

## ***Restraining State Attorneys General, Curbing Government Lawsuit Abuse***

**by Michael DeBow**

### **Executive Summary**

In recent years, state attorneys general (AGs) have begun to act more and more like plaintiffs' lawyers who aggressively assert novel claims in litigation. That trend was most dramatically illustrated by the AGs' lawsuits against the tobacco industry in the 1990s. By filing those suits, which lacked any support in prior law, the AGs invaded areas of regulatory and tax policy that are properly the responsibility of state legislatures. Although the AGs probably did not expect to prevail in court, they filed with the aim of forcing the defendants to settle—which they did. The primary effects of the settlement have been higher prices for cigarettes and the transfer of enormous sums of money, raised through the higher prices, to state governments and the private attorneys they hired. Perversely, the settlement also protected the market shares and profit margins of the major tobacco companies and further confounded the public as to the proper role of government in American life.

Unfortunately, the AGs' "success" in the

tobacco cases has inspired state and local governments to file similar lawsuits against firearms manufacturers, lead paint manufacturers, and health maintenance organizations. While those suits have not yet resulted in any significant victories for the plaintiff governments, much of the litigation is still pending. More important, we can expect to see more "son-of-tobacco" government lawsuits. The states have an enormous incentive to bring such big, flashy lawsuits against unpopular industries.

This paper argues that the AGs' new litigation strategy amounts to a form of "government lawsuit abuse" that not only breaches the separation of powers in state government but saddles the public with additional tax and regulatory burdens that are both unwanted and unwise.

The paper also sketches several legal reforms that would redefine the office of state attorney general, returning it to the important (but much less headline-grabbing) work that occupied the holders of that office until very recently.

**The AGs' tobacco litigation was an unprecedented affront to the rule of law.**

## **Introduction**

Some aspects of the American legal system are now so absurd that they are beyond parody. If that assessment sounds too extreme, consider this: On Sunday, January 20, 2002, the Fox Network's animated program *The Simpsons* featured an episode in which Marge Simpson filed a class-action suit against the sugar industry (referred to as "Big Sugar") on behalf of the obese citizens of Springfield, her family's hometown.

On the following Tuesday, the ABC News website posted a story titled, "You're Fat, Who Can You Sue?" In it, "nutrition activists" and their academic fellow travelers complain about a wide range of things, including the amount of money spent by the food industry on advertising. ("It's not fair," [one activist] said. "People are confronted with food in every possible way to eat more. The function of the food industry is to get people to eat more, not less.") The story notes, "Some say the food industry—particularly fast food, vending machine and processed food companies—should be held accountable for playing a role in the declining health of the nation." But, of course, "Most public health experts . . . are mindful that after years of going after Big Tobacco, anti-smoking forces only achieved success when plaintiffs and lawyers stepped in." The hope is expressed that while to date no such litigation has been commenced, "it is reasonable to think that someday, it may come to that."<sup>1</sup>

How on earth did it come to this—that "serious" discussions of the future of American law are as outlandish as the plot of a satirical cartoon program? How can we account for the widely held view that virtually any social concern should ultimately be treated as a legal issue and decided in a court of law?

State attorneys general (AGs) bear a great deal of responsibility for our present predicament, particularly because of their conduct of the states' litigation crusade against the tobacco industry from 1994 to 1998. The

AGs' tobacco litigation was an unprecedented affront to the rule of law and will have deleterious effects on the American legal system for years to come unless it is countered by new restrictions on the powers of state attorneys general that take away their ability to commit "government lawsuit abuse."

This paper first describes the state tobacco litigation in some detail, then briefly surveys the lawsuits brought by state and local governments against other industries in the wake of the tobacco suits. It then fleshes out the concept of "government lawsuit abuse." Next, the paper turns to the state attorney general's office—its history and constitutional status. The AG's "common law" and *parens patriae*<sup>2</sup> powers are described and placed in historical context. The bottom line is that those two powers have assumed the importance they have today only in the last 20 years or so. Accordingly, there is ample historical precedent to trim those powers to restore some semblance of constitutional order to the office of state attorney general. The final section of the paper discusses legislative and constitutional reforms that can and should be considered as correctives to the recent lawsuit abuse practiced by state attorneys general.

## **Overview of the State Tobacco Litigation**

The case for new constraints on state AGs begins with an understanding of the lawsuits the AGs filed against the tobacco industry.<sup>3</sup> The suits were nothing if not inventive. Individual smokers had tried for years, unsuccessfully, to sue the tobacco industry for smoking-related health problems. The states' lawsuits attempted to avoid the fate of the smokers' suits by seeking not to vindicate the rights of smokers but to recoup state government expenditures on Medicaid and other health programs that could be statistically linked to smoking-related illnesses.

Each state's complaint alleged a number of causes of action—some statutory, some

based on common law. In each count, the state attempted to shoehorn its Medicaid recoupment theory into a pre-existing legal category, such as subrogation, unjust enrichment, indemnity, fraud, product liability, breach of warranty, public nuisance, antitrust, or deceptive trade practices. However—and *this point is critical*—none of those causes of action, as defined at the time the cases were filed, would justify the state’s claim for recoupment from the tobacco companies.<sup>4</sup> Accordingly, the plaintiff state AGs argued that the pre-existing definition of a cause of action be dramatically expanded by the courts to encompass, for the first time, the state’s alleged right to recoup health care monies from the defendants.

The fact that the legal theories advanced in the litigation by the state AGs were without precedent in American law raises an extremely important question: Is it properly the job of a state attorney general to file suits without solid precedential support in order to extract settlements that promote regulatory and/or tax policies that the state AG desires?

For reasons that are clearly illustrated by the settlement of the state tobacco litigation, the answer to that question is “No.”

The settlement of the tobacco litigation, in November 1998, was a legal and public policy debacle of truly historic proportions.<sup>5</sup> The tobacco companies agreed to abide by a new set of regulatory constraints and to make multibillion-dollar payments annually to the states (and the trial lawyers from private practice who were hired to represent most of them) in perpetuity. Although the amounts paid out may vary because of inflation and changes in the percentage of the population who smoke, the total payout to the states during the first 25 years covered by the settlements (1998–2023) will be approximately a quarter of a *trillion* dollars. Although the amount of payments to the lawyers during this same period is more difficult to predict, a total of \$13.75 *billion* seems a good ballpark estimate.<sup>6</sup> The tobacco settlements will thus lead to the largest transfer of wealth resulting from litigation in the history of the human race!

The settlement has generated several significant perverse consequences. First, the enormous payments to the state governments and their private-sector attorneys are being, and will continue to be, financed almost entirely by smokers paying new, higher prices announced by the defendant firms immediately after the settlement was announced. Thus, the putative “victims” of the tobacco companies are, in effect, paying the lion’s share of the settlement amounts that the states are collecting.

Second, the tobacco companies negotiated several features of the settlement that will protect their profits and market shares from new entrants.<sup>7</sup> The settlement effectively acts as a cartel agreement for the firms currently in the tobacco industry.

Third, the size of the payments is dependent on the future profits of the tobacco companies, thus making the state governments de facto silent partners in the operations of the companies that the states so vigorously demonized during the litigation.

Fourth, the only clear winners in this sad tale are those few plaintiffs’ lawyers who were fortunate enough to be tapped by one or more of the state AGs to represent one or more states in this raid on the tobacco industry. They are now reaping historically unprecedented fees—and will continue to do so in perpetuity—under contracts that raise very serious ethical questions.<sup>8</sup>

To put it mildly, the righteously indignant state crusade against the tobacco industry generated more than its share of irony.

Furthermore, in its practical effects, the result of the settlement is indistinguishable from an increase in the excise tax on tobacco. Viewed constitutionally, the settlement is nothing short of a disaster. It results in huge changes in state regulatory and fiscal policy toward tobacco without any direct involvement of the political branches—the state legislatures and the governors. What was once settled in the free-for-all of the political arena is now committed to the care of the state AGs, their high-rolling trial lawyer allies, and judges. This situation further confuses the

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public about the locus of governmental authority—and encourages us to see the judicial system as the ultimate arbiter of all social issues. Representative government is thus undermined.

## **Son-of-Tobacco Litigation**

Because all the state tobacco lawsuits were settled, the litigation created no new legal precedent in the narrow, technical sense of the word. As a practical matter, however, the extremely lucrative state settlements have already proven to be a very tempting political precedent for ambitious public office holders. Most directly, the states' success led to the filing of additional tobacco recoupment suits by the federal government (most of which has been dismissed),<sup>9</sup> local governments, and even some foreign governments and other foreign institutions. For example, last December a cancer hospital in Saudi Arabia filed a reimbursement suit in a Saudi court against 10 tobacco firms, with its lawyer characterizing the defendants as terrorists.<sup>10</sup>

More ominously, state and local governments have initiated litigation against other industries using the template provided by the tobacco litigation. In 1999, Rhode Island filed a recoupment suit against lead-paint makers.<sup>11</sup> In 2000, Connecticut followed the lead of several high-profile plaintiffs' lawyers and sued four large health maintenance organizations on the theory that various of their company policies violate the federal Employee Retirement Income Security Act of 1974 (ERISA). (Contrary to the private attorneys' suits, Connecticut's suit seeks injunctive relief and says nothing about monetary damages. It does not seek recoupment of any costs to the state government.)<sup>12</sup> And, perhaps most dramatically, in 2000 the state of New York followed the lead of dozens of local governments and filed a recoupment suit against eight firearms manufacturers under a public nuisance theory.<sup>13</sup>

To date, those tobacco-inspired state suits have not met with much success. With one

exception in the firearms litigation—Smith and Wesson, discussed below—we have not seen defendants in those suits scrambling to negotiate settlements that confer significant benefits on them (as in the tobacco cases). For now, it looks like those industries are prepared to fight their suits to the end. Of course, the possibility of another tobacco-type settlement in any of the cases cannot be ruled out.

The trial judge dismissed New York's firearms suit in August 2001,<sup>14</sup> but an appeal is pending. It is worth noting that most of the municipal government lawsuits against that industry have met the same fate, and that the Connecticut Supreme Court recently upheld the dismissal of the city of Bridgeport's firearms suit.<sup>15</sup>

The trial judge in the Rhode Island paint lawsuit dismissed a number of the state's claims in April 2001 but is allowing the litigation to proceed on legal theories of public nuisance, unfair competition, conspiracy, unjust enrichment, and indemnity.<sup>16</sup>

The Connecticut health maintenance organization (HMO) lawsuit is ongoing, but to date has not attracted any other state AGs into the fold.

On the basis of the state AGs' post-1998 track record, it seems a safe prediction that, unchecked, the state tobacco litigation will continue to inspire state AGs to file long-shot lawsuits against disfavored industries. The AGs' activities in that vein will further distort and destabilize a number of areas of law. In particular, it will further compromise the separation of powers among the branches of state governments by seeking to achieve regulatory and tax outcomes through litigation rather than through the familiar and constitutionally appropriate legislative channels.

Unless we want government policy concerning, for example, alcoholic beverages, automobiles, and pharmaceuticals, to be set by state AGs through litigation—rather than through legislative and other political processes—we should act now to stem the tide.

Fortunately, we have not yet reached the point of no return. Several states have already adopted reforms that will prevent or greatly

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inhibit the intrusion of the tobacco template into other areas of the state legislature's taxing and regulatory powers. All state legislatures should take such steps—about which more below—to preserve a sensible separation of powers among the three branches of state government.

## **Defining “Government Lawsuit Abuse”**

I borrow the term “government lawsuit abuse” from Alabama attorney general Bill Pryor, a strong critic of the tobacco litigation. Government lawsuit abuse occurs when a unit of government files a lawsuit that has only a small chance of winning a litigated judicial decision, to coerce the defendant into a settlement that will require the defendant to behave in a way that existing law does not require.

It may not be immediately clear why such a strategy on the part of a state AG would ever work. Why would a defendant agree to settle such a case if he would likely win at trial? The reasons might include a desire to avoid the high costs of litigation—both in terms of out-of-pocket expenses and lost time, aggravation, bad publicity, and the like—especially when similar suits are filed in multiple jurisdictions. Those multiple lawsuits also increase the probability that one rogue jury, without real evidence, could award damages that push the defendant into bankruptcy.

Other reasons might include the opportunity the settlement negotiations give the defendant to hold out for terms that give them some advantage at the expense of parties not represented in the negotiations. Recall that in the tobacco cases, the defendants negotiated terms that help them maintain their market share and profitability. Similarly, firearms manufacturer Smith and Wesson settled a number of government suits brought against it, while seeking favorable treatment in municipal purchases of firearms for police forces and the like. That strategy did not work well for the company, which faced a severely negative reaction from gun

owners, but it nevertheless demonstrates that a defendant can try to use settlement negotiations to “steal a march” on its competitors.<sup>17</sup>

In short, a state AG may be able to extract concessions in a settlement agreement that he would be highly unlikely to win at trial. That is an abuse of his authority, and it should be stopped, to the extent possible.

Government lawsuit abuse should be avoided for a second reason: The settlement of such cases depends on voter ignorance of the details of the litigation and the policy choices the settlement represents and further confuses the public about the nature of American law and government. That's because the general public is unlikely to expend the time and effort necessary to become well informed about the weaknesses of any given case brought by a state AG. If significant public policy is made as a result of the settlement of a tobacco-type state lawsuit, or even from a judicial decision in such a matter, the participation of the broader public is frustrated by the procedures that are used. Moreover, the widely held view that every issue is or should be treated as a judicial matter is reinforced, and the role of litigation and courts in our system of government is further exalted. None of those results is beneficial to our system of government.

## **State AGs: Expanding Powers, Increasing Activism**

For most of American history, the office of state attorney general was a decidedly unglamorous, albeit essential, part of each state's governmental structure. Holders of the position in earlier times would never have dreamed their successors would one day wield the power we saw deployed in the tobacco lawsuits.

The most important role of the state attorney general is to act as the chief legal officer of the state government. The typical state attorney general has the responsibility for “prosecuting all suits or proceedings wherein the state government is concerned” and “advising

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the governor and other administrative heads of the government in all legal matters on which they may desire his or her opinion.”<sup>18</sup>

The state attorney general is directly elected by the voters in 43 states. In Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming he is appointed by the governor, in Maine by the legislature, and in Tennessee by the justices of the state supreme court.<sup>19</sup> The attorney general is a member of the executive branch in every state<sup>20</sup> except Tennessee, where he is considered part of the judicial branch.<sup>21</sup> In no state is the attorney general considered a member of the legislative branch.<sup>22</sup> Accordingly, it is improper as a matter of state constitutional law to regard the state AG as a source of law (except insofar as he may have the authority to issue non-binding “opinions” on the proper interpretation of state law).

State AGs can trace the historical roots of their office back to the 13th century, when English kings began to appoint attorneys to represent “regal interests in the courts . . . without restricting the types of courts in which they could appear on the king’s behalf.”<sup>23</sup> The first such attorney to be titled “Attorney General of England” was appointed in 1461.<sup>24</sup> When English colonies were planted in the Americas, the Crown appointed colonial attorneys general with “powers and duties similar to those of the Old World Attorneys General in whose position they acted.”<sup>25</sup> As representatives of the Crown, colonial attorneys general thus exercised very broad powers.

Most state attorneys general retain very broad “common law powers,” so that theoretically at least a present-day state attorney general resembles his royal predecessor to a remarkable degree. Until recently, though, no state attorney general regularly attempted to map the outer reaches of that broad spectrum of discretion. To the contrary, the state AG’s chief tasks—providing legal advice to the governor and to state agencies, coordinating the legal positions asserted by state government in litigation, and rendering advisory opinions to other organs of state government—are vital ones, but can fairly be characterized as largely

routine, at least most of the time. And those routine tasks were what occupied state attorneys general for most of two centuries of American government.

Could the typical state attorney general’s actions in bringing the state’s tobacco case be fairly characterized as “routine”? That is, can it be argued that the attorney general was merely attempting to collect on a debt the state thought it was owed? Was he only doing what lawyers do routinely—asking the court hearing his case to “interpret” or even “fill in the gaps” in the law so that his client (the state) would win?

Certainly not. As we have seen, there was nothing “routine” about the tobacco cases. They were not only unprecedented, they encroached on policy questions that are properly aired in legislative, rather than judicial, hearing rooms. They imposed a new tax on a large segment of the public and relied on public ignorance of the details of both the litigation and its settlement to do so. In any event, making such large changes in the law is not the job of the state attorney general; it is the job of the legislature.<sup>26</sup> While the attorney general certainly has the authority to seek to convince a court to make marginal, interstitial changes in the law to benefit the state, the tobacco cases were very far from being interstitial lawmaking.

If bringing a tobacco case cannot be considered within the attorney general’s routine duties, does he have extraordinary duties or powers that might entitle him to bring such a case? It is true that in the last 20 or 30 years state AGs have taken a more active role in what might be called questions of “public policy,” as distinguished from questions of law, narrowly conceived. That phenomenon is proudly described in a publication of the National Association of Attorneys General:

The Attorney General is no longer just the “chief lawyer of State X.” As the legislatures have adopted new laws and programs, in response to perceived or actual needs identified by the legislatures, Attorneys

General have become active to a degree never before envisioned in areas of consumer protection, antitrust, toxic waste, child support enforcement, organized crime, and services to the elderly.<sup>27</sup>

Note that the passage emphasizes that the attorney general's new role is the result of legislative policy choices rather than personal initiative. Although that trend does not free the attorney general to make up legal policy on his own, it probably has encouraged attorneys general to take a more aggressive role in state governments.

The change in the role of state attorneys general accelerated during the Reagan administration.<sup>28</sup> As the administration pursued deregulatory and federalism goals that were opposed by many Democratic members of Congress, the state attorneys general—an overwhelmingly Democratic group at the time—sought ways to counter those changes in federal policy.

One area that received much attention from the state attorneys general was antitrust, where the administration had a much narrower view of proper government enforcement activity than did the state attorneys general.<sup>29</sup> Armed with their own state antitrust statutes and with *parens patriae* authority to bring federal antitrust claims on behalf of state residents, conferred by the 1976 amendments to the Clayton Act, many state AGs conducted a guerilla war against Reagan administration efforts to rein in antitrust law.

That episode in antitrust history appears to have done a great deal to encourage state AGs to think of themselves as more than just the “chief lawyer of State X.” It also promoted a higher level of coordination among state AGs, principally through the expansion of the National Association of Attorneys General.<sup>30</sup> Similar stories could be told about the involvement of state attorneys general in environmental and civil rights controversies that arose from the Reagan administration's attempts to change policy in those areas.<sup>31</sup>

## Two (Overly) Broad Sources of State AG Authority

Even so, where did the state AGs who filed tobacco suits find their authority to do so? Two grounds have been asserted. In most states the attorney general has what are called “common law powers,” and in every state the attorney general can sue in *parens patriae* to vindicate some public interests. Although both sources of authority are quite broad, neither had been used to justify such aggressive entrepreneurial litigation by attorneys general prior to the tobacco litigation. The tobacco cases are thus extraordinary in a second sense—they have no precedent in the history of the state attorney general's office.

In approximately 40 states the attorney general has common law powers;<sup>32</sup> the remaining states do not recognize such powers in their attorney general's office. The Fifth Circuit described the common law powers of state attorneys general in its 1976 opinion in *Florida ex rel. Shevin v. Exxon Corporation*:

Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such legislative action, he typically may exercise all such authority as the public interest requires. And the attorney general has wide discretion in making the determination as to the public interest.<sup>33</sup>

The Fifth Circuit went on to hold that the Florida attorney general had acted within his common law powers, as defined in Florida law, in bringing an antitrust suit against 17 major oil companies in federal court.

Compared with the tobacco litigation, the antitrust theory asserted by the Florida attorney general was quite mundane. Thus,

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whether a given state’s definition of the attorney general’s common law powers would include the authority to bring a case as unprecedented as the tobacco cases is certainly not foreordained by the outcome in *Shevin*. Nevertheless, the broad common law powers wielded by many state attorneys general have been urged as a proper ground for those suits.<sup>34</sup>

The second possible ground is the attorney general’s authority to act in *parens patriae*. As the U.S. Supreme Court attempted to explain in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, a state attorney general may be able to bring a suit under that concept if the state is asserting “an injury to what has been characterized as a ‘quasi-sovereign’ interest.”<sup>35</sup>

Unfortunately, the concept of “quasi-sovereign interests” is difficult to pin down. According to the Court: “They are not sovereign interests, proprietary interests, or private interests pursued by the State as a nominal party. They consist of a set of interests that the State has in the well-being of its populace.”<sup>36</sup> Later in the opinion, that set of interests was defined as including “the health and well-being—both physical and economic—of its residents in general.”<sup>37</sup>

Thus broadly defined, the *parens patriae* authority arguably might provide a state attorney general with the power to file a tobacco recoupment lawsuit. In fact, the U.S. district judge who heard the Texas recoupment suit so ruled.<sup>38</sup> He also used the *parens patriae* concept to reject the companies’ separation of powers arguments:

A final point raised by the Defendants is that because tobacco is a highly regulated product, the courts should leave the questions to be resolved by this suit to the legislature. In the first sentence of their argument, the Defendants state, “[t]he Attorney General asks this Court to step into the shoes of the Texas legislature and rewrite state law.” The Court disagrees with this proposition. By allowing this case to proceed, the Court is

not rewriting any law. To the contrary, it is only allowing a claim that is based on quasi-sovereign interests to proceed. In the Court’s opinion, such a basis for suit has long been available to the State. Therefore, this is not the type of radical departure from traditional theories of liability that the Fifth Circuit frowns upon. In this case, the State has simply dusted off a long recognized legal theory and seeks to use it to further the purposes of the statutes in question and right the alleged wrongs involved in this matter.<sup>39</sup>

Not surprisingly, defenders and proponents of governmental entrepreneurial litigation have recently argued that the *parens patriae* approach holds great potential for future state attorney general litigation.<sup>40</sup>

The state constitutional problem with such an expansion of the *parens patriae* authority is that it would create in the state attorney general a power that would be quite similar to, if not indistinguishable from, the police power. The police power—to protect and promote the public’s health, safety, morals, and general welfare—is indisputably a legislative power. As one of the classic American decisions defining the concept puts it:

[T]he power we allude to is . . . the police power, the power vested in the legislature by the [state] constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise.<sup>41</sup>

The leading treatises on the police power



confirm that it is clearly a legislative power and there is no historical precedent for a role for the state attorney general in exercising it.<sup>42</sup>

Thus, a state AG who exploits his *parens patriae* authority threatens to arrogate the police power to himself, in effect becoming a one-man legislature. For an example of that kind of hubris, consider high-profile plaintiffs' attorney Richard Scruggs's account of his meeting with Mississippi attorney general Mike Moore prior to the filing of the first tobacco lawsuit. Scruggs states that Moore's friends warned him of the political dangers of filing the suit, and that Moore responded with, "Well, I'm the Attorney General. This is a public health problem. I'm supposed to protect public health, and we're going to do this."<sup>43</sup> That sounds very much as though the attorney general of Mississippi thinks he exercises something very much like the police power. He did not say that he protected the public health pursuant to a legislative grant of power. Instead, he asserted authority over matters of public health—long a subject for the legislature's police power.

Cut loose from any statutory mooring, the *parens patriae* authority can be seen as a "roving commission to inquire into evils and then, upon discovering them, do anything [the attorney general] pleases" (to borrow a phrase from a celebrated New Deal-era Supreme Court decision).<sup>44</sup> But such a view of the office is clearly inconsistent with the state legislature's exclusive prerogative to wield the police power.

It should be noted that in the tobacco litigation three state legislatures—Florida, Maryland, and Vermont—cooperated to an astonishing degree with their state AG's lawsuits by passing legislation that foreordained the outcome of the litigation.<sup>45</sup> Moreover, it is safe to say that all 50 state legislatures had a large number of members—likely a majority—who enjoyed very much spending the windfall from the tobacco settlement, particularly since they did not have to cast a politically accountable vote in favor of the hidden tax increase on cigarettes that the settlement entailed.

So, a large number of current state legislators are complicit in the disaster that is the tobacco settlement and could be expected to support various other instances of government lawsuit abuse if they led to similar windfalls for the states' coffers. But that does not lessen the importance of the separation of powers arguments being made here. To the contrary, the separation of powers is meant to protect the citizenry from the concentration of too much government power in the hands of a few. It was not designed merely to be observed when it serves the purposes of sitting legislators.

## Separation of Powers under State Constitutions

How important is separation of powers to American government today? Certainly, the concept has taken quite a beating in the federal government over the last century or so. The rise of federal administrative government involved much mixing of governmental powers within administrative agencies, and very significant delegations of legislative power to those agencies. The result has been called "a bloodless constitutional revolution" by one commentator,<sup>46</sup> and "Madison's nightmare" by another.<sup>47</sup>

The good news is that the separation of powers has remained a stronger concept in state constitutional law. Most state governments have historically been rooted in a strong preference for a strict separation of powers among the executive, legislative, and judicial departments.<sup>48</sup> Eliminating the authority of the state attorneys general to bring suits modeled on the tobacco litigation would protect and reinforce the states' commitment to separation of powers.

Separation of powers "was reflected in all the Revolutionary state constitutions and explicitly endorsed in six of them."<sup>49</sup> In the most famous formulation of the doctrine, the Massachusetts Constitution of 1780 declared:

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**Action to stop  
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In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.<sup>50</sup>

Historian Marc Kruman explains that such provisions were rooted in a distrust of concentrated political power:

Constitution makers brought to their task an obsession with governmental power. They believed that men in power invariably lusted after more power and would attempt in myriad ways to obtain it. In this view, because power was always aggressive and bent upon expansion, liberty was perpetually endangered. When republicans framed state constitutions, they erected barriers against arbitrary exercise of power. By separating the functions of government among different branches and men, they hoped to prevent this headlong rush toward tyranny and slavery.<sup>51</sup>

Nor were their efforts directed only at limiting the authority of the executive:

The separation of powers was not a doctrine limited to protecting the legislature from executive corruption. American patriots embraced the doctrine partially in reaction to colonial practice and the imperial crisis but also in response to their experience with all-powerful provincial congresses, which consolidated executive, legislative, and judicial powers. As a consequence, they attempted to separate powers by barring any member of one branch of government from assuming the

powers of another . . . by stripping governors of the veto, and by dividing the functions of the colonial council between an executive council and, usually, a senate.<sup>52</sup>

Although the Framers did not follow as rigid an approach in crafting the U.S. Constitution,<sup>53</sup> state constitution writers continued to favor inclusion of express separation-of-powers provisions. Currently, 40 states have such explicit provisions, and only 10 do not.<sup>54</sup> Continued judicial vigor in maintaining the separation of powers, along with a nondelegation doctrine<sup>55</sup> that tends to be more robust than the federal version,<sup>56</sup> has helped limit the growth of government in many states. That is a disappointment to most of the law professors writing in this area, who urge a relaxation of both doctrines by state courts.<sup>57</sup>

Of course, the states' efforts to maintain the separation of powers and control the delegation of legislative authority to other bodies are well advised. Accordingly, action to stop future entrepreneurial litigation by state attorneys general is necessary to the continued viability of those long-standing state doctrines. Before discussing the options available to destroy the tobacco template, a further consideration of the modern function of separation of powers is in order.

Even the lawyers who represented the states in the tobacco litigation recognize that the lawsuits and their settlement are a direct assault on the concept of separation of powers. They are, however, quite comfortable with that. Accordingly, an article in the *New York Times* quotes John Coale ("the legislature has failed") and New Orleans trial lawyer Wendell Gauthier ("I think legislatures need our [trial lawyers'] help") in this vein.<sup>58</sup> A more recent article in *Time* magazine states: "Ask [Richard] Scruggs if trial lawyers are trying to run America, and he doesn't bother to deny it. 'Somebody's got to do it,' he says, laughing."<sup>59</sup>

There are somewhat more sophisticated versions of that view. Prof. Susan Estrich has explained the tobacco litigation phenomenon as "a measure of the failure of political institu-

tions to address concerns that demand attention,”<sup>60</sup> and Professor Lawrence Tribe has defended the firearms suits on the grounds that “the more natural and democratic alternative of getting the legislature to do something seems to be ruled out by the lobbying power of the industry.”<sup>61</sup> Those views are wrong and pernicious and are ultimately destructive of democratic self-government, for the following reasons.

First, the police power is meant to be deployed through legislative procedures, as a result of legislative fact-finding and legislative debate. Legislative processes are better suited than judicial processes to making broad social policy. In addition, when legislative processes are bypassed in favor of the process of litigation—as with the tobacco lawsuits—the public is excluded from participation, in contrast to the opportunities the public has to participate in the legislative process.

Second, when a state attorney general attempts to make tax or regulatory policy in the context of a lawsuit, that makes the rationale for the deployment of the taxing and police powers more opaque to the public, increasing the public’s misunderstanding of the nature of the political system. Non-lawyers are not likely to understand the nature of judicial discretion, and thus are more likely to accept judicial resolution of a difficult issue—tobacco taxation, for example—as what “the law” requires, rather than to see it as a questionable judicial choice among competing policy alternatives. That point applies even more strongly if the issues are resolved by settlement rather than judicial opinion and if the state AG steadfastly denies that there is anything unusual or constitutionally questionable about the lawsuits he files.<sup>62</sup> That is a significant part of the real long-term damage risked by further travel down the trail blazed by the tobacco suits. Increasingly, people will come to be ruled by settlements of lawsuits they do not understand. Moreover, they will not realize what is happening as a result of that kind of litigation.<sup>63</sup>

In *The Federalist*, Madison warned that “[t]he accumulation of all [governmental]

powers in the same hands . . . [is] the very definition of tyranny.”<sup>64</sup> Government lawsuit abuse by state attorneys general runs roughshod over separation of powers, but it seems a little strong to equate that with “tyranny” in Madison’s eighteenth century sense. Alexis de Tocqueville may provide a better frame of reference for us. Very near the end of his magnum opus, *Democracy in America*, he turned his thoughts to the question of “what kind of despotism democratic nations have to fear.”<sup>65</sup> His vision of a soft despotism, written 160 years ago, has a certain familiar ring to many twenty-first century Americans:

[T]he sovereign extends its arms over society as a whole; it covers its surface with a network of small, complicated, painstaking, uniform rules . . . it does not break wills, but it softens them, bends them, and directs them; it rarely forces one to act, but it constantly opposes itself to one’s acting; . . . it does not tyrannize, it hinders, compromises, enervates, extinguishes, dazes, and finally reduces each nation to being nothing more than a herd of timid and industrious animals of which the government is the shepherd.<sup>66</sup>

Americans, collectively speaking, may desire larger and more intrusive versions of the welfare state (or nanny state, depending on your point of view). If so, proponents of that vision should be capable of making their case in the political and legislative arenas. We should not have further expansion of government foisted on us through the settlement of clever, but baseless, lawsuits filed by state attorneys general and their allies from the private plaintiffs’ bar.

## Ending Government Lawsuit Abuse

The state tobacco litigation and settlements constitute a force of uncertain but potentially far-reaching scope and power in

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American law. In 1999 Robert Reich, former U.S. secretary of labor, predicted, “The era of big government may be over, but the era of regulation through litigation has just begun.”<sup>67</sup> More recently, Prof. Jonathan Turley has argued, “Circumvention of the legislative process in dealing with tobacco violates core constitutional principles and undermines the stability of the tripartite system of representative government.”<sup>68</sup>

The tobacco example clearly threatens to convert a number of regulatory and public finance questions into contested issues to be settled through litigation. For example, to what extent can fast food restaurants “market to children”? Should auto manufacturers be permitted to sell cars that are less safe than “safer cars”? Should state and local governments be able to recoup from the makers of alcoholic beverages the costs that government incurs from auto accidents involving alcohol? Should purveyors of foods with high fat content be liable as a class to reimburse state governments for expenditures on cardiovascular and other diseases that can be statistically linked to the consumption of fatty foods?

As recently as a decade ago, such questions would have sounded outlandish. They still do, in one sense, but they are no longer unthinkable. The tobacco litigation and settlements threaten to change much in American law—and pass the costs along to rationally ignorant consumers and (perhaps somewhat better-informed) investors in the form of higher prices, lower profits, and reduced product availability.

What can be done to avoid such a result? Fortunately, several plausible strategies are currently being explored by state legislatures and by Congress. Beyond those proposals, legislators should seriously consider redefining, or even eliminating, state AGs’ common law and *parens patriae* powers.

### **Banning Contingent Fee Contracts between State Attorneys General and Outside Lawyers**

This approach seeks to cut off the oxygen to one particular fire, by preventing private attor-

neys from promoting and managing government-sponsored litigation in return for a piece of the action. A model act drafted by the American Legislative Exchange Council, titled The Private Attorney Retention Sunshine Act, in effect caps the amount the state will pay under contingent-fee contracts at \$1,000 per hour. It also provides for certain disclosures—“government in the sunshine” procedures—to be followed prior to awarding a contingent fee contract to outside attorneys. Four states have already adopted statutes based on that model: Kansas,<sup>69</sup> North Dakota,<sup>70</sup> Texas,<sup>71</sup> and Virginia.<sup>72</sup>

Although that development is certainly positive, a flat prohibition on those contracts would probably be preferable. Contingent fee contracts are meant to open the courthouse doors for plaintiffs of modest means; they serve no obvious purpose in the context of the government as plaintiff.<sup>73</sup> In fact, as the tobacco litigation demonstrates, the use of contingent-fee contracts by state governments is easily abused. The fact that no state-appropriated money is involved on the front end of such a lawsuit helps obscure the fact that, should the defendants settle, the (potentially) large payments to the private attorneys will come from the same pile of cash as the state’s recovery. Instead, the public may see—as the private attorneys in the tobacco litigation invited them to see—the payments to the contingent fee attorneys as something wholly separate and apart from the state government’s financial interests. That is an incorrect view, of course, but one that is all too understandable in the contingent fee setting. Given that there is no positive argument in favor of such contracts, that very real negative tips the balance in favor of prohibition, in my view. If the state attorney general thinks the state has a valid claim under existing law, why should he not be willing to commit state-appropriated funds and personnel to it?

### **Restricting Government Recoupment Lawsuits**

Thus far, statutes restricting government recoupment suits have been passed by legis-

latures only with respect to municipal governments' firearms litigation. As of October 2001, 27 states had enacted laws that block such suits.<sup>74</sup> While that is certainly a positive development—particularly as it suggests that the public may be catching on to the phenomenon of government lawsuit abuse—it is also disappointing because of its narrow focus. Even in the 27 states that have banned recoupment suits against gun makers by municipalities, the state itself can file such suits. And municipalities can still file recoupment suits against other industries. Obviously, it is harder to elicit political support for broader restrictions than for a firearms-specific proposal.

Yet, to restore the status quo that existed prior to the state tobacco suits, a statutory bar to state recoupment lawsuits seems necessary. Whereas such a bar should not lessen the ability of a state government to sue under a theory of subrogation, as historically understood, it should be possible to draft a statute that makes a clear distinction between those kinds of subrogation cases long recognized in law, and the Medicaid reimbursement claims raised for the first time in Anglo-American law in the tobacco litigation. The Litigation Fairness Act, sponsored by Sen. Mitch McConnell (R-Ky.), is one possible step toward a solution.

### **Litigation Fairness Act**

Senator McConnell's proposed legislation (S. 1269, 1999) would forbid any level of government from suing for indirect harm without being subject to the same laws and rules that would apply to suits brought by the citizens on whose behalf the government is suing. Although hearings were held on McConnell's bill, its future in the 107th Congress is unclear, given the Democratic control of the Senate and the small Republican edge in the House. Perhaps the chance of favorable congressional action on the proposal will be increased by the results of the 2002 elections.

Some opponents argue that a Federal Litigation Fairness Act goes beyond the authority of Congress and offends principles

of federalism.<sup>75</sup> At any rate, state legislators should seek passage of state versions of the legislation. State statutes would act as a virtual roadblock to the state AGs' ability to seek reimbursement of state health care expenditures through tobacco-type lawsuits.

### **Limiting the Powers of the State Attorneys General**

Although not currently under consideration in any state to my knowledge, state legislators would do well to consider clarifying or even eliminating the "common law powers" and *parens patriae* authority of state attorneys general. As we have seen, those are extremely broad areas of authority and can currently be deployed in support of such mischief as the tobacco litigation. That danger should be removed.

With regard to the state AGs' common law powers, recall that the attorneys general in a significant number of states currently do not have such powers—and those states do not seem any worse for it.<sup>76</sup> Put another way, I am aware of no evidence that the common law power is necessary for the efficient operation of a state attorney general's office. Its removal would occasion no great disruption or loss, and it would help ensure that inventive state attorneys general of the future would not be able to use the tobacco template.

With respect to removing the *parens patriae* powers of state attorneys general, recall that those powers are relatively new in the sense of furnishing a vehicle for novel litigation. The most significant use of *parens patriae* has been in the antitrust area, and that has been pursuant to a congressional grant of power to the state attorneys general in the Hart-Scott-Rodino Amendments to the Clayton Act, adopted in 1976.<sup>77</sup> In that relatively short time, the states' performance in the antitrust arena has been less than stellar—as evidenced by the dubious state antitrust suits against Microsoft<sup>78</sup> as well as some smaller and less publicized but similarly questionable antitrust and consumer protection suits brought by the states acting cooperatively.<sup>79</sup> Removal of the *parens patriae* power would pre-

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vent future mischief on the part of state attorneys general rather than result in any significant diminution of their legitimate authority.

## Conclusion

Is there evidence of public support to move any of those proposals forward? One of the most disappointing aspects of the tobacco episode was general indifference by the public as it unfolded.

And yet, a poll conducted by the U.S. Chamber of Commerce in the summer of 1999—after the tobacco cases were settled—provides some encouragement: “Two-thirds of those surveyed say suing tobacco companies is not the best way to discourage smoking, and a similar percentage say they oppose state and local government attempts to sue gun manufacturers.”<sup>80</sup> Perhaps the public, in the wake of the tobacco settlements, is developing a better perspective on the question of how much discretion a state AG should have.

Political entrepreneurs are needed to transform that public skepticism into legislation that will destroy the example of the state tobacco litigation, and restore a much more modest conception of the role of the state attorney general. It is not too much to say that failure to achieve those reforms will hasten the arrival of Tocqueville’s soft despotism.

## Notes

1. See, for example, Michael Y. Park, “Lawyers See Fat Payoffs in Junk Food Lawsuits,” Fox News, January 23, 2002, [www.foxnews.com/story/0,2933,43735,00.html](http://www.foxnews.com/story/0,2933,43735,00.html); Will Hutton, “Fat Is a Capitalist Issue,” *The Observer* (London), January 27, 2002, [www.guardian.co.uk/Columnists/Column/0,5673,640107,00.html](http://www.guardian.co.uk/Columnists/Column/0,5673,640107,00.html); “You Are What You Eat,” Fox TV, February 20, 2002, [www.foxnews.com/story/0,2933,46121,00.html](http://www.foxnews.com/story/0,2933,46121,00.html) (discussing whether “junk food manufacturers and restaurants” must “cover the healthcare costs” of customers, citing the tobacco settlement as precedent).

2. The power of the attorney general to act on behalf of state residents.

3. Key litigation documents and complaints filed by 42 states are available on the website of the Tobacco

Control Archives at the University of California, San Francisco, [www.library.ucsf.edu/tobacco/litigation](http://www.library.ucsf.edu/tobacco/litigation). The 8 states that did not file suit were Alabama, Delaware, Kentucky, North Carolina, North Dakota, Tennessee, Virginia, and Wyoming. The District of Columbia also declined to file a suit against the industry. A number of municipal governments sued the industry. After the filing states and the industry agreed to a settlement in November 1998, the nonfiling states then filed proforma lawsuits so that they too could join the settlement.

4. For an extended analysis of the legal theories advanced in the state lawsuits, see “Report of the Task Force on Tobacco Litigation,” *Cumberland Law Review* 27 (1996): 588–639.

5. For the text of the Master Settlement Agreement, see [www.tobacco.neu.edu/Extra/multistatesettlement.htm](http://www.tobacco.neu.edu/Extra/multistatesettlement.htm).

6. Jeremy Bulow and Paul Klemperer, “The Tobacco Deal,” in *Brookings Papers on Economic Activity: Microeconomics*, ed. Martin Neil Baily et al. (Washington: Brookings Institution, 1998), p. 323 (annual payment to lawyers of \$750 million for five years, declining to \$500 million annually thereafter, yields a total of \$13.75 billion through year 2023).

7. See Robert A. Levy, “The War on Tobacco,” in *The Rule of Law in the Wake of Clinton*, ed. Roger Pilon (Washington: Cato Institute, 2000), p. 121. See also Ian Ayres, “Using Tort Settlements to Cartelize,” *Valparaiso University Law Review* 34 (2000): 595.

8. Margaret A. Little, “A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Government’s Tobacco Litigation,” *Connecticut Law Review* 33 (2001):1150–56, 1181–87 (criticizing contingent fee contracts under which private attorneys were hired to represent many state governments).

9. See *United States v. Philip Morris Inc.*, 116 F. Supp. 2d 131, 155 (D.D.C. 2000) (dismissing all but RICO counts).

10. See *In re Tobacco/Governmental Health Care Costs Litigation*, 83 F. Supp. 2d 125 (D.D.C. 1999) (dismissing Guatemala’s suit on grounds of remoteness); Jonathan Turley, “The New Profiteers of the Tobacco War,” *Wall Street Journal*, September 20, 1999, p. A29 (discussing suits brought by the governments of Guatemala, Brazil, Bolivia, Nicaragua, Panama, and Venezuela and reporting that “a dozen other countries, including Russia, are reportedly considering lawsuits of their own”). See also, “Saudi Hospital Fights Tobacco ‘Terrorists,’” BBC News, December 4, 2001, [http://news.bbc.co.uk/hi/english/world/middle\\_east/newsid\\_1691000/1691709.stm](http://news.bbc.co.uk/hi/english/world/middle_east/newsid_1691000/1691709.stm).

11. The complaint in *State of Rhode Island v. Lead Industries Assoc., et al.*, C.A. No. 99-5226 (Providence Superior Ct.), is available on the state attorney general's website, [www.riag.state.ri.us/press/Complaint.htm](http://www.riag.state.ri.us/press/Complaint.htm).
12. "Attorney General Files Class Action Lawsuit against Connecticut HMOs," Press release, Connecticut Attorney General's Office, September 7, 2000, [www.cslib.org/attygenl/press/2000/health/allhmo.htm](http://www.cslib.org/attygenl/press/2000/health/allhmo.htm). The complaint is available at [www.cslib.org/attygenl/health/omni.htm](http://www.cslib.org/attygenl/health/omni.htm). For background on the private suits against HMOs (including those of the anti-tobacco lawyers now working in the anti-HMO crusade), see Laurie McGinley and Milo Geyelin, "Attorneys Prepare Suits against HMOs," *Wall Street Journal*, September 30, 1999, p. A3.
13. Information on a number of the municipal suits is available on the website of the Legal Action Project of the Brady Center to Prevent Gun Violence, [www.gunlawsuits.org](http://www.gunlawsuits.org). For information on the New York lawsuit, see "New York Becomes First State to Sue Gun Companies," Press release, Office of New York State Attorney General Eliot Spitzer, June 25, 2000, [www.oag.state.ny.us/press/2000/jun/jun25a\\_00.html](http://www.oag.state.ny.us/press/2000/jun/jun25a_00.html). For a discussion of the weakness of those suits, see Michael I. Krauss, *Fire and Smoke: Government, Lawsuits and the Rule of Law* (Oakland, Calif.: Independent Institute, 2000), pp. 1-23, 35-40.
14. Daniel Wise, "New York State's Gun Suit Must Be Dismissed," *New York Law Journal*, August 15, 2001.
15. *Ganim v. Smith & Wesson Corp.*, 258 Conn. 313, 780 A.2d 98 (2001).
16. The trial judge denied defendants' motions to dismiss but struck the state's strict liability, negligence, and misrepresentation claims as "too derivative, remote, or contingent." The judge's ruling is available at [www.courts.state.ri.us/superior/pdf/99-5226.PDF](http://www.courts.state.ri.us/superior/pdf/99-5226.PDF).
17. For an interesting postmortem on the gun litigation, see Dave Kopel, "Unintended Consequences," *National Review Online*, March 6, 2002, [www.nationalreview.com/kopel/kopel030602.asp](http://www.nationalreview.com/kopel/kopel030602.asp).
18. *American Jurisprudence* 7, 2d *Attorney General* § 1 (1997).
19. Council of State Governments, *The Book of the States 1998-99*, Table 2.17.
20. See Lynne M. Ross, ed., *State Attorneys General: Powers and Responsibilities* (Washington: National Association of Attorneys General, 1990), p. 44.
- Hereinafter cited as NAAG.
21. Tennessee Constitution, Art. IV, § 5.
22. See NAAG, pp. 55-56.
23. *Ibid.*, p. 4.
24. *Ibid.*, p. 5.
25. *Ibid.*, p. 6.
26. "Altering common law rights, creating new causes of action, and providing new remedies for wrongs is generally a legislative function, not a judicial function." *State v. Philip Morris, Inc.*, Nos. 96122017 and CL211487, 1997 WL 540913, p. \*6 (Md. Cir. Ct. May 21, 1997). If it is a legislative function, then it is not a function of the attorney general.
27. NAAG, p. 12.
28. Cornell W. Clayton, "Law, Politics and the New Federalism: State Attorneys General as National Policymakers," *Review of Politics* 56 (1994): 525.
29. Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice*, 2d ed. (New York: West/Wadsworth, 2000), pp. 590-91; David A. Zimmerman, "Why State Attorneys General Should Have a Limited Role in Enforcing the Federal Antitrust Law of Mergers," *Emory Law Journal* 48 (1999): 344-45.
30. Hovenkamp, pp. 590-91.
31. See generally Clayton; and Scott M. Matheson Jr., "Constitutional Status and Role of the State Attorney General," *University of Florida Journal of Law and Public Policy* 6 (1993): 1.
32. Attorneys general "expressly lack common law authority" in 10 states—Arizona, Colorado, Indiana, Iowa, Louisiana, Maryland, New Mexico, South Dakota, West Virginia, and Wisconsin. NAAG, p. 38 and n. 59.
33. 526 F.2d 266, 268-69 (5th Cir. 1976).
34. For example, in the West Virginia tobacco lawsuit, the attorney general (unsuccessfully) asserted the common law power as his only authority for bringing the case. *McGraw v. American Tobacco Co.*, No. 94-C-1707, 1995 WL 569618 (W.Va. Cir. Ct. June 6, 1995).
35. 458 U.S. 592, 601 (1982).
36. *Ibid.* at 602.
37. *Ibid.* at 607.

38. *State v. American Tobacco Co.*, 14 F. Supp. 2d 956, 962-63 (E.D. Tex. 1997).
39. *Ibid.* at 971 (internal citations omitted).
40. Edward Brunet, "Improving Class Action Efficiency by Expanded Use of *Parens Patriae* Suits and Intervention," *Tulane Law Review* 74 (2000): 1921-22; Richard P. Ieyoub and Theodore Eisenberg, "State Attorney General Actions, the Tobacco Litigation, and the Doctrine of *Parens Patriae*," *Tulane Law Review* 74 (2000): 1875-82; and Jack Ratliff, "*Parens Patriae*: An Overview," *Tulane Law Review* 74 (2000): 1857-58.
41. *Commonwealth v. Alger*, 61 Mass. 53, 84 (1851). See also *Munn v. Illinois*, 94 U.S. 113, 124-25 (1877); *Ibid.* at 145-48 (Field, J., dissenting); *Thorpe v. Rutland & Burlington R.R. Co.*, 27 Vt. 140, 149 (1855); Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America*, 2d ed. (Boston: Little Brown, 1891), pp. 320-21. ("The police power may be defined in general terms as that power which inheres in the legislature to make, ordain, and establish all manner of reasonable regulations and laws whereby to preserve the peace and order of society and the safety of its members").
42. Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* (Boston: Little Brown, 1868), pp. 572-97; Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* (Chicago: Callaghan, 1904); Alfred Russell, *The Police Power of the State and Decisions Thereon as Illustrating the Development and Value of Case Law* (Chicago: Callaghan, 1900); and Christopher G. Tiedeman, *A Treatise on the Limitations of the Police Power* (St. Louis: F.H. Thomas, 1886), p. 5 ("The legislature is clearly the department of government which can and does exercise the police power, and consequently in the limitations upon the legislative power, are to be found the limitations of the police power"). For a more recent treatment of the history of the police power, see generally William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996).
43. "The Tobacco Settlement: Practical Implications and the Future of Tort Law," *Mississippi Law Journal* 67 (1998): 859-60 (transcript of a panel discussion held in October 1997 on the ill-fated national settlement proposal). Moore was on the same panel as Scruggs, and did not dispute Scruggs' account of the meeting.
44. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring).
45. See, for example, Medicaid Third-Party Liability Act, Fla. Stat. Ann. § 409.910 (1995). The Maryland and Vermont statutes were replicas of Florida's. The president of the Maryland senate boasted, "We agreed to change tort law, which was no small feat. We changed centuries of precedent in order to assure a win in this case." Sheila R. Cherry, "Litigation Lotto," *Insight on the News*, April 3, 2000, p. 10.
46. Gary Lawson, "The Rise and Rise of the Administrative State," *Harvard Law Review* 107 (1994): 1231.
47. Richard B. Stewart, "Madison's Nightmare," *University of Chicago Law Review* 57 (1990): 342.
48. Marc W. Kruman, *Between Authority and Liberty: State Constitution Making in Revolutionary America* (Chapel Hill: University of North Carolina Press, 1997), pp. 109-30; and Jim Rossi, "Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States," *Vanderbilt Law Review* 52 (1999): 1187-89.
49. Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: University Press of Kansas, 1985), p.84. *Ibid.*, n. 55 lists the six states as Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, and Virginia.
50. Massachusetts Constitution of 1780, Part the First, Art. XXX.
51. Kruman, p.109.
52. *Ibid.*, p. 111.
53. Madison explained in *Federalist* nos. 47-51 that strict adherence to separation of powers had been sacrificed in the framing of the Constitution to ensure an overlapping system of checks and balances. McDonald, p. 258. For another view of the doctrine as it developed during the Founding period, see M. J. C. Vile, *Constitutionalism and the Separation of Powers*, 2d ed. (Indianapolis: Liberty Fund, 1998), pp. 131-92.
54. Rossi, pp. 1190-91 and nn. 105, 107.
55. At the federal level, Art. I, sec. 1, of the Constitution vests all legislative powers in the U.S. Congress. The nondelegation doctrine asserts that exercise by the executive branch of powers delegated to the legislative branch offends Art. I, sec. 1.
56. Rossi, pp. 1191-1201. Rossi characterizes the nondelegation doctrine in 20 states as "strong," in 23 states as "moderate," and in 7 states as "weak" (which is similar to the federal version of the doctrine).



57. See *ibid.*, pp. 1239–40; and Robert A. Schapiro, “Contingency and Universalism in State Separation of Powers Discourse,” *Roger Williams University Law Review* 4 (1998):79.
58. Patrick E. Tyler, “Tobacco-Busting Lawyers on New Gold-Dusted Trails,” *New York Times*, March 10, 1999, p. A1.
59. Adam Cohen, “Are Lawyers Running America?” *Time*, July 17, 2000, p. 22.
60. Susan Estrich, “Want Political Help? Look to the Courts,” *Los Angeles Times*, February 7, 1999, p. M2.
61. Quoted in Ellen Goodman, “Victims Saying Ready, Aim, Sue,” *Birmingham News*, February 27, 1999.
62. “As state attorney general, I did not even purport to create new law [in filing Connecticut’s tobacco lawsuit], but rather insisted on enforcing state statutes already on the books.” Richard Blumenthal, “The Role of State Attorneys General,” *Connecticut Law Review* 33 (2001): 1210. See also comment of Hubert H. Humphrey III, *Seton Hall Law Review* 31 (2001): 599 (former attorney general of Minnesota “disagree[ing] strongly that state attorneys general have overreached their authority and their role in our structure of government” in filing tobacco lawsuits).
63. For example, the fees paid to the states’ private trial lawyers were absurdly high. Given how angry voters get over proposed congressional pay raises, why has the public not exploded in outrage over those fees—money that the tobacco companies would just as willingly pay to the states as to the states’ lawyers? Remember that cigarette price hikes to pay for the tobacco settlement are equivalent to a tax imposed on smokers. Imagine that members of Congress were paid the same contingency fee for enacting taxes that the tobacco plaintiffs’ attorneys have demanded. At 5 1/2 percent, the low end of the lawyers’ demands, members of Congress would split a total bounty of \$110 billion annually. That translates to congressional salaries of more than \$200 million annually for each member—an amount that would, obviously, not be politically feasible.
64. *Federalist* no. 47 (James Madison).
65. Alexis de Tocqueville, *Democracy in America*, trans. Harvey C. Mansfield and Delba Winthrop (1835; Chicago: University of Chicago Press, 2000), p. 661.
66. *Ibid.*, p. 663.
67. Robert Reich, “Regulation Is Out, Litigation Is In,” *USA Today*, February 11, 1999, p. 15A.
68. Jonathan Turley, “A Crisis of Faith: Tobacco and the Madisonian Democracy,” *Harvard Journal on Legislation* 37 (2000): 437. Turley also thinks “tobacco may be the quintessential [political] debate for a Madisonian system, a product upon which factional views and interests are numerous, intense, and volatile.” *Ibid.*
69. Kansas Statutes §§ 75-37,135 (West 2001).
70. North Dakota Cent. Code §§ 54-12-08.1 (1999).
71. Texas Government Code Ann. §§ 404.097, 2254.101-2254.109 (Vernon 2000).
72. Virginia Code Ann. §§ 2.2-510.1.
73. Some state constitutions have been read as prohibiting the attorney general from awarding such contracts—for example, *Meredith v. Ieyoub*, 700 So.2d 478, 484 (La. 1997)—see, while others have been read as permitting them—see, for example, *Philip Morris Inc. v. Glendening*, 709 A.2d 1230, 1240 (Md. 1998) (approving contingent contracts in state tobacco case); and *State v. Hagerty*, 580 N.W.2d 139, 148 (N.D. 1998).
74. Those states are Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maine, Michigan, Missouri, Montana, Nevada, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia and Wyoming. “Fact Sheet: Courts Reject Lawsuits against Gun Makers,” National Rifle Association Institute for Legislative Action, October 15, 2001, [www.nraila.org/FactSheets.asp?FormMode=Detail&ID=37](http://www.nraila.org/FactSheets.asp?FormMode=Detail&ID=37). The Louisiana Supreme Court has upheld that state’s statute against various challenges lodged by the plaintiff City of New Orleans and dismissed the city’s suit. *Morial v. Smith & Wesson Corp.*, 785 So.2d 1 (La.), cert. denied, 122 S. Ct. 346 (2001).
75. See, for example, Robert A. Levy, “Turning Lead into Gold,” *Legal Times*, August 23, 1999, p. 23.
76. The absence of any such power in West Virginia led to the trial court’s dismissal of all the common law causes of action in that state’s tobacco case. *McGraw v. American Tobacco Co.*, No. 94-C-1707, 1995 WL 569618, p. \*2 (W.Va. Cir. Ct. June 6, 1995).
77. 15 U.S.C. § 15c (1997). The grant was itself subject to a state opt-out provision. 15 U.S.C. § 15h (1997).
78. Steve Lohr, “Microsoft and 9 States Spar in Filings,” *New York Times*, February 9, 2002. See also, Robert A. Levy, “For Nine States, a Second

Bite at the Microsoft Apple," *Los Angeles Times*, March 24, 2002, p. M5.

Regulating Business," *Los Angeles Times*, July 6, 1999, p. A1.

79. Myron Levin, "Teaming Up to Aid Consumers: With Activism and Sheer Numbers, State Attorneys General Emerge as Powers

80. "New Poll Finds Solid Public Opposition to Government Lawsuits" Press release, U.S. Chamber of Commerce, July 21, 1999.

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