

# Pirates at the Parchment Gates

How State Attorneys  
General Violate the  
Constitution and  
Shower Billions on  
Trial Lawyers

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*By Margaret A. Little*

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## How State Attorneys General Lawyers Violate the Constitution and Shower Billions on Trial Lawyers

By Margaret A. Little

*Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power?*

James Madison, *The Federalist No. 48*

February 1, 1788

### Executive Summary

In recent years, state attorneys general (AGs), have partnered with private lawyers working on a contingency fee basis to advance policy agendas without any statutory authority. These remarkable arrangements call for close scrutiny. Recent legal attacks against the energy industry and some think tanks over their positions on climate change and energy policy highlight the abusive nature of this partnership between state AGs and wealthy, politically connected lawyer barons.

With the benefit of 20 years of scholarship and ensuing appellate case law, it has become inescapable to conclude that contingency fee contracting by state attorneys general violates the structure of the Constitution and its guarantees of due process, as well as state fiscal laws and professional codes of ethics. Further, these arrangements result in the privatization of law enforcement, and thus transfer power into the hands of influential private counsel who have cashed in for billions of dollars in fees—in open defiance of constitutional and legal prohibitions put into place by our nation’s Founders to prevent such corruption.

At least three core constitutional principles are laid waste by attorneys general who retain private counsel to regulate industries by litigation.

1. Contingency fee financing is an attempt to do an end run around the appropriations process, and is constitutionally prohibited. That means that even statutes permitting such arrangements violate constitutional controls over the flow of money expressly put into place to prevent government corruption.

2. No private party or law firm should ever finance any government operation. Both state and federal constitutions require that all receipts of money or services must be legislatively authorized and subject to legislative control and accountability.
3. No private party or law firm should ever play any role in a government investigation or prosecution, especially when that party has a direct financial stake in the outcome. State and federal due process clauses prohibit such compromised prosecutions, as recognized by the United States Supreme Court, along with state and federal appellate courts and governmental Codes of Ethics.F

### Policy Considerations

1. The billions in public money transferred to contingency fee lawyers fuels new cycles of regulation by litigation.
2. “Made to Settle” suits are cynical money grabs pushing an unlegislated ideological agenda and end up bloating state governments and levying national taxes on unsuspecting and unrepresented citizens. Regulation by litigation that is commenced because Congress or state legislatures “are not doing their job” violates the separation of powers and intrudes upon the legislative branch’s exclusive lawmaking function. State AGs are lawyers for their respective states. They do not possess national regulatory power, either singly or in combination. AGs who try to accomplish policy goals through litigation by self-

interested proxies essentially privatize national lawmaking to a small band of state-funded cronies. The settlements that ensue enlarge government off-budget, often by the billions, and burden the public with taxation and regulation they would never vote into place.

3. These unlawfully enriched trial lawyer tycoons use these diverted public funds to wield enormous political power, while entrenching their ideological partners—the state AGs and their allies—in public office.

That so many and varied constitutional, legal, and ethical violations can be enumerated and that many appellate courts have ruled that such contracting is illegal is compelling evidence that this collusion between state attorneys general and contingency fee counsel works to severely undermine fundamental, structural American constitutional law and theory. This paper examines the illegality and unconstitutionality of the contingency fees that fuel these prosecutions, and systematically refutes the arguments proffered in favor of such arrangements.

## Introduction

Over the past 20 years, a little understood revolution in American law has taken place—regulation by litigation. This entails the investigation or prosecution and settlement of government lawsuits by state attorneys general (AGs) against industries some government officials wish to regulate, but in ways or to a degree lawmakers have not authorized. To date, targets have included politically disfavored industries such as financial services, managed health care organizations, fossil fuel producers, and manufacturers of asbestos, tobacco, firearms, latex, lead paint, and pharmaceuticals. Complaints brought by AGs against such companies often center around their impact on the environment, public health, consumer safety, or some other public policy concern that the AGs have taken upon themselves to address.

The political forces behind this quiet revolution were well-understood and predicted by the Founders, who structured the Constitution to prohibit just this abuse of power. These lawsuits violate the Constitution's separation of powers, particularly the assignment of lawmaking, taxing, and expenditure powers to the legislature. Worse, they constitute a partial privatization of lawmaking, since state AGs who pursue such suits often hire outside counsel on a contingency fee basis. AGs who retain outside counsel claim it saves taxpayer money by ensuring the lawyers

only get paid in winning cases. In truth, contingency fee regulation by litigation transfers enormous wealth and power to lawyers in private practice, who act on behalf of the AGs, and creates perverse incentives for them to seek out the largest payouts possible.

At least three core constitutional principles are laid waste by state attorneys general who retain private counsel to regulate industries by litigation.

First, contingency fee financing of lawsuits constitutes an end-run around the appropriations process. Therefore, it is constitutionally prohibited, which means that even statutes permitting such arrangements violate constitutional controls over the flow of money expressly put into place to prohibit government corruption.

Second, both the federal and state constitutions require that all receipts of money or services must be legislatively authorized and subject to legislative accountability. No private party or law firm should ever finance any government operation.

Third, no private party—including law firms—should ever have a role in a government investigation or prosecution when it has a direct, personal financial stake in the outcome. State and federal due process clauses prohibit such compromised prosecutions, as recognized by the

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United States Supreme Court and state and federal appellate courts and governmental codes of ethics.

### **State Attorneys General Overstep their Constitutional Role**

Regulation by litigation launched by state attorneys general, on the ground that Congress or state legislatures “are not doing their job,” violates the separation of powers and intrudes upon the legislature’s exclusive lawmaking function. State AGs are executive branch lawyers whose central role is to represent their states in legal disputes. As such, their powers are constitutionally limited to enforcing the *existing laws* of their respective states. They do not possess national regulatory power, singly or in combination. AGs who try to accomplish through these self-interested proxies what they cannot achieve legislatively have flunked Civics 101. Worse, they have privatized national lawmaking and handed it over to a small band of state-funded cronies. These “made to settle” suits are cynical money grabs pushing an unlegislated ideological agenda. They bloat state governments off-budget, levy de facto national taxes, and impose regulation on unsuspecting and unrepresented citizens. Acting as a de facto fourth branch of government, these unlawfully enriched trial lawyer tycoons use these billions of diverted public funds to wield enormous political power, fuel new

cycles of regulation by litigation, and entrench their ideological partners—the state AGs and their allies—in public office.

### **How Regulation by Litigation Works**

Imagine a Republican-led state government that appointed conservative law firms to be “special assistant attorneys general” conducting government investigations and prosecutions of industries or organizations that dissent from the government. Imagine that these firms are empowered to issue subpoenas, investigate, file lawsuits, seek injunctions and declaratory relief, sue for millions or billions in damages, and wield the panoply of government powers under the government attorney’s supervision. The firms advance all of the costs of the investigation or litigation and in return are awarded a whopping percentage of the government’s recovery. These same private law firms are among the largest campaign donors to the attorneys general, often selected without competitive bidding, and are often political allies of the very politicians who selected them for this lucrative work. Even when chosen by bidding, the attorneys general admit that the richer firms get the work, resulting in the same law firms getting the repeat business.

Imagine that the targets of these privately funded government investigations or suits are alternative energy companies or think tanks that advocate for alternative energy policy. The investigations assert that the alternative energy groups make claims of efficiency or environmental impact that are exaggerated, bad science, bad economics, or not factual at all. These AGs quietly meet with the law firms planning concerted action against their targets, unleashing subpoenas seeking decades of communications, research, and advocacy. These private lawyers are at risk of recovering nothing unless they can amass enough government muscle to bring their targets to their knees and recoup their investment. Would any fair-minded citizen regard this as consistent with constitutional government principles of free speech and limited and separated powers?

Yet, that is precisely how regulation by litigation works. It involves state attorneys general awarding billions of dollars in fees to private attorneys in order to extract settlements from targets the AGs believe are insufficiently regulated or too lightly taxed. The AGs' tobacco litigation in the late 1990s is a case in point. That wildly successful settlement shifted a quarter of a trillion dollars to state treasuries, leading to state fiscal bloat that has proven unsustainable in the years since. It transferred over \$20 billion to private law firms, which are capitalized and

incentivized to bring recurring cycles of suits without any legislative authorization for the regulatory activity.<sup>1</sup>

The first comprehensive analysis of the tobacco Master Settlement Agreement (MSA) and related state settlements by two scholars at the Brookings Institution, Jeremy Bulow of Stanford and Paul Klemperer of Oxford, described these settlements as “collusive agreements that effectively impose federal excise taxes ... and set very dangerous precedents.”<sup>2</sup> Bulow and Klemperer concluded:

As a general principle we are very troubled by the prospect of a group of private citizens (contingency fee lawyers) getting paid a percentage of a tax increase they helped pass. ... [T]he 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.<sup>3</sup>

Bulow and Klemperer's devastating critique was followed by a comprehensive Cato Institute study of the Master Settlement Agreement, which concluded that the 1998 tobacco settlement “is a sophisticated, white-collar crime instigated by contingency fee lawyers in pursuit of unimaginable riches.”<sup>4</sup> As the author, former Corning

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Incorporated Assistant General Counsel Thomas C. O'Brien noted, the state AGs lawlessly colluded with trial lawyers to swell their respective states' coffers at the expense of unrepresented and politically powerless smokers:

Essentially, the major cigarette makers bought permission to fix prices and exclude competitors. Not surprisingly, the object of the crime is money—\$206 billion to the states and billions more to contingency fee lawyers. The cover for the crime is the maddening complexity of the Master Settlement Agreement. ... The real victims are the people whom the states and their lawyers set out to protect—smokers who get nothing out of the settlement yet must pay the entire cost.<sup>5</sup>

As Stanford economist Jeremy Bulow notes, state excise taxes on tobacco would have yielded far more revenue to the states<sup>6</sup> and avoided the billions upon billions of dollars of state recovery diverted to the trial lawyers: “[W]ere the deal constructed more transparently, voters and consumers would likely have rebelled.”<sup>7</sup> “The deal was incredibly corrupt; had it been made in any other industry it would surely have been declared illegal.... The lack of transparency is key to paying the lawyers... fees of over \$100,000 per hour, which even one trial lawyer described as ‘beyond human comprehension.’” Bulow also

presciently noted the dangerous precedent set by the tobacco litigation template: “Deals like these have the potential for unbelievable mischief. For example, what if the oil companies were sued by environmentalists for causing global warming ... the right venue for these concerns is Congress, not a collusion-facilitating agreement between the companies and the trial lawyers.”<sup>8</sup>

What Bulow warned against as “potential unbelievable mischief” has now come to pass. Worse, some AGs often launch abusive suits to assail individuals and political organizations they oppose. Consider a recent egregious example. On March 29, 2016, a coalition of state attorneys general calling themselves “AGs United for Clean Power” announced concerted state action against ExxonMobil and any public policy organization or scholar that dared to question the climate models on which these AGs and their political allies, such as former Vice President Al Gore, have based alarming climate predictions.<sup>9</sup> Taking a page from the tobacco litigation playbook, the AGs went on the offensive by demonizing their targets, and claimed they were investigating them for alleged fraud over withholding climate data from the public—asking in effect, “what did they know about climate change and when did they know it.” Then on April 7, 2016, the Competitive Enterprise Institute (CEI), which published this paper, was

presented with a subpoena from U.S. Virgin Islands Attorney General Claude Walker, seeking a decades' worth of documents related to CEI's work on climate and energy policy—including confidential donor information. CEI has fought back and Walker withdrew his subpoena, but the case is ongoing at this writing, as CEI is seeking damages from Walker over the abuse of the power of his office.<sup>10</sup>

One of the first critics to sound the alarm about Regulation by Litigation is former Clinton Secretary of Labor Robert Reich, who has blasted these government prosecutions as “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. ... We used to be a nation of laws, but this new strategy presents an entirely novel means of legislating—with settlement negotiations of large civil lawsuits initiated by the executive branch. This is nothing short of faux legislation, which sacrifices democracy to the discretion of administration officials operating in utter secrecy.”<sup>11</sup>

Reich is right. In fact, many state attorneys general and their activist lawyer allies openly acknowledge that they are supplanting the legislature as lawmaker. Al Gore notably so justified the extraordinary climate change investigation:

If the Congress would actually work—our democracy's been hacked ... but if the Congress really would allow the executive branch of the federal government to work, then maybe this would be taken care of at the federal level. ... [Instead] these brave men and women, who are the attorneys general of the states represented in this historic coalition, are doing their job ... just as many of them did in the tobacco example.<sup>12</sup>

G. Robert Blakey, a designer of the federal tobacco suit, which Gore hailed as a template, admitted that the technique is to consolidate enough state AGs imposing investigative demands so daunting and potential exposure so high, that the targets will pay up: “The number will be so large the industry can't pay it. ... This case is not made to win, it's made to settle.”<sup>13</sup> Unfortunately, many media accounts have helped perpetuate the AGs' narrative that they are acting in the interest of the little guy, rather than unilaterally seizing power for themselves.<sup>14</sup>

### **The Founders' View**

In essence, some state attorneys general have arrogated to themselves the role of a fourth branch of government, a concept the Framers of the Constitution never endorsed and which has never

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existed in American law. The mechanisms used to finance Regulation by Litigation are unconstitutional. And the practice itself is illegal, no matter how widespread, longstanding, or lucrative.

Regulation by Litigation operates through two mechanisms, both of which are absolutely forbidden in a constitutional democracy: 1) funding of government by private parties, and 2) directing of government funds to *anyone* without legislative appropriation. There is a good reason for these prohibitions. Without them, private interests could fund, and thereby control the considerable powers and resources of government toward private ends not authorized by the branch of government given the exclusive power of the purse. Principles of public finance law common to all states and territories prescribe that all funds owed to the government from whatever source, however obtained and in whatever form, are public monies, subject to public control and accountability. No one in the executive branch has the appropriations power to transfer these funds to contingency fee attorneys. That includes an attorney general.

These concepts of separated and limited powers are essential to American constitutionalism. The Founders were exquisitely attuned to and outraged by the widespread corruption that characterized English and continental

governments of the 17th and 18th centuries. Colonial-era pamphlets vigorously denounced government ministers' lawless and lucrative assignment of government functions to private appointees. The historian Bernard Bailyn, in his masterful *Ideological Origins of the American Revolution*, reviewed the ardent pamphlets of the pre-revolutionary era and concluded that it was "their major theme, their obsessive concern" to design a government that would prevent the ministerial corruption that plagued England and the continent. Those pamphlets denounced executive ministers that "distract[ed] Parliament from its proper function," installed and lavishly compensated cronies in positions to abuse government power without any legislative oversight and "grow beyond Parliament's control," where "places and employments which ought not to be sold at all, are sold for treble value," with payment falling upon a public wholly unaware of these transactions. They even coined a term for the phenomenon, "Robinarchy":

The Robinarch ... is nominally a minister only, ... but in reality he is a sovereign, as despotic, arbitrary a sovereign as this part of the world affords, ... [who has] unjustly engrossed the whole power of a nation into his own hands ... [and] admits no person to any considerable post of trust and power under him who is not either a relation, a creature, or a

thorough-paced tool whom he can lead at pleasure into any dirty work without being able to discover his designs or the consequences of them. ... Once in power the Robinarcal ministry feeds on its own corruption. It loads the people with taxes and with debts, and ends by creating a mercenary army ostensibly for the purpose of protecting the people, but in fact to perfect its dominance.<sup>15</sup>

In *Federalist* No. 58, James Madison explained that the House of Representatives “can not only refuse, but they alone can propose the supplies requisite for the support of government.”<sup>16</sup> In other words, private funding of government is forbidden. Alexis de Tocqueville denounced the pre-constitutional practice of appointing private special prosecutors “to encourage informers by offering them a share in the fines” or that allowed public officials to take a percentage of the fine as “a dangerous expedient which insures the execution of the laws at the cost of degrading mores.”<sup>17</sup>

### **The Twin Pillars of Public Finance**

The Constitution’s Article I, Section 9 provides that no money shall be drawn from the Treasury, but by legislative appropriation. Receipts laws further require that any agent receiving money for the government from any source

must deposit those funds into the Treasury. Governments may not resort to private funding of their activities, because governmental powers are authorized only to the extent of their appropriations. No Founder understood money better than Alexander Hamilton, who made sure the Constitution and laws enshrined the concept that the legislature alone can receive or spend money or contributions. Hamilton explained 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.”<sup>18</sup> [Emphasis in original] James Randolph observed: “If there could be ‘public money’ that is not deposited in the Treasury prior to expenditure, the Congress’ control over expenditures is rendered an ‘empty shadow.’”<sup>19</sup>

These same concepts are built into state constitutions, which means they cannot be overridden, even by a statute that attempts to confer the power to transfer wealth to private parties outside of the appropriations process. All government money received—whatever its nature or source, and however obtained—are public funds, subject to public control and accountability.<sup>20</sup> “The power of the legislature with respect to public funds is ... supreme, and no state official, not even the highest, has any power to create an obligation of the state, either

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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.”<sup>21</sup> The Founders separated powers and enacted these principles of the public fisc in both state and federal constitutions in order to prohibit deals that fund government or enrich private citizens without legislative approval and accountability.

### **Robinarchy Redux**

We are now witnessing exactly what the Founders sought to prevent. A quiet revolution has taken place that allows a mere state functionary, by the stroke of his or her pen, to shift the costs of financing government operations to private attorneys and set them up to receive a sizable percentage of the government’s recovery.

### **The Tobacco Litigation Template**

The wildly successful tobacco litigation, a template openly invoked as precedent by AGs United for Clean Power, transferred a quarter of a trillion dollars from smokers to state governments, and an estimated \$20 billion to their allied private counsel—the largest

wealth transfer through litigation in world history. In a recent book on how state AGs regulate via litigation, Marquette University political scientist Paul Nolette calls the settlement “the largest civil settlement in American history.” More importantly, he notes that the “multi-billion dollar Master Settlement Agreement in 1998 between the tobacco industry and most of the nation’s AGs ... served as a form of national regulation of one of America’s largest industries while simultaneously bypassing the typical channels of national policymaking in Washington D.C.” Since that settlement, says Nolette, “AGs have become increasingly aggressive in using coordinated litigation strategies to exert influence in national policy ... that have gone beyond simply enforcing the law and have instead crucially shaped the contours of national policy ... especially as Congress and the courts continue to encourage AG activism.”<sup>22</sup> Contingency fee financing of lawsuits has become so common in American law that it is now widely accepted that state attorneys general can appropriate powers of regulation for themselves. Yet, that view implies that state AGs need not be governed by fiscal and constitutional limitations, and *that opinions issued by their own offices impose on every other governmental department*. That view also implies that AGs can use these contracts to finance controversial, push-the-envelope regulatory suits and

investigations, which in many cases the legislature has explicitly refused to regulate or provide appropriations for the effort. The contingency fee lawyers openly refer to these contracts as “letters of marque” that lend a veneer of legitimacy to this state-sponsored piracy.<sup>23</sup> Constitutionally speaking, we have lost our way.

### **Pirates of the Caribbean**

AGs United for Clean Power launched their intimidation campaign against climate change skeptics in April 2016, when the Attorney General of the U.S. Virgin Islands, using Washington D.C. law firm Cohen Milstein, issued subpoenas against ExxonMobil, one of its public relations firms, and the Competitive Enterprise Institute. The CEI subpoena sought a decade’s worth of material on the Institute’s climate policy. The subpoena, since withdrawn, constituted a fishing expedition to find any evidence to link CEI and other public policy organizations to ExxonMobil, which the AGs sought to charge with fraud over allegedly “misrepresenting” risks from climate change.

Cohen Milstein has a thriving state AG practice, headed by partner and former District of Columbia Attorney General Linda Singer, that bills itself as “the most effective law firm in the United States for lawsuits with a strong social and political component.” In December

2014, *New York Times* reporter Eric Lipton profiled that firm’s solicitation of state AGs to bring class action and mass tort suits from which this contingency fee firm garners millions of dollars in fees. Lipton examined thousands of pages of emails involving Cohen Milstein and noted “the enormous potential payoff for Ms. Singer’s firm” if she successfully persuades state AGs to hire her and use their state powers to investigate and sue. He outlined the modus operandi of law firms that seek business from state AGs:

The lawsuits follow a pattern: Private lawyers, who scour the news media and public records looking for potential cases in which a state or its consumers have been harmed, approach attorneys general. The attorneys general hire the private firms to do the necessary work, with the understanding that the firms will front most of the cost of the investigation and the litigation. The firms take a fee, typically 20 percent, and the state takes the rest of any money won from the defendants.

While prospecting for contracts, the private lawyers have also donated tens of thousands of dollars to campaigns of individual attorneys general, as well as party-backed organizations that they run. The donations often

come in large chunks just before or after the firms sign contracts to represent the state, campaign finance records and more than 240 contracts examined by *The Times* show.

Private lawyers whose traditional work has been filing class-action tort claims or securities fraud cases on behalf of individuals or groups are now often operating with the power of the state, substantially increasing their chance for success by bringing claims on behalf of “the people.”<sup>24</sup>

Following this template, the U.S. Virgin Islands AG’s contract with Cohen Milstein requires the firm to advance all costs and expenses of litigating the climate change investigation, and awards Cohen Milstein 27 percent of the first \$100 million in recovery from the investigation’s targets. That is serious pay-to-play. This goes beyond the usual meaning of that phrase—campaign donations in return for government contracts—and instead quite literally requires the private firm to finance government prosecutions!

A review of U.S. Virgin Islands law confirms that the territory’s laws prohibit this outsourcing. U.S. Virgin Islands law requires the deposit of all funds into the Department of Finance (3 V.I.C. §177(3)) and provides: “No money shall be paid out of the Virgin Islands treasury except in accordance

with an Act of Congress or money bill of the legislature.”<sup>25</sup> Statutes enforcing these constitutional provisions similarly call into question the legality of these arrangements, specifically 33 V.I.C. §3101, which provides:

No officer or employee of the Virgin Islands shall make or authorize an expenditure from, or create or authorize an obligation under, any appropriation or fund in excess of the amount available therein; *nor shall any such officer or employee involve the government in any contract or obligation for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.*<sup>26</sup> [Emphasis added]

Additionally, U.S. Virgin Islands law has an express non-delegation provision that provides that no official or head of department may delegate power or duties to anyone outside of that department.<sup>27</sup>

### **Due Process**

The delegation of the awesome powers and resources of government to private parties who have a personal financial stake in the outcome of a government prosecution fundamentally undermines the integrity of a judicial proceeding, violates defendants’ due process rights, and calls into serious question

the ethics and conduct of the entire prosecution.<sup>28</sup>

When private lawyers pay for the costs of a government investigation or prosecution, which they only stand to recoup in the event of a large settlement or verdict, the incentive for violating the targets' due process rights is obvious. This was recognized by the California Supreme Court when it unanimously held that due process was violated when a prosecutor accepted funds to defray the costs of prosecution from the victim of trade secret theft; such a contribution (a mere \$13,000) was of a nature and magnitude likely to put the prosecutor's discretionary decision making within the interest or control of an interested party.<sup>29</sup>

The U. S. Supreme Court explicitly recognizes that the executive branch lacks authority to privately fund its operations:

No one suggests that some doctrine of necessity authorizes the Executive to raise money for its operations without congressional appropriation ...<sup>30</sup>

Scholars have noted the corrupting influence of accepting such gifts and voluntary service, which create "moral and political expectations of repayment." Permitting any such gifts of expenditures or service creates "dangers of corruption, conflict of interest, favoritism, and undue

discrimination in government administration."<sup>31</sup>

### **What Happens when Targets Fight Back?**

Challenges to these contingency fee contracts have been made, successfully in several—though not all—jurisdictions in the tobacco litigation. Contingency fee contracts were found to violate state constitutional law in West Virginia<sup>32</sup> and Louisiana,<sup>33</sup> but withstood appellate challenges in Maryland<sup>34</sup> and Minnesota.<sup>35</sup> Less than two months after the 1997 federal tobacco settlement, the Louisiana Supreme Court resoundingly ruled, in a non-tobacco case, that the state's attorney general may not enter into contingency fee agreements under Louisiana law.<sup>36</sup> More recently, state AGs have entered into contingency fee contracts with private counsel to sue companies over Superfund cleanup obligations, pharmaceutical pricing or marketing, or contributing to acid rain that have been challenged on various grounds. A useful summary of these cases is set forth in *Int'l Paper Co. v. Harris County*, a case in which the legislature's later approval and appropriation for the contingency fee contract mooted the appropriations part of the appeal, and the due process challenge was dismissed.<sup>37</sup> Most recent trial courts uphold the deals on one ground or another, although some of those cases did not involve contingency contracts.<sup>38</sup>

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Courts and arbitrators upholding awards of multi-billion dollar fees cite as the *first* factor the contingency fee counsel's financial investment, as well as their political maneuvering (the tobacco settlement was negotiated in the White House and Senate offices) and successful manipulation of public opinion.<sup>39</sup> Yet, state laws prohibit these private lawyers from financing government operations. Their engagement of political and PR forces to compel settlement of cases of dubious validity are not powers constitutionally vested in them or their partners, the AGs in the executive branch. Justice is blindfolded. Neither political pressure nor public opinion has any place in the courtroom. Quite simply, this is legislation by other means.

Courts have generally rejected due process challenges, conjuring up an exception to the well-established prohibition against prosecutors having a direct, personal financial stake in a government prosecution, based merely on the AGs' promises that they will remain in control of the investigation or prosecution. Courts' acceptance of these assurances of control runs contrary both to long established law,<sup>40</sup> and, frankly, human nature. It strains credulity to believe that contingency fee counsel, having invested sizable funds, time, and resources, would not exert pressure to extract maximum financial recovery.

Further, the contract with the U.S. Virgin Islands explicitly delegates to contingency counsel an exhaustive list of day-to-day tasks ("firm is responsible for providing all legal services ... required in litigating," hiring of experts, and "day-to-day responsibility for the prosecution and conduct of the litigation"), so as to provide them with active control sufficient to influence the course of the prosecution. Such discretion need not be boundless to violate due process, as recognized by the California Supreme Court in the 1994 case, *Clancy v. Superior Court*.<sup>41</sup> In addition, the contract's requirement that Cohen Milstein pay all of the upfront costs of the prosecution cannot fail to create a sense of obligation, and incentivize the AG's office to make sure there is a monetary settlement to cover the unfunded debt for advanced costs created by the contract.

*The New York Times*' Adam Liptak has focused on the appropriations and due process problems that can arise with such contracts, as well as on "the question of whether hiring lawyers by promising them a percentage of what they win—on contingency, in the legal jargon—violates the separation of powers."<sup>42</sup> In a 2007 news story, reporting on contingency fee litigation against chicken farmers by then-Oklahoma Attorney General Drew Edmondson, Liptak noted:

It is, after all, the legislature's job to decide how to spend the state's money. But an attorney general who promises a percentage of a recovery to a law firm is giving away state money without legislative approval.

"These arrangements rob the legislature of its right to control what is in the public interest," said Paul M. Pohl, who represents defendants in lead paint suits in which governments are represented by lawyers who will be paid a percentage of what they win. "And the last people you want to have to decide what good public policy in your state is are contingency-fee lawyers from out of state. They're like groups of locusts looking for the next wheat field."<sup>43</sup>

Regarding Edmondson's claim that the state cannot afford to prosecute without the device of contingency fee contracts, Liptak queries: "But Oklahoma is a government, with the power to tax and to borrow, and it does not have to turn to a private business to finance a lawsuit it says is in the public interest."<sup>44</sup> "We're not going to ask the taxpayers of the state of Oklahoma to pay the lawyers," Edmondson responded. "Our adversaries would like us to ask the legislature to choose between this litigation and increased funding for education, for mental health or for corrections."<sup>45</sup> In response, Liptak comments: "But that is not quite

right. The taxpayers may pay either way. Any recovery in the case belongs to the state's taxpayers, but Mr. Edmondson has signed a contract to give a big chunk of it away."<sup>46</sup>

Liptak's story closes with an observation by former Alabama Attorney General William H. Pryor, Jr., now a federal appeals court judge, that is worth quoting:

The use of contingent-fee contracts allows governments to avoid the appropriation process and create the illusion that these lawsuits are being pursued at no cost to the taxpayers. These contracts also create the potential for outrageous windfalls or even outright corruption for political supporters of the officials who negotiated the contracts.<sup>47</sup>

As this probing back-and-forth discussion shows, the claims of economy and risk assumption by the powerful firms in alliance with the state AGs proves illusory upon careful examination.

### **A Breath of Fresh Air from the Mississippi Delta to the White Mountains**

Some of the largest contingent fees in history went to the lawyers who litigated on behalf of Mississippi as part of the concerted state AG suits against the tobacco industry. In the

*The claims of economy and risk assumption by the powerful firms in alliance with the state AGs proves illusory upon careful examination.*



wake of that debacle, the Mississippi Supreme Court has issued two decisions confirming the constitutional principle that any contract entered into by the state AG, contingency or otherwise, must be paid out of funds appropriated to the state AG's office and may not be separately paid either by the defendant or out of the recovery by the state, since those are public funds.<sup>48</sup>

In March 2016, a New Hampshire trial court invalidated a contingency fee contract that the state attorney general had signed without legislative approval, holding that under the New Hampshire constitution and statutes, such contingency fee contracting arrogated the legislature's appropriations power, and was unlawful.<sup>49</sup> That ruling is now on appeal to the New Hampshire Supreme Court.<sup>50</sup>

All such challenges face the hurdle of a dominant media and political climate that heaps accolades on state attorneys general as crusaders in the public's interest. Still, these recent developments represent an encouraging return to the rule of law.

### **But Aren't these Win-Win Deals?**

Supporters of such contingency fee contracts like to argue that they are "win-win" situations. If the state loses, the private lawyers get nothing. If the state wins, then the lawyers' fees come out of the recovery at no cost to the

state. This rationale is flawed both in theory and practice.

Civil litigation brought on behalf of the state seeks to recover funds to which the taxpayer-supported government is legally entitled. Claims that the AG brings on behalf of the state are existing rights of the state to recover money in contract, tort, or under a statute. Regardless of the nature of the claim, such a right is already the property of the government. The attorney general may be able to reduce that right to a sum of money by settlement or verdict, but he does not create a new asset for the state that the AGs' office may dispose of at will.

Looking at this from a policy standpoint, giving 25 percent or more to private attorneys is likely not the most cost-effective way to prosecute such actions. In the multistate tobacco litigation, the contingency fee lawyers notably neglected to keep time records, making such an assessment of their hourly rate difficult or impossible. Where it was able to be determined, the hourly rates ranged from \$7,000 to over \$100,000 *per hour*. How did that happen?

State attorneys general usually prosecute their strong cases with in-house staff. Historically, these contingency fee lawyers have been retained only for politically controversial cases where the legal theories are weak and untested. Rewarding counsel with such munificent contracts leads to an

expansion of liability that favors only one sector of the economy—lawyers, both plaintiff and defense—and richly incentivizes the filing of weak and legally doubtful claims. It is a little known fact that in the multistate tobacco litigation, the contracts to pay the private attorneys were broken by the states since it was politically radioactive to pay tens of billions in fees to private attorneys.<sup>51</sup> It was for this reason, among others, that the initial 1997 global federally brokered tobacco settlement of \$368.5 billion fell apart, whereupon four states—Mississippi, Minnesota, Texas, and Florida—entered into separate settlements totaling around \$40 billion, followed by the Master Settlement Agreement of November 1998 of \$206 billion with the remaining 46 states.

### **The Big Lie**

The contention that Regulation by Litigation is a risk-free undertaking for the state, because the counsel retained on a contingency fee basis bears the costs of pursuing the litigation, puts in the time, and faces the risk of no recovery is demonstrably untrue. These contingency contracts with the various states have resulted in lawsuits and equitable claims for full recovery of those expenses and fees. Some tobacco contracts obligated the AG to petition the legislature to recover expenses and fees if the suit was

unsuccessful or the recovery was insufficient to cover them.

With these contracts, the AGs create unfunded debts, equitable claims, liens, and obligations for the state without any legislative permission to do so. These expenses typically run into millions of dollars, far beyond what the AG can pay from his office's appropriations. That means they are gambling for a settlement or recovery with public money while they claim to be selflessly paying for the costs of the prosecutions.<sup>52</sup> These contracts also require the AG to demand that the targets pay any unawarded expenses and costs. This device allows the AG to use *what is now the targets' own money* as a bounty to attract resources to finance the litigation for which he has no appropriation. When the first tobacco settlement fell apart and the AGs broke the contracts, multi-billion dollar claims from contingency counsel flooded the state courts, an uncomfortable fact that got little media attention,<sup>53</sup> and was given cover by the later fee arbitrations.<sup>54</sup>

Other arguments used to support these contracts are that state statutes typically allow the AG's office to procure such assistance as it may require. That language may permit an AG to hire outside counsel, if necessary, but the AG's office, like every other state agency, must operate within its budget. The AG cannot legally or

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constitutionally supplement that appropriation by seizing a percentage of the state's recovery, which are public funds that belong to the state. If specialized help is needed, the AG, like any other government official, may not obligate the state beyond his own office's appropriations.

State attorneys general like to claim they are understaffed to prosecute major actions. That reflects a dated and inaccurate picture of state AG offices, which are often the largest law firms in the state, hiring top graduates of top law schools. As Cato Institute legal scholar Robert Levy has noted, states are not poor or unable to afford top-flight salaried attorneys. Yet in Texas, where the Office of the Attorney General employed 600 attorneys with an annual budget of \$271 million, the AG handed out multi-billion dollar contracts without competitive bidding to lawyers who had bankrolled the AG's campaign on contingency fee basis, "a sure-fire catalyst for abuse of power."<sup>55</sup> In *New Mexico v. General Electric Co.*, the 10th Circuit was not persuaded by the argument that the substantial costs associated with mass tort or resource recovery serves as a financial bar to the government's ability to bring such actions.<sup>56</sup>

State attorneys general often claim that amendments to Rule 1.5(c) of the American Bar Association's Rules of Professional Conduct permit counsel to advance costs for a client. But in

fact, Rule 1.5(c) prohibits the use of a contingent fee contract "in a matter in which a contingent fee is prohibited by ... other law."<sup>57</sup> *Other law* necessarily includes constitutional and statutory provisions prohibiting public officials from accepting advances of costs or expending state funds without legislative oversight. In the hierarchy of American law, an amendment to the Rules of Professional Conduct does not trump constitutional and statutory prohibitions that prohibit the receipt of funds by state officials without legislative oversight and appropriations control over such gifts.

### **But the Defendants Are Paying the Fees**

In 1999, then-New York Attorney General Eliot Spitzer advanced a specious argument that the gross award or settlement is not state money until after contingent fees and expenses are deducted and then the funds are deposited into the state treasury.

[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.<sup>58</sup>

This is contrary to established law. Attorney's fees awarded in an action belong to the client, not the attorney.<sup>59</sup>

This flawed logic was adopted by at least two courts. In *Conant et al. v. Robins, Kaplan, Miller & Ciresi*, an after-the-fact challenge to the payment of a contingency fee to the state's outside tobacco counsel was brought by an individual and a legislator in Minnesota.<sup>60</sup> The plaintiffs in that case argued that the funds derived from the lawsuit should have been deposited in the state treasury and disbursed only through a legislative appropriation. In declining to hear the claim, the court cited *Philip Morris, Inc. v. Glendening*, which also bought into the flawed theory that the gross recovery in tobacco litigation is not state money until after those fees and expenses are deducted and the funds are deposited into the state treasury.<sup>61</sup> These holdings cannot be reconciled with U.S. Supreme Court precedent and state constitutional provisions that provide that all of the recovery, including attorney's fees, belong to the state.<sup>62</sup> Both the Minnesota and Maryland courts import extraneous considerations in those decisions (that the cases were settled, that the deals are "win-win," that the litigation was unprecedented and extraordinary against unusually

wealthy and powerful defendants, and the voluntary agreement by the tobacco companies to assume payment of the fees) that display both a disinclination to rock the "too big to fail" MSA, and a deliberate sidestepping of principles of general applicability outside of that particular case.<sup>63</sup>

The fiction that only the net recovery is due the state or that the defendant's payment of the attorneys makes the fees not public funds was recently explicitly rejected by the Mississippi Supreme Court in *Pickering v. Hood*, in which the court held that the AG's contingent fund is not the defendant's checking account or the funds recovered by the state in the litigation. The court ruled that state lawsuit settlements are public funds, which may only be spent by appropriation, and it ordered the private attorneys to refund the \$10 million paid directly to them by the defendant.<sup>64</sup>

In testimony before House Judiciary Committee's Subcommittee on Courts and Intellectual Property in 1997, then-Rep. Christopher Cox (who later served as head of the Securities and Exchange Commission) eloquently exposed the fiction advanced by Spitzer:

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

*These fees continue to be awarded in secret and in private arbitrations paid by the defendants, which keeps them out of the public eye.*

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. ... Excessive attorneys’ fees in this case will not be a victimless crime.<sup>65</sup>

This flawed theory also assumes a favorable outcome. If the state obtains no judgment, only a non-monetary judgment, or if contingency fee counsel is terminated, the attorney general will have created debts for which there are no appropriations. The U.S. Virgin Islands contract explicitly provides that Cohen Milstein is entitled to recover its fees and expenses from the U.S. Virgin Islands.<sup>66</sup>

### **What Lies Behind the Curtain**

If these contracts are such good deals, effectively forced upon state attorneys general who cannot undertake the costs of such massive prosecutions,

*why is it that every state in the Union broke its contract with contingency fee counsel in the tobacco cases?* This is an extremely unpleasant fact for advocates of such contracts. In fact, not a single case upholding these fee deals acknowledges that the size of the tobacco fees was so politically volatile that the whole debacle was sent into arbitration, over protests and lawsuits by the states’ tobacco attorneys. Even after being reduced in arbitration, the fees ultimately awarded were scathingly denounced. Former Carter administration Health, Education and Welfare Secretary Joseph Califano, a longtime anti-smoking advocate, called it “the most sordid piece of money-changing in the temple of the American bar.”<sup>67</sup> Judge Harold J. Cohen, who supervised the Florida case, called the fees “unconscionable.”<sup>68</sup> And attorney fee arbitrator Judge Charles Renfrew predicted that the awards, “clearly excessive and incomprehensible ... will undermine public confidence ... in our profession and in our civil justice system.”<sup>69</sup>

These fees continue to be awarded in secret and in private arbitrations paid by the defendants, which keeps them out of the public eye. Indeed, the Cohen Milstein Virgin Islands contract assumes a negotiated or settled fee, with disputes going into mediation. This is a nod to the technique of arbitration employed in the tobacco fee arbitrations, which cloaked the

deals from public scrutiny, and more importantly, from effective appellate review.

While it is true that many trial courts have upheld these arrangements, the record on appeal is much less supportive of such contingency fee financing. Even the appellate cases that uphold the idea, such as in Maryland and Minnesota, in fact support a *settlement*, not a contract. Those decisions suffer from “too big to fail” judicial sclerosis, and subsequent court decisions following that precedent embed that flawed template. Indeed, a scholar reviewing one judicial decision upholding the tobacco Master Settlement Agreement concluded that “a more critical reading reveals that its logic is plagued with inherent inconsistencies, and strongly suggests, if not compels, the notion that the court was reasoning toward a particular end—that the “enormity of the social and financial implications” of reversal leading the court to entrench dangerous anticompetitive state regulatory action.<sup>70</sup> Contingency fee firms learned this the hard way when they tried to enforce the 25 percent fee contracts, which the state broke with impunity.

The reluctance of courts to disrupt these settlements is perhaps the most compelling argument for challenging these unlawful and corrupting arrangements at the outset of litigation before the “too big to fail” dynamic,

which these firms cynically count on, comes into play.

It takes a highly capitalized firm to undertake the costs of a government’s investigation into decades of documents, communications, and research of private parties, and to impose costs that often prompt a quick settlement advantageous to lawyers, if not their clients. Cohen Milstein, like other large firms, has had the benefit of decades of government-funded contingent fees that have brought millions into its coffers. Such coffers need periodic refilling, so a large part of these enormous fees are channeled back to candidates who are committed to the expansion of Regulation by Litigation and repeatedly steer the same governmental regulatory contingency work to the same firms.

Many commentators have noted the multiplier effect of these fees employed by an organized plaintiffs’ bar to fuel new cycles of regulation by litigation. *Fortune* magazine has detailed the strategies firms such as Cohen Milstein routinely use to target a company or industry:

Tobacco provided the template for targeting, attacking, and wearing down an industry. There were a few basic axioms. Go on the public relations offensive. (The softening-up process begins with vilifying an industry and cultivating media outlets. ...) Go on the

*It takes a highly capitalized firm to undertake the costs of a government’s investigation into decades of documents, communications, and research of private parties.*

political offensive. (Forging strong alliances with attorneys general outflanked the normally well-connected tobacco industry.) Dazzle them with novel legal theories. (Defendants will sputter that the arguments are specious, but a multipronged attack will make them think about settling.) Go to Wall Street. (Scaring off investors has a way of bringing companies to the table.)<sup>71</sup>

“The legal merits are almost beside the point,” says Victor Schwartz, general counsel to the American Tort Reform Association, sworn enemy of the plaintiffs’ bar. “The point is pressure, vilifying your enemy, politically enhancing your position, then leveraging it all into a quick and lucrative settlement.”<sup>72</sup>

The obvious potential for redirecting a portion of such funds to the elected official through campaign contributions or otherwise was proven when Texas AG Dan Morales was convicted of corruption arising from allegations of soliciting a kickback and backdated contracts with tobacco lawyers.<sup>73</sup>

From 1999 to the beginning of 2002 contributions from trial lawyers to candidates of all political parties reportedly totaled close to \$13 million, with tobacco settlement lawyers prominent among the top givers. As Chris Cox noted in his testimony, it was a mystery why all of the tobacco

contracts had such identical and lavish contingency percentages: “It may be that the renowned political clout of these wealthy law firms played a part; the 89 firms in question reportedly contributed \$3.8 million to federal candidates alone over the past two years.”<sup>74</sup> From 2002 to 2016, contributions by the American Association for Justice Political Action Committee, which represents trial lawyers, skyrocketed to over \$6 million per election cycle, with Democrats receiving 96 percent of those contributions.<sup>75</sup> Former President Clinton appeared in a video in support of the \$3.4 billion fee application by the consortium of attorneys (which came to include his brother-in-law, Hugh Rodham), who were seeking fees for early-settling states, including Florida and Texas. In the video, Clinton “credits the group with bringing “Big Tobacco” to the table for a ‘truly historic settlement,’” reported *The New York Times*, noting that Hugh “Rodham’s role in the tobacco case has always been controversial,” and that “he had little experience in product liability or tobacco litigation. Cigarette company lawyers and others said they believed that he was brought into the case by the [plaintiff] lawyers, many of whom are large Democratic contributors, because of his White House connections,” often wearing his White House security pass around his neck to settlement talks in Washington area hotels.<sup>76</sup> Democratic National

Committee chairman Don Fowler’s 1995 call sheet to solicit longtime Democratic donor Walter Umphrey, one of the Texas lawyers who were awarded the tobacco work, read: “Sorry you missed the vice president: I know [you] will give \$100K when the President vetoes tort reform, but we really need it now. Please send ASAP if possible.”<sup>77</sup> President Clinton vetoed federal tort reform legislation in the spring of 1996.<sup>78</sup>

These lawyer barons in turn finance state AGs’ efforts to act like a fourth branch, arrogating to themselves the power to regulate without legislative authorization in order to advance their own political ends. What the AGs cannot accomplish legislatively, they do through surrogates, as Al Gore pointedly noted.

### **We Have Been here Before**

The Founders and Tocqueville recognized that side deals entered into by state officials that enable private parties to finance government operations, in exchange for a piece of the action, are an enduring, persistent problem in political behavior. State attorneys general in the early 20th century handed out contingency contracts, until in a 1952 challenge, the New Jersey Supreme Court asserted that the state attorney general had no appropriations power or statutory authorization to enter into such deals.

The attorney general claimed longstanding practice as a defense. The Court rejected this “we do it all the time” argument in *Driscoll v. Burlington-Bristol Bridge Co.*: “In the face of [statutes prohibiting such fiscal arrangements] we are not impressed by the ... argument that the practice is to the contrary, for if that is the practice, it should be terminated, not perpetuated.”<sup>79</sup>

The story of attorneys general ignoring the fiscal laws has happened before and continues to this day. The Founders understood that the impulse to siphon wealth using government power, and for government officials to bestow such power and largesse on their cronies, is a persistent human political temptation. If men were angels, we would not need such laws and constitutions that forbid such corrupting arrangements. Men are not angels, as the sorry round of convictions and imprisonment<sup>80</sup> and subsequent history<sup>81</sup> of many of the key players<sup>82</sup> in the tobacco scandal proves.<sup>83</sup> Cox, in his 1997 testimony, tells the following account of trial lawyer corruption:

[I]n the Florida [tobacco] litigation alone, one of the state’s lawyers has sued another alleging collusion with the defendants, another of the state’s private lawyers is being investigated for allegedly loaning a state employee some \$30,000 as a quid

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pro quo for being retained as one of Florida's lawyers; and that same lawyer recently testified before a Committee of the Florida Senate that a Texas firm that did no work on the Florida case was going to receive \$20 million in fees for it in violation of the state's bar rules. He also testified that some of the state's private lawyers were involved in a nationwide cartel trying to control legal fees.<sup>84</sup>

Indeed, an April 2016 *Dallas Morning News* retrospective on the 20th anniversary of the Texas tobacco case carries the subtitle: "Biggest litigation win ever or a complete scam?"<sup>85</sup>

### **Conclusion**

It is essential to call attention to these structural constitutional questions, to revisit them, as happened in New Hampshire, and to engage in a legal and policy debate about whether our form of government permits coalitions of state attorneys general to legislate national regulatory policy, as was done in the tobacco cases. Attorneys general are officials of the executive branch whose duty is to enforce, not make law. Because the judicial

process, while public in name, is private in essence, the public is unaware that lawmaking power has fallen into the hands of an organized sector of the bar and a confederacy of their politically and financially allied state attorneys general. To paraphrase the colonial pamphleteer, they act as despotic and arbitrary sovereigns, arrogating the power of a whole nation into their hands, and directing billions toward their lawyer cronies. The time to enforce and respect the constitutions and laws so carefully put in place by our Founders is long past due.

Like all constitutional principles, the principles of the public fisc hold fast, no matter how disregarded they may be, even for extended periods of time. No amount of noise, bluster, PR, or rhetoric can change the nature of the Constitution and the law. Our state and federal constitutions prohibit illegal and corrupting arrangements, such as contingency fee contracts by state attorneys general outlined in this paper. Courts, legislatures, and the executive branch, bound by their oaths to support and defend the Constitution should uphold the law—and protect taxpayers in the process—before more billions go missing.

## NOTES

- 1 For more on the tobacco Master Settlement Agreement see Sam Kazman, “Demonize-Then Pulverize,” *The Navigator*, The Atlas Society (formerly Objectivist Center), November 2004, pp. 8-12, <https://cei.org/sites/default/files/Demonize%20then%20Pulverize.pdf>. Competitive Enterprise Institute, “Misspending, Abuses Marks Tobacco Settlement Anniversary,” news release, November 27, 2005, <https://cei.org/news-releases/misspending-abuses-marks-tobacco-settlement-anniversary>.
- 2 Jeremy Bulow and Paul Klempner, *The Tobacco Deal*, Brookings Papers on Economic Activity: Microeconomics, November 1998, [https://www.brookings.edu/wp-content/uploads/2016/07/1998\\_bpeamicro\\_bulow.pdf](https://www.brookings.edu/wp-content/uploads/2016/07/1998_bpeamicro_bulow.pdf).
- 3 Jeremy Bulow, *The State Tobacco Settlements and Antitrust*, Address before the Antitrust Section of the ABA (April 1999), <http://www.ftc.gov/speeches/other/abatobacco.htm>
- 4 Thomas C. O’Brien, *Constitutional and Antitrust Violations of the Multistate Tobacco Settlement*, *Policy Analysis* No. 371, Cato Institute, May 18, 2000, <https://www.cato.org/publications/policy-analysis/constitutional-antitrust-violations-multistate-tobacco-settlement>.
- 5 *Ibid.*, p. 1.
- 6 Jeremy Bulow, “The Tobacco Settlement,” *Milken Institute Review*, Fourth Quarter, 2006. “Under the agreement, smokers in ... Georgia, Kentucky, North Carolina and Virginia are paying over \$100 million per year more for tobacco than the settlement returns to their coffers.”
- 7 “Most States Get Short End of Tobacco Agreement,” *Southern Standard*, August 8, 2005, <http://www.iclassifiedsnetwork.com/contentitem/72333/1259/most-states-get-short-end-of-tobacco-agreement>.
- 8 Jeremy Bulow, “Profiting from Smokers,” *Southern Economic Journal*, Vol. 69, No. 3 (2003), pp. 736-742, <https://faculty-gsb.stanford.edu/bulow/articles/profit%20from%20smokers.pdf>. In discussing the corruption, illegality and “exceptionally dirty” politics, Bulow notes that the tobacco companies were not the only bad guys in the story: “The trial lawyers, the politicians, and even the public health officials, and anti-smoking advocates who believed that any means were appropriate to achieve their desired ends of massive fees, political victories, and higher cigarette prices *were the ones who most abused the system.*” [Emphasis added]
- 9 Office of New York Attorney General Eric Schneiderman, “A.G. Schneiderman, Al Gore and Coalition of AGs Announce Historic Effort to Combat Climate Change,” news conference (video), March 29, 2016, <https://www.youtube.com/watch?v=hd4Udhna2A&app=desktop>. A transcript of the news conference is appended to the countersuit brought by Exxon. *Exxon Mobil Corporation v. Claude Earl Walker, et al*, No. 017-284890-16, Tarrant County District Court, Texas, April 13, 2016, <http://amlawdaily.typepad.com/0000exxon%20suit.pdf>. That lawsuit includes a complete transcript of the March 29, 2016 news conference at Exhibit B.
- 10 For more on the subpoena, see “First Amendment Fight: CEI’s Climate Change Subpoena,” Competitive Enterprise Institute website, <https://cei.org/climatesubpoena>.
- 11 Robert Reich, “Smoking, Guns,” *The American Prospect*, January 17, 2000, <https://www.questia.com/magazine/1G1-58669761/smoking-guns>.
- 12 Transcript of March 29, 2016 press conference appears at pp. 9-10 of the transcript appended at Exhibit B to the lawsuit. The link to a live videotape of that press conference appears at footnote 1.
- 13 David S. Cloud and Gordon Fairclough, “U.S. Sues Cigarette Industry in Attempt to Recoup Costs,” *Wall Street Journal*, September 23, 1999, <http://www.wsj.com/articles/SB93800475034704958>.
- 14 Kimberley A. Strassel, “Spitzer’s Media Enablers,” *Wall Street Journal*, March 12, 2008. “Here was a prosecutor using a law that really was an end run around basic Constitutional protections—and the press adored him. Yes, that ‘watchdog’ press which tells us that it is keeping tabs on government abuses was the Greek Chorus for Spitzer’s legal predations on Wall Street. Yet from the start, the press corps acted as an adjunct of Spitzer power, rather than a skeptic of it. Many journalists get into this business because they want to see wrongs righted. Mr. Spitzer portrayed himself as the moral avenger. He was the slayer of the big guy, the fat cat, the Wall Street titan—all allegedly on behalf of the little guy. The press ate it up, and came back for more. ... *Time* magazine bestowed upon Mr. Spitzer the title ‘Crusader of the Year,’ and likened him to Moses. *Fortune* dubbed him the ‘Enforcer.’ A fawning article in the *Atlantic Monthly* in 2004 explained he was “a rock star,” and “the Democratic Party’s future.” Similar media lionizations of the state AGs and their contingency fee lawyers have dominated the narrative in the mainstream press. Thomas Scheffey, *Jedi Blumenthal*, CONN. L. TRIB., Nov. 29, 1999, at 10. Asked if trial lawyers are an unelected fourth branch running America, Mississippi tobacco lawyer Dickie Scruggs didn’t bother to deny it: Somebody’s got to do it. ... Man, we’re going to sue everybody.” Adam Cohen, “Are Lawyers Running America,” *Time*, July 9, 2000. National Public Radio Series, *Inside the Tobacco Deal*, Scruggs and Mississippi AG Mike Moore are “entitled to sainthood.” Interview of Dick Morris, the White House “Prime Minister” in charge of the Clinton tobacco litigation policy.
- 15 Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Massachusetts: Harvard University Press/Belknap, 1992), pp. 48-50. The material quoted in italics is from pamphleteers: Pocock, “English Political Ideologies,” p. 565, *Cato’s Letters*, No. 20, March 11, 1720, No. 98 October 13, 1722 and *The Craftsman*, No. 172 October 18, 1729 and No. 198 April 18, 1730.

- 16 *Federalist* No. 58, ed. Jacob Cooke, (Middletown, Connecticut: Wesleyan University Press, 1961), p. 394. For a modern expression of this core concept, see Justice Scalia’s concurring statement in *Young v. United States*, 481 U.S. 787, 804, 809-10 (1987), “No one suggests that some doctrine of necessity authorizes the Executive to raise money for its operations without congressional appropriation.”
- 17 Alexis de Tocqueville, *Democracy in America*, (New York: Harper/J.P. Mayer, 1969) (translated by G. Lawrence), p.80.
- 18 Alexander Hamilton, Explanation, in *The Works of Alexander Hamilton*, Vol. 8, p.128 (Henry Cabot Lodge ed., 2d ed. 1903).
- 19 19 ANNALS OF CONG. 1330-31 (1809) (statement of Rep. J. Randolph).
- 20 State constitutions typically provide that all public monies, receipts or gifts be deposited into the Treasury. *State v. Blake*, 69 Conn. 64, 74 (1897) (Only the legislature, and not the Governor or Treasurer, may accept a gift to the state.) Connecticut Constitution Article IV §17, and Connecticut General Statute §§ 3-17, 4-32, 4-31a(a) (“Any gift, contribution ... or other aid from any private source ... shall be entered upon the records of the general fund.”) Connecticut General Statute §35-32a requires that all gifts or grants to the state for antitrust enforcement, and all recoveries shall be deposited in the general fund. See 86 Op. Attorney General of Connecticut 72, 1986 Conn. AG LEXIS 23, March 11, 1986 (the power to acquire property in any manner for the state rests in the legislature alone). Article 63, § 1, of the Amendments to the Massachusetts Constitution provides: “[A]ll money received on account of the Commonwealth from any source whatsoever shall be paid into the treasury thereof.” 1982 Mass. AG LEXIS 7, 1981-82 Op. Att’y Gen. Mass. 152, 1981-82 Op. Att’y Gen. Mass. 152.
- 21 63C AM. JUR. 2d Public Funds §26 (2015, 2016). See also 81A C.J.S. States § 407 (2016) (“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.”)
- 22 Paul Nolette, *Federalism on Trial: State Attorneys General and National Policymaking in Contemporary America*, (Lawrence, Kansas: University Press of Kansas, 2015), pp. i-iii.
- 23 *The New York Times* published a lively account of these self-described pirates’ scheme in which they operate under state-issued letters of marque, namely the contingency fee alliance with a state AG, essential to these private lawyers’ claim of legitimacy to arrogate powers to regulate by litigation. Glenn Collins, “A Tobacco Case’s Legal Buccaneers,” *New York Times*, March 6, 1995 p. 3, <http://www.nytimes.com/1995/03/06/business/a-tobacco-case-s-legal-buccaneers.html?pagewanted=all>.
- 24 Eric Lipton, “Lawyers Create Big Paydays by Coaxing Attorneys General to Sue,” *New York Times*, December 18, 2014, [http://www.nytimes.com/2014/12/19/us/politics/lawyers-create-big-paydays-by-coaxing-attorneys-general-to-sue-.html?\\_r=0](http://www.nytimes.com/2014/12/19/us/politics/lawyers-create-big-paydays-by-coaxing-attorneys-general-to-sue-.html?_r=0).
- 25 V.I.C. Rev. Org. Act of 1954 §3.
- 26 All states have such laws. See *Pellegrino v. O’Neill*, 193 Conn. 670, 675, 480 A.2d 476, 479, cert. denied, 469 U.S. 875 (1984) (“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.”) See also Conn. Gen. Stat. §§4-98, 4-100 for the criminal penalty for any public official who creates an obligation for the state for which there is not an existing appropriation. Other states, such as Ohio, Georgia and Illinois have constitutional prohibitions on the creation of any debt outside of strict statutory procedures governing state assumption of debt. Ohio law imposes criminal penalties on public officials who incur debt without legislative authorization. Ohio Constitution Article VIII, §3 (“No debt whatever shall be created by or on behalf of the state.”).
- 27 (3 V.I.C. §62).The Virgin Islands Attorney General’s office itself has asserted in a legal opinion that its Public Service Commission has no authority to utilize the services of private counsel because the law provides for representation of the commission by the Office of the Attorney General; where payment by the commission for private counsel is not authorized by statute, members or employees of the commission may be personally liable for sums due private counsel. 8 V.I. Op. Att’y Gen. 53. (Summary provided by Lexis which does not include the opinions.) Case law supports this Opinion of the Attorney General. *Daily News v. PSC*, 45 V.I. 139, 2002 LEXIS 34 (V.I. Super. Ct., Dec. 19, 2005) Ct., Dec. 19, 2005) (PSC had no authority to retain private counsel). *Sargeant v. Government of the Virgin Islands*, 10 V.I. 245, 1973 U.S. Dist. LEXIS 5213 (D.C.V.I. 1973) (Where contract with government was executed in violation of statutory requirement that funds be appropriated to cover the contract, government not estopped from raising the violation as a bar to recovery on the contract, nor could private party recover in quantum meruit.) Numerous devastatingly on-point published opinions of other AG offices consistently tell other public officials that they may not set up or solicit special funds to finance their activities, or ever incur or pay any obligation for which there is not an existing appropriation. See Notes 20, 21.
- 28 *Young v. United States*, 481 U.S. 787, 808-814 (1987).
- 29 *People v. Eubanks*, 927 P.2d 310, 59 Cal. Rptr. 2d 200 (1996). Federal law similarly prohibits public officials from accepting gifts of service or monies to support its operations. Kate Stith, “Congress’ Power of the Purse,” *Yale Law Journal*, Vol. 97, p. 1344, pp. 1365-1370, pp. 1372-1377 (1988). State law similarly prohibits public officials from accepting such gifts without formal legislative oversight and deposit into the general fund. See note 20 above.
- 30 *Young v. United States*, 481 U.S. 787, 804, 809-10) (1987) (Scalia, J. concurring).
- 31 Stith, Note 29, pp. 1376-1377.
- 32 *McGraw v. American Tobacco Company*, Civ. A. No. 94-C-1707 (W. Va. Cir. Ct. Nov. 29, 1995). (Contingency fee arrangement was an unlawful appropriation of state funds and Attorney General had no statutory or constitutional authority to retain such counsel.)
- 33 *Meredith v. Ieyoub*, 700 So. 2d 478 (1997) (“[A]bsent legislative authorization, such contracts violate state law and are illegal.”)

- 34 *Philip Morris, Inc. v. Glendening*, 349 Md. 660, 709 A.2d 1230, 1998 Md. LEXIS 316 (Md. 1998).
- 35 *Conant v. Robins, Kaplan, Miller & Ciresi, L.L.P.*, 603 N.W.2d 143, 1999 Minn. App. LEXIS 1341 (Minn. Ct. App. 1999)
- 36 *Meredith v. Ieyoub*. Louisiana’s Court of Appeals confirmed that same principle in *Ieyoub ex rel. State v. W. R. Grace & Co.-Conn.*, 708 So. 2d 1227, 1998 La. App. LEXIS 400, 97-0728 (La. App. 3 Cir. 03/06/98); (La. App. 3 Cir. March 6, 1998) in the context of state AG contingency fee contracting of state claims against asbestos manufacturers.
- 37 *Int’l Paper Co. v. Harris County*, 445 S.W.3d 379, 2013 Tex. App. LEXIS 9188, 2013 WL 3864317 (Tex. App. Houston 1st Dist. 2013)
- 38 *State ex rel. Discover Fin. Servs. v. Nibert*, 231 W. Va. 227, 744 S.E.2d 625, 2013 W. Va. LEXIS 603, 2013 WL 2460623 (W. Va. 2013) (“We are not addressing the appropriateness of awarding attorney’s fees to special assistant attorneys general directly from any actual monetary judgement ... because such a contingent fee agreement is not at issue in this case.”) *Ibid*, p. 253. “Curbing Contingency Fee Arrangements with State AGs,” Law360, February 13, 2015, <http://www.law360.com/articles/621582/curbing-contingency-fee-arrangements-with-state-ags>.
- 39 *Brown & Williamson Tobacco Corp. v. Chesley*, 7 A.D.3d 368, 777 N.Y.S.2d 82, 2004 N.Y. App. Div. LEXIS 6957 (N.Y. App. Div. 1st Dep’t 2004), (“Private counsel committed itself to fund personally these actions for whatever amount and for as long as was required ... [and]had to proceed on three fronts, legal, political and public opinion.) *Ibid*, p. 374.
- 40 See Young, *supra* at pp. 10 and 17. *Clancy v. Superior Court*, 705 P. 2d 347 at 353, n. 4 (Cal. 1984), *cert. den.* 479 U.S. 848 (1986), *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-250 (1980). *Sears, Roebuck & Co. v. Parsons*, 260 Ga. 824, 401 S.E.2d 4 (1991) (Contingency fee contract between county Board and private auditing corporation by which the corporation contingently shared in a percentage of the tax collected, was void as against public policy.) *Greater Ga. Amusements, LLC v. State*, 317 Ga. App. 118, 728 S.E.2d 744, 2012 Ga. App. LEXIS 695, 2012 Fulton County D. Rep. 2572 (Ga. Ct. App. 2012). (Contingency fee arrangement under which two individuals were retained by the district attorney for work on RICO forfeiture cases was void as against Georgia public policy.) *Yankee Gas Company v. City of Meriden*, (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,” *Connecticut Law Tribune*, April 30, 2001, p. 1.
- 41 *Clancy v. Superior Court*, 705 P. 2d 347 at 353, n. 4 (Cal. 1984), *cert. den.* 479 U.S. 848 (1986).
- 42 Adam Liptak, “A Deal for the Public: If You Win, You Lose,” *New York Times*, July 9, 2007, [http://www.nytimes.com/2007/07/09/us/09bar.html?\\_r=0&mtref=undefined&gwh=82ED216F7253E46AEDAB9AA004F98876&gwt=pay](http://www.nytimes.com/2007/07/09/us/09bar.html?_r=0&mtref=undefined&gwh=82ED216F7253E46AEDAB9AA004F98876&gwt=pay).
- 43 *Ibid*.
- 44 *Ibid*.
- 45 *Ibid*.
- 46 *Ibid*.
- 47 *Ibid*.
- 48 Prior to the tobacco suits, Mississippi Supreme Court precedent prohibited state attorneys general from entering into contingency fee contracts. *State ex rel. Brown v. Poplarville Sawmill Co.*, 81 So. 124 (Miss. 1919) overruled in part on unrelated grounds in *Solomon v. Cont. Baking Co.*, 165 So. 607 (Miss. 1936) (25 percent contingency fee to private “was unauthorized and unlawful and renders the entire contract void.) In 2002, the Mississippi Supreme Court held that while the Mississippi AG may enter into contingency fee contracts, those payments are subject to legislative control, *Pursue Energy Corp. v. State Tax Comm’n*, 816 So. 2d 385, 2002 Miss. LEXIS 140 (Miss. 2002) (AG Michael Moore testified by affidavit that outside counsel would not be paid out of any recovery; AG would apply to the Legislature for an appropriation to pay the firm and the legislature could in its discretion appropriate all, part, or none of the AG’s recommendation for attorney’s fees, but in no event were they to be paid directly out of any recovery.) Similarly, in *Pickering v. Hood*, 95 So. 3d 611, 2012 Miss. LEXIS 365, 2012 WL 3172092 (Miss. 2012), the Mississippi Supreme Court held that while the state AG could enter into a contingency fee contract, any such contingency-fee contract would be—as are all contracts governed by Mississippi law—subject to Mississippi constitutional and statutory provisions and limitations. Those laws required that payments to the attorneys “shall be paid out of the attorney general’s contingent fund, or out of any other funds appropriated to the attorney general’s office” and that they may not be paid by the defendant (as in the tobacco cases) or out of the funds recovered by the state in litigation or settlement, inasmuch as those are public funds. As *Hood* put it, the “contingent fund” is not Microsoft’s checking account or the funds recovered by the state in the litigation, as those are public funds. Accordingly, the state auditor was allowed to seize the \$10 million in attorney’s fees paid directly by Microsoft to the contingency attorneys. *Hood*, 95 So. 3d at 622.
- 49 *State of New Hampshire v. Actavis Pharma, Inc.* Case No. 217-2015-CV-00566, Merrimack Superior Court, (March 8, 2016).
- 50 Case No. 2016-0199.

- 51 John Gibeaut, "Getting Burned," *ABA Journal*, Vol. 84 (September 1998), <http://www.readabstracts.com/Law/Getting-burned-Deadly-advice-targeted-decision-allows-suit-against-publisher-of-murder-manual.html>. Bob Van Voris, "That \$10 Billion Fee," *National Law Journal*, November 30, 1998, <https://advance.lexis.com/document/?pdmfid=1000516&crd=df4cc3d7-5f80-4dc3-8dcd-53b38097bfa4&pddocfullpath=%2Fshared%2Fdocument%2Flegalnews%2Furn%3AcontentItem%3A52MT-GSJ1-DYF0-S15Y-00000-00&pddocid=urn%3AcontentItem%3A52MT-GSJ1-DYF0-S15Y-00000-00&pdcontentcomponentid=8024&pdteaserkey=sr1&ecom=q85tk&earg=sr1&prid=ed811992-880d-4f8e-9d32-a8240f13bde5>. ("At the heart of the Master Settlement Agreement'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.") Most of the states' contingency deals in tobacco were 25 percent, while a few got 20 percent, and at least one, Texas, 15 percent. Maine had an hourly rate with a percentage cap. Estimates of the fees due under the 1997 failed federal settlement varied from \$45 billion to \$55 billion. Interestingly, the fees in the later 1998 settlement were first estimated at \$8 billion to \$10 billion, but somehow ballooned to over \$20 billion.
- 52 One of the most disturbing consequences of these contingency fee agreements occurred when Maryland's contingency fee counsel, Peter G. Angelos, bartered half of his 25 percent contingency fee in exchange for retroactive changes in the law that would assure him a win in court. "Mr. Angelos ... agreed to accept 12.5% 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." Statement of Maryland State Senate President Thomas V. Mike Miller, Jr., reported in Daniel LeDuc, "Angelos, Md. Feud Over Tobacco Fee, \$4 Billion Payout to State Will Be on Hold as Lawyer Argues for 25%," *Washington Post*, October 15, 1999, p. B1. Peter Angelos essentially purchased the law that would be applied to his case—with the state's own money—and then reneged on the fee adjustment.
- 53 Dan Morain and Henry Weinstein, "Dispute Brewing over Private Attorneys' Fees in Tobacco Lawsuits Litigation," *Los Angeles Times*, November 22, 1998, <http://articles.latimes.com/1998/nov/22/news/mn-46618>. (Detailing Bill Lerach's threat to sue California for millions: "We're going to get paid some day. ... We didn't work for seven years for nothing.")
- 54 Gibeaut. "Faced with the politically cataclysmic prospect of paying as much as \$2.8 billion in fees ... [Florida Governor Lawton] Chiles and [Attorney General Bob] Butterworth broke the contingency fee contract in favor of a secret deal between tobacco and two lawyers." The contingency fee lawyers filed charging liens against the state to enforce the original contract for 25 percent. Butterworth "claimed the contract the lawyers worked under for 2½ years never was any good in the first place because of a provision, stricken at signing, requiring the legislature to appropriate any money the state received. ... Butterworth said the lawyers should have known up front that the contract they signed with the state would require the legislature to approve any money they would get."
- 55 Robert Levy, "The Great Tobacco Robbery; Lawyers Grab Billions," *Legal Times*, February 1, 1999, <https://www.cato.org/publications/commentary/great-tobacco-robbery-lawyers-grab-billions>.
- 56 *New Mexico v. General Electric Co.*, 467 F. 3d. 1223, 1242 n. 28 (10th Cir. 2006).
- 57 American Bar Association, "Rule 1.5: Fees," Rules of Professional Conduct, accessed January 26, 2017, [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_5\\_fees.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_5_fees.html).
- 58 Monograph on Regulation on Litigation, June 22, 1999, Center for Legal Policy p. 23 (statement of Eliot Spitzer).
- 59 *Venegas v. Mitchell*, 495 U.S. 82, 87-88 (1990). *State v. Am. Tobacco Co.*, 723 So. 2d 263, 267-68 (Fla. 1998). The Florida Supreme Court held that as a matter of codified state law—and state contract law—that funds recovered in Florida's tobacco case, including attorneys' fees had to be paid by the court into the state treasury, such attorneys' fees were not subject to disbursement by the court, other than to the state.
- 60 *Conant et al. v. Robins, Kaplan, Miller & Ciresi*, 603 N.W. 2d 143 (Minn. 1999).
- 61 *Philip Morris, Inc. v. Glendening*, 349 Md. 660, 709 A.2d 1230 (1998).
- 62 *Venegas v. Mitchell*, 495 U.S. 82, 87-88 (1990); *O'Brien v. Seyer*, 183 Conn. 199, 207, 439 A.2d 292, 296 (1981), *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."). *Brown v. Gen. Motors Corp.*, Chevrolet Div., 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). 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.").
- 63 The Maryland appellate decision was issued after the 1997 national settlement of all the cases. The Minnesota appellate decision was issued after the Master Settlement Agreement of 1998, and also after contingency fee counsel had already agreed to accept a much lower contingency fee than the 25% provided by contract: "[T]he law firm agreed to relinquish its rights to recover costs and much larger attorney fees from the state under the 1994 contingency fee retainer agreement." *Conant*, 603 N.W. 2d at 145. This context matters. No court was likely to do a thing to disturb the "too big to fail" Master Settlement Agreement. Decisions reached in the tobacco cases are accordingly of limited precedential value. They routinely ignore and dismiss constitutional arguments in favor of political considerations they expressly invoke when rubber-stamping the deals. That courts are paralytic when faced with challenges to that settlement works both ways. Law firms were not successful in suing to enforce the original (usually 25 percent) deal. *Milberg Weiss v. State of Arkansas*, 342 Ark. 303, 28 S.W. 3d. 842 (2000) (Contingency fee firm barred from intervening to challenge the settlement and enforce their full 25%). Indeed, when contingency fee counsel sued for the full 25% in Massachusetts, the Commonwealth of Massachusetts successfully convinced a jury to reduce the award to 10.5%. Alex Beam, "Greed on Trial," *Atlantic Monthly*, June 2004, <http://www.theatlantic.com/magazine/archive/2004/06/greed-on-trial/302957/>.

- 64 Hood.
- 65 Testimony of Hon. Christopher Cox, Congressman, House Judiciary Courts and Intellectual Property Attorney's Fees in the Tobacco Settlement, Subcommittee on Courts and Intellectual Property, December 10, 1997, <http://www.afn.org/~afn54735/tob971210a.html>. “[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 highest standards of advocacy, or to the sovereign's non-monetary policy objectives in pursuing litigation.”)
- 66 Contract April 2016 between Cohen Milstein and USVI, 1.B ¶6. The contract also provides that they can apply to the court for such reimbursement or seek it from the defendants and creates by law claims in *quantum meruit* upon discharge. *Bowes v. Suzuki Motor Co.*, 217 F. Supp. 610 (D. VI 2002). *Ibid*, ¶¶4, 5.
- 67 Joseph A. Califano, Jr., “Tobacco: The Moral Issues,” *America*, August 15, 1998, <https://business.highbeam.com/410107/article-1G1-21066398/tobacco-moral-issues-joseph-califano-jr-president-national>. The Department of Health, Education and Welfare was split into the Department of Health and Human Services and the Department of Education in 1980.
- 68 Gibeaut.
- 69 Barry Meier, “Lawyers in Early Tobacco Suits to Get \$8 Billion,” *New York Times*, December 12, 1998, <http://www.nytimes.com/1998/12/12/us/lawyers-in-early-tobacco-suits-to-get-8-billion.html>.
- 70 Robert W. Bauer, *Sanders v. Brown*; State-Action Immunity and Judicial Protection of the Master Settlement Agreement, 34 J. Corp.: L. 4, 1291, 1307-8 (2009). That article cites this author in its conclusion that the driving force behind the perpetuity of the MSA – “[L]aw made in the course of an end-run around state and federal legislatures” is “a question with immense implications, but with an answer of profound simplicity”: “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?” Margaret A. Little, “A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Government's Tobacco Litigation,” *Connecticut Law Review*, Vol. 33 (2001), pp. 1143, 1178.
- 71 John Helyer, Soo-Min Oh, and Patricia Neering, “They're Ba-a-ack! The lawyers who humbled Bid Tobacco and Microsoft are on the march once again. This time their battle is with the health-care industry—and with each other,” *Fortune*, June 26, 2000, [http://archive.fortune.com/magazines/fortune/fortune\\_archive/2000/06/26/283022/index.htm](http://archive.fortune.com/magazines/fortune/fortune_archive/2000/06/26/283022/index.htm). “Acting like a fourth branch of government, the plaintiffs lawyers seek to contravene the decisions of the established ones... They're challenging the whole rationale that Congress and state legislatures have set up.” Quoting John Beisner, counsel for one of the HMO defendants. Other critiques of contingency fee financing and regulation by litigation include: Robert A. Levy, *Shakedown; How Corporations, Government and Trial Lawyers abuse the Judicial Process*, (Washington: Cato Institute, 2004). Bill McCollum, “States and Lawyer's Fees; Transparency Needed,” *Wall Street Journal*, March 8, 2011, <http://www.wsj.com/articles/SB10001424052748704570904576180922353089608>. Editorial, “Lawsuit, Inc.,” *Wall Street Journal*, February 25, 2008, <http://www.wsj.com/articles/SB120389878913889385>. Paul Nolette, Elected Attorneys General Prone to Politicized Behavior, *Connecticut Law Tribune*, December 29, 2014, <http://www.ctlawtribune.com/id=1202720068709/Editorial-Restrictions-Should-Be-Place-on-Fundraising-By-Attorneys-General?slreturn=20161120123132>. Peter Roff, “Attorneys General Shouldn't Outsource legal work to private firms,” *Washington Examiner*, August 24, 2016, <http://www.washingtonexaminer.com/attorneys-general-shouldnt-outsource-legal-work-to-private-firms/article/2600022>.
- 72 American Tort Reform Association, Tracking the Trial Lawyers, available at <http://atrf.trkcinc.com>.
- 73 Mark Curriden, “‘Your boss is a crook!’ The phone call that sent Texas AG Dan Morales to prison,” *Dallas Morning News*, April 15, 2016, <http://www.dallasnews.com/business/business/2016/04/15/your-boss-is-a-crook-the-phone-call-that-sent-texas-ag-dan-morales-to-prison>.
- 74 Cox.
- 75 Center for Responsive Politics, American Association for Justice, PAC Summary Data, accessed December 20, 2016, <https://www.opensecrets.org/pacs/lookup2.php?strID=C00024521>.
- 76 Barry Meier, “Rodham and Group Seeking Legal Fees Uses Clinton Testimonial,” *New York Times*, March 8, 2001, <http://www.nytimes.com/2001/03/08/us/rodham-and-group-seeking-legal-fees-uses-clinton-testimonial.html>. As the *Times* noted: “Julia Payne, a spokeswoman for Mr. Clinton, said the group of lawyers that includes Mr. Rodham had ‘facilitated’ the video, but she said she did not know who had suggested that Mr. Clinton make the tape. She said he was unaware that his taped remarks were being used in the effort to get legal fees. ‘It was against White House policy to use the image of the president or his words for profit,’ she said.”)

- 77 Kate O’Beirne, “Cash Bar—How Trial Lawyers Bankroll the Democratic Party,” *National Review*, August 20, 2001, <http://www.unz.org/Pub/NationalRev-2001aug20-00026>.
- 78 Editorial, “Politics Sets Back Tort Reform,” *Chicago Tribune*, May 5, 1996, [http://articles.chicagotribune.com/1996-05-08/news/9605080103\\_1\\_product-liability-cases-faulty-products-punitive](http://articles.chicagotribune.com/1996-05-08/news/9605080103_1_product-liability-cases-faulty-products-punitive).
- 79 *Driscoll v. Burlington-Bristol Bridge Co* 8 N.J. 433, 494, 86 A.2d. 201, 231, *cert. denied* 344 U.S. 838 (1952)
- 80 Peter J. Boyer, “The Bribe,” *The New Yorker*, May 19, 2008, pp. 45-57, [http://online.wsj.com/public/resources/documents/WSJ\\_Boyer\\_Scruggs\\_Fact080512.pdf](http://online.wsj.com/public/resources/documents/WSJ_Boyer_Scruggs_Fact080512.pdf)
- 81 Adam Liptak, “Big Firm Found to have acted unethically,” *New York Times*, July 4, 2003, <http://www.nytimes.com/2003/07/04/us/big-litigation-firm-found-to-have-acted-unethically.html>.
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- 83 Hugh Rice Kelly, “The Lingering Odor of the Texas Tobacco Settlement,” *Texans for Lawsuit Reform* blog undated, accessed December 20, 2016, <https://www.tortreform.com/blog/lingering-odor-texas-tobacco-settlement>
- 84 Cox.
- 85 Mark Curriden, “Historic Tobacco Case Revisited: Biggest litigation win ever or a complete scam?” *Dallas Morning News/Texas Lawbook*, April 15, 2016, <http://www.dallasnews.com/business/business/2016/04/15/historic-tobacco-case-revisited-biggest-litigation-win-ever-or-a-complete-scam>.

## About the Author

Margaret A. Little is an attorney in private practice in Stratford, Connecticut, concentrating in commercial and constitutional litigation and appeals in state and federal courts. She received her B.A. *summa cum laude* from Yale College in 1977 and her J.D. in 1984 from Yale Law School, where she was awarded the Potter Stewart Prize from the Yale Moot Court of Appeals. From 1984 to 1985, Little served as a Law Clerk for the Honorable Ralph K. Winter, Judge of the United States Court of Appeals for the Second Circuit. Prior to opening her own law offices in 1997, where she continues her practice of civil litigation and appeals in state and federal courts, Little was a partner at Tyler, Cooper & Alcorn in New Haven, Connecticut. She recently served as appellate consulting counsel as part of the team representing the New Haven firefighters in *Ricci v. DeStefano*, a landmark 2009 United States Supreme Court decision.

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