys general would force energy restrictions on industries within the United States. The U.S. Senate has already rejected Kyoto by a 95-to-0 vote because it would have unilaterally cut industrial CO₂ emissions in developed Western countries, while leaving industries in rapidly developing economies like India and China subject to fewer pollution controls and thus at a competitive advantage.²⁸ The Senate also repeatedly banned EPA from using any federal funds to implement, or prepare for, Kyoto-style carbon emission restrictions.²⁹

Blumenthal's nuisance lawsuit further encroached on Congressional authority by applying the nuisance law of the plaintiff states against utilities located in different states. This clashed with federal court rulings, which have held that the federal Clean Air Act preempts state regulation of industrial air pollution, and that *federal* common law applies to forms of pollution not covered by the Clean Air Act.³⁰ As the Supreme Court has emphasized, federal preemption of state laws in matters concerning interstate pollution disputes minimizes the risks of regulatory chaos, unpredictability, and interstate conflicts, which can result when one state asserts jurisdiction over an out-of-state source.³¹

Blumenthal has been an eager advocate of lawsuits against out-of-state businesses that are not subject to Connecticut law. Blumenthal's nuisance lawsuit was against out-of-state defendants. Similarly, his amicus brief in *Ganim v. Smith & Wesson Corp* favored a city's lawsuit against mostly out-of-state gun makers located as far away as Nevada and Utah and was based largely on lawful gun sales outside the borders of the plaintiff city. Blumenthal's nuisance lawsuit over carbon dioxide was also brought against out-of-state defendants. All but one of the utilities sued were located in the South or West, outside the boundaries of the plaintiff states. None were located in Connecticut or even the Northeast.

2. Bill Lockyer, California

California's Bill Lockyer, who recently became state Treasurer, ranks a close second on the list of the nation's Top Ten worst state attorneys general. He neglected to enforce state laws against favored in-state campaign donors, even as he forced out-of-state businesses to live by California rules.³² He backed lawsuits that flout well-settled law and potentially endanger the public health while enriching his wealthy trial lawyer supporters.

It pays to contribute to Bill Lockyer's political campaigns. Despite

Blumenthal's nuisance lawsuit further encroached on Congressional authority by applying the nuisance law of the plaintiff states against utilities located in different states.

In one lawsuit, Lockyer sought to discourage people from eating seafood, despite its health benefits, by demanding—over the objections of the Food and Drug Administration—that tuna cans bear “warnings” about unproven dangers of trace amounts of mercury contained in tuna.

his duties as the state’s chief law enforcement officer, Lockyer refused to enforce state election laws against an Indian tribe that ran a lucrative casino, even though, in 2002, the California Fair Political Practices Commission concluded that the tribe had violated state campaign laws. The tribe had given Lockyer \$175,000, and other allied tribes gave him \$900,000. He refused to represent the Commission in its lawsuit against the tribe, even though one of the attorney general’s duties is to bring suit on behalf of the Commission.³³ Tribes donated more than \$900,000 to Lockyer since 1998, according to campaign records. A Lockyer spokesman claimed the political donations did not influence the work of his office’s gambling control division. But according to four former agents, the California Attorney General’s office thwarted investigations into alleged corruption, embezzlement, and theft at Indian casinos during the last four years. Those agents allege in court papers that Harlan Goodson, former director of the gambling control division, ordered them to “go lightly” in dealing with tribes.³⁴

Lockyer received hundreds of thousands of dollars from attorneys at what was then the nation’s richest class-action plaintiff’s law firm, Milberg Weiss. On the firm’s behalf, Lockyer filed amicus briefs taking positions that conflicted with well-settled law and were deemed absurd, even by a liberal San Francisco appeals court. The court pointed out that under Lockyer’s definition of fraud, which was contrary to binding California Supreme Court precedent, a foolish consumer could sue for fraud after ordering a Danish pastry, solely on the grounds that it did not come from Denmark.³⁵ The Milberg Weiss firm was subsequently indicted for illegal kickbacks in an unrelated case.³⁶

Lockyer also backed lawsuits that misled the public and endangered public health in order to enrich his wealthy trial lawyer supporters. For example, he filed an amicus brief in support of a meritless lawsuit brought by a campaign donor that that would have required unjustifiably alarming labels to appear on nicotine-replacement therapy. Not only would such labeling conflict with federal drug safety laws, it could have dissuaded pregnant women from using smoking-cessation drugs, which bear less health risks than cigarettes. Fortunately, the California Supreme Court unanimously rejected Lockyer’s position.³⁷

In another lawsuit, Lockyer sought to discourage people from eating seafood, despite its health benefits, by demanding—over the objections of the Food and Drug Administration—that tuna cans bear “warnings” about unproven dangers of trace amounts of mercury contained in tuna.³⁸

Lockyer also took aim at the First Amendment to profit his trial lawyer friends. He supported a lawsuit—handled by his allies at Milberg Weiss—that turned California’s already-draconian Unfair Competition Law into an engine of censorship.³⁹ Milberg sued the Nike shoe company on behalf of labor activist Marc Kasky, claiming that Nike’s statements to newspapers and the general public “concerning working conditions under which Nike products are manufactured” contained misleading statements and “omissions of fact.” Even labor unions opposed to Nike asked the courts to dismiss Kasky’s suit because of its obvious conflict with the First Amendment, in light of the fact that, as the AFL-CIO noted in an

amicus brief on the case, “the communications were part of an ongoing discussion and debate about important public issues that was concerned not only with Nike’s labor practices, but with similar practices used by other multinational corporations.”⁴⁰ Moreover, Kasky himself admitted he had suffered “no harm or damages” as a result of Nike’s statements.⁴¹ Nevertheless, a sharply-divided California Supreme Court, at Lockyer’s urging, ruled 4-to-3 in favor of allowing Kasky to sue Nike,⁴² and Kasky ultimately wrung a \$1.5 million settlement out of Nike without ever proving its guilt.

The law Kasky sued under, California’s Unfair Competition Law (UCL), is applied by the state courts even to conduct far outside of California that has some effects within the state, and Kasky alleged that Nike had made misleading statements in newspapers across the country that were read by Californians.⁴³ The chilling effect on its speech was enormous. As a result of Kasky’s suit, Nike stopped publicly discussing labor-related issues on a *national* basis.⁴⁴ With the backing of media, organized labor, and other corporations, all concerned about the terrible precedent that the case set for the First Amendment, Nike appealed to the U.S. Supreme Court.⁴⁵ (The Court later dismissed Nike’s appeal based on an ironic legal technicality: Kasky had suffered no injury, and thus had no standing to have his case heard in federal courts, which can only hear lawsuits in which the plaintiff has suffered a concrete injury.⁴⁶)

Not content with using the Unfair Competition Law to squelch freedom of speech, Lockyer also:

- Used the law to attack competition and promote cartels. In 2004, he filed an amicus brief in favor of a lawsuit seeking to use the UCL to restrict competition by optometrists with opticians. A court found the lawsuit meritless.⁴⁷
- Used the UCL to erode freedom of contract and thwart resolution of disputes without litigation. In 2003, Lockyer convinced the California Supreme Court to refuse, by a 4-to-3 vote, to allow UCL injunctive relief claims to be arbitrated as agreed to in a contract,⁴⁸ even though the Federal Arbitration Act preempts state laws that limit the enforceability of arbitration agreements by not putting them “upon the same footing as other contracts.”⁴⁹

During his tenure as attorney general, Lockyer filed many lawsuits against out-of-state businesses, seeking to control interstate commerce that takes place wholly outside California’s borders. For example, in April 2006 he sued the Pepsi Cola Company over labels it used on sodas in Mexico, forcing the company to immediately shift to lead-free labels on new bottles for Mexican sodas, eliminate existing lead-painted bottles there within 10 years, and pay a \$1 million civil penalty to California for soda it sold in Mexico that was later resold by third parties in California without Pepsi’s consent.⁵⁰ (Bottlers’ contracts do not allow them to sell outside a set area.)

Lockyer opposed legal reforms to prevent what amounts to legalized extortion. Trial lawyers have used the UCL to extort thousands of dollars in attorneys’ fees and civil penalties from businesses over technicalities like writing auto-repair estimates but forgetting to note the

Lockyer himself conceded that his suit was unprecedented and was brought to challenge the federal government’s failure to regulate the way he wanted.

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date or using the same bottle of nail polish on several customers, even though no consumer was adversely affected.⁵¹ Lockyer steadfastly opposed efforts to reform the UCL, opposing a successful ballot initiative in 2004 that amended the UCL to prevent trial lawyers from suing without demonstrating harm or damages.⁵²

Lockyer joined two meritless global warming lawsuits: Connecticut Attorney General Blumenthal's nuisance suit against out-of-state utilities⁵³ and Massachusetts Attorney General Reilly's lawsuit against the federal Environmental Protection Agency (EPA).⁵⁴ As previously described, these lawsuits flouted the Senate's decision not to ratify the Kyoto Protocol⁵⁵ and sought to impose the plaintiff states' laws on industries located in other states.⁵⁶

Worse, Lockyer brought his own global warming nuisance lawsuit demanding billions of dollars from automakers, despite the fact that Blumenthal's similar nuisance lawsuit had already been dismissed as frivolous in Connecticut,⁵⁷ and even though Lockyer's lawsuit had an even weaker legal basis than Blumenthal's.⁵⁸ Newspapers across the political spectrum denounced Lockyer's lawsuit; *The Los Angeles Times* called it "kooky," and *The San Jose Mercury-News* termed it "frivolous," while *The Orange County Register* described it as a "political stunt."⁵⁹ Lockyer himself conceded that his suit was unprecedented and was brought to challenge the federal government's failure to regulate the way he wanted.⁶⁰

An avid supporter of judicial activism, Lockyer urged the courts to rewrite antidiscrimination laws passed by the legislature and the voters. Sometimes, he did this to exclude from protection against discrimination people he believes should be discriminated against, such as the victims of racial set-asides. The California Supreme Court, in a rebuff to Lockyer, held that racial set-asides in government contracts are clearly forbidden by the California Constitution,⁶¹ which expressly enjoins the state not to "discriminate against, or grant preferential treatment to, any individual... on the basis of race" in "public contracting."⁶² Yet Lockyer supported racial set-asides in contracting, even though they are clearly illegal and very costly to taxpayers.⁶³

More often, Lockyer sought to stretch the law to conjure up new "protected classes" or to benefit trial lawyers who bring discrimination lawsuits. For example, he sought to compel private clubs to treat domestic partners the same as married couples, even before domestic partners legally assumed the same obligations and responsibilities to each other as married couples under California law, and even though the relevant antidiscrimination law, the Unruh Act, did not even mention marital status discrimination.⁶⁴ Similarly, he unsuccessfully urged the courts to retroactively change the state's state sexual harassment law to make state agencies liable for harassment by non-employees, which would have led to increased awards and attorneys' fees against the State of California but would have done nothing to deter harassment in the future.⁶⁵

While Lockyer deemphasized criminal law enforcement in general,⁶⁶ he showed a vindictive streak. In 2004, he expressed the wish that one business executive would be convicted and then raped in prison.⁶⁷

3. Eliot Spitzer, New York

Eliot Spitzer, New York Attorney General from 1999 through 2006 and now New York's Governor, was the nation's third worst state attorney general.⁶⁸ He specialized in using lawsuits and threats of indictment to force businesses to enter into costly settlements that regulate entire national industries and restrict lawful conduct in other states. He sought to dictate the rules of commerce for other states, urged courts to twist the law to benefit his political contributors, and encroached on federal authority. Meanwhile, he turned a blind eye to rampant fraud in New York's Medicaid system, which robs the state of billions of dollars every year.

Spitzer & Friends. In 2000, Spitzer testified in favor of a \$1.25 billion attorneys' fee request by lawyers who brought New York State's copycat lawsuit against the tobacco companies, which those lawyers were hired to litigate only after two other states, Mississippi and Florida, had already won billions of dollars. The lawyers got an eye-popping \$625 million, at an hourly rate of over \$13,000. Although a trial judge later blocked the fees awarded as unethically excessive, Spitzer got an appeals court to rule that the trial judge lacked jurisdiction to consider the ethics violations, reinstating the full \$625 million award.⁶⁹ Since their fee award, those lawyers have contributed to Spitzer and New York politicians allied with him.⁷⁰ For example, Spitzer later received \$7,000 from Philip Damashek of the firm Schneider, Kleinick, Weitz & Damashek—now known as The Cochran Law Firm after Johnnie Cochran of O.J. Simpson fame—which shared in the \$625 million fee.⁷¹

Spitzer steered millions of dollars from state settlements to groups tied to political supporters such as Larry Rockefeller, a major Democratic campaign donor.⁷²

Spitzer also received \$300,000 from an Indian tribe seeking to promote gambling and its lobbyists.⁷³ He also accepted discounted air travel from a gambling mogul seeking to build a casino in the Catskills for an Indian tribe embroiled in litigation with Spitzer, creating the appearance of a conflict of interest.⁷⁴

Spitzer failed to disclose \$9.1 million in loans that funded his 1994 and 1998 candidacies, violating principles of full disclosure, and possibly violating state law as well.⁷⁵

The Spitzer Shakedown. Spitzer accepted campaign contributions from those he was tasked to regulate, including Wall Street financiers, investment bankers, insurers, pharmacists, auto dealers, and their lawyers.⁷⁶ In just the first half of 2005, he collected half a million dollars from hedge funds and \$400,000 from lawyers,⁷⁷ including law firms whom Spitzer was investigating at the time.⁷⁸ That included more than \$120,000 from the Milberg Weiss firm, which paid illegal kickbacks that led to a federal indictment.⁷⁹

Spitzer received big contributions from Milberg Weiss attorneys in prior runs for attorney general.⁸⁰ Spitzer then sued the very companies targeted for lawsuits by the Milberg Weiss firm.⁸¹ Spitzer failed to investigate Milberg Weiss, despite being aware of allegations that its

Eliot Spitzer sought to dictate the rules of commerce for other states, urged courts to twist the law to benefit his political contributors, and encroached on federal authority.

Spitzer frequently used the threat of indicting a firm or its officers to force the firm to enter into a civil settlement, although using criminal penalties to extort civil settlements is ethically improper.

New York office paid \$11 million in kickbacks to get people to take part in shareholder lawsuits, claiming to defer to federal investigators, who indicted the firm in May 2006 without any help from Spitzer.⁸² His excuse—that he had to defer to federal investigators—was utterly unconvincing, given his repeated willingness to step on the toes of federal regulators by conducting parallel investigations, even when doing so led to litigation between Spitzer and the federal government. For example, the federal courts had to step in to prevent Spitzer from continuing with a sweeping investigation of New York’s national banks, which had not been accused of any individual wrongdoing and over which Spitzer had no jurisdiction.⁸³ And Spitzer investigated mutual funds that had already been the subject of federal investigations by the Securities and Exchange Commission (SEC) for more than a year and had already reached carefully crafted settlements with the SEC.⁸⁴

Spitzer sued The Western Union Company because foreign swindlers were covertly using telegrams to engage in wire fraud scams (of the “Millions of dollars are trapped in Nigeria“ variety). Spitzer succeeded in extracting more than \$8 million for “national peer-counseling programs” run by his political ally, the American Association of Retired Persons (AARP).⁸⁵ Spitzer and other state attorneys general also forced Western Union to pay \$400,000 to New York and the other states that brought the lawsuit. Victims of fraud received *nothing*.⁸⁶ Three states didn’t join the settlement—including Colorado, where Western Union is headquartered—but the settlement regulates Western Union in all 50 states.⁸⁷ The settlement mandates such things as warnings—in both English and Spanish—on forms and transfers about the potential for fraud and regulates employee training and discipline in all 50 states—a clear usurpation of Congress’s authority to regulate interstate commerce.⁸⁸

Spitzer frequently used the threat of indicting a firm or its officers to force the firm to enter into a civil settlement, although using criminal penalties to extort civil settlements is ethically improper.⁸⁹ For example, Spitzer threatened to indict (a virtual death sentence) the big insurer American International Group (AIG) unless its board fired its longtime CEO, Hank Greenberg, who had successfully built AIG into a multibillion dollar company, making huge profits for shareholders.⁹⁰

When confronted with disagreement, Spitzer often responded by hurling insults and threats.⁹¹ For example, former Goldman Sachs Chairman John Whitehead recounts that after he wrote an op-ed criticizing Spitzer, the attorney general called him and said, “Mr. Whitehead, it’s now a war between us, and you’ve fired the first shot. I will be coming after you. You will pay the price. This is only the beginning and you will pay dearly for what you have done.”⁹²

Abuse of Law. Spitzer filed an amicus brief on behalf of a campaign donor’s lawsuit seeking to force a construction site owner to give back pay to illegal aliens who once worked on the site, even though illegal aliens cannot legally work in the United States. The New York Court of Appeals, in a divided ruling, granted the back pay,⁹³ flouting an earlier decision by the U.S. Supreme Court that held that giving illegal aliens backpay violates federal immigration policy.⁹⁴

Meddling in the Affairs of Other States. Spitzer filed a nuisance lawsuit against out-of-state gun makers based on the actions of in-state criminals who happened to use guns, even though it was obvious—and the courts subsequently ruled—that the gun makers had no duty to control acts by independent third parties—criminals in this case—and even though the legislature, not the courts, has the power to regulate the gun industry.⁹⁵ Trying to evade the constitutional ban on extraterritorial regulation, Spitzer filed an amicus brief in another meritless lawsuit that alleged that out-of-state gun makers could be sued for lawful gun sales in other states with few gun control laws, mainly in the Southeast, because such “guns will make their way into...states with stricter laws like New York.”⁹⁶

Spitzer also joined and played a substantial role in Connecticut Attorney General Blumenthal’s aforementioned nuisance lawsuit against out-of-state utilities for allegedly contributing to global warming, which a federal judge said belonged in the legislature, not the courts.⁹⁷ That meritless lawsuit attempted to impose the plaintiff states’ nuisance laws on other states.⁹⁸ He also joined Massachusetts Attorney General Reilly’s global warming lawsuit against the EPA.⁹⁹ Through these cases, Spitzer sought to circumvent the Senate’s rejection of carbon dioxide restrictions in its near-unanimous vote against the Kyoto Protocol.¹⁰⁰

Failure to Prosecute Real Crimes. Medicaid fraud is unusually rampant in New York State, costing state taxpayers billions of dollars a year.¹⁰¹ As *The New York Times* has reported, “the pursuit of Medicaid fraud by...Attorney General Eliot Spitzer is now so lax that New York State’s Medicaid Program ‘almost begs people to steal.’”¹⁰² The State ranks near the bottom in recovering fraudulent payments.¹⁰³ As a result, as *The New York Post* noted in an editorial, federal prosecutors “increasingly seem to be doing the job that state law has specifically vested in [Spitzer’s] office... searching out and prosecuting Medicaid fraud,” recovering hundreds of millions of dollars a year, and as much money in one week as Spitzer’s office did in all of 2005.¹⁰⁴

Czar Spitzer. In April 2006, Spitzer told employers to let their illegal alien employees take the day off to participate in protests against federal immigration policy, falsely claiming that such absences were protected by federal labor law, even though the Supreme Court rejected illegal aliens’ ability to sue under federal labor law in *Hoffman Plastics v. NLRB*.¹⁰⁵

In many settlements induced by the threat of a lawsuit—and possible indictment—Spitzer imposed provisions that regulate companies’ conduct in all 50 states, thereby regulating both extraterritorially—in violation of other states’ sovereignty—and nationally—usurping Congress’s prerogative to regulate interstate commerce. Spitzer bullied and intimidated businessmen who criticized him or refused to accede to his demands. For example, although Congress and the New York legislature chose to regulate rather than ban “payola,” whereby music publishers pay broadcasters for radio airplay of their signed artists, Spitzer used the threat of litigation and bad publicity to force Sony BMG Music to enter into a settlement banning this practice.¹⁰⁶ The ban applies anywhere in the United States, not just New York.¹⁰⁷ Payments in exchange for exposure

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In many settlements induced by the threat of a lawsuit—and possible indictment—Spitzer imposed provisions that regulate companies’ conduct in all 50 states, thereby regulating both extraterritorially—in violation of other states’ sovereignty—and nationally—usurping Congress’s prerogative to regulate interstate commerce.

are not banned because they are neither nefarious nor unprecedented. For example, grocers receive payments for favorable shelf space, and Internet search engines receive payment for listing preference in search results.¹⁰⁸ Indeed, Economics Nobel Laureate Ronald Coase, who has studied payola, found that it is economically efficient, results in the dissemination of music that people enjoy but would not otherwise hear, and creates opportunities for small music publishers who otherwise could not get their foot in the door at radio stations.¹⁰⁹

Assisted by the Connecticut and Illinois attorneys general, Spitzer sued the Liberty Mutual Insurance Company, seeking to regulate insurance brokerage fees and bidding on a *nationwide* basis, again violating other states’ rights and Congress’s authority to regulate interstate commerce.¹¹⁰

Alleging that they had made misleading claims, Spitzer sued securities firms, including many located outside New York, forcing them into nationwide settlements that siphoned off money from out-of-state businesses and investors while giving nothing back to the allegedly defrauded investors.¹¹¹ Spitzer reacted with fury to federal proposals that penalties obtained by the states for securities law violations be payable to the SEC for distribution to victims.¹¹² Spitzer’s indictments effectively forced the securities firms to settle, because the indictment of a securities firm immediately suspends its ability to operate under federal law, even if it is later found innocent. For example, Merrill Lynch & Co., Inc., as a result of the indictment against it, swiftly lost \$5 billion in market value,¹¹³ even though a distinguished, award-winning federal judge, the late Milton Pollack, later found that the claims of fraud underlying the indictment were largely baseless.¹¹⁴

The Tobacco Racket. In another case, Spitzer used threats of litigation to ban a practice, permitted by federal and state law, outside his own jurisdiction. He sued United Parcel Service, forcing it to stop delivering mail order cigarettes to smokers in all 50 states, including states that had no interest in joining Spitzer’s crusade. Spitzer claimed that mail order sales lead to tax evasion and underage smoking.¹¹⁵ Taken to its logical conclusion, Spitzer’s theory that you can prevent mail-order shipments just to stop possible evasion of state sales taxes would give attorneys general the power to block shipments of goods bought online, on outlets like Amazon.com and eBay. This would greatly harm mail order and Internet commerce and reduce consumer choice.¹¹⁶ Spitzer also pressured Federal Express, DHL, and Philip Morris into settlements restricting cigarette shipments in all 50 states.¹¹⁷ But since Spitzer had no control over any part of the U.S. Postal Service, which continues to ship cigarettes,¹¹⁸ all his actions succeeded in doing was to funnel cigarette sales through a medium in which underage smokers are less likely to be detected. UPS was the *only* common carrier compatible with state-of-the-art age and identity verification systems that prevent children from gaining access to cigarettes; the Post Office does not provide such checks against fraud.¹¹⁹

4. **Zulima Farber, New Jersey**

Both before and after her appointment by Governor Jon Corzine, New Jersey Attorney General Zulima Farber, who resigned from office in September 2006, exhibited contempt for the law. She assumed office in January 2006, even though court records showed that she had 13 speeding tickets, three license suspensions, and two bench warrants seeking her arrest. Farber admitted to being embarrassed by her record, joking that it might take “psychoanalysis” to learn why she behaved as she did.¹²⁰ Yet her behavior did not improve after taking office. A special prosecutor was assigned to investigate whether she intervened in a traffic stop to help her boyfriend, serial tax evader and ethics violator Hamlet Goore; a police officer initially issued two traffic summonses to Goore but later acted to void them after she and her state police driver went to the scene of the stop, which occurred in Fairview on Memorial Day weekend.¹²¹ Even her allies in the state legislature conceded that at best, her behavior in that episode exhibited a “lapse in judgment.”¹²² The beneficiary of her intervention repeatedly failed to pay business and personal income taxes and was reprimanded twice by the New Jersey Supreme Court for failing to properly represent his clients and for filing false records with the court.¹²³

Farber sought to thwart action against political corruption, which is rife among her former supporters in New Jersey’s Democratic machine. She opposed tougher penalties for corrupt public officials, attempting, as the *Bridgewater Courier-News* described in an editorial, to “protect the pensions of corrupt politicians.”¹²⁴ She testified before the legislature in June 2006, that she opposed bills that would require jail time for officials convicted of corruption and cut off their retirement benefits.¹²⁵

Farber used litigation to try to circumvent the legislative process. For example, she joined two meritless global warming lawsuits: Connecticut Attorney General Blumenthal’s nuisance lawsuit against out-of-state utilities,¹²⁶ and Massachusetts Attorney General Tom Reilly’s lawsuit (discussed later in this paper) seeking to force the EPA to regulate carbon dioxide emissions.¹²⁷ Both of these suits would effectively circumvent the U.S. Senate’s refusal to ratify the Kyoto Protocol,¹²⁸ and embroil the courts in political questions.¹²⁹

5. **Patrick Lynch, Rhode Island.**

The fifth worst attorney general in America is Patrick Lynch of Rhode Island, in office since January 2003. Lynch empowered trial lawyers who donated to his campaign to seek hundreds of millions of dollars in contingency fees for bringing a multibillion-dollar nuisance lawsuit, launched by his predecessor, against out-of-state companies, based on their lawful sales of lead paint decades earlier. To maximize their potential legal fees, he allowed the lawyers to seek the most extravagant remedy possible, even though less expensive remedies would do more to protect public health. Lynch then pocketed more campaign contributions from these same trial lawyers, as well as from lawyers for paint companies seeking special settlement terms.

Former New Jersey Attorney General Zulima Farber assumed office even though court records showed that she had 13 speeding tickets, three license suspensions, and two bench warrants seeking her arrest.

On February 22, 2006, a jury decided that lead paint is a public nuisance, and that three companies must remove lead paint from more than 300,000 homes, and are potentially liable for billions of dollars in damages.¹³⁰ The judge allowed the companies to be sued for vast sums even though they had removed the lead from their paint long before the government banned it.¹³¹ Moreover, the lead paint companies, which were from out of state, were held liable to Rhode Island without any proof that the lead paint they sold ended up on any buildings currently standing in Rhode Island.¹³²

As *The Providence Journal* noted in an editorial, “The resulting Rhode Island verdict makes a mockery of the basic principles of tort law. Typically, to win a lawsuit, there needs to be an injured party. Not here, where not a single injured party—or a single house constituting a “nuisance”—made it into the evidence. Typically, for liability, a plaintiff needs to show that the defendant caused its harm. Not here, where the judge instructed the jury that it could find the defendants guilty without even finding that any of the paint companies had manufactured any paint actually used in the state.”¹³³

Ratifying a decision by his predecessor, Sheldon Whitehouse, Lynch contracted out the state’s power to sue in the public interest to the Motley law firm, whose members and relatives gave Lynch thousands of dollars in contributions,¹³⁴ and had become the largest donor in Rhode Island politics.¹³⁵ Their donors included, among others, John J. “Jack” McConnell, the lead lawyer in the lead paint lawsuit, who gave at least \$3,000 to Lynch, and his wife, Sara Shea McConnell, who also gave \$3,000 to Lynch, on exactly the same dates as her husband.¹³⁶ McConnell is also a major donor to the Rhode Island Democratic Party, which backs Lynch.¹³⁷

Collecting money for his own personal benefit from those he sued, Lynch accepted campaign contributions from a lawyer for the DuPont while he was negotiating to drop the company from the state’s lead paint lawsuit, including \$2,500 from the attorney and a total of \$4,250 from others tied to DuPont.¹³⁸ After doing so, Lynch entered into a deal with DuPont that allowed the company to escape liability in exchange for a donation to a charity that the company itself set up, even as he continued to seek billions of dollars from the other lead paint companies.¹³⁹ A non-partisan ethics watchdog observed that Lynch’s conduct “does not pass the smell test.”¹⁴⁰

Moreover, the contingency fee arrangement between Lynch’s office and the Motley law firm in the lead paint suit flouted laws requiring that attorneys’ fees recovered by the attorney general be paid back into the state treasury, that the legislature authorize any payments to attorneys acting on behalf of the state through the appropriations process, and that attorneys working on behalf of the state not financially profit from a lawsuit.¹⁴¹

It also created a serious conflict of interest. The lawyers handling the case for Rhode Island had an irreconcilable conflict with the state because it was in their interest to maximize any damage award paid by the defendant—the larger the award, the larger their fee. A damage award based on the cost of removing all lead paint would be vastly larger—and

A non-partisan ethics watchdog observed that Rhode Island Attorney General Patrick Lynch’s conduct “does not pass the smell test.”

thus far costlier to taxpayers—than an award based on the cost of ensuring that painted surfaces on older buildings are kept intact. As a Rhode Island journalist observed, “The decision of the Motley law firm to seek the former remedy—despite the views of virtually all scientists that the latter remedy is far better from a public health standpoint—can only be explained by the attorneys’ financial interest in maximizing their own fees. In other words, since contingency fee lawyers are compensated based of damages awarded, they have an incentive to advocate (in the name of the state) for whatever is most expensive, not for what is most effective.”¹⁴²

Engaging in grandstanding, Lynch made intemperate remarks in the lead paint litigation, leading to repeated litigation over whether he should be subject to court sanctions. He has been sanctioned by a court twice, for a total of \$15,000, although both sanctions were appealed.¹⁴³

Lynch has also been a major participant in multistate lawsuits that seek to regulate conduct occurring wholly outside Rhode Island and circumvent the legislative process. For example, he joined Connecticut Attorney General Blumenthal’s global warming nuisance lawsuit against out-of-state utilities, which was dismissed by a federal judge.¹⁴⁴ He also joined Massachusetts Attorney General Reilly’s meritless lawsuit (discussed later in this paper) seeking to force the EPA to impose global warming regulations.¹⁴⁵ As already noted, these suits would effectively circumvent the Senate’s refusal to ratify the Kyoto Protocol,¹⁴⁶ and embroil the courts in political questions.¹⁴⁷

6. Darrell McGraw, West Virginia

Darrell McGraw, attorney general of West Virginia since January 1993, has violated the most basic duty of his office: to defend the state in court. In 1996, he brought a lawsuit against state agencies that was settled at a cost to taxpayers of more than \$2 million, all of which was pocketed by the trial lawyer whom McGraw hired to bring the suit. And he has diverted money recovered by the state from legal settlements to friends and allies.

McGraw appointed trial lawyer Thomas Galloway as special assistant attorney general to bring a contingency fee lawsuit against West Virginia’s Bureau of Employment Programs, which ended when the state paid Galloway a \$2 million fee in exchange for dismissing suit.¹⁴⁸ The state attorney general is supposed to defend state agencies from suit, not sue them for the benefit of his trial lawyer allies. The West Virginia Supreme Court noted that there has been “an order of this court directing the attorney general to explain why he has not represented West Virginia” in that very case, but that he filed a non-responsive answer.¹⁴⁹ It is interesting to note that the plaintiff’s counsel in this case donated to McGraw’s 1996 and 2004 campaigns.¹⁵⁰ The contingency fees McGraw authorized were themselves probably illegal under West Virginia law.¹⁵¹

In similar fashion, McGraw hired lawyers on a contingency fee to sue tobacco companies in 1995. In response, he was specifically told by the state judge handling the state’s tobacco lawsuit that paying contingency fees to lawyers hired to represent the state was illegal.¹⁵² But he went ahead and did it anyway, paying the trial lawyers he hired

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\$33.5 million, including \$3.85 million to an attorney who barely did any work, and even though the Legislative Auditor's office specifically questioned the payments, doubting McGraw's "authority to enter into the settlement."¹⁵³ McGraw authorized these millions in payments without even telling the state legislature, even though state law specifically limits any compensation for lawyers hired by the state to "amounts appropriated by the Legislature."¹⁵⁴ Later, McGraw hired a campaign contributor as a Special Assistant Attorney General to bring a contingency fee lawsuit against two drug companies.¹⁵⁵

McGraw used another court settlement as his own political slush fund. In 2004, he took a \$10 million settlement from Purdue Pharma, decided that he didn't need to turn it over to the state treasury, and has been doling out the dollars himself ever since.¹⁵⁶ Legislators are not happy with this apparent violation of the West Virginia constitution. And his doling out money to his trial lawyer friends may also violate rules against paying contingency fees to lawyers hired by the state.

McGraw sued Purdue Pharma on behalf of state Medicaid and workers compensation programs, alleging that the company had failed to warn about the addictive qualities of the prescription pain reliever Oxycontin. But the state agencies in whose name McGraw sued received virtually none of the settlement. Indeed, in violation of state ethics rules, they were not even informed in advance of the settlement by their lawyer, the state attorney general.¹⁵⁷

Out of the settlement, \$2 million went to attorneys' fees for McGraw's trial lawyer friends, even though that was contrary to a state court ruling that West Virginia law bars contingency fees to lawyers hired by the state attorney general.¹⁵⁸ Another \$180,000 went to a nursing program run by the wife of the State Senate president,¹⁵⁹ while \$500,000 went to a private, unaccredited pharmacy school.¹⁶⁰ Moreover, McGraw has apparently paid no heed to provisions in the settlement requiring that he consult with Purdue Pharma before disbursing funds from the settlement.¹⁶¹

The failure to return the settlement money to the state treasury has been criticized as a violation of the state constitution. Critics include lawmakers such as fellow Democrat and House Finance Committee chairman Harold Michael, Delegate Eustace Frederick (D-Mercer) and Senator Andy McKenzie (R-Ohio), as well as legal commentators.¹⁶² Had the settlement been paid back into the state treasury rather than doled out to McGraw's friends, it might have resulted in as much as \$30 million in federal matching funds.¹⁶³

McGraw took West Virginia into the multi-state Master Settlement Agreement, which resulted in wealthy trial lawyers receiving \$14 billion in attorneys' fees¹⁶⁴ under a \$246 billion-plus settlement paid for primarily by smokers, who were the alleged victims of the very fraud that supposedly led to the settlement.¹⁶⁵

McGraw has helped his trial lawyers allies in other ways, such as by persuading the West Virginia Supreme Court to circumvent the exclusivity provisions of state workers' compensation laws so as to allow duplicative recoveries by employees. He filed an amicus brief in a case filed by a campaign donor in which a divided West Virginia

Supreme Court ruled that an employee could recover under both Workers' Compensation Law and state handicap discrimination law based on injuries flowing from the very same accident for which the employee has already been compensated, even though Workers' Compensation awards are supposed to be exclusive.¹⁶⁶ The state Supreme Court's pro-plaintiff rulings have helped cement the state's reputation as a "tort hell" hostile to business.¹⁶⁷

7. William Sorrell, Vermont

Few attorneys general have done more damage to the fabric of the law than William Sorrell, appointed in 1997 by then-Governor Howard Dean. He promptly got his state's legislature to change the law to make tobacco companies retroactively liable for the state's Medicaid bills, irrespective of their individual guilt or innocence of fraud towards smokers.¹⁶⁸ Once that law was passed, the state was guaranteed to win, and the tobacco companies settled soon after Sorrell sued under it. Wealthy trial lawyers got a big cut of the loot from that lawsuit, and smokers ended up paying the tab.

Almost a decade later, Sorrell's law remains an extremely dangerous precedent for other businesses whose products can be alleged to have an ill effect on public health. Under the logic of Sorrell's law, Vermont businesses could easily be targeted by lawyers in other states.

After the settlement went into effect, Sorrell then reshaped it to squelch competition from smaller tobacco companies that refused to join the tobacco settlement because they had never been accused of wrongdoing, in order to protect the market share of the big tobacco companies that had joined the settlement and were making big payments under it to trial lawyers.

Under Sorrell's law, the state could sue the tobacco companies based not on individual injuries or losses to the state's Medicaid program, but on national statistics that might or might not be characteristic of Vermont's own Medicaid expenses.¹⁶⁹ As John McClaughry of Vermont's Ethan Allen Institute notes, "[I]f national studies show that, say, 12% of all Medicaid expenditures are smoking-related, then Vermont could demand that the tobacco industry pay 12% of Vermont's Medicaid costs, year after year,"¹⁷⁰ even though fewer people smoke in Vermont than in most states.¹⁷¹

More importantly, Sorrell's bill eliminated the principle of individual responsibility, by holding a tobacco company liable for a smoker's injuries even if the smoker knew the risk of smoking and chose to smoke anyway. Notes McClaughry:

"In hundreds of tort cases brought by individual smokers around the country, Big Tobacco has argued that the plaintiff knowingly assumed the risks of smoking and should be responsible for the health consequences. Juries almost always reject the plaintiff's argument that he was brainwashed into damaging his health by that rascal Joe Camel.

Few attorneys general have done more damage to the fabric of the law than William Sorrell, appointed in 1997 by then-Governor Howard Dean.

Sorrell want[ed] a case he c[ould] win, so his legislation simply strip[ped] away these defenses and declare[d] the state the victor.”¹⁷²

Sorrell had been approached by “a group of tobacco tort lawyers, headed by Steve Berman of Seattle, Richard Scruggs of Mississippi, and Ron Motley of South Carolina, who have gone from state to state to sell their services on a contingency basis to attorneys general eager to pocket big bucks from the much-despised tobacco industry,” notes McClaughry. Sorrell’s tobacco lawsuits named these three and others as “special assistant attorneys general for the state of Vermont.”¹⁷³

Despite the fact that winning was a sure thing after the legislature changed the law, Sorrell made sure that the lawyers he hired collected lots of money. They got at least \$10.5 million dollars for their low-risk representation of Vermont in state court, under a contingency fee, even though contingency fees are supposed to compensate lawyers for taking a risky case.¹⁷⁴

In addition, the lawyers received a much larger amount of money for their role in the multi-state Master Settlement Agreement, which Sorrell helped negotiate.¹⁷⁵ Under it, the big tobacco companies agreed to pay more than \$14 billion to lawyers hired by state attorneys general like Sorrell, in annual installments over a period of years.¹⁷⁶

While Sorrell’s bill targeted only on Big Tobacco specifically, it set a bad precedent for similar legislation that could give the state what the Ethan Allen Institute’s McClaughry calls “a sure-fire legal hunting license, aimed at one industry after another wherever a lucrative recovery appears possible. The state could sue liquor companies for the costs of alcoholism.” Similarly, it could sue Vermont-based “Ben and Jerry’s for peddling artery clogging 15% butterfat ice cream, purposely made as tasty as possible to encourage addiction from childhood on.”¹⁷⁷

Sorrell joined the meritless, overreaching global warming suits against out-of-state utilities and the EPA discussed earlier in this paper,¹⁷⁸ which sought to circumvent the Senate’s rejection of the Kyoto Protocol, and to impose the plaintiff states’ laws on people far outside their borders.¹⁷⁹

Sorrell joined the meritless, overreaching global warming suits against out-of-state utilities and the EPA, which sought to circumvent the Senate’s rejection of the Kyoto Protocol, and to impose the plaintiff states’ laws on people far outside their borders.

8. Lisa Madigan, Illinois

Lisa Madigan, Illinois Attorney General since January 2003, is an enthusiastic proponent of dragging out-of-state businesses into Illinois courts over lawful business practices that occur outside her state’s boundaries. The fact that they have done nothing in Illinois and are not subject to Illinois law seems not to matter when the businesses have deep pockets or are sued by her campaign contributors.

In 2003, Madigan filed briefs in support of meritless lawsuits brought by some of her top campaign donors, in which they sought to hold out-of-state gun manufacturers responsible for crimes committed by Illinois felons, even though many of the guns they used were not even sold in Illinois. The Illinois Supreme Court resoundingly rejected these lawsuits as contrary to well-settled law.¹⁸⁰

Madigan intervened in support of lawsuit seeking to impose sales taxes on out-of-state mail-order businesses, apparently contrary to the Supreme Court's decision in *Quill v. North Dakota*, which declared imposing sales taxes on out-of-state mail-order businesses unconstitutional under the Commerce Clause. If the suit were successful, the businesses would have had to pay three times the taxes they allegedly owed, and Beeler, Schad & Diamond, the law firm that brought the suit, and had given money to Madigan's campaign,¹⁸¹ would receive a 25 percent cut.¹⁸²

Madigan supported the suit even though the Illinois Department of Revenue refused to collect such taxes from some of the businesses sued. Thus, the lawsuit effectively usurped the role of the Illinois Department of Revenue, the sole entity authorized by the Illinois General Assembly to assess and collect use and sales taxes, in setting state tax policy. Moreover, the law firm's demand for 25 percent of the money recovered as legal fees potentially violated the Illinois Constitution's Executive Compensation clause, while its demand for triple damages circumvented legal limits on back taxes intended to protect taxpayers.¹⁸³

Madigan joined Massachusetts Attorney General Reilly's suit against the EPA, which attempted to circumvent the Senate's rejection of the Kyoto Protocol.¹⁸⁴

In a similar vein, Madigan filed a lawsuit in the wrong forum challenging emissions by an Indiana power plant, outside her state's boundaries, seeking relief for interstate pollution under state law rather than the federal Clean Air Act. As Illinois's top government lawyer, Madigan should have known the basic legal rule that one state's environmental law cannot be applied to emissions in another state, since states are not supposed to regulate beyond their own borders, and federal law preempts state law in such disputes.¹⁸⁵

Madigan assisted Eliot Spitzer in suing Liberty Mutual, seeking to regulate insurance brokerage fees and bidding on a nationwide basis.¹⁸⁶

Ironically, although Madigan believes that out-of-state businesses should be subject to suit in Illinois courts—even for lawful conduct that occurs in other states—she believes that she should not be subject to suit in other states' courts, even when she violates those states' laws. She advocates a special exception for out-of-state jurisdiction for attorneys general such as herself, whom she believes should be able to violate federal statutory and constitutional provisions with impunity in another state, and yet not be subject to suit there.

In *King v. Grand River Enterprises Six Nations Ltd.*, Madigan sought a reversal by the Supreme Court of a federal appeals court decision, *Grand River Enterprises Six Nations Ltd. v. Pryor*, that held that state attorneys general can be sued for entering into agreements that violate federal law in the state in which the agreement occurs or is carried out. The court reversed the dismissal of a lawsuit alleging that state attorneys general had violated antitrust laws and the U.S. Constitution's Commerce Clause by entering into the tobacco Master Settlement Agreement in New York, holding that the attorneys general were subject to suit in New York State.¹⁸⁷

Madigan, speaking on behalf of herself and other state attorneys general, urged the Supreme Court to grant state AGs immunity from suit

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Attorney General
Peg Lautenschlager is
perhaps most famous
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after misappropriating
it for her personal use.*

in the courts of every state but their own, claiming that this was a matter of states' rights.¹⁸⁸ But the Constitution itself makes clear that states can be sued outside of their own courts, by giving the U.S. Supreme Court jurisdiction over suits between states. Madigan's attitude could be summed up as, "immunity from suit for me, but not for thee."

9. Peg Lautenschlager, Wisconsin

Peg Lautenschlager, Wisconsin Attorney General from 2003 until 2006, is perhaps most famous for drunkenly driving a state car into a ditch after misappropriating it for her personal use.¹⁸⁹ While busy bringing meritless suits against out-of-state businesses, she allowed the backlog at the Wisconsin state crime lab to triple to well over 1,000 cases, leading to a delay in apprehending a rapist who went on to murder a Wisconsin State Department of Justice agent.¹⁹⁰ Though no longer in office, Wisconsin will have to deal with Lautenschlager's legacy for some time. (She was defeated in the 2006 Democratic primary by Kathleen Falk, who in turn went on to lose in the November general election to former U.S. Attorney J.B. Van Hollen.)

Lautenschlager joined Connecticut attorney general Blumenthal's meritless nuisance lawsuit against out-of-state utilities, which sought to impose the plaintiff states' nuisance laws on utilities in other states.¹⁹¹ She also filed a brief in support of Massachusetts Attorney General Reilly's global warming lawsuit against the EPA.¹⁹² As noted earlier, these two meritless lawsuits sought to circumvent the Senate's rejection of the Kyoto Protocol.¹⁹³

Lautenschlager joined the suit against Western Union by Massachusetts Attorney General Reilly and New York Attorney General Eliot Spitzer, discussed earlier, which extorted an \$8 million settlement over the company's alleged failure to prevent foreign swindlers in places like Nigeria from using telegrams to defraud gullible people. The \$8 million was given not to taxpayers or defrauded citizens, but to liberal lobby group AARP for "national peer-counseling programs."¹⁹⁴ Western Union was also forced pay \$400,000 to Wisconsin and other states that brought the lawsuit. Victims of fraud received nothing.¹⁹⁵

Three states did not join the settlement—including Colorado, where Western Union is based—but the settlement regulates Western Union in all 50 states.¹⁹⁶ The settlement regulates employee training and discipline and mandates such things as Spanish and English language warnings on forms and transfers about the potential for fraud.¹⁹⁷

10. Tom Reilly, Massachusetts

Tom Reilly, Massachusetts Attorney General since January 1999, is probably best known outside of Massachusetts for his involvement as a prosecutor in the infamous Fells Acre child sex abuse cases, in which the Amirault family, in an atmosphere of hysteria, were sent to jail for decades, in violation of their constitutional rights, based on incredible allegations of child abuse—allegations that resulted from coercive questioning of children in the day care center that the Amiraults

operated.¹⁹⁸ Reilly is an avid promoter of politically correct double standards who uses meritless lawsuits to extract money from out-of-state businesses and subject them to extraterritorial regulation.¹⁹⁹

He helped persuade the Massachusetts Supreme Court to deny employers and accused employees the right to jury trial in discrimination cases, even though the employees suing them enjoy such a right.²⁰⁰

In 2003, along with the attorneys general of Maryland, New York, and Connecticut, he filed an amicus brief in support racial quotas in college admissions that were struck down by the Supreme Court in 2003.²⁰¹ In 2006, Reilly extracted \$50,000 from a bank through a meritless lawsuit, and forced it to provide services to disgruntled customers who wrongly believed that they had been subject to discrimination.²⁰² In 2001, he helped convince the state courts to interpret state disabilities discrimination law in a way at odds with federal disabilities laws, so that people with easily correctable conditions can demand the sort of special accommodations that are properly accorded only the truly disabled.²⁰³

In 2002, Reilly unsuccessfully urged the Massachusetts courts to curb employers' right to petition the courts and enforce contracts with employees who accuse them of discrimination, which would have violated the First Amendment.²⁰⁴ Reilly argued that an employer is "liable for retaliation when it seeks to enforce a valid waiver" of an employee's right to sue in exchange for cash,²⁰⁵ and even when the employer seeks redress for defamatory claims made by the employee in a discrimination charge.²⁰⁶

Reilly made this argument even though the U.S. Supreme Court has held that employers have a First Amendment right of freedom of petition to sue in court, even when the claims in their lawsuit are ultimately rejected by the courts,²⁰⁷ and even though the Massachusetts Supreme Court previously held that laws against workplace retaliation do not override the First Amendment rights of employers or accused employees.²⁰⁸

Reilly also uses litigation to circumvent the legislative process and embroil the courts in political questions. He played the lead role in suing EPA in order to force it to regulate U.S. emissions of carbon dioxide under the Clean Air Act.²⁰⁹ His lawsuit sought to circumvent the U.S. Senate's 1997 rejection of carbon emission restriction schemes like the Kyoto Protocol, which would have similarly restricted carbon dioxide emissions in American industry.

Even if the Senate had not already voted to reject Kyoto, Reilly's suit would still have run afoul of the principle that legislatures, not the courts, have jurisdiction over broad-based social problems that affect the public at large rather than a small group of individuals. As Judge David Sentelle observed in voting to dismiss Reilly's lawsuit, Massachusetts had no standing to bring the suit, since it involved a generalized grievance over global climate changes that might or might not happen in the future, rather than a concrete injury to a specific individual, making it the proper subject for action by Congress, not the courts.²¹⁰

Reilly played a leading role in the \$8 million out of Western Union settlement, discussed earlier.²¹¹

Reilly also joined a nuisance lawsuit against out-of-state utilities filed by Connecticut Attorney General Blumenthal.²¹² That meritless

Tom Reilly is an avid promoter of politically correct double standards who uses meritless lawsuits to extract money from out-of-state businesses and subject them to extraterritorial regulation.

suit sought to impose the plaintiff states' laws on utilities in other states that were properly subject only to federal law and the laws of their own states.²¹³ A federal judge held that the plaintiffs had brought to court a political question that belonged in the legislature, rather than in the courts.²¹⁴

Although attorney general abuses are widespread, some attorneys general are much worse than others. The Top Ten Worst State Attorneys General profiled in this paper exemplify those abuses.

Conclusion

Many state attorneys general fulfill their duties with responsibility and distinction. However, many others, like those discussed above, have failed to heed the limits on their own power. Instead of focusing on their historical function of defending state agencies in court and providing legal advice, they have chosen to use lawsuits as a weapon by which to impose new regulations on the public. In the process, they have usurped the authority of state legislatures and Congress to make law.

These state AGs have increasingly used lawsuits to regulate out-of-state industries and extort money from out-of-state defendants, encroaching on Congress's authority to regulate interstate commerce and make laws on a national basis.

These lawsuits have furthered the attorney generals' ambitions, and enriched their political allies, but in the process, they have imposed great costs on our nation's economy and our system of government. It has fostered corruption, circumvented legislative checks and balances, undermined openness in government, and diverted AGs' attention away from their core responsibilities of defending state agencies.

Although attorney general abuses are widespread, some attorneys general are much worse than others. The Top Ten Worst State Attorneys General profiled in this paper exemplify those abuses. Most of them have shown favoritism towards campaign contributors and engaged in unethical conduct, while all of them have undermined the legal system by backing frivolous lawsuits, meddling in other states' affairs, and usurping the powers of other branches of government.

Notes

¹ Steven Anderson, “The Rise of State Attorneys General,” *Corp. Legal Times*, Aug. 2003, at A1 (quoting Drew Kemmerer, attorney general of Maine from 1995 to 2001) (“For 200 years, [State attorney generals] defended the state in cases brought by outside parties or gave opinions to the governor and lawmakers on pending bills. That was basically the job”).

² *Blumenthal v. Barnes*, 804 A.2d 152, 170 (Conn. 2002) (Attorney general cannot enforce law that legislature did not intend to be enforced by state attorney general); *but see In re Cardizem CD Antitrust Litigation*, 218 F.R.D. 508, 520-22 (E.D. Mich. 2003) (noting variations in powers of attorney generals across state lines).

³ Michael S. Greve, *Government by Indictment: Attorneys General and Their False Federalism*, American Enterprise Institute (AEI) Working Paper #110, at 40 n. 19 (May 24, 2005) (<http://www.aei.org/publication22565#18451>).

⁴ *Blumenthal v. Barnes*, 804 A.2d 152, 170 (Conn. 2002) (“the office of the attorney general is ‘a creature of statute’ that is governed by statute and, thus, has no common-law authority”).

⁵ *Morales v. Trans World Airlines*, 504 U.S. 374, 383 (1992) (invalidating the National Association of Attorneys General’s guidelines as a violation of the Constitution’s Supremacy Clause).

⁶ *Miller Bros. v. Maryland*, 347 U.S. 340, 342 (1954) (“[N]o principle is better settled than that the power of a State, even its power of taxation, in respect to property is limited to such as is within its jurisdiction”); *Healy v. Beer Institute*, 491 U.S. 324, 332 (1989) (“A state-imposed restraint which ‘has the practical effect’ of regulating commerce occurring wholly outside that State’s border is invalid under the Commerce Clause”).

⁷ Michael S. Greve, *Our Parallel Government*, Speech, American Enterprise Institute (AEI), June 18, 2002 (www.aei.org/publications/filter.all.pubID.17055/pub_detail.asp); Greve, *Government by Indictment: Attorneys General and Their False Federalism*, AEI Working Paper #110 (May 24, 2005) (www.aei.org/publications/filter.all.pubID.22565/pub_detail.asp); Greve, “When States Screech, Don’t Listen,” *National Review Online*, Jan. 23, 2004 (www.aei.org/publications/filter.all.pubID.19800/pub_detail.asp); Greve, “States’ Rights on Steroids,” *AEI Online*, Sept. 1, 2002 (www.aei.org/publications/filter.all.pubID.14296/pub_detail.asp); Michael S. Greve, “Free Eliot Spitzer!,” *AEI Online*, May 1, 2002 (www.aei.org/publications/filter.all.pubID.13928/pub_detail.asp) (“Attorneys general have over the past decade managed to create a parallel national government on issues from product safety to antitrust law to tobacco regulation. In all those areas, some enterprising attorney general has reversely preempted the national government, typically in cahoots with trial lawyers and his fellow attorneys general. In all instances, the usurpation was made possible by the effectively unbounded extraterritorial reach of the usurpers’ authority”).

⁸ *Biography of Eliot Spitzer*, <http://www.oag.state.ny.us/bio.html> (visited July 19, 2006).

⁹ Michael S. Greve, *Government by Indictment: Attorneys General and Their False Federalism*, AEI Working Paper #110 (May 24, 2005) at 6, 14-15, 28-32 (www.aei.org/publications/filter.all.pubID.22565/pub_detail.asp); *see also* Greve, “When States Screech, Don’t Listen,” *National Review Online*, Jan. 23, 2004 (giving as an example a \$200 billion tobacco settlement designed to pass on all of its costs to consumers) (www.aei.org/publications/filter.all.pubID.19800/pub_detail.asp); Greve, *Our Parallel Government*, Speech, AEI, June 18, 2002 (discussing coercive aspects of AGs’ tobacco settlement).

¹⁰ Kevin Mayhood, “\$145 Million Dispute in Federal Court Here,” *Columbus Dispatch*, Jan. 10, 2005 (<http://www.tobacco.org/news/186687.html>) (lawyers “were awarded more than \$14 billion from the tobacco settlement”).

¹¹ “Tobacco Deal-Breaker?” *Wall Street Journal*, Review and Outlook, Aug. 19, 2005 (settlement amounted to \$246 billion over 25 years, passed on to consumers through higher prices) (www.controlabuseofpower.org/news/news_briefing_WSJ.asp).

¹² *Freedom Holdings v. Spitzer*, 357 F.3d 205, 226 (2d Cir. 2004)

¹³ The supposed public interest behind the tobacco settlement was to discourage young people from smoking and finance anti-smoking campaigns. But Connecticut has spent virtually nothing fighting smoking, even as Blumenthal’s cronies have received millions under the settlement. *See* Campaign for Tobacco-Free Kids, *A Broken Promise for Our Children: the 1998 State Tobacco Settlement Seven Years Later* (Nov. 30, 2005) at 13-14 (www.tobaccofreekids.org/reports/settlements/2006/fullreport.pdf).

¹⁴ *Martin v. Wilks*, 490 U.S. 755 (1989) (federal court settlement should not bind non-parties, since that violates federal rules of civil procedure, and perhaps due process rights as well); MSA, § IX, Exhibit T (each settling state was required to pass a law, modeled on MSA, Exhibit T, that required tobacco companies that did not join the settlement to make escrow payments).

¹⁵ MSA, Exhibit T (company is subject to escrow payments if it “intended” that its cigarettes be sold in the United States, even if the cigarettes were not first sold in an MSA state); *Star Scientific v. Carter*, 2001 WL 1112673 (S.D. Ind. Aug. 20, 2001) (company forced to make payments on cigarettes it did not itself sell in the state); *but see Virginia v. Patriot Tobacco Co.*, Case No. CH03-44-1 (Virginia Circuit Court, City of Richmond, Oct. 17, 2003) (Melvin Hughes, J.), Letter Opinion at pg. 5 (Due Process Clause barred enforcement of escrow payment obligation in situation where out-of-state cigarette maker did not intend or expect its cigarettes sold outside the state to be resold in the state).

¹⁶ Thomas Scheffey, *Winning the \$65 Million Gamble*, Conn. L. Trib., Dec. 6, 1999, at 1.

¹⁷ Scheffey, *Winning the \$65 Million Gamble*.

¹⁸ Margaret Little, “A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments’ Tobacco Litigation,” 33 *Conn. L. Rev.* 1143, 1152-56 (2001) (citing Connecticut Constitution, article IV, §§ 22, 24, and Connecticut General Statutes, §§ 3-17, 3-112, 4-32, 4-85(a), 4-86, 4-98, 4-100, 35-32a, and 42-110c).

¹⁹ John Beisner, Jessica Davidson Miller & Terrell McSweeney, *Bounty Hunters on the Prowl: The Troubling Alliance of State Attorneys General and Plaintiffs’ Lawyers*, at 14; Little, “A Most Dangerous Indiscretion.” For example, in *Adams v. Rubinow*, 251 A.2d 49, 65 (Conn. 1968), the state supreme court held that a statute transferring the power to set probate court fees from the

legislature to the probate court administrator unconstitutionally transferred the legislature's power of the purse.

²⁰Little, "A Most Dangerous Indiscretion."

²¹ John Beisner, Jessica Davidson Miller & Terrell McSweeney, *Bounty Hunters on the Prowl: The Troubling Alliance of State Attorneys General and Plaintiffs' Lawyers*, at 14; accord Little ("[A]ttorney's fees awarded in any action belong to the party, not his attorney").

²² *Erickson v. Foote*, 153 A. 853, 854 (Conn. 1931).

²³ Little ("The contingency fee contract conferred a direct and substantial personal financial stake in the litigation upon outside counsel prosecuting these state sovereign actions. Connecticut's Code of Ethics for state employees, and regulations promulgated thereunder, prohibit a state employee from having any direct monetary gain or loss at stake by reason of his official capacity. At law, neither Connecticut's Attorney General nor any member of his office would be permitted to prosecute the tobacco cases with such a stake in interest. The Attorney General, recognizing that he could not delegate the prosecution to such outside counsel without raising significant issues of conflict of interest, asserted that he was exercising complete authority and control over the conduct of the litigation. . . . However, the Connecticut Supreme Court has held that such control is the deciding factor in determining whether outside contractors are to be deemed 'state employees' under defense and indemnification statutes. Applying these legal precedents consistently to the factual incidents of control applicable to the tobacco litigation suggests that Connecticut's contingency fee counsel were state employees, and as such, subject to the State Code of Ethics"), citing, e.g., *Hunte v. Blumenthal*, 238 Conn. 146, 680 A.2d 1231 (1996)) and Conn. Gen. Stat. §§ 1-84(a), 1-85 (2000); Conn. Agencies Regs. § § 1-81-28(c), 1-81-28(h)). A similar tobacco-lawsuit contingency fee was found to be unethical by the Louisiana Board of Ethics, which levied a \$650,000 fine on the lawyers involved. *Opinion # 2000-381* (May 17, 2001).

²⁴ *Ganim v. Smith & Wesson Corp.*, 258 Conn. 313, 372, 780 A.2d 98 (Conn. 2001)

²⁵ Dan Feegin, "'Public Nuisance' Lawsuit: NYC, 8 States Sue Power Firms, They Say Carbon Dioxide Emissions Are Health Threat and Seek Cuts, But Industry Says Suit Frivolous," *Newsday*, July 22, 2004, at A18 (quoting Blumenthal); U.S. Constitution, Art. I, § 8 (vesting in Congress the power to regulate interstate commerce).

²⁶ *Connecticut v. American Electric Power Co.*, 406 F.Supp.2d 265 (S.D.N.Y. Sept. 22, 2005).

²⁷ *Massachusetts v. EPA*, 415 F.3d 50, 51, 59-61 (D.C. Cir. 2005) (Massachusetts, California, Connecticut, New York, New Jersey, Illinois, Rhode Island, Vermont, New Mexico, Maine, Oregon, and Washington sued, arguing that the federal EPA has jurisdiction over carbon dioxide emissions within the United States that contribute to global warming, and thus should regulate carbon emissions, even though it only has the authority to do so on a state-by-state basis within the United States; Judge Sentelle, concurring in the court's decision to dismiss the suit, pointed out that the states were suing over a society-wide problem that should be addressed by legislatures, not courts, and that the regulation they were seeking was something that should be crafted by Congress, not the courts).

²⁸ Byrd-Hagel Resolution, S. Res. 98, 105th Cong., 1st Sess. (1997) (www.nationalcenter.org/KyotoSenate.html) (Senate expressed opposition to Kyoto Protocol because it excluded major developing countries such as China and India from reductions, placing American industry at a disadvantage, and risked inflicting serious harm to the U.S. economy if unilateral reductions on carbon dioxide were mandated); Pub. L. No. 105-276, 112 Stat. 2461, 2496 (1998) (Congress forbade EPA to implement Kyoto); Pub. L. No. 106-74, 113 Stat. 1047, 1080 (1999) (same); Pub. L. No. 106-377, 114 Stat. 1441, 1441A-41 (2000) (same); "A Mighty Important Nuisance," *Cincinnati Post, E*, July 22, 2004 (www.cincypost.com/2004/07/22/edit07-22-2004.html) (Connecticut's lawsuit flouts will of Congress).

²⁹ Pub. L. No. 105-276, 112 Stat. 2461, 2496 (1998); Pub. L. No. 106-74, 113 Stat. 1047, 1086 (1999); Pub. L. No. 106-377, 114 Stat. 1441, 1441A-41 (2000).

³⁰ *Clean Air Markets Group v. Pataki*, 338 F.3d 82, 89 (2d Cir. 2003) (Clean Air Act generally preempts state air pollution laws, and limited exception for intrastate regulation to protect public health does not permit one state to control emissions in another state); *Illinois v. Milwaukee*, 406 U.S. 91 (1977) (state law may not be applied by one state to regulate an emissions source in another state). The due process and commerce clauses also generally bar state regulation of conduct in another state. See footnote 6 and accompanying text.

³¹ *International Paper Co. v. Ouellette*, 479 U.S. 481, 93 L. Ed. 2d 883, 107 S. Ct. 805 (1987)

³² On November 7, Lockyer was elected State Treasurer of California.

³³ Donald L. Barlett and James B. Steele, *Playing the Political Slots*, *Time Magazine*, Dec. 23, 2002

(www.nocasinoerie.org/news2.htm; excerpted at www.calvoter.org/news/cvfnews/cvfnews122002.html) ("Earlier this year, California's Fair Political Practices Commission, which monitors the state's elections, charged that since 1998 one tribe -- the 232-member Agua Caliente Band of Cahuilla Indians, which has a pair of money-churning casinos near Palm Springs -- had failed to promptly report multiple contributions totaling \$8.5 million. When the commission tried to work out a settlement, the Agua Caliente would not negotiate, contending that because the tribe is a sovereign nation, California campaign-finance laws do not apply. Despite that, the commission filed a lawsuit, assuming that California's attorney general, Bill Lockyer -- the state's top law-enforcement officer—would represent the agency. But he declined. Lockyer, by the way, has accepted substantial campaign contributions from Indian tribes—some \$800,000 in the past four years, including \$175,000 from the Agua Caliente Band"); Erica Werner, Associated Press, *Suit Over Donations Tests Indian Tribes*, January 16, 2003 (noting "the unusual refusal by state Attorney General Bill Lockyer to take the case, forcing the agency to hire a private attorney," following the "hundreds of thousands of dollars in tribal donations he has received").

³⁴ Glenn Bunting, "Tribes Watch Their Own Casinos," *Los Angeles Times*, Oct. 19, 2004

(www.latimes.com/news/local/state/la-me-regulate19oct19,1,624586.story?coll=la-news-state); Common Cause, *Stacking the Deck: Gambling Industry Emerges as Top Campaign Contributor in California*, July 2001 (Lockyer among "Top Ten Recipients of

Gambling Money,” receiving nearly \$900,000 as of 1998)

(www.commoncause.org/site/apps/nl/content2.asp?c=dkLNK1MQIwG&b=196460&ct=225684&printmode=1); *Gambling Magazine*, “Campaign Finance Reformers See Gaming Conflict” (www.gamblingmagazine.com/articles/26/26-302.htm) (“A pricey fund-raiser for Attorney General Bill Lockyer, the state official responsible for regulating California’s booming Indian gambling industry, is being sponsored by a San Diego tribe that’s planning a \$120-million expansion of its casino,” charging participants “up to \$25,000 per person” for admission to the “April 3” event; “Critics on Tuesday said the event offers proof that California needs campaign finance reform to prohibit candidates from accepting money in cases of a potential conflict of interest”).

³⁵ Attorney General (D) Lockyer, Bill, *Open Secrets* (showing \$150,000 donated by Milberg, Weiss, Bershad, Spechtrie & Lerach to Lockyer’s 1998 campaign) (www.opensecrets.org/st/getscontrib.asp?state=CA&candid=CA11&cycle=1998); Cal. Sec. of State, *Campaign Finance: Lockyer Committee* (http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1221992&view=received&page=*&session=1999) (Lockyer got \$10,000 from William S. Lerach, the most well-known partner of the Milberg Weiss law firm, on 8/29/2000); Cal. Secretary of State, *Campaign Finance: Milberg, Weiss, Bershad & Schulman, LLP* (<http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1010694&view=contributions&session=2001>) (Milberg Weiss gave Lockyer \$1,000 on November 1, 2002); *Lavie v. Procter & Gamble*, 105 Cal.App.4th 496, 500-01, 504, 514, 129 Cal.Rptr.2d 486 (Cal. App. 1 Dist. 2003) (rejecting Lockyer’s proposed “least sophisticated consumer” test, submitted by Lockyer in support of a lawsuit filed by Milberg, Weiss).

³⁶ “Spitzer to Return Donations: The candidate for New York governor received \$124,455 from indicted law firm Milberg Weiss,” *Los Angeles Times*, May 20, 2006

(<http://www.latimes.com/news/politics/la-fi-milberg20may20,0,3498824.story?coll=la-headlines-politics>).

³⁷ Cal. Sec. of State, *Campaign Finance: Lockyer Committee*

(http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1221992&session=2001&view=received&page=*) (Lockyer received \$250 from Eric Somers of The Lexington Group); *Dowhal v. Smithkline Beecham Consumer Healthcare*, 32 Cal.4th 910, 12 Cal.Rptr.3d 262 (Cal. 2004) (Locker filed amicus brief that supported lawsuit prosecuted by Somers seeking scary warnings on nicotine replacement therapy drugs under California’s Prop. 65, even though such NRT drugs are less dangerous than the alternative of smoking, any such “warnings” will encourage pregnant women to keep smoking, and such warnings conflict with the FDA’s own warning label and thus are preempted by federal law).

³⁸ Press Release 04-065, *Attorney General Lockyer Files Lawsuit Against Canned Tuna Companies for Failing to Warn Consumers About Exposure to Mercury* (June 21, 2004) (<http://caag.state.ca.us/newsalerts/2004/04-065.htm>) (announcing suit); August 12, 2005 *Letter from FDA Commissioner Lester Crawford to Bill Lockyer, Attorney General of the State of California, Re: a suit filed on June 21, 2004 in San Francisco Superior Court, The People of the State of California v. Tri-Union Seafoods, LLC, et al.* (Case No.: CGC-04-432394) (warning sought by lawsuit would be misleading and cloud cardio-protective benefits of eating fish) (<http://www.cfsan.fda.gov/~dms/fl-ltr65.html>); Tuna Foundation, *Press Release: Tuna Industry to Challenge Proposition 65 Suit Filed by California Attorney General*, June 21, 2004 (<http://www.tunafacts.com/press/2004/june21.cfm>) (noting FDA’s conclusion that “fish and shellfish are an important part of a healthy diet” and even pregnant women can consume up to six ounces of tuna a week without any possible ill-effect).

³⁹ *Nike v. Kasky*, 539 U.S. 654 (2003); 2003 WL 1844750 (Lockyer’s April 4, 2003 brief for the State of California); *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 45 P.3d 243, 246 (Cal. 2002) (Lockyer filed brief for Kasky, who was represented by Milberg Weiss firm).

⁴⁰ *Nike v. Kasky* (Stevens, J., concurring) (citing the AFL-CIO’s *amicus curiae* brief at pg. 2).

⁴¹ *Nike v. Kasky* (Stevens, J., concurring).

⁴² *Kasky v. Nike, Inc.*, (Lockyer filed briefs in support of plaintiff, who was represented by the Milberg Weiss law firm).

⁴³ *Nike v. Kasky*.

⁴⁴ *Nike v. Kasky* (Breyer, J, dissenting).

⁴⁵ *Nike v. Kasky* (listing a wide variety of groups filing briefs in support of Nike)

⁴⁶ *Nike v. Kasky* (Stevens, J., concurring).

⁴⁷ *Consumer Cause v. Emerging Vision*, 2004 WL 717001 (Cal. App. 4 Dist. 2004).

⁴⁸ *Cruz v. Pacific Health Systems*, 30 Cal. 4th 303, 307, 133 Cal. Rptr. 2d 58 (Cal. 2003) (Lockyer filed amicus brief in support of class-action filed by his trial lawyer allies).

⁴⁹ *Shearson American Express v. McMahon*, 482 U.S. 220, 225-26 (1987).

⁵⁰ Press Release 06-039, *Attorney General Lockyer Announces Multi-Million Dollar Settlement With Pepsi to Eliminate Lead in Mexican Bottles* (Apr. 21, 2006) (<http://ag.ca.gov/newsalerts/release.php?id=1289>); This Was All Just a Thought-Experiment, Federalism Project, AG Watch (April 25, 2006) (<http://federalismproject.org/agwatch/?p=74>).

⁵¹ See Steven Greenhut, *Some Lawyers Practice Legal Extortion*, Orange County Register, Jan. 19, 2003 (www.ocregister.com/commentary/greenhut/greenhut11903.shtml).

⁵² Kevin Yamamura, “Lockyer Criticizes Prop. 64’s Limits on Lawsuits,” *Sacramento Bee*, Oct. 1, 2004

(<http://www.sacbee.com/content/politics/story/10935508p-11852901c.html>); *CA Attorney General Lockyer Opposes Proposition to Reform Unfair Competition Law*, Southern California Law Blog, Oct. 2, 2004

(<http://sclblog.com/2004/10/02/ca-attorney-general-lockyer-opposes-proposition-to-reform-unfair-competition-law>); Associated Press, “California Supreme Court Clarifies Proposition 64 Reach,” *San Francisco Chronicle*, July 24, 2006 (noting Prop. 64 was enacted, barring certain lawsuits not alleging injuries) (<http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2006/07/24/state/n172716D18.DTL>).

⁵³ *Connecticut v. American Electric Power Co.*, 406 F.Supp.2d 265 (S.D.N.Y. 2005) (dismissing nuisance suit filed by Connecticut, California, New York, Vermont, Rhode Island, and other states).

⁵⁴ *Massachusetts v. EPA*, 415 F.3d 50, 51 (D.C. Cir. 2005) (rejecting suit filed by Massachusetts, California, Connecticut, New York, New Jersey, Illinois, Rhode Island, Vermont, New Mexico, Maine, Oregon, and Washington, arguing federal EPA should impose global warming regulations).

⁵⁵ See endnotes 25-27 and accompanying text (discussing court rulings barring interstate suits as a danger to interstate relations and encroachment on Congress's power over interstate commerce); *Byrd-Hagel Resolution*, S. Res. 98, 105th Cong., 1st Sess. (1997) (Senate voted 95-to-0 to reject Kyoto global-warming Treaty, citing the fact that it would require America to unilaterally cut carbon dioxide emissions, leaving American industry at a competitive disadvantage with major developing countries like India and China whose emissions are exempted from the Treaty's limits); Pub. L. No. 105-276, 112 Stat. 2461, 2496 (1998) (Congress barred EPA from implementing Kyoto emissions limits).

⁵⁶ *Connecticut v. American Electric Power Co.*, 406 F.Supp.2d 265 (S.D.N.Y. 2005).

⁵⁷ Complaint, *People of the State of California v. General Motors Corp.* (N.D. Cal. Sept. 20, 2006)

(<http://ag.ca.gov/newsalerts/cms06/06-082-0a.pdf>) ¶ 63 (seeking billions in damages); Karen Gullo & Alan Ohnsman, "California Sues GM, Ford, Toyota Over Global Warming," Bloomberg, Sept. 20, 2006

(http://www.bloomberg.com/apps/news?pid=20601103&sid=aSthCirr_IoI&refer=us) (describing suit).

⁵⁸ The Connecticut lawsuit sought only injunctive relief; by contrast, Lockyer's lawsuit sought damages, but standing to seek damages is far more limited than standing to seek injunctive relief. See, e.g., *Campos v. Ticketmaster*, 140 F.3d 1166, 1172 (8th Cir. 1998); *McCarty v. Recordex Services*, 80 F.3d 842, 856 (3d Cir. 1996).

⁵⁹ Editorial, "Cars as Global Warming's Causes," *Los Angeles Times*, Sept. 22, 2006

(www.latimes.com/news/opinion/la-ed-lockyer22sep22.0.7259653.story?coll=la-opinion-leftrail); Editorial, "Suing Car Makers Is A Waste of Time," *San Jose Mercury-News*, Sept. 28, 2006

(www.mercurynews.com/mld/mercurynews/news/opinion/15627877.htm); "Today's Editorial: Bill Lockyer's Nuisance Lawsuit," *Orange County Register*, Sept. 22, 2006 (www.ocregister.com/ocregister/opinion/homepage/article_1283478.php).

⁶⁰ Press Release # 06-082, *Attorney General Lockyer Files Lawsuit Against "Big Six" Automakers for Global Warming Damages in California* (Sept. 20, 2006) at pg. 1 (www.calcleancars.org/news/06-082.GlobalWarmingLawsuitAgainstAutoManufacturers.0920.pdf) (denouncing "federal government" for having "refused" to regulate, and boasting that "the lawsuit is the first of its kind to seek to hold manufacturers liable for [global warming] damages").

⁶¹ See *Hi-Voltage Wire Works v. City of San Jose*, 24 Cal.4th 537, 555-57, 12 P.3d 1068, 1079-80, 101 Cal.Rptr.2d 653, 665-67 (Nov. 30, 2000) (California Supreme Court unanimously invalidates a municipal racial preference defended by Bill Lockyer).

⁶² *California Constitution*, Article 1, § 31 ("The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting").

⁶³ *Hi-Voltage Wire Works v. City of San Jose*, 24 Cal.4th 537 (2000); John Rosenberg, "The High Cost of Racial Preference," *Discriminations*, June 1, 2006 (Discussing the \$650,000 costs to California taxpayers of a single contract subject to a relatively mild form of affirmative action) (available at www.discriminations.us/2006/06/the_high_cost_of_racial_prefer.html).

⁶⁴ *Koebke v. Bernardo Heights Country Club*, 36 Cal.4th 874, 31 Cal.Rptr. 3d 565 (Cal. 2005) (Domestic partners only analogous to married couples when they register under 2003 law which imposed same obligations and responsibilities on domestic partners as spouses); *Brief of the Attorney General as Amicus Curiae*, 2004 WL 3256422.

⁶⁵ *Salazar v. Diversified Paratransit*, 117 Cal.App.4th 318, 11 Cal.Rptr.3d 630 (Cal. App. 2 Dist. 2004) (No retroactive liability under state sexual harassment law by employer for conduct of non-employee; result is that only the harasser can be sued, and perhaps only through common law tort claims, which do not provide for recovery of attorneys fees).

⁶⁶ Hallye Jordan, "A New Direction: Lockyer Puts Stamp on Office; Attorney General Says He'll Focus on Labor, Rights," *San Jose Mercury News*, Jan. 24, 1999, at 3B (1999 WLNR 1714741).

⁶⁷ Daniel Brook, "The Problem of Prison Rape," *Legal Affairs*, March/April 2004

(http://www.legalaffairs.org/issues/March-April-2004/feature_brook_marapr04.msp) (Lockyer said he "would love to personally escort" Enron CEO Ken Lay "to an 8-by-10 cell that he could share with a tattooed dude who says, 'Hi, my name is Spike, honey'").

⁶⁸ On November 7, Spitzer was elected governor of New York State.

⁶⁹ Hans Bader, *Spitzer Strains Out Grasso While Swallowing Camels*, Competitive Enterprise Institute OnPoint No. 90, June 25, 2004 (<http://www.cei.org/pdf/4106.pdf>), citing *State v. Philip Morris*, 763 N.Y.S.2d 32 (N.Y. App. Div. 1st Dept. 2003); Andrew Tilghman, "Tobacco Case Legal Fees Under Fire," *Albany Times-Union*, Oct. 14, 2002, at A1 (2002 WLNR 328644).

⁷⁰ Tilghman (\$200,000 contributed to New York political war chests).

⁷¹ New York State Board of Elections, *List of All Contributors who contributed whose name is like %DAMASHEK%*

(http://www.elections.state.ny.us/plsql_browser/CONTRIBUTORB_COUNTY?NAME_IN=Damashek&position_IN=ANYWHERE&date_from=&date_to=&CATEGORY_IN=ALL&office_IN=7&county_IN=ALL&amount_from=&amount_to=&ZIP1=&ZIP2=&ORDERBY_IN=N) (showing \$5000 paid on 8/28/1999 and \$2000 paid on 6/13/2000; data from before July 1999 is not available).

⁷² *In the Matter of Sony BMG Music Entertainment, Assurance of Discontinuance Pursuant to Executive Law § 63(15)* (July 22, 2005), p. 26, ¶ 2 (www.oag.state.ny.us/press/2005/jul/payola.pdf) (giving \$10 million from settlement with the state to Rockefeller

Philanthropy Advisors (RPA)); Michael Gormley, “Spitzer, UMG Settle Payola Case,” *Charlotte Observer* May 12, 2006, 3D (\$12 million paid to RPA); New York State Board of Elections, *List of All Contributors Who Contributed Whose Name is Like %ROCKEFELLER%* (showing \$2,000 in gifts to Spitzer’s 2002 campaign by Laurance Rockefeller, who also gave money to other high-profile Democrats; data limited to since 1999, after Spitzer took office) (data retrievable from <http://www.elections.state.ny.us>); Rockefeller Philanthropy Advisors, 2002-2004 Annual Report, at pp. 16, 19 (showing that RPA gave “grants of \$10,000 or more” to the “League of Conservation Voters” and also to related entities) (<http://216.198.218.233/wp-content/uploads/2006/06/annual%20report%20FINAL.pdf>); N.Y. League of Conservation Voters, *Eliot Spitzer* (endorsing Spitzer for governor) (http://www.nylcv.org/endorse/candidate/eliot_spitzer); “Campaign Files,” *Albany Times Union*, Oct. 27, 1998, at A1 (noting that “Larry Rockefeller” is N.Y. LCV’s co-founder).

⁷³ Elizabeth Cooper, *Opponent Says Spitzer Going Easy on Oneidas*, *Utica Observer-Dispatch*, June 20, 2006 (<http://www.uticaod.com/apps/pbcs.dll/article?AID=/20060620/NEWS/606200320/1009/NEWS02&template=printart>).

⁷⁴ Bill Hammond, “High-Flying Spitzer Hits Ethical Turbulence,” *New York Daily News*, Sept. 5, 2006 (www.nydailynews.com/news/col/story/449428p-378303c.html).

⁷⁵ See Michael Freedman, “Witch Hunt,” *Forbes*, Dec. 19, 2002 (http://www.forbes.com/forbes/2002/1209/072_print.html).

⁷⁶ “Meanwhile, Spitzer’s Fundraising,” Editorial, *New York Sun*, June 10, 2005 (http://www.nysun.com/article/15202?page_no=1).

⁷⁷ Brian McGuire, “Spitzer Campaign Filings Show \$400,000 in Contributions From Lawyers,” *New York Sun*, July 21, 2005 (data/news/files/220.shtml).

⁷⁸ “Pataki, Spitzer Spar Over AIG Lawyer Contributions,” *Insurance Journal*, April 13, 2005 (<http://www.badfaithinsurance.org/reference/General/0231a.htm>).

⁷⁹ “Spitzer to Return Donations: The candidate for New York governor received \$124,455 from indicted law firm Milberg Weiss,” *Los Angeles Times*, May 20, 2006 (<http://www.latimes.com/news/politics/la-fi-milberg20may20.0,3498824.story?coll=la-headlines-politics>); *N.Y. State Bd. of Elections Financial Disclosure Report* (Spitzer 2006, 2006 Jan. Periodic Rep.) (Firm gave \$20,000 on Jan. 11, 2006) (http://www.elections.state.ny.us/reports/rwservlet?cmdkey=efs_sch_report+p_filer_id=A11552+p_e_year=2002+p_freport_id=K+p_transaction_code=A).

⁸⁰ *New York State Board of Elections Financial Disclosure Report* (Spitzer received \$10,000 each from Melvyn Weiss and David Bershad on July 3, 2002).

⁸¹ *Milberg, Weiss, Hevesi & Spitzer*, Editorial, *New York Sun*, June 30, 2005 (<http://www.nysun.com/article/16313>).

⁸² Peter Lattman, *Why Wasn’t Spitzer Involved in the Milberg Weiss Investigation?*, *WSJ Law Blog*, May 24, 2006 (<http://blogs.wsj.com/law/2006/05/24/why-wasnt-spitzer-involved-in-the-milberg-weiss-investigation/>).

⁸³ Larry Neumeister, “Judge Bars Probe of National Banks,” *Associated Press*, Oct. 13, 2005 (federal judge Sydney H. Stein ruled that Spitzer encroached on the domain of the Comptroller of the Currency by investigating national banks under the Comptroller’s jurisdiction) (available at http://federalnewsradio.com/index.php?sid=270349&nid=185&template=section_print); *Office of the Comptroller of the Currency v. Spitzer*, 396 F.Supp.2d 383 (S.D.N.Y. 2005) (ruling Spitzer encroached on federal prerogatives); *Clearing House Association v. Spitzer*, 394 F.Supp.2d 62 (S.D.N.Y. 2005) (same).

⁸⁴ Michael S. Greve, *Government by Indictment: Attorneys General and Their False Federalism*, *American Enterprise Institute* (AEI Working Paper #110), at 31, Side Note 8 (May 24, 2005) (<http://www.aei.org/publication22565#18451>) (“Spitzer’s insistence that he is forced to fill a vacuum left by captured federal regulators rings particularly hollow here: mutual fund practices had been under active SEC supervision for well over a year. In launching a preemptive state investigation, Spitzer chiefly sought to teach federal investigators that he could make them look bad on any given day”); *J. & W. Seligman & Co., Complaint*, ¶¶ 9-14 (S.D.N.Y. Sept. 2, 2005) (No. 05-7781)(Spitzer investigated company at the same time as the SEC, and then continued investigating it over a particular issue, advisory fees, that is subject to the SEC’s exclusive jurisdiction, even after the SEC settled with the company).

⁸⁵ AEI Federalism Project, *Carve My Turkey*, *AG Watch*, November 21, 2005 (<http://federalismproject.org/agwatch/?p=41>); Press Release, *Western Union Agrees to Help Combat Telemarketing Fraud*, New York Attorney General’s Office, November 14, 2005 (www.oag.state.ny.us/press/2005/nov/nov14a_05.html). (AARP is a liberal lobby group which frequently files amicus briefs in support of liberal causes in the Supreme Court on issues having little to do with the elderly, taking the same side as Spitzer and other liberal attorney generals and the trial lawyers).

⁸⁶ Press Release, *Western Union Agrees to Help Combat Telemarketing Fraud*, New York Attorney General’s Office, November 14, 2005 (http://www.oag.state.ny.us/press/2005/nov/nov14a_05.html); Press Release, *AG Reilly Reaches Agreement with Western Union to Protect Consumers Against Fraudulent Telemarketers*, Nov. 14, 2005 (\$400,000 split among several states, including New York, Massachusetts, Vermont, and Wisconsin) (www.ago.state.ma.us/sp.cfm?pageid=986&id=1532).

⁸⁷ Press Release, *Western Union Agrees to Help Combat Telemarketing Fraud*; AEI, *Carve My Turkey*

⁸⁸ Press Release, *AG Reilly Reaches Agreement with Western Union to Protect Consumers Against Fraudulent Telemarketers*, Nov. 14, 2005 (www.ago.state.ma.us/sp.cfm?pageid=986&id=1532).

⁸⁹ Greve, *Government by Indictment*, at pp. 8, 18-19 (discussing Spitzer’s threats of indictment, and actual indictments based on conduct that was widely perceived within the insurance industry as lawful, and tolerated for years by state regulators); Kimberley Strassel, “The Passion of Eliot Spitzer,” *Commentary*, *Wall Street Journal*, May 3, 2006, at A14 (http://online.wsj.com/article_print/SB114662479399042307.html).

⁹⁰ Strassel

⁹¹ Ibid. (Longtime GE chief Jack Welch confirms Spitzer's threat to "put a spike through [the] heart" of a colleague, and Congresswoman Sue Kelly describes political threats and insults from Spitzer); John Whitehead, *Scary*, letter, WSJ, Dec. 27, 2005 (http://online.wsj.com/article_print/SB113521165136628992.html); Will Wilson, *Finally, Spitzer Gets Some Publicity*, AEI Federalism Project's Eye on Attorneys General, May 4, 2006 (<http://federalismproject.org/agwatch/?p=80>).

⁹² Strassel, Whitehead.

⁹³ *Balbuena v. IDR Realty*, 845 N.E.2d 1246 (N.Y. 2006) (Divided court allows suit by illegal aliens, represented by Jeffrey A. Lichtman); N.Y. State Bd. of Elections, *List of Individuals who contributed whose name is like %LICHTMAN%* (\$1000 donated to Spitzer) (http://www.elections.state.ny.us/plsql_browser/CONTRIBUTORB_COUNTY?NAME_IN=Lichtman&position_IN=ANYWHERE&date_from=&date_to=&CATEGORY_IN=IND&office_IN=7&county_IN=ALL&amount_from=&amount_to=&ZIP1=&ZIP2=&ORDERBY_IN=N).

⁹⁴ *Hoffman Plastics v. NLRB*, 535 U.S. 137, 140 (2002) (an award of backpay "to an undocumented alien who has never been legally authorized to work in the United States . . . is foreclosed by federal immigration policy").

⁹⁵ *Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 105-06, 761 N.Y.S.2d 192 (2003).

⁹⁶ *Hamilton v. Beretta USA Corp.*, 96 N.Y.2d 222, 231, 750 N.E.2d 1055, 1060 (N.Y. 2001) (Dismissing suit because gun makers owed no duty of care to public at large and because liability cannot be based solely on market share).

⁹⁷ *Connecticut v. American Electric Power Co.*, 406 F.Supp.2d 265 (S.D.N.Y. Sept. 22, 2005) (rejecting the lawsuit); *Brief for Plaintiffs-Appellants in State of Connecticut, et al., v. American Electric Power Co., et al.* (2d Cir. Dec. 15, 2005) (No. 05-5104) (Eliot Spitzer listed as lead attorney on states' appellate brief).

⁹⁸ See text in and accompanying footnotes 26-27.

⁹⁹ *Massachusetts v. EPA*, 415 F.3d 50, 51 (D.C. Cir. 2005) (Massachusetts, New York, Connecticut, California, New Jersey, Illinois, Rhode Island, Vermont, New Mexico, Maine, Oregon, and Washington sued, arguing federal EPA has jurisdiction over, and must regulate, carbon dioxide emissions in America).

¹⁰⁰ *Byrd-Hagel Resolution*, S. Res. 98, 105th Cong., 1st Sess. (1997) (Senate votes 95-to-0 to reject Kyoto global-warming Treaty, citing the fact that it would require America to unilaterally cut carbon dioxide emissions, leaving American industry at a competitive disadvantage with major developing countries like India and China whose emissions are exempted from the Treaty's limits); Pub. L. No. 105-276, 112 Stat. 2461, 2496 (1998) (Congress barred EPA from implementing Kyoto emissions limits); Pub. L. No. 106-74, 113 Stat. 1047, 1080 (1999) (same); Pub. L. No. 106-377, 114 Stat. 1441, 1441A-41 (2000) (same).

¹⁰¹ See Clifford J. Levy & Michael Luo, *New York Medicaid Fraud May Reach Into Billions*, New York Times, July 18, 2005, at A18 (2005 WLNR 11322715).

¹⁰² *Who's Minding Medicaid?*, New York Times, July 20, 2005, at A22 (2005 WLNR 11332796) (quoting a former prosecutor).

¹⁰³ Tom Suozzi, *Spitzer's "Day One" Platitudes: Promises Are Not a Plan*" (<http://tomsuozzi.com/announcements/pr-060106a/>) ("New York had the worst recovery-to-expenditure ratio between 1999 and 2003" for rooting out Medicaid fraud, according to Nassau County executive Tom Suozzi).

¹⁰⁴ "Editorial: While Eliot Slept," *New York Post*, Oct. 10, 2005, at 28 (2005 WLNR 23233676).

¹⁰⁵ *Hoffman Plastics v. NLRB*, 535 U.S. 137, 140 (2002). See *Statement of Attorney General's Office Regarding May 1 "National Day of Action for Immigrant Rights"*, April 28, 2006 (http://www.oag.state.ny.us/press/2006/apr/apr28b_06.html). Federal labor law only protects concerted activity to improve workplace conditions, not generalized political protests, and doesn't abrogate workplace attendance rules, leaving employers free to find replacements for absent workers. So even legal aliens could probably not invoke federal labor law to take the day off. See, e.g., *NLRB v. Mackay Radio*, 304 U.S. 333 (1938) (employers have right to hire permanent replacements for absent employees, such as strikers); *Curay-Cramer v. Ursuline Academy*, 450 F.3d 130 (3d Cir. 2006) (generalized protests, such as signing pro-choice petition, are not shielded by federal employment laws protecting employees who protest workplace discrimination based on pregnancy or having an abortion).

¹⁰⁶ *In the Matter of Sony BMG Music Entertainment, Assurance of Discontinuance Pursuant to Executive Law § 63(15)* (July 22, 2005) (Exhibit B, "Business Reforms") (www.oag.state.ny.us/press/2005/jul/payola.pdf).

¹⁰⁷ *In the Matter of Sony BMG Music Entertainment, Assurance of Discontinuance Pursuant to Executive Law § 63(15)* (July 22, 2005) (Exhibit B, §§ II.B, C, & D).

¹⁰⁸ Wright, *Some Economics of Payola*, Conglomerate Blog, Aug. 2, 2005 (www.theconglomerate.org/2005/08/some_economics.html).

¹⁰⁹ Wright, *Some Economics of Payola*, Conglomerate Blog, Aug. 2, 2005 (discussing Coase, *Payola in Radio & Television Broadcasting*, Journal of Law and Economics, Vol. 22, No. 2 (Oct. 1979), pp. 269-328); Ronald H. Coase: 1991 Nobel Laureate in Economics (<http://almaz.com/nobel/economics/1991a.html>).

¹¹⁰ AEI Federalism Project, *You Live for the Fight When It's All You've Got*, AG Watch, May 9, 2006 (<http://federalismproject.org/agwatch/?p=81>) (discussing national scope of settlement demanded); Press Release, *Liberty Mutual To Contest Allegations By New York And Connecticut Attorneys General* (May 5, 2006) (<http://www.libertymutual.com/omapps/ContentServer?cid=1003349317278&year=2006&prid=1138334255300&pagename=CorporateInternet%2FPPage%2FPPressReleaseDarkBlue&c=Page>) (same); Press Release, *Liberty Mutual Sued in Bid-Rigging Probe* (May 5, 2006) (www.oag.state.ny.us/press/2006/may/may05b_06.html) (Connecticut & Illinois back suit).

¹¹¹ Michael S. Greve, *Government by Indictment: Attorneys General and Their False Federalism*, American Enterprise Institute (AEI Working Paper #110), at 18-21, 25, 31-32 (May 24, 2005) (<http://www.aei.org/publication22565#18451>); Greve, *Free Eliot Spitzer!*, AEI Online, May 1, 2002 (http://www.aei.org/publications/filter.all.pubID.13928/pub_detail.asp).

¹¹² Greve, *Government by Indictment*, p. 31.

¹¹³ Greve, *Government by Indictment*, p. 21.

¹¹⁴ See *In re Merrill Lynch*, 273 F.Supp.2d 351 (S.D.N.Y. 2003); Greve, *Government by Indictment*, at 21.

¹¹⁵ See Walter Olson, *Spitzer: No Smokes Via UPS*, Point of Law, Nov. 1, 2005 (<http://www.pointoflaw.com/archives/001783.php>) ; Michael Gormley, *UPS Agrees to End Cigarette Deliveries to Individuals*, Associated Press, October 24, 2005 (<http://www.smokersclubinc.com/modules.php?name=News&file=article&sid=2229>) (settlement bars delivery to all “individuals in the United States”; DHL also restricted nationally by Spitzer); *Association of Responsible Cigarette Sellers v. State of New York*, Appendix to Complaint (“Appendix”) at pp. 119-39 (N.Y. Sup. Ct., Erie County, April 30, 2006) (Index # 4260/2006) (reprinting the settlement, which covers the nation at pp. 124-25).

¹¹⁶ Walter Olson, “Spitzer: No Smokes Via UPS,” *Point of Law*, Nov. 1, 2005 (www.pointoflaw.com/archives/001783.php) (“There’s no good reason why enterprises that carry parcels should feel legally obliged to check, opening the parcels if necessary, whether the sender and recipient have paid all the taxes due on their transaction. That’s one reason why, if you order cigarettes by phone or online from an Indian tribal supplier, the U.S. Postal Service will be happy to deliver the cartons to your door. (Another reason: it remains a matter of legal dispute whether states can tax the tribes’ sales in the first place.) Nonetheless, New York Attorney General Eliot Spitzer has just bullied UPS, the world’s largest package carrier, into agreeing to cease the delivery of cigarettes to individuals nationwide. (N.B. -- not just in New York, but *anywhere in the country* -- including the 49 states whose citizens never got a chance to vote on Spitzer’s elevation to his post). For now, at least, Spitzer can’t reach the U.S. Postal Service itself with his legal threats, so that avenue of distribution remains open. . . it’s hard to see why the principles at stake, once established, will not be carried further. For example, states would love to tax interstate sales of goods on eBay, many of which are shipped by UPS. What happens when a Spitzer successor demands that UPS cease to deliver shipments of goods bought on eBay unless the sender proffers evidence that sales tax has been paid? Will the delivery service fold up and go quietly then, too?”).

¹¹⁷ Appendix at 142-55 (Fed Ex), 103-116 (DHL), 180-89 (Philip Morris) in *Association of Responsible Cigarette Sellers v. State of New York* (Erie County Sup. Ct., April 30, 2006) (Index No. 4260/2006).

¹¹⁸ Michael Gormley, *UPS Agrees to End Cigarette Deliveries to Individuals*, Associated Press, October 24, 2005.

¹¹⁹ *Association of Responsible Cigarette Sellers v. State of New York*, Affidavit of Scott B. Maybee, ¶ 22 (April 2006), and Memorandum of Law In Support of Plaintiffs’ Motion for Preliminary Injunction, pp. 11, 29-30 (May 1, 2006) (<http://www.responsiblesellers.org/pdf/Brief.pdf>).

¹²⁰ Chuck Shepherd, *News of the Weird*, Week of Apr. 9, 2006 (www.newsoftheweird.com/archive/nw060409.html) (citing *New York Daily News*, 1-29-06); see also Jennifer Moroz, *Farber Sworn in as Attorney General*, Philadelphia Inquirer, Jan. 31, 2006 (describing Farber’s driving record and bench warrants) (http://72.14.207.104/search?q=cache:mwVT8mlZTYJ:www.philly.com/mld/philly/news/13752535.htm%3Fsource%3Drss%26chanel%3Dphilly_news+Zulima+Farber+bench+warrants&hl=en&gl=us&ct=clnk&cd=26); Richard G. Jones, “In New Jersey, New Nominee to Top Law Job,” *New York Times*, Aug. 25, 2006, at A20 (Farber had “4 bench warrants for failing to appear in court”).

¹²¹ Rick Hepp, “Farber Seeks Political Allies As Traffic Stop Is Investigated,” *Newark Star-Ledger*, July 13, 2006 (<http://www.nj.com/printer/printer.ssf?/base/news-7/1152770695110840.xml&coll=1>).

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ “Zulima Farber Should Be Out As AG,” Editorial, *Courier-News*, July 25, 2006

(<http://www.c-n.com/apps/pbcs.dll/article?AID=/20060706/OPINION01/607060338/1009>).

¹²⁵ Tom Hester, Jr., Associated Press, “Farber Favors Stiff Fines, Not Jail, for Corruption,” *NorthJersey.com*, June 16, 2006

(<http://www.northjersey.com/page.php?qstr=eXJpcnk3ZjcxN2Y3dnFIZUVFeXkyJmZnYmVsN2Y3dnFIZUVFeXk2OTQ0ODQ1>).

¹²⁶ *Connecticut v. American Electric Power Co.*, 406 F.Supp.2d 265 (S.D.N.Y. Sept. 22, 2005) (nuisance suit); *Connecticut v. American Electric Power Co.*, Reply Brief for Plaintiffs-Appellants Responding to Brief of Appellee Tennessee Valley Authority, at pg. 29 (2d Cir. Mar. 16, 2006) (No. 05-5104) (brief signed by Farber and other attorneys general) (www.pawalaw.com/html/documents/States-TVA-Reply-FinalAsFiled.pdf).

¹²⁷ *Massachusetts v. EPA*, 415 F.3d 50, 51 (D.C. Cir. 2005) (rejecting lawsuit by Massachusetts, Connecticut, New York, California, New Jersey, Illinois, Rhode Island, Vermont, New Mexico, Maine, Oregon, and Washington, seeking to force federal EPA to impose global warming regulations); Commonwealth of Massachusetts, et al., v. United States Environmental Protection Agency, *Petition for Certiorari*, at pg. 28 (U.S. March 2, 2006) (No.05-1120) (brief jointly signed by Farber along with other attorneys general) (http://www.ago.state.ma.us/filelibrary/Env_ClimateChangeCert.pdf).

¹²⁸ *Byrd-Hagel Resolution*, S. Res. 98, 105th Cong., 1st Sess. (1997) (Senate rejects Kyoto 95-to-0 for these reasons); Pub. L. No. 106-74, 113 Stat. 1447, 1088 (1999) (barring EPA from enforcing Kyoto). See also text accompanying footnotes 26-27 (discussing court rulings rejecting interstate suits as a threat to interstate relations and an encroachment on Congress’s authority over interstate commerce).

¹²⁹ *Connecticut v. American Electric Power Co.*, 406 F.Supp.2d 265 (S.D.N.Y. Sept. 22, 2005) (judge ruled plaintiffs had brought to court a political question that belonged in the legislature, rather than in the courts); *Massachusetts v. EPA*, 415 F.3d 50, 59-61 (D.C. Cir. 2005) (concurring judge observed that the lawsuit involved a generalized problem to be addressed by Congress, not an injury

targeted at a particular individual, of the sort that courts are supposed to remedy).

¹³⁰ Raja Mishra, *Rhode Island Wins Lead Paint Suit*, Boston Globe, Feb. 23, 2006 (www.boston.com/news/local/rhode_island/articles/2006/02/23/rhode_island_wins_lead_paint_suit/); Editorial, “Blaming the Wrong People,” *Providence Journal*, March 6, 2006.

¹³¹ “Blaming the Wrong People.”

¹³² *Ibid.* (The “jury acted without proof that the three companies produced paint that is now on Rhode Island buildings”).

¹³³ James R. Copland, “Lawyer Leadership: The Plaintiff’s bar’s paint profits,” *City Journal* (Manhattan Institute, Spring 2006) (http://www.city-journal.org/html/16_2_sndgs03.html).

¹³⁴ Rhode Island Board of Elections, *Campaign Finance Electronic Reporting & Tracking System, Public Contribution Report* (www.ricampaignfinance.com/RIPublic/Reporting/TransactionReport.aspx?OrgID=0&BeginDate=&EndDate=&LastName=mcconnell&FirstName=&ContType=0&State=&City=&ZIPCode=&EmployerName=&Amount=0&ReportType=Contrib&CFStatus=F&MPFStatus=A&Level=S&SumBy=Type&Sort1=ReceiptDate&Direct1=desc&Sort2=None&Direct2=asc&Sort3=None&Direct3=asc&Site=Public&Incomplete=A&ContSource=CF) (visited, May 15, 2006)).

¹³⁵ Walter Olson, “R.I. Jury Finds Former Lead Paint Makers Liable,” *Overlawyered.com*, Feb. 22, 2006 (“the Motley firm,” known as Ness Motley and then Motley Rice, “quickly established itself the number one donor in Rhode Island politics, with special generosity toward officials who could be helpful to its idea for a lead paint suit”) (http://www.overlawyered.com/2006/02/ri_jury_finds_former_lead_paint.html).

¹³⁶ *Public Contribution Report* (showing 3 contributions by Sara Shea McConnell); *John J. McConnell Jr.: Motley Rice Attorney Bio* (“McConnell is married to Sara Shea McConnell”).

¹³⁷ Carroll Andrew Morse, *The Lead Paint Trial Continues*, Anchor Rising, April 3, 2006 (<http://www.anchorrising.com/barnacles/002837.html>).

¹³⁸ Michelle R. Smith, “R.I. Attorney General Faces Ethics Complaint,” *Boston Globe*, July 6, 2006 (http://www.boston.com/news/local/rhode_island/articles/2006/07/06/ri_attorney_general_faces_ethics_complaint?mode=PF).

¹³⁹ Michelle R. Smith, “Du Pont Lead Paint Suit Deal Questioned,” *Delaware News-Journal*, Aug. 4, 2006 (<http://www.delawareonline.com/apps/pbcs.dll/article?AID=/20060804/BUSINESS/608040336/1003>).

¹⁴⁰ *Ibid.* (“It does not pass the smell test,” said “Robert Arruda, President of Operation Clean Government, a nonpartisan public watchdog”).

¹⁴¹ *Tyler v. Superior Court*, 30 R.I. 107, 114 (R.I. 1909) (court costs are the property of “the party who recovers the judgment and not the attorney”); R.I. Gen. Laws § 35-41-2 (2004) (“All revenue of the state of whatever character shall be paid into the hands of the general treasurer and credited to the general funds of the state, except in such cases as the general assembly may by law specifically allocate to a special fund”); R.I. Gen. Laws § 35-6-71 (all money belonging to state must be deposited in state treasury); R.I. Gen. Laws § 36-6-7 (any money recovered by state official must be turned over to treasurer); R.I. Gen. Laws § 36-14-1 (barring financial gain from exercise of state authority); Louisiana Board of Ethics, *Opinion No. 2000-381* (May 17, 2001) (<http://domino.ethics.state.la.us/EthicRu2.nsf/ecfd553acd8f6446862567f9006e60b6/2612f2554768ab7886256abd0058d0a6?OpenDocument>) (finding that a similarly-worded Louisiana ethical provision barring economic gains from performance of public duties was violated by a contingency-fee arrangement between a state attorney general and trial lawyers).

¹⁴² Carroll Andrew Morse, “The Lead Paint Trial Continues,” *Anchor Rising*, April 3, 2006 (<http://www.anchorrising.com/barnacles/002837.html>); *accord* Brief of Washington Legal Foundation as Amicus Curiae (www.wlf.org/upload/LeadIndustriesvRhodelsland.pdf), at pg. 13 (citing Rhode Island Dept. of Health) (removing intact lead paint can create, rather than eliminate, health risks), in *State of Rhode Island v. Lead Indus. Ass’n*, (R.I. Feb. 22, 2005) (No. 2004-63-MP).

¹⁴³ “Lynch was fined \$5,000 and held in civil contempt by [Judge] Silverstein, [who was presiding over the lead paint litigation], last fall for a comment that appeared in The Providence Journal in which Lynch described the lead paint companies as those who would ‘spin and twist the facts.’ That fine has been appealed.” Eric Tucker, “R.I. Attorney General Hit With Second Fine for Comments in Lead Paint Case,” Associated Press (reprinted at Legal Soapbox by FreeAdvice.com) (http://legalsoapbox.freeadvice.com/n22778_R.I._attorney_general_hit_with_second_fine_for_comments_in_lead_paint_case.htm).

¹⁴⁴ *Connecticut v. American Electric Power Co.*, 406 F.Supp.2d 265 (S.D.N.Y. Sept. 22, 2005) .

¹⁴⁵ *Massachusetts v. EPA*, 415 F.3d 50, 51 (D.C. Cir. 2005) (rejecting suit by Massachusetts, Connecticut, New York, California, New Jersey, Illinois, Rhode Island, Vermont, New Mexico, Maine, Oregon, and Washington seeking to force EPA to impose global warming regulations).

¹⁴⁶ *Byrd-Hagel Resolution*, S. Res. 98, 105th Cong., 1st Sess. (1997) (Senate rejects Kyoto 95-to-0 for these reasons); Pub. L. No. 106-74, 113 Stat. 1447, 1088 (1999) (barring EPA from enforcing Kyoto). *See also* text accompanying footnotes 25-26 (discussing court rulings rejecting interstate suits as a threat to interstate relations and an encroachment on Congress’s power over interstate commerce).

¹⁴⁷ *Connecticut v. American Electric Power Co.*, 406 F.Supp.2d 265 (S.D.N.Y. Sept. 22, 2005) (judge ruled plaintiffs had brought to court a political question that belonged in the legislature, rather than in the courts); *Massachusetts v. EPA*, 415 F.3d 50, 59-61 (D.C. Cir. 2005) (concurring judge observed that the lawsuit involved a generalized problem to be addressed by Congress, not an injury targeted at a particular individual, of the sort that courts are supposed to remedy).

¹⁴⁸ *State v. Vieweg*, 205 W.Va. 687, 520 S.E.2d 854 (W.Va. 1999).

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.* (Stuart Calwell and John Skaggs represented Galloway before the state supreme court); *State of West Virginia Campaign*

Financial Statement (Long Form) In Relation to 2004 Election Year (First Primary, 4/2/2004) (Calwell made \$1000 donation on 3/8/2004) (<http://www.wvsos.com/elections/PDF/Candidates/004507243.pdf>); *State of West Virginia Campaign Financial Statement (Long Form) In Relation to 2004 Election Year (Pre-Primary, 5/3/2004)* (Skaggs donation) (<http://www.wvsos.com/elections/PDF/Candidates/004507270.pdf>); *State of W. Va. Campaign Financial Statement for Elections in 1996 (4/13/2001)* (another Skaggs donation recorded on 1/24/2001) (www.wvsos.com/cfrpdfdocs/pdfdocs/WF_3D7.pdf).

¹⁵¹ *McGraw v. American Tobacco Co.*, Civ. A No. 94-C-1707 (W. Va. Cir. Ct. Nov. 29, 1995) (Holding that a contingency fee arrangement is an unlawful appropriation of state funds and that the attorney general has neither statutory or constitutional authority to retain such counsel); John Beisner, Jessica Davidson Miller, and Terrell McSweeney, *Bounty Hunters on the Prowl: The Troubling Alliance of State Attorneys General and Plaintiffs' Lawyers*, at 34 (citing the McGraw decision); Juliet Terry, "Lawmaker Asks Members for 'Will to Act,'" *West Virginia State Journal*, March 9, 2006 (Citing a "1995 Kanawha County Circuit Court opinion by Judge Irene Berger, who ruled, 'The Attorney General has no statutory or constitutional authority to retain private counsel under the contingent fee arrangement. Neither the attorney general nor this court has statutory or constitutional authority to authorize payment of compensation to private counsel as contemplated under the contingent fee arrangement.' . . . Berger cited state code, which states the AG 'may appoint such assistant attorneys general as may be necessary to perform the duties of his office.' But those state appointees are to be compensated 'within the limits of the amounts appropriated by the Legislature for personal services.' That order was part of the state's litigation against national cigarette makers, a case that ended with a national settlement awarding many states, including West Virginia, substantial funds.") (<http://www.statejournal.com/story.cfm?func=viewstory&storyid=9272>)

¹⁵² *McGraw v. American Tobacco Co.*

¹⁵³ Editorial, *Charleston Daily Mail*, July 10, 2002, at 5A (2002 WLNR 1069724) (quoting the Legislative Auditor); Phil Kabler, *Legislative Audit Questions Attorney General's Authority*, *Charleston Gazette*, January 8, 2002, at 5A (2002 WLNR 1024876) (citing "constitutional requirement that the Legislature appropriate state funds"); Sam Trnum, "Lawyer Receives \$3.85 Million; Was Only Briefly Involved in Tobacco Lawsuit," *Daily Mail*, June 27, 2002, at 1A (2002 WLNR 1068927); Robert Mauk, "McGraw's Ads Are An Abuse," *Daily Mail*, Sept. 4, 2003, at 4A (2003 WL 1586234).

¹⁵⁴ Cheryl Carlson, "Our Grievances Pay Handsomely: Lawyers Speaking on Citizens Behalf Got \$33.5 Million?" *Charleston Daily Mail*, July 10, 2002, at 5A (2002 WLNR 1069724) (quoting House Finance Chairman Harold Michael about the legislature's lack of knowledge of the payments); Robert Mauk, "Personal Injury Lawyers Thriving: Lawsuit Abuse Taints Government," *Charleston Daily Mail*, October 29, 2001, at 5A (2001 WLNR 757763) ("secret \$33.5 million sweetheart deal").

¹⁵⁵ Chris Dickerson, "Drug Companies Question McGraw's Use of Special Assistant AGs," *West Virginia Record*, July 25, 2006 (<http://www.wvrecord.com/news/newsview.asp?c=182166>) (McGraw hired lawyer Pamela Clark Toriseva, after she gave him \$2000, and Paul Toriseva gave him \$1000).

¹⁵⁶ Juliet Terry, "AG Funds Drawing Legislative Ire," *WOWKTV*, Feb. 23, 2006 (<http://wowktv.com/story.cfm?func=viewstory&storyid=8931>).

¹⁵⁷ Terry, "Lawmaker Asks Members for 'Will to Act.'" ("The state has reported that OxyContin settlement money has not gone back to the government agencies that sued Purdue, apart from a \$250,000 award to DHHR, nor were the agencies made privy to the details of the settlement before it was signed, which violates a tenet in the state's code of professional conduct for lawyers").

¹⁵⁸ Terry, "Lawmaker Asks Members for 'Will to Act.'" (Noting that "the bulk of the first \$2.5 million payment [was] going to legal fees" and citing a "1995 Kanawha County Circuit Court opinion by Judge Irene Berger, who ruled, 'The Attorney General has no statutory or constitutional authority to retain private counsel under the contingent fee arrangement. Neither the attorney general nor this court has statutory or constitutional authority to authorize payment of compensation to private counsel as contemplated under the contingent fee arrangement' . . . Berger cited state code, which states the AG 'may appoint such assistant attorneys general as may be necessary to perform the duties of his office.' But those state appointees are to be compensated 'within the limits of the amounts appropriated by the Legislature for personal services.' That order was part of the state's litigation against national cigarette makers, a case that ended with a national settlement awarding many states, including West Virginia, substantial funds.")

¹⁵⁹ Steve Korris, *AG's \$180,000 Award to Tomblin's Wife's College Raises Eyebrows*, *West Virginia Record*, April 13, 2006 (<http://www.wvrecord.com/news/newsview.asp?c=177707>).

¹⁶⁰ Terry, "Lawmaker Asks Members for 'Will to Act.'"

¹⁶¹ Juliet Terry, "AG Funds Drawing Legislative Ire."

¹⁶² *Ibid.* (Quoting legislators); Ted Frank, *AG Darrell McGraw Slush Fund*, *Point of Law*, Feb. 25, 2006 (legal commentary) (<http://www.pointoflaw.com/archives/002159.php>).

¹⁶³ Chris Dickerson, "Questions Arise Over McGraw's Handling of Settlement Funds," *West Virginia Record*, February 24, 2006 (www.wvrecord.com/news/newsview.asp?c=175190) ("Steve Roberts, president of the West Virginia Chamber of Commerce, says McGraw could have structured the Oxycontin settlement to go to state health care programs, such as Medicaid. Roberts says the state agencies McGraw represented in the suit could use the settlement money, among other uses, to be appropriated over the next several years to obtain an additional \$30 million in federal Medicaid funds. 'Attorney General Darrell McGraw's arbitrary decision not to structure these settlement dollars to go to these state agencies is unfathomable,' he said. 'The lawsuit was filed on behalf of these agencies, but it appears that none of the settlement dollars is going back to them. Since they were the clients, how come they are not having a say in how these settlement funds are used? The crying shame in all of this is that these dollars should have been returned to

the state's General Fund for lawful appropriation such as to obtain, on a 3-for-1 match, much badly needed federal Medical dollars. That would create nearly \$40 million more to cover growing pharmaceutical and other costs in our state's health care system.”).

¹⁶⁴ Kevin Mayhood, *\$145 Million Dispute in Federal Court Here*, Columbus Dispatch, Jan. 10, 2005

(<http://www.tobacco.org/news/186687.html>) (lawyers “were awarded more than \$14 billion from the tobacco settlement”).

¹⁶⁵ “Tobacco Deal-Breaker?” *Wall Street Journal*, Review and Outlook, Aug. 19, 2005 (settlement amounted to \$246 billion over 25 years, passed on to consumers through higher prices) (www.controlabuseofpower.org/news/news_briefing_WSJ.asp).

¹⁶⁶ *Messer v. Huntington Anesthesia Group*, 218 W.Va. 4, 620 S.E.2d 144 (2005). The brief benefited campaign donor Walt Auvil, counsel for plaintiff, who earlier gave money to McGraw. *State of W. Va. Campaign Financial Statement for Elections in 1996*

(4/13/2001) (Auvil gave \$125 to McGraw's 1996 campaign on 2/17/2001) (http://www.wvsos.com/cfrpdfdocs/pdfdocs/WF_3D7.pdf).

¹⁶⁷ “Can We Escape Our “Tort Hell”?” *West Virginia State Journal*, June 8, 2006

(<http://statejournal.com/story.cfm?func=viewstory&storyid=11469>).

¹⁶⁸ See H. 749 (Sorrell's bill), *encodified as* Vt. Stat. Ann. tit. 33, §§ 1904, 1911 (1998) (retroactively changing the law); John McClaughry, *Sharp Practice*, Ethan Allen Institute Commentary, April 1998

(http://www.ethanallen.org/commentary.php?commentary_id=75) (Noting that Sorrell was responsible for the bill); Little, “A Most Dangerous Indiscretion” (Law in Vermont “retroactively changed”); Robert A. Levy, “The New Business of Government-Sponsored Litigation,” 9 *Kansas Journal of Law & Public Policy* 592, 594 (2000) (Vermont changed the law to eliminate time-honored defenses to liability, such as the assumption-of-risk defense, under which a smoker who smoked despite knowing the risks could not blame anyone else).

¹⁶⁹ H. 749, *encodified as* Vt. Stat. Ann. tit. 33, §§ 1904, 1911 (1998)

¹⁷⁰ John McClaughry, *Sharp Practice*, Ethan Allen Institute Commentary, April 1998 (http://www.ethanallen.org/commentary.php?commentary_id=75).

¹⁷¹ StateHealthFacts.org, *Percent of Adults Who Are Smokers, 2004*

(www.statehealthfacts.org/cgi-bin/healthfacts.cgi?action=compare&category=Health+Status&subcategory=Smoking&topic=Smoking+Rate) (Vermont has a lower percentage of smokers than 35 other states).

¹⁷² McClaughry, *Sharp Practice*

¹⁷³ *Ibid.*

¹⁷⁴ Alison Frankel, “Tobacco's Big Pay Day,” *American Lawyer*, Jan./Feb. 1999, at 22; Rocco Cammarere, “Tobacco Fees: Just Waiting to Inhale,” *New Jersey Lawyer*, Vol. 8, # 3, Jan. 18, 1999, at 107.

¹⁷⁵ Tom Precious, “Spitzer Declines to Join Bid to Keep Philip Morris Solvent,” *Buffalo News*, April 3, 2003, at A12 (2003 WLNR 2175996) (Sorrell “helped negotiate the 1998 settlement”).

¹⁷⁶ Kevin Mayhood, “\$145 Million Dispute in Federal Court Here,” *Columbus Dispatch*, Jan. 10, 2005

(<http://www.tobacco.org/news/186687.html>) (Lawyers “were awarded more than \$14 billion from the tobacco settlement”); Alex Beam, “Greed on Trial,” *Atlantic Monthly*, June 1, 2004, at 96 (Noting that attorneys fees are paid over a period of years and subject to an “annual cap”)(2004 WLNR 9589211).

¹⁷⁷ McClaughry, *Sharp Practice*.

¹⁷⁸ *Connecticut v. American Electric Power Co.*, 406 F.Supp.2d 265 (S.D.N.Y. Sept. 22, 2005) (dismissing nuisance suit by Connecticut, Vermont, and other states, seeking to impose the nuisance laws of their respective states on utilities located in distant states); *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005)(rejecting suit by Massachusetts, Vermont, and other states seeking to force the federal government (through the EPA) to regulate carbon dioxide emissions in America).

¹⁷⁹ See text accompanying footnotes 25-27 (discussing the Senate's unanimous rejection of the Kyoto Treaty in S. Res. 98 (1997) because it unilaterally restricted American CO2 emissions, while leaving Indian and Chinese emissions unlimited; Congress's barring the EPA from implementing Kyoto, *see, e.g.*, Pub. L. No. 105-276, 112 Stat. 2461, 2496 (1998); and court rulings barring interstate suits brought under state law, based on their potential for interstate conflict and encroachment on federal authority).

¹⁸⁰ *City of Chicago v. Beretta USA Corp.*, 213 Ill.2d 351, 356-57 (2004) (dismissing meritless suit by City of Chicago against gunmakers who lawfully sold guns outside Chicago just because they were later used in Chicago; suit was brought by lawyer Michael J. Hayes; court rejected position taken by Madigan's amicus brief in support of that suit); *Young v. Bryco Arms*, 213 Ill.2d 433 (2004) (court rejected as meritless lawsuit against gun maker brought by Thomas H. Geoghegan and the Katten Muchin law firm, since gun crimes committed by felons are intentional torts that are not legally considered the proximate result of lawful sales by out-of-state gun-makers); *Madigan, Lisa: Campaign Top Contributors* (showing \$1,000 contribution from Katten, Muchin in 2000 alone) (http://www.opensecrets.org/stl_getscontrib.asp?state=IL&candid=i17011&cycle=2000); Illinois State Board of Elections, *Campaign Disclosure: Contributions Search* (www.elections.state.il.us/CampaignDisclosure/ContribSearch.aspx) (search engine showing that Geoghegan gave Madigan \$250 in contributions on 8/28/2001 & 3/14/2002 and Hayes gave Madigan \$150 in contributions on 11/20/1997 & 2/26/1998).

¹⁸¹ Open Secrets.Org, *Contribution Search Results: Beeler* (available from search engine at

(<http://www.elections.state.il.us/CampaignDisclosure/ContribList.aspx>) (Showing the Beeler, Schad & Diamond law firm gave Madigan \$150 on 3/4/2002 and gave \$950 to the Democratic Party of Illinois in 2003 and 2004, during the election cycle in which she was elected attorney general).

¹⁸² Clerk of the Circuit Court for Cook County, Illinois, *Case Information Summary for Case No. 2002-L-000869* (showing intervention in *Illinois ex rel. Beeler, Schad & Diamond v. Ritz Camera* by “attorney general's office”)

(<https://63.251.13.149/cookcounty/Finddock.asp?DocketKey=CAAC0L0AAAIGJ0LD>); Brief of Amicus Curiae in *Illinois ex rel. Beeler, Schad & Diamond v. Ritz Camera Centers, Inc.*, No. 1-05-1059 (Cir. Ct. Ill. Cook Cty.)

(http://www.statetax.org/Template.cfm?Section=Briefs_Filed&Template=/ContentManagement/ContentDisplay.cfm&ContentID=6747) (Factual summary of the lawsuit by Council on State Taxation).

¹⁸³ Illinois Constitution, Article V, §§ 15 & 21; Clerk of the Circuit Court for Cook County, Illinois, *Case Information Summary for Case No. 2002-L-000869* (showing intervention in *Illinois ex rel. Beeler, Schad & Diamond v. Ritz Camera* by “attorney general’s office”) (<https://63.251.13.149/cookcounty/Finddock.asp?DocketKey=CAAC0L0AAAIGJ0LD>);

Brief of Amicus Curiae in *Illinois ex rel. Beeler, Schad & Diamond v. Ritz Camera Centers, Inc.*, No. 1-05-1059 (Cir. Ct. Ill. Cook County)

(http://www.statetax.org/Template.cfm?Section=Briefs_Filed&Template=/ContentManagement/ContentDisplay.cfm&ContentID=6747) (Factual summary of the suit by Council on State Taxation);

State of Illinois v. Ritz Camera Centers, 216 Ill.2d 735, 834 N.E.2d 912, 912-13 (Ill. 2005) (state supreme court found challenge to lawsuit sufficiently weighty to order state appeals court to “answer the certified questions of law raised by the trial court,” which questioned the suit’s constitutionality).

¹⁸⁴ *Massachusetts v. EPA*, 415 F.3d 50, 51 (D.C. Cir. 2005) (rejecting suit by Massachusetts, California, Connecticut, New York, New Jersey, Illinois, Rhode Island, Vermont, New Mexico, Maine, Oregon, and Washington, seeking to compel EPA to regulate emissions that allegedly contribute to global warming; a concurring judge noted that the suit raised a grievance that should be handled by Congress, not the courts); *Byrd-Hagel Resolution*, S. Res. 98, 105 Cong. , 1st Sess. (1997) (explaining the Senate’s opposition to Kyoto, because it would regulate emissions by American industry, while leaving competing industries in the Third World unburdened by regulation and at a competitive advantage); Pub. L. No. 105-276, 112 Stat. 2461, 2496 (1998) (Congress banned EPA from implementing Kyoto); Pub. L. No. 106-74, 113 Stat. 1047, 1086 (1999) (same); Pub. L. No. 106-377, 114 Stat. 1441, 1441A-41 (2000) (same).

¹⁸⁵ *Madigan v. PSI Energy*, 847 N.E.2d 514, 516 (Ill. App. 5th Dist. 2006) (“As noted in *International Paper Co. v. Ouellete*, 479 U.S. 481 (1987), preemption in interstate pollution disputes serves the valuable purpose of minimizing regulatory chaos, unpredictability, and innumerable interstate conflicts that are created when one state asserts jurisdiction over an out-of-state source”).

¹⁸⁶ AEI Federalism Project, *You Live for the Fight When It’s All You’ve Got*, AG Watch, May 9, 2006

(<http://federalismproject.org/agwatch/?p=81>) (discussing national scope of settlement demanded); Press Release, *Liberty Mutual To Contest Allegations By New York And Connecticut Attorneys General* (May 5, 2006)

(<http://www.libertymutual.com/omapps/ContentServer?cid=1003349317278&year=2006&prid=1138334255300&pagename=CorporateInternet%2FPage%2FPressReleaseDarkBlue&c=Page>) (same); Press Release, *Liberty Mutual Sued in Bid-Rigging Probe* (May 5, 2006) (www.oag.state.ny.us/press/2006/may/may05b_06.html) (Connecticut & Illinois back suit).

¹⁸⁷ *Grand River Enterprises Six Nations Ltd. v. Pryor*, 425 F.3d 518 (2d Cir. 2005).

¹⁸⁸ Lisa Madigan, et al., *Petition for Writ of Certiorari in King v. Grand River Enterprises Six Nations*, No. 05-1343 (U.S. Apr. 18, 2006) (www.scotusblog.com/movabletype/archives/stateAGspetition.pdf); Article III, § 2 of the Constitution

(<http://caselaw.lp.findlaw.com/data/constitution/article03/>).

¹⁸⁹ Phil Brinkman, “Lautenschlager Gives Emotional Apology, Takes No Questions,” *Wisconsin State Journal*, Feb. 27, 2004, (<http://www.madison.com/wisconsinstatejournal/local/68967.php>) (Pled guilty to drunken driving); Wisconsin Circuit Court Access (WCCA), *Dodge County v. Peggy A. Lautenschlager*, Case No. 2004TR001348 (Lautenschlager convicted)

(<http://wcca.wicourts.gov/caseDetails.do;jsessionid=AF8D2AB9FF2D839FDB0468C2EEFAC932.render11?caseNo=2004TR001348&countyNo=14&printable=1>).

¹⁹⁰ Jason Stein, “Crime Lab Backup Is Decried,” *Wisconsin State Journal*, Aug. 18, 2006

(<http://www.madison.com/wsj/mad/top/index.php?ntid=95361&ntpid=1>) (“The backlog of DNA cases at the crime lab nearly tripled between 2003 and 2005,” and a rapist remained free while his DNA sample sat unanalyzed at a state crime lab and thus was able to kill a state agent in October 2004); Associated Press, “Lautenschlager Defends Crime Lab at Debate,” Aug. 10, 2006 (crime lab solved steadily fewer cases each year during Lautenschlager’s tenure, falling from 1225 cases in 2003 to 1119 cases in 2005); Associated Press, “DNA Backlog, Submissions Grow,” (July 31, 2006) (Governor and legislature granted all of the modest increases in crime lab funding Lautenschlager belatedly sought).

¹⁹¹ *Connecticut v. American Elec. Power Co.*, 406 F.Supp.2d 265 (S.D.N.Y. 2005) (Rejecting the suit as an attempt to get the courts to decide a political question). See footnotes 26-27 and the accompanying text, which discusses court rulings barring the use of one state’s law to regulate emissions in another state, and their recognition that such suits threaten to generate interstate conflict.

¹⁹² *Brief of the States of Arizona, Iowa, Maryland, Minnesota and Wisconsin as Amici Curiae in Support of Petitioners* (August 31, 2006) in *Massachusetts v. EPA*, No. 05-1120; *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005) (rejecting Massachusetts lawsuit).

¹⁹³ *Byrd-Hagel Resolution*.

¹⁹⁴ AEI Federalism Project, *Carve My Turkey*, AG Watch, November 21, 2005 (<http://federalismproject.org/agwatch/?p=41>); Press Release, *Western Union Agrees to Help Combat Telemarketing Fraud*, New York Attorney General’s Office, November 14, 2005 (http://www.oag.state.ny.us/press/2005/nov/nov14a_05.html) (AARP frequently files amicus briefs in support of liberal causes in the Supreme Court on issues having little to do with the elderly, taking the same side as Lautenschlager and other liberal attorney generals and the trial lawyers).

¹⁹⁵ Press Release, *Western Union Agrees to Help Combat Telemarketing Fraud*, New York Attorney General’s Office, November 14, 2005 (http://www.oag.state.ny.us/press/2005/nov/nov14a_05.html); Press Release, *AG Reilly Reaches Agreement with Western Union*

to *Protect Consumers Against Fraudulent Telemarketers*, Nov. 14, 2005 (\$400,000 split among several states, including New York, Massachusetts, Vermont, and Wisconsin) (<http://www.ago.state.ma.us/sp.cfm?pageid=986&id=1532>).

¹⁹⁶ Press Release, *Western Union Agrees to Help Combat Telemarketing Fraud*; AEI, *Carve My Turkey*

¹⁹⁷ Press Release, *AG Reilly Reaches Agreement with Western Union to Protect Consumers Against Fraudulent Telemarketers*, Nov. 14, 2005 (<http://www.ago.state.ma.us/sp.cfm?pageid=986&id=1532>).

¹⁹⁸ *Massachusetts v. Amirault*, 677 N.E.2d 652, 662, 665 (Mass. 1997) (Admitting that the Amiraults' constitutional rights, such as the right to confront their accusers, had been violated, but refusing to overturn their convictions because of a purported need for "finality," given that the Amiraults had previously appealed their convictions in both state and federal courts); Alexander Cockburn, "Our Little Secret: Eileen McNamara: 1997's Janet Cooke," *CounterPunch*, May 1-15, 1997 (Vol. 4, No. 9) (Tom Reilly is "one of the team which prosecuted the Amiraults") (<http://users.rcn.com/kyp/ourlsecr.html>); "Travesty of Justice," Editorial, *Massachusetts Lawyers Weekly*, Sept. 13, 1999, at 28 ("The Amirault prosecutions took place in an atmosphere of hysteria") (available at <http://cltg.org/cltg/amirault/mlwedit.htm>).

¹⁹⁹ Reilly unsuccessfully ran for governor of Massachusetts, losing the 2006 Democratic primary. Prosecutor Martha Moakley was elected in November to succeed him.

²⁰⁰ *Stonehill College v. MCAD*, 441 Mass. 549, 808 N.E.2d 205 (2004) (Plaintiff can seek either jury trial in superior court, or non-jury trial in administrative tribunal, whichever is more favorable for plaintiff, and defendant is bound by plaintiff's choice), overruling *Lavelle v. MCAD*, 688 N.E.2d 1331 (1997).

²⁰¹ *Gratz v. Bollinger*, 539 U.S. 244 (2003) (Invalidating the University of Michigan's undergraduate admissions system as a racial quota); *Brief of the States of Maryland, et al.*, 2003 WL 538556 (U.S. Feb. 19, 2003) (No. 02-516)

²⁰² AEI Federalism Project, *Non-Party Interlopers Take \$50K from Society*, AG Watch, April 13, 2006

(<http://federalismproject.org/agwatch/?p=71>), quoting *AG Reilly Reaches Agreement with Bank of America Resolving Arab-American Community Complaints About Fleet Account Closures* (Press Release, April 12, 2006)

(<http://www.ago.state.ma.us/sp.cfm?pageid=986&id=1650>). "Attorney General Tom Reilly released this gem of a statement, 'Although a review of the Fleet Bank account closures and other information Fleet provided did not show a pattern of discrimination against customers with Arab and South Asian descent, Bank of America has agreed to inform three of the four complainants that they are welcome to reopen their accounts. Bank of America will also pay AG Reilly's office \$50,000 to create a brochure and video on consumer and financial awareness geared toward the Arab-American and Muslim communities.'

Let's get this straight: Reilly blew a wad of taxpayer cash to review and confirm that nothing was happening and then took \$50,000 from honest bank users to ensure that something that wasn't happening continued to not happen?"

²⁰³ *Dahill v. Police Dept. of Boston*, 748 N.E.2d 956 (Mass. 2001) (Even correctable conditions make an employee a protected disabled person). By contrast, under federal law, an impairment that was correctable should be evaluated in its corrected state, in determining whether or not the impairment is a disability. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). Thus, impairments such as myopia (corrected to normal vision with eyeglasses), or high blood pressure (corrected to normal range through medication), do not constitute disabilities.

²⁰⁴ *Sahli v. Bull HN Info. Systems*, 774 N.E.2d 1085 (Mass. 2002) (Holding that employer had First Amendment freedom-of-petition right to sue to enforce contractual waiver of age discrimination claims by plaintiff in response to plaintiff's discrimination charge, since plaintiff had accepted cash in exchange for waiving any potential claims against her employer); *Brief of the Attorney General, Amicus Brief in Sahli v. Bull HN Info. Sys.*, 2002 WL 33767717, **19-20, 23 (Mass. May 1, 2002) (No. SJC08697) (arguing that an employer's defensive countersuit is forbidden "adverse employment action" whenever it either "arose" from a discrimination charge by the employee (such as an employer's counterclaim that such a charge is defamatory) or has the effect of undermining a plaintiff's image in the workplace or in the eyes of future employers).

²⁰⁵ *Commonwealth of Massachusetts v. Bull HN Info. Systems*, 16 F.Supp.2d 90, 109-10 (D. Mass. 1998) (rejecting the attorney general's "unavailing" argument to this effect).

²⁰⁶ *Brief of the Attorney General, Amicus Brief in Sahli v. Bull HN Info. Sys.*, 2002 WL 33767717, **22-23 (Mass. May 1, 2002) (No. SJC08697) (citing defamation counterclaim as example of forbidden retaliation).

²⁰⁷ *BE&K Constr. Co. v. NLRB*, 536 U.S. 516 (2002) (even unsuccessful suits by employers in response to discrimination claims are protected, unless they raise claims that are not just weak but baseless).

²⁰⁸ *Bain v. City of Springfield*, 678 N.E.2d 155 (Mass. 1997) (mayor had right to publicly denounce as unfounded a sexual harassment complaint against him, despite the adverse impact on the complainant, since retaliation prohibitions are "subject to constitutional guarantees of freedom of speech. The interest in remedying discrimination is weighty but not so weighty as to justify" censorship).

²⁰⁹ *Massachusetts v. EPA*, 415 F.3d 50, 51 (D.C. Cir. 2005).

²¹⁰ *Massachusetts v. EPA* (Sentelle, J., concurring).

²¹¹ Press Release, *AG Reilly Reaches Agreement with Western Union to Protect Consumers Against Fraudulent Telemarketers*, Nov. 14, 2005) (www.ago.state.ma.us/sp.cfm?pageid=986&id=1532).

²¹² *Connecticut v. American Electric Power Co.*, 406 F.Supp.2d 265 (S.D.N.Y. Sept. 22, 2005).

²¹³ See footnotes 25 and 26 and accompanying text, discussing court rulings rejecting such interstate suits as a danger to interstate relations and encroachment on Congress's authority over interstate commerce.

²¹⁴ *Connecticut v. American Electric Power Co.*

About the Author

Hans Bader is Counsel for Special Projects at the Competitive Enterprise Institute. He has litigated a variety of constitutional cases, focusing on federalism, civil-rights, and First Amendment issues. He graduated from the University of Virginia with a Bachelor's in economics and history, and later earned his Juris Doctor from Harvard Law School.

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