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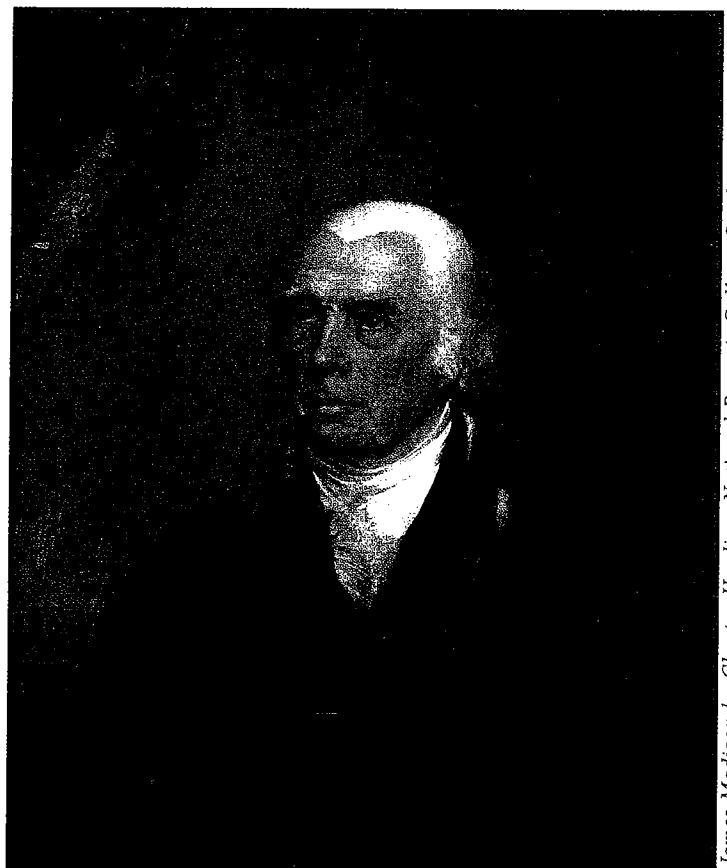
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James Madison by Chester Harding, National Portrait Gallery, Smithsonian Institution

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# SHAKEDOWN:

## HOW CORPORATIONS, GOVERNMENT AND TRIAL LAWYERS ABUSE THE JUDICIAL PROCESS

BY ROBERT A. LEVY

REVIEWED BY MARK A. BEHRENS AND ANDREW W. CROUSE\*

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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 connect an individual's smoking with an individual's injury. General and often questionable data would supply that link. Further, 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 burden or proof standard and limits against "double jeopardy" through repetitive punishment; abolition of joint liability; and a model law developed by the American Legislative Exchange Council (ALEC) to subject government plaintiffs to the same legal rules applicable to a private claim by an injured party when the government 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" jurisdiction over out-of-state businesses so that a defendant could avoid litigation in a hostile state by choosing not to do business there. The American Tort Reform 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 business 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.

In part two, *Antitrust Law as Corporate Welfare for Market Losers*, Levy deconstructs the Justice Department's case against Microsoft and argues for the repeal of the antitrust laws. Essentially, Levy argues that Microsoft's market-competitors persuaded the Justice Department to bring an unwarranted antitrust case against Microsoft "as a crutch ... for the rigors of competition."

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 inconsistent with the market forces driving the new high-tech economy than he is in proving that any invidious conduct was involved in the Justice Department's suit against Microsoft. His arguments for repealing the antitrust laws are unlikely to catch fire, but may stimulate 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 federal 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 federalism, 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 without ever having to compromise on his core values.

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