Comment

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My friend and colleague, Professor Michael DeBow, has explained cogently the flaws of recoupment litigation, and has offered a few common sense reforms to counter this new form of lawsuit abuse. I agree, of course, with the thrust of his presentation.

As Alabama's State Attorney General for the last four years, I have been a persistent critic of tobacco and gun litigation.[1] Indeed, when I served as a Deputy Attorney General for Alabama, I chaired a task force, of which Professor DeBow was a member, to determine whether Alabama should file a Medicaid reimbursement suit against the tobacco industry. We concluded that this litigation was wrong as a matter of law and public policy.[2] I would add a few items to Professor DeBow's presentation, however, before I address some of the points made by Attorney General Humphrey.

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[1] *See, e.g.*, Bill Pryor, Editorial, *Trial Lawyers Target Rule of Law*, ATLANTA CONST., Jan. 13, 1999, at A11; Bill Pryor, Editorial, *The Law is at Risk in Tobacco Suits*, N.Y. TIMES, Apr. 27, 1997, at E15; Bill Pryor, Editorial, *Litigators' Smoke Screen*, WALL ST. J., Apr. 7, 1997, at A14.

[2] *See Report of the Task Force on Tobacco Litigation, Submitted to Governor James and Attorney General Sessions*, 27 CUMB. L. REV. 575, 583 (1996) [hereinafter *Task Force Report*]. The committee concluded that Alabama should not file a Medicaid reimbursement suit for several reasons:

> First, such a suit would advance weak legal or novel equitable theories which, even if the State won the suit, would threaten to undermine Alabama law generally. Second, the State's burden of proving net harm is problematic, because widely respected economic studies conclude that there is no net harm to the State's treasury as a result of cigarette consumption. Third, this litigation would effectively raise taxes on tobacco companies without going through the ordinary legislative policy.

Id.; *see also* William H. Pryor Jr., *A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits*, 74 TUL. L. REV. 1885, 1901 (2000) [hereinafter Pryor, *Comparison of Abuses*]. In this article, the four abuses of multi-government litigation are discussed. *Id.* These abuses are the "misapplication of public litigation to mass torts involving personal injuries, use of dubious legal theories, involvement of many of the same lawyers with checkered pasts in class action litigation, and design for settlement rather than litigation to a final judgment." *Id.*; *see also* Bill Pryor, *The War on Guns*, *in* THE RULE OF LAW IN THE WAKE OF CLINTON 135 (Roger Pilon ed., 2000).

First, aside from Professor DeBow's irrefutable argument that these lawsuits involve a usurpation of legislative authority, the regulatory and tax policies supported by the proponents of these suits are both absurd and dangerous. Second, this litigation undermines the two major structural constraints of the abuse of government power—separation of powers and federalism—in ways that Professor DeBow did not even mention. I will address each of these matters in turn.

First, consider the tax policy of this litigation. The pursuit of taxation through litigation against the tobacco industry represented more than a government-imposed increase of billions of dollars in the price of a legal product. The revenues from the tobacco industry are raised in a cruelly regressive manner. Smokers, who are addicted to cigarettes, and are disproportionately less educated and less affluent than the general population, pay the costs of the tobacco settlement, which are passed on by the industry to consumers in the form of higher prices. Furthermore, each year, half of a billion dollars from those smokers is skimmed off the top to pay a relatively small number of already wealthy personal injury trial lawyers, making this form of taxation singularly inefficient.

The regulatory philosophy of the proponents of this form of litigation is even worse than their tax policy. The proponents of this litigation support economic regulation as an end unto itself. They reject the use of cost-benefit analysis and, instead, support a philosophy of regulation that can be traced to the so-called consumer advocate and former Green Party Presidential candidate, Ralph Nader.[3]

An example of this "Naderite" philosophy was the persistent refusal of the proponents of the tobacco litigation to evaluate honestly the true economic costs of tobacco use.[4] In 1996, our task force in Alabama found that all of the best economic studies concluded that smokers, as a group, do not impose the cost of their habit on the government. Indeed, leading economists have determined that cigarette taxes more than offset the cost of treating sick smokers,[5] and the premature deaths of smokers actually save the government

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[3] For an explanation of Ralph Nader's political platform see http://www.ralphnader.org (last visited May 20, 2001).

[4] *See* Press Release, Ralph Nader, Nader Criticizes "Sweetheart Deal" for Big Tobacco (Nov. 16, 1998), *available at* http://www.ralphnader.com/releases/981116.html (last visited Feb. 13, 2001). Interestingly, Ralph Nader criticized the multi-state tobacco settlement, stating: "The multistate settlement agreement between some state attorneys general and Big Tobacco is plainly a sweetheart deal concocted by the addictive companies' law firms for the industry. State AGs should reject it." *Id.*

[5] *See Task Force Report*, *supra* note 2, at 641. The report questioned whether states suing to recover Medicaid costs actually suffered damage, and concluded: "The State is not harmed in the absolute amount of money spent on smoking-related illnesses, but rather on the difference in the amount spent now versus the amount that would have to be spent later." *Id.* Furthermore, W. Kip Viscusi, a professor of law and economics at Harvard Law School,

the cost of social security, pension, and nursing home payments.[6]

This economic analysis of tobacco litigation was greeted by howls of derision. My neighbor, Mississippi Attorney General Mike Moore,[7] self-righteously complained that I had accepted the "early death defense of the tobacco industry."[8] None of the proponents of the tobacco litigation ever seemed to care, however, whether the economic analysis was correct.

Similarly, in the ongoing gun litigation,[9] the plaintiffs ignore the substantial evidence of the benefits of firearm ownership. There is strong evidence, for example, that violent crime is less prevalent where law-abiding citizens are permitted to carry concealed weapons.[10] Despite that evidence, gun control proponents favor litigation to restrict the ownership of firearms, and achieve regulations that have failed to gain the approval of either Congress or a substantial number of state legislatures.

Another example of unauthorized regulation through litigation is the campaign of the Clinton administration and New York Attorney General, Elliot Spitzer,[11] to reward Smith & Wesson for agreeing to new marketing

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supports the proposition that cigarette taxes offset the costs of providing medical care for smokers. W. Kip Viscusi, *Cigarette Taxation and the Social Consequences of Smoking*, 9 TAX POL'Y & ECON. 57 (1995).

[6] *See Task Force Report*, *supra* note 2 at 645 ("Because nonsmokers live longer . . . smokers effectively subsidize their pensions."). Moreover, Professor Viscusi's report supports this conclusion: "Detailed calculations of the financial externalities of smoking indicate that the financial savings from premature mortality in terms of lower nursing home costs and retirement pensions exceed the higher medical care and life insurance costs generated." Viscusi, *supra* note 5, at 51.

[7] Mike Moore filed a lawsuit on behalf of the Mississippi state government against tobacco manufacturers on May 23, 1994, and received "considerable attention for his unprecedented lawsuit from his peers and from the national media." Lynn Mather, *Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 LAW & SOC. INQUIRY 897, 918 (1998).

[8] Letter from Mississippi Attorney General Michael Moore to Alabama Attorney General Bill Pryor (Mar. 14, 1997) (on file with author).

[9] *See* Susan Milligan, *Gun Maker to Add Safety Measures*, BOSTON GLOBE, Mar. 18, 2000, at A1. Milligan reported that "the federal Department of Housing and Urban Development threatened to file a class action suit by the nation's 3,200 public housing authorities against the gun manufacturers." *Id.* Numerous actions against gun manufacturers ensued. *See* Jeff Reh, *Social Issue Litigation and the Route Around Democracy*, 37 HARV. J. ON LEGIS. 515 (2000) ("Between October 1998 and February 2000, twenty-one . . . city mayors and four county executives filed lawsuits similar to those initiated by mayors [Marc] Morial [of New Orleans] and [Richard] Daley [of Chicago].").

[10] *See* JOHN R. LOTT, MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS (2d ed. 2000) [hereinafter LOTT, MORE GUNS]; John R. Lott, Jr. & David B. Mustard, *Crime Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997); *see also* George F. Will, *Handguns and Hired Guns*, WASH. POST, Jan. 24, 1999, at B7. Will noted the likelihood that "Americans supplement police services and save municipalities large sums by using guns defensively against criminals 2 million times a year, 98 percent of the time just by brandishing guns." *Id.*

[11] *See* Paul M. Barrett & Vanessa O'Connell, *Glock May Accept Handgun Restrictions*,

and manufacturing restrictions by encouraging mayors to favor Smith & Wesson in the procurement of firearms for police departments.[12] In many instances, this kind of preference would violate state constitutional prohibitions of exclusive grants and franchises and competitive bid laws.[13] Violating these legal restrictions could compromise the safety of police officers and of citizens who depend on the procurement of quality firearms at reasonable prices.

From a structural and constitutional perspective, the aim of this type of litigation is to undermine the American foundation of limited government, which is the combination of the separation of powers and federalism. Justice Antonin Scalia once explained the importance of the separation of powers this way:

> It is the proud boast of our democracy that we have a government of laws, and not of men. Many Americans are familiar with that phrase. Not many know its derivation. It comes from Part the First, Article XXX, of the Massachusetts Constitution of 1780, which reads in full as follows:
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> > In the government of this Commonwealth, the legislative Department shall never exercise the executive and judicial powers, or either of them. The executive shall never exercise the legislative and judicial powers, or either of them. The judicial shall never exercise the legislative and executive powers, or either of them. To the end, and it may be a government of laws, and not of men.
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> The Framers of the United States Constitution similarly viewed the principle of separation of powers as the absolute central guarantee of a just government.[14]

WALL ST. J., Mar. 20, 2000, at A10 (noting that Elliot Spitzer "first sketched the blueprint that Clinton administration officials used to design the Smith & Wesson settlement"); Vanessa O'Connell, *Glock Plans to Change How it Sells Guns*, WALL ST. J., Mar. 21, 2000, at A3 (discussing the collaboration between Spitzer and the Clinton administration).

[12] *See Give Preference to Gun Makers That Abide by Code*, NEWSDAY (N.Y.), Apr. 4, 2000, at A44. An editorial in *Newsday* explained:

> Prodded by Housing Secretary Andrew Cuomo and New York Attorney General Elliot Spitzer, many municipalities have agreed to give a purchase preference to gun companies that sign on to the code of conduct that Smith & Wesson negotiated to end suits. The preference could be significant: thirty percent of handguns sold in America go to law enforcement . . . . Under the plan, Smith & Wesson, and any other companies that come on board, will become preferred vendors for municipalities buying guns. Spitzer wants to go a step further, and is winning agreements from cities and counties to buy guns only from firms that abide by the code.

Id.

[13] *See, e.g.*, ALA. CONST. art. I, § 22 (prohibition of exclusive franchises); ALA. CODE §§ 41-16-50-16-63 (Supp. 2000) (competitive bill law).

[14] Morrison v. Olson, 487 U.S. 654, 696 (1988) (Scalia, J., dissenting).

Justice Scalia wrote the aforementioned words to begin his lone dissenting opinion in *Morrison v. Olson*, a case in which the Supreme Court unwisely upheld the constitutionality of the Independent Counsel law.[15]

Ten years ago, the Supreme Court explained in *Gregory v. Ashcroft*[16] that federalism likewise serves the end of limited government:

> Just as the separation and independence of the coordinate branches of the federal government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the states and the federal government will reduce the risk of tyranny and abuse from either front.[17]

Justice Anthony Kennedy has thus written that the genius of the Framers was to "split the atom of sovereignty."[18]

Recent abuses in government litigation have undermined both federalism and the separation of powers. The purpose of the tobacco litigation, which a few dozen cities hope to duplicate in the gun litigation, was to establish through the action of several states a national policy that is properly reserved to state legislatures and to Congress in the exercise of its enumerated powers.

The national tobacco settlement[19] was structured to impose burdens on any state that did not enter the agreement because that state wanted either a more stringent or more liberal policy toward the tobacco industry. As a result,

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[15] *Morrison*, 487 U.S. at 693. Although the Supreme Court recognized the importance of the separation of powers, stating that "[t]ime and time again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches," the Court denied that Congress' ability to appoint independent counsel violated this principle: "Congress retained for itself no powers of control or supervision over an independent counsel . . . . Members of Congress [may] request the Attorney General to apply for the appointment of an independent counsel, but the Attorney General has no duty to comply with the request." *Id.* at 694-95. Additionally, the Court held that the judiciary does not usurp any executive functions when it appoints independent counsel. *Id.* at 695. Ultimately, the Court concluded that the ability to appoint independent counsel "does not violate the separation of powers principle by impermissibly interfering with the functions of the Executive Branch." *Id.* at 697.

[16] 501 U.S. 452 (1991).

[17] *Id.* at 458. The Court lauded the federalist structure of the United States, noting that it "preserves to the people numerous advantages." *Id.* Specifically, the Court explained that federalism:

> [A]ssures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation for the government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Id.

[18] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

[19] *Multistate Tobacco Agreement, available at* http://www.library.ucsf.edu/ tobacco/ litigation/msa.pdf (last visited May 20, 2001).

the opposing state would suffer the burdens of the agreement in the form of higher tobacco prices without the benefits of higher revenues to the state government. That is why I and several other state attorneys general who had declined to sue the tobacco industry eventually entered the settlement agreement. It is also why some state attorneys general, who wanted to be tougher on the industry, nevertheless agreed to the settlement. The Multistate Settlement Agreement, therefore, turned on its head the principle of federalism, which supports the ability of each state to choose its own policies.

Similarly, in the gun litigation, the plaintiff cities, which have high crime rates, have enacted strict gun control laws that have exacerbated the challenges of crime reduction. Conversely, other jurisdictions, with fewer restrictions on the ownership of firearms, have enjoyed lower crime rates.[20] The mayors of the cities that promote gun control want to use litigation to subvert federalism by exporting their flawed policies to those other jurisdictions.[21] In the gun litigation, mayors of large cities hope to bypass the exclusive power of Congress to set a national policy regarding the interstate trade of firearms.

Aside from undermining the principle of separation of powers through judicial activism, the government lawsuits against the tobacco and firearms industries raise objections that are similar to those expressed by Justice Scalia in relation to the Independent Counsel law.[22] By hiring private trial lawyers on a contingent fee basis, the proponents of these novel government lawsuits have created what one of those trial lawyers affectionately calls a "fourth branch of government."[23] That branch is free from the ordinary restraints of prosecutorial abuse, such as legislative oversight and appropriation, and the duty to perform multiple tasks in the enforcement of the laws with limited resources. The hiring of contingency fee lawyers by state governments is similar to what former United States Attorney General Edwin Meese[24] said about the Independent Counsel law: "[it is] an effort to rule outside the normal framework of our constitutional system beyond the limits of accountability."[25]

Mr. Humphrey made a few points that deserve a response. First, he stated that the tobacco cases were all different and that they were all based on

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[20] *See generally* LOTT, MORE GUNS, *supra* note 10.

[21] *See* Reh, *supra* note 9. Reh argued that the municipalities that chose to sue firearms manufacturers represent "an attempt by a handful of people to federalize their particular judgments about firearm issues without the approval of the American electorate." *Id.* at 519-20.

[22] *Morrison*, 487 U.S. at 696 (Scalia, J., dissenting).

[23] Douglas McCollam, *Long Shot at Gun Tort Dollars*, AMER. LAW., June 1, 1999; Elaine McArdle, *Trial Lawyers, AGs, Creating a New Branch of Government*, TRIAL LAW. WKLY., July 12, 1999, at 3.

[24] Meese served as Attorney General of the United States from 1985-1988.

[25] EDWIN MEESE III, WITH REAGAN: THE INSIDE STORY 327 (1992).

different legal theories. Although there were some minor variations in the cases that were pursued by the various state attorneys general, you should ask yourself this: if these cases were all different, then why is it that forty-six states settled on exactly the same basis? *Exactly the same basis*. That is what the multistate agreement with the tobacco litigation is.

Mr. Humphrey asserts the multistate agreement is not taxation, that resulting costs are merely paying the cost of an illegal operation of business.[26] Again, I beg to differ. This is not a case like that surrounding the Exxon Valdez oil spill.[27] The payments are not for past conduct. The payments by the tobacco industry to the states are based on what? Current government costs. They are paid in perpetuity. There is no exception for the good or the bad conduct of the industry. The companies are simply obligated to make these payments, just like a tax. If it looks like a duck, and walks like a duck, and quacks like a duck, it probably is a duck. Compare this with how taxes work in operation, and tell me what the difference is.

Attorney General Humphrey said, "the people did not know the facts."[28] I have been an Attorney General for only four years, but I knew when I became the Attorney General of Alabama that smoking was bad for you, and nothing in the tobacco litigation taught me anything new about that. We have known that for more than a century.

In the late 1800s, when cigarettes became popular, a huge anti-smoking movement arose in this country.[29] Twenty-one states enacted laws in the late 1800s, banning the sale of cigarettes to minors. Fourteen states banned the sale of cigarettes altogether, including to adults. One of those states was Tennessee. And in 1897, those companies who wanted to sell cigarettes challenged the constitutionality of Tennessee's ban and brought a lawsuit that went to the Supreme Court of Tennessee.[30] The Supreme Court of Tennessee took judicial notice of the fact that the legislature had the power to ban cigarette sales because cigarettes were "wholly noxious and deleterious to health."[31]

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[26] *See* Hubert Humphrey III, *Comment*, 31 SETON HALL L. REV. 598, 599 (2001).

[27] *See In re* Exxon Valdez, No. A89-0095-CV, 1995 U.S. Dist. LEXIS 12952, at *42 (D. Alaska 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).

[28] Humphrey, *supra* note 26, at 600.

[29] *See* RICHARD KLUGER, ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR 13, 37-40 (1996).

[30] Austin v. State, 48 S.W. 305 (Tenn. 1898).

[31] *Id.* at 307.

Attorney General Humphrey also argues that precedents were created as a result of the recent tobacco litigation.[32] Yes, there were precedents created. Look to the decision of the Supreme Court of Iowa,[33] which dismissed the Iowa Attorney General's tobacco subrogation lawsuit.[34] Look to the trial court decision in Indiana which threw out an entire tobacco lawsuit.[35] Look to the state of Maryland, where a trial judge dismissed most of the State Attorney General's claims against the tobacco industry.[36] And then Maryland enacted a new law that overturned centuries of precedent.[37] Vermont passed a similar law.[38] Why were they doing this? Why were they passing these new laws to make these cases slam-dunks? Why? Because it was against all precedent.

And then Mr. Humphrey raised the bloody red flag of *Brown v. Board of Education*.[39] Well, I'm sorry, but history will record that the tobacco litigation is nothing like, or in no way equivalent to, the civil rights movement of the 1950s and 1960s.

This form of litigation is madness. It is a threat to human liberty, and it needs to stop.

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[32] Humphrey, *supra* note 26, at 601.

[33] Iowa v. Philip Morris, 577 N.W.2d 401 (Iowa 1998).

[34] *Id.* at 406 (dismissing the State's petition for Medicaid reimbursement because the State failed to properly state a claim for subrogation, and because the State's injuries were too remote).

[35] State v. Philip Morris, Inc., 49D07-9702-CT-003236 (Ind. Super. Ct. July 23, 1998). I discuss these cases in greater detail elsewhere. *See* Pryor, *Comparison of Abuses*, *supra* note 2.

[36] Maryland v. Philip Morris, No. 96-122017, 1997 WL 540913 (Md. Cir. Ct. 1997). The State Circuit Court for Baltimore held that the State's remedy for the costs incurred from treating cigarette smokers was limited to subrogation under Maryland statute. *Id.* at *13. The court specifically noted that "the State is limited to the statutory remedy contained in Maryland's Medicaid statute . . . it is the role of the legislature, not the courts, to create an independent cause of action upon which Defendants [tobacco manufacturers] may be sued." *Id.* at *9. Ultimately, the court denied the cigarette manufacturers' motions to dismiss the counts which alleged violations of the Maryland Consumer Protection Act and violations of the Maryland Antitrust Act. *Id.* at *20. The court, however, granted the cigarette manufacturers' motions to dismiss the State's claims of unjust enrichment, breach of duty, fraud and deceit, negligent misrepresentation, breach of express warranty, breach of implied warranty, negligence, strict liability, and conspiracy. *Id.*

[37] MD. CODE ANN., [HEALTH-GEN. I] § 15-120 (2000).

[38] VT. STAT. ANN. tit. 33, § 1911 (Supp. 2000).

[39] Humphrey, *supra* note 26, at 62 & n.15 (citing 345 U.S. 972 (1953)).