
Swift Boat Democracy & the New American Campaign Finance Regime by Lee E. Goodman

The Iraqi Special Tribunal: Securing Sovereignty from the Ground Up by Michael A. Newton

The Murky Politics of Removal Jurisdiction by Brian P. Brooks

I, Plaintiff: A Chat With Joshua Davey Interview Conducted by Susanna Dokupil

Shakedown: How Corporations, Government and Trial Lawyers Abuse the Judicial Process by Robert A. Levy Reviewed by Mark A. Behrens and Andrew W. Crouse
Cato Institute Senior Fellow Robert A. Levy's latest book, Shakedown: How Corporations, Government and Trial Lawyers Abuse the Judicial Process, is a provocative, bare knuckles assault on what Levy calls "government-sponsored extortion using the courts." Specifically, he argues that the tort trend of "regulation through litigation" and the U.S. Department of Justice's antitrust case against Microsoft illustrate how the tort and antitrust systems have become avenues for "exploitation" rather than justice. Levy's suggested fixes reflect his purest libertarian thinking and steadfast dedication to principles of federalism.

Part one of the two-part book, Tort Law as Litigation Tyranny, begins with an analysis of the state attorneys' general Medicaid recoupment lawsuits against the tobacco industry. Levy details how state attorneys general worked with private contingency fee lawyers to bring parallel cases in multiple jurisdictions in order to ratchet up pressure on the industry to settle. Levy also describes how some state courts and legislatures circumvented traditional tort law rules in order to facilitate recovery by the states.

For example, Levy illustrates how, "out of whole cloth," state governments were given an independent cause of action to recover Medicaid expenditures. States would not be subject to defenses based on smoker choice. States would not have to identify which particular manufacturer caused which particular injury. Levy shows how all of these fundamental tort rules were swept away.

Forced into "bet the industry" litigation, the tobacco companies entered into a multi-billion dollar settlement that also required changes in behavior, such as how the companies advertise and market their products. According to Levy, the settlement ushered in a new era in which tort law and the judicial process are being abused in order to achieve regulation and taxation of entire industries through un-Democratic means.

Levy pulls no punches in attacking the legitimacy of the tobacco litigation as "faux legislation." He also questions whether the primary motivation for the litigation was the stated intention of discouraging youth smoking since only a fraction of the settlement money has been spent on anti-smoking programs; the rest has been directed into other areas of state budgets.

Levy also blasts the close relationship between the state attorneys general involved in the litigation and their wealthy personal injury lawyer partners. In the state tobacco lawsuits, many state attorneys general negotiated contingent fee contracts - behind closed doors - with hand-picked private personal injury lawyers. These contracts stipulated that in lieu of a flat or hourly fee, the private lawyers were guaranteed a percentage of any trial judgment or settlement amount. Some contingency fee personal injury lawyers have earned astronomical fees as a result, which Levy documents.

Shakedown debunks the legitimacy of the Medicaid recoupment suits, but Levy also raises questions about the Multistate Master Settlement Agreement, which he believes resulted in a "tobacco cartel" in violation of the U.S. Constitution and antitrust law. Levy's view may not be widely held by others, but it does illustrate his independence and free market philosophy.

Levy goes on to show how the newly fashioned legal principles that were used to target the tobacco industry are now being used against other industries, such as gun makers, former lead paint manufacturers, and "big food." Through his analysis of each of these new targets, Levy fully develops what is perhaps the book's most compelling theme: well-financed personal injury lawyers are misusing the courts to regulate entire industries and rake in enormous fees.

Levy offers a number of remedies that would counter the new tort regime while remaining consistent with his "pure form" of federalism. Some of his proposed "fixes" are standard civil justice reform pro-
posals. These include state-based reforms to provide
punitive damages defendants with protections similar
to those of criminal defendants, such as a higher bur-
den or proof standard and limits against “double jeop-
dardy” through repetitive punishment; abolition of joint
liability; and a model law developed by the American
Legislative Exchange Council (ALEC) to subject gov-
ernment plaintiffs to the same legal rules applicable to
a private claim by an injured party when the govern-
ment sues to recover indirect economic losses related
to the same injury. Other proposed state-based fixes
are more controversial, such as banning contingency
fee contracts between private lawyers and government
entities. ALEC model legislation, for example, would
continue to permit such contracts but require open
and competitive bidding and legislative oversight to
ensure the terms of the contract are fair to taxpayers.

Levy’s two proposed federal solutions to the
problem of “regulation through litigation” are less likely
to generate enthusiasm among civil justice reformers.
First, he would have Congress amend the rules that
control state exercise of so-called “long-arm” jurisdic-
tion over out-of-state businesses so that a defend-
ant could avoid litigation in a hostile state by choosing
not to do business there. The American Tort Re-
form Association calls Madison County, Illinois
America’s number one “judicial hellhole,” but what
manufacturer is likely to forego a market as large as
Chicago, and the rest of the state, to avoid being sued
in “Mad County?” Los Angeles County’s Central Civil
West Division is such a money-maker for plaintiffs’
lawyers that they call it “the Bank.” Still, what busi-
ness is going to withdraw from the California market,
one of the largest in the world, to avoid being sued in
one Los Angeles “judicial hellhole?”

Levy himself recognizes that not all businesses
can avoid a state’s jurisdiction so he proposes another
remedy: a federal choice-of-law rule that would allow
a manufacturer to stamp products by state of sale and
price them differently to allow for anticipated product
liability verdicts. For various reasons, this reform also
may have limited practical value.

Using the Microsoft litigation as a platform, Levy
systematically dismantles the rationale for antitrust law
in both the economy of yesterday and the high-tech
economy of today, suggesting that its only real use is
to prop-up “market-losers.” Levy is more successful
in making the argument that antitrust law is inconsis-
tent with the market forces driving the new high-tech
economy than he is in proving that any invidious con-
duct was involved in the Justice Department’s suit
against Microsoft. His arguments for repealing the
antitrust laws are unlikely to catch fire, but may stimu-
late debate regarding the applicability of the antitrust
laws in the current economy.

In sum, Robert Levy’s Shakedown book
chronicles two of the biggest litigations of our era,
the state attorneys general tobacco litigation and fed-
eral government’s antitrust action against Microsoft.
Levy presents a bold and compelling case that the tort
and antitrust systems have been abused and turned
into avenues for “exploitation” rather than justice.
Levy’s proposed fixes often are not “mainstream,” but
they are firmly rooted in his core principles of federal-
ism, limited government, and free markets. Levy may
well understand that shining a light on litigation abuse
can have a curative effect. If that happens, Levy may
help bring about changes regarding the way in which
the tort and antitrust laws are being administered with-
out ever having to compromise on his core values.

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Hardy & Bacon L.L.P. in Washington, D.C. The views 
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