

# A DEFENSE OF THE DEFENSE: AN ANALYSIS OF THE NORTH CAROLINA ATTORNEY GENERAL'S LEGAL ABILITY TO REFUSE TO DEFEND STATE LAWS\*

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## INTRODUCTION

Since 2008, more and more state attorneys general around the nation have begun refusing to defend state actions by their respective state governments,<sup>1</sup> usually on the grounds that a given state law violates either the State or Federal Constitution.<sup>2</sup> The issue of refusals to defend recently came to national prominence when attorneys

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1. Matt Apuzzo, *Holder Sees Way to Curb Bans on Gay Marriage*, N.Y. TIMES (Feb. 24, 2014), <http://www.nytimes.com/2014/02/25/us/holder-says-state-attorneys-general-dont-have-to-defend-gay-marriage-bans.html> [https://perma.cc/T5R5-6LB]; Niraj Chokshi, *Seven Attorneys General Won't Defend Their Own State's Gay-Marriage Bans*, WASH. POST: GOVBEAT (Feb. 20, 2014), <http://www.washingtonpost.com/blogs/govbeat/we/2014/02/20/six-attorneys-general-wont-defend-their-own-states-gay-marriage-bans> [https://perma.cc/2CMP-JAXA].

2. Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2102 (2015).

general in Nevada, Oregon, Pennsylvania, Virginia, California, and Illinois refused to defend state bans on same-sex marriage.<sup>3</sup> Additionally, attorneys general have refused to defend laws involving immigration, gun control, education, and property rights.<sup>4</sup> Despite the recent uptick in state attorneys general refusing to defend state laws, claims of such a power were virtually unheard of until recently.<sup>5</sup> Only sixteen instances arose nationwide between 1935 and 2011.<sup>6</sup> Whether such action is legally permissible has become a significant controversy over the past decade.<sup>7</sup>

These instances have most often occurred in “purple states,” where the predominant political party of the state legislature is the opposite of the attorney general’s,<sup>8</sup> and where the attorney general may be seeking to curry favor with a particular voting base or incite

3. See Apuzzo, *supra* note 1 (detailing the particular grounds on which state attorneys general refused to defend gay marriage bans enacted by their state legislatures); Chokshi, *supra* note 1 (discussing statements and filings of state attorneys general explaining their reasoning for refusing to defend various laws).

4. See Devins & Prakash, *supra* note 2, app. at 2178–87 (providing individual instances in which state attorneys general have refused to defend laws of their own state); see also Neal Devins & Saikrishna Prakash, Opinion-Editorial, *Can a State’s Attorney General Pick and Choose Which Laws to Defend?*, L.A. TIMES (Apr. 18, 2016, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-0418-devinsprakash-attorneys-general-refusal-to-defend-20160418-story.html> [<https://perma.cc/P5FK-UYAB>].

5. See Devins & Prakash, *supra* note 2, at 2134 (“Before 2008, state attorneys general routinely defended state law and non defense of state law seemed non-politicized.”).

6. *Id.* at 2135. The study used to identify these sixteen instances was not comprehensive in the sense that all cases in which an attorney general brought suit to challenge the constitutionality of a state law were not tracked down and analyzed. *Id.* at 2135 n.140. The criteria for analysis was focused on the attorney general’s duty to defend a state law, not to challenge a state law. *Id.* Furthermore, not every decision to forego an appeal of an adverse judgment was considered. *Id.* at 2136 n.141.

7. See, e.g., *Holder Gives Nod to State AGs to Drop Defense of Gay Marriage Bans Amid Court Challenges*, FOX NEWS: POL. (Feb. 25, 2014), <http://www.foxnews.com/politics/2014/02/25/holder-gives-nod-to-state-ags-to-drop-defense-gay-marriage-bans-amid-court.html> [<https://perma.cc/894C-GC4D>] (providing one example of how hotly contested the duty to defend may be). Federal Attorney General Eric Holder reportedly said that attorneys general should closely scrutinize state laws when deciding whether to defend them against a constitutional challenge. *Id.* Alabama Attorney General Luther Strange responded:

A state attorney general has a solemn duty to the state and its people to defend state laws and constitutional provisions against challenge under federal law. To refuse to do so because of personal policy preferences or political pressure erodes the rule of law on which all of our freedoms are founded.

*Id.*

8. See Devins & Prakash, *supra* note 2, at 2106.

political opponents.<sup>9</sup> Scholars suggest that this temptation to appeal to certain electoral coalitions will likely lead to continued instances of state attorneys general refusing to defend state laws.<sup>10</sup> Though increasingly common, most attorneys general who have refused to defend a state law cannot point to an express source of power granting them the ability to do so.<sup>11</sup> In fact, most state constitutions and statutes—the sources of an attorney general’s powers and duties—do not directly mention a duty to defend (or not defend), which leaves the analysis in most states up to structural inference and scarce case law.<sup>12</sup>

This trend has loomed especially large in North Carolina over the past four years. In 2013, the federal government instituted a lawsuit against the State regarding its recently passed voter ID law.<sup>13</sup> Then-Attorney General Roy Cooper vocally opposed the law as “[o]ne of the worst election pieces of legislation in the country”<sup>14</sup> and wrote a personal letter to then-Governor Pat McCrory urging the bill be vetoed.<sup>15</sup> Despite his personal objections, Cooper condemned the State’s choice to hire outside counsel as “a waste of money,” insisting

9. See *id.* at 2104 (suggesting that attorneys general with political aspirations for higher office may feel pressure to “endear [themselves] to an electoral block by refusing to defend a reviled state statute”).

10. See *id.* at 2106–07.

11. See Will Doran, *N.C. Sen. Phil Berger Says A.G. Roy Cooper is Failing His Duties by Not Defending HB2 Lawsuit*, POLITIFACT (Apr. 7, 2016, 6:53 PM), <http://www.politifact.com/north-carolina/statements/2016/apr/07/phil-berger/nc-sen-phil-berger-says-g-roy-cooper-failing-his-d/> [https://perma.cc/3VYV-Y5GZ]. Doran notes that the Attorney General of North Carolina’s duties have been “pieced together over the years by common law, court rulings, and state statutes,” and that varying scholarly opinions have interpreted these sources differently. *Id.*

12. Devins & Prakash, *supra* note 2, at 2103; see also *id.* app. at 2157–77 (listing the constitutional and statutory sources of authority that all fifty state attorneys general draw on for their powers and noting that most do not discuss a duty to defend).

13. David Ingram & Aruna Viswanatha, *Government Sues to Block North Carolina Voter Law*, REUTERS: POL. (Sept. 30, 2013, 4:59 PM), <https://www.reuters.com/article/us-usa-justice-voting-rights/government-sues-to-block-north-carolina-voter-law-idUSBRE98T13620130930> [https://perma.cc/X6K8-SPAA].

14. Joel Brown, *Cooper, McCrory Disagree About Defending Lawsuit Over Voter ID*, ABC11 (Oct. 1, 2013, 3:37 PM), <http://abc11.com/archive/9269692/> [https://perma.cc/DSZ3-LZT5].

15. Letter from Roy Cooper, Attorney Gen., State of N.C., to Pat McCrory, Governor, State of N.C. (July 26, 2013), <http://ftpcontent4.worldnow.com/wect/PDFs%20for%20stories/voting%20restrictions%20letter.pdf> [https://perma.cc/KZ26-PNK8]. Cooper noted in his letter: “I am expressing . . . my public policy objections and not legal opinions.” *Id.*

that his personal grievances with the voter ID law would not prevent him from defending it in court.<sup>16</sup>

Cooper took the opposite approach just barely a year later when he openly refused to defend North Carolina's infamous House Bill 2 ("HB2"), which provided that only biological gender, and not gender identity, could determine which bathroom a person could use at state-run facilities.<sup>17</sup> When the bill was passed, the ACLU, Equality NC, and several transgender individuals, among others, filed suit.<sup>18</sup> This time, however, Cooper stated that he would not defend the state law in the pending litigation because it was a discriminatory "national embarrassment" and because he and his office believed the law to be unconstitutional.<sup>19</sup> At the time, Cooper was the Democratic candidate for Governor, so his actions created political tension with the state's Republican leadership.<sup>20</sup> Tension surrounding the issue continued to mount between Cooper, McCrory, and the Republican leadership in the state until early 2017 when Cooper became Governor and the General Assembly partially repealed HB2.<sup>21</sup> The repeal of HB2 without a challenge to Cooper's action leaves essentially unanswered the question of whether the Attorney General of North Carolina can refuse to defend state laws.

This Comment attempts to answer that question. It examines a wide range of authorities on the scope of an attorney general's power from medieval times to the present and ultimately argues that the Attorney General of North Carolina does not possess the power to

16. Brown, *supra* note 14. Cooper insisted the Attorney General's office was more than capable of defending the voter ID law in court because "[t]here are laws that I have disagreed with personally that our staff have defended successfully." *Id.*

17. See Doran, *supra* note 11.

18. *Id.*

19. Amber Phillips, *Is It Legal for North Carolina's Attorney General to Not Defend the State's Bathroom Law?*, WASH. POST: THE FIX (May 15, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/05/15/is-it-legal-for-north-carolinas-attorney-general-to-not-defend-the-states-bathroom-law-probably/?utm\\_term=.d57b0023963f](https://www.washingtonpost.com/news/the-fix/wp/2016/05/15/is-it-legal-for-north-carolinas-attorney-general-to-not-defend-the-states-bathroom-law-probably/?utm_term=.d57b0023963f) [<https://perma.cc/H5BC-7XJF>].

20. *Id.* In criticizing Roy Cooper's refusal to defend HB2, incumbent Governor Pat McCrory insisted that "[a]s the state's attorney, he can't select which laws he will defend and which laws are politically expedient to refuse to defend." *Id.* Likewise, Senate Pro Tempore Phil Berger remarked, "Attorney General Roy Cooper refuses to do his job and defend us . . . . This isn't the first time Cooper has pandered to far left special interests instead of fulfilling his oath to defend the people of North Carolina." Doran, *supra* note 11.

21. See, e.g., Jason Hanna, Madison Park & Elliott C. McLaughlin, *North Carolina Repeals 'Bathroom Bill'*, CNN: POL. (Mar. 30, 2017, 9:36 PM), <http://www.cnn.com/2017/03/30/politics/north-carolina-hb2-agreement/index.html> [<https://perma.cc/2LNJ-ESF9>] (stating that the repeal of HB2 was a "compromise" after "contentious debate").

refuse to defend state laws, even when she personally believes some higher law supersedes the one in question.

The analysis proceeds in four parts. Part I examines the historical development of the role of attorneys general, both broadly and in North Carolina. Part II lays out the sources of the law that currently give the Attorney General of North Carolina authority. Part III identifies statutory and common law arguments used to support a right not to defend and explains how the Supreme Court of North Carolina's 2000 decision in *Bailey v. State*<sup>22</sup> refutes these arguments. Lastly, Part IV discusses other sources of relevant law, including the role of the North Carolina Rules of Professional Conduct in guiding the attorney-client-like relationship between the Attorney General and the State.

### I. THE HISTORICAL BACKGROUND

The office and nomenclature of "Attorney General" existed as far back as the Middle Ages, first appearing around 1278.<sup>23</sup> At this time, multiple "serjeants" and solicitors shared the duties of the modern attorneys general.<sup>24</sup>

A "King's attorney" also came into existence in the latter part of the fifteenth century, and it was this position that developed into the modern iteration of the American attorney general.<sup>25</sup> By the end of the seventeenth century, the attorney general "ceased to be a royal agent and became an advisor to the government as a whole or attorney for the crown."<sup>26</sup> In doing so, "[h]e appeared on behalf of the Crown in the courts, gave legal advice to all departments of state and appeared for them if they wished to take action in the courts."<sup>27</sup>

"Counterparts" to this office were found in the English colonies in America, each possessing the common law powers of the English Attorney General.<sup>28</sup> In order to ensure his interests were efficiently

22. 353 N.C. 142, 540 S.E.2d 313 (2000).

23. Robert Morgan, *The Office of the Attorney General*, 2 N.C. CENT. L.J. 165, 165 (1970).

24. Rita W. Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 AM. J. LEGAL HIST. 304, 305–06 (1958).

25. *Id.* at 306.

26. *Id.* at 307.

27. *Id.*; see also *Tice v. Dep't of Transp.*, 67 N.C. App. 48, 52, 312 S.E.2d 241, 243 (1984) ("As the office evolved in England, the Attorney General became the Chief Legal Advisor for the Crown and had charge of management of all legal affairs and the prosecution of all suits in which the Crown was interested." (internal quotation marks and citations omitted)).

28. Cooley, *supra* note 24, at 309; see also Oliver W. Hammonds, *The Attorney General in the American Colonies*, in 1 *Anglo-American Legal History Series*, No. 2, at 3

served, the King was directly involved in appointing the attorney general of each colony.<sup>29</sup> In North Carolina specifically, the first confirmed Attorney General was Nicholas Trott, appointed by the King in 1697 as part of an attempt to regain monarchical control over the proprietary colonies.<sup>30</sup>

After the American Revolution, every state constitution, except for Connecticut's, provided for a state attorney general,<sup>31</sup> though none specifically outlined the duties of the office.<sup>32</sup> Rather, the powers attorneys general exercised in the newly independent states "stemmed from the common law, colonial custom, and legislative act."<sup>33</sup> Article XIII of the first North Carolina Constitution, ratified on December 18, 1776, provided "[t]hat the General Assembly shall . . . appoint . . . [the] Attorney-General, who shall be commissioned by the Governor, and hold . . . offices during good behavior."<sup>34</sup> The drafters of this constitution envisioned the Attorney General as an officer of the courts.<sup>35</sup> The position was separate from the executive branch entirely, which is illustrative of the "[p]rofound distrust of . . . executive power [that] is evident throughout" the first North Carolina Constitution.<sup>36</sup> It was not until the North Carolina Constitution of 1868 that the State Attorney General became a publicly elected member of the executive branch, whose duties were to be "prescribed by law."<sup>37</sup> Constitutional reference to the Attorney General has

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(Paul M. Hamlin ed., 1939). There was no need for the crown or colonial leaders to enumerate the specific powers of the colonial attorneys general because they were essentially thirteen delegates of their analogue in England. *Id.*

29. Cooley, *supra* note 24, at 310–11.

30. See Hammonds, *supra* note 28, at 11. Trott was Attorney General for "the whole of Carolina," including what is today both North and South Carolina. *Id.* The two colonies were not completely separate until at least the 1710s. Robert J. Cain, *Separation of Carolinas*, NCPEDIA (2006), <https://www.ncpedia.org/carolinas-separation> [<https://perma.cc/4L4L-KZA7>].

31. Cooley, *supra* note 24, at 311.

32. *Id.* at 312.

33. *Id.*

34. N.C. CONST. of 1776, § 13.

35. JOHN V. ORTH & PAUL MARTIN NEWBY, *THE NORTH CAROLINA STATE CONSTITUTION* 6 n.20 (2d ed. 2013) ("The attorney general enjoyed the same tenure as the judges, apparently on the theory that he was an officer of the court.").

36. John L. Sanders, *Our Constitutions: An Historical Perspective*, reprinted in ELAINE F. MARSHALL, N.C. DEP'T OF SEC'Y OF STATE, *NORTH CAROLINA MANUAL* 2007–2008, at 85. Shortly after statehood, in keeping with this distrust of executive power, the General Assembly began to directly appoint the Attorney General's deputies and limit the scope of his jurisdiction. Morgan, *supra* note 23, at 176. By 1806, the Attorney General was allowed to prosecute only within one of six state jurisdictions. *Id.*

37. See N.C. CONST. of 1868, art. III, §§ 1, 13.

remained essentially the same since then.<sup>38</sup> Pursuant to the 1868 constitution's grant of power, the North Carolina General Assembly prescribed the Attorney General's powers and duties that same year.<sup>39</sup> Section 114-2 of the General Statutes of North Carolina lists eight duties of the Attorney General and has remained much the same since its initial codification in 1868.<sup>40</sup> However, like most state attorneys general, the Attorney General of North Carolina was seen as continuing to possess the common law powers held by colonial and English Attorneys General,<sup>41</sup> a practice formally recognized by the General Assembly in 1985.<sup>42</sup> This history helps inform the bounds of the modern Attorney General of North Carolina's authority, which is explored in greater detail in the next section.

38. Compare *id.* (describing an elected Attorney General in the "Executive Department" whose duties "shall be prescribed by law"), with N.C. CONST. art. III, § 7(1)–(2) (calling for "an Attorney General," to be among one of the "other elective officers," whose "respective duties shall be prescribed by law"). Although the North Carolina Constitution was significantly redrafted in 1971, the language creating the Attorney General of North Carolina remained largely the same. See N.C. CONST. art. III, § 7(1)–(2); N.C. CONST. of 1868, art. III., §§ 1, 13.

39. Act of Apr. 12, 1869, ch. 270, § 82, 1868 N.C. Sess. Laws 615, 633–34 (codified at N.C. GEN. STAT. § 114-2 (2017)).

40. The original eight duties may be summarized as follows: (1) To defend all actions in which the State has an interest or is a party; (2) To defend and prosecute, at the request of other government officials, all suits relating to matters connected to the officials' department; (3) To consult with and advise the Solicitors; (4) To make and submit annual reports to the General Assembly; (5) To include an abstract of the reports pertaining to the Solicitors within the annual report; (6) To give an opinion on all questions of law asked by the General Assembly or other select branches; (7) To pay all moneys to the State; and (8) To keep proper books. *Id.* The current statute is quite similar, though it provides for ten specific duties of the Attorney General of North Carolina. See N.C. GEN. STAT. § 114-2 (2017).

41. See Rufus L. Edmisten, *The Common Law Powers of the Attorney General of North Carolina*, 9 N.C. CENT. L.J. 1, 2 (1977) ("Since 1715, the North Carolina General Assembly has provided that the common law remains in full force and effect in North Carolina except as it may be inconsistent with our form of government or modified, repealed, or otherwise affected by constitutional or statutory enactment."); Hammonds, *supra* note 28, at 12 ("[T]he attorney general in North Carolina exercised 'all the powers authority and trusts that the Attorney and Solicitor General of England have in that kingdom.'" (quoting William Tryon, *A View of the Polity of the Province of North Carolina in the Year 1767*, in 7 THE COLONIAL RECORDS OF NORTH CAROLINA 472, 486 (William L. Saunders ed., 1890))).

42. N.C. GEN. STAT. § 114-1.1 (2017). ("The General Assembly reaffirms that the Attorney General has had and continues to be vested with those powers of the Attorney General that existed at the common law, that are not repugnant to or inconsistent with the Constitution or laws of North Carolina.").

## II. THE SOURCES OF THE ATTORNEY GENERAL'S AUTHORITY

Like all other forty-nine state attorneys general, the Attorney General of North Carolina is a creature of state law, created by the state constitution with duties “prescribed by law.”<sup>43</sup> The Federal Constitution does assume state governments each include a legislative, executive, and judicial branch, but beyond that general structure and a minimal requirement of a republican form of government, the Constitution is silent as to a duty or power to decline to defend a state’s actions.<sup>44</sup> So while federal law is by no means irrelevant to how state attorneys general operate,<sup>45</sup> for purposes of determining the Attorney General of North Carolina’s duty to defend state laws and actions, it adds little—if anything—to the analysis.<sup>46</sup> Similarly, each state attorney general is a creature of her own state’s law, meaning the powers and duties of all fifty state attorneys general are unique.<sup>47</sup> Thus, broad “categorical statements about whether state attorneys general must (or must not) defend . . . are usually little more than self-serving sound bites from elected, politically ambitious attorneys general” that “evinced a lamentable indifference to the power of states to craft an office that suits their particular needs.”<sup>48</sup>

As noted above, many of the duties of attorneys general have their origin in a historical tradition stretching back to medieval times. In North Carolina, these historical common law duties have been

43. N.C. CONST. art. III, § 7(1)–(2).

44. Devins & Prakash, *supra* note 2, at 2116.

45. *See id.* at 2105, 2108–10. Devins and Prakash believe federal law is relevant to the extent that states cannot discriminate between federal and state law when it comes to a duty to defend. *Id.* at 2015. For instance, if a state expressly requires an attorney general to refuse to defend state laws for a given reason, then the attorney general is duty bound to refuse to defend a federal law for that same reason. *Id.* Further, they note that neither the Federal Constitution nor any federal statute require or grant any state attorney general the power to refuse to defend state laws. *Id.* at 2107–10.

46. *See id.* at 2107–08 (“[N]either the Constitution nor federal statutes empower or oblige attorneys general to concede the invalidity of a challenged state law.”).

47. *Id.* at 2100.

48. *Id.* In 2014, both Federal Attorney General Eric Holder and Wisconsin Attorney General J. B. Van Hollen made sweeping statements about whether state attorneys general could refuse to defend state same-sex marriage bans. *See Apuzzo, supra* note 1. Holder asserted that “state attorneys general are not obligated to defend laws they believe are discriminatory,” while Van Hollen responded that state attorneys general “are the ultimate defenders of our state constitutions.” *Id.* As noted, such overarching analyses ignore the fact that state attorneys general are subject to their own state constitutions and laws and, therefore, have differing duties and powers. *See Devins & Prakash, supra* note 2, at 2100. Devins and Prakash note that these two men “suppose that there is a one-size-fits all answer to the question whether attorneys general may concede the invalidity of state statutes and constitutions.” *Id.* at 2122. They insist instead that “[w]hile attorneys general all share the same title, they can and do have different powers and duties.” *Id.*



affirmed by the General Assembly in part and modified by statute in part. This section details the various common law duties of the Attorney General of North Carolina and describes how these common law duties were modified by statute.

A. *The Attorney General's Common Law Powers*

The North Carolina General Assembly has recognized on more than one occasion that the common law of England is in effect in North Carolina, both generally and with regard to the powers of the Attorney General.<sup>49</sup> The exact scope of the common law governing state attorneys general is unclear. But the common law remains a vital source of power for attorneys general to draw upon.<sup>50</sup> Though the scope of the powers of attorneys general varies from state to state, former Attorney General of North Carolina Rufus Edmisten asserts that “as primary legal officer of the state,” the Attorney General has “consistently been viewed . . . as possessing the power to initiate, conduct and maintain any suits necessary for enforcement of the laws of the state, preservation of order, and protection of public rights.”<sup>51</sup> Edmisten posits that such a broad grant of authority permits the Attorney General of North Carolina an affirmative power to “control litigation”<sup>52</sup> by bringing suits against state officials, “to protect the integrity of state laws,”<sup>53</sup> to intervene in suits concerning issues like

49. In 1715, the General Assembly first confirmed that the common law of England was in force in North Carolina. Act of 1715, ch. 31, § VI, 1715 N.C. Sess. Laws 13, 14. Similarly, section 4-1 of the General Statutes of North Carolina now provides: “All such parts of the common law as were heretofore in force and use [and are] not destructive of or repugnant to, or inconsistent with the freedom and independence of this State . . . [a]re hereby declared to be in full force within this State.” N.C. GEN. STAT. § 4-1 (2017). In 1985, the General Assembly enacted section 114-1.1 of the General Statutes of North Carolina, which provides: “The General Assembly reaffirms that the attorney general has and continues to be vested with those powers of the Attorney General that existed at the common law, that are not repugnant to or inconsistent with the Constitution or laws of North Carolina.” *Id.* § 114-1.1.

50. John Ben Shepperd, *Common Law Powers and Duties of the Attorney General*, 7 BAYLOR L. REV. 1, 1 (1955) (“[I]ncidents of the office [of the attorney general] were so numerous and varied as to discourage the framers of the state constitutions and legislature from setting them out in complete detail, thus permitting [attorneys general] to look to common law to fill in the gaps.”).

51. See Edmisten, *supra* note 41, at 10; Lacy H. Thornburg, *Changes in the State's Law Firm: The Powers, Duties and Operations of the Office of the Attorney General*, 12 CAMPBELL L. REV. 343, 348–49 (1990) (“[T]he common law is the fountainhead of the Attorney General's authority to represent, defend, and enforce the legal interests of State government and the citizens of our state.”).

52. See Edmisten, *supra* note 41, at 18.

53. *Id.* at 13.

utilities rates,<sup>54</sup> and even to challenge the constitutionality of state statutes.<sup>55</sup> Under this view, the Attorney General essentially has the ability to act or bring suit whenever he thinks such action is in “the public interest.”<sup>56</sup>

This ability to act in “the public interest” is certainly an expansive grant of power. In North Carolina and beyond, it has allowed several state attorneys general to bring nationally influential litigation in a wide variety of areas, including consumer protection, antitrust enforcement, environmental regulation, and securities regulation.<sup>57</sup> In fact, a former Attorney General of North Carolina attempted to use this broad authority to intervene in opposition to the State in ongoing litigation.<sup>58</sup> Using a similar argument, John Harris claims that “representing the public interest” is a major source of power supporting the Attorney General’s ability to refuse to defend state laws, at least when they are unconstitutional.<sup>59</sup> Broad though the common law powers of the Attorney General may be, the exact extent of these powers is unclear, and others disagree with Edmisten and Harris, arguing that the replacement of the monarch by “the people as represented by their governments” implies a common law duty to represent the State and its agencies.<sup>60</sup>

54. *Id.*

55. *Id.* at 14 n.74. An early example of such a constitutional challenge is *State ex rel. Attorney-General v. Knight*, 169 N.C. 333, 85 S.E. 418 (1915). There, the Attorney General challenged the constitutionality of a statute permitting the Governor to appoint women as well as men as notaries public. *Id.* at 334, 85 S.E. at 419.

56. See *State ex rel. Utils. Comm’n v. Edmisten*, 291 N.C. 327, 330, 230 S.E.2d 651, 653 (1976) (allowing Attorney General’s intervention “on behalf of the using and consuming public” in utilities rate making adjustment); *State ex rel. Attorney-General v. Scott*, 182 N.C. 866, 869, 109 S.E. 789, 792 (1921) (describing Attorney General’s suit against the State Board of Accountancy for ultra vires actions as “in the interest of the public”); Edmisten, *supra* note 41, at 13.

57. Timothy Meyer, Comment, *Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism*, 95 CALIF. L. REV. 885, 886 (2007).

58. See *Bailey v. State*, 353 N.C. 142, 151–52, 540 S.E.2d 313, 319 (2000) (refuting an attempt by the Attorney General of North Carolina to challenge trial court’s award of the State’s attorneys’ fees to the plaintiffs in a class action).

59. John E. Harris, Comment, *Holes in the Defense: Evaluating the North Carolina Attorney General’s Duty to Defend and the Responses of Other Government Actors*, 92 N.C. L. REV. 2027, 2036 (2014). Harris asserts that the Attorney General may be able to refuse to defend a state law when he subjectively deems it unconstitutional because defending an unconstitutional law might violate “(1) the common law duty to represent the public interest; and (2) the Attorney General’s constitutional oath of office.” *Id.* at 2039; see also *id.* at 2039–45 (elaborating on this argument).

60. *E.g.*, Morgan, *supra* note 23, at 167 (“[T]he logical conclusion in interpreting the common law was that the Attorney General had the duty and the exclusive right to represent these governments and their agencies and officers. Beginning in the 19th

*B. The Attorney General's Statutory Powers*

The effectiveness of the Attorney General's common law authority as described by Edmisten and Harris is complicated by section 114-1.1 of the General Statutes of North Carolina, enacted in 1985.<sup>61</sup> That law explicitly provides that though the Attorney General continues to possess his common law powers, his statutory duties get preferential treatment if and when they conflict with common law powers.<sup>62</sup> As noted above, section 114-2 also includes eight subsections outlining the enumerated powers and duties of the Attorney General.<sup>63</sup> Two of these subsections are significant in analyzing a duty to defend. Subsections 1 and 2 state that it shall be the duty of the Attorney General:

- (1) To defend all actions in the appellate division in which the State shall be interested, or a party, and to appear for the State in any other court or tribunal in any cause or matter, civil or criminal, in which the State may be a party or interested.
- (2) To represent all State departments, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State. Where the Attorney General represents a State department, agency, institution, commission, bureau, or other organized activity of the State which receives support in whole or in part from the State, the Attorney General shall act in conformance with Rule 1.2 of the Rules of Professional Conduct of the North Carolina State Bar.<sup>64</sup>

These provisions, along with two others,<sup>65</sup> appear to limit the supposed common law ability to act in the public interest against the

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Century, a trend developed in a number of states to diminish the Attorney General's common law power to exclusively represent the State agencies.”).

61. See Act of June 28, 1985, ch. 479, § 137, 1985 N.C. Sess. Laws 488 (codified at N.C. GEN. STAT. § 114-1.1 (2017)).

62. The statute provides: “The General Assembly reaffirms that the Attorney General has had and continues to be vested with those powers of the Attorney General that existed at the common law, that are not repugnant to or inconsistent with the Constitution or laws of North Carolina.” N.C. GEN. STAT. § 114-1.1 (2017).

63. See *supra* note 40 and accompanying text.

64. N.C. GEN. STAT. § 114-2(1)–(2) (2017).

65. Section 147-17 of the General Statutes of North Carolina reads in part:

- (a) No department, officer, agency, institution, commission, bureau or other organized activity of the State which receives support in whole or in part from the State shall employ private counsel, except with the approval of the Governor. The Governor shall give his approval only if the Attorney General has advised him, as provided in subsection (b) of this section, that it is impracticable for the Attorney General to render legal services . . . .

State by specifically creating a duty to represent the State in just about every situation. This broad language encompasses most imaginable scenarios in which the Attorney General might wish to refuse to defend the State and does not imply any grant of discretion to the Attorney General for the circumstances under which this duty arises.<sup>66</sup>

Conversely, subsection 8(a) could appear to expressly provide for the Attorney General's ability to refuse to defend. It allows the Attorney General to

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(b) The Attorney General shall be counsel for all departments, officers, agencies, institutions, commissions, bureaus, or other organized activities of the State which receives support in whole or in part from the State. Whenever the Attorney General shall advise the Governor that it is impracticable for him to render legal services to any State agency, institution, commission, bureau or other organized activity, or to defend a State employee or former employee as authorized by Article 31A of Chapter 143 of the General Statutes [which details specific tort instances committed by state employees the Attorney General may refuse to defend], the Governor may authorize the employment of private counsel . . .

*See id.* § 147-17(a)–(b). While this provision does not provide that the Attorney General may never refuse to defend the State or its sub-entities, it does imply that refusals should occur under very narrow circumstances. The structure of subsection (a) suggests that the Attorney General is expected to represent an agency or other state entity because it establishes a default standard, *id.* § 147-17(a) (“No department . . . shall employ outside counsel.”), followed by an exception. Had this provision been drafted using more permissive language, such as “An agency, etc. *may* hire private counsel when . . .,” then it would be clearer that the General Assembly intended the Attorney General's duty to represent the State to be more flexible. Similarly, subsection (b) first provides a default rule that the Attorney General shall be counsel for the State and its entities. *Id.* § 147-17(b). It then provides two separate exceptions for the duty to be counsel to the State: one for when the Attorney General finds it “impracticable to render legal services” and one for when he finds it impracticable “to defend a State employee.” *Id.* Again, this language clearly does not prohibit the Attorney General from refusing to defend the State, but the structure of this provision, along with the express duty to defend the State as laid out in section 114-2, insinuates that the General Assembly intended refusals to defend the State to be, at minimum, uncommon. Former Attorney General of North Carolina Lacy Thornburg notes that even though many state agencies now employ “a legal advisor or in-house counsel . . . [t]hese attorneys cannot represent their officials or agencies in legal proceedings.” Thornburg, *supra* note 51, at 358. The Attorney General plays the “major role” in providing legal representation for state agencies. *Id.* at 359.

66. Compare LA. STAT. ANN. § 49:257(C) (West, Westlaw through 2018 First Extraordinary Sess.) (stating ambiguously “the attorney general, at his discretion, shall represent or supervise the representation of the interests of the state in any action or proceeding in which the constitutionality of a state statute or of a resolution of the legislature is challenged or assailed”), with N.C. GEN. STAT. § 114-2(1)–(2) (2017) (requiring the Attorney General to “defend all actions” where the State or its sub-entities are a party to and “represent” the state and its sub-entities). The phrase “at his discretion” in the Louisiana statute provides less clarity than the parallel North Carolina statute as to whether or not the Louisiana Attorney General may refuse to defend a state law since he may choose when to represent the State.

intervene, when *he deems it to be advisable in the public interest*, in proceedings before any courts, regulatory officers, agencies and bodies, both State and federal, in a representative capacity for and on behalf of the using and consuming public of this State. He shall also have the authority to institute and originate proceedings before such courts, officers, agencies or bodies and shall have authority to appear before agencies on behalf of the State and its agencies and *citizens in all matters affecting the public interest*.<sup>67</sup>

This provision reads like a specific codification of the common law power to act in the public interest, which could be read to weigh in favor of the ability to refuse to defend.<sup>68</sup> Though it does not specifically discuss refusing to defend state laws, it does include the affirmative ability to intervene and initiate suits on behalf of the public. This language appears to imply a duty to the public that is on equal footing with the duty to defend and represent the State, although the Supreme Court of North Carolina has construed this provision otherwise.<sup>69</sup> There are several other statutory duties of the Attorney General scattered across the General Statutes,<sup>70</sup> but sections 114-1.1 and 114-2 are the most relevant for analyzing the duty to defend.

### III. BAILEY AS REJOINDER TO ARGUMENTS FOR A RIGHT NOT TO DEFEND

With the common law and statutory framework described above, two North Carolina commentators—Edmisten and Harris—have made strong arguments that the common law provides, at least by implication, if not more, the Attorney General’s ability to refuse to defend. This section reviews those arguments and suggests a potential statutory argument for the right not to defend. It then uses *Bailey v. State* as a framework for refuting both the common law and statutory arguments for a right not to defend.

67. N.C. GEN. STAT. § 114-2(8)(a) (2017) (emphasis added).

68. See *Bailey v. State*, 353 N.C. 142, 153, 540 S.E.2d 313, 320 (2000) (analyzing section 114-2(8)(a) to determine if it supported a broad power to “defend the public interest”).

69. See *infra* Part III.A.

70. See Thornburg, *supra* note 51, at 357 (noting that since the 1960s and 1970s, the Attorney General of North Carolina’s statutory responsibilities have expanded to include “such diverse tasks as antitrust enforcement and consumer protection, utilities ratemaking intervention, Medicaid fraud detection and prosecution, and increased statewide investigatory authority”).

In *Bailey*, the Attorney General of North Carolina attempted to intervene in a class action appeal, complaining that the attorneys' fees granted to the plaintiff by the trial court in the case were excessive.<sup>71</sup> The Attorney General argued that he had standing to intervene because setting a standard for such high attorneys' fees was against the public interest.<sup>72</sup> The Attorney General relied upon both the broad common law right to act in the public interest and the statutory reference to the power to intervene on behalf of the public interest.<sup>73</sup> While this was not a direct attempt to refuse to defend a state law, it allowed the court to define the breadth of the Attorney General's powers in this area. The court declined to let the Attorney General intervene in the case, rejecting both the common law and statutory arguments he made.<sup>74</sup>

A. *Bailey's Response to Common Law Arguments for a Right Not to Defend*

John Harris argues that the Attorney General retains the right to refuse to defend state laws despite section 114-1.1, at least in regard to challenging a law that is unconstitutional.<sup>75</sup> Harris imagines the clear and affirmative duty to defend state laws as existing on a sliding scale in relationship with the Attorney General's duty to uphold the United States Constitution.<sup>76</sup> He notes that "[a]t one end there is no conflict between competing duties, and the power to decline defense is non-existent. At the other end, there is clear conflict between competing duties, and declining defense is very likely within his or her legal authority."<sup>77</sup> Harris substantiates his argument by noting the General Assembly reaffirmed the existence of all the Attorney General's common law powers by statute,<sup>78</sup> but he fails to note that section 114-1.1 only grants use of the common law powers to the extent they do not conflict with statutory duties—an oversight that undercuts his argument.

71. *Bailey*, 353 N.C. at 152, 540 S.E.2d at 320.

72. *Id.*

73. *Id.* at 151–54, 540 S.E.2d at 320–21.

74. *Id.* at 152–53, 540 S.E.2d at 320.

75. See *supra* note 59 and accompanying text.

76. See Harris, *supra* note 59, at 2038 (comparing the Attorney General's duty to defend to the sliding scale of presidential authority crafted by Justice Jackson in his famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

77. *Id.*

78. *Id.* at 2039–40.

Harris further infers the ability to refuse to defend from the common law power to act in the public interest from the Supreme Court of North Carolina's 1915 decision in *State ex rel. Attorney-General v. Knight*.<sup>79</sup> Harris points out that in that case the court did not question that the Attorney General had standing to bring suit challenging the constitutionality of a state law allowing women to serve as notaries public.<sup>80</sup> Harris interprets the court's choice not to discuss the Attorney General's standing as acceptance of the Attorney General's ability to challenge state laws in the name of acting in the public interest.<sup>81</sup> Further, Harris suggests that if the Attorney General is able to act against the State by invoking the public interest, then it follows that she can, in the same vein, choose not to act.<sup>82</sup> According to Harris, "if the Attorney General has the ability under the common law powers to *challenge* the constitutionality of a state statute outright, declining to defend—a seemingly 'lesser' offense—would appear to fall within the parameters of his or her powers."<sup>83</sup> This argument is tenuous at best in that it first infers one power from judicial silence and then implies another power from that first inference.<sup>84</sup> While his deductions are not illogical, they lack clear legal support—judicial or otherwise. But even if Harris's argument regarding the common law right not to

79. See *id.* at 2041–42 (discussing *State ex rel. Attorney-General v. Knight*, 169 N.C. 333, 85 S.E. 418 (1915)).

80. Harris notes that in *Knight*, the court "explicitly acknowledged that the Attorney General brought the action as a plaintiff, exercised appellate rights, and . . . 'insisted that the act of the General Assembly [in question] was invalid'" but did not "consider it necessary to cite any authority for the Attorney General to bring such an action, and neither the majority opinion nor the dissent discusses the authority of the Attorney General to challenge the constitutionality of state laws." *Id.* at 2041–42 (second alteration in original) (quoting *State ex rel. Attorney-General v. Knight*, 169 N.C. 333, 340–41, 85 S.E. 418, 422 (1915)). Harris interprets the court's silence on the issue as acceptance that the Attorney General had standing in the matter. *Id.* at 2041.

81. *Id.*

82. *Id.* at 2042.

83. *Id.* (emphasis in original). Harris assumes that the court's recognition of the Attorney General's ability to affirmatively take action in the public interest implies the ability to choose not to take action without providing any sort of reasoning for that implication. See *id.* While his implication may be true, providing reasoning for it seems necessary.

84. Further, Harris supposes that if the Attorney General can actively challenge a state statute, then he should be able to passively refuse to defend that same statute, a right he deems a "lesser offense." *Id.* He seems to categorize a refusal to defend a state law as a "lesser offense" based on the fact that it is passive as compared to the action required to challenge a state law. However, he provides no support for the assumption that a refusal to defend is actually a "lesser offense" than an active challenge.

defend was less attenuated, section 114-1.1 subjugates all common law powers below the duty to represent and defend the State.

In reading all that he does into *Knight*, Harris ignores the much more recent *Bailey* case that addresses the issue more directly. In *Bailey*, the court affirmatively interprets the breadth of the Attorney General's common law powers much more stringently than Harris believes it did in 1915. The court held the Attorney General did not have standing under his common law power to act in the public interest because

the Attorney General cites to no source—case or statute—which suggests that his common law power to defend the public interest as an entity separate from the State extends to circumstances analogous to the facts of this case. While this Court held in *Martin v. Thornburg* that the Attorney General had a duty to prosecute all actions necessary to defend “the property and revenue” of the people, it did not recognize a distinction between either the “people” and the “State,” or their respective interests in that case. Moreover, no language within the *Martin* holding can be construed as to imply that the Attorney General may act to defend the “people’s” interest at the expense of the State’s interest.<sup>85</sup>

Unlike the *Knight* court in 1915, which took for granted the power of the Attorney General to challenge the constitutionality of state laws, the *Bailey* court highlighted the inability of the Attorney General to point to any specific case or statute suggesting that intervening in class action suits was within the purview of acting in the

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85. *Bailey v. State*, 353 N.C. 142, 152, 540 S.E.2d 313, 320 (2000) (emphasis added) (citations omitted) (quoting *Martin v. Thornburg*, 320 N.C. 533, 546, 359 S.E.2d 472, 479 (1987)). The court in *Martin v. Thornburg*, 320 N.C. 533, 359 S.E.2d 472 (1987), was faced with the question of whether the duty of the Attorney General as prescribed in section 114-2(1) of the General Statutes of North Carolina—a duty to appear for the State in any proceeding in which the State may be a party—violated article III, section 1 of the North Carolina Constitution. *Id.* at 545, 359 S.E.2d at 479. The court determined that because the common law duties of the English Attorney General included the “duty to prosecute all actions necessary for the protection and defense of the property and revenue of the Crown,” that same duty applied to the Attorney General of North Carolina regarding the “defense of property and revenue of the sovereign people of North Carolina.” *Id.* at 546, 359 S.E.2d at 479. However, as noted by the *Bailey* court, the *Martin* court did not distinguish between the duty to defend the “sovereign people” and the State. *Bailey*, 353 N.C. at 152, 540 S.E.2d at 320. In fact, the *Martin* court, after determining that it was within the purview of the Attorney General of North Carolina’s duties to defend the sovereign people, held that this duty included the duty to defend suits brought against the State, its agencies, or its officers. *Martin*, 320 N.C. at 546, 359 S.E.2d at 479.



public interest.<sup>86</sup> While the *Bailey* court does not specifically address the issue of an attorney general refusing to defend a state law, its approach suggests that when evaluating the legality of an attorney general's actions, a North Carolina court would require an attorney general to point to a case or statute supporting his or her ability to refuse to defend. But since the Supreme Court of North Carolina has clearly held it does not recognize a divergence between the statutory phrase "in the public interest" and the interests of the State, it is doubtful whether it would respond positively to an attorney general's attempt to refuse to defend a state law in the name of acting in the public interest. Because the Supreme Court of North Carolina does not currently recognize a distinction between the public interest and the State's interest, a refusal to defend a state law or action might actually be a refusal to defend the public interest as well.

Harris's interpretation of the common law power to act in the public interest seems to run contrary to the judicial interpretation of that power. Case law on this common law power is sparse, and case law regarding the Attorney General's ability to refuse to defend is nonexistent. But the precedent that does exist construes the common law powers of the Attorney General very narrowly and conveys the sense that acting in the public interest is not a power separate from the duty to represent the State. Therefore, it does not support an argument for the Attorney General of North Carolina's ability to refuse to defend state law.

Edmisten made similar arguments to Harris's while more fully exploring all the facets of the Attorney General's duty to act in the public interest. However, since his article was published seven years before the General Assembly enacted section 114-1.1—the statute that subjugates the common law powers of the Attorney General below higher statutory duties—it is largely irrelevant for understanding the duty to defend in the modern context. As is more fully explained below, this law effectively elevates the duty to represent and defend the State and its various entities above all of the Attorney General's other responsibilities.<sup>87</sup> It is difficult to see how

86. Compare *Bailey*, 353 N.C. at 152, 540 S.E.2d at 320 (discussing that the Attorney General provided no source which supported the power to represent "the public interest as an entity separate from the State"), with *State ex rel. Attorney-General v. Knight*, 169 N.C. 333, 333, 85 S.E. 418, 419 (1915) (listing five questions under consideration, which did not include whether or not the Attorney General had standing).

87. Section 114-1.1 provides: "The General Assembly reaffirms that the Attorney General has had and continues to be vested with those powers of the Attorney General that existed at common law, *that are not repugnant to or inconsistent with the Constitution or laws of North Carolina.*" N.C. GEN. STAT. § 114-1.1 (2017) (emphasis added). By

the Attorney General could claim a common law ability to refuse to defend the State or its laws or actions, when the General Assembly has clearly stated that any such power comes second to the duty to defend the State.

*B. Bailey's Response to Statutory Arguments for a Right Not to Defend*

Although the Supreme Court of North Carolina has held the common law power to act in the public interest is not distinct from the interests of the State, the specific statutory enumeration of a duty to act in the public interest in subsection 8(a), wholly separate from the duty to represent the State, might suggest the General Assembly decided to legislate that division.<sup>88</sup> Expansive terminology, such as “when he deems it to be advisable” and “all matters affecting the public interest,”<sup>89</sup> connotes an extensive grant of power from the General Assembly that might include refusing to defend the State.<sup>90</sup>

The Attorney General attempted to use just such an argument when claiming the power to intervene on behalf of the public in *Bailey*. But the court determined the language of this provision was not nearly as far-reaching as it appears. It noted that “while subsection (8)(a) allows the Attorney General to intervene in proceedings when he deems it to be advisable ‘in the public interest,’ he may do so only as a representative of ‘the *using* and *consuming* public.’”<sup>91</sup> The court noted that the phrase “using and consuming public” has only ever appeared in cases dealing with “utility-related goods and services,”<sup>92</sup> i.e., in rate-making cases. The court was cautious not to interpret this phrasing in a broader way. To support such a narrow reading of the statute, the court seems to rely on the General Assembly’s intent to limit the Attorney General’s statutory power to intervene on behalf of the public interest in proceedings involving utility rates.<sup>93</sup> As further support for this interpretation, the

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vesting the Attorney General with only those powers that are not “repugnant” to the law of North Carolina, this statute inherently subordinates the Attorney General’s common law powers to those codified in section 114-2, including the duty to defend the State.

88. See Morgan, *supra* note 23, at 171 (“It seems certain that the General Assembly intended, by this amendment, to clearly establish the power and duty of the Attorney General to represent the public interest quite separate and apart from the existence of any such power and duty at common law.”).

89. N.C. GEN. STAT. § 114-2(8)(a) (2017).

90. See Morgan, *supra* note 23, at 170–71.

91. *Bailey*, 353 N.C. at 154, 540 S.E.2d. at 321 (emphasis in original).

92. *Id.*

93. See *id.* Former Attorney General of North Carolina Lacy Thornburg recognized similar limitations on the power of the Attorney General to “protect the public interest.”

court notes that the second sentence of subsection 8(a) only allows the Attorney General to “institute and originate” a proceeding before an agency but does not permit her to intervene in a court of law.<sup>94</sup>

Thus, in *Bailey*, the Supreme Court of North Carolina took a literal and narrow view of the language in subsection 8(a). Assuming that the court would use the same sort of literal interpretation if presented with the question of whether or not the Attorney General could refuse to defend state laws, it would likely say no. The court insisted that this provision only enables the Attorney General to act in situations involving utility-related goods and services, and not to act for the public in general. Furthermore, even if this provision was more broadly applicable, the court likely would not view it as implying the ability to refuse to defend the State or its laws because the court also precisely interprets the language regarding the situations to which this provision applies. Because the statute directly states the Attorney General may “institute or originate” proceedings before an “agency,” the court found that it does not grant the Attorney General the power to intervene in a suit before a court of law.<sup>95</sup> Therefore, a court is unlikely to construe this same language as granting the power to refuse to defend a state law, an action that would deviate from the language in subsection 8(a) even more than the actions of the Attorney General in *Bailey*.

#### IV. OTHER SOURCES OF POWER

While the common law and statutory duties are the Attorney General of North Carolina’s main sources of power, other authorities impact whether the Attorney General can refuse to defend. John Harris argues the oath of office the Attorney General must take pursuant to the North Carolina Constitution weighs in favor of the Attorney General’s ability to refuse to defend.<sup>96</sup> Others have considered the effect oaths of office have on the refusal to defend,<sup>97</sup> but few have yet considered what role the North Carolina Rules of

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See Thornburg, *supra* note 51, at 370–71. Thornburg notes that the office of the Attorney General was tasked with the duty “to handle cases and establish policy in areas where, by law, responsibility for establishment or enforcement of public policy is placed directly on the Attorney General.” *Id.* (emphasis added).

94. *Bailey*, 353 N.C. at 154, 540 S.E.2d at 321.

95. *See id.*

96. *See Harris, supra* note 59, at 2042–44.

97. *See, e.g., Devins & Prakash, supra* note 2, at 2110 (rejecting the argument that an oath to “support” the Constitution “might compel state executives to decline to defend the validity of state laws”).

Professional Conduct play in the matter. This section considers both in turn.

A. *Oath(s) of Office*

As noted above, Harris argues that the constitutional oath of office supports the argument that the Attorney General can refuse to defend a state law.<sup>98</sup> Harris concludes that the Attorney General's promise to "support and maintain" the Constitutions of the United States and North Carolina provides a clear avenue for refusing to defend a state law the Attorney General deems unconstitutional.<sup>99</sup> While straightforward enough, others have disagreed with this interpretation.<sup>100</sup> Devins and Prakash assert that an interpretation like Harris's reads too much into such supportive oaths because it would require the Attorney General to become "a purely disinterested arbiter of the interplay between state and federal law."<sup>101</sup> This is hardly the role of the Attorney General of North Carolina, as his enumerated duties clearly require him to represent and defend the State and all its departments and agencies.<sup>102</sup>

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98. See Harris, *supra* note 59, at 2042. The North Carolina Constitution provides that all elected or appointed state officials must take the following oath: "I, \_\_\_\_\_, do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office as \_\_\_\_\_, so help me God." N.C. CONST. art. VI, § 7.

99. See Harris, *supra* note 59, at 2042–45. A similar argument could be made with respect to the oath the federal government requires state officials to take:

Every member of a State legislature, and every executive and judicial officer of a State, shall, before he proceeds to execute the duties of his office, take an oath in the following form, to wit: "I, A B, do solemnly swear that I will support the Constitution of the United States."

4 U.S.C. § 101 (2012).

100. See, e.g., Devins & Prakash, *supra* note 2, at 2112 ("This oath [of office] does not demand that attorneys general decline to defend state law (or concede its invalidity) whenever they personally conclude that a state law is unconstitutional . . . . The supportive oath never requires attorneys to shed their ordinary role of advancing the interests of their states . . . and instead only act on the 'best' reading of the law.").

101. *Id.*

102. N.C. GEN. STAT. § 114-2(1)–(2) (2017).

Devins and Prakash further note that such an interpretation would have far-reaching implications beyond the office of the Attorney General. Every single attorney in North Carolina is required to take an oath upon receiving a license to practice law<sup>103</sup> which is similar to that required of the Attorney General of North Carolina in the state constitution.<sup>104</sup> Both require a promise to support, maintain, or otherwise defend the Constitution of the United States. If these supportive oaths were interpreted in the manner Harris suggests—requiring attorneys to play “disinterested arbiter” between laws and the Federal and State Constitutions—“[t]housands of litigators would be duty-bound to yield arguments . . . merely because that lawyer personally concludes that the . . . statute is unconstitutional.”<sup>105</sup> “No one,” though, “imagines that such lawyers are barred from advancing a viable argument in favor of validity of state law merely because that lawyer personally concludes that federal law more likely than not trumps the state law in question.”<sup>106</sup> Similarly, it is hard to imagine the Attorney General, who is duty bound to defend and represent the State and its agencies, may yield representation of the State solely because he subjectively interprets a given law as invalid or unconstitutional.<sup>107</sup>

Furthermore, interpreting the constitutional oath of office as conflicting with the statutory duties of the Attorney General would go against the basic rules of statutory interpretation. Assuming that the constitutional oath required the Attorney General to refuse to defend state laws when she deemed them unconstitutional would directly conflict with the statutory duty to defend and represent the State in suits to which it is a party. This would assume that the General Assembly enacted a requirement for the Attorney General to defend state agencies without intending them to operate in harmony with the statutory oath. Such an assumption would be contrary to the “well-settled principle” that “a statute enacted by the

103. 27 N.C. ADMIN. CODE 1C.0103 (2018).

104. See N.C. CONST. art. VI, § 7; N.C. STATE BAR, OATH OF OFFICE AS AN ATTORNEY AT LAW (2018), <https://www.ncbar.gov/media/283884/Oath-of-Office.pdf> [<https://perma.cc/YJ39-HG7J>].

105. See Devins & Prakash, *supra* note 2, at 2112–13 (emphasis in original).

106. See *id.* at 2113.

107. The question might be different if the Attorney General was sure, for example, that there was absolutely no “basis in law or fact” for defense of a state law, or that a defense would be “frivolous.” N.C. R. PROF’L CONDUCT r. 3.1 (N.C. STATE BAR 2017). But at least where the Attorney General subjectively believes a state law to be unconstitutional, the supportive oath of office is likely not basis enough for refusing to defend a state law.

General Assembly is presumed to be constitutional.”<sup>108</sup> North Carolina courts apply this rule by resolving all doubts about a law in favor of the law’s constitutionality.<sup>109</sup> Therefore, interpreting the oath of office as Harris suggests would require foregoing basic statutory construction rules in order to imply an option to refuse to defend state laws.

One could argue that the implications of the Attorney General’s oath are different from those of other attorneys because the Attorney General is an elected official and his responsibilities are somewhat unique compared to those of other attorneys. But this interpretation would conflict with the duties of the Attorney General of North Carolina, in particular, because the General Assembly has formally stipulated that, at least in certain situations, the Attorney General’s duties to the State are those that any attorney owes to a client.<sup>110</sup> Section 120-32.6 of the General Statutes of North Carolina provides that “[w]henver the validity or constitutionality of an act of the General Assembly or a provision of the Constitution of North Carolina is the subject of any action in any court” the General Assembly is “deemed to be a *client of the Attorney General* for purposes of that action as a matter of law.”<sup>111</sup> This language invokes all of the North Carolina Rules of Professional Conduct that govern the relationship between all attorneys and their clients, including Rule 1.2, which is specifically mentioned in the statutory duties of the Attorney General.<sup>112</sup>

#### B. *The North Carolina Rules of Professional Conduct*

Although section 120-32.6 only applies in a very specific scenario—when the General Assembly is the defendant to a suit challenging the constitutionality of one of its acts—that has proven to be the most common scenario where the question of a duty to defend arises.<sup>113</sup> By mandating that the General Assembly is the Attorney General’s “client” in these situations, this provision invokes the lawyering aspect of the Attorney General’s role and places her duties to the State, just like the duties of any attorney to a client, squarely

108. *E.g.*, *Wayne Cty. Citizens Ass’n for Better Tax Control v. Wayne Cty. Bd. of Comm’rs*, 328 N.C. 24, 29, 399 S.E.2d 311, 314–15 (1991).

109. *Id.*

110. *See, e.g.*, N.C. GEN. STAT. § 114-2(2) (2017) (requiring the Attorney General to represent the State and its sub-entities “in conformance with Rule 1.2 of the Rules of Professional Conduct of the North Carolina State Bar”).

111. *Id.* § 120-32.6(b) (emphasis added).

112. *See id.* § 114-2(2).

113. *See Brown, supra* note 14; Phillips, *supra* note 19.

within the purview of the North Carolina Rules of Professional Conduct.<sup>114</sup> The General Assembly had already bound the Attorney General to Rule 1.2 in section 114-2(2).<sup>115</sup> That rule states “a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.”<sup>116</sup> The rule does go on to allow an attorney to “exercise his or her professional judgment to waive or fail to assert a right or position of the client.”<sup>117</sup> The operative language here is “*professional* judgment,” meaning the Attorney General would likely need a concrete legal reason beyond determining the state law at issue is “a national embarrassment”<sup>118</sup> or that it is “[o]ne of the worst election pieces of legislation in the country”<sup>119</sup> in order to waive a particular defense of a state law. Similarly, the language of the rule expressly allows attorneys to waive or fail to assert particular defenses or positions of a client but does not specifically mention the ability to refuse to defend the client altogether.<sup>120</sup>

Other Rules of Professional Conduct suggest that the Attorney General lacks the ability to refuse to defend state laws. Rule 1.3 addresses the diligence with which an attorney is to pursue a matter on behalf of a client.<sup>121</sup> While a comment to the rule does state that a lawyer has “*professional* discretion”<sup>122</sup> regarding the means by which a matter may be pursued, it specifically notes that

lawyers should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the

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114. By using the word “client” in section 120-32.6, the General Assembly implied that the Rules of Professional Conduct involving the relationship between an attorney and his client apply to the Attorney General. *See, e.g.*, N.C. R. PROF’L CONDUCT r. 1.1 (N.C. STATE BAR 2017) (describing the competence an attorney should exhibit when representing a client); *id.* r. 1.2 (outlining the scope of an attorney’s representation of a client and the allocation of authority between a client and lawyer); *id.* r. 3.2 (describing an attorney’s duty to expedite litigation).

115. *See* N.C. GEN. STAT. § 114-2(2) (2017).

116. N.C. R. PROF’L CONDUCT r. 1.2(a) 1 (N.C. STATE BAR 2017).

117. *Id.* r. 1.2(a)(3).

118. *See* Phillips, *supra* note 19.

119. *See* Brown, *supra* note 14.

120. The absence of language expressly allowing attorneys to refuse to defend their clients altogether certainly does not mean they are allowed to refuse to defend their clients. *See infra* text accompanying notes 129–31. But the fact that the drafters of the rule specifically provided that attorneys could “waive or fail to assert a right or position,” without expressly providing that an attorney could refuse to defend a client altogether, at least suggests that the latter course of action is discouraged.

121. N.C. R. PROF’L CONDUCT r. 1.3 1 (N.C. STATE BAR 2017).

122. *Id.* cmt. 1 (emphasis added).

lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.<sup>123</sup>

Such language clearly seems to contradict any suggestion that the Attorney General can refuse to defend his "client," the General Assembly. There are other Rules that support the same sentiment,<sup>124</sup> and in 2016 the General Assembly at least implied that all of these rules are applicable to the Attorney General.<sup>125</sup>

The Rules of Professional Conduct do not unequivocally suggest that the Attorney General does not have the right to defend. In fact, some Rules actually seem to expressly allow the ability to refuse to defend. Rule 1.16(b) states that an attorney "may withdraw from representing a client" under one of nine enumerated circumstances.<sup>126</sup> For example, subsection (b)(4) allows an attorney to withdraw when "the client insists upon taking action that the lawyer considers repugnant, imprudent or contrary to the advice and judgment of the lawyer, or with which the lawyer has a fundamental disagreement."<sup>127</sup> Similarly, subsection (b)(8) specifies that an attorney may withdraw from a representation if the client "insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law."<sup>128</sup> The permissive "may" in the prefatory language indicates that the decision to withdraw would be completely within the discretion of an attorney when the circumstances described in subsections (b)(4) or (b)(8) arise. Similarly, Rule 3.1 asserts that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law."<sup>129</sup>

123. *Id.*

124. The Preamble to the Rules of Professional Conduct states that "[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." *Id.* r. 0.1. Rule 2.1 states that as an advisor, "a lawyer shall exercise independent, professional, judgment and render candid advice. In rendering candid advice, the lawyer may refer not only to law, but also to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation." *Id.* r. 2.1.

125. See N.C. GEN. STAT. § 120-32.6 (2017).

126. See N.C. R. PROF'L CONDUCT r. 1.16(b) (N.C. STATE BAR 2017).

127. *Id.* r. 1.16(b)(4).

128. *Id.* r. 1.16(b)(8).

129. *Id.* r. 3.1.



On its face, the language in Rule 1.16(b) appears to indicate that the Attorney General could ethically refuse to defend the State when she believed subsections (b)(4) or (b)(8) applied. Rule 3.1 also seems to indicate that the Attorney General could refuse to defend the constitutionality of a state law when she believed there was no basis in law or fact to do so. However, the Rules of Professional Conduct are promulgated by the North Carolina State Bar and are not superior to conflicting statutory law. The drafters of the Rules recognized this hierarchy in paragraph two of Rule 0.2, which states that “[t]he Rules presuppose a larger legal context shaping the lawyer’s role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general.”<sup>130</sup> While this language does not expressly subjugate the Rules to statutory law, it at least suggests the drafters understood there are sources other than the Rules that must guide lawyers and that they did not intend the Rules to conflict with or supersede them. Therefore, it seems unlikely that the Attorney General could successfully invoke the permissive language in Rule 1.16(b)(4) or (b)(8), or even the mandatory obligation in Rule 3.1 to refuse her statutory duty to “defend all actions in the appellate division in which the State shall be interested or a party.”<sup>131</sup>

Rule 0.2 also specifically addresses the unique role of the Attorney General and external sources of law that govern his actions. Paragraph five asserts that

[u]nder various legal provisions, including constitutional, statutory, and common law, the responsibilities of a government lawyer may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships . . . . Such authority in various respects is generally vested in the attorney general . . . . *These Rules do not abrogate any such authority.*<sup>132</sup>

This paragraph addresses the Rules’ relationship to statutes that grant the Attorney General authorities not usually given to lawyers. But the last sentence of paragraph five, which expressly provides that the Rules do not purport to supersede these statutory grants of power, could be extended to statutory duties of the Attorney General as well. Such an interpretation would further elevate the Attorney General’s

130. *Id.* r. 0.2.

131. N.C. GEN. STAT. § 114-2(1) (2017).

132. N.C. R. PROF’L CONDUCT r. 0.2 1 (N.C. STATE BAR 2017) (emphasis added).

statutory duties above the language in Rules 1.16 and 3.1. There could be an argument that the language “these rules do not abrogate such authority” was not meant to apply equally to statutory duties as to statutory grants of authority, since paragraph two expressly mentions authorities and not duties. However, it is difficult to see how the State Bar, which is statutorily created,<sup>133</sup> would have the power to promulgate rules that would preempt a legislatively established duty of the Attorney General. Although the State Bar is vested “with the authority to regulate the professional conduct of licensed lawyers,”<sup>134</sup> it seems counterintuitive, in light of preceding analysis, that the legislature intended the Rules of Professional Conduct to preempt its own statutorily mandated duties for the Attorney General.

Although the Rules of Professional Conduct have been overlooked in analyzing the duties of the Attorney General, the law of lawyering plays an integral role in governing the Attorney General’s duties to his client, the State. These rules would apply to the Attorney General in some manner, even if section 120-32.6 did not exist. But the existence of that statute makes clear that the Rules of Professional Conduct govern the Attorney General when the General Assembly is a party to a suit where its laws are being constitutionally challenged—at least to the extent the Rules are able to work in harmony with the Attorney General’s statutory duties. However, because of the inherent hierarchy between statutory law and the Rules of Professional Conduct, it is unlikely that any Rule contradictory to the Attorney General’s statutory duties could be used as a basis to refute that duty.

#### CONCLUSION

In conclusion, it seems that the Attorney General of North Carolina does not have the power to refuse to defend state laws or actions. Numerous sources of overlapping law dating back to the common law of colonial times have made this question difficult to answer. Despite this complexity, the recent passage of section 114-1.1, which establishes the dominance of the Attorney General’s statutory duty to defend and represent the State, along with the Supreme Court of North Carolina’s very narrow interpretation of the Attorney General’s power to act in the public interest, provide a very clear answer. Though these sources of law are probably enough on their own to squash any claim of a right to refuse to defend, there are other

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133. See N.C. GEN. STAT. § 84-15 (2017).

134. *Id.* § 84-23(a).

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supplementary sources that further clarify the Attorney General's chief duty as defender of the State in lawsuits and other actions. The Attorney General's oath of office and the North Carolina Rules of Professional Conduct further imply the Attorney General likely does not possess a right to refuse to defend the State at his own discretion.

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