

## Comment

*Hubert H. Humphrey III\**

I thank Professor DeBow for his very instructive and interesting commentary. Having said that, I beg to differ just a little. Like Professor DeBow, I do not want to mince words. Although I appreciate your point of view and comments, Professor, I must say that I disagree in the strongest terms with your conclusions, especially with your assertion that state actions against the tobacco industry will rank as one of the worst developments in American law.<sup>1</sup>

I believe, in fact, that the actions of state attorneys general against the tobacco industry will rank as one of the best and most significant developments in law. Further, I disagree with your argument that there exists no legal basis for state action.<sup>2</sup> Your position is particularly incorrect in Minnesota's case.<sup>3</sup> You have to distinguish these cases, analyzing them on a state-by-state basis. They are not all brought on the same basis. You cannot lump them all under one kind of theory.

In fact, Professor, I disagree that the cases were without precedent. All you have to do to find precedent is look at oil overcharge cases,<sup>4</sup> milk pricing

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<sup>1</sup> Michael DeBow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 SETON HALL L. REV. 563, 563 (2001). Professor DeBow stated: "Unless legislators and voters act to undo the mischief they have created, the states' legal crusade against the tobacco industry will one day rank as one of the worst 20th Century developments in American public law." *Id.*

<sup>2</sup> *Id.* at 570. Professor DeBow argued: "Viewed as of the time the suits were filed, the tobacco suits had no support in either case law or statutory law . . ." *Id.*

<sup>3</sup> See *Tobacco Firms Targeted: Minnesota, Insurance Company Files Suit*, CHI. TRIB., Aug. 17, 1994, at C1. The *Chicago Tribune* reported that Minnesota intended to sue tobacco companies, alleging that "cigarette companies and their trade associates broke a promise to disclose the truth about smoking and health and have united in a four-decade conspiracy to cover up their knowledge about the addictive, lethal qualities of cigarettes, and to suppress the marketing of safer cigarettes." *Id.* Ultimately, the State of Minnesota settled its case against the tobacco industry for \$6.6 billion to be paid over twenty-five years. *Key Elements of the Deal*, INDIANAPOLIS NEWS, May 9, 1998, at A4. Furthermore, the tobacco companies agreed to cease marketing to children, to provide free treatment to Minnesotans who desire to stop smoking, and to dramatically reduce advertising campaigns in Minnesota. *Id.*

<sup>4</sup> See *California v. Texaco, Inc.*, No. 24506, 193 Cal. App. LEXIS 2730, at \*15-16 (Cal. Ct. App. Nov. 7, 1985) (recognizing state cause of action to enforce antitrust laws, but

cases,<sup>5</sup> and other multi-state antitrust cases. There, you will find similar kinds of actions that were taken by attorneys general against industries that were outside the bounds of the law, and had to be brought back in, just as any other industry would be required. You can see the result in these examples and many other antitrust cases: companies are forced to pay. They are not human beings; therefore you cannot send a company to jail. Instead, you make them pay. And when you make them pay, what do they do? They make you pay. You are paying more for oil today because of the damages awarded against Exxon for the Valdez oil spill.<sup>6</sup> The reality is that we all end up paying.

That is not taxation. That is the cost of penalizing an industry for its illegal operation of business that all of us have to ultimately bear.

I disagree strongly that state attorneys general have overreached their authority and their role in our structure of government. In fact, attorneys general have not attacked or harmed the separation of powers, but instead, have complimented it. If you really want to talk about an attack on the principle of separation of powers, all you need to do is take a look at the election controversy that occurred in the state of Florida to see what the Supreme Court of the United States has done.<sup>7</sup> Talk about stepping over the separation of powers.

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holding in this case that federal action preempted California's state claim); *Clark Oil & Refining Corp. v. Ashcroft*, 639 S.W.2d 594, 597 (Mo. 1982) (holding that the Missouri attorney general had the power to protect the state's consumers against oil company's violation of antitrust laws); see also Susan Beth Farmer, *More Lessons From the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 FORDHAM L. REV. 361, 362 (1999) (noting that the Hart-Scott-Rodino Antitrust Improvements Act empowered "state Attorneys General to act as *parens patriae* on behalf of their natural-person citizens in federal antitrust actions . . .").

<sup>5</sup> See, e.g., *Ohio v. Louis Trauth Dairy, Inc.*, 163 F.R.D. 500, 501 (S.D. Ohio 1995) (recognizing an action by the Ohio State Attorney General against Ohio dairies for conspiring to fix prices for milk sold to school districts); *Pennsylvania v. Milk Indus. Mgmt.*, 812 F. Supp. 500, 502 (E.D. Pa. 1992) (recognizing antitrust action by Pennsylvania State Attorney General against milk producers for engaging in anti-competitive practices); *Tennessee v. Flav-O-Rich, Inc.*, No. 3-91-0676, 1991 U.S. Dist. LEXIS 19339, at \*1 (M.D. Tenn. Aug. 23, 1991) (approving settlement agreement between the Attorney General of Tennessee and Flav-O-Rich dairy); *New York v. Dairy Lea Coop.*, 547 F. Supp. 306, 307-08 (S.D.N.Y. 1982) (recognizing that the New York State Attorney General had the power to take action against numerous milk producers for conspiring to fix the wholesale price of milk, but declining to approve settlement agreement).

<sup>6</sup> See *In re Exxon Valdez*, No. A89-0095-CV, 1995 U.S. Dist. LEXIS 12952, at \*42 (D. Ak. Jan. 27, 1995) (denying Exxon's motion for summary judgment, and holding that a jury award of \$5 billion in punitive damages was "defensible under the evidence . . ."). In 1996, the Federal District Court for the District of Alaska approved an allocation plan to distribute punitive and compensatory damages awarded against Exxon. *In re Exxon Valdez*, No. A89-0095-CV, 1996 U.S. Dist. LEXIS 8173, at \*77 (D. Alaska June 11, 1996).

<sup>7</sup> *Bush v. Gore*, 121 S. Ct. 525 (2000) (holding that Florida's vote recount scheme did not meet "minimal constitutional standards"); *Bush v. Palm Beach County Canvassing Bd.*, 121 S. Ct. 471, 475 (2000) (vacating the Supreme Court of Florida's decision to require a hand recount of votes cast in Florida during the 2000 presidential election).

I do not agree with the idea and the theory of rational ignorance.<sup>8</sup> Although, in some respects, the suits against the tobacco industry did involve rational ignorance. The reason it was rational ignorance was that the people did not know the facts about the dangers of tobacco. The companies organized over years and years and years in collusion to make absolutely certain the public did not know the facts. Additionally, the industry created a false argument so that there was confusion about what facts there were to be known. Ultimately, when the facts came out, and in Minnesota's lawsuit, after thirty-three million pages of documents<sup>9</sup> were finally made public,<sup>10</sup> we can conclude that, indeed, when the people do know the truth, they act rationally. The people who now know the truth have said, "Shame on you." They allowed these actions to go forward. That is why you see the kind of efforts that have taken place.

A system of government based on the idea of separation of powers, if drawn to its logical conclusion, would result in a government that does nothing. The three branches of government act separately. The Attorney General plays an important role at the confluence of these three branches. It is a unique and special office, and highly independent. Frankly, it is, by and large, non-partisan, although some would like to make it partisan.

The fact is that the Attorney General's office acts in a non-partisan way to enforce the laws that are passed by the legislature. It provides the executive branch with legal counsel. Likewise, the attorney general provides legal opinions and defends legislative enactments. Attorneys general are officers of the court. So, in a sense, we are part of the court itself. And when we represent the sovereign we act on behalf of the people and the state.

The office necessarily has a high degree of counsel independence. And the vast majority, if not all, of the Attorney Generals' work is both legal and non-partisan. The office is especially important in an expanding global economy, where huge, well-financed entities (like the tobacco industry) must be monitored.

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<sup>8</sup> See ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 259 (1957); ROBERT E. GOODIN, MANIPULATING POLITICS 37-39 (1980); MANCUR OLSON, THE RISE AND DECLINE OF NATIONS 26-29 (1982).

<sup>9</sup> See Michael V. Ciresi et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477 (1999). Ciresi explained the reasoning behind Minnesota's efforts: "Minnesota knew that the only way to hold the cigarette industry accountable was to . . . pursue documents which had not been produced in four decades of litigation against the industry. The ensuing discovery battles . . . resulted in the production of approximately thirty-five million pages of internal industry documents." *Id.*

<sup>10</sup> See *Minnesota v. Philip Morris*, 606 N.W.2d 676, 697 (Minn. Ct. App. 2000) (affirming district court decision to allow public access to tobacco litigation documents, which had previously been concealed from the public under a protective order).

The Attorney Generals' role as a consumer protector is also extremely important. Let me give you a few quick brief facts about the Minnesota case.<sup>11</sup> It was the only state action against the tobacco industry to go all the way to trial. It was not part of the proposed June 20th settlement.<sup>12</sup> I was the only Attorney General that stood up to the industry and said, "This smells. Take a look at the details. It's not right." The Minnesota action advocated three principles. First, we aimed to prevent companies from marketing tobacco to kids; second, we required those companies to tell the truth about tobacco products; and third, we requested that the companies pay damages commensurate with the harm that was caused by their illegal activity.

We discovered the truth by locating and sifting through thirty-three million pages of documents, which you can now read at your leisure.<sup>13</sup> Our action was a law enforcement action. It was not an assertion of Minnesota's *parens patrie* power. It was to enforce state antitrust laws, state consumer protection laws, and state consumer fraud laws. We enforce these laws against every other industry. I do not know why the tobacco industry would think that it was above the law. Hundreds of court orders, over twenty appeals (based on arguments similar to Professor DeBow's), several which went to the Supreme Court of Minnesota, and to the United States Supreme Court,<sup>14</sup> were all defeated. The courts did set precedents in that process.

Regarding my remaining points, first let me mention that taking state action against large corporations is not contrary to the separation of powers. In fact, this type of action enforces the separation of power, because the

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<sup>11</sup> Minnesota v. Philip Morris, 551 N.W.2d 490 (Minn. 1996).

<sup>12</sup> See Allison Frankel, *After the Smoke Cleared*, AM. LAWYER, Jan. 1999, at 48. Frankel reported about the June 20, 1997 multistate tobacco settlement, explaining:

In June 1997, a group of lawyers for plaintiffs and the tobacco industry had reached agreement on a historic \$350 billion national tobacco settlement—the deal that would resolve all major tobacco litigation and place the industry under federal regulation. It was regarded as a signal achievement by the lawyers who pulled it together, but it required congressional approval. And Congress, it became clear by the spring of 1998, wasn't approving . . . . Finally, on April 1 [1998], the tobacco companies announced that they'd had enough. The deal had been stubbed out.

*Id.*; see also Henry Weinstein, *\$200-Billion Pact in Tobacco Case Down to the Final Details*, L.A. TIMES, Nov. 11, 1998, at A1. Weinstein reported that in November 1998 the parties once again agreed to a settlement agreement, this time for \$200 billion. *Id.* This agreement was final, and considered to be a victory for the thirty-six states that were party to the settlement. See Frankel, *supra*. The multi-state tobacco agreement can be viewed online at <http://www.library.ucsf.edu/tobacco/litigation/msa.pdf> (last visited Mar. 13, 2001).

<sup>13</sup> For a sample of exhibits entered into evidence by the State of Minnesota in its lawsuit against the tobacco industry see Tobacco Control Resource Center, *State of Minnesota Trial Plaintiff Exhibits*, at [http://www.tobacco.neu.edu/mn\\_trial](http://www.tobacco.neu.edu/mn_trial) (last visited Mar. 8, 2001).

<sup>14</sup> See, e.g., Philip Morris v. Minnesota, 523 U.S. 1056 (1998) (denying Philip Morris' request to stay a motion compelling the production of documents that were withheld under the claim of privilege).

principle supports actions in state court that arise out of legislation passed by our legislature and signed by our governor. That is the basis upon which we took this action. How would you otherwise enforce monetary damages against tobacco companies who successfully created a false debate about the safety of their product and kept the truth about their product from the public and the legislature?

But when the truth came out, both the state legislatures and Congress acted upon the new information they had received. The result of which was to not pre-empt pending state lawsuits like Minnesota's, as had been proposed in the June 20 settlement agreement.

The tobacco companies reacted by dangling hundreds of billions of dollars in front of many of my colleagues, and they said to the states, "The only thing we want is for you to stop this action, and we want you to stop Minnesota's action." I stood my ground and said "No" to the tobacco companies' proposal. I believed that no one should decide what Minnesota does with regard to its state law enforcement other than Minnesota.

And so, when the truth about the tobacco industry came out, Minnesota went forward with its action despite the fact that the other states and the industry had joined together in the proposed multistate agreement. That proposal did not matter to us in Minnesota; what mattered was achieving our stated goals. By the next January, we were in trial before a jury. We intended to finish the case. For almost five months we battled in the courtroom, opening up the treasure-trove of documents for the jury and the public to consider. It came down to the last day, the last hour, literally the last forty-five minutes before the State was to make its final argument to the jury, when the tobacco companies caved-in and agreed to settle the case, meeting and exceeding all of our stated goals.

Finally, for my last comment, I ask you to contemplate this: What would happen if you did not have attorneys general to pursue these kinds of actions? What would happen if you just waited around for the state legislatures to act? For example, do you think there would have been any progress in the civil rights movement of the 1960s,<sup>15</sup> if we would have waited around for state legislatures, particularly in the South and elsewhere, to take action?

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<sup>15</sup> See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding in a suit which was initiated by the Alabama Attorney General, that it was within the purview of Congress to regulate local commercial activities under the Civil Rights Act); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding Congress' power to enforce the Civil Rights Act against a business that provided accommodation for interstate travelers); *Brown v. Bd. of Educ.* 349 U.S. 294 (1955) (declaring segregated educational institutions unconstitutional).

It took action in the courtroom, and protests on the streets, to finally get government moving. Thank goodness for the independence of courts and the actions that the courts have taken.

I strongly support the principle of separation of powers. But frankly, you need to have an attorney general's office that allows the branches of this government to actually work together.