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State Attorneys General and the Public Nuisance Doctrine: Lessons to Be Derived from State Ex Rel. Attorney General of Oklahoma v. Johnson & Johnson

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STATE ATTORNEYS GENERAL AND THE PUBLIC NUISANCE DOCTRINE: LESSONS TO BE DERIVED FROM *STATE EX REL. ATTORNEY GENERAL OF OKLAHOMA V. JOHNSON & JOHNSON*[1]

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INTRODUCTION

A number of state attorneys general—both Democrats and Republicans— have been making expansive claims about their common-law powers, specifically claiming that the common-law "public nuisance" doctrine allows them to seek damages for the manufacturing, marketing, and sale of opioids. This article responds to an appellate amicus curiae brief filed on behalf of 29 states attorneys general and the attorney general for the District of Columbia.[2] It is the first case to enter a trial-court judgment for a state attorney general, which was then reversed in the first state supreme court case ruling on such claims.[3]

The argument by these 30 attorneys general is quite amazing. Insofar as their brief deals with Oklahoma law, it cites few cases from Oklahoma. Virtually all case-law authority comes from other states and a few federal cases. Their argument presumes the existence of a nation-wide, common-law standard for the powers of states' attorneys general. In doing so, the brief ignores differences among the states in their adoption and development of the Common Law of England.[4] The point of federalism is that each state,

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1 State *ex rel.* Hunter v. Johnson & Johnson, 2021 OK 54, 499 P.3d 719.

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2 *See generally* Brief of Alabama, Washington, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Vermont, Virginia, West Virginia, and Wisconsin as *Amici Curiae* in Support of Oklahoma, *State* ex rel. *Hunter v. Johnson & Johnson*, 2021 OK 54, 499 P.3d 719 (No. 118,474) [hereinafter Brief of Alabama]. The signing attorneys general are Steve Marshall, Robert W. Ferguson, Xavier Becerra, Philip J. Weiser, William Tong, Kathleen Jennings, Karl A. Racine, Clare E. Connors, Lawrence Wasden, Kwame Raoul, Thomas J. Miller, Daniel Cameron, Aaron M. Frey, Brian E. Frosh, Maura Healey, Dana Nessel, Keith Ellison, Lynn Fitch, Jane Young, Hector Balderas, Letita James, Wayne Stenehjem, Dave Yost, Ellen F. Rosenblum, Peter F. Neronha, Jason Ravnsborg, Thomas J. Donovan, Jr., Mark R. Herring, Patrick Morrisey, and Josh Kaul, respectively.

3 *State* ex rel. *Hunter*, 499 P.3d at 721-23.

4 *State* ex rel. *Hunter*, 499 P.3d at 721-23.

within the limits set by the US Constitution, enjoys the authority to modify the Common Law and to create its own constitution and legislation.

In one of the few Oklahoma cases cited by the state's attorney general, *State* ex rel. *Cartwright v. Georgia Pacific Corp.*,[5] the Oklahoma Supreme Court explained that the states vary in terms of the common-law powers of their attorney general.

> The paucity of constitutional enumeration of the duties of the state's Attorney General is more typical than rare among the states, and it has been said that there are twenty-seven state constitutions which invest upon the Attorney General duties "prescribed by law" or make use of words of similar import, the judicial construction of which has led to three divergent views:
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> (1) The Attorney General is invested with those duties which existed at the common law; but the legislature has the power to not only add to them, but may lessen or limit the common law duties which attached to the office under common law.
>
> (2) The Attorney General has no common law duties, and the legislature may deal with the office at will.
>
> (3) The Attorney General not only is invested with common law duties, such duties are inviolable and cannot be diminished by the legislature.[6]

In its recent reversal of the district court in the case against Johnson & Johnson, the Oklahoma Supreme Court refused to accept the district court's expansion of the public nuisance doctrine. It concluded that:

> [T]he district court stepping into the shoes of the Legislature by creating and funding government programs designed to address social and health issues goes too far. This Court defers the policy-making to the legislative and executive branches and rejects the unprecedented expansion of public nuisance law. The district court erred in finding J&J's conduct created a public nuisance.[7]

Thus, the Oklahoma case focused on the district court infringing on the legislature's power, which is a matter of separation of powers. The brief of the state attorneys general completely ignored separation of powers, which is the focus of this response.

Before taking aim at the attorneys general, however, we first want to empathize with some of their frustrations. As the states' chief legal officers, most of whom are elected by state voters, they seek to be, and rightly deserve the title, 'public interest lawyers.'

For decades now, however, state attorneys general have been defending countless constitutional claims brought by self-styled, unelected lawyers who

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5 663 P.2d 718 (1982).

6 *Id.* at 720.

7 *State* ex rel. *Hunter*, 499 P.3d at 731.

have appropriated the term, 'public interest lawyers.' Several private lawyers who claim to represent the public actually represent tax-exempt organizations, often funded at least in part by tax-exempt foundations and some by federal tax money. Regardless of the specific claims made in litigation by these organizations (both left-leaning and right-leaning), virtually all suits filed also seek attorneys' fees, billed on an hourly basis comparable to rates charged by local private lawyers, despite the fact that many, if not most, of these attorneys are salaried employees and often volunteers for the organization. If successful in the litigation, the organization will receive tax monies which need not be paid to their salaried or volunteer lawyers.

Given such distortions in the meaning of the term 'public interest,' it is quite understandable that the states' lawyers, elected by the voters to represent their (the public's) interests would be tempted to follow in the footsteps of some *faux* 'public interest lawyers.' Many partnered with plaintiffs' attorneys in tobacco litigation. The states of those AGs who joined the litigation reaped great financial rewards. That litigation, however, was led and bankrolled not by 'public interest lawyers,' but by large plaintiffs' firms. Even though tobacco litigation fattened state coffers, it was not the work of 'public interest lawyers.'

Public nuisance suits, as reimagined, are enticing. They offer attorneys general the benefits of being on the plaintiff side and possibly reaping financial windfalls available in private tort litigation. If they do not bring in outside plaintiff attorneys, any damages recovered would benefit the public.

Having one's client, a state, sued so many times, AGs naturally would prefer to litigate as plaintiffs. For some time now, state attorneys general have been doing just that. During the Trump Administration, Democrat AGs brought and supported much litigation against the federal government. Now during the Biden Administration, Republican AGs are doing likewise. The kinds of litigation they can bring are limited,[8] however. Success may save the state from spending money, but rarely—if ever—results in a financial windfall.

Public nuisance litigation by state attorneys general stretches the concept of a 'public-private partnership.' Public nuisance suits generally must be brought by a public official. It is a criminal, or at least quasi-criminal, action on behalf of the public. Tort actions are brought by individuals or classes of individuals in their private capacities. These AGs are blending—but really blurring the distinction between—public and private legal actions. To succeed, AGs must convince courts to redefine public nuisance as a "public tort." If at some point successful, AGs and other public officers would have the best of both public and private litigation.

The Oklahoma Supreme Court rejected the attempt to combine public nuisance and product liability. Citing the *Restatement*, the Court wrote:

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[8] *See generally* Jim Ryan & Don R. Sampen, Suing on Behalf of the State: A Parens Patria Primer, 86 ILL. B.J. 684 (1998) (discussing the parameters of the parens patriae standing doctrine).

"[P]ublic nuisance and products liability are two distinct causes of action, each with boundaries that are not intended to overlap."[9] The *Restatement* explains as follows:

> Tort suits seeking to recover for public nuisance have occasionally been brought against the makers of products that have caused harm, such as tobacco, firearms, and lead paint. These cases vary in the theory of damages on which they seek recovery, but often involve claims for economic losses the plaintiffs have suffered on account of the defendant's activities; they may include the costs of removing lead paint, for example, or of providing health care to those injured by smoking cigarettes. Liability on such theories has been rejected by most courts, and is excluded by this Section, because the common law of public nuisance is an inapt vehicle for addressing the conduct at issue. Mass harms caused by dangerous products are better addressed through the law of products liability, which has been developed and refined with sensitivity to the various policies at stake.[10]

As the concurring opinion in *State* ex. rel *Hunter* observes, affirming expansion of the public nuisance as done by the district court would create "the newest fictional shape-shifting monster."[11] Hammering that message home to state attorneys general is the reason for publishing this article. Lest the Oklahoma Supreme Court decision be dismissed by some AGs as just that of a single state, we are focusing not only on over-reaching of the Oklahoma Attorney General, but more generally on the fundamentally distorted understanding of law and the legitimate powers of office reflected in the *Amicus* Brief filed by several state attorneys general, both Democrats and some Republicans.

The Oklahoma Supreme Court's discussion of the common-law meaning of public nuisance completely contradicts the view offered in the AG Brief. How could that be? Certainly, these attorneys general are not incompetent. No, rather they have adopted the Legal-Realist view that law is whatever a judge decides the law should be, regardless of the law as it currently stands.[12] Moreover, the state AGs are viewing their own power through the Legal-Realist lens by distorting current law to achieve their desired end. Rather than defending state law as it stands, they are willing to encourage state courts to circumvent the legislative power to achieve what they have determined is desirable law. Indeed, these state attorneys general are so bold at to band together for the purpose of having state judiciaries nationwide usurp state legislative powers to modify law, namely the Common Law.

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9 *State* ex rel. *Hunter*, 499 P.3d at 725.

10 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 8 cmt. g (Am. Law. Inst. 2020)).

11 *State* ex rel. *Hunter*, 499 P.3d at 732 (Kuehn, J., concurring).

12 *Legal Realism*, Legal Information Institute, https://www.law.cornell.edu/wex/legal_realism (last visited Jan. 17, 2022) ("A theory that all law derives from prevailing social interests and public policy. According to this theory, judges consider not only abstract rules, but also social interests and public policy when deciding a case.").

The Legal-Realist's willingness to manipulate law is grounded in the Progressive rejection of Separation of Powers, led by Woodrow Wilson.[13] Not all state attorneys general consider themselves Progressives. Those AGs and their solicitors' general who think they reject Progressivism either have a poor understanding of separation of powers or have chosen to ignore the doctrine for political reasons.

As presumably every lawyer should know, the structures of both the United States Constitution and the states' constitutions separate governmental powers into three branches: Legislative, Executive and Judiciary. Each branch of government has specific, distinct duties. This design was intentional. As stated in *The Federalist*, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[14] The purpose of separation of powers is the protection of liberty through the proper allocation of powers among the three branches of government.[15]

In both the United States and the state constitutions, the powers of the Attorney General fall under the Executive Branch of Government. The states vary somewhat in the powers provided to state attorneys general according to each state's constitutional and statutory law, as discussed above. Therefore, it is wrong for this group of state attorneys general to claim the existence of a nationwide standard as to their powers. Their united front does not hide their attempt to expand their own common-law powers not only within, but also outside of, the borders of the states they individually represent. So much for federalism.

Accordingly, the approach taken here is quite straightforward. It rests on the basic principle of separation of powers, ignored by the states' attorneys general. It uses the opinion of the Oklahoma Supreme Court opinion to restate matters of law which should be obvious. Much of this is very basic. We emphasize the basics in order to discredit the nationwide efforts of those attorneys general represented on the *Amicus* brief.

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13 *See* Thomas Sargentich, *The Limits of the Parliamentary Critique of the Separation of Powers*, 34 WM. & MARY L. REV. 679, 684-88 (1993).

14 THE FEDERALIST NO. 47, at 249 (James Madison) (George W. Carey & James McClellan eds., 2003).

15 *See* THE FEDERALIST NOS. 47, 48 (James Madison) (George W. Carey & James McClellan eds., 2003).

I. THE POWERS OF THE OKLAHOMA OFFICE OF THE ATTORNEY GENERAL ARE EXCLUSIVELY DERIVED FROM THE OKLAHOMA CONSTITUTION, OKLAHOMA STATUTES, AND THE STATE'S COMMON LAW.

The powers of the Oklahoma Office of the Attorney General are exclusively derived from the Oklahoma Constitution, Oklahoma Statutory Law, and the state's Common Law. Unlike the federal Attorney General, Oklahoma's Attorney General is elected. Nevertheless, that office is not independent from, but is part of, the executive branch. Separation of powers forms the foundation of the Oklahoma government. As the power to write laws lies with the Legislature, and as no branch may infringe upon the powers of another, therefore, the Executive branch may not write new laws. The Attorney General cannot operate as a free agent, even though the powers of the office are not specified in the Oklahoma Constitution.

A. *Oklahoma State Constitution*

The Oklahoma Constitution provides not only for the allocation of powers, but more significantly, the limitations of those powers:

Departments of government - Separation and distinction.

> The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others.[16]

Thus, the Oklahoma Constitution specifically prevents one branch of government from assuming the powers of the other. As only the legislature has the power to write laws, neither the executive nor the judicial branches of government may assume that power.

The Oklahoma Constitution has a further check on the law-making power, as it grants the power of law-making to both the Legislative branch as well as to the people of the state of Oklahoma.

Legislature - Authority and composition - Powers reserved to people.

> The Legislative authority of the State shall be vested in a Legislature, consisting of a Senate and a House of Representatives; but the people reserve to themselves the

16 OKLA CONST. art. IV, § 1.

> power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act of the Legislature.[17]

Furthermore, the Oklahoma Constitution firmly places the role of the Attorney General into the Executive Branch of the state government.

> The Executive authority of the state shall be vested in a Governor, Lieutenant Governor, Secretary of State, State Auditor and Inspector, Attorney General, . . . and other officers provided by law and this Constitution, each of whom shall keep his office and public records, books and papers at the seat of government, and shall perform such duties as may be designated in this Constitution or prescribed by law.[18]

As part of the executive branch, Oklahoma's Attorney General cannot operate as a free agent, even though the powers of the office are not specified in the Oklahoma Constitution. Instead of delineating the specific powers of the Attorney General, the Oklahoma Constitution assigns the Legislature the authority to write laws defining those powers. At no point in the Oklahoma Constitution is the Attorney General granted authority to determine or expand its own powers.

Therefore, because the Oklahoma Attorney General is a constitutional executive officer and because that position is constitutionally prohibited from assuming any of the powers of the Judiciary or the Legislature, the Oklahoma Constitution specifically prevents the Oklahoma Attorney General from exercising law-making powers. Likewise, the Oklahoma Constitution specifically directs the Oklahoma Legislature to write laws defining the Attorney General's duties and responsibilities.

B. *Oklahoma Statutes*

As empowered by the Constitution, the Oklahoma Legislature drafted laws defining the duties of the Attorney General. Oklahoma law defines the Attorney General as the "chief law officer of the state" and lists the specific duties assigned to that office.[19] The code thoroughly and specifically details the powers of the Attorney General.[20] Those powers range from subpoena and investigatory to the ouster of those who openly and notoriously violate penal laws.[21] None of these delineated powers includes an ability to unilaterally develop new duties, invent novel causes of action or to write new

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17 OKLA CONST. art. V, § 1.

18 OKLA CONST. art. VI, § 1.

19 OKLA. STAT. tit. 74, §§ 74-18 to 74-19.3, 74-20, 74-20(f) to (1) (2021).

20 OKLA. STAT. tit. 51, §§ 51-100 (2021).

21 OKLA. STAT. tit. 51, §§ 100-102 (2021).

laws. Taken together, these laws demonstrate that the role of the Attorney General is not open for expanding the power of that office. Instead, pursuant to the Oklahoma Constitution, the Legislature has clearly defined and thus limited the role of the Attorney General.

C. *Oklahoma Common Law*

The common-law powers of the Oklahoma Attorney General are those of long-use and custom and not subject to expansion by that office. The Executive Branch has no common-law authority to expand its power. Only the legislature can write new laws expanding the powers of the Attorney General. The common-law duties of the Oklahoma Attorney are limited to enforcing those matters that existed under the Common Law. The AG Brief correctly states that the Oklahoma Attorney General office developed from "the original nature of the office in England, where the Attorney General was the chief legal advisor of the Crown and was entrusted with the management of all legal affairs and the prosecution of all suits, civil and criminal, in which the Crown was interested."[22] But the AG Brief ignores the language in the same case that states limitations on the role of the Attorney General.

> The correct rule appears to be that, where the office of Attorney General is created in states where the common law prevails, without any reference to the duties of such office, the word is used with its accepted meaning under the common law, and carries with it such duties and powers as were usually incident to the office of Attorney General in England under the common law, when not locally inapplicable.[23]

Thus, the "Crown's" interests derived from the Common Law do not include the ability of the Attorney General to *sua sponte* expand its own role. Instead, the role of the office of the Attorney General remains limited by Common Law as well as actions by the Oklahoma Executive or the Legislature.

The Oklahoma Supreme Court stated that "it was not the intention of the lawmakers that the Attorney General should have control of litigation in which the state was interested or a party, either civil or criminal, in the district courts of the state, except when requested by the governor or either branch of the legislature."[24] The Court specifically emphasized that whether the system best protects the citizens of Oklahoma, "it is not for us to determine. This is a legislative power and policy, and not within the province of the

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22 Brief of Alabama at 2, State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719 (2021) (citing State *ex rel.* Cartwright v. Georgia-Pac. Corp., 663 P.2d 718).

23 State *ex rel.* Cartwright v. Georgia-Pac. Corp., 663 P.2d 718, 720 (citing State v. Huston, 97 P. 982, 992 *dismissed sub nom.* Huston v. State of Oklahoma *ex rel.* Haskell, 215 U.S 592 (1910)).

24 *Huston*, 97 P. at 994-95.

judiciary."[25] The Court recognizes that neither the Executive nor the Judiciary is empowered to write new laws.

The common-law power of the Attorney General extends to enforcement of matters historically within the Common Law. According to statute, even statutory changes to the Common Law are to be strictly construed.[26] Thus, the common-law power extends no further and is not subject to developing new causes of action without statutory or Constitutional grants of such authority. Neither the abuse of opioids leading to widespread addiction, nor the Attorney General's plan to finance state sponsored programs designed to combat opioid addiction fit within the Common Law. Therefore, the Oklahoma Attorney General has no authority to commandeer nuisance statutes as a vehicle to expand the Common Law.

II. THE POWERS OF THE OKLAHOMA OFFICE OF THE ATTORNEY GENERAL ARE EXCLUSIVELY DERIVED FROM THE OKLAHOMA CONSTITUTION, OKLAHOMA STATUTES, AND THE STATE'S COMMON LAW.

The action of the Oklahoma Attorney General in filing the suit filing a novel application of public nuisance had neither basis in the Common Law nor in an act of the Oklahoma Legislature.[27] By invading the province of the Oklahoma Legislature, Oklahoma's Attorney General and the other state attorneys general who supported him completely disregarded Separation of Powers.

The AGs Brief[28] filed by the Attorneys General misrepresented Oklahoma jurisprudence concerning the public nuisance doctrine. It relied upon the 1982 case, *State* ex rel. *Cartwright v. Georgia-Pac. Corp.*,[29] for the assertion that the states Attorneys General have "long been responsible for protecting the public's health and safety."[30] However, the *Cartwright* court was specifically limiting the common-law power of the Attorney General, not embracing an expansion of that power.

In discussing the merits of the nuisance case for polluting the waterways of Oklahoma, the *Cartwright* Court specifically noted that "The action was brought without the Attorney General's having first procured the approval or

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25 *Id.* at 995.

26 OKLA. STAT. tit. 12, § 12-2 (2021) ("The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma; but the rule of the common law, that statutes in derogation thereof, shall be strictly construed.").

27 If indeed a legislative basis did exist, it would be unconstitutional. *See* Steed v. Bain-Holloway, 2015 OK CIV APP 68, 356 P.3d 62.

28 Brief of Alabama as *Amici Curiae* in Support of Oklahoma, State *ex rel.* Hunter v. Johnson & Johnson, 2021 OK 54, 499 P.3d 719 (No. 118,474).

29 *Id.* at 2 (citing State *ex rel.* Cartwright, 663 P.2d at 721).

30 *Id.*

consent of the Governor of the State of Oklahoma or of either branch of the Oklahoma Legislature."[31] The *Cartwright* Court considered proposed changes to authorize the Attorney General to bring such claims, and concluded that the legislative history demonstrated that the Attorney General's powers had not been expanded.[32]

Furthermore, the *Cartwright* Court followed precedent set in *State ex rel. Haskell v. Huston*,[33] a case concerning the supposed nuisance created by the Prairie Oil & Gas Company by allegedly improper use of state highways. The *Huston* Court explained the limited power of the Oklahoma Attorney General.

> In Huston, C.N. Haskell, as Governor of the State of Oklahoma, filed an action for a writ of prohibition against a district court judge and the Attorney General to prohibit the prosecution of an action brought by the Attorney General in the district court to enjoin the Prairie Oil & Gas Company from committing a nuisance . . . . The Governor's suit challenged the standing of the Attorney General to bring and maintain the action without having first procured the Governor's consent to the filing of the action.[34]

The *Huston* Court found that the Attorney General was not acting pursuant to the Governor's request. Instead, the Attorney General exceeded his powers by proceeding to claim powers not granted by Oklahoma constitutional or statutory law. Even when new statutes are passed amending the power of the Attorney General, it is still the legislature that must bestow those powers, not the Executive.

The *Huston* Court emphasized that the Oklahoma Constitution does not enumerate the powers of the Attorney General, but does locate that office in the executive branch,[35] the head of which is the governor. The Court further interpreted Oklahoma statutory law concerning the duties of the Attorney General.

> It would seem that a proper construction of the words as used in that section "when requested" should be "if requested," thereby making the right of the Attorney General to bring a suit in the name of the state in the district court to depend, as a condition precedent, upon executive discretion to be exercised by the Governor. We are clearly of

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31 *Cartwright*, 663 P.2d at 720.

32 *Id.* at 724 ("In the case before us, the previous legislative amendment of what has now become 74 O.S. 1981 § 18b by the reenactment of words having like import to the words replaced, coupled by a clear legislative rejection of proposed legislative language which would have conferred upon the Attorney General the discretion to initiate the type of suit brought by the Attorney General without first obtaining the approval of the Governor or of either branch of the legislature, manifests a clear legislative intent not to confer such powers, duties and standing upon the Attorney General, thereby reaffirming the authority of *State v. Huston*.").

33 *Huston*, 1098 OK 157, 97 P. 982.

34 *Cartwright*, 663 P.2d at 722.

35 *Id.* at 722 ("The Oklahoma Constitution then, as now, provided (Art. 6, § 1 A): 'The executive authority of the State shall be vested in a Governor, . . . Attorney General . . . each of whom . . . shall perform such duties as may be designated in this Constitution or prescribed by law.'").

> the opinion that the word "when," as used in this connection means no more than "in case" or "if," and this construction is supported by the authorities.[36]

Both *Cartwright* and *Huston* stand for the proposition that the Oklahoma Attorney General's powers are specifically enumerated in law. In both cases, the law at that time provided that the Attorney General could only act at the request of the Governor and may not *sua sponte* bring claims or develop new causes of action. Additionally, both cases expressly limit the power of the Attorney General. Even though the Oklahoma Attorney General retains some common-law powers, those powers are limited by Oklahoma constitutional and statutory law and may not be expanded by the Attorney General.

By bringing *State* ex rel. *Hunter v. Johnson & Johnson*, the Attorney General also prompted the District Court to exceed its own powers in violation of separation of powers. Unless the District Court is one committed to changing law regardless of being reversed by the Oklahoma Supreme Court, the Attorney General has misled the District Court and undercut its credibility with a majority of the Supreme Court. The Attorney General also likely undercut the credibility of his office both before the district court judge and most members of the Supreme Court.

Neither the Oklahoma Attorney General nor those who signed the AG Brief seem to have thought through the consequences of the District Court's acceptance of the Attorney General's argument. The District Court ruled that Oklahoma's nuisance statue covers literally any conduct that "annoys" or "endangers" the health, safety or comfort of a large number of Oklahomans.[37] If this rationale had been accepted by the Oklahoma Supreme Court, every manufacturer of alcohol, of automobiles, of firearms, of motorcycles, of butter, of glue, of trampolines and of many other products would have been liable for "abatement" if the Attorney General deemed the particular product to be a public nuisance.

How many of these Attorneys General realized how radical is the position they have endorsed? Instead of elected legislative representatives weighing arguments for a change in policy, the judiciary enticed by the Attorney General would regulate Oklahoma's economy with no notice to the public and corporate producers or marketers of legal products until long after the production and distribution of the products. Such a blatant violation of the separation of power should become the poster child for state attorneys general abusing power by attempting to legislate through adjudication.[38]

The AG Brief demonstrated a willingness deliberately to misrepresent Oklahoma precedents. It quoted the following language from *State* ex rel.

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36 *Cartwright*, 663 P.2d at 722 (internal quotation marks omitted) (quoting Huston, 97 P. at 986).

37 State of Oklahoma v. Purdue Pharma L.P., No. CJ-2017-816., 2019 WL 9241510, (Dist. Ct. Okla. Nov. 15, 2019).

38 *See* Amicus Brief of Professors John Baker and Michael Krauss at 23, State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719.

Derryberry v. Kerr-McGee Corp:[39] "In the absence of express statutory or constitutional restrictions, the common-law duties and powers attach themselves to the office as far as they are applicable and in harmony with our system of government."[40] Rather than lending support, *Derryberry* undermines the claims of the AG Brief in two ways.

First, in *Derryberry* the Supreme Court of Oklahoma focused on the specific power of the Attorney General to settle and dismiss a suit brought on behalf of Oklahoma. In this case alleging a conspiracy to fix asphalt prices in sales to the state, the *Derryberry* Court reviewed both statutory and common-law powers of the Attorney General.

> As an incident to the dominion the Attorney General possesses over every suit instituted in his official capacity, he has the power to dismiss, abandon, discontinue, or compromise suits brought by him either with or without a stipulation by the other party and to make any disposition of such suits as he deems best for the interest of the state.[41]

The Court found specific *statutory* authority for the Attorney General's settlement of the asphalt cases.[42]

Second, the *Derryberry* court did not assert common-law powers as broad as those claimed by the AG Brief. Instead, the court specifically noted that the common-law powers of the Attorney General were subject to statutory limitations. "We conclude...that the Attorney General's powers are as broad as the common law *unless restricted or modified by statute*, and that his authority to dismiss, settle or compromise the litigation in question, in the absence of fraud or collusion, is undisputed."[43] Thus, the very case that AG Brief claims supports an unrestricted ability of Oklahoma's Attorney General to expand common-law powers in fact demonstrates the opposite. The Attorney General does not have such authority. As the Oklahoma Legislature has never expanded the Attorney General's authority as to create the tort of public nuisance, there was no authority to proceed in *State* ex rel. *Hunter v. Johnson & Johnson*.[44]

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39 State *ex rel.* Derryberry v. Kerr-McGee Corp, 516 P.2d 813.

40 Brief of Alabama as *Amici Curiae* in Support of Oklahoma at 3, State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719.

41 *Derryberry*, 516 P.2d at 818.

42 *Id.* ("The Attorney General has authority to bring law suits by virtue of 74 O.S. 1971 § 18b and to assume and control the prosecution thereof in the state's best interest. It must logically follow that he has authority to compromise and dismiss the suit.")

43 *Id.* at 819 (emphasis added).

44 *See* State *ex rel.* Hunter, 499 P.3d at 731.

III. THE POWERS OF THE OKLAHOMA OFFICE OF THE ATTORNEY GENERAL ARE EXCLUSIVELY DERIVED FROM THE OKLAHOMA CONSTITUTION, OKLAHOMA STATUTES, AND THE STATE'S COMMON LAW.

In *State* ex rel. *Hunter v. Johnson & Johnson*, the district court exercised law-making powers properly within the province of the Oklahoma Legislature when it extended "the public nuisance statute to the manufacturing, marketing and selling of prescription opioids."[45] The Oklahoma Supreme Court rejected the District Court's intrusion on legislature's power. Judging from the apparent ease with which it issued its breath-taking order, the district judge seemed totally unaware of, or at least unconcerned about, Separation of Powers.

In defense of the district court, the AG Brief made two separate and equally erroneous claims, in response to the *Amicus* Brief filed by Professors Michael I. Kraus and John S. Baker, Jr.[46] The Krauss/Baker Brief asserted that the underlying case "amounts to an abuse of power by the Attorney General, who initiated a judicial action abased on a novel application of public nuisance that has neither basis in the Common Law nor in an act of the Oklahoma Legislature."[47]

A. *The AG Brief Mischaracterizes the Krauss/Baker argument.*

The AG Brief incorrectly claims that the Kraus/Baker brief alleges that "modern State Attorneys General can abate only minor nuisances – road construction and the like – but must wait for legislation or federal agency action to abate the more severe harms at issue in this case."[48] Yet, the Krauss/Baker Brief makes no such claim. Indeed, the AG Brief mistakenly conflates an example of a public nuisance with severity of damage, an issue never raised.

In actuality, the Krauss/Baker Brief explains the difference between private nuisances and public nuisances, using the road construction example to illustrate a public nuisance. Private ordering is initiated by private, civil litigation, whereas public ordering is the province of the legislative and executive branches. The road construction example demonstrated that when a road is blocked, preventing or hindering travel, many individuals may

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45 *Hunter*, 499 P.3d at 723.

46 *But see* Amicus Brief of Professors John Baker and Michael Krauss at 23, State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d. 719

47 *Id.* at 22.

48 Brief of Alabama as *Amici Curiae* in Support of Oklahoma at 4-5, State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719 (citing Appellants' Brief in Chief at 16, 20, 27-28, State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719; Amicus Brief of Professors John Baker and Michael Krauss at 13-14, State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719).

suffer minor inconvenience even if no one suffers substantial personal damage. The road construction example distinguishes private nuisances from public nuisances. Public nuisances potentially affect masses of people. Because public nuisance suits are intended to protect rights common to the public, they are most often filed by public authorities acting on behalf of the state in its sovereign capacity.[49]

Instead of acknowledging the legal difference between private and public nuisances, the AG Brief misstates the distinction as nuisances that cause minor injury versus those that cause more severe harms.[50] There is no such legal distinction. A private nuisance may in fact cause severe harms, while a public nuisance might cause only minor injury. The severity of the harm is not what differentiates a private nuisance from a public one. Instead, the legal definitions of the two types of nuisance illustrate their differences.

Public nuisances historically sounded in criminal law (part of public ordering); private nuisances in tort.[51] The cause of action for indirect harm caused by a private nuisance result in a civil lawsuit, which is distinct from the criminal case that can be brought against the offender by the state government. The AG Brief fails to comprehend the nuanced distinction between public and private nuisances.

In particular, the AG Brief simply disregards the requirement that public nuisance actions for damages require a crime. As explained by the Oklahoma Supreme Court, "The State's allegations in this case do not fit within Oklahoma nuisance statutes as construed by this Court. The Court applies the nuisance statutes to unlawful conduct that annoys, injures, or endangers the comfort, repose, health, or safety of others. But that conduct has been criminal or property-based conflict."[52] Since the allegations in the *State* ex rel. *Hunter v. Johnson & Johnson* case neither contain criminal allegations nor property-based conflict, there is no public nuisance cause of action.

The AG Brief further claims that the Krauss/Baker Brief argues "that the district court erred by expanding public nuisance to encompass actions that do not directly affect individual property rights."[53] The AG Brief simply misconstrues the following statement made in the Krauss/Baker Brief summarizing the holding by the lower court: "The District Court abused its powers by ruling that Oklahoma's nuisance statue does not require harm to property[.]"[54] That summary is not an assertion by Krauss/Baker that to constitute a nuisance there must be an impact on private property rights. To allege otherwise is absurd, especially in light of the Krauss/Baker Brief's

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49 Amicus Brief of Professors John Baker and Michael Krauss, *supra* note 46, at 5.

50 Brief of Alabama et al. as Amici Curiae in Support of Oklahoma, *supra* note 48, at 4-5.

51 Amicus Brief of Professors John Baker and Michael Krauss, *supra* note 46, at 5.

52 *Hunter*, 499 P.3d at 725.

53 Brief of Alabama et al. as *Amici Curiae* in Support of Oklahoma at 8-9, State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719.

54 Amicus Brief of Professors John Baker and Michael Krauss at 20, State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719 (citing State of Oklahoma v. Purdue Pharma L.P., No. CJ-2017-816., 2019 WL 9241510, (Dist. Ct. Okla. 2019).

detailed explanation that public nuisances require a crime, as distinguished from a tort.

The Krauss/Baker Brief explains that public nuisance, damage actions for civil liability require a crime. Criminal statutes or municipal ordinances might seem to have nothing to do with public nuisance. But in fact, an action for damages for a public nuisance follows from, and depends on, a crime of public nuisance. As recognized by a University of Oklahoma law professor and others, a public nuisance action requires a violation of some criminal law.[55] Assessing relatively recent attempts to create a tort of public nuisance, Professor Thomas Merrill concludes: "public nuisance is always a crime . . . .[It] is not, and never was, a tort.[56]

> A tort is a remedy for a private wrong. Public nuisance is not a tort because
>
> 1. Public nuisance law protects public rights, not private rights.
>
> 2. Public nuisance liability was historically said to lie for activity indictable as a crime.
>
> 3. Public nuisance is normally enforced by public officials, not private claimants.
>
> 4. Public nuisance traditionally focused on the existence of a condition, not solely on defendant's conduct.
>
> 5. Public nuisance liability typically did not result in an award of damages other than damages for abatement when the criminal declines to abate.[57]

That some attorneys general posited a so-called "tort" of public nuisance does not make it the case. Nor does the fact that judges think they have a common-law power to create innovative torts justify their abandonment of tort law's crucial requirements of wrongfulness and causation. Without a public nuisance crime, state attorneys general cannot lawfully seek damages for what they choose to label a public nuisance 'tort.' The identification of public nuisance as grounded in a type of criminal liability reinforces the conclusion that public nuisance is a public action, not a tort. This AG Brief completely misstates the criminal versus tort distinction.

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55 Osborne M. Reynolds, *Public Nuisance: A Crime in Tort Law*, 31 OKLA L. REV. 318, 323 (1978) (quoting W. Prosser, TORTS 573 (4th ed. 1971). *Cf.* P. Winfield, TORT 466 (1937)) ("But public nuisance is unusual in that violation of the criminal law is often treated as a required element of the tort action, and it has been reliably reported that '[n]o case has been found of tort liability for a public nuisance which was not a crime.'").

56 Amicus Brief of Professors John Baker and Michael Krauss, at 7, State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719.

57 *Id.* at 7-8 (quoting Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. 1, 11 (2011)).

The Court goes on to reject the attempt by the Attorney General to expand the law to novel situations not contemplated in the relevant statutes, and notes that the cause fits within another area of tort law: product liability. "Applying the nuisance statutes to lawful products as the State requests would create unlimited and unprincipled liability for product manufacturers; this is why our Court has never applied public nuisance law to the manufacturing, marketing, and selling of lawful products."[58] The Court decisively rejects the State's power grab and attempt to have the court legislate from the bench. "The common-law criminal and property-based limitations have shaped Oklahoma's public nuisance statute. Without these limitations, businesses have no way to know whether they might face nuisance liability for manufacturing, marketing, or selling products . . . We follow the limitations set by this Court for the past 100 years."[59]

B. The AG Brief overstates their powers by claiming "[t]he authority to bring public nuisance suits has long resided with Attorney General at Common Law and Oklahoma has likewise long recognized that authority by statute."[60]

The AG Brief conflates two separate powers and does not cite authority for either one. As demonstrated in Section II of this article, there is no such power at Common Law for the Attorney General to bring a public nuisance suit against manufacturers of lawful products.

Additionally, the Oklahoma Supreme Court held that there is no statutory authority for the claims brought in *State* ex rel. *Hunter v. Johnson & Johnson*. "For the past 100 years, our Court, applying Oklahoma's nuisance statutes, has limited Oklahoma public nuisance liability to defendants (1) committing crimes constituting a nuisance, or (2) causing physical injury to property or participating in an offensive activity that rendered the property uninhabitable."[61] The Court noted that Oklahoma statutory law specifically defines nuisance:

> A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either:
>
> First. Annoys, injures or endangers the comfort, repose, health, or safety of others; or
>
> Second. Offends decency; or

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58 *Hunter*, 499 P.3d at 725.

59 *Id.* at 731.

60 Brief of Alabama et al. as *Amici Curiae* in Support of Oklahoma at 5, State *ex rel.* Hunter v. Johnson & Johnson, 499 P.3d 719.

61 *Hunter*, 499 P.3d at 724.

> Third. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway; or
>
> Fourth. In any way renders other persons insecure in life, or in the use of property, provided, this section shall not apply to preexisting agricultural activities.[62]

Absent from this definition is authorization for the Attorney General to unilaterally expand the definitions and bring a nuisance lawsuit against a company for manufacturing and selling legal products.[63]

CONCLUSION

The Supreme Court of the State of Oklahoma ruled that "the district court's expansion of public nuisance law went too far."[64] The Court pointed to a clear violation of the separation of powers, albeit limiting its ruling to the abuse of power by the lower court. "The district court's expansion of public nuisance law allows courts to manage public policy matters that should be dealt with by the legislative and executive branches; the branches that are more capable than courts to balance the competing interest at play in society problems."[65] The Court forcefully made clear that the district court had absolutely abused its judicial power.

> The State's Abatement Plan is not an abatement in that it does not stop the act or omission that constitutes a nuisance . . . It is instead an award to the State to fund multiple governmental programs . . . Our Court, over the past 100 years in deciding nuisance cases, has never allowed the State to collect a cash payment from a defendant that the district court line-item apportioned to address social, health and criminal issues arising from conduct alleged to be a nuisance.[66]

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62 *Hunter*, 499 P.3d at 740 (Edmondson, J., dissenting).

63 *Id.* at 725 ("Applying the nuisance statutes to lawful products as the State requests would create unlimited and unprincipled liability for product manufacturers; this is why our Court has never applied public nuisance law to the manufacturing, marketing, and selling of lawful products.").

64 *Id.* at 721.

65 *Id.* at 731.

66 *Id.* at 729. Emphasizing its discomfort with the activist nature of the lower court's ruling, the Oklahoma Supreme Court footnoted the specific line-items ordered by the district court. *Id.* at 722 n.12. ("The district court appropriated the funds to the following governmental programs:
Opioid Use Disorder Treatment Program $232,947,710
Addiction Treatment -- Supplementary Services $ 31,769,011
Public Medication and Disposal Programs $ 139,883
Screening, Brief Intervention and Referral to Treatment (SBIRT) Program $ 56,857,054
Pain Prevention and Non-Opioid Pain Management Therapies $103,277,835
Expanded and Targeted Naloxone Distribution and Overdose Prevention Education $ 1,585,797
Medical Case Management/Consulting (Project Echo) $ 3,953,832

The Court clearly interprets the District Court's actions as improperly invading the province of the other branches of government.

The Court's ruling in *State* ex rel. *Hunter v. Johnson & Johnson* focuses on the District Court. It does not specifically comment upon the fact that it was the state's Attorney General who urged the District Court to make the ruling it did. Nevertheless, the Supreme court's decision stands as a rebuke to the Attorney General's attempted power grab. The Oklahoma Attorney General attempted to justify the expansion of his own powers with the following statement: "To address this problem, the State of Oklahoma *ex rel.* Mike Hunter, Attorney General of Oklahoma . . . sued three prescription opioid manufactures and requested that the district court hold opioid manufacturers liable for violating Oklahoma's public nuisance statute."[67] The District Court would not have had the occasion to attempt to expand the public nuisance law without the Attorney General first filing what the Oklahoma Supreme Court could have and should have labelled a frivolous case—one without a credible legal basis that wasted both the state's and the defendant's time and much money.

The Oklahoma Supreme Court's ruling in *State* ex rel. *Hunter v. Johnson & Johnson* confirms the significance of separation of powers as guarding against the tyranny of governmental power. The Framers of the U.S. Constitution understood that "a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."[68] Separation of powers is the primary protection against the abuse of governmental power. The doctrine of Separation of Powers has not always been respected even by federal courts. Yet, few federal courts have been as brazen as was this Oklahoma district court in disregarding such a fundamental constitutional doctrine. By

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Developing and Disseminating NAS Treatment Evaluation and Standards $ 107,683
Development of NAS as a Required Reportable Condition $ 181,983
Implementing Universal Substance Use Screening for Pregnant Women $ 1,969,000
Medical Treatment for Infants Born with NAS or Opioid Withdrawal $ 20,608,847
Investigatory and Regulatory Actions $ 500,000
Additional Staffing for OBN
Additional Staffing for Oklahoma Licensure Boards
Additional Staffing for Oklahoma Veterinary Board
Additional Staffing for Oklahoma State Osteopathic Board
Additional Staffing for Oklahoma Board of Nursing
Additional Staffing for Oklahoma Board of Medical Licensure and Supervision
Additional Staffing for Oklahoma Board of Dentistry
Additional Staffing for Office of the Chief Medical Examiner
Additional Staffing for Office of the Attorney General
Additional Staffing for Medicaid Fraud Control Unit $ 11,101,076
TOTAL $465,026,711").

67 *Id.* at 721.

68 THE FEDERALIST NO. 48, at 260 (James Madison) (George W. Carey & James McClellan eds., 2003).

rebuking the district court's clear abuse of power, the Oklahoma Supreme Court's decision provides hope that other state supreme courts may follow.