A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments’ Tobacco Litigation

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I. INTRODUCTION

This is one account of an extraordinary mass litigation that occurred in the United States at the close of the millennium: the prosecution of civil suits against the tobacco industry at almost every level of federal, state and local government. Those governmental plaintiffs were accompanied by suits brought by unions, health insurers, class action plaintiffs and individual smokers in an unprecedented assault upon one very unpopular industry.

The tobacco companies settled the state lawsuits by agreeing to submit to additional regulatory controls over their activities and to make multi-billion dollar annual payments to the states in perpetuity. The total payout to the states during the first twenty-five years covered by the settlements (1998-2023) has been estimated on the order of a quarter of a trillion dollars. Payments to the private lawyers hired by the states during this same period have been given a ballpark figure of at least eight billion dollars in net present value: $750 million per year for five years and $500 million per year thereafter, indefinitely. The settlement represents the largest privately negotiated transfer of wealth arising out of litigation in world history, a transfer that will be financed almost exclusively by smokers who were, significantly, not represented in the settlement proceedings.

It is the thesis of this paper that the governmental suits were prosecuted in disregard of the rule of law—most importantly, state and federal constitutional provisions providing for the separation of powers. The settlement

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of these suits has led to what many scholars have identified as the cartelization of the tobacco industry and unconscionable transfers of wealth to private attorneys retained under contracts that in many cases were unlawful at the time they were signed. The increasing understanding of the troubling precedential and economic effects of the settlements, and their shaky legal and political tenability, reinforces the truth that they present a non-justiciable political question that should never have been decided by the courts in the first place, and may not be countenanced in the long term in their current posture as settlements.

Legal commentators both here and abroad use unusually strong terms to describe these suits, such as illegal, unconstitutional, corrupt, insane, scary, lawless, pernicious, and abusive. The departing Secretary of Labor of the last federal administration—whose President in his 1999 State of the Union address called for the federal government to join in the tobacco suits—has called these suits “blatant end-runs around the democratic process,” prosecuted with the “goal . . . to threaten the industries with such large penalties that they’ll agree to a deal,” so that “no judge will ever scrutinize these theories.”1 The most in-depth studies to date of the Master Settlement Agreement (MSA) and the four separate state settlements have concluded that the settlements are collusive and anticompetitive agreements between the states and the tobacco companies that levy federal extraterritorial taxes and set very dangerous precedents.2 One detailed study concludes that these settlements violate the Commerce and Compacts Clauses of the United States Constitution, are per se antitrust violations, specifically prohibited by state and federal antitrust laws, and essentially constitute “a sophisticated white collar crime.”3

This paper will attempt to show how this extraordinary state of affairs came to pass and why these suits are not a good template for the future. The MSA is extra-constitutional legislation crafted outside of any statehouse or Congress in disregard of the structural constitutions it displaces, and it constitutes bad public policy and worse precedent.

II. HISTORY

The people have always some champion whom they set over them and nurse into greatness. . . . This and no other is the root from which a tyrant springs; when he first appears above ground he is a protector.4

A. *The Doctors: Language on Fire*

The public health community began to pathologize the human activity of smoking in the last decades of this century. Prominent figures, such as former Secretary of Health, Education and Welfare Joseph Califano, and Surgeons General C. Everett Koop and David A. Kessler, routinely describe smoking as a disease, not as an unhealthful activity, or even as a habit. This is consistent with the modern tendency of the medical profession to view all risky behavior as a kind of pathology—the disfavored behavior increases the likelihood of injury, disease, or death and therefore to engage in the activity is a kind of disease. Leaders in the public health community describe smoking as a "manmade plague,"7 refer to the "global tobacco epidemic"8 and in their literature and public discourse use medical metaphors to argue that smoking can be eliminated, in the same manner as diseases such as polio or smallpox.

The public health media began to use a more ominous vocabulary with respect to the tobacco industry in a series of editorials in the Journal of the American Medical Association (JAMA) in the 1980s. One 1986 editorial described smoking-related deaths as Nazi genocide and called for "a declaration of all-out war" to save "the victims of the tobaccoism holocaust."9 A former director of the Centers for Disease Control maintained in a 1990 editorial that tobacco executives and the advertising agencies working for them "daily make the decision to kill for money, to become 'hit men' on a colossal scale."10 By 1995, Food and Drug Administration (FDA) Commissioner David A. Kessler was publicly describing tobacco use, which typically begins in adolescence, as "a pediatric disease."11

The academic, press and legal communities soon joined in. In a 1997 Los Angeles Times op-ed piece, Stanton Glantz, a professor at the University of California at San Francisco, compared the tobacco companies to Timothy McVeigh: "[T]he tobacco industry has killed 10 million Americans since 1964. No attorney general or politician even considered letting McVeigh cop a plea; the same should be true for the tobacco industry."12 New York Times reporter Philip J. Hilts compared tobacco industry em-
ployees to "the guards and doctors in the Nazi death camps."\textsuperscript{11} Texas Attorney General Dan Morales pronounced that "[h]istory will record the modern-day tobacco industry along side the worst of civilization's evil empires."\textsuperscript{12} One federal judge has characterized the tobacco industry as "the king of concealment and disinformation."\textsuperscript{13}

Tobacco industry executives are far from blameless in this process of demonization. As late as 1986—after decades of research, including a long-term study by the AMA, \textit{paid for by the tobacco industry}, released in 1978, which established that cigarette smoking played an important role in lung cancer and heart disease\textsuperscript{14}—R. J. Reynolds President Gerald H. Long said:

If I saw or thought that there were any evidence whatsoever that conclusively proved that, in some way, tobacco was harmful to people, and I believed it in my heart and my soul, then I would get out of the business and I wouldn't be involved in it. Honestly, I have not seen one piece of medical evidence that has been presented by anybody, anywhere that absolutely, totally said that smoking caused the disease or created it.\textsuperscript{15}

The industry's refusal to acknowledge the undeniable hazards of smoking, its funding of dubious research institutes and studies, the well-known corporate misdeeds that have played so well in Hollywood, the unforgettable image of the executives of the seven largest United States tobacco companies raising their hands and swearing before Congress, \textit{seriatim}, (and, more sadly, seriously) that nicotine was not addictive,\textsuperscript{16} the stolen memoranda that detail a campaign to target minors,\textsuperscript{17} have all combined to destroy public trust in the industry and to make it one of the most reviled in

\textsuperscript{11} PHILIP J. HILTS, \textsc{Smokescreen: The Truth Behind the Tobacco Industry Cover-Up} 216-17 (1996).
\textsuperscript{13} Haines v. Liggett Group, Inc., 140 F.R.D. 681, 683 (D.N.J.) (Sarokin, J.) (stating that "despite some rising pretenders, the tobacco industry may be the king of concealment and disinformation"), \textit{vacated and reh'g denied}, 975 F.2d 81 (3d Cir. 1992).
\textsuperscript{14} This 1978 AMA study was funded by the tobacco industry—at a cost of $15 million—and was managed by a committee of the American Medical Association. RICHARD KLUGER, \textsc{Ashes to Ashes}, 360, 448 (1997). The fact that this study confirmed the relationship between cigarette smoking and lung and heart disease undermines the conventional wisdom that tobacco-funded research was bound to be tainted.
\textsuperscript{15} LARRY C. WHITE, \textsc{Merchants of Death: The American Tobacco Industry} 188 (1988).
\textsuperscript{16} Hearing Before the House Subcommittee on Health and the Environment, April 14, 1994, \textit{available at www.house.gov/waxman/tobacco/leg/hearings/highlights/highlights.html}. Excerpts of this testimony are also quoted in PETER PRINGLE, \textsc{Cornered: Big Tobacco at the Bar of Justice} 77-81 (1998).
\textsuperscript{17} A paralegal named Merrell Williams stole a cache of sensitive documents from Brown & Williamson and traded them to Richard Scruggs in exchange for a job and some gifts, including the funds to purchase a $109,600 house for cash. Bulow & Klemperer, \textit{supra} note 2, at 333.
United States’ history.

At the same time, an organized plaintiffs’ class action bar, flush with fees from other mass tort litigation, was primed for a new target. As one commentator has noted, “the plaintiffs’ bar was coming off a fabulous run of successful cases: the hotel fires at the MGM Grand in Las Vegas and the Dupont Plaza in San Juan, the asbestos litigation, the Bhopal disaster, the Dalkon Shield and silicon breast implants, among others. These victories generated not only a certain boldness, but also a pool of capital.” 18

B. The Lawyers: Maelstrom out of Mississippi

In 1994, the State of Mississippi, through its Attorney General, filed the first state lawsuit against the tobacco industry in a voluminous complaint asserting theories that served as a template for actions filed in other states. 19 Shortly thereafter, the Florida legislature laid the groundwork for a similar suit by passing the “Medicaid Third-Party Liability Act” (MTPLA). 20 This unprecedented legislation stripped tobacco industry 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. The act also abolished the defense of statute of repose in recoupment suits, thus allowing the state to sue on claims that had already been extinguished by the passage of time. 21

In March 1994, the Castano Group, a consortium of law firms, filed a federal class action liability suit against the tobacco industry on behalf of ninety million current and former American smokers. One of the Castano Group attorneys, John Coale, stated in an interview that members of his group “were in touch with people at the F.D.A. all the time.” 22 The district court approved the Castano class action; the Fifth Circuit reversed, holding

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19. The Mississippi action was filed in some haste. The Mississippi legislature had adopted a tort reform statute that governed all products liability cases as of July 1, 1994. One observer has opined that “[h]ad [Attorney] General Moore failed to beat that deadline, every one of his theories would have been thrown out of court as directly contrary to the people’s will.” CIT. FOR LEGAL POLICY AT THE MANHATTAN INST., REGULATION BY LITIGATION: THE NEW WAVE OF GOVERNMENT-SPONSORED LITIGATION 9 (1999) [hereinafter REGULATION BY LITIGATION] (statements of Michael Wallace).


21. This statute was not aimed at the tobacco industry alone, because its drafters were concerned about due process and equal protection claims. “Gov. Lawton Chiles later ordered state officials to use the statute only against tobacco. ‘But it wasn’t worded that way,’ Levin said. ‘That was the beauty of it. It could have been used against anyone else.’” John Giben, For Rigging Statute, Lawyer Wants a Slice, A.B.A. J., Sept. 1998, at 51. For a lively account of how this legislation was enacted, and then repealed, which repeal fell one vote short of overriding Gov. Chiles’ veto, see id.

that the case was unmanageable, as it would require consolidation of cases from the various states, each of which has different fraud and negligence laws, defenses and evidentiary rules.\textsuperscript{23} By this time, however, numerous class actions, secondhand smoke claims and hundreds of cases filed by individual smokers were being brought to state courts. One of the lead attorneys in the class action arena, Stanley M. Rosenblatt, declared: "My goal is to destroy the industry and thereby save millions of lives."\textsuperscript{24}

Minnesota and West Virginia filed suit in 1994. The Minnesota state litigation was accompanied by a suit by that state's Blue Cross/Blue Shield health insurer (hereinafter "Blues"), working closely with the Attorney General's office. This opened up a whole new category of health insurance organizations as parallel plaintiffs with the state, a pattern that eventually resulted in many state-regulated Blues filing actions. In July 1994, the Massachusetts legislature authorized a recoupment suit, but did not rewrite the state's laws to predetermine the result, as had been done in Florida.\textsuperscript{25} Florida and Massachusetts filed suit in 1995. In 1996, thirteen more states, including Connecticut, filed suit. In the first six months of 1997, twenty more states filed suit.

By 1996, cities and municipalities started to bring suit against the tobacco companies, and in 1997 several counties followed.\textsuperscript{26} This meant that the tobacco companies were facing concerted recoupment litigation at virtually every level of political organization in a country consisting of one federal, fifty state, eight territory, 36,001 municipal, and 3,043 county governments.\textsuperscript{27} In Connecticut, as elsewhere, the tobacco industry was embroiled in litigation with municipalities and also with non-governmental entities, such as unions, which filed copycat complaints hoping to jump on the recoupment bandwagon.\textsuperscript{28} Foreign governments, including Bolivia, Guatemala, Nicaragua, Panama, Thailand, Venezuela, and Brazil, filed

\begin{itemize}
\item \textsuperscript{23} Castano v. Am. Tobacco Co., 84 F.3d 734, 752 (5th Cir. 1996).
\item \textsuperscript{25} \textit{Mass. Gen. Laws Ann.}, ch. 118E \& 22 (West 1995).
\item \textsuperscript{27} \textit{U.S. Census Bureau}, 1997 \textit{Census of Governments}, at v.
\item \textsuperscript{28} Philip Morris was defending 530 lawsuits by the end of 1997, broken down as follows: 375 individual personal injury cases, fifty class action cases including second-hand smoke cases and 105 health care recoupment cases, mostly brought by governments and unions. R.J. Reynolds was defending 540 cases by March 3, 1998, as compared with fifty-four cases at the end of 1994. Bulow & Klemperer, supra note 2, at 332.
\end{itemize}
recoupment suits in American courts; British Columbia and the Marshall Islands sued in their home courts.29 Foreign health insurer suits in France and Israel, for example, made the headlines.30

Within the astonishingly short time of three years, more than forty states followed Mississippi’s initiative.31 In Maryland, the contingency fee lawyer hired by the state, Peter Angelos, was widely credited with the successful lobbying for, and enactment of, legislation that retroactively abolished defenses otherwise available to the tobacco companies. “We changed centuries of precedent to ensure a win in this case,” said the president of the State Senate.32 In April 1998, the Vermont legislature passed a statute modeled on the Florida and Maryland statutes abolishing defenses and imposing retroactive liability.33 The federal government soon joined this geometrically expanding group of plaintiffs in a suit filed by Attorney General Janet Reno in September 1999; a suit which owed intellectual debts to the legal theories that had already made their way through the various states. Although in United States v. Philip Morris, Inc.,34 the district court dismissed all but the RICO cause of action, that statute has serious enforcement powers and broad remedies available against defendants.

In short, at the end of the last century, the tobacco industry was faced with multi-billion or trillion dollar claims from an ever-expanding group of plaintiffs at every level of government, each armed with daunting powers of sovereign authority, broad enforcement authority under various state and federal statutes and regulations, and which, as a group, held absolute regulatory power over the industry. Nearly every level of governmental authority either already was, or was rapidly becoming the tobacco industry’s prosecutor. No wonder the Marlboro Man surrendered.

III. ANATOMY OF AN ACTION

Connecticut’s complaint makes a good proxy for analysis of the forty-


31. Copies of the states’ complaints are available at http://www.stic.ren.edu/Libraries.html (last visited April 25, 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. Id.

32. See infra note 37.


plus states’ complaints. For one thing, as has been widely noted, the complaints filed in the various states were only slightly altered versions of a master complaint that had been working its way up the polity from Pascagoula.\textsuperscript{35} For another, it offers an opportunity to mine the rich quarry of one state’s constitutional law, discussion of which is essential to understanding these important questions of public law.

A. **Financing the Litigation**

1. **The Contingency Fee Agreement**

   **Follow the money.**\textsuperscript{36}

   In 1995 and 1996, bills were introduced in the Connecticut General Assembly which sought legislative authorization for the Attorney General to enter into an agreement with any attorney who is not an employee of the state to provide assistance in litigation against tobacco manufacturers and to pay such attorney a percentage of the amount collected, not to exceed thirty percent of the recovery.\textsuperscript{37} Neither bill passed; neither bill made it out of committee. On July 17-18, 1996, the State of Connecticut, acting by its Attorney General, signed a contingency fee contract with the Attorney General’s former law firm, Silver Golub and Teitell, and an out-of-state firm that had figured prominently in asbestos litigation, Berger & Montague, P.C., providing for a twenty-five percent share of the recovery.\textsuperscript{38}

2. **Financing of Costs**

   **In a cohesive system, nothing is trivial.**\textsuperscript{39}

   The contingency fee contract also contained a provision whereby contingency counsel agreed to contribute up to $100,000 annually towards the cost of the state’s litigation, a provision that was typical in many of the contracts entered into by the states with their private attorneys. In addition, the Attorney General sought and received from Blue Cross/Blue Shield of Connecticut a commitment to donate one million dollars over four years to

\textsuperscript{35} See Dagan & White, supra note 29, at 373-76 and accompanying notes.

\textsuperscript{36} *ALL THE PRESIDENT’S MEN* (Warner Bros. 1976).

\textsuperscript{37} 1995 H.B. 6991 (Conn. 1995); 1996 H.B. 5817 (Conn. 1996). Both bills also avoided singling out the tobacco industry; but the testimony in support of the bills indicated that their application would be so limited.

\textsuperscript{38} The agreement was later amended to add two additional Connecticut law firms, Emmet & Glander, a law firm whose first named partner is married to David Golub of Silver, Golub & Teitell, and Carmody & Torrance, a Waterbury firm with close ties to Connecticut’s Republican governor. Professional Employment Agreement Between the State of Connecticut, Acting by Its Attorney General and Silver, Golub & Teitell, Berger & Montague, P.C., Carmody & Torrance and Emmett & Glander, Oct. 2, 1996.

finance the litigation. 40

3. The Legality of the Contracts

While other writers have focused on the pattern of attorneys general hiring their own former law firms or close cronies—a pattern that applied in Connecticut as well as most states 41—the focus of this paper is that any such contract entered into with any firm violated Connecticut state law and the state constitutional structure providing for the separation of powers.

The contingency fee contract posed a fundamental question of constitutional law: under Connecticut's constitution, who decides whether the state should commit to pay private attorneys what was estimated at the time the suit was filed at $250 million or more 42—the Attorney General or the legislature?

The argument, briefly, is this. The contract faced a serious legal challenge under the Connecticut Constitution, article IV, sections 22, 24, 43 and Connecticut General Statutes, sections 3-17, 3-112, 4-32, 4-85(a), 4-86, 4-98, 4-100, 35-32a and 42-110. 44 Connecticut law is consistent with fed-


41. The award of contingency contracts to political or professional cronies has been the subject of much comment in the press. See, e.g., Pamela Coyle, Tobacco Lawyers Reveal How They'll Divvy Up Fee, TIMES-PICAYUNE, May 12, 2000, at A1, LEXIS, News Library, Notipic File (reporting that a firm with "close ties to Attorney General Richard Iveyou" was awarded the state contract under which he would receive "more than $120 million"); Robert A. Levy, Hired Guns Corral Contingent Fee Bonanza, LEGAL TIMES, Feb. 1, 1999, at 27, LEXIS, News Library, Lgtime File ("In Mississippi, Attorney General Michael Moore selected his leading campaign contributor, Richard Scruggs, brother-in-law of Sen. Trent Lott, to lead the Medicaid recovery suit."); id. (reporting that four out of the five law firms selected by Texas Attorney General Dan Morales "contributed nearly $150,000 in campaign contributions to Morales"); Ted Wendling, Bonanza for 3 Lawyers: Ohio Trio Could Split Up to $1 Billion in Tobacco-Case Fees, PLAIN DEALER, Feb. 29, 2000, at 1A, LEXIS, News Library, Cleved File (reporting that a lead tobacco lawyer hired close side of state attorney general and his firm contributed roughly $26,000 to attorney general's campaign). Hugh Rodham, an attorney with no relevant experience in mass tort litigation, was brought in to help broker the failed federal settlement. CARRICK MOLLENKAMP ET AL., THE PEOPLE VS. BIG TOBACCO 74 (1998). President Clinton's videotape in support of the $3.4 billion fee application by the group of attorneys that includes Mr. Rodham just recently came to light. Barry Meier, Rodham and Group Seeking Legal Fees Uses Clinton Testimonial, N.Y. TIMES, Mar. 8, 2001, at A15. The saga of the contingency fee contracts in Texas and Florida has been the subject of much controversy. See, e.g., Peter Katel, Spoils of Law, NEWSWEEK, Dec. 8, 1997, at 53, LEXIS, News Library, Nweek File; Walter Olson, Texas Tobacco Fees: Corvyn's Battle, at http://overlawyered.com/archives/000sept1.html (last visited Apr. 8, 2001) (on file with author).

42. As it turned out, the twenty-five percent fee bestowed on them by contract came to $900 million. Thomas Scheffey, Jedi Blumenthal, CONN. L. TRIB., Nov. 29, 1999, at 10.

43. CONN. CONST. art. IV, §§ 22, 24.

44. CONN. GEN. STAT. §§ 3-17, 3-112, 4-32, 4-85(a), 4-86, 4-98, 4-100, 35-32a, 42-110 (2001).
eral law in that attorney’s fees awarded in any action belong to the party, not his attorney, and that it is unlawful for any government agency to make or authorize an expenditure or obligation exceeding an amount available in an appropriation.

This requirement that all funds belong to the state and must be deposited in the treasury is one of two complementary governing principles implicit in our state and federal constitutional order, the other being the prohibition of any expenditure of any public money without legislative authorization. The author of this analysis of constitutional appropriations

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documentation necessary to process the transaction, the Comptroller shall immediately charge the same to the specific appropriation of the budgeted agency issuing the same.

Id. § 4-98. Section 4-100 provides in relevant part:

[Es]ch agent, commissioner, or executive officer of the state. . . . who willfully authorizes or contracts for the expenditure of any money or the creation of any debt for any purpose in excess of the amount specifically appropriated for such purpose by the General Assembly or the . . . corporation of which he is agent, commissioner or executive officer . . . shall be fined not more than one thousand dollars or imprisoned in a community correctional center not more than one year or both.

Id. § 4-100. Section 35-32a provides in relevant part:

All . . . (2) funds awarded to the state or any agency of the state for the recovery of costs and attorney’s fees in an antitrust action . . . and (4) damages collected by the state for injuries to its business or property pursuant to a judgment or settlement agreement in an antitrust action, shall be deposited in the General Fund.

Id. § 35-32a.

45. Venegas v. Mitchell, 495 U.S. 82, 87-88 (1990); O’Brien v. Seyer, 183 Conn. 199, 207, 439 A.2d 292, 296 (1981) (same); Erickson v. Foote, 112 Conn. 662, 666 153 A. 853, 854 (1931) ("The costs allowed in an action belong to the party in whose favor they are taxed, and not to his attorney."); see also Brown v. Gen. Motors Corp., 722 F.2d 1009, 1011 (2d Cir. 1983) (holding that the prevailing party, not the attorney is entitled to award of attorneys’ fees and attorneys lack standing to petition the court for fees).

46. This is known as the federal Anti-Deficiency Act and, like Connecticut General Statutes §§ 4-98 and 4-100, it specifically prohibits not only the payment or spending of funds but the contracting for or obligating of funds. 31 U.S.C. § 1341(a)(1)(B) (1994) ("[A government employee may not] involve . . . [the] government in a contract or obligation for the payment of money before an appropriation is made . . . .")

47. See generally Kate Stith, Congress ’ Power of the Purse, 97 YALE L. J. 1343 (1988) (discussing the analogous federal prohibitions). The rule is the same throughout the states: state funds may only be committed or expended through the appropriations process. Specifically:

The power of the legislature with respect to the public funds raised by general taxation is supreme, and no state official, not even the highest, has any power to create an obligation of the state, either legal or moral, unless there has first been a specific appropriation of funds to meet the obligation . . . .

The object of such [constitutional] provisions is to secure regularity . . . in the disbursement of public money, and to prohibit expenditures of public funds at the mere will and caprice of those having the funds in custody, without direct legislative sanction therefor.

63 C. A. LIN. JUR. Public Funds § 34 (1997); see also 81A C.J.S. States § 233 (1977) ("General funds, available for general state purposes, which are deposited in the state treasury, are subject to constitutional requirements as to appropriations with respect to their disbursement, and this is true regardless of the source from which such funds are derived."). The Florida Supreme Court recently held that as a matter of codified state law—and state contract law—that the funds recovered from the Florida litigation, including attorneys fees had to be paid by the court into the state treasury and that such attorneys fees were not subject to disbursement by the court, other than to the state. State v. Am. Tobacco Co., 723 So. 2d 263, 264-65 (Fla. 1998).
power, Kate Stith, gives it the name of the “Principle of the Public Fise” and defines it as follows: “All funds belonging to the United States—received from whatever source, however obtained, and whether in the form of cash, intangible property or physical assets—are public monies, subject to public control and accountability.”\(^{48}\) Stith notes that “[i]f there could be ‘public money’ that is not deposited in ‘the Treasury’ prior to expenditure, the Congress’s control over expenditures is rendered “an empty shadow.”\(^{49}\)

The article demonstrated that it was the evasion of these statutes, essential to our constitutional form of government, that led to the Iran-Contra affair: “The covert program of support for the Contras evaded the Constitution’s most significant check on executive power: the President can spend funds on a program only if he can convince Congress to appropriate the money.”\(^{50}\)

State constitutions, which typically observe separation of powers principles more strictly,\(^{51}\) are governed by the same principles.\(^{52}\) The purported commitment of funds made by the Attorney General’s signature on the contingency fee contract not only committed the state to pay the private law firms’ fees and expenses in excess of appropriations, but in the absence of any appropriation at all.\(^{53}\) The contingency fee contracts were also ethically and constitutionally vulnerable.\(^{54}\)

\(^{48}\) Stith, supra note 47, at 1356.

\(^{49}\) Id. at 1357 n. 64 (quoting 19 ANNALS OF CONG. 1330-31 (1809) (statement of Rep. J. Randolph)).

\(^{50}\) Id. at 1344 (quoting Report of the Congressional Committees Investigating the Iran-Contra Affair, S. Rep. No. 100-216, H.R. Rep. No. 100-433, 100th Cong., 1st Sess. 18 (1987)).


\(^{52}\) The Connecticut Supreme Court has noted that “[a] criminal penalty is provided for any agent of the state who willfully authorizes or contracts for an expenditure in excess of the amount specifically appropriated by the General Assembly for a particular purpose.” Pellegrino v. O’Neill, 193 Conn. 670, 675, 480 A.2d 476, 479 (1984).

\(^{53}\) Indeed, an opinion of the current Connecticut Attorney General addressing the constitutionality of then Governor Lowell Weicker’s agreement with the Mashantucket Pequot Tribe with respect to gambling limitations stated: “We recognize that a contract within the province only of the legislative department will not bind the State without legislative approval.” Finding that then Governor Weicker’s agreement involved “[n]o new appropriations,” the opinion concluded that the gambling agreement was constitutional. Op. Conn. Att’y Gen. No. 93-4, 1993 WL 378477, at *2-3 (Feb. 11, 1993).

\(^{54}\) The contingency fee contract conferred a direct and substantial personal financial stake in the litigation upon outside counsel prosecuting these state sovereign actions. Connecticut’s Code of Ethics for state employees, and regulations promulgated thereunder, prohibit a state employee from having any direct monetary gain or loss at stake by reason of his official capacity. CONN. GEN. STAT. §§ 1-84(a), 1-85 (2000); CONN. AGENCIES REGS. §§ 1-81-28(c), 1-81-28(h). At law, neither Connecticut’s Attorney General nor any member of his office would be permitted to prosecute the tobacco cases with such a stake in interest. The Attorney General, recognizing that he could not delegate the prosecution to such outside counsel without raising significant issues of conflict of interest, asserted that he was exercising complete authority and control over the conduct of the litigation. See Plaintiff’s Memorandum in Opposition to Defendants’ Motion to Disqualify, State v. Philip Morris, Inc., No. CV-96-0153440S, at 1 (Conn. Super. Ct. Dec. 11, 1990). However, the Connecticut Supreme Court has held that such control is the deciding factor in determining whether outside contractors are to be deemed
Analytically, any state officer who has the power to enter into contracts that award percentages of future recoveries to privately retained vendors possesses the power of the purse. If such power were legal, unchecked by legislative appropriations oversight, it would give the attorneys general lawmaking authority and an unconstitutional discretion over the expenditure of state funds. In *Bromfield v. Treasurer and Receiver-General*, Massachusetts' highest court held that laws very similar to Connecticut's appropriations statutes precluded *any implied* powers of the Treasurer to pay monies in the absence of an appropriation:

The Treasurer is not free to pick and choose among the funds entrusted to him to satisfy demands for payment. Were that the case, the Treasurer could, at will, usurp the powers of appropriation which . . . reside with the Legislature . . . [and] would . . . confer upon the Treasurer a "most dangerous discretion."

Motions to disqualify or enjoin prosecution by contingency fee counsel failed in Minnesota and Maryland and succeeded in West Virginia; the motion was never decided in Connecticut. The most constitutionally troubling sentence of the Maryland court's opinion denying the motion to disqualify Peter G. Angelos was its statement that to require the Attorney General's contract "to be funded by the general assembly would be to hamstring the attorney general, for his efforts likely would be delayed, if not

"state employees" under defense and indemnification statutes. Hunte v. Blumenthal, 238 Conn. 146, 680 A.2d 1231 (1996); Panaro v. Electrolux Corp., 208 Conn. 589, 604 (1988) (stating that "professionals . . . such as doctors, nurses, engineers and architects" can be deemed state employees if sufficient control is exercised). Applying these legal precedents consistently to the factual incidents of control applicable to the tobacco litigation suggests that Connecticut's contingency fee counsel were state employees, and as such, subject to the State Code of Ethics. The applicability of state ethics codes was an issue addressed in Connecticut but apparently not addressed in other states.

The tobacco companies also challenged the contingency fee contracts on due process grounds in Connecticut and other states. This claim has received some recent support in a lengthy opinion recently issued by the Complex Litigation Court in Connecticut, *Yankee Gas Company v. City of Meriden*, which held that a private revaluation company's contingency fee contract for revaluation of property for municipal taxation violates the taxpayer's due process rights under the state and federal constitutions and further represents an unconstitutional abdication by the tax assessor. Thomas Scheffey, *Judge Blasts $15.6 Million Meriden Mistake*, CONN. L. TRIB., Apr. 30, 2001, at 1. If justice according to law means an impartial, equal, certain administration of justice so far as these may be secured by precepts of general application, this holding suggests that the Attorney General's contract with private counsel performing law enforcement functions on a contingency fee basis raises due process concerns under state and federal constitutions.


56. *Id.* at 449-50 (quoting Reeside v. Walker, 52 U.S. (11 How.) 272, 291 (1851)). Robert Reich has identified this "dangerous discretion" as one of the most troubling aspects of these governmental suits. "These novel legal theories give the administration extraordinary discretion to decide who's misleading the public and whose products are defective." He further notes that while some may approve of the outcomes in gun and tobacco suits, "they establish a precedent for other cases you might find wildly unjust." Reich, *supra* note 1.
thwarted, by the cumbersome legislative process.”57 That process, cumbersome or not, is the constitutionally mandated procedure for enacting laws, appropriating funds and taxing citizens and products. Alexander Hamilton stated that in a constitutional order that assigns the lawmaking and appropriations powers to the legislature, “no money can be expended, but for an object, to an extent, and out of a fund, which the laws have prescribed.”58

The contingency fee contract also violated Connecticut Constitution article IV, section 22 and Connecticut General Statutes sections 3-17 and 4-32 because of the provision whereby contingency counsel agreed to contribute up to $100,000 annually towards the cost of this litigation,59 and the one million dollars contribution from Connecticut’s Blue Cross/Blue Shield.60 By accepting these promises of funds to advance his suit, the Attorney General ignored these constitutional provisions and opinions of his own office applying these rules to other state officers that forbid any officer of the state to accept gifts or donations unless a statute explicitly authorizes him to do so.61

Delaware’s Attorney General has also noted that contingency fee arrangements are not consistent with the duty of public attorneys to pursue equity justice and fairness on behalf of the people they represent.62 The

59. Article IV, section 22 of the Connecticut Constitution requires the immediate deposit of such funds into the general fund. CONN. CONST. art. IV, § 22. The state antitrust set requires that all “gifts or grants made to the state for antitrust enforcement purposes . . . shall be deposited in the General Fund.” CONN. GEN. STAT. § 35-32a (2001); see also id. § 4-31[b] (2001) (“Any gift, contribution, income from trust funds, or other aid from any private source . . . shall be entered upon the records of the General Fund in the manner prescribed by the Secretary of the Office of Policy and Management.”).
60. The agreement with Blue Cross also implicated the State Code of Ethics, which provides:
   No public official or state employee shall knowingly accept, directly or indirectly, any gift . . . from any person the official or employee knows or has reason to know . . . is engaged in activities which are directly regulated by such department or agency. No person shall knowingly give, directly or indirectly, any gift or gifts in violation of this provision.
   CONN. GEN. STAT. § 1-84(m) (2001).
62. REGULATION BY LITIGATION, supra note 19, at 37 (statements of Delaware Attorney General Jane Brady). Testimony of Hon. Christopher Cox, Hearing on Proposed Legislation to Limit Lawyers Fees Resulting From Congressionally Enacted Tobacco Settlement, Subcomm. on Courts and Intellectual Property, LEXIS, Legis Library, Congst File [Hereinafter Cox Testimony] (“[W]hen states contract out their litigating authority to a contingent-fee lawyer, they automatically create a profound agency problem: the conduct of the litigation is in the hands of lawyers whose direct personal interest is in maximizing the state’s, and thereby their own, monetary recovery. It is simply unrealistic to believe that such agents will give sufficient weight either to the sovereign’s abstract interest in justice and the
contingency fee contracts violated long-standing rules that prohibit public attorneys from prosecuting an action in which they have a proprietary interest.\textsuperscript{63}

The importance of this rule regarding legislative approval and oversight of such contracts and gifts to the open and ethical conduct of our political branches is obvious. One of the most disturbing consequences of these contingency fee agreements occurred when Maryland's contingency fee counsel reportedly bartered half his fee in exchange for retroactive changes in the law that would assure him a win. Maryland State Senate President Thomas V. Mike Miller, Jr., has stated that the twenty-five percent contingency fee with the state's retained counsel, Peter G. Angelos, was reduced in exchange for changes in the state's laws. Miller stated: "Mr. Angelos ... agreed to accept 12.5 percent if and only if we agreed to change tort law, which was no small feat. We changed centuries of precedent to ensure a win in this case."\textsuperscript{64}

Public officials, at least in Connecticut, cannot under these laws solicit and use contributions to fund their activities beyond the monies appropriated to them by the legislature. The Iran-Contra case again comes to mind. It is not just the financial support of the Contras without legislative oversight that is prohibited; no government official can accept arms from Iran without legislative oversight and control over the use of such assets.

B. The Merits of the Complaint

1. A Conspiracy of the Obvious

The complaints were proxix and unprecedented—a fact universally acknowledged at the time\textsuperscript{65}—and had a curious and paranoiac quality. A forty year conspiracy by the tobacco industry to suppress and conceal in-

\textsuperscript{63} See, e.g., Young v. United States, 481 U.S. 787, 804, 809-10 (1987); Conn. Gen. Stat. § 1-84(a) (2001); Comm'n on Special Revenue v. Freedom of Info. Comm'n, 174 Conn. 308, 321 n. 6, 387 A.2d 533, 538 n.6 (1978) ("The salaried government employee does not have the financial interest in the success of departmental representation that is inherent in private practice."); Am. Fed'n of State, County & Mun. Employees v. City of W. Haven, No. CV 93-0704841S, 1994 WL 260782, at *14 (Conn. Super. Ct. Aug. 24, 1994) (stating that a "pecuniary interest in the manner in which [officials] perform their duties" or a "personal interest . . . in the results of" a proceeding may result in a conflict of interest that violates due process); 63C Am. Jur. 2d, Prosecuting Attorneys § 26 (1997) ("A trial court has the power to disqualify a prosecuting attorney . . . if it determines [he or she] suffers from a conflict of interest . . . or where he or she has a pecuniary interest in the outcome.").


formation about the adverse health effects of smoking was alleged, with the Council on Tobacco Research (CTR) "acting as a front," nefarious industry lawyers who "furtherted this conspiracy," the "Mouse House Massacre," furtive and dishonest behavior in the development of a "safer cigarette," "suppression and concealment of research on nicotine addiction," "manipulation of nicotine content . . . and delivery," and the "marketing hoax" of light cigarettes.

All this bad—or just foolish, unwise, or ill- advised—industry behavior may well be true. The analytical flaw, however, is that those nefarious tobacco executives and industry-shilling scientists were trying to suppress, conceal, and deny what any schoolchild knew perfectly well throughout those same forty years: that cigarettes are dangerously habit-forming and cause a host of illnesses and earlier mortality. The industry was fooling no one, except, perhaps, itself.

2. *Advertising as a Tort*

The complaint also focussed heavily on industry advertising. These allegations include:

The "Marlboro Man" . . . presents an image of adventure and freedom . . . . Because young smokers often take up the habit as an assertion of independence and adulthood, the Marlboro cowboy campaign emphasizes themes of independence. The Marlboro man is always alone, free from the constraints of an authority figure. There are no parents, no older brothers and no bullies in Marlboro country.66

Virginia Slims caters to

[o]ne of the most important psychological needs of most adolescent girls . . . to become independent from their parents. . . . Another important psychological need of adolescent girls is to be perceived as slim. . . . By associating their cigarettes with images of thin and glamorous models, Philip Morris conveys the image that smoking will help girls to lose weight and look slimmer. Indeed, the very name, Virginia Slims, is suggestive.67

"Joe Camel" gives humorous dating tips and engages in activities such as motorcycle riding and water-skiing.68

Newport advertisements are sexually suggestive; their "Alive with

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66. Complaint ¶ 203-04, State v. Philip Morris, Inc., No. CV-96-0153440S (Conn. Sup. Ct. July 18, 1996). As a matter of fact, the Marlboro man is often not alone and the complaint's drafters perhaps did not consider the figure of the trail boss when constructing their somewhat idiosyncratic image of a cattle drive.

67. Id. ¶ 206. (Note to Attorneys General: Advertisers make widespread use of thin and glamorous models in the promotion of many products.).

68. Id. ¶ 203.
Pleasure" slogan offers children and adolescents "images to wear as badges of identity."69

Hollywood and the television media have conspired in a "stealth" campaign to corrupt minors viz. 1) a 1983 letter signed by Sylvester Stallone that guarantees his use of Brown & Williamson products in no less than five feature films in exchange for a fee of $500,000, and 2) the allegation that during the 1989 Marlboro Grand Prix, the Marlboro logo (on billboards, cars, etc.) could be seen for forty-six of the ninety-four total minutes of the event’s broadcast time.70

Sex sells, advertisers use thin and glamorous models, and advertisers appeal to our baser instincts to manipulate us into buying their product. Hollywood makes money by accepting fees for using advertisers' products in films. Car racing is plastered with advertising. None of this is new. None of this is illegal. E. B. White has noted that "[a]dvertisers . . . like the movies . . . infect the routine futility of our days with purposeful adventure. Their weapons are our weaknesses: fear, ambition, illness, pride, selfishness, desire, ignorance."71 Given these well-understood traits of that most manipulative of the commercial trades, virtually any advertising campaign can be deconstructed as some vast conspiracy to manipulate our psyches and separate ourselves from our money and good sense. As Robert Reich noted, speaking of the federal suit, "[i]f any agreement to mislead any segment of the public is a 'conspiracy' under RICO, then America's entire advertising industry is in deep trouble."72

The infantilization of smokers, by the device of the complaint's focus on minors and its underlying assumptions of manipulation, deception, and psychological needs, is striking and was deliberate.73 The effectiveness of a children's crusade as a public relations strategy is a concept apparently not confined to the Middle Ages.74

69. Id. ¶ 203.
70. Id. ¶¶ 212-13.
72. Reich, supra note 1, at 64.
73. The New Yorker article has noted that "Kessler's greatest contribution was to identify smoking as a 'pediatric disease,' thus making the fight a battle to save America's children." Boyer, supra note 22, at 58; The Council for Tobacco-Free Kids was established in 1996. SULLUM, supra note 5, at 252.
74. REGULATION BY LITIGATION, supra note 19, at 65-67 (statements of Dan Webb and Jacob Sullum) ("The statistics show that from 1975 to 1993, the policies aimed at discouraging children from smoking led to a forty percent per capita reduction. This campaign emphasized personal responsibility. After 1993 . . . [w]e now have an increase in teenage smoking in the United States."). Holman W. Jenkins, Jr., Let My Shareholders Go, WALL ST. J., Apr. 15, 1998, at A23, LEXIS, News Library, Wsj File ("[S]moking has increased a stunning 32% among teenagers, and 80% among black teenagers, in the last six years."). The effect of over-zealous anti-smoking initiatives has raised concerns in several quarters. Bob Herbert, Burning the Victim, N.Y. TIMES, Dec. 11, 1997, at A27. A discussion of this new cultural practice of infantilizing adolescents, and the law of unintended consequences, appears at Jonathan Rauch, Hey Kids! Don't Read This!, NAT'L J., July 10, 1999, LEXIS News Folder, Nijnl File.
3. Legal Theories and Defenses

Buried among all of this heightened rhetoric were just a few frail theories. The principal theories alleged were antitrust and unfair trade practices, both attractive causes of action for an attorney general because of the broad powers of enforcement conferred by the state antitrust and trade regulation statutes and regulations and because of their damage multipliers, including, significantly, attorneys’ fees.

The complaint in Connecticut, fairly read, failed to allege any antitrust injury. The antitrust laws are enacted to protect competition. Whatever effect the sale of cigarettes may have had on health care costs, those costs are not the subject of the antitrust laws. Courts have consistently rejected similar attempts by states to subsume unrelated torts into the matrix of the antitrust laws.

The Connecticut Unfair Trade Practices Act (CUTPA) counts were vulnerable on a number of grounds, including that they were unclearly pled, and subject to causation, contributory negligence and statute of limitation defenses. The recoupment claims were not recognized under longstanding Connecticut Supreme Court doctrines of remoteness. A CUTPA claim brought against the tobacco industry by union health and welfare trust funds on the same theories was recently dismissed by a Connecticut federal court for failure to state a claim.

This paper will not undertake to delineate every deficiency of every count of the complaint. Such an enterprise would require an article in itself, if not an entire issue of a law journal. In a recent comprehensive analysis of the states’ complaints nationwide, two scholars have made a detailed argument that not a single count stated a cause of action. These


76. Arizona v. Cook Paint & Varnish Co., 391 F. Supp. 962, 969-70 (D. Ariz. 1975), aff’d, 538 F.2d 231 (9th Cir. 1976); in re Multidistrict Vehicle Air Pollution, 367 F. Supp. 1298, 1304 (C.D. Cal. 1973), aff’d, 538 F. 2d 231 (9th Cir. 1976), the court stated:
Antitrust laws, since their first enactment in July 1889, have been considered a charter of Economic Liberty aimed at preserving free and unfettered competition—no more and no less. They are not intended—nor do they purport to be—a panacea to cure all the ills that befall our citizenry by the accident that some damage or injury may have been caused by a business enterprise.

Id. at 1304.


79. Noting that “the states had only one meritorious claim against the tobacco manufacturers, namely subrogation” those scholars note that “[t]he states’ complaints neglected their true remedy: subrogation.” Hanoosh Dagan & James J. White, Governments, Citizens, and Injurious Industries, 75 N.Y.U. L. Rev. 354, 373, 376, 382 (2000). In Connecticut, this subrogated products liability claim has
deficiencies were recognized by many, though not all, courts.\textsuperscript{80}

This paper instead argues the thesis that the complaint violated the separation of powers provision of Connecticut’s Constitution and presented a non-justiciable political question.

The complaint on its merits was a clear arrogation of legislative powers. Connecticut was an excellent forum to raise the serious question of separation of powers, justiciability and the point—so obvious to the scholars at the Brookings Institution\textsuperscript{81}—that under all the smoke and mirrors, taxation of an unpopular product was parading in the robes of a common law, trade regulation or antitrust claim. Connecticut’s Supreme Court has strong and contemporary case law affirming the doctrine of separation of powers and justiciability:

The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another. Just as the exercise of judicial power by the legislature is constitutionally prohibited, so is the legislative power forbidden to the judiciary. . . . The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights.\textsuperscript{82}

The \textit{Pellegrino} court held that a suit that would require it to rule on the adequacy of appropriations for the courts presented “a political question which could not be adjudicated by judicial authority without violating the principle of separation of powers.”\textsuperscript{83}

We must resist the temptation which this case affords to enhance our own constitutional authority by trespassing upon an area clearly reserved as the prerogative of a coordinate branch of gov-


\textsuperscript{81} Bulow & Klemperer, supra note 2, at 375.

\textsuperscript{82} Pellegrino v. O’Neill, 480 A.2d 476, 481 (Conn. 1984) (internal citations omitted).

\textsuperscript{83} Pellegrino, 480 A.2d at 479.
ernment.

That the votes of individual legislators should be subject to direct control by judicial decree, which would be necessary to implement a declaration that court congestion had resulted in a violation of the right to justice without delay, is a proposition we cannot accept. 84

Other states' high courts recognize that this fundamental principle of the state tripartite form of government prohibits courts from acting as a super-legislature—"[I]t is for the Legislature, and not the executive branch, to determine finally which social objectives or programs are worthy of pursuit." 85

Federal law was similarly favorable to the tobacco companies. The recoupment concept upon which the states' suits were based had been considered and rejected by the United States Supreme Court in United States v. Standard Oil Co. of California, 86 where the court was presented with an attempt by the federal government to recover the medical and other costs it incurred in providing care to a soldier hit by a truck owned by Standard Oil. The Court, by an 8-1 vote, recognized that such a novel recoupment theory is a question of federal fiscal policy that would require a congressional enactment. Given its relevance to this paper's subject, the separation of powers, the Supreme Court's reasoning on this point should be considered 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

84. Id. at 482-83.
86. 332 U.S. 301, 302 (1947).
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.87

The claims for relief in the Connecticut complaint underscored the point that the attorneys general filing this template complaint in state after state were engaged in lawmakers functions reserved to the legislature. The Connecticut ad damnum sought court-compelled corrective public education campaigns88 and orders that each tobacco company "fund tobacco products use cessation programs, including the provision of nicotine replacement therapy for dependent tobacco products users, administered and controlled by the State of Connecticut."89

Consider these last prayers for relief. The decision to engage state governmental resources in such public education or nicotine therapy campaigns surely should be made in the first instance by a legislature. No member of the executive branch, not even the governor—and certainly not a judge—can hale an industry before the court so that the State of Connecticut can engage in "nicotine replacement therapy for dependent tobacco products users" or a "public education campaign"—at that industry's cost without a law entitling him to do so.

The complaints' focus on advertising also implicates questions that are not well decided by courts without a predicate state law making such allegedly "manipulative" advertising, or advertising directed to minors, illegal. A legislature can weigh the competing interests of free expression, protection of minors, and constitutional limitations on restrictions on commercial speech, have open debate and then reach a consensus of elected representatives. One may not like product placement in Hollywood movies—or Joe Camel—but they are legal arrangements and expressions of commercial speech protected by state and federal constitutions.

Connecticut's Attorney General announced at the time the suit was filed that he would seek one billion dollars in health care costs. A judgment of this size would, necessarily, ultimately be paid out of higher prices charged by the tobacco industry to its customers.90 If it is the political will of the State of Connecticut to levy a one billion—or five and one-half billion—dollar tax on any industry selling a legal product, it has unlimited powers of taxation that would allow it to do so. And the state doesn't need to pay a twenty-five percent bounty to anyone to levy that revenue. And, most importantly, recognizing that the question of levying such an enor-

87. Id. at 314 (emphasis added).
89. Id. at ¶ A.4.
90. This is, of course, exactly what happened right after the MSA settlement was announced on Nov. 17, 1998. Barry Meier, Cigarette Makers Announce Large Price Rise, N.Y. TIMES, Nov. 24, 1998, at A20.
mous tax on a lawful industry is a legislative question, means that smokers, the people paying for all this largesse, are represented in the decision-making process.

In Pellegrino, the Supreme Court recognized its constitutional limitations even where the case dealt directly with the administration of justice in the courts, an area in which courts under Connecticut’s constitutional history typically have significant authority and leeway. The concurring opinion in Pellegrino recognized that “the tools with which a court can work, the data which it can fairly appraise, the conclusions which it can reach as a basis for entering judgments, have limits.” The question of the future of tobacco use and whether it should be regulated involves an important philosophical debate (personal responsibility vs. corporate regulation), complex calculations of the actual cost, if any, imposed upon governments or health insurers, and the historic fact that states, including Connecticut, have supported and even subsidized tobacco farming and already profit greatly from its taxation. These obviously policy-making issues brought before the court in Connecticut and nationwide are matters best determined with legislative oversight, approval and judgment. Or, as the Pellegrino court put it: “The answer must lie in the hearts and minds of the legislators, who are sworn to support the state as well as the federal constitution and to discharge their duties to the best of their abilities . . . More fundamentally, it must rest with the people who elect them.”

Separation of powers and justiciability doctrines have successfully been used to decisively resolve claims in Connecticut trial courts. Indeed, just a year after the tobacco litigation settled, a fellow member of the Connecticut bench sitting on the complex litigation docket dismissed a gun suit brought by the City of Bridgeport in a decision that expressly invoked the doctrines of remoteness and justiciability.

Standing . . . is a practical concept designed to insure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests.

[T]he plaintiffs’ claims are too remote to be cognizable at law . . . .

91. Pellegrino v. O’Neill, 480 A.2d 476, 485 (Conn. 1984) (Healy, J., concurring). The inadequacy of courts to deal with these social issues and the inefficiency and lack of transparency of resorting to them for regulatory purposes has been noted by Robert Reich: “Judges don’t have large expert staffs for research and analyses, which regulatory agencies possess. And when plaintiffs and defendants settle . . . we can’t always be sure the public interest is being served.” Robert Reich, Regulation Is Out, Litigation Is In, USA TODAY, Feb. 11, 1999, at 15A, LEXIS, News Library, Usatoday File.


93. Pellegrino, 480 A.2d at 484 (internal citation omitted).

Connecticut . . . was instrumental in the recognition of this [common law] principle [of remoteness.] . . . In advance of their unusual theories supporting this litigation, the plaintiffs draw inspiration if not precedent from the “tobacco” cases.

. . . .

The tobacco litigation, by the states, has not succeeded in eradicating the rules of law on proximate cause, remoteness of damages and limits on justiciability.

. . . .

When conceiving the complaint in this case, the plaintiffs must have envisioned such settlements as the dawning of a new age of litigation during which the gun industry, liquor industry and purveyors of “junk” food would follow the tobacco industry in reimbursing government expenditures and submitting to judicial regulation. 95

Furthermore, both the state and the tobacco companies were fortunate in the judge assigned to them in Connecticut, from whom they could expect a fair and careful hearing. The judge, Michael Sheldon, was and is held in very high esteem as a jurist who took these issues most seriously and was by training, background, and experience especially attuned to the need to protect the constitutional and legal rights of unpopular defendants.

In addition to these favorable state and federal precedents, the 1996 majority opinion in BMW of North America, Inc. v. Gore 96 contained some very useful holdings for the tobacco industry, namely:

[P]rinciples of state sovereignty and comity [dictate] that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors’ lawful conduct in other States. . . . [T]he economic penalties that a State . . . inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State’s interest in protecting its own consumers and economy.

Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it oc-

95. Ganim v. Smith & Wesson Corp., 26 Conn. L. Rptr. 39, 40-41 (Conn. Super. Ct. Dec. 10, 1999) (emphasis added). The City of Bridgeport was denied standing to sue the gun industry. The case was in a significantly different posture than the tobacco suit in that municipalities, unlike states, do not have parens patriae authority and other broad enforcement powers conferred under the state antitrust and consumer protection statutes.
curred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.

Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of that severity of the penalty that a State may impose.97

These holdings clearly address some of the many other legal doctrines implicated by this mass litigation, including concepts of federalism98 the conceptual and territorial limits of a state’s regulatory power,99 and the Commerce Clause. Lastly, with respect to the states that passed statutes retroactively abolishing defenses, creating new standards of proof for old causes of action, or nullifying statutes of limitation or repose, the governmental actions implicate several constitutional doctrines, including due process and/or equal protection concerns.

These legal doctrines were forcefully invoked by the trial court in City of Cincinnati v. Beretta U.S.A., Corp.100 when it dismissed the suit brought by the City against the gun industry:

[T]he City’s complaint is an improper attempt to have this Court substitute its judgment for that of the legislature, something which this Court is neither inclined nor empowered to do. Only the legislature has the power to engage in the type of regulation which is being sought by the City here. Moreover, the City’s request that this Court abate or enjoin the defendant’s lawful sale and distribution of their products outside the City of Cincinnati exceeds the scope of its municipal powers and, to the extent it asks this Court to regulate commercial conduct lawful in other states, violates the

97. Id. at 572-74.
98. From McCulloch v. Maryland, 17 U.S. 316, 368 (1819), to Bonaparte v. Tax Court, 104 U.S. 592 (1881), and to BMW, 517 U.S. 559 (1996), the United States Supreme Court has recognized that “[n]o State can regulate except with reference to its own jurisdictions.” 517 U.S. at 571.
99. Jeremy Bulow’s and Paul Klemperer’s astute analysis of the proposed federal settlement and the actual settlement agreements entered into separately by four states observes that the settlements with the individual states are “collusive agreements that effectively impose federal excise taxes for the exclusive benefit of one plaintiff [state] which ‘set very dangerous preadents.’” Bulow and Klemperer, supra note 2, at 326. Professor Ian Ayres has opined that this extraterritorial regulation of liquor is “the most compelling reason why the settlement might be struck down” if it ever was judicially scrutinized. Ian Ayres, Comment to The Tobacco Deal by Jeremy Bulow and Paul Klemperer, BROOKING PAPERS ON ECON. ACTIVITY, Nov. 1998, at 401-02.
IV. THE FEDERAL SUITS

Federal tobacco litigation has proceeded on two fronts. Both quite boldly involved "open and notorious" circumvention of Congress.102

A. FDA Regulation of the Tobacco Industry

In 1995, the FDA reversed its long-standing view that it could not regulate tobacco absent new legislation empowering it to do so, and stated its intent to regulate tobacco despite the failure of six attempts to pass legislation empowering it to regulate the industry. Its 1996 "Regulation Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents"103 was challenged in court and the district court upheld the FDA's regulation in part.104 The Fourth Circuit, in a divided panel, reversed, citing the clear "extrinsic evidence" that Congress specifically declined to grant the FDA the jurisdiction it was newly asserting before the judicial branch.105 The Supreme Court affirmed in a 5-4 decision written by Justice O'Connor that focussed on the unambiguous legislative history precluding the FDA from asserting jurisdiction over tobacco products.106

B. The Federal Recoupmment and RICO Suit

In his 1999 State of the Union address, President Clinton announced his administration's impending recoupmment lawsuit against the tobacco industry seeking "hundreds of billions" of federal funds expended under Medicare and other programs.107 This lawsuit was filed despite earlier testimony from Attorney General Janet Reno that the federal government lacked jurisdiction to bring such a recoupmment claim.108 By May 5, 1999,

101. City of Cincinnati, 1999 LEXIS 27, at *4-5 (internal citation omitted).
103. 21 C.F.R. pts. 801, 803, 804, 807, 820, 897 (1997)
108. "What we . . . determined was that it was the state's cause of action and that we needed to work with the states, that the federal government does not have an independent cause of action." U.S. Senate Comm. On the Judiciary Holds Hearings on Justice Dept's Operations, 105 Cong. 72 (1997) (statement of U.S. Attorney General Janet Reno), 1997 WL 210888; see also U.S. House of Representatives Comm. on Commerce Holds Hearings on the Tobacco Settlement, 105 Cong. 39 (1997) 1997 WL 16138815 (testimony of Mississippi Attorney General Mike Moore that the Justice Department had refused "to file a lawsuit on behalf of Medicare . . . [because] the Justice Department and others felt that they did not have a . . . cause of action under the federal statutory framework.").
Attorney General Reno informed the Senate that she had found a basis for a federal recoupment action.\textsuperscript{109} At the time of the federal lawsuit, the administration had already failed in its effort to secure statutory funding for the lawsuit.\textsuperscript{110}

One scholar has done a detailed analysis of the federal claim brought in 1999, noting that "[i]t required Justice Department attorneys to reverse-engineer from a public claim of damages to a theory that would justify such damages while avoiding the need for new legislation."\textsuperscript{111} That analysis carefully reviews the Supreme Court's holding in \textit{Standard Oil} discussed above and concludes that the "only difference between the recent federal tobacco filing and the failed effort at circumvention in \textit{Standard Oil} is the current administration's pretense of a statutory basis."\textsuperscript{112}

For purposes of this paper it is sufficient to note that the federal court dismissed each of the statutory bases advanced by the Justice Department under the Medical Care Recovery Act ("MCRA") and the Medicare Secondary Payer ("MSP") provisions.\textsuperscript{113} A legitimate question exists whether Congress ever intended for RICO to be used in this fashion.

V. ENTREPRENEURIAL LITIGATION/RATIONAL IGNORANCE

In a forthcoming paper, Michael DeBow argues that these suits constitute governmental "entrepreneurial litigation," a concept borrowed from the debate over class action litigation.\textsuperscript{114} The term describes a weak lawsuit with a low probability of success \textit{ex ante} filed in the expectation of extracting a quick, lucrative settlement. He argues that except in the three states where the legislatures statutorily abolished defenses, the attorneys general were facing the long shot of asking the state judges to legislate a

\textsuperscript{109} U.S. Senate Comm. on the Judiciary Holds Hearings on Justice Dep't Oversight, 106 Cong. (1999), 1999 WL 273291 (statement of Attorney General Janet Reno "that there were viable bases for the Department to pursue recovery of the federal government's tobacco-related . . . litigation team, housed in the Civil Division, to pursue recovery of these costs.").

\textsuperscript{110} Congress had also by this time barred the federal government from claiming any part of the state settlements, even though the regulatory rules under Medicare requires that the federal share of funds received by the state in subrogation be repaid to the federal government. Sandra Torry & Helen Dewar, \textit{Possible Tobacco Suit Clears Hurdle}, WSAT. POST., July 23, 1999, at A10. At law, at the time of settlement, the Federal Government was entitled to $135.3 billion from the states, fifty-five percent of the $246 billion recovery. \textit{As State Awaits Tobacco Cash, Spending Fight Could Get Bitter-Ugly}, CONN. POST, Dec. 5, 1998, at A3 [hereinafter \textit{State Awaits Tobacco Cash}].

\textsuperscript{111} Turley, supra note 102, at 458-59.

\textsuperscript{112} Id. at 460.


\textsuperscript{114} Michael E. DeBow, \textit{The State Tobacco Litigation and Separation of Powers in State Governments: Repairing the Damage}, 31 SETON HALL L. REV. (forthcoming 2001). Pringle captures the nature of the enterprise when he noted that "[t]he greatest tort prize of all time—the treasures of Big Tobacco—suddenly seemed to be within the grasp of these risk capitalists of adversity." PRINGLE, supra note 16, at 4-5.
major change in state common law and ignore their own binding supreme court precedents.

The concept fits. The entrepreneurial nature of these suits is best exposed when one examines how they are financed and the fact that they always settle. The attorneys general in many states required the contingency fee law firms to put up capital even to be considered for the position of contingency fee counsel. This meant that, for a fee, the contingency fee lawyers could borrow the state’s statutory, parens patriae, police and common law enforcement powers, and then settle on the eve of trial and run no risk of an adverse outcome or a win that might be reversed on appeal. With counsel and, in some cases, Blue Cross organizations financing the litigation, the state had very low risk and little or no political exposure.115 Professor G. Robert Blakey, a RICO consultant engaged by the Department of Justice to plan the federal tobacco lawsuit, has frankly admitted, “this case is not made to win, it’s made to settle.”116 Both the state and its financiers are thus in a position to reap enormous rewards with no risk of judicial precedents that would stem the tide of other, like initiatives against firearms or other industries.

The key to understanding why the rewards will be so munificent is that the plaintiff is the state. One economist has noted that “rationality manifests itself differently when the plaintiff is the state rather than a private party . . . litigation [is] nearly a free good” to an attorney general.117 This point is doubly underscored when one understands how the Connecticut litigation was financed. A state is a subsidized political plaintiff, driven by interest groups and ideology and its officers’ political ambitions; it can afford to bring a weak case and pursue it more vigorously than could any private plaintiff.118 Further, the arsenal of remedies at its disposal—consent decrees, injunctive relief, enforcement powers available under its consumer protection, trade practices and antitrust statutes—are simply not available to a private tort plaintiff. This would explain, at least in part, why the Connecticut action, which only sought one billion dollars in damages was settled for $5.5 billion, a good day’s work for its Attorney General, but a good deal less than the attorneys’ fees alone awarded to the Texas and Florida contingency fee counsel.

DeBow’s paper also sheds insight on the compelling question of why

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118. Id. (“When the state takes over, the operation of partisan interests and ideologies must be taken into account, as must indifference to the costs of litigation . . . a zealous plaintiff will be less inhibited than a risk-neutral plaintiff . . . [and] will act as if the odds of success are higher than an objective, risk-neutral appraisal would show them to be.”)
the state legislatures did not just levy taxes to bring in this revenue. The concept is known as “rational ignorance” in the economic literature and it posits that “legislators who could not safely vote for a cigarette tax increase could safely vote for a statute [authorizing a lawsuit] that would have the same effect . . . precisely because the details” of the lawsuits, contingency contracts, abolition of defenses, settlements “would be too confusing for most voters to follow.”119 In states such as Connecticut, legislators did not have to act at all. In a 1999 speech given to the Antitrust Section of the ABA, Bulow noted that “the lack of transparency is key to paying the lawyers so well since there would be a tremendous hue and cry about literally paying [the lawyers] a percentage for getting a tax increase passed.”120 Bulow and Klemperer also note that more thoughtfully designed taxes, such as ad valorem taxes, would be better suited to combat youth smoking.121 Right now, smokers in Connecticut are being taxed by the settlement of a lawsuit and the political decisions underlying that tax and the destination of all that money—the largest price increase ever in the cost of cigarettes122—are utterly opaque to them.

One of the goals of this paper—which is consciously a mix of legal analysis and reportage—is to try to bring some transparency to these proceedings which have enormous economic effects on a public that is largely unaware of, and therefore indifferent to, them.

VI. THE PROPOSED FEDERAL SETTLEMENT

On June 20, 1997, a comprehensive settlement was announced under the terms of which the tobacco companies would pay $368.5 billion over twenty-five years, concede to the FDA’s jurisdiction over tobacco products, and accept severe restrictions on their advertising. The money would be used to pay the state’s costs of litigation, enforcement costs, fund various tobacco-control efforts, including smoking cessation programs, a $500 million per year anti-smoking ad campaign and require prominent warning labels such as “Smoking can kill you.” The tobacco companies committed to plans to achieve sharp reductions in underage smoking, under the threat of high fines, and they also promised to back federal legislation banning smoking in most non-residential buildings.

In exchange, the companies would be released from forty state Medicaid lawsuits and some of the private litigation, including class actions filed by the Castano Group and other consortia of firms. Individual law-

119. DeBow, supra note 51.
121. Bulow & Klemperer, supra note 2, at 325.
122. See Barry Meier, Cigarette Makers Announce Large Price Raise, N.Y. TIMES, Nov. 24, 1998 at A20 (noting that cigarette prices would be raised forty-five cents per pack to pay for the settlement).
suits would have limits on liability that eliminated punitive damages for past conduct, banning future class actions and capping their yearly payments.\textsuperscript{123}

The federal settlement fell apart. No one factor seems to have been responsible. The very breadth of its aims, the fact that key interests were not represented in the negotiations, the atmosphere of mutual distrust and suspicion, made a collapse under its own weight inevitable. Two scholars have noted that surprisingly “[t]he identity of the persons who were to receive the lion’s share of the money was not clear,”\textsuperscript{124} (attorneys’ fees excepted). The defeat of the federal settlement came within one week of the Senate’s approval of an amendment that would have capped contingency fees at $4,000 per hour.\textsuperscript{125} Furthermore the prohibitions on class actions and punitive damages and the restriction on “addiction” claims would have stifled civil litigation by parties who were not represented at the bargaining table. Again, language was on fire. Former head of the Food and Drug Administration, David Kessler, a key player in the negotiations, said at this point:

I don’t want to live in peace with these guys. If they cared at all for the public health, they wouldn’t be in this business in the first place. All this talk about it being a legal business is euphemism. They sell a deadly, addictive product. There’s no reason to allow them to conduct business as usual.\textsuperscript{126}

Said Senate Majority Leader Trent Lott (R. Miss.): “The Senate, in its unique way, has not reached a consensus here.”\textsuperscript{127} The tobacco companies were trying to buy peace, something that they could not have, at any price.\textsuperscript{128} One commentator, telling the story from the trial lawyer’s point of view, admitted, “it has become clear that the legal system had reached its


\textsuperscript{124} Dagan & White, supra note 29, at 365.

\textsuperscript{125} Anti-tobacco groups claimed that the fee cap would discourage plaintiff’s lawyers from taking on new tobacco cases in the future. \textit{Senate Stops Work on McCain Tobacco Bill}, MEALEY’S LITIGATION REPORT: TOBACCO, June 18, 1998, LEXIS, News Library, Meatob File. The contingency fee lawyers ultimately received far in excess of this fee cap; Texas contingency fee counsel’s fees were expected to exceed $90,000 per hour. David E. Rosenbaum, \textit{Senate Approves Limiting Fees Lawyers Get in Tobacco Cases}, N.Y. TIMES, June 17, 1998, at A1.

\textsuperscript{126} Jeffrey Goldberg, \textit{Big Tobacco’s Endgame}, N.Y. TIMES, June 21, 1998, § 6 (Magazine), at 41.

\textsuperscript{127} 144 CONG. REC. S6475 (daily ed. June 17, 1998) (statement of Sen. Lott). Senator Lott made this statement regarding tobacco legislation that was about to be defeated on the Senate floor.

\textsuperscript{128} One academic commentator has made the interesting argument that the failure of the federal settlement was the predictable outcome of public choice theory. Samford, supra note 123, at 846. Samford correctly observes that on the national level the settlement had become “a rambling legislative blunder with too many objectives, too many formulas, too many regulations, and too many opponents.” \textit{Id.} at 890. He notes that the secret to the successful settlements at the state level was that many directly affected parties were not represented. \textit{Id.} at 891.
limits in the tobacco wars.”

VII. THE ECONOMIC LEGACY: THE SETTLEMENT WITH THE STATES

A. Master Settlement Agreement: License in Restraint of Trade

1. Background

In 1997 and 1998, the tobacco companies settled with four states who were approaching trial under agreements valued at around $40 billion. This was followed in late 1998 by a Master Settlement Agreement ("MSA") wherein forty-six states entered into a massive $206 billion settlement agreement with the tobacco companies. In addition, the tobacco companies agreed to contribute $1.5 billion to an anti-smoking "education and advertising campaign" and $250 million "for a foundation dedicated to reducing teen smoking." These agreements which total $246 billion are reported to represent the largest privately negotiated redistribution of wealth in world history. MSA further obligates the tobacco companies to pay the private practice attorneys hired by the settling states what has been variously estimated at $8 to $10 billion in net present value. Each state's legislature must pass a "Qualifying Statute" to be eligible for the "damage" payments. The agreement could not be fully implemented until courts in eighty percent of the states "in number and aggregate damages" had approved the settlement. The most significant difference between the settlement with the states and the 1997 federal settlement is that the MSA confers no protections on the tobacco companies from suits by smokers.

The Master Settlement Agreement and the accompanying agreements by the four separate states are certainly a vindication of public choice theory. If "[i]n the public choice/tobacco settlement context, the resource most coveted is a favorable governmental policy—a framework of ground rules—by which interest groups may then conduct their routine business and make strategic organizational decisions," then the Master Settlement Agreement is a resounding success—"for the tobacco companies."

2. Some Constitutional Observations

Several features of the MSA raise compelling constitutional concerns that are not reported in the press at all or otherwise are not generally known or understood. First, the MSA punishes states that refuse to join (or drop out of) the MSA. Although consumers in any state that refuses to join the MSA must nevertheless pay collusively raised tobacco prices, their state

132. Samford, supra note 123, at 855.
receives no "damage" payments. Moreover, if a state court invalidates the Qualifying Statute because it is illegal or unconstitutional, that state's "damages" payments can be reduced by up to sixty-five percent.133 Second, the MSA prohibits many types of advertising for tobacco products.134 Third, the MSA creates a $50 million enforcement fund for use by the state attorneys general through the National Association of Attorney Generals (NAAG) to police nonparticipating tobacco companies or to defend against challenges to the MSA scheme.135 Fourth, the MSA prohibits the sale of assets or products by participating tobacco companies to tobacco companies that do not sign the MSA.136 Fifth, the MSA imposes a complex scheme involving penalties and mandatory "damage" payments levied on non-settling tobacco companies and new market entrants.137

Setting aside the rather glaring antitrust issues raised by these and other provisions, these things seem, well, un-American. Penalizing a state by taking away "damages" that it is allegedly entitled to receive for providing health care for its indigents because that state's courts interpret the law in a way that is not agreeable to the MSA drafters is, to this reader, an unheard-of innovation in political design. It directly implicates the integrity of judicial review, both because it tries to predetermine the penalties that arise from a judicial ruling,138 and because it puts such an excessive fine on the exercise of that judicial discretion, a fine borne by the citizens of the state. One cannot imagine a legislature getting away with a rider on a bill that imposed such consequences upon judicial review, and that is a law-making body, unlike any of the signatories to the MSA.

The restrictions on First Amendment expression and rights of association imposed by the MSA are similarly unsettling and its clear national regulation of the tobacco industry, including the industry-funded NAAG national enforcement scheme, is extraconstitutional.139 Because the MSA

133. MSA, supra note 130, §§ IX(d)(2)(B), (E) & (F).
134. Id. § III.
135. Id. § VIII(c). Mike DeBow has argued that these actions by the attorneys general, "cut loose from any statutory mooring," strongly resemble Justice Cardozo's "roving commission to inquire into evils and then, upon discovering them, correct them." DeBow, supra note 51, at 32 (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring)). This attribute has been given some permanency by the MSA's $50 million funded NAAG enforcement bureau.
136. MSA § XVIII(c).
137. MSA, supra note 130, Exhibit T.
138. The MSA's drafters exhibit some considerable optimism about the residual force of their contract when they assume that a court that has found this scheme illegal or unconstitutional will agree that a reduction of payments to the state in which that court sits to thirty-five percent of the amount otherwise to be paid is the appropriate consequence of the MSA's illegality.
139. See O'Brien, supra note 3, at 1. One legal consequence of the settlement was that settlement liability might not survive bankruptcy of the current manufacturers the way a more direct and legally straightforward tax liability would. O'Brien's analysis asserts that the MSA has, by agreement among the states, "created a new bankruptcy system for tobacco companies despite Congress's enumerated power in that area." Id. at 9. Noting that the $206 billion settlement liability exceeded the fair valua-
and the separate state settlements base payments on national sales, Connecticut has in effect imposed a tax on cigarettes manufactured in North Carolina and sold in Maine—taxes levied in most states by the stroke of an attorney general’s signature, not by the deliberative process of state legislative taxation, which incidentally could never tax such sales outside its borders. The fact that smokers are taxed for all this largesse implicates another old-fashioned concept—taxation without representation. Granted, as to the constitutional issues with respect to the settling tobacco companies, they voluntarily signed the agreements and thus could voluntarily waive their constitutional rights—albeit under the government’s boot. But these restrictions also plainly implicate the rights of non-signatories to the deal, such as non-participating companies and new entrants, and surely raise some doubts about the power of Attorneys General and defendant tobacco companies to either enact or enforce these restrictions. The enormous penalties and restrictions imposed upon these entities—who never engaged in any of the misleading behavior alleged against “Big Tobacco”—also exposes the fiction that these are not “damage” payments tied to past tortious behavior but are instead current taxes and penalties imposed upon guilty and innocent parties alike without distinction.

In one of the most in-depth studies of the MSA to date, Thomas O’Brien presents a compellingly argued case that the integrally interstate nature of the MSA and its obstruction or regulation of such interstate commerce violates the Commerce Clause, art. I, sec. 8, which grants such power solely to Congress. He further argues that the MSA violates the Compacts Clause of the Constitution which provides “[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State.”

3. Anticompetitiveness

Economists and legal analysts have written extensively on the anti-competitive effects of the MSA and the four state settlements. They have leveled pointed criticisms at the provisions of the MSA that create high barriers to entry, that entrench the current market shares of the settling tobacco companies, and that eliminate price competition and facilitate price

140. See id. at 8-10.
fixing among the settling tobacco companies.\textsuperscript{142} In 1998, two economists with the Brookings Institution Panel on Microeconomic Activity examined the antitrust implications of the proposed federal settlement of the tobacco litigation and concluded that the proposed federal resolution facilitated collusion among the existing tobacco companies to raise prices, erected barriers to entry, and thereby set dangerous precedents. They conclude, "[o]nly consumers, in whose name class action suits were filed, would lose out."\textsuperscript{143} Another observer notes:

The word for this process is \textit{cartelization}, and the irony is that had cigarette executives met privately among themselves to raise prices, freeze market shares, confine small competitors to minor allocations on the fringe of the market, and penalize defectors and new entrants, they could have been sent to prison as antitrust violators—a quite possibly by the same attorneys general who sued them . . . . This way it’s all legal.\textsuperscript{144}

The consensus of the academic commentators who have analyzed the MSA and the four separate settlement agreements is that they pose serious antitrust concerns and are anticompetitive in their effects.

O’Brien concludes that the MSA—a document he aptly describes as of “maddening complexity” —“is essentially a contract for the purchase by the tobacco companies of a license to restrain trade.”\textsuperscript{145} The purchase price is the nearly quarter of a trillion dollars of “damages” and attorneys’ fees paid by the tobacco companies to the states and their contingency fee lawyers.\textsuperscript{146}

The settling tobacco companies have purchased, with smoker’s money, permission to raise prices collusively and suppress competition. In return for not enforcing the antitrust laws, the states receive a new source of revenue which is essentially the same as a national excise tax but without the budgetary and fiscal controls applicable to taxes. The people who devised that scheme—namely the states’ contingency fee lawyers—have become multimillionaires and, in a few cases, billionaires through payment to them of “fees” collected from smokers. The problem that lies at the root of all this—namely sick smokers—has simply been forgotten. They receive virtually nothing of value from the settlement and are

\textsuperscript{142} Michael I. Krauss, \textit{Fire and Smoke: Governments, Lawsuits, and the Rule of Law} 29 (2000); Dagan & White, supra note 29, at 381; Bulow & Klemperer, supra note 2, at 374; O’Brien, supra note 3; Thomas C. O’Brien & Robert A. Levy, \textit{A Tobacco Cartel Is Born, Paid for by Smokers}, WALL ST. J. May 1, 2000, at A35; Olson, supra note 41.

\textsuperscript{143} Bulow & Klemperer, supra note 2, at 323.

\textsuperscript{144} Walter Olson, \textit{Puff the Magic Settlement}, REASON, Jan. 2000, at 64.

\textsuperscript{145} O’Brien, supra note 3.

\textsuperscript{146} Id.
forced to pay for the whole thing.\textsuperscript{147}

Dagan and White see the cartelization effect of the MSA as a prime motivating factor for the companies to settle; they call the MSA's barriers to entry "diabolically clever" and predict that "the new entrant tax and non-participating manufacturers' reduction will effectively exclude new entrants."\textsuperscript{148} Michael Krauss believes that the "best explanation for the tobacco settlement" is that "the states have become complicit in this price fixing in exchange for an increased share of the booty."\textsuperscript{149}

The most astonishing thing of this most astonishing saga is that neither the states nor the tobacco companies could have been blind to the antitrust implications of their settlement. Bulow and Klemperer report that the 1997 proposed federal settlement included a provision in the "Resolution" that would have given the deal antitrust immunity. The FTC strongly objected to the provision.\textsuperscript{150} Given that the attorneys general serve as their states' chief antitrust enforcement officers and have close familiarity with the antitrust laws, one can only conclude that this evasion of the antitrust statutes was a conscious decision by both sides or a serious oversight by the attorneys general.\textsuperscript{151} Indeed, an enterprising scholar could undertake a case study of how these lengthy negotiations between these law enforcers and their targets, the leading tobacco companies, led to such a bald and undisputedly anticompetitive document and thereby contribute a gem to the study of both law and economics.

We are certainly in a brave new world of law when an attorney general, exercising his or her powers under the antitrust laws in a complaint that utterly fails to state an antitrust injury, settles these claims by a MSA that itself is quite arguably a \textit{per se} violation of the antitrust laws but for state participation, and a violation in which he or she is complicit—as signatory. The MSA may ultimately be determined to fall within the Noerr-Pennington or state action exceptions to the antitrust laws. Its defenders have so far successfully been able to assert these defenses in the few court challenges that have been mounted.\textsuperscript{152} But a \textit{much more} important and unanswered question is: Do we want as a society for the tobacco industry to be immune from our antitrust laws? If so, what legislative or policy-making body should make this decision? To put the latter question in its

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{147} \textit{Id.}
\item \textsuperscript{148} Dagan & White, \textit{supra}, note 29, at 381-82.
\item \textsuperscript{149} KRAUSS, \textit{supra} note 141, at 29.
\item \textsuperscript{150} \textsc{Fed. Trade Comm'n, Competition and the Financial Impact of the Proposed Tobacco Industry Settlement (1997)}, available at http://www.ftc.gov/reports/tobacco/ndoc95.pdf (last visited April 7, 2001).
\item \textsuperscript{151} The tobacco companies set forth a detailed analysis of the numerous aspects of the federal settlement that violated the antitrust laws and presented arguments of why the settlement required limited antitrust protection. O'Brien, \textit{supra} note 3.
\item \textsuperscript{152} \textit{See infra} notes 167 and 219 and accompanying text.
\end{enumerate}
\end{footnotesize}
most interesting form, can forty or even fifty state attorneys general whose acts are later endorsed by forty or even fifty state legislatures grant an effective exemption from the Sherman Act to one industry for its national sales in interstate commerce? By examining this policy question at this higher level of generality, I will argue that the MSA, the end result of this concerted state action, bears the predictable and dubious DNA of law made in the course of an end-run around state and federal legislatures.

4. Some State and Federal Constitutional Observations

This paper does not presume to do more than summarize these important antitrust concerns, best articulated when Jeremy Bulow spoke to the Antitrust Section of the ABA and said "it hardly seems possible that such an arrangement could stand legal scrutiny." But I do have some thoughts about how constitutional assignment of powers to separate branches of government bears upon this antitrust question.

Professor Ian Ayres issued a comment on the Bulow and Klemperer study, noting that "[i]f such shenanigans do not violate federal law, we're in a lot of trouble," and reaching "the extremely tentative thesis" that the state cigarette settlements "are not clearly illegal." Professor Ayres identifies three principal rationales as to why the settlements might be illegal: nonlegislated taxation, extraterritorial taxation, and cartelization. As to the non-legislated taxation rationale, he argues that since "the power of taxation is a matter of state constitutional law, and a state could repeal a constitutional restriction (if it currently has one) requiring the legislature to impose all taxes," this rationale might not be sufficient.

Certainly, at a very high level of generality, a state can change its constitution and grant taxing authority to its attorney general. However, at present in Connecticut, the power to tax rests in the legislature alone, and a state constitutional amendment is a major and protracted procedure requiring a supermajority three-fourths vote of the legislature that must then submit the proposed amendment to the electorate at the next general election.

Professor Ayres also makes the interesting argument that there could be a question "of whether this settlement constitutes a tax or a fee," noting that "[e]ven though there is some basis at the federal level for thinking taxes are a matter solely for the legislature, courts have narrowly defined

153. Bulow, supra note 120.
155. Id. at 398.
156. Id.
158. CONN. CONST. art. VI.
what constitutes a ‘tax.’”\textsuperscript{159} He cites a 1974 Supreme Court FCC case that stated that while “taxation is a legislative function . . . fee . . . is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station.”\textsuperscript{160} Certainly, analytically speaking, the settlement looks like a fee paid in order to continue doing business in a newly cartelized form. The economic commentators specifically identify this “fee” aspect when they argue that the tobacco companies have purchased a license to restrain trade from the various states.\textsuperscript{161}

I think this distinction between taxes and fees is not likely to save the day for the MSA for two important reasons. While a $246 billion payment in perpetuity is, to put it mildly, an unusually large licensing fee, its size is not the problem. The settlement, to quote MIT Professor John Gruber, “[i]s a tax because it’s a set of payments made by tobacco companies that depend on how many packs they sell;” in short, it looks like a tax and quacks like a tax.\textsuperscript{162} Furthermore, the states extracting these sums have never made any pretense that the settlement payments were fees, or called them fees, nor did they follow any state statutory mandate or procedures for levying such fees. And more fatally, at least in Connecticut, state law provides that only the legislature can levy taxes or set fees. In \textit{Adams v. Rubinow}, the Connecticut Supreme Court held that a statute transferring the power to set probate court fees from the legislature to the probate court administrator “clearly constitutes an unconstitutional attempt by the General Assembly . . . to impose legislative powers and duties on the probate court administrator.”\textsuperscript{163}

Professor Ayres also relies on the consent of the payor as a “substitute for the political check,” noting, however, in a footnote that “[o]f course, if the incidence of the settlement will largely fall on consumers, the question arises whether the companies’ consent is sufficient.”\textsuperscript{164} This is, of course, the central question and at least from a functional, economic standpoint, the consumers can make a compelling case that they have been and are being taxed without representation in this process.

Professor Ayres sees the extraterritorial tax liabilities as the “strongest grounds for attacking the state settlements.”\textsuperscript{165} I agree with him that the biggest hurdle is whether this question will ever reach a competent court.

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\textsuperscript{159} Ayres, \textit{supra} note 99, at 398.
\textsuperscript{161} O'Brien, \textit{supra} note 3, at 2.
\textsuperscript{163} 157 Conn. 150, 175, 251 A.2d 49, 65 (1968).
\textsuperscript{164} Ayres, \textit{supra} note 99, at 399.
\textsuperscript{165} Id. at 402.
\end{flushleft}
Noting that it is "not . . . surprising that (to my knowledge) no court has to date been presented with this substantive issue," he identifies problems of standing and the problem of getting a disinterested determination of either standing or the underlying substantive question from a state court that faces the penalty of such a huge loss of revenue if it rules the MSA is illegal or unconstitutional. This is precisely why this paper first identified the penalty on judicial review as perhaps the most constitutionally troubling feature of what is a very constitutionally troubling MSA.

In fact, standing law in Connecticut would permit various classes of potential challengers to raise such a challenge and the Supreme Court holding in *BMW v. Gore*, directly addresses extraterritorial regulation. The central problem is: What judge—state or federal—wants to invalidate a settlement agreement signed by fifty attorneys general, apparently entered as a court order in some states, endorsed by at least forty state legislatures that have enacted some form of the Qualifying Statute, and thereby reduce his state’s treasury by billions—and, incidentally, by so doing throw his court’s doors and other states’ court doors open to resumed litigation; the breadth of which is and was utterly unprecedented in American history? Unfortunately, Ayres may be right to “not put great faith in state tribunals being able to make a disinterested determination of either this standing question or the underlying substantive issue.” The “Byzantine structure” and “maddening complexity” of the MSA are further impediments to such review.

The MSA has so far successfully been immune from challenges under the Sherman Act because of the “state action” exception and/or the Noerr-Pennington immunity doctrines. However, the “state action” immunity cases involve passage of a statute by a legislature that clearly articulates a state policy that is anticompetitive in effect. Attorneys general, who are members of the executive branch and therefore not lawmakers, signed the MSA. Whether the states’ later adoption of the Qualifying Statutes—especially considering the financial penalty for not passing the statute and the obscenity of its legal and economic consequences—is sufficient to move these deals into the state action exemption is, of course, the $246 billion question. At least twenty percent of the states appear to have no legislative approval for this settlement.

Ayres identifies the “only realistic hope of voiding the state settlements on antitrust grounds” is to convince a court that the states are “commercial participants” in the antitrust conspiracy, who participated “in the market by claiming its share of the oligopoly profits.” I would agree with Ayres

166. *Id.* at 402.
169. *Id.* at 405.
that a court is unlikely to find that this exception applies, less for the reasons of standing and jurisdiction given by Ayres, than simply a visceral aversion to taking this jaundiced view of the sovereign states. And yet the states are very much co-partners in this uncompetitive activity, so much so that many states enacted legislation to protect the tobacco companies from bond posting requirements that would have had a ruinous impact on the industry—and its cash-flow to the states under the settlement.\footnote{170}

The persistently troubling aspect of all this is that, \textit{ex ante}, any one of the states could have just passed a cigarette tax increase that could have yielded a sum comparable to that now dangled before it by the MSA. Now, however, a renegade state cannot use its traditional taxing authority to tax cigarettes without raising prices within its borders to a degree that is likely to result in taxpayer protest—\textit{with potential electoral consequences for the legislators—and further lead to loss of sales and a rise in black market trading in cigarettes imported from an MSA subscribing state or across U.S. borders. In effect, the compacting states have tapped into the other states’ taxing powers with respect to this product, and may even have depleted their own under this payment plan in perpetuity. The states may well find in time that their taxing power over the same period could have generated more revenue through better taxes. As it now stands, most states are likely to submit themselves, and their courts, to the strictures of the MSA. Finally, the infusion of such large extra-budgetary sources of state funds into the states coffers has already resulted in political entities casting about for new targets for revenue through litigation; the long-term effects on state spending and budgetary practices is another area of concern.\footnote{171}

The Brookings paper notes that the MSA is the beginning, not the end, of a political process. The authors express the hope that

Some legislators may ultimately understand the economics . . . and fight to have it overturned . . . . An organization focused on consumer, but not trial lawyer, interests could object to the structure of the multistate settlement, \textit{as might anyone disturbed by the pros-
pect of one or more states being able to get together to pass a na-
tional tax.\textsuperscript{172}

It remains to be seen whether courts will find the MSA to be consistent
with our state and federal constitutions and laws. The scholarship and
court challenges to date have only begun to unravel some of the many
troubling aspects of this multistate agreement. At a 1999 conference on
this “new business” of government sponsored litigation, Richard Scruggs
admitted to having serious reservations about the unintended consequences
of these suits:

In some ways, the states are now getting into partnerships with the
tobacco industry to create an alternative revenue source. I don’t
think that’s healthy. This is not why my partner or I undertook to-
bacco litigation in 1993. We took tobacco on because it was a
public health matter. We did not take this case for fees, nor did we
intend to raise taxes or put the states in partnership with tobacco.
There is a danger that this is happening, though, and I’m not sure
how to stop it.\textsuperscript{173}

In time both the state and the tobacco companies may find this alliance
uncomfortable. For example, there is already evidence that the tobacco
companies are chafing under their assumed yoke of submission with re-
spect to advertising. Likewise, the states may be flummoxed by any num-
ber of issues presented by the MSA, including their assumed mantle,
funded by the tobacco companies, of a super MSA enforcer, whatever that
may mean, and whatever it means they can do. There has been and contin-
ues to be very broad public disappointment with the fact that these enor-
mous settlement payments have not been used for anti-tobacco initia-
tives.\textsuperscript{174}

\begin{flushright}
172. Bulow & Klemperer, supra note 2, at 379-80 (emphasis added).
173. Regulation by Litigation, supra note 19, at 47 (statements of Richard Scruggs).
174. See Judy Jarvis, Tussling Over Tobacco Money, Forgetting the Victims, N.Y. Times, July 16,
1999, at A19; David Stout, Few States are Using Settlements in Tobacco Suit to Cut Smoking, N.Y.
16, 2001, at A1 (quoting Connecticut Attorney General Blumenthal that “Connecticut [was] one of the
first states to lead [and the state] is virtually dead last in battling tobacco”).
\end{flushright}
B. The Fees Legacy: The Dismal Swamp of Fee Arbitration

1. Bonfire of the Contracts

The *ABA Journal* devoted its September 1998 issue to the legal and political fee fallout from the settlement of the tobacco cases. It is significant that the story opens with then Governor of Florida, Lawton Chiles, before the state Senate ethics committee which was asking him how a select group of private lawyers had been chosen to sue the state. His response: “I don’t care.” When asked whether anyone in his office had drafted the contract giving the select firms twenty-five percent of the state’s recovery in the Medicaid recoupment suits, he responded: “They could have, but I don’t know that they did.” When asked about whether he had any concerns that an elite group of personal injury lawyers had drafted legislation that retroactively stripped the tobacco companies of all of their common-law defenses and quietly tucked the provision at the last minute into a larger bill whose sponsors kept mum about this provision, he said, “It doesn’t bother me a whit . . . I was fighting the powers of darkness.”

What emerges from these reports is that it was politically and ethically impossible for the states to hand over twenty-five percent of a federal settlement then valued at $368.5 billion to the private attorneys they had hired. It was as if the politicians in the states had just awakened and for the first time realized the sheer magnitude of what they had done when they signed those contracts years earlier and how utterly impossible it would be to secure public or legislative approval of such mind-boggling transfers of wealth to these lawyers.

So, the attorneys general and governors involved in the negotiations decided to break the contracts, apparently without advance notice to at least some of the attorneys. The contingency fee lawyers filed liens against the state tobacco funds in several states and lawsuits proliferated.

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175. At the close of the eighteenth century, the insatiable European demand for American tobacco and a belief that fortunes could be made by draining the “Dismal Swamp,” a vast morass striding the Virginia-North Carolina border, led to an economically delusional enterprise known as the Dismal Swamp Company. An account of the cronism, conspicuous consumption and debt that emboiled George Washington, Robert “King” Carter, two William Byrds, Patrick Henry, Thomas Jefferson and Robert Morris, all trying—and failing—to make substantial fortunes from insubstantial things, suggests that men should be on their collective guards as centuries draw to a close. A lively account of this story has been published recently. CHARLES ROYSTER, THE FABULOUS HISTORY OF THE DISMAL SWAMP COMPANY (1999). The legacy of financial ruin and ruinous litigation left in the aftermath of that financial mania is hauntingly familiar.

177. Id.
178. Id.
179. Dan Morain & Henry Weinstein, *Dispute Brewing over Private Attorneys’ Fees in Tobacco Lawsuits Litigation*, L.A. TIMES, Nov. 22, 1998, A26. Even academics such as Lawrence Tribe and Alan Dershowitz swept in with fee applications in this fee-for-all. Alan Dershowitz demanded $24 million for 118 hours of work on Florida’s Medicaid-reimbursement tobacco suit—that’s $288,000 per
Beach County Circuit Judge Harold J. Cohen, the presiding judge in the main tobacco case, called the Florida fee demands "unconscionable" and presciently warned that "[i]f you ever put any of these issues to a public vote, they will come down hard on the lawyers and on the courts....[t]he reverberations go way beyond this case." Lawyers in New Jersey filed liens against the state proceeds which they lifted only when the state agreed to "document" their claims. The Illinois contingency fee counsel filed liens claiming the right to $910 million in fees, for their late-filed action. Although both the governor and attorney general of Texas aggressively challenged the fees, the end result was that Texas did not break its fifteen percent contingency fee contract with private counsel. Instead, such counsel agreed to get as much of their $2.3 billion fee as they could through arbitration before applying to the state for the shortfall. The Minnesota attorneys abandoned their twenty-five percent claim and accepted seven percent instead, a mere $441 million in fees noting that "you have to look at... how this is going to be perceived." But for contingency fee counsel in most states, nothing was as non-negotiable as those fee contracts.

2. Resurrection, as Addenda

The MSA revives the fee contracts and indeed incorporates them as addenda. The agreement outlines two ways lawyers can claim fees in arbitration. They may waive all rights under their original fee agreements with the states and then negotiate their fees directly with the tobacco industry. Under the alternative plan, lawyers may first seek fees from arbitration panels, into the composition of which both the tobacco companies and outside counsel have input. Although payouts under arbitration cannot exceed $500 million per year, there is no limit on the total that can be awarded and the lawyers retain the right to seek payment from the states if arbitration awards are less than they would have received in their contracts with the states.

Essentially, this plan is a holding action that shifts attention from these munificent fee contracts while keeping the contract claims very much

180. Gibeaut, supra note 175, at 44; see also Robert A. Levy, Hired Guns Corral Contingent Fee Bonanza, LEGAL TIMES, Feb. 1, 1999, at 27. Judge Cohen denounced the state's twenty-five percent contingency contract that came to $233 million per lawyer, which "shocked the conscience of the Court." He calculated that if the state's lawyers had worked twenty-four hours per day, seven days per week for the forty-two months they had represented the state, they still would earn $7,716 per hour. "No evidentiary basis can possibly exist for fees of that nature and this Court can never enter an order justifying such hourly rates on any grounds." Id.
181. John Gibeaut, supra note 175, at 57. Bulow & Klemperer, supra note 2, at 371 n.119 (noting that "[a]lthough this [Minnesota] fee was widely reported as 7 percent, the lawyers would be paid over five years while the state would be paid over twenty-five years. Discounting payments at 10 percent, the lawyer's fee was closer to 17 percent."
alive. Although lawyers in some states, such as Minnesota and Connecticut, have apparently agreed to waive their rights to the original twenty-five percent contingency fee, those fee agreements are nonetheless appended to and made part of the MSA. The attorneys general signing the MSA have in writing only agreed that their contingency fee counsel will first secure what fees they can in arbitration, and offset those amounts against their contractual claims against the treasuries of the states they were representing. A 1998 report by the National Law Journal noted that “[a]t the heart of the [MSA’s] fee agreement is an attempt by the state AGs to get out from under the contingency fee agreements they negotiated with the dozens of law firms they hired to sue the tobacco industry.”\(^{182}\)

The contingency fee contracts remain a political time bomb. What state wants to be on the receiving end of a lawsuit for, in the case of Connecticut, a $900 million fee, handed out by the Attorney General by the stroke of his pen on a contract four years ago? The attorneys general, tobacco companies and fee arbitrators know these are politically explosive, and it can be argued that the arbitrators’ pattern of enormous generosity, usually overriding a dissenter—with funds that under both Connecticut law and a recent decision of the Florida Supreme Court\(^{183}\) are at law state funds—is a hopeful attempt to forestall any such claims.

Of course, if the thesis of this paper is correct, and some or all of those agreements were illegal or unethical at the time they were signed, the defense of illegality or lack of adherence to ethics codes precludes enforcement of those contracts. Further, the incorporation of such contracts into the MSA is additional grounds to argue that the settlement is legally flawed or unconstitutional—if one can find a state or federal court courageous enough to consider these questions.

3. The Flight to Arbitration

The decision to move the embarrassing issue of contingency fees into arbitration was key to all of the settlements. Here’s how one observer describes it:

Because it was widely agreed that even the smallest amount of money the trial lawyers would ask for would seem outrageous . . . [the fees were left] to be determined by arbitrators. State settlements adopted the technique of announcing a settlement with lawyers’ fees to be paid in addition, so that the governments could disclaim spending the billions of dollars. Knowing that if the trial lawyers were not bought off, the whole deal might fall apart, the companies offered to pay the lawyers an annuity of up to $500 mil-


\(^{183}\) State v. Am. Tobacco Co., 723 So. 2d 263, 268 (Fla. 1998).
lion a year...as part of any national settlement. The dissenting arbitrator, former U.S. District Judge Charles Renfrew, publicly stated that the awards were "clearly excessive and, to me, incomprehensible," and added, "[t]hese excessive fees will undermine public confidence . . . in our profession and in our civil justice system." Consider the following awards made by the Tobacco Fee Arbitration Panel:

Texas: $3.3 billion to five law firms, all major Democratic party donors.
Florida: $3.4 billion.
Mississippi: $1.4 billion.
Massachusetts: $775 million.
Connecticut: $65 million dollars to four law firms.
Louisiana: $575 million.
Ohio: $265 million.
Oklahoma: $250 million to six law firms.

184. Bulow & Klemperer, supra note 2, at 370; see also Milo Geyelin, Tobacco Firms Quiet on Fees to Be Paid to Plaintiffs' Lawyers Under Settlement, WALL ST. J., Dec. 15, 1997, at B16. PRINGLE, supra note 16, at 302 ("The lawyers could only agree on one thing: keep the fees out of the public eye, or that would be all the media would talk about. . . . The plan was to negotiate fees separately with the industry so that it was not part of the legislative package in Congress.").


186. Levy, supra note 179.

187. Walter Olson, a fellow at the Manhattan Institute, at his online publication, overlawyered.com, is, to this writer's knowledge, the only source for systematic nationwide coverage of these fee awards. I am in his debt for the information that follows. See also http://www.ag.state.bh.us/agpubs/Tobacco/tobfeeschart.html.

188. This amounts to $5,000 per hour. Walter Olson, News Judgment, at http://overlawyered.com/archives/99aug1.html (Aug. 6, 1999). A later news report notes that arbitrators have paid $178 million to the Boston firm of Brown, Rudnick Freed & Gesmer, hired by Democratic Attorney General Scott Harshbarger. The successor Attorney General in Massachusetts, Thomas F. Reilly, has vowed to fight "with every resource we have" that firm's claim for up to $500 million, its twenty-five percent share of the two billion dollars awarded to Massachusetts. Frank Phillips, Reilly to Fight Claim of Lawyers, BOSTON GLOBE, Dec. 20, 2000, at B1, LEXIS, News Library, Bglob File.

189. Thomas Scheffey, Winning the $65 Million Gamble, CONN. L. TRIB, Dec. 6, 1999. In an article published a week earlier, Connecticut's Attorney General stated that he had "no idea" how much money Connecticut's contingency fee counsel would receive in arbitration, but was sure it was "substantially less" than the twenty-five percent fee he had contractually awarded them of $900 million. The firms agreed not to insist upon the full amount. Walter Olson, Update: Connecticut Tobacco-Fee Bonanza, at http://overlawyered.com/archives/00feb2.html (Feb. 16, 2000).
Utah: $64.85 million.
South Carolina: $82.5 million.
Missouri: $100 million.
Hawaii: $90.2 million.
Iowa: $85 million.
Kansas: $54 million.
North Carolina: $1.5 million.
Pennsylvania: $50 million.
New Jersey: $350 million.
Illinois: $121 million.
Wisconsin: $75 million.
Maryland: $1 billion.\(^\text{190}\)
California cities and counties: $637.5 million.\(^\text{191}\)

In any state, this precedent of such large transfers of wealth, *in perpetuity*, to politically well-connected legal entrepreneurs sets a dangerous precedent.

Disinterested commentators have made pointed criticisms that the secretive proceedings of the fee arbitrations represent a “technique”\(^\text{192}\) that shields from public view distribution of funds belonging to the state and extracted from the tobacco companies through the exercise of the state’s enforcement powers.\(^\text{193}\) The legal fees have been sharply criticized by the

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\(^{190}\) Maryland deserves more than just a bullet point. The relations of that state’s legislative, executive, and judicial branches to lawyer Peter Angelos is a fascinating case study in political science. The curious are referred to Walter Olson, *Maryland’s Kingmaker*, at http://overlawyered.com/archives/99oct2.html (Oct. 19, 1999).

\(^{191}\) Kirsten Andelman, *Monster Fee Award for Tobacco Fighters*, Recorder, Mar. 8, 2001, at 1, Lexis, News Library, Read File. (stating that New York’s Milberg Weiss Bershad Hynes & Lerach and San Francisco’s Lieff, Cabraser, Heimann & Bernstein are among ten firms that will share $627.5 million; the award comes to approximately $4,904 per hour).

\(^{192}\) Bulow & Klemperer, supra note 2, at 370 (noting that “[s]tate settlements adopted the technique of announcing a settlement with lawyers’ fees to be paid in addition, so that the governments could disclaim spending billions of dollars.” They have noted that buying off the contingency fee lawyers was key to keeping the deal from falling apart. *Id.* Bulow and Klemperer had made the same point about the proposed federal settlement: “This leverage was the primary driver behind the (McCain) Resolution. Effectively the resolution created a collusion agreement among the companies. By agreeing with the attorneys general that each of the companies would pay a per-pack tax, the companies would push the price of cigarettes closer to the monopoly level, enabling them to pay the states and the attorneys about twice as much as their annual pre-tax profits without being badly damaged. The fact that the proceeds of the companies’ agreement were to be used to buy legal protections does not in any way alter the collusive nature of the agreement. *Id.* at 339.

\(^{193}\) Former Massachusetts Attorney General, Scott Harshbarger has acknowledged that shifting the fee responsibility to the tobacco companies was essential to the settlement. “Had most attorneys general ever believed that in any way they were likely to be liable beyond this [arbitration] or that any amount was going to come back and be charged to the state, that would be, in my view, a total breach of good faith negotiations on the part of the tobacco companies.... Otherwise there would never have been a settlement—and the tobacco companies know that.” *Regulation by Litigation*, supra note 19, at 20 (statement of Scott Harshbarger). This remarkable statement accomplishes the dual feat of
public health advocates that had been so crucial to the success of the state lawsuits. 194 The attorneys general and their contingency fee counsel undoubtedly find arbitration an attractive venue to seek to resolve these fee claims. Arbitrators do not need to follow the law, rules of evidence, provide for discovery, make a transcript or record of proceedings, and are shielded from any effective appellate review. 195 However, there is simply no legal basis for public funds to be dispensed by the Tobacco Fee Arbitration Panel; the legal fees paid by the tobacco companies are public property which can be expended only by a legislative appropriation. 196

shifting both blame and responsibility for these fee demands to the tobacco companies. It does not acknowledge that the contractual liability for the fees was incurred by the state when the state signed the contracts and further that those agreements were, with the states' knowledge and consent, made part of the MSA which expressly gives the contingency fee lawyers rights of recourse for any shortfalls against the states. New York's Attorney General, Elliot Spitzer, has offered this justification for the fee arbitrations:

[O]ne of the underlying misconceptions about the tobacco settlement is that the attorneys' fees are coming out of the public's pocket. That is not the case. They [sic] defendants have agreed to pay these fees. Now you could argue they would have paid more in the settlement, but then you get into negotiation theory and pure hypotheticals. The tobacco companies are paying the attorneys' fees and, therefore, these fees are not state property.

Id. at 23 (statement of the Honorable Elliot Spitzer). Setting aside the rather immutable problem that at law these are state funds, a taxpayer whose legal or other bills are paid by someone else might try out this logic on the IRS when arguing that such payments are not income to him. United States v. Chestnut, 394 F. Supp. 581, 586 (S.D.N.Y. 1975) ("Clearly, picking up another's obligation . . . is a gift of money.").

194. David Kessler has described the lawyer fee requests as "outrageous. . . [a]ll the legal fees are out of control." Barry Meier, Case Study in Tobacco Law: How a Fee Jumped in Days, N.Y. TIMES, Dec. 15, 1998, at A16. (Noting that one firm, Milberg Weiss Bershad Hynes & Lerach, raised its fee request for public relations work attacking Joe Camel from $50 million to $650 million; "Rightly or wrongly," said the attorney, "I decided to ask for hundreds of millions of dollars so that I won't be crushed by the amounts other people were asking for." That attorney stated that he would be "crazy not to take his fees into arbitration given the prior awards.")

195. See generally IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW (5th ed. 1994) V 34:22 (judicial discovery rules do not apply in arbitration), V 32:50-51 (no right of public access to arbitration proceedings), V 32:53 (no legal requirement that arbitration proceedings be put on the record), V 32:5 (conformity to rules of evidence is not required in arbitrations), V 37:10-11 (arbitrators need not give written reasons for decision) IV 40:82-84 (judicial review not available for mere errors of law; award generally vacatable if procured by corruption, fraud or undue means; grounds for judicial review very narrow). "Arbitrators are not officers of the court but are appointees of the parties . . . [and] are not bound to follow strict rules of law . . . ." Liggio v. Torrington Building Co., 114 Conn. 425 (1932). In his testimony before Congress, Representative Cox expressed concern with respect to assigning the task of fee setting "to an unaccountable body of arbitrators." Cox Testimony, supra note 62.

196. Cox Testimony, supra note 62.

We must also understand that their multi-billion dollar [contingency] fee demands represent funds that would otherwise be available for taxpayers and public-health purposes. . . . It is specious to argue that these $45-55 billion in fees are not being diverted out of the funds available for public health and taxpayers. The tobacco industry is willing to pay a certain sum to get rid of these cases. That sum is the total cost of the payment to the plaintiffs and their lawyers. It is a matter of indifference to the industry how that sum is divided—75% for the plaintiffs and 25% for their lawyers—or vice versa. That means that every penny paid to the plaintiff's lawyers—whether it is technically "in" the settlement or not—is money that the industry could have paid to the states or the private plaintiffs. Excessive attorneys' fees in this case will not be a victimless crime.
To sum up, the economic legacy of the tobacco litigation — its most immediate and costly consequence — is that the attorneys general and their contingency fee counsel have engineered a way for the states to collect highly regressive taxes both in and outside their borders — in return for an enormous piece of the action — taxes that the attorneys general lacked the power to raise in the first place. These are bad taxes levied in stealth that siphon off huge sums belonging to the state, handed, in part, to lawyers hired under contracts that do not bear the light of day. And the state was all along blessed with unlimited powers of taxation that would involve no such diversion of funds.

VIII. THE POLITICAL LEGACY

Those who have been once intoxicated with power, and have derived any kind of emolument from it, even only for one year, never can willingly abandon it. They may be distressed in the midst of all their power, but they will never look to anything but power for their relief.\textsuperscript{197}

The New York Times, in an article of March 23, 2000, reported that “with the lawyers’ fees in the tobacco settlement running into the hundreds of millions, even billions . . . . [T]rial lawyers raised $2.7 million in soft money donations for Democrats in 1999, of a total of $49.4 million in soft dollars raised so far by the party according to a recent report from Common Cause.”\textsuperscript{198} Three law firms involved in the Texas tobacco case — Ness Motley Loadholt Richardson & Poole, Williams Bailey, and Nix Patterson & Roach—accounted for $1.135 billion in soft money for the Democrats. Again, listen to the rhetoric:

“It would be very, very horrifying to trial lawyers if Bush were elected,” said John P. Coale, a Washington lawyer involved in the tobacco litigation, who has given over $70,000 to the Democrats. “To combat that, we want to make sure we have a Democratic president, House and Senate. There is some serious tobacco money being spread around.”

. . . .

Peter Angelos, the lawyer who represented the state of Maryland in the tobacco litigation and who gave $400,000 [said] “I will do whatever necessary to see that candidates who espouse the position

\textsuperscript{Id. See also supra notes 44-52 and accompanying text.}
\textsuperscript{197. Edmund Burke, A Letter to a Member of the National Assembly, 1791 (on file with author).}
\textsuperscript{198. Leslie Wayne, Trial Lawyers Pour Money Into Democrats’ Chests, N.Y. TIMES, Mar. 23, 2000, at A1.}
that Bush does are defeated at the polls."

IX. THE LAWSUIT LEGACY: COMPOUNDING INTERESTS

_Come, agree, the law's costly._ Jonathan Swift

A. Other Recoupment Suits, Big Verdicts and Settlements

Even after settling with the states, tobacco companies then had to turn their attention to potentially ruinous litigation taking place on four fronts. The individual smoker cases, buttressed by the incriminating documents now gathered by and stored in a states-established document repository, started to return some huge verdicts and/or settlements. The class action cases, brought under generous state class action rules, represent another potential for multi-billion dollar future judgments. In July 1999, a jury in Miami-Dade County rendered the largest damage award in United States history, ordering "...the tobacco industry to pay $144.8 billion in punitive damages to some five hundred thousand Florida smokers." One of the industry lawyers remarked that "[t]here is no industry in America, there's probably not a country in the world, that would withstand a verdict of this size.

The states' litigation was followed by an onslaught of cases filed by unions, Blues, insurance and health and welfare funds that have not fared well in the courts. Connecticut's Blue Cross and Blue Shield Associa-

199. _Id._

200. JONATHAN SWIFT, POLITE CONVERSATION IN THREE DIALOGUES (1738).

201. Henley v. Philip Morris, Inc., No. 995172, 1999 WL 221076, at *9 (Cal. App. Dep't Super. Ct. Apr. 6, 1999) (involving a situation where the jury, responding to the documents obtained from the industry awarded 1.5 million in compensatory and 50 million in punitive damages; a remititio reduced the award from $50 million to $25 million); Williams v. Philip Morris, Inc., No. 9706-03957 (Ore. Cir. Ct. 1999) (awarding smoker $80.3 million, later reduced by remititio to $32.8 million); Brown & Williamson Tobacco Corp. v. Carter, 680 So. 2d 546 (Fla. Cir. Ct. 1996). The threat of such verdicts has led to huge settlements. See Gina Piccalo, _Cancer Patient Savors Victory in Tobacco Suit_, L.A. TIMES, Apr. 13, 2000, at B5 (illustrating jury verdict against Philip Morris and R.J. Reynolds for $21.7 million in a suit brought by a smoker who began smoking after the time of mandatory warnings); _Big Tobacco Pays $1 Million to Ex-Smoker_, N. Y. TIMES, Mar. 10, 2001, at A8.

202. One such successful class action brought by flight attendants claiming injury from second-hand smoke was settled for $346 million. Ramos v. Philip Morris Cos., 743 So. 2d 24, 28 (Fla. Dist. Ct. App. 1999).


204. _Id._ (quoting Dan Webb, counsel to Philip Morris).

tion joined in a suit brought by other Blues from Arkansas, Illinois, Kentucky, Missouri and North Dakota, and joined by their affiliated insurers against the tobacco industry, seeking to sue directly for wrongs done to their insureds. Here's what the Seventh Circuit had to say about that suit before it, all the claims of which were dismissed:

Because three other appellate courts have issued comprehensive opinions on the merits of plaintiff's claims, we just hit the highlights, mentioning only our principal reasons for agreeing with these decisions.

For more than one hundred years state and federal courts have adhered to the principle . . . that the victim of a tort is the proper plaintiff, and that insurers or other third-party providers of assistance and medical care to the victim may recover only to the extent their contracts subrogate them to the victim’s rights . . . .

The outcome of smokers' suits is why the funds and Blues want to sue in their own names; they choose antitrust and RICO [instead of subrogation] because, in the Blues' [own] words, “assumption of the risk, contributory negligence and similar defenses are not pertinent.” This is exactly why plaintiffs must lose. A third-party payor has no claim if its insured did not suffer a tort; no rule of law requires persons whose acts cause harm to cover all of the costs, unless these acts were legal wrongs . . . . If, as these Funds and the Blues say, the difference is that Philip Morris has committed civil wrongs while Godiva [chocolatier] has not, then the way to establish this is through tort suits, rather than through litigation in which the plaintiffs seek to strip their adversaries of all defenses. Given the posture of these cases we must assume, as the complaints allege, that the cigarette manufacturers have lied to the public about the safety of their products. But lies matter only if customers are deceived. Whether smokers relied to their detriment on tobacco producers' statements is a central question in tort litigation, a question that cannot be dodged by the device of an insurer's direct suit.206

The sheer volume of these cases and their costs of defense are an undeniable burden to the industry. The tobacco industry has also been the subject of a class action suit based on the Civil Rights Acts of 1866 and 1870 which accused the industry of violating the civil rights of blacks by targeting the sale of menthol cigarettes—claimed to be more dangerous—

206. Int'l Bhd. of Teamsters, 196 F.3d at 822-23.
to black smokers.\textsuperscript{207}

The fourth front is, of course, the ongoing federal tobacco litigation which seeks both damages and greatly expanded regulatory authority. To O’Brien, the greatest risk is in the congressional arena: if the suit “made to settle” either settles along the model of the MSA, or if the MSA receives Department of Justice approval, that will be argued as the equivalent of congressional approval. He notes that “avoiding approving the MSA (and thus completing the perfect crime) will take courage, and understanding of how the [MSA] undermines Congress’s role in the government, and a high regard for the Constitution.”\textsuperscript{208} And soon after the MSA was signed it became apparent that litigation would now take place on a fifth front—suits attacking the settlement itself.

B. Imploding Suits

The Medicaid Act and regulations require a state receiving reimbursement of Medicaid payments from a liable third party to pay the federal government the applicable federal share of reimbursement.\textsuperscript{209} The federal government’s right to a share of these proceeds has been a persistent and nagging detail that does not seem to have been well addressed at any stage of these proceedings. As Dagan & White note, “[b]ecause the states pay no part of Medicare and approximately one-half of Medicaid costs, and because private insurance companies and the smokers themselves pay most health care costs associated with smoking, the part of the total cost borne by the states is small.”\textsuperscript{210} At one point the federal administration was aggressively pursuing this share of the state’s enormous take, noting that it had an obligation to the taxpayers to do so.\textsuperscript{211} Later news reports indicate that this initiative, \textit{required by the then existing Medicaid laws}, met with such opposition that it was abandoned and Congress apparently acted to forgo its claims to what have been estimated at $135.3 billion. Again, this looks like retroactive lawmaking. If the law provided that at the time of recovery, the states owed the federal government fifty-five percent of that recovery, it is a legitimate question whether that statutory obligation can be retroactively waived and, further, whether it is politically responsible to do so.

A major collateral attack on the settlement was launched by class-action suits filed by Medicaid smokers who seek to capture settlement funds that they assert rightfully belong to them—settlement funds over and

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\textsuperscript{208} O’Brien, \textit{supra} note 3, at 21.


\textsuperscript{210} Dagan & White, \textit{supra} note 29, at 377.

\textsuperscript{211} \textit{State Awaits Tobacco Cash}, \textit{supra} note 110.
above what the state actually paid to them.\textsuperscript{212} That litigation has been described as a “new wave of lawyers . . . attempting to wrest the billions from the lawmakers and pay it directly to poor Medicaid recipients.”\textsuperscript{213} Noting that the $207 billion settlement was negotiated on behalf of Medicaid recipients, the national trial counsel have invoked federal Medicaid rules to demand payment to individual indigent smokers. All eight class actions filed in January 2000 “name the respective attorneys general as defendants, and charge that if the [attorneys general] weren’t bringing the suits to collect Medicaid payments, they were lawbreakers.”\textsuperscript{214} This class of Medicaid/tobacco suit does not seek money damages—an intentional stratagem to avoid the defense of sovereign immunity. Instead, the suits are using federal law to secure injunctive relief, leaving it to the federal courts to direct the tobacco money from the states’ coffers to the class. The national network of attorneys who have filed these actions indicate that, if successful, the states will keep sums in the hundreds of millions of dollars, with multi-billion dollar payments going to the Medicaid recipients. The complaints filed in Pennsylvania and Georgia request that the settlement funds be accounted for, escrowed, and protected from state spending.\textsuperscript{215} One of the Connecticut counsel representing the indigent Medicaid recipients has represented that of the $5.5 billion recovery to be paid to the State of Connecticut over 25 years, $300 million belongs to the state and the difference belongs to the indigent Medicaid recipients.\textsuperscript{216} Connecticut’s Attorney General, Richard Blumenthal who “was extraordinarily active in the litigation and settlement—more so than any other attorney general,” has been described as “clearly dismayed” by these suits.\textsuperscript{217}

Other scholars have frankly acknowledged that “the government’s temptation to eat the citizens’ lunch may be irresistible.”\textsuperscript{218} They even go so far as to suggest that the government’s “interference with its citizens’ compensatory claims beyond its role as a legitimate subrogee . . . [is a constitutional taking that justifies] compensation.” They express the view that “governmental interference in the resolution of mass tort claims will violate the legal rights of the individual victims,” noting that “such interference is also bad public policy even where it might not violate the legal

\textsuperscript{212} Stephen Labaton, Medicaid Smokers Seek to Gain a Share of States’ Settlement, N.Y. TIMES, Jan. 26, 2000, at A11.
\textsuperscript{213} Thomas Scheffey, After the Lion’s Share, CONN. L. TRIB., Feb. 7, 2000, at 1.
\textsuperscript{214} Id. at 8.
\textsuperscript{215} Id. at 8.
\textsuperscript{216} Of course, the contingency fee funds set up by the MSA should also be the subject of such oversight. The Medicaid recipients surely did not concur that billions of dollars recovered in their names should be handed over to counsel who had no plan to recoup such funds for them; nor did they agree that such counsel would be paid pursuant to a percentage share or arbitrated fee recovery in which they did not consent.
\textsuperscript{217} Scheffey, supra note 210, at 1.
\textsuperscript{218} Id. at 8.
\textsuperscript{218} Dagan & White, supra note 29, at 406.
rights of the individual victims."^{219}

The settlement has also been subject to collateral attack by other potential claimants, for example, by Indian tribes. In June 1999, a federal suit was filed in San Francisco seeking a share of the multibillion dollar settlement between the tobacco companies and the forty-six states. The suit accused the tobacco industry of violating the due process and civil rights of the tribes and contends that the settlement constitutes an assault on the tribes’ right of self-determination and governance.\(^{220}\)

O’Brien’s analysis of the constitutional and antitrust infirmities of the MSA also suggests that future litigation can be expected as these settlement agreements come to be more fully understood.\(^{221}\) To date, at least several suits brought mostly by tobacco wholesalers have challenged the MSA on antitrust and constitutional grounds, all in federal courts. Not surprisingly, none has been successful.\(^{222}\) Jeremy Bulow has noted that smokers could file a class action suit against the MSA and the four individual state settlements on antitrust and other grounds.\(^{223}\) Once the MSA enforcers dip into their enforcement war chest, there is no telling where all this courtroom activity might end.

The central lesson of this class of imploding suits directed at the settlements is that one can surely recognize ex post that this is a non-justiciable, and even non-settleable, political question — even if one were not able to see it at the outset. It will take many years, many lawsuits, and continued careful study and hard experience to fully understand the consequences of this mystifying extraconstitutional contract. It will also likely be many years before a court or legislature will be willing to examine the important structural constitutional issues, questions with respect to authority and what seems to be the overriding consensus that this is bad public policy and bad economics.\(^{224}\)

\(^{219}\) Id. at 424.

\(^{220}\) Tribes Sue for a Share of Tobacco Settlement, N. Y. TIMES, June 4, 1999 at A25.

\(^{221}\) See O’Brien, supra note 3, at 2, 19-20.


\(^{223}\) See Bulow & Klemperer, supra note 2, at 121.

\(^{224}\) The academic literature indicates that there have been more than eighty lawsuits filed by union health care trust funds. See Note, Statutory Interpretation—Second Circuit Holds that Health Care Funds Lack Standing to Sue Tobacco Companies Under RICO, 113 HARV. L. REV. 1063, 1063 (2000); Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 191 F. 3d 229, 244 (2d Cir. 1999), cert. denied, 528 U.S. 1080 (2000) (stating that claim too remote to state RICO claim). The health insurers have been among the most aggressive and persistent litigants, despite what seems to this writer to be a significant conceptual problem with regulated companies whose premiums already account for such costs who then seek direct damages for those same costs—it would seem to be at least partial double-dipping. At least one Blue Cross and Blue Shield company has received significant damage
C. Expansion of Liability Against Other Industries

Despite repeated assertions by the attorneys general and their attorneys that the tobacco suits were about tobacco only, these governmental suits have expanded to other industries—as anything so richly endowed will. State and local governments have brought suit against lead paint manufacturers, and dozens of municipalities and the State of New York have filed recoupment suits modeled on the tobacco template against firearms manufacturers.\textsuperscript{225} Many observers of these suits have noted that this model of governmental litigation could be applied to a broad range of industries including makers of alcoholic beverages, fatty foods, automobiles, lead paint, latex industry, and health maintenance organizations.\textsuperscript{226} Indeed, the Rhode Island Attorney General has written to his fellow attorneys general “I have read in recent medical publications that 10 percent and more of the health care workforce is now latex allergic” and suggests “[g]oing after the latex rubber industry to put a couple of billion dollars into a foundation to raise awareness and do research.”\textsuperscript{227} Robert Reich has noted that the federal handgun case brought on behalf of the housing authorities prefigured liability for such products as “alcohol and beer, fatty foods, and sharp cooking utensils.”\textsuperscript{228} He also pointedly notes that, again, these suits are made to settle; “Secretary of Housing and Urban Development Andrew Cuomo assured the press the whole effort was just a bargaining ploy: ‘If all parties act in good faith, we’ll stay at the bargaining table.’”\textsuperscript{229} It is of some interest that New York’s highest court recently held that gun manufacturers did not owe a duty to exercise care in the marketing and distribution of handguns and would not be subject to market-share liability.\textsuperscript{230}

The English criminal law scholar Sir James F. Stephen, after surveying a mass of rapidly proliferating legislation, noted that “the only general interest attaching to these [laws] is that they prove that the general principle

\textsuperscript{225} See, e.g., Settlement Agreement and Stipulation for Entry of Consent Judgment, State ex rel. Humphrey v. Philip Morris, Inc., No. CI-94-S565, 1998 WL 394331 at *4, *6 (Minn. Dist. Ct. May 8, 1998) (providing for Blue Cross and Blue Shield of Minnesota to receive $469 million in damages). This in turn has led to some interesting collateral litigation. After the Minnesota Blue was paid the $469 million, it found itself with a quantity of surplus prohibited by law for a non-profit health service corporation. In re Excess Surplus Status of Blue Cross and Blue Shield of Minn., 605 N.W.2d 697 (Minn. App. 2000). Contingency fee counsel for the state successfully defended the Blue in this action.

\textsuperscript{226} Reich, supra note 1; Reich, supra note 90; The Lawyer Issue, WALL ST. J., Oct. 16, 2000, at A36; Victor E. Schwartz, Trial Lawyers Unleashed, WASH. POST, May 10, 2000, at A29.

\textsuperscript{227} Schwartz, supra note 223, at A29.

\textsuperscript{228} Reich, supra note 1.

\textsuperscript{229} Id.

which requires so many exceptions must be wrong.\textsuperscript{231} In science, if one splits the internal forces of an atom, nuclear fission ensues. The state-by-state progression of lawsuits financed by these contingency fee contracts that seek to impose regulation by litigation has similarly resulted in a proliferation of collateral, ancillary, satellite and geometrically expanding lawsuits. Any governmental initiative dragging this many lawsuits in its wake—lawsuits attacking the lawsuits, its settlement agreements, its financing, its legitimacy, and lawsuits hoping to build upon this “model” — is fairly certain to be a bad idea. And, if nothing else suggested it, this pattern of layer upon layer of lawsuits alone tells us that some basic tenet or tenets of our system of government has been set aside.

\textbf{X. How Did We Get Here?}

\textit{In all very numerous assemblies, passion never fails to wrest the scepter from reason.}\textsuperscript{232}

\textit{All economic movements, by their very nature, are motivated by crowd psychology . . . knowledge of [crowd-madness] is necessary to right judgments on passing events.}\textsuperscript{233}

The New Yorker profiled John Coale, one of the leaders of the plaintiff’s bar in this field, shortly after the tobacco settlement and just as the assault on the gun industry was gearing up.\textsuperscript{234} In that interview the attorneys involved in planning the firearms suits cited studies suggesting that guns be thought of as “pathogens” and gun ownership as a “disease”: “the idea [is] that guns are a public-health issue . . . the risk factor of interest is ownership of a handgun. The disease is violent death.”\textsuperscript{235} The lawyers speak of the gun industry’s “day of atonement” for an “unforgivable record of callous disregard for the safety of children.”\textsuperscript{236} An invited speaker at a Centers for Disease Control conference on gun control announced that “guns are a virus that must be eradicated.”\textsuperscript{237}

The interview is important and reveals the explicit strategy and political and cultural forces put into play by these suits.

\textsuperscript{231} JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 277 (1883).
\textsuperscript{232} See James Madison, Federalist, No. 55.
\textsuperscript{233} CHARLES MACKAY, MEMOIRS OF EXTRAORDINARY POPULAR DELUSIONS AND THE MADNESS OF CROWDS xiii (1932). It is of some interest that this landmark study of public hysterias opens with an account of “The Mississippi Scheme” followed by “The South Sea Bubble” and “Tulipomania,” three notorious examples of historic manias in financial markets.
\textsuperscript{234} Boyer, supra note 22, at 57.
\textsuperscript{235} Id.
\textsuperscript{236} Id. at 61.
You just stir things up . . . . I mean, look, the gun issue's all over the place now. A year ago, it wasn't. You just stir it up, and there ain't nothing like a good fight to stir it up. We've got bills now flying all over Congress . . . . We've got Bob Barr introducing a bill that would probably electrocute me (ha-ha-ha), and you've got Barbara Boxer coming in with 'Well, whatever your bill says, my bill says the opposite.' You've got Torricelli, you've got Patrick Kennedy, you've got all this activity. And we're stirring it up. And we stir it up and stir it up, and you know what happens? Eventually, the industry has to see us as the only reasonable people in town. It ain't gonna be reasonable up on that Hill. And we are reasonable (ha-ha-ha). That's what it comes down to. 238

The author of that same article, expresses the view that these massive, concerted lawsuits, regulatory activity, and Congressional action are "something entirely new in the public area - not so much a lawsuit as a declaration of a culture war, and the enemy was corporate tobacco."239 One might wryly give these choses in action a new name, whirlwind lawsuits, cauldron cases or some other such lively and descriptive concept. But the clear pattern - the essential key - is to pathologize some social problem and then propose litigation as a cure.

Litigation as medicine. Lest the reader find this far-fetched, long before the suits against the tobacco industry began, this was the subject of articles in medical journals.240

This is not a rational approach to either public policy or litigation. Indeed, it has all the indicia of a late twentieth century economic hysteria among sectors of the legal and public health professions and the media. Professor Elaine Showalter's recent study of some modern cases of what Charles MacKay's nineteenth century book calls Extraordinary Popular Delusions and the Madness of Crowds, sets out as the three basic elements which signal that reason has departed from a particular social behavior:

Hysterical epidemics require at least three ingredients: physician-enthusiasts and theorists; unhappy, vulnerable patients; and supportive cultural environments. A doctor or other authority figure must first define, name, and publicize the disorder and then attract patients into its community.241

238. Boyer, supra note 22, at 61. Mr. Coale has told The New York Times: "I am a pirate . . . . I have been described as an ambulance chaser, and I don't disagree." Glenn Collins, A Tobacco Case's Legal Buccaneers, N.Y. TIMES, Mar. 6, 1995, at D1.

239. Boyer, supra note 22, at 57.

240. See SULLUM, supra note 5, at 218 n.87 (citing Richard A. Deyard, Tobacco Liability Litigation as a Cancer Control Strategy, 80 J. OF THE NAT'L CANCER INST., 9, 9-13 (1988); Stephen P. Teret, Litigating for the Public's Health, 76 AM. J. OF PUB. HEALTH, 1027, 1027-29 (1986)).

Showalter notes that “[e]pidemics of hysteria seem to peak at the ends of centuries, when people are already alarmed about social change.” As noted above, the physician-enthusiasts are much in evidence in this story, and there are few groups more unhappy and vulnerable than smokers, that low-income caste of unrepresented social pariahs with their inelastic demand for tobacco.

Profound shifts in our political, cultural, philosophical and moral underpinnings account for the “supportive cultural environment” that led to the instigation of this extraordinary litigation. A recent scholarly work by James L. Nolan, Jr., entitled The Therapeutic State; Justifying Government at Century’s End, exhaustively documents the way in which a “therapeutic ethos” has been introduced into nearly every aspect of government at the end of the last century. The book examines civil case law, specifically personal injury law, the criminal justice system, public education, and welfare policy, and finds a common thread of substituting the language of sickness and health for judgments of right and wrong. Nolan analyzes political discourse—showing, for example, how substantive discussion of what is wise or good, just or unjust, right or wrong that dominated the Lincoln-Douglas debates has decayed to a kind of meaningless and subjective pathos that characterizes more recent political rhetoric. Because of the cultural salience of this therapeutic model, an unsettling degree of social control and even tyrannical coercive actions are largely accepted, even though they often involve grave violations of liberty and justice. He concludes that the state has adopted this therapeutic impulse as a new form of legitimation “which portends a transformation in the very nature of the state and the way authority is exercised over the citizens within its control.”

DeBow gives a name to the kind of tyranny these entrepreneurial lawsuits tend towards, one taken from Alexis de Tocqueville’s Democracy in America, when de Tocqueville pondered “what kind of despotism democratic nations have to fear.” De Tocqueville’s answer was the “soft despotism” where a “sovereign extends its arms over society as a whole . . . in which government is the shepherd.” The political philosopher Hannah Arendt has astutely noted that while true human solidarity looks upon everyone with an equal eye, political systems based upon pathos and victimi-

242. Id. at 19. Showalter has persuasively argued that the psychiatric profession’s late nineteenth century’s hysteria craze arose at the same time women were demanding unsettling things, like the right to vote. Suffragists were routinely labeled as hysterics both in the medical literature and in the popular press. Elaine Showalter, Hysteria, Feminism, and Gender, in Sander L. Gilman et al., Hysteria Beyond Freud 287 (1993).
244. Id. at 308.
zation have "a vested interest in the existence of the weak." In this instance, it has been a lucrative partnership.

XI. THE IMPORTANCE OF FUNCTIONAL ANALYSIS

*With what good humor we let ourselves be dupes of words.* Robespierre.

One of the many fascinating issues presented by this endlessly rich subject is how economists—much more surely and swiftly than the lawyers—immediately recognized the constitutional and legal flaws and terrible economic effects of the litigation and settlement. The best of the academic discussion, particularly of economists and some small sectors in the media, tries to focus on the questions of what these governmental initiatives do and are they doing it in the best, *i.e.*, most efficient manner—a kind of functionalism. This approach has the advantage of taking a hard look at what things are called—"damages," "payments of the states’ lawyers by tobacco companies," etc.—and judging what it is they do and how they came about and then assigning those acts their proper place in the actual legal and constitutional order in which they have occurred. Legal scholars concerned with the structural constitution also provided early warning that these suits represented a crisis in American political experience. Some attorneys general opposed the suits from the outset, notably Alabama’s Attorney General William Pryor who took an early public stand that these suits violated the states’ constitution’s separation of powers and were economic regulation pursued in the guise of litigation. The Attorney General of Delaware also took a public stand that these suits were not likely to prevail in its courts and did not warrant devoting state resources to their prosecution.

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247. **Susan Dunn,** *Sister Revolutions, French Lightning, American Light* 118 (1999) (quoting Robespierre, Speech of 18 Pluviose Year II, in Discours et Rapports de Robespierre 335 (Charles Valley ed. 1908). Robespierre was a master of Orwellian doublespeak.
248. Bulow, supra note 120, at 1 (stating that it "hardly seems possible that such an arrangement could stand legal scrutiny").
251. Delaware Attorney General Jane Brady has noted that Delaware's highly regarded Court of Chancery is known for its adherence to settled rules of law and reports that her state was regarded by her fellow attorneys general as "a turf of choice for the tobacco industry. I think they were pleased that I didn't file suit." Comments of Delaware Attorney General Jane Brady, Conference proceedings *supra* note 19, at 37. She adds: "The motivation of public attorneys is, or should be, to serve the best interests of the people they represent and to pursue equity, justice and fairness. Contingency fee agreements are not consistent with these motivations." **REGULATION BY LITIGATION, supra note 19** (statement of Jane
One reason the economists were swifter to the punch may be the bar's own immersion in what has increasingly become its own distinct therapeutic culture of litigation. It has long been recognized that the bar has a vested interest in the expansion of tort law; the defense bar richly benefits from these novel actions as well as the plaintiffs' attorneys who engineer these changes. Economic studies have demonstrated that the benefits of the increasing complexity of law accrue to the legal profession as a whole.

Two economists at Emory University who have studied these agency problems between attorneys and their clients have noted that "an attorney may do an excellent job of defending the particular case in hand, but not devote effort to apparently implausible arguments regarding fundamental legal change. It is these arguments that might have the most significant long term effect." That article analyzes empirical studies in the market for lawyers and after reviewing the evidence concludes:

"[R]eal earnings of lawyers remained fairly stable from 1929 to the middle fifties and increased markedly thereafter... [G]overnment regulation cannot explain the increased demand for lawyers... The increased demand for lawyers has occurred because law has been changing in ways favorable to lawyers. The stock of lawyers did not reach equilibrium because the law was continually changing (and indeed is continuing to change) in a way that increases demand.

A similar study of the market for lawyers in the 1970s and 1980s documents increased growth rates in the market for lawyers explained by increased litigiousness:

By the mid 1970s... growth in the number of lawyers really started to climb... High demand sustained the price of lawyers'
services in the face of huge entry during the 1970s and that demand for legal services continued to grow during the 1980s.256

Rubin and Bailey find the substantive implications of these developments to be pessimistic:

It is generally agreed that a stable legal system is a prerequisite to economic development and growth. . . . Rent seeking by lawyers seems to take the form of undermining those legal institutions that provide stability and clear rights for citizens.

. . . .

Litigation is profitable to lawyers, and most especially to plaintiffs' attorneys. Defense attorneys . . . also benefit from an increased demand for their services when there is increased litigation.257

The cultural forces of increased payment of damages and uncertainty and unpredictability in the law are identified as two principal factors leading Rubin and Bailey to predict that the law . . . will come to favor the interests of attorneys. Where attorneys have a financial interest in the outcome of litigation (as through a contingent fee), then their interests in precedent may determine the shape of the law. . . . [T]he major actors with an interest in the law are tort lawyers (on both plaintiffs' and defendants' sides).258

Those authors also make the telling point, which is of some interest to the litigation that is the subject of this paper, that lobbying a legislature with respect to a particular issue is less effective than lobbying to obtain favorable appointments of judges.259 Greater economies of scale apply to a judiciary that can change the law on any issue the lawyers bring before them. "This would imply that state courts would be more proplaintiff than would federal courts or state legislatures."260

And this point, of course, leads one to the heart of the matter—should legislatures or courts be deciding these questions. The functionalist approach taken by the economists and structural legal commentators has much to commend it. Its best feature is its intellectual honesty and cross-

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258. Id. at 827-28.
259. Id.
260. Id. This is, of course, of greatest impact in states where there is an elected judiciary; lawyers on both the plaintiff and defense spectrum will, through their contributions, have an impact on those elections. Id. at 827. Those authors have posited elsewhere that judges have a far more limited impact on the evolution of law because they do not drive the process of change: "they can only respond to litigants who choose to come before them." Martin J. Bailey & Paul H. Rubin, A Positive Theory of Legal Change, 14 INT'L REV. OF LAW & ECON. 467, 475-77 (1994).
disciplinary currency and comprehensibility. Clearheadedness is too often missing from the courtrooms of interstitial lawmaking. Certainly, the question most overlooked in the heat of the litigation is where will this all lead at the end of the day and, ex ante, are we, lawyers, litigants and judges, the actors to effectuate such a change. Litigation, by definition, is an ex post activity.

XII. FIRST PRINCIPLES

The proclamation of first principles is a constant feature of life in our democracy. . . . Active adherence to these principles is less common. We recipients of the boon of liberty have always been ready to discard any and all first principles of liberty, and further, to indict those who do not freely join with us in happily arrogating those principles.261

A. Two Cheers for Democracy

William Gladstone, Prime Minister of a formerly hostile nation, called the American Constitution “the most remarkable work known to me . . . to have been produced by the human intellect.”262 A remarkable and hopeful testament to the strength and genius of our constitutional order on both state and federal levels is seen in the extreme fragility of these settlements and arbitrated end-runs around the legislative process, their apparent legal vulnerability, the widespread belief that, if exposed to public scrutiny, they will cause “a hue and cry.” The Federal Trade Commission (FTC) economists’ alertness to and early critique of the antitrust implications of the settlements was a courageous and independent exercise of regulatory authority. This is particularly true as it was in an administration that was also introducing legislation to sue the tobacco companies. These checks are also a sign of hope that the system just may work over time.

The first principle ignored by the federal tobacco suit and the FDA’s attempt to regulate tobacco is easy to locate. It is found in Article I, Section I of the United States Constitution which states in its entirety that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”263 As for the state lawsuits, it is of interest to note that only forty states appear to have passed legislation adopting the MSA; Connecticut is one of a handful of states that has not passed some form of the MSA’s qualifying statute. It would be of interest to examine the legislative histories behind the forty-some states that have adopted this scheme to see whether the bills’ sponsors were candid enough to acknowledge that the

261. DAVID MAMET, WRITING IN RESTAURANTS (1986).
MSA is a functional tax increase that the state could have levied on sales within its borders at all times without paying lawyers the exorbitant fees awarded in arbitration and that the qualifying statute will confer an exemption from the antitrust laws upon the settling tobacco companies.

A poll conducted by the U.S. Chamber of Commerce in 1999 found that 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.264

The tobacco settlements are politically untenable and plainly unpalatable to the general public. They should be set aside as unworkable, anti-competitive and ill-advised compacts with the tobacco industry and contingency-fee lawyers who are too financially embroiled in this maelstrom to act with the dispassion and judgment required of lawyers who, at least in Connecticut, are at law state actors bound by the state code of ethics.265

B. Speaking the Truth

"There is no social order without trust and no trust without truth or, at least truth-finding procedures. The opinions upon which society depends—such as mutual respect, adhesion to contracts, obedience to laws, devolution of individual strength to the community—have to be commended on convincing grounds."266

The lawyers who represented the states recognize that these suits are a substitute for legislative activity. John Coale, a Washington lawyer, interviewed by The New York Times, stated frankly, "The legislature has failed."267 Wendell Gauthier admitted in the same article: "I think legislatures need our [trial lawyers'] help."268 An article in Time magazine quotes Richard Scruggs, a Mississippi trial lawyer, as follows: "Ask [Scruggs] if trial lawyers are running America, and he doesn’t bother to deny it. ‘Somebody’s got to do it,’ he says laughing."269 The American Lawyer reported that Wendell Gauthier was able to convince the trial bar to sue the gun industry even though, unlike the tobacco industry, they were not deep pockets. This was because such a suit "fit with Gauthier’s notion of the plaintiffs [sic] bar as a de facto fourth branch of government."270

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268. Id.
270. Douglas McCollam, Long Shot, AM. LAW., June 1999. Walter Olson has astutely remarked that this de facto fourth branch "pays a whole lot better than the other three, isn’t subject to the disclosure rules and blind trusts we expect of Presidents, Senators and Chief Justices, does its unaccountable work
a recent Senate hearing on tobacco and government litigation, senators chastised Congress for repeatedly failing to act aggressively against the tobacco industry. The argument apparently was that legislative inaction made such circumvention necessary.\footnote{271} When the federal tobacco case was filed, an editorial in \textit{The New York Times} asserted that Congress's inability to wean itself from tobacco industry contributions or to give the FDA regulatory authority over the tobacco industry "left the Clinton Administration no choice but to seek change through the courts."\footnote{272}

Prominent members of the academy share a more nuanced version of these views. Laurence Tribe, a Harvard Law School professor, has defended the gun suits, arguing 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."\footnote{273} That scholars such as these are defending the obvious arrogation of legislative prerogatives by attorneys general suggests that the academy may be in part responsible for this lack of principled adherence to the basic principles upon which our constitutional order is founded. Even \textit{The New Yorker} profile acknowledges that these consortia of law firms represent "a new means of public-policy making that can't be found in any civics book."\footnote{274}

One scholar, referring to the senators' statements to their colleagues, has put his finger on the heart of the controversy:

All of these statements reflect more than a misunderstanding of the constitutional process. They represent a certain crisis of faith in Madisonian democracy . . . . Under that system, those who want social change must face the representatives of the public, not a randomly selected jury of six . . . . In large class actions or governmental lawsuits, courts can force legal consequences in areas where political consensus may be lacking. In this way, recent litigation has moved the debate over the future of tobacco from committee rooms to courtroom . . . powerful members of the Senate sit and debate what state and federal judges might do to institute tobacco reform.

\footnote{271}{Senate Tobacco Hearing, 106th Cong. (1999) (statement of Sen. Charles Schumer); Senate Tobacco Hearing, 106th Cong. (1999) (statement of Sen. Richard Durbin); Senate Tobacco Hearing (statement of Sen. Edward Kennedy). These speakers hailed the federal suit as the circumvention of a Congress unwilling to pass legislation advanced by the anti-smoking lobby.}

\footnote{272}{\textit{Tobacco Becomes a Federal Case}, \textit{N.Y. Times}, Sept. 23, 1999, at A26.}

\footnote{273}{Quoted in Ellen Goodman, \textit{A New Weapon to Aim at the Gun Industry}, \textit{Boston Globe}, Feb. 25, 1999, at A17.}

\footnote{274}{Boyer, supra note 22, at 67.}
pulse given our Madisonian system of government: a single faction has taken its insular interests to an unelected member of the judiciary in order to achieve that which the majority in Congress has previously denied. 275

We all *know* the attorneys general are making law and levying taxes with these suits. Some just think it is a very good idea. It is not. The editorial writers at *The Economist* view it as

using the courts to bully industries in this way is an abuse of the legal process and an evasion of democratic accountability. It promises to inflict on consumers, as well as companies, punitive levels of taxation and regulation which are not supported by most voters. Worse, if the tobacco and gun suits succeed, public officials eager to swell their budgets with huge legal payments will look for new targets . . . . If legal extortion comes to replace the democratic process, everyone will suffer. A legal system which, despite its occasional excesses, enjoys the support of most Americans will be brought into disrepute. Any rational debate about balancing choice with risk will be abandoned as irrelevant. Legislation will be replaced by litigation, deliberation by legal threats. 276

In short, the lawyers have come up with a way for the states to collect badly designed taxes outside as well as inside their borders, without express legislative approval—all in return for a substantial piece of the action . . . . It is a hideous precedent. No sane system would invite lawyers to design bad taxes by stealth in exchange for a fat cut of the proceeds. Insane or not, this is the turn that American product-liability law has now taken. 277

This is not how any legal system should want to be perceived, at home or abroad.

Montesquieu prophetically understood that when the judiciary acts as a legislature, the legislature’s power over citizen’s lives and freedoms becomes arbitrary. Both the industry haled into court when litigation is regulation and the consumer/taxpayer financing any settlement or judgment have been denied the validating principle of representative participation in the making of the law or assessment of taxes applied to them. 278 Montesquieu’s great insight—that the separation of judicial

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The first and most powerful objection is that as a tax the Settlement violates the democratic principles that are built into the tax laws of every state. If a state were to enact a multibillion dollar tax equal to the revenues that it would receive under the Settlement, it would
power from legislative and executive power is an essential condition of freedom—has been ignored.279

Commentators have offered suggestions as to how to stem the tide of this deeply disturbing trend. Certainly statutes putting sunshine on state contingency fee contracts are important, although one would think that most states already had bid and fiscal statutes that would have prohibited these fee debacles in the first place. Bulow has proposed that the current MSA could be restructured to remove its worst antitrust and constitutional flaws and passed as federal legislation.280 Debow has reviewed a variety of initiatives on the state and federal level to pass legislation to stem the tide of these entrepreneurial suits employing the government’s police powers.281

It is the final thesis of this paper that new laws are not necessary. Connecticut’s lawsuit and its contingency fee agreement ignored constitutional imperatives and the rule of law from the outset. The common tripartite structure of American constitutional design in state constitutions suggests that the suits and contracts in other states are likely to have similar infirmities.282 A firm understanding of who does what in our constitutional order and the judicious application of first principles and precedents in the face of a windstorm is all that is required, “to the end that [we] may be a

have to follow elaborate legislative procedures . . . . [T]hese measures include legislative hearings, debate, and passage by both houses of the state legislature, and signature by the governor . . . . This lack of public participation becomes even more troubling when we consider that in modern America smokers are drawn disproportionately from classes with limited education and low incomes . . . . We see much that is bad and little that is good from enacting such a tax by a quasi-judicial process . . . . [W]e believe that when the government asserts a claim that could be asserted by an individual citizen, it will almost always be presented with the same temptation to collusion and conversion.”

Id. 279. MONTESQUIEU, DE L’ESPRIT DES LOIS, Book IV, Ch. 6. See also THE FEDERALIST NO. 47 (Clinton Rossiter ed., 1961) (“When the legislative and executive powers are united in the same person or body there can be no liberty . . . .”) (quoting Montesquieu). DeBow has noted that the state constitutions, including Connecticut’s at issue in this paper, generally observe strict separation of powers principles. DeBow, supra note 51. In the federal constitution, by contrast, the principle of strict separation was abandoned as part of the mixing of powers necessary to enactment. However, it is of great significance to the theme of this paper that the one mix of power not permitted in our federal constitution is for the judiciary to perform legislative functions. “Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary . . . will always be the least dangerous [branch]. The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society . . . . It may truly be said to have neither Force nor Will but merely judgment . . . .; and if they should be disposed to exercise Will instead of Judgment, the consequence would be the substitution of their pleasure to that of the legislative body.” THE FEDERALIST NO. 78 (Clinton Rossiter ed., 1961).

280. Bulow & Klemperer, supra note 2, at 381-84.
281. DeBow, supra note 51.
282. Each state’s constitution and laws with respect to the public fise, emoluments, ex post facto laws and bills of attainder bear study and attention as well.
government of laws and not of men."283

One can only hope that this pattern of regulation by litigation, with its arrant disregard for constitutional and legal principles, will be an historical aberration. These government-sponsored suits distract government from the real problems it is equipped to address, grossly overburden the courts, undermine a respect for evidence and the truth, and contribute to recurring cycles of suits against new targets fueled by the unconscionable fees of the earlier litigation. The social psychologies of victimization, infantilization, and revenge that fuel them are a betrayal of this country’s original social compact entered into between free and responsible citizens and a government of limited powers.
