

The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage

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INTRODUCTION

The states' legal crusade against the tobacco industry will one day rank as one of the worst developments in American public law in the twentieth century, unless legislators and voters act to undo the mischief it has caused. Between 1994 and 1998, forty-two states filed suit against the industry, seeking to recoup state government expenditures on Medicaid and other health programs that could be statistically linked to smoking-related illnesses.¹ The legal theories advanced in this litigation by the plaintiff states were without precedent in American law—a fact that virtually everyone who commented upon the cases acknowledged.²

Ultimately, the tobacco companies settled the lawsuits by agreeing to abide by a new set of regulatory constraints and to make multi-billion dollar payments annually to the states (and the trial lawyers from private practice who were hired to represent most of them) in perpetuity.³ Although the amounts paid out may vary because of inflation and changes in the percentage of Americans who smoke, the total payout to the states during the first twenty-five years covered by the settlements (1998-2023) would be something on the order of a quarter of a *trillion* dollars. Although the amount of payments to the lawyers during this same period is more

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¹ The states' complaints and other key litigation documents are available on the website of the Tobacco Control Archives at the University of California San Francisco, <http://www.library.ucsf.edu/tobacco/litigation> (last visited Apr. 20, 2001). The eight 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 filed similar suits. *See, e.g.*, *City and County of San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130 (N.D. Cal. 1997); *City of Birmingham v. Am. Tobacco Co.*, 10 F. Supp. 2d 1257 (N.D. Ala. 1998).

² *See infra* note 45.

³ W. Kip Viscusi, *The Governmental Composition of the Insurance Costs of Smoking*, 42 J.L. & ECON. 575, 580 (1999) [hereinafter Viscusi, *Insurance Costs*].

difficult to predict, a ballpark number of \$13.75 billion looks about right.⁴ The tobacco settlements will thus lead to the largest transfer of wealth as a result of litigation in the history of the human race, a transfer that is being, and will continue to be, financed almost entirely by smokers paying higher prices for cigarettes.

Because all the state tobacco lawsuits were settled, this litigation created no new legal precedent. As a practical matter, however, the extremely lucrative state settlements constitute a very tempting political precedent for ambitious public office-holders.

The states' success led directly to the filing of additional tobacco recoupment suits by the federal government,⁵ local governments, and even some foreign governments.⁶ 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 that recently survived a round of motions to dismiss.⁷ In 2000 Connecticut followed the lead of several high-profile tobacco lawyers and sued a number of health maintenance organizations. Contrary to the private attorneys' suits, Connecticut's suit seeks injunctive relief and says nothing about monetary damages.⁸ Most dramatically,

⁴ Jeremy Bulow & Paul Klemperer, *The Tobacco Deal*, in BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS 323, 376-80 (Martin Neil Bailey et al. eds., 1998) (noting the annual payment to lawyers of \$750 million for five years, and declining to \$500 million annually, in perpetuity, thereafter, yields a net present value of \$8 billion).

⁵ See, e.g., *United States v. Philip Morris Inc.*, 116 F. Supp. 2d 131, 155 (D.D.C. 2000) (dismissing all but RICO counts).

⁶ See *In re Tobacco/Governmental Health Care Costs Litig.*, 83 F. Supp. 2d 125 (D.D.C. 1999) (dismissing Guatemala's suit on grounds of remoteness); see also Brian S. Appel, Note, *The Developing World Takes on the Tobacco Industry: An Analysis of Recent Litigation and Its Future Implications*, 16 AM. U. INT'L L. REV. 809 (2001); Jonathan Turley, *The New Profiteers of the Tobacco War*, WALL ST. J., Sept. 20, 1999, at 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").

⁷ The complaint in *State of Rhode Island v. Lead Industries Assocs.*, C.A. No. 99-5226 (Providence Superior Ct.), is available on the state attorney general's website, <http://www.riag.state.ri.us/press/Complaint.htm> (last visited Apr. 20, 2001). In April 2001, 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 <http://www.courts.state.ri.us/superior/pdf/99-5226.PDF> (last visited Apr. 20, 2001).

⁸ Press Release, Connecticut Attorney General's Office, Attorney General Files Class Action Lawsuit Against Connecticut HMOs (Sept. 7, 2000), available at <http://www.cslib.org/attygenl/press/2000/health/allhmo.htm> (last visited Apr. 23, 2001). The complaint is available at <http://www.cslib.org/attygenl/health/omni.htm> (last visited Apr. 23, 2001). For background on the private suits against HMOs (including the anti-tobacco lawyers now working in the anti-HMO crusade), see Laurie McGinley & Milo Geyelin, *Attorneys Prepare Suits Against HMOs*, WALL ST. J., Sept. 30, 1999, at A3. The

dozens of local governments and the state of New York filed recoupment suits against firearms manufacturers.⁹ In addition, as many observers have pointed out, the tobacco template could conceivably be applied to a wide range of industries in future government litigation—including, perhaps, makers of alcoholic beverages, fatty foods, and automobiles.¹⁰

If the fallout from the state tobacco litigation is not addressed quickly, it will further distort and destabilize a number of areas of law, including the separation of powers within state governments—the primary subject of this paper. There is a substantial danger that state attorneys general and local government officials will regularly succumb to the temptation of the tobacco example, and will seek to achieve regulatory and tax outcomes through litigation, rather than through the normal—and constitutionally appropriate—legislative channels.

Fortunately, we have not yet reached the point of no return. Several states have already adopted reforms that will prevent or greatly inhibit the intrusion of the tobacco template into other areas of the state legislature's taxing and police powers. This paper will argue that all state legislatures should take such steps in order to preserve a sensible separation of powers among the three branches of state government. This paper will also make the case for two additional state statutory (or, if need be, constitutional) provisions that would clearly deny to the state attorney general *any* authority to bring cases for recoupment of state health care expenditures.

Aetna Corporation's website also contains a wealth of updated information on HMO litigation, at http://www.aetna.com/legal_issues (last visited Apr. 23, 2001).

⁹ Information on a number of the municipal suits is available on the websites of the Legal Action Project of the Center to Prevent Handgun Violence, <http://www.gunlawsuits.org/city.asp> (last visited May 31, 2001), and the Firearms Litigation Clearinghouse, <http://www.firearmslitigation.org> (last visited Aug. 3, 2001). For information on the New York lawsuit, see Press Release, Office of New York State Attorney General Eliot Spitzer, *New York Becomes First State to Sue Gun Companies* (June 25, 2000), available at http://www.oag.state.ny.us/press/2000/jun/jun25_00.html (last visited May 31, 2001). On the merits of these suits, compare David Kairys, *Legal Claims of Cities Against the Manufacturers of Handguns*, 71 TEMPLE L. REV. 1 (1998), with MICHAEL I. KRAUSS, FIRE & SMOKE: GOVERNMENT, LAWSUITS AND THE RULE OF LAW 1-23, 35-40 (2000).

¹⁰ For early warnings along these lines, see Bill Pryor, *The Law Is at Risk in Tobacco Suits*, WALL ST. J., Apr. 7, 1997; see also Robert A. Levy, *Tobacco Medicaid Litigation: Snuffing Out the Rule of Law* (Cato Policy Analysis No. 275, June 20, 1997), available at <http://www.cato.org/pubs/pas/pa-275es.html> (last visited Apr. 20, 2001). The most recent industry to be hit with a tobacco-inspired wave of lawsuits is the cellular telephone industry. Baltimore lawyer Peter Angelos, who was the key private practice attorney in the Maryland tobacco lawsuit, has filed two massive class action suits against cellular telephone providers for "knowingly peddling dangerous products that have inflicted damaging radiation on their customers." Peter S. Goodman, *Angelos Takes a Swing at Cellular*, WASH. POST, Apr. 20, 2001, at E1. Goodman notes that "suits do not claim that anyone has actually suffered an illness. Rather, they seek money for headsets to mitigate exposure to radiation, plus unspecified punitive damages." *Id.* To date, no state attorney general has followed Mr. Angelos's lead.

I. THE STATE TOBACCO LITIGATION

The states' legal crusade against the tobacco industry began in 1994, on both the litigation and legislative fronts. Mississippi Attorney General Mike Moore filed the first state lawsuit against the industry in May. Moore explained that the case was "premised on a simple notion—you cause the health crisis, you pay for it."¹¹

At approximately the same time, the Florida legislature prepared the ground for a similar suit by passing the Medicaid Third-Party Liability Act (MTPLA),¹² which stacked the deck decisively against the defendants in any recoupment suit brought by the state. The MTPLA stripped the defendants of all their pre-existing common law affirmative defenses, allowed the use of market share liability, replaced long-standing concepts of causation and damages with "statistical analysis," and dispensed with the requirement that the state identify the individual recipients whose illnesses were treated through state health care programs.¹³ The Act also abolished the defense provided by statutes of repose in recoupment suits, thus allowing the state to sue on claims that had already been extinguished by the passage of time.¹⁴ In July 1994, the Massachusetts legislature authorized such a recoupment suit, but did not rewrite the state's laws to foreordain the result, as Florida's legislature had.¹⁵

Two states followed Mississippi's example within a year, with Minnesota and West Virginia filing in August and September, 1994, respectively. In February 1995, Florida filed its suit, and Massachusetts followed in December of that year. By the end of 1995, the number of plaintiff states stood at five.

The pace picked up in 1996, however, when thirteen more states filed suit. Additionally, in June the Florida Supreme Court, on a 4-3 vote, upheld most of the Florida MTPLA against a multi-pronged constitutional attack.¹⁶ The court struck down only the sections of the act that purported to abrogate the statute of repose and free the state of the requirement that it identify individual recipients of state health care spending.¹⁷ The upshot was that the state's case could proceed, but only on claims that were not

¹¹ James W. Brosnan, "We Needed to Build an Army," *Moore Says*, COMM. APPEAL (Memphis, Tenn.), June 21, 1997, at A11, cited in Laurens Walker & John Monahan, *Sampling Liability*, 85 VA. L. REV. 329, 333 n.26 (1999).

¹² FLA. STAT. ch. 409.910 (1998).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ MASS. GEN. LAWS ch. 118E, § 22 (2000).

¹⁶ Agency for Health Care Admin. v. Assoc. Indus. of Fla., Inc., 678 So.2d 1239, 1257 (Fla. 1996).

¹⁷ *Id.* at 1253-54.

time-barred, and only on the condition that the tobacco companies could probe each individual recipient's history for evidence of "improper payments" made by the state due to "fraud, misdiagnosis of the plaintiff's condition, or unnecessary treatments."¹⁸ Although the state's suit could proceed, it would be a long and tedious one, to put it mildly.

Alarmed by the gathering momentum among the states, in early 1997 the tobacco companies signaled a willingness to discuss settlement. Not coincidentally, twenty more states filed suit against the companies in the first six months of the year. On June 20, the companies and a group of state attorneys general announced they had agreed on a "national settlement," and that they would seek Congressional action to implement the settlement.

The 1997 national settlement proposal would have imposed numerous regulatory restrictions on the companies and required them to pay more than \$368 billion to the states over the next twenty-five years. In return, the states agreed to drop their litigation and help lobby Congress to confer significant benefits on the companies—including immunity from both punitive damages and class actions on behalf of smokers, and a \$1 billion cap on the amount the industry would be required to pay individual smokers in any given year.¹⁹

Congress debated the 1997 settlement proposal at length. However, as the debate wore on, the legislation attracted many special-interest amendments and conditions. The tobacco companies watched as the legal protections they sought were deleted and the projected total of their payments to the states more than doubled. Finally, in late July 1998, the tobacco companies walked away from the settlement proposal.²⁰

During Congress' deliberations, the companies negotiated individual settlements with the states that had moved furthest down the litigation path: Mississippi (July 1997), Florida (August 1997), Texas (January 1998), and Minnesota (May 1998).²¹ The companies agreed to make payments in perpetuity to these four states, with the payments during the first 25 years totaling some \$40 billion, and to abide by a set of new rules to cover their advertising and product promotion efforts.²² The question of the fees to be

¹⁸ *Id.* at 1254.

¹⁹ Bulow & Klemperer, *supra* note 4, at 337-41, 352-54.

²⁰ For an interesting assessment of the failure of this legislation, see David S. Sarnford, Note, *Cutting Deals in Smoke-Free Rooms: A Case Study in Public Choice Theory*, 87 KY. L.J. 845, 846 (1999) (explaining the fate of the proposal as "the predictable outcome under a doctrine of analysis known as public choice theory").

²¹ *See supra* note 1.

²² *See id.*

paid the private attorneys who represented these states was sent to a panel of three arbitrators.²³

In April 1998, both the Maryland²⁴ and Vermont²⁵ legislatures passed statutes similar to the Florida MTPLA. The president of the Maryland state senate explained, with apparent pride, "We changed centuries of precedent to ensure a win in this case."²⁶

After the national settlement proposal failed in Congress, the states and the tobacco companies returned to the bargaining table. On November 16, 1998, a "Master Settlement Agreement" (MSA) between the companies and all the remaining forty-six states, the District of Columbia, and five U.S. territories, was announced.²⁷ Under the MSA, the companies agreed to make multi-billion dollar payments to the states in perpetuity.²⁸ The total amount due through the year 2023 is approximately \$206 billion. In addition, the tobacco companies agreed to "contribute" \$1.5 billion over five years to an anti-smoking "education and advertising campaign," and \$250 million "for a foundation dedicated to reducing teen smoking."²⁹ The net present value of all the companies' payments to the states pursuant to the MSA has been estimated at \$281.6 billion, using a three-percent discount rate.³⁰

Another section of the MSA obligates the companies to pay the private practice attorneys who represented the settling states "\$750 million per year for five years and, thereafter, \$500 million per year indefinitely."³¹ The net present value of these payments to the private attorneys is "about \$8 billion," using a seven-percent discount rate.³²

²³ In December 1998, the panel voted two to one to award a total of approximately \$8.1 billion in fees to the attorneys who represented Mississippi, Florida, and Texas. *Id.* The dissenting arbitrator, former U.S. District Judge Charles Renfrew, deemed the awards "clearly excessive and, to me, incomprehensible." Alison Frankel, *Bar Talk: Tobacco's Big Payday*, AM. LAW., Jan.-Feb. 1999, at 22.

²⁴ MD. CODE ANN., [HEALTH-GEN.] § 15-120(e)(2) (2000).

²⁵ VT. STAT. ANN. tit. 33, §§ 1904, 1911 (2000).

²⁶ Walter Olson, *Puff, the Magic Settlement*, REASON, Jan. 2000, available at <http://www.reason.com/0001/co.wo.reasonable.html> (last visited Feb. 19, 2001).

²⁷ Press Release, National Association of Attorneys General, Attorneys General Announce Tobacco Settlement Proposal, Nov. 16, 1998, available at <http://www.naag.org/tobac/npr.htm> (last visited Mar. 2, 2001) [hereinafter Press Release, NAAG]. The full text of the MSA is available at <http://www.naag.org> (last visited May 20, 2001) [hereinafter MSA]. For a succinct overview of the MSA, see W. Kip Viscusi, *A Postmortem on the Cigarette Settlement*, 29 CUMB. L. REV. 523, 537-43 (1999).

²⁸ MSA, *supra* note 27.

²⁹ Press Release, NAAG, *supra* note 27.

³⁰ Viscusi, *Insurance Costs*, *supra* note 3, at 580.

³¹ Bulow & Klemperer, *supra* note 4, at 378.

³² *Id.* This unprecedented fee raises a number of ethical and other issues that are simply beyond the scope of this paper. Interested readers should consult the academic writings of

In the regulatory vein, the MSA subjects the companies to a new set of constraints on, *inter alia*, their advertising and other product promotion efforts. The MSA bans cartoon characters in tobacco advertising, prohibits the industry from “targeting youth in ads and marketing,” prohibits billboard and transit advertising, and bans “the sale and distribution of apparel, backpacks and other merchandise which bear brand name logos and become, in effect, walking billboards.”³³ In marked contrast to the 1997 settlement proposal, the MSA does not confer on the companies any protection from suits by smokers themselves.

One week after the details of the MSA were made public, the three largest tobacco companies announced that they would increase the wholesale price of cigarettes.³⁴ This in turn caused retail prices to increase by about thirty-five cents per pack, generating more than enough new revenue for the tobacco companies to finance their annual payment of \$8 billion to the states under the MSA.³⁵ According to one industry analyst, this was “the biggest [cigarette] price increase in dollar terms in the history of the United States.”³⁶ It was clearly designed to shift most of the cost of the MSA to smokers. The tobacco companies could shift most of this increase in their cost of doing business to their customers because of smokers’ relatively inelastic demand for cigarettes. W. Kip Viscusi, an economist on the Harvard Law faculty and a long-time student of the cigarette industry, estimates that smokers will wind up paying approximately ninety percent of the cost of the settlement through higher prices.³⁷ The remainder will be absorbed by the owners and employees of the tobacco companies, in the form of lower sales and lower profits.

In short, some ninety percent of the financial side of the tobacco settlements is identical to an increase on the state tax on cigarettes, and the regulatory side of the settlements is similar to the kind of regulations that state legislatures have long imposed on the marketing of cigarettes, such as

Cardozo Law School professor Lester Brickman, and the up-to-date journalistic record maintained on a state-by-state basis by Walter Olson at <http://www.overlawyered.com/topics/tobacco.html> (last visited Mar. 2, 2001).

³³ Press Release, NAAG, *supra* note 27.

³⁴ See Vanessa O’Connell, *Philip Morris, RJR Lift Wholesale Price for Cigarettes 45 Cents a Pack Today*, WALL ST. J., Nov. 24, 1998 (noting the price increase was announced with the “ink barely dry on the . . . settlement”); see also *Philip Morris Takes Lead in Cigarette-Price Boost*, WALL ST. J., Dec. 19, 2000, at B14 (noting that “[w]holesale cigarette prices have climbed by 77%, or 96 cents per pack, since the settlement deal”).

³⁵ Viscusi, *Insurance Costs*, *supra* note 3, at 580. A price increase had also followed the earlier settlements with the four non-MSA states.

³⁶ Barry Meier, *Cigarette Makers Announce Large Price Rise*, N.Y. TIMES, Nov. 24, 1998, at A20.

³⁷ Interview with W. Kip Viscusi, Professor, Harvard Law School, in Birmingham, Alabama (Feb. 25, 1999).

the prohibition of sales to minors. The settlements clearly involve public policy actions with respect to taxation and regulation that are normally associated with legislative action rather than litigation. Herein lies the very serious separation of powers problem that such inventive state litigation entails.

A fuller understanding of the separation of powers problem is gained when one understands the weakness of the legal theories pursued by the state attorneys general in the tobacco litigation.

A. *The Tobacco Suits as "Entrepreneurial Litigation"*

The term "entrepreneurial litigation" comes from the debate over class action lawsuits. The phrase refers to a plaintiff's filing of a lawsuit with a low probability of success viewed *ex ante*, in the hopes of extracting a "nuisance settlement" from a defendant.³⁸ This label is entirely appropriate for the states' tobacco lawsuits.³⁹ Viewed as of the time the suits were filed, the tobacco suits had no support in either case law or statutory law,⁴⁰ and thus constituted a governmental experiment in entrepreneurial litigation.

At the most general level, the biggest obstacle to the states was the clear, long-standing reluctance of the common law to award damages to third parties. As Justice Holmes famously put this point, "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step."⁴¹ This "remoteness doctrine" is "a basic doctrine of tort law"⁴² and has in fact been used by several courts to dismiss both state tobacco and municipal firearms cases.⁴³ By seeking to recoup state money spent on

³⁸ For an explication of the term, see Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847, 1848 n.6 (2000).

³⁹ It also accurately describes the municipal lawsuits against firearms manufacturers.

⁴⁰ An examination of each cause of action asserted by one or more states in their complaints is beyond the scope of this article. For a thorough examination of the typical complaint's theories of recovery in terms of one state's laws, see *Report of the Task Force on Tobacco Litigation Submitted to Governor James and Attorney General Sessions*, 27 CUMB. L. REV. 577, 588-639 (1996-97) [hereinafter *Alabama Task Force Report*].

⁴¹ *S. Pac. Co. v. Darnell Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918).

⁴² Victor E. Schwartz, *The Remoteness Doctrine: A Rational Limit on Tort Law*, 8 CORNELL J.L. & PUB. POL'Y 421, 425 (1999).

⁴³ Iowa's Supreme Court is the only state supreme court to rule on a tobacco case. In *Iowa ex rel. Miller v. Philip Morris Inc.*, 577 N.W.2d 401, 407 (Iowa 1998), the court dismissed all but the state's statutory subrogation claim, explaining that "failure to apply the remoteness doctrine would permit unlimited suits to be filed." The trial judge in the Maryland tobacco case dismissed all the common law counts (subject to amendment), largely on remoteness grounds. *State v. Philip Morris Inc.*, Nos. 96122017, CL211487, 1997 WL 540913, at *9-*14 (Cir. Ct. Md. May 21, 1997). A federal district judge invoked the remoteness doctrine in dismissing a tobacco reimbursement suit brought by the government of Guatemala. *In re Tobacco/Governmental Health Care Costs Litig.*, 83 F.

indigent patients who exhibited smoking-related illnesses, the states were completely at odds with the remoteness doctrine, urging their judges to go considerably beyond Holmes's "first step."

Furthermore, the states could not successfully frame their claims against the tobacco companies in terms of either the traditional tort doctrine of subrogation or the codified version of the doctrine that allows most state governments to seek reimbursement for medical expenditures. Subrogation was useless to the states in this litigation because one of the features of a subrogation case is that the defendant can assert any defense against the subrogee that it would have had against the subrogor.⁴⁴ This would put the states in the shoes of smokers—who, as we know, had uniformly failed in their lawsuits against the tobacco companies up to that point. The companies' perfect batting average in litigation brought by smokers and ex-smokers was due to the companies' successful invocation of such affirmative defenses as assumption of risk and proximate cause. The same fate would almost certainly befall any garden-variety subrogation suit filed by the states.

The state attorneys general had to finesse these traditional defenses to a subrogation tort claim in order for their suits to have any possibility of success. The legal strategy they developed was nothing if not inventive. Each state's complaint alleged a number of causes of action—some statutory, some sounding in 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, restitution, public nuisance, breach of warranty, antitrust, consumer protection, or racketeering. However—and this point is critical—none of these causes of action, as defined at the time the cases were filed, would encompass the state's claim for recoupment from the tobacco companies. Accordingly, with regard to each count of the state's complaint, the plaintiff state attorney general was arguing that the pre-existing definition of a cause of action be expanded by the court to encompass, for the first time, the state's alleged right to recoup health-care monies from the defendants. In addition to its novelty, a point on which commentators were virtually unanimous,⁴⁵

Supp. 2d 125 (D.D.C. 1999).

Several trial judges' dismissals of some or all of a municipal firearms lawsuit are based at least in part on the remoteness doctrine. *See, e.g.,* Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 123 F. Supp. 2d 245, 255-64 (D.N.J. 2000); City of Philadelphia v. Beretta U.S.A. Corp., 126 F. Supp. 2d 882, 903-06 (E.D. Pa. 2000); City of Cincinnati v. Beretta U.S.A. Corp., Nos. C-990729, C-990814, C-990815, 2000 WL 1133078, at *1 (Ct. App. Ohio Aug. 11, 2000); Ganim v. Smith & Wesson Corp., No. CV 990153198S, 1999 WL 1241909, at *1 (Conn. Super. Dec. 10, 1999).

⁴⁴ DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 404-05 (2d ed. 1993).

⁴⁵ KRAUSS, *supra* note 9, at 40 ("The common law should not be arrogantly swept away

the states' theories of recovery in the tobacco suits had other questionable aspects. As argued by the states, the recoupment theory would allow them to avoid assumption of risk and other legal defenses that had consistently defeated private suits against the tobacco companies. As Attorney General Moore explained:

This time, the industry cannot claim that a smoker knew full well what risks he took each time he lit up. The state of Mississippi never smoked a cigarette. Yet it has paid the medical expenses of thousands of indigent smokers who did.⁴⁶

Under the recoupment approach the states also sought to avoid questions of causation that had stymied many individual smoker-plaintiffs. The states based their Medicaid claims on statistical calculations that finessed questions of causation. The states argued that because smoking can be associated with smoking-related diseases in a predictable percentage of a given population, they should be allowed to claim that same percentage of their expenditures on Medicaid patients who smoked.

The states sought to define their recoupment claim as excluding any offset in favor of the tobacco companies for either state revenues generated by taxes on cigarettes, or state Medicaid savings on, *inter alia*, nursing home expenditures as a result of the higher mortality rate of smokers. Economic research shows definitively that the value of either of these two items, if recognized, would zero-out the states' claims.⁴⁷ The states' response to this inconvenient fact was simple: they argued that while all the payments from the state treasury that could be statistically tied to smoking-related diseases should be assessed against the tobacco companies, none of the pecuniary benefits to that same state treasury from smoking ought to be judicially recognized.

In short, the states' recoupment theories of recovery were utterly without precedent in American law. In fact, the case against the states' claims can be stated even more strongly. The states' recoupment concept had been rejected in principle by one U.S. Supreme Court decision, and more recently by two different U.S. circuit courts of appeal.

to satisfy politicians' addiction to money."); MANHATTAN INSTITUTE, REGULATION BY LITIGATION: THE NEW WAVE OF GOVERNMENT-SPONSORED LITIGATION 2-6 (Judyth W. Pendell et al. eds., 1999) (remarks of Alabama Attorney General Bill Pryor); Lynn Mather, *Theorizing about Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 LAW & SOC. INQUIRY 897, 921 (1998) ("The initial state lawsuits filed in 1994 presented untested and unprecedented legal arguments.").

⁴⁶ Mike Moore, *The States Are Just Trying to Take Care of Sick Citizens and Protect Children*, 83 A.B.A. J. 53 (1997).

⁴⁷ Viscusi, *Insurance Costs*, *supra* note 3, at 605 ("At the time smokers purchase cigarettes, they are paying an excise tax fee that fully covers the adverse state medical insurance consequences of their smoking behavior.").

In *United States v. Standard Oil of California*,⁴⁸ a soldier was hit by a truck owned by Standard Oil and hospitalized at the federal government's expense.⁴⁹ The government sued Standard Oil, seeking to recover the cost of hospitalization and the salary that had been paid the soldier during his convalescence.⁵⁰ Both parties to the litigation recognized that this was the first time the federal government had sought to recover such costs and, in this case of first impression, the Supreme Court rejected the government's arguments in an 8-1 decision.⁵¹ Justice Rutledge's opinion for the Court explained the majority's unwillingness to fashion a new cause of action for the federal government largely in terms of separation of powers.⁵² Given its relevance to our subject, the Court's reasoning on this point deserves quoting at length:

[W]e have not here simply a question of creating a new liability in the nature of a tort. For grounded though the argument is in analogies drawn from that field, the issue comes down in final consequence to a question of federal fiscal policy, coupled with considerations concerning the need for and the appropriateness of means to be used in executing the policy sought to be established. The tort law analogy is brought forth, indeed, not to secure a new step forward in expanding the recognized area for applying settled principles of that law as such, or for creating new ones. *It is advanced rather as the instrument for determining and establishing the federal fiscal and regulatory policies which the Government's executive arm thinks should prevail in a situation not covered by traditionally established liabilities. Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours. Congress, not this Court or the other federal courts, is the custodian of the national purse. By the same token it is the primary and most often the exclusive arbiter of federal fiscal affairs.*⁵³

Congress did respond, rather belatedly, to the *Standard Oil* decision by passing the Medical Care Recovery Act some fifteen years later.⁵⁴ *Standard Oil* remains the Supreme Court decision that addresses legal arguments that most resemble those asserted by the states in the tobacco litigation, and the Court's message on separation-of-powers grounds is quite clear.

⁴⁸ 332 U.S. 301 (1947).

⁴⁹ *Id.* at 302.

⁵⁰ *Id.*

⁵¹ *Id.* at 302, 316-17.

⁵² *Id.* at 314-17.

⁵³ *Id.* at 314-15 (emphasis added).

⁵⁴ 42 U.S.C. §§ 2651-2653 (1994). For a discussion of legislative history of the Act, see *United States v. Philip Morris Inc.*, 116 F. Supp. 2d 131, 140-42 (D.D.C. 2000).

Precisely the same argument can be made using state constitutional law against the positions asserted by the state attorneys general in the tobacco lawsuits. That is, the legislature, acting on its concern for the public fisc, is the constitutionally proper arm of the government to decree such a radical departure from traditional tort law. For a court to announce a recoupment cause of action would constitute judicial overreaching, and an encroachment on the legislature's prerogative to define the state's subrogation law. Except in the three states where the state legislature did change subrogation law by statutory amendment,⁵⁵ the attorneys general were asking the courts to engage in judicial legislation, rather than marginal, interstitial common law adjudication.

The *Standard Oil* decision figured prominently in more recent decisions by two U.S. circuit courts of appeal rejecting municipal government recoupment claims. In a case in the Ninth Circuit, railroad tank cars carrying liquefied petroleum gas derailed near Flagstaff, Arizona, requiring the evacuation of nearby residents.⁵⁶ The city of Flagstaff spent almost \$42,000 on overtime pay, emergency equipment, emergency medical personnel, and food provided to the evacuees.⁵⁷ The city then sued the railroad for this sum "on the theory that the city's expenditures were compensable damages, arising from either or both the railroad's negligence or its conduct of an ultrahazardous activity."⁵⁸ The district court granted the railroad summary judgment, and the city appealed.⁵⁹

The Ninth Circuit, noting that "precedent on the point is limited," nevertheless concluded "that the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service."⁶⁰ Citing *Standard Oil*, the court further explained:

Here governmental entities bear the cost in question, and they have taken no action to shift it elsewhere. If the government has chosen to bear the cost for reasons of economic efficiency, or even as a subsidy to the citizens and their business, the decision implicates fiscal policy; the legislature and its public deliberative processes, rather than the court, is the appropriate forum to address such fiscal concerns.⁶¹

⁵⁵ See *supra* notes 12-14 and accompanying text (describing Florida's statute); *supra* note 24 and accompanying text (describing Maryland's statute); *supra* note 25 and accompanying text (describing Vermont's statute).

⁵⁶ *City of Flagstaff v. Atchiston, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322, 323 (9th Cir. 1983).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 324.

In the same vein, the D.C. Circuit rejected the claim of the District of Columbia government that it be reimbursed for the costs it incurred in dealing with the 1982 crash of an Air Florida plane into the 14th Street bridge.⁶² Although the court does not cite *Standard Oil*, it does cite the Ninth Circuit decision in *City of Flagstaff* to support its ruling, and develops a fairness-based argument against the D.C. government's position:

Where emergency services are provided by the government and the costs are spread by taxes, the tortfeasor does not anticipate a demand for reimbursement. Although settled expectations must sometimes be disregarded when new tort doctrines are needed to remedy an inequitable allocation of risks and costs, where a generally fair system for spreading the costs of accidents is already in effect—as it is here through assessing taxpayers the expense of emergency services—we do not find the argument for judicial adjustment of liabilities to be compelling.

We are especially reluctant to reallocate risks where a governmental entity is the injured party. It is critically important to recognize that the government's decision to provide tax supported services is a legislative policy determination. It is not the place of the courts to modify such decisions. Furthermore, it is within the power of the government to protect itself from extraordinary emergency expenses by passing statutes or regulations that permit recovery from negligent parties. In other words, the city clearly has recourse to legislative initiative to eliminate or reduce the economic burdens of accidents such as the Air Florida crash.⁶³

This line of cases, grounded in the Supreme Court's decision in *Standard Oil*, would seem to argue rather strongly against the states' tobacco lawsuits—as does several hundred years of tort law. The states' arguments in the tobacco cases flew in the face of all this. It is hard not to reach the conclusion that the cases were an audacious attempt by the states' attorneys general to impose a totally unforeseen liability, retroactively, on the defendant tobacco companies without the benefit of legislative action.

In sum, the state tobacco cases could not have looked promising to the plaintiff state governments, as a matter of law, at the time they were filed. The conclusion that the cases constituted governmental “entrepreneurial litigation” seems inescapable.

⁶² Dist. of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1079, 1086 (D.C. Cir. 1984).

⁶³ *Id.* at 1080.

B. Three Puzzles

The manifest legal weakness of the state tobacco cases raises three intriguing questions, all of which can be at least partially answered using the economist's concept of voter "rational ignorance" of public policy issues.

1. The First Puzzle: What explains state legislators' support for the tobacco litigation, given their failure to increase the tax and regulatory burdens on the industry through legislation?

Obviously, state legislatures have long exercised their powers to tax and regulate with respect to tobacco products. In addition to sales-tax revenues, state governments in 1993 collected \$6.2 billion in tobacco excise tax revenues.⁶⁴ Clearly, state legislatures know how to tax cigarettes.⁶⁵ State governments have also long regulated the sale of tobacco products. Indeed, prior to 1921, thirteen state legislatures had banned cigarette sales outright, at least for a time.⁶⁶ The regulation of tobacco products is clearly within a state government's "police powers," the plenary power of a state's legislature to act to protect "the public health, safety, morals, or general welfare."⁶⁷

Why, then, would a state legislature wait for the state attorney general to sue tobacco companies to impose what are, in effect, heavier tax and regulatory demands? After all, the legislature could quite easily, by its own actions, accomplish the same results.⁶⁸ Why didn't the legislature simply raise taxes and increase the regulation of tobacco sales on its own, rather than await the outcome of a very weak government lawsuit?

If one assumes that legislators act rationally in their own interests, most of the time, then one should be able to find a rational explanation for

⁶⁴ W. Kip Viscusi, *Cigarette Taxation and the Social Consequences of Smoking*, in 9 TAX POLICY AND THE ECONOMY 57 (James Poterba ed., 1995).

⁶⁵ To put the size of state tax revenues from cigarettes into perspective, consider that in recent years the Florida state government has collected roughly \$440 million in cigarette taxes annually. Richard N. Pearson, *The Florida Medicaid Third-Party Liability Act*, 46 FLA. L. REV. 609, 633 (1994). The Alabama state government has collected between \$60 and \$70 million yearly. *Alabama Task Force Report*, *supra* note 40, at 642.

⁶⁶ Jonathan Turley, *A Crisis of Faith: Tobacco and the Madisonian Democracy*, 37 HARV. J. ON LEGIS. 433, 440 & n. 33 (2000) (noting that the bans "were often . . . short-lived and ineffectual") [hereinafter Turley, *Crisis of Faith*].

⁶⁷ *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (upholding municipal zoning ordinance as exercise of police power).

⁶⁸ I leave to one side the possibility that the settlements as agreed upon extracted from the tobacco companies restrictions on their exercise of First Amendment freedoms that could not withstand judicial scrutiny if they were embodied in statutory law rather than in the settlement of a lawsuit.

the legislators' forbearance on these issues. One way to think of the issue is in terms of the pressures for and against higher taxes and more regulation. At any given time and with regard to any particular product or service sold in a state's economy, the interest groups on either side of these issues have battled to a draw, which is reflected in the existing level of taxation and regulation. Any change in taxes or regulation would be the result of a change in the pressures brought to bear by the interest groups on one side or the other of the issue. Thus, any given state's rate of excise taxation of cigarettes and level of regulation of the sales of cigarettes reflects a sort of political equilibrium that will persist until it is disturbed by changes in the political environment. It is this concept that best explains the legislators' failure to pre-empt the lawsuits by their own actions.

Add to this the fact that many voters strongly oppose tax increases of any sort, and the following explanation emerges: While many legislators might personally prefer higher taxes and stronger regulation, most would be unwilling to run the personal political risk (i.e., voter disapproval of their actions to promote tax increases) involved in such tobacco policy changes.

If this explains most legislator behavior, however, how are we to account for the three state legislatures—Florida, Maryland, and Vermont—that passed statutes to stack the deck in favor of their tobacco suits?⁶⁹ If voters opposed cigarette tax increases to the point that legislators were deterred from raising the tax rates, how could the same legislators get away with passing a statute that would have the same practical effect as a tax increase?

The best explanation for this phenomenon would seem to be the concept of "rational ignorance."⁷⁰ Economists are fond of pointing out that, since in the first place it is time-consuming and otherwise costly for voters to educate themselves about public policy issues, and moreover a person's single vote, whether cast in an informed or uninformed manner, is quite unlikely to decide any given political race, it is "rational" for most voters to stay uninformed about politics and public affairs. While some voters will become well-informed and politically active out of a sense of public spiritedness or because they simply enjoy learning about and participating in politics, there is ample evidence that the average voter chooses to remain "rationally ignorant" about most things political.⁷¹

⁶⁹ It is worth pointing out that forty-seven state legislatures did not do this. The Iowa legislature, for example, debated a statute similar to Florida's after the state's lawsuit was dismissed by the trial judge, but declined to adopt one. Gregory C. Sisk, *Targeting Big Tobacco; Who's Next?*, DES MOINES REG., Sept. 24, 1997, at 2.

⁷⁰ See generally ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

⁷¹ See *id.* In addition, one of the leading researchers in this area recently noted that

Applied to the tobacco context, rational ignorance suggests that some legislators who could not safely vote for a cigarette tax increase could safely vote for a statute that would have the same effect as a tax increase precisely because the details of all this would be too confusing for most voters to follow. A legislator could get away with the latter but not the former. This may well explain why early on the Florida, Maryland, and Vermont legislatures were willing accomplices of their attorneys general, and why state legislatures have passed statutes to implement the MSA (or individual state settlements) even though they were not willing to raise cigarette taxes clearly and explicitly.

2. The Second Puzzle: Why did the state attorneys general pursue the tobacco suits, given their low probability of success *ex ante*?

The political savvy of state attorneys general is legendary. Many governors, senators, and other political leaders of the highest rank did a stint in their state's attorney general's office as their careers developed. The old joke that NAAG, the acronym for the National Association for Attorneys General, could just as accurately be read as the "National Association of Aspiring Governors," is funny precisely because of its ring of truth.

Why would a group of politically adept officeholders file lawsuits with such low probabilities of success? Wouldn't a loss to the tobacco companies, on the legalities of the case, be a black eye for the attorney general who brought it? And wouldn't an attorney general who brought such a weak case run the risk that much, or even most, of the public would see the case as unfair to the companies, a vendetta with very little or no warrant in the law?

A story told by trial lawyer Richard Scruggs, the man who represented Mississippi and a number of other states, illustrates one view of the political calculation facing the attorneys general in deciding to sue:

We sat in [Mississippi Attorney General Mike Moore's] . . . office and said, "Mike, this is not a politically smart thing for you to do. People are going to think it's a frivolous lawsuit. They're going to agree that smoking is bad, but they are not going to somehow translate that into the fact that the tobacco industries ought to pay money. They are going to pour all sorts of political resources into defeating you, and this is not

economists "continue to be perplexed by . . . [the fact that] many individuals vote despite the very small probability that their individual votes will have any effect on the outcome of an election." Gordon Tullock, *Some Further Thoughts on Voting*, 104 PUB. CHOICE 181, 181 (2000).

a smart political move.” And Mike’s response to us was, “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”⁷²

Let’s stipulate, in order to give the attorneys general the benefit of the doubt, that a desire to advance what they saw as the “public interest” in this matter was part of the motivation of every attorney general who filed. What else might explain their willingness to undertake a crusade with such long odds?

Doubtless some attorneys general planned on reaping political advantage from being seen as an anti-smoking crusader, protector of young people, and the like. This political angle went hand-in-glove with the relentless public relations campaign waged during this time by the most active attorneys general and their trial lawyer allies to demonize the tobacco companies. Another likely motivation was the opportunity the cases presented for an attorney general to give what was potentially a very lucrative contract to represent the state to friends in the private trial bar. These attorneys could then be counted on to support, financially and otherwise, the attorney general in his or her future political career.

In addition, the attorneys general could probably rely on the rational ignorance of the general public. The public was unlikely to become so well informed about the weaknesses of the case that public opinion would turn against the attorneys general. The complexity of the tobacco suits and the settlements virtually guaranteed that voter rational ignorance was on the side of the attorneys general. Add to this the tendency of many non-lawyers to think that “the law” is usually fairly clear in its commands, so that anyone who is sued by the state must have done something to justify the law’s scrutiny. Mr. Scruggs’ warnings to the contrary notwithstanding, the attorneys general could and did succeed in suing the tobacco companies without suffering much, if anything, in the way of negative political consequences. Late-filing attorneys general had yet another motivation. Recall that only eighteen states had filed suit before the tobacco companies indicated a willingness to talk settlement. The twenty-four that filed after settlement became a real possibility likely joined the fray in part so their states would not miss out should a settlement materialize.

Finally, one must conclude that when the attorneys general filed these cases they intended them to settle, rather than reach a litigated conclusion. The vast majority of lawsuits settle, of course, but state attorneys general typically have a very high success rate in their litigation and have a

⁷² *The Tobacco Settlement: Practical Implications and the Future of Tort Law*, 67 MISS. L.J. 847, 859-60 (1998) (transcript of a panel discussion held in October 1997 on the ill-fated national settlement proposal) [hereinafter *The Tobacco Settlement: Practical Implications*].

prosecutor's healthy interest in win-loss ratios. For them to engage in entrepreneurial litigation—which is defined by its low probability of success on the merits—in the hope of winning a large and unprecedented settlement raises serious questions about the nature of the office of attorney general and its place within each state's constitutional system. Put bluntly, does a state attorney general act consistently with the powers and responsibilities of his office if he files a lawsuit, which *ex ante* has a low probability of success and will involve the attorney general arguing in favor of drastic changes in the common law, with the primary goal of extracting a settlement? We turn to this question after taking a brief look at the tobacco companies' motivations in settling.

3. The Third Puzzle: Why did the tobacco companies settle with the states?

If the suits were weak as a matter of law, why did the tobacco companies agree to make such lavish payments to the states and their lawyers, and live under new regulatory constraints? There are numerous theories on this, which, when taken together, make the companies' decision much more understandable.

Hanoch Dagan and James J. White argue that the most important motivation for the companies to settle was to avoid being bankrupted by the states' claims:

The financial stakes in the state suits were particularly great because the tobacco manufacturers faced a queue of state plaintiffs thirty or forty deep, each of whom could observe earlier trials and learn from the mistakes of each prior plaintiff by bringing their suits in seriatim fashion. Since any judgment would be due and owing in full on the exhaustion of the defendant's appeals, the amount of the judgment would have to be booked as a liquidated liability and, absent an agreement with the plaintiff, would have to be paid at once, not over twenty-five years out of future earnings.⁷³

Of course, if the companies prevailed in each and every case, they would have nothing to worry about. Apparently the companies were not eager to play this courtroom version of Russian roulette.

Another benefit conferred on the settling companies is emphasized by Robert Levy:

In effect, the MSA transforms a competitive industry into a cartel, then guards against destabilization of the cartel by erecting barriers to entry that preserve the 99 percent market dominance of the tobacco giants. Far from being victims, the big four tobacco companies are at the very

⁷³ Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354, 378-79 (2000) (footnote omitted).

center of the plot. They managed to carve out a protected market for themselves—all at the expense of smokers and tobacco companies who did not sign the agreement.⁷⁴

Every business would like to see its market share guaranteed, of course, but this concern was likely foremost in the minds of the executives of the settling tobacco companies precisely because of the large price increases the settlement would bring. The settling companies had every reason to worry that the fringe of small cigarette manufacturers—which were not sued by the states and thus did not participate in the settlement negotiations—would be able to take market share away from the settling companies by keeping their own prices low as the settling companies raised their prices to finance the settlement. Clearly, the settling companies were in a position to want protection even more than the average firm.

Levy explains how the MSA protects the market position of the settling firms:

First, if the aggregate market share of the four majors were to decline by more than two percentage points, then their “damages” payments would decline by three times the excess over the two percentage-point threshold. Any such reduction would be charged against only those states that did not adopt a “Qualifying Statute,” attached as an exhibit to the MSA. Naturally, because of the risk of losing enormous sums of money, all of the states have already enacted, or will soon enact, the statute.

Second, the Qualifying Statute requires any tobacco company that did not sign the MSA to post pro rata damages—based on cigarette sales—in escrow for 25 years to offset any liability that might hereafter be assessed! That’s right—no evidence, no trial, no verdict, no injury, just damages. In fact, because the escrow payments are nondeductible against income taxes, they are actually about one and one-half times what the majors pay per cigarette. That was the stick. Then came the carrot.

Third, if a nonsettling tobacco company agreed to participate in the MSA, the Qualifying Statute would not apply. In fact, the new participant would be allowed to increase its market share by an apparently whopping 25 percent of its 1997 level. Bear in mind, however, that all of the nonsettling companies combined in 1997 had roughly one percent of the market, which, under the MSA, could grow to 1.25 percent. Essentially, the dominant companies guaranteed themselves no less than 99 percent of the market in perpetuity.⁷⁵

⁷⁴ Robert A. Levy, *The War on Tobacco*, in *THE RULE OF LAW IN THE WAKE OF CLINTON* 121, 128 (Roger Pilon ed., 2000).

⁷⁵ *Id.* at 129-30 (internal citations omitted).

This cartelization explanation for the companies' willingness to settle might well be reason enough by itself. It is stressed by Dagan and White, who call the MSA's provisions to insulate the settling companies from competition "diabolically clever,"⁷⁶ by Michael Krauss who says "the best explanation for the tobacco settlement" is that "[t]he states have become complicit in this price fixing in exchange for an increased share of the booty,"⁷⁷ and by Ian Ayres, who predicts that the MSA's transformation of state governments into "cartel ringmasters" will result in increases in the price of cigarettes (which the companies will split with the governments) and in the deterrence of new entry.⁷⁸

In addition to the bankruptcy-avoidance and cartelization motivations, the settling companies must have felt increased pressure to settle due to the shift in public opinion against them while the state litigation unfolded. Ironically, they had almost certainly contributed to this change in public opinion by opening settlement talks in 1997. Prior to this time, the industry had followed a tough, "don't-give-an-inch" strategy in all the litigation filed against it.⁷⁹ In 1997, however, in pursuit of congressionally-mandated immunity from both punitive damages and class actions and a cap on their exposure to individual plaintiffs, the companies for the first time agreed to talk about settlement. When the congressional deal fell through, the companies could not simply retreat to the *status quo ante*. The tobacco companies had probably communicated to at least some portion of the public the idea that the industry had done something wrong—otherwise, why would it be willing to pay the states billions of dollars in settlement? When the 1997 proposal failed, the companies found themselves on the other side of the Rubicon. Some form of settlement was almost inevitable.

For the settling companies, however, the MSA was far from a bad deal. They gained protection from bankruptcy and from loss of market share, and were able to pass along virtually all of the costs of the settlement to their customers because of the inelastic demand for cigarettes. Once again, rational ignorance meant that the public at large was unlikely to understand these details of the settlement.

⁷⁶ Dagan & White, *supra* note 73, at 381.

⁷⁷ KRAUSS, *supra* note 9, at 29.

⁷⁸ Ian Ayres, *Using Tort Settlements to Cartelize*, 34 VAL. U. L. REV. 595, 595 (2000).

⁷⁹ See generally Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853 (1992).

II. STATE ATTORNEYS GENERAL, STATE CONSTITUTIONS, AND THE SEPARATION OF POWERS

To return to our fundamental question: Is it constitutionally proper for a state attorney general to engage in “entrepreneurial litigation?” The answer to this question is “no,” for reasons based largely on the need to separate the executive from the legislative power in state government. To see why this is so, consider the position of a state attorney general in his state’s governmental system.

Fundamentally, the state attorney general is 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 the governor and other administrative heads of the government in all legal matters on which they may desire his or her opinion.”⁸⁰

The state attorney general is directly elected by the voters in forty-three 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.⁸¹ The attorney general is a member of the executive branch in most states,⁸² and a member of the judicial branch in Tennessee.⁸³ In no state is the attorney general a member of the legislative branch.⁸⁴

The office traces its historical roots to the thirteenth 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.”⁸⁵ The first such attorney to be titled “Attorney General of England” was appointed in 1461.⁸⁶ 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.”⁸⁷ As representatives of the Crown, colonial attorneys general thus exercised very broad powers.

⁸⁰ 7 AM. JUR. 2D *Attorney General* § 1 (1997).

⁸¹ THE BOOK OF THE STATES 1998-99, at tbl. 2.17.

⁸² See NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 44 (Lynne M. Ross ed., 1990) [hereinafter NAAG, POWERS AND RESPONSIBILITIES].

⁸³ TENN. CONST. art IV, § 5.

⁸⁴ See NAAG, POWERS AND RESPONSIBILITIES, *supra* note 82, at 55-56.

⁸⁵ *Id.* at 4.

⁸⁶ *Id.* at 5.

⁸⁷ *Id.* at 6.

Most state attorneys general retain very broad “common law powers,” so that theoretically at least a present-day state attorney general resembles this royal predecessor to a remarkable degree. Until recently, the outer reaches of this broad spectrum of discretion were very seldom visited by state attorneys general. Their 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 are also what can fairly be characterized as largely routine, at least most of the time. And these 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 his 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? That the attorney general was only doing what lawyers do routinely—asking the court hearing his case to “interpret,” or even “change,” the law so that the attorney general’s client (the state) would win?

This argument is not persuasive. As we have seen, there was nothing “routine” about the tobacco cases. They were not only unprecedented, they ran counter to Supreme Court case law, and 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 to do so. Making such large changes in the law is not the job of the state attorney general; it is the job of the legislature.⁸⁸ 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 twenty years or so state attorneys general have taken a more and more active role in what might be called questions of “public policy,” as distinguished from questions of law, narrowly conceived. This phenomenon is proudly described in a NAAG publication, as follows:

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

⁸⁸ “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 & CL211487, 1997 WL 540913, at *6 (Md. Cir. Ct. May 21, 1997). If it’s a legislative function, then it’s not a function of the attorney general.

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.⁸⁹

Note, however, that this passage emphasizes that the attorney general's new role is the result of legislative policy choices, rather than any personal initiative on the part of the attorney general. While this 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.

This change in the role of state attorneys general accelerated during the Reagan Administration.⁹⁰ 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 these 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.⁹¹ Armed with their own state antitrust statutes and with *parens patriae* authority under the federal Clayton Act, many state attorneys general conducted a guerilla war against Reagan Administration antitrust policy.⁹² In my opinion, this episode did more than any other to encourage the state attorneys general to think of themselves as more important than “just the ‘chief lawyer of State X.’” It also promoted a higher level of coordination among the state attorneys general, principally through an expanding NAAG.⁹³ Similar stories could be told about state attorney general involvement in environmental and civil rights controversies that arose from the Reagan Administration's attempts to change policy in these areas.⁹⁴

Even so, where did the state attorneys general 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 (apparently) the attorney general can sue in *parens patriae* to

⁸⁹ NAAG, POWERS AND RESPONSIBILITIES, *supra* note 82, at 12.

⁹⁰ Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POL. 525, 532-37 (1994).

⁹¹ Herbert Hovenkamp, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 590-91 (2d ed. 1999); David A. Zimmerman, Comment, *Why State Attorneys General Should Have a Limited Role in Enforcing the Federal Antitrust Law of Mergers*, 48 EMORY L.J. 337, 344-45 (1999).

⁹² This was particularly the case with respect to the antitrust rules concerning vertical restraints. ABA ANTITRUST SECTION: MONOGRAPH NO. 15, ANTITRUST FEDERALISM: THE ROLE OF STATE LAW 5-8 (1988).

⁹³ Hovenkamp, *supra* note 91, at 590-91.

⁹⁴ See generally Clayton, *supra* note 90; Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J. L. & PUB. POL'Y 1 (1993).

vindicate some public interests. Both sources of authority are quite broad; however, neither had previously been asserted as justifying 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 attorneys general.

In approximately forty states the attorney general has common law powers;⁹⁵ 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 *State of Florida ex rel. Shevin v. Exxon Corp.*⁹⁶

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.⁹⁷

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 seventeen major oil companies in federal court.⁹⁸

As compared to the tobacco litigation, the antitrust theory asserted by the Florida attorney general was quite mundane. Thus, 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 power wielded by many state attorneys general has been urged as a proper ground for these suits.⁹⁹

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 ex rel. Barez*,¹⁰⁰ a state attorney

⁹⁵ A 1990 publication of the National Association of Attorneys General listed ten states whose attorneys general "expressly lack common law authority," including Arizona, Colorado, Indiana, Iowa, Louisiana, Maryland, New Mexico, South Dakota, West Virginia, and Wisconsin. NAAG, POWERS AND RESPONSIBILITIES, *supra* note 82, at 38 & n.59.

⁹⁶ 526 F.2d 266 (5th Cir. 1976).

⁹⁷ *Id.* at 268-69.

⁹⁸ *Id.* at 274.

⁹⁹ 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. Am. Tobacco Co.*, Civ.A.No. 94-C-1707, 1995 WL 569618 (W.Va. Cir. Ct. June 6, 1995).

¹⁰⁰ 458 U.S. 592 (1982).

general may be able to bring a suit under this concept if the state is asserting “an injury to what has been characterized as a ‘quasi-sovereign’ interest”¹⁰¹

As it develops, however, the concept of “quasi-sovereign interests” is difficult to pin down. “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.”¹⁰² Later in the opinion, this set of interests was defined as including “the health and well-being—both physical and economic—of its residents in general.”¹⁰³

This broadly defined, the *parens patriae* authority arguably might provide a state attorney general with power to file a tobacco recoupment lawsuit. In fact, the U.S. district judge who heard the Texas recoupment suit so ruled.¹⁰⁴ He also used the *parens patriae* concept to reject the companies’ separation of powers arguments in the following passage:

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.¹⁰⁵

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.¹⁰⁶

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

¹⁰¹ *Id.* at 601.

¹⁰² *Id.* at 602.

¹⁰³ *Id.* at 607.

¹⁰⁴ *State v. Am. Tobacco Co.*, 14 F. Supp. 2d 956, 962-63 (E.D. Tex. 1997).

¹⁰⁵ *Id.* at 971 (internal citations omitted).

¹⁰⁶ Edward Brunet, *Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 TUL. L. REV. 1919, 1921-22 (2000); Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1875-82 (2000); Ratliff, *supra* note 38, at 1857-58.

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.¹⁰⁷

A quick check of four well-known treatises on the police power establishes that it is clearly a legislative power, and that there is no historical precedent for a role for the state attorney general in exercising it.¹⁰⁸

Thus, in using his *parens patriae* authority a state attorney general runs the risk of arrogating the police power to himself, in effect becoming a one-person legislature. In this light, reconsider 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"¹⁰⁹ This sounds very much like the Attorney General of Mississippi thinks he exercises something very much like the police power. He did not

¹⁰⁷ *Commonwealth v. Alger*, 61 Mass. 53, 84 (1851). *Accord* *Munn v. Illinois*, 94 U.S. 113, 124-25 (1877); *id.* 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* 320-21 (2d ed. 1891) ("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 . . .").

¹⁰⁸ See generally THOMAS M. COOLEY, *CONSTITUTIONAL LIMITATIONS* 572-97 (1868); ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* (1904); ALFRED RUSSELL, *THE POLICE POWER OF THE STATE AND DECISIONS THEREON AS ILLUSTRATING THE DEVELOPMENT AND VALUE OF CASE LAW* (1900); see also CHRISTOPHER G. TIEDEMAN, *A TREATISE ON THE LIMITATIONS OF THE POLICE POWER* 5 (1886) (noting "[t]he 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 & REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

¹⁰⁹ *The Tobacco Settlement: Practical Implications*, *supra* note 72, at 859-60. Moore was on the same panel as Scruggs, and did not dispute Scruggs's account of the meeting. See *id.*

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 strongly resembles Justice Cardozo’s famous “roving commission to inquire into evils and upon discovery correct them.”¹¹⁰ It is clearly inconsistent with the state legislature’s exclusive prerogative to wield the police power.

But how important is separation of powers to American government in 2001? 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 these agencies. The result has been called “a bloodless constitutional revolution” by one commentator,¹¹¹ and “Madison’s nightmare” by another.¹¹²

The good news is that the separation of powers is 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.¹¹³ 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.”¹¹⁴ In the most famous formulation of the doctrine, the Massachusetts Constitution of 1780 declared:

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

¹¹⁰ A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring).

¹¹¹ Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994).

¹¹² Richard B. Stewart, *Madison’s Nightmare*, 57 U. CHI. L. REV. 335, 342 (1990).

¹¹³ MARC W. KRUMAN, BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA 109-30 (1997); Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1187-89 (1999).

¹¹⁴ FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 84 (1985). The six states were Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, and Virginia. *Id.* at 84 n.55.

legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.¹¹⁵

The reasons for including such provisions are explained by historian Marc Kruman as 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.¹¹⁶

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.¹¹⁷

Although the Framers did not follow as rigid an approach in crafting the U.S. Constitution,¹¹⁸ state constitution writers continued to favor inclusion of express separation-of-powers provisions. Currently, forty states have such explicit provisions, while only ten do not.¹¹⁹ Continued judicial vigor in maintaining the separation of powers, along with a non-delegation doctrine that tends to be more robust than the federal version,¹²⁰ has helped limit the growth of government in many states. This is a

¹¹⁵ MASS. CONST. pt. I, art. XXX.

¹¹⁶ KRUMAN, *supra* note 113, at 109.

¹¹⁷ *Id.* at 111.

¹¹⁸ "The doctrine of the separation of powers had clearly been abandoned in the framing of the Constitution; as Madison explained in *Federalist* numbers 47-51, mixing powers was necessary to ensure a system of checks and balances." McDONALD, *supra* note 114, at 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* 131-92 (2d ed. 1998).

¹¹⁹ Rossi, *supra* note 113, at 1190-91 & nn. 105, 107.

¹²⁰ *Id.* at 1191-1201. Rossi characterizes the non-delegation doctrine in twenty states as "strong," twenty-three states as "moderate," and seven states as "weak" (i.e., similar to the federal version of the doctrine). *Id.*

disappointment to most of the law professors writing in this area, who urge a relaxation of both doctrines by state courts.¹²¹

I wish to counsel just the opposite. The states are right to try to maintain the separation of powers and to control the delegation of legislative authority to other bodies. Accordingly, action to stop future entrepreneurial litigation by state attorneys general is necessary to the continued viability of these 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 this. Accordingly, an article in the *New York Times* quotes Washington plaintiffs' lawyer John Coale ("The legislature has failed") and New Orleans trial lawyer Wendell Gauthier ("I think legislatures need our [trial lawyers'] help") in this vein.¹²² 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."¹²³

There are somewhat more sophisticated versions of this view. Susan Estrich has explained the tobacco litigation phenomenon as "a measure of the failure of political institutions to address concerns that demand attention,"¹²⁴ and 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."¹²⁵ These views are wrong and pernicious, and 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 for 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.

¹²¹ See *id.* at 1239-40; Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79 (1998).

¹²² Patrick E. Tyler, *Tobacco-Busting Lawyers on New Gold-Dusted Trails*, N.Y. TIMES, Mar. 10, 1999, at A1.

¹²³ Adam Cohen, *Are Lawyers Running America?*, TIME, July 17, 2000, at 22.

¹²⁴ Susan Estrich, *Want Political Help? Look to the Courts*, L.A. TIMES, Feb. 7, 1999, at M2.

¹²⁵ Ellen Goodman, *Ready, aim . . . sue!*, BOSTON GLOBE, Feb. 26, 1999, available at <http://www.texnews.com/1998/1999/opinion/good0226.html> (last visited June 19, 2001).

Second, when a state attorney general attempts to make tax or regulatory policy in the context of a lawsuit, this makes the rationale for the deployment of the taxing and police powers more opaque to the public, increasing the amount of rational ignorance in the political system. This is because 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. This is the real long-term damage that is 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 and, moreover, they will not realize that they do not understand what is happening as a result of this kind of litigation.¹²⁶

In *The Federalist*, Madison warned that “[t]he accumulation of all [governmental] powers in the same hands . . . [is] the very definition of tyranny.”¹²⁷ Entrepreneurial lawsuits brought by state attorneys general run 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.”¹²⁸ 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

¹²⁶ For example, the fees paid to the states’ private trial lawyers were absurdly large. Given how angry voters get over proposed congressional pay raises, why has the public not exploded in outrage over these fees—money that the tobacco companies would just as willingly pay to the states as to the states’ lawyers? The answer: it’s all too difficult to understand and follow. If members of Congress were paid the same 5 1/2% “finders fee” that represents the lower estimate of what the tobacco plaintiffs’ attorneys think is coming to them, then a member of congress would be paid 5 1/2% of the tax revenues he helps raise each year—just over \$2 trillion. This would translate to a congressional salary of \$205 million a year—and would certainly not be politically feasible. Only rational ignorance on the public’s part can explain why the enormous attorneys’ fees in the tobacco litigation are politically viable.

¹²⁷ THE FEDERALIST NO. 47 (James Madison).

¹²⁸ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 661 (Harvey C. Mansfield & Delba Winthrop trans., 2000).

nothing more than a herd of timid and industrious animals of which the government is the shepherd.¹²⁹

Americans, collectively speaking, may well desire larger and more intrusive versions of the welfare state (or nanny state, depending on your point of view). If so, we should be capable of saying so in the political process and in the legislative process. We should not have further expansion of government foisted off on us through the settlement of clever, but baseless, lawsuits filed by state attorneys general and their allies from the private plaintiff's bar—now the self-styled “fourth branch” of government.¹³⁰

III. THE WAY OUT: DISMANTLING THE “FOURTH BRANCH”

The state tobacco litigation and settlements constitute a force of uncertain but potentially far-reaching scope and power in American law. In 1999 former U.S. Secretary of Labor Robert Reich predicted that “[t]he era of big government may be over, but the era of regulation through litigation has just begun.”¹³¹ More recently, Jonathan Turley argued that “[c]ircumvention of the legislative process in dealing with tobacco violates core constitutional principles and undermines the stability of the tripartite system of representative government.”¹³²

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 they incur in dealing with the aftermath of auto accidents that involved alcohol? Should purveyors of foods with high fat content be liable as a class to

¹²⁹ *Id.* at 663.

¹³⁰ See Walter Olson, *Big Guns*, REASON, Oct. 1999, available at <http://www.reason.com/9910/co.wo.reasonable.html> (last visited Feb. 19, 2001). Olson stated that:

The June [1999] *American Lawyer*, in its article recounting the origins of the firearms litigation, reports that prominent New Orleans trial lawyer Wendell Gauthier was the first to talk his colleagues into suing gun makers, even though their pockets weren't all that deep. The suit “fit with Gauthier's notion of the plaintiffs bar as a *de facto* fourth branch of government, one that achieved regulation through litigation where legislation failed.”

Id.

¹³¹ Robert Reich, *Regulation Is Out, Litigation Is In*, USA TODAY, Feb. 11, 1999, at 15A.

¹³² Turley, *Crisis of Faith*, *supra* note 66, at 437. Turley also thinks “[t]obacco may be the quintessential [political] debate for a Madisonian system, a product upon which factional views and interests are numerous, intense, and volatile.” *Id.*

reimburse state governments for their expenditures on citizens with 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 to shut down our new “fourth branch” of government. The first three are currently being explored by state legislatures and by Congress.

A. *Banning Contingent Fee Contracts Between the State Attorney General and Outside Lawyers*

This approach seeks to cut off the oxygen to this particular fire, by making government entrepreneurial litigation less attractive to the private attorneys who promote and manage it. A model act promoted by the American Legislative Exchange Council, titled “The Private Attorney Retention Sunshine Act,”¹³³ in effect caps the amount the state will pay under contingent fee contracts at \$1,000 per hour.¹³⁴ It also provides for certain “government in the sunshine” procedures to be followed prior to awarding a contingent fee contract to outside attorneys.¹³⁵ Three state legislatures have already passed statutes in this area: Kansas,¹³⁶ North Dakota,¹³⁷ and Texas.¹³⁸ While this development is certainly positive, a flat prohibition on these contracts would probably be preferable. Contingent fee contracts are meant to open the court house doors for plaintiffs of modest means; they serve no obvious purpose in the context of the government as plaintiff.¹³⁹

¹³³ For an overview of the proposal see Victor E. Schwartz et al., *Tort Reform Past, Present and Future: Solving Old Problems and Dealing with "New Style" Litigation*, 27 WM. MITCHELL L. REV. 237, 260 (2000) [hereinafter Schwartz, *Solving Old Problems*]. The text of the proposal is available at <http://www.alec.org> (last visited Mar. 2, 2001).

¹³⁴ Schwartz, *Solving Old Problems*, *supra* note 133, at 260.

¹³⁵ *Id.*

¹³⁶ 2000 Kan. Sess. Laws 124.

¹³⁷ N.D. CENT. CODE §§ 54-12-08.1 (1999).

¹³⁸ TEX. GOV'T CODE ANN. §§ 404.097, 2254.1101-2254.109 (Vernon 2000).

¹³⁹ Some state constitutions have been read as prohibiting the attorney general from awarding such contracts, e.g., *Meredith v. Ieyoub*, 700 So. 2d 478, 484 (La. 1997), while others have been read as permitting them, e.g., *Philip Morris Inc. v. Glendening*, 709 A.2d 1230, 1240 (Md. 1998) (approving contingent contracts in state tobacco case); *State v. Hagerty*, 580 N.W.2d 139, 148 (N.D. 1998).

B. Banning Government Recoupment Lawsuits

Thus far, such statutes have been passed by legislatures only with respect to municipal governments' firearms litigation. According to one recent count, twenty-six states have enacted laws that block such suits.¹⁴⁰ While this is certainly a positive development—particularly as it suggests that the public may be catching on to the phenomenon of government entrepreneurial litigation—it is also disappointing because of its very narrow focus. A flat ban on state and local government recoupment suits would be far preferable, though obviously harder to organize intense political support for than a firearms-specific proposal. A flat ban would not be the drastic remedy it may seem at first glance, since it would only restore the status quo that existed prior to the filing of the tobacco suits.

C. The Litigation Fairness Act

A bill sponsored by Senator Mitch McConnell, a Republican from Kentucky, 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.¹⁴¹ Although hearings have been held on this bill, its future at this point is unclear, given the equal division of the Senate and the smaller Republican edge in the House in the 107th Congress. On the other hand, President Bush would be unlikely to veto the bill if passed. While this kind of preemptive federal legislation probably raises doubts among some conservative defenders of federalism, there is a fairly strong Commerce Clause argument that can be made in favor of it. Since our focus here has been on state law, however, we will take only a short detour on this point.

The reaction of state legislatures to the appearance of government entrepreneurial litigation has been and will probably continue to be something of a mixed bag. Doubtless some legislatures will contain majorities that disapprove of the concept and will be sympathetic to calls for reforming (or banning) contingent fee contracts and banning government recoupment suits. Other legislatures will contain majorities that approve of such litigation and will not want to interfere with it. If legislators in large, politically liberal states—New York and California, for example—choose to continue to allow their attorneys general to file such

¹⁴⁰ *Bush Signs Bill to Protect Gun Industry from Reckless Lawsuits*, NATIONAL RIFLE ASSOCIATION INSTITUTE FOR LEGISLATIVE ACTION, May 1, 2001, available at <http://www.nraila.org/newscenter.asp> (last visited Aug. 3, 2001). The Louisiana Supreme Court recently 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.*, No. 00-CA-1132, 2001 WL 316267 (La. Apr. 3, 2001).

¹⁴¹ S. 1269, 106th Cong. (1999).

suits, then any costs of their settlement would be spread over consumers nationwide, not simply those who reside in those two states. Given such circumstances, federal legislation designed to address this externality would find support in current interpretations of the Commerce Clause.

D. Limiting the Power of the State Attorney General

Although not currently under consideration in any state of which I am aware, state legislators should act to clarify or eliminate the “common law powers” and the *parens patriae* authority of state attorneys general. With respect to the 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.¹⁴² 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 a state’s attorney general, recall that these 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 this has been pursuant to a congressional grant of this power to the state attorneys general in the Hart-Scott-Rodino Amendments to the Clayton Act, adopted in 1976.¹⁴³ Removal of the *parens patriae* power would prevent future mischief on the part of the state attorney general rather than result in any significant diminution of his necessary authority.

CONCLUSION

Is there any evidence that there is enough public support to move any of these proposals—other than the popular anti-firearms litigation statutes—off the mark? One of the most disappointing things about the entire tobacco episode was the general indifference of the public to the subject. At some point, being able to explain public inattention and disinterest in terms of “rational ignorance” is not very satisfying. Action is called for, and on a subject that is as vital to freedom as it is dry and uninteresting to many Americans—separation of powers.

¹⁴² 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. Am. Tobacco Co.*, Civ.A.No. 94-C-1707, 1995 WL 569618, at *2 (W.Va. Cir. Ct. June 6, 1995).

¹⁴³ 15 U.S.C. § 15c (1997). This grant was itself subject to a state opt-out provision. 15 U.S.C. § 15h (1997).

And yet, a poll conducted by the U.S. Chamber of Commerce in the summer of 1999 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."¹⁴⁴

Political entrepreneurs are needed to transform this public skepticism into legislation that will destroy the tobacco template, 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 these reforms will hasten the arrival of Tocqueville's soft despotism.

¹⁴⁴ Press Release, U.S. Chamber of Commerce, *New Poll Finds Solid Public Opposition to Government Lawsuits* (July 21, 1999) (on file with author).