

BOOK REVIEWS

FIRE AND SMOKE: GOVERNMENT, LAWSUITS AND THE RULE OF LAW. BY MICHAEL I. KRAUSS. SAN FRANCISCO: THE INDEPENDENT INSTITUTE, 2000.

This monograph by Professor Michael Krauss of the George Mason University School of Law is a well-written and accessible critique of the recent government lawsuits against the tobacco and firearms industries. The first of these so-called recoupment suits was filed in May 1994 by the attorney general of Mississippi against the tobacco industry for the recovery of Medicaid and other expenditures by the state for medical treatment of sick smokers. Four years later, forty-six states and a few territories entered a settlement agreement with the tobacco industry following earlier settlement agreements between the industry and the states of Mississippi, Florida, Texas, and Minnesota. In 1999, the federal government filed a similar lawsuit against the tobacco industry. Since 1998, dozens of municipal governments have filed lawsuits against the firearms industry for the recovery of municipal expenditures for police departments, the criminal justice system, and the medical treatment of persons injured in firearms-related incidents.

These recoupment suits have been criticized by many conservatives and libertarians, who have described these lawsuits as, among other things, “executive taxation,” “regulation through litigation,” and “extortion.” Professor Krauss’s monograph is a primer from that perspective. Krauss explains how these recoupment suits are based on a general misapplication of private law to public disputes, and he discusses the specific legal and economic flaws of these lawsuits.

The early conservative and libertarian scholarship on this subject uniformly criticized the tobacco litigation. In 1996, I chaired a committee of five attorneys, including Professor Michael DeBow of the Cumberland School of Law of Samford University, to consider whether the State of Alabama should file a recoupment lawsuit against the tobacco industry. That committee unanimously recommended against the filing of a tobacco suit, and the committee published a lengthy report, which was later published in a law review. Several months later, Professor DeBow wrote a policy study of the tobacco suits which was published by the Heartland Institute, and later that same month, Robert Levy wrote a similar policy study, published by the Cato Institute.

As recoupment litigation multiplied, so did the critical commentary. In 1999, the U.S. Chamber of Commerce, with cosponsors The Federalist Society and The Manhattan Institute, hosted a major conference about recoupment litigation, and in 2000, the American Tort Reform Foundation published a monograph on the subject, written by John Fund of *The Wall Street Journal* and Martin Wooster of *The American Enterprise*. The general counsel of the American Tort Reform Association, Victor Schwartz, drafted and touted model legislation to curb the abuses of this new litigation. Much of this commentary focused critically on the retention of politically active trial lawyers to represent government agencies on a contingent-fee basis or, as Robert Levy described it, “private lawyers using the power of the state to enforce public law—with an incentive to increase the penalties.”

Professor Krauss’s contribution to this scholarship and commentary is two-fold. First, Krauss briefly explains the key distinction between public and private law. Krauss notes that, in contemporary American culture, “[p]ublic law, involving relationships between citizens and the state, is all the rage. Constitutional litigation makes headlines, as it should. And criminal trials are often appropriate front-page fodder” (p. 2). Krauss explains, however, that private law, not public law, is “what distinguishes free societies from totalitarian ones. All countries have public law institutions. But only in free countries does private law govern the acquisition and exchange of rights” (p. 2). To blur this distinction and transform the private law of torts into a form of public law ultimately means that “freedom is replaced by collectivism” (p. 5).

Krauss then proceeds to his second point: The government recoupment litigation against the firearms and tobacco industries is flawed as matters of both law and public policy. Krauss explains why public concerns of the governmental costs attributed to gun violence and tobacco-related illnesses are not properly the subject of the private law of torts. He explains why each of the claims, under traditional tort law, fail because either the alleged conduct of the defendants was not legally wrongful or the alleged victims, such as smokers, voluntarily assumed the risks of harm to themselves. In the gun context, Krauss refers to persuasive studies that report the benefits of firearms ownership by law-abiding citizens and law enforcement agencies outweigh the costs of gun violence. In the tobacco context, Krauss again notes that leading economic studies show that “smoking does not cause any economic loss to government” (p. 26), because smokers pay high taxes and, through premature deaths, impose fewer pension and medical costs on the welfare state.

Krauss concludes by suggesting two ordinary public-law alternatives for the resolution of these matters: taxation and prohibition. Krauss explains that neither alternative is likely to succeed, and for that reason, elected representatives are reluctant to turn to these public remedies. That is why the proponents of government expansion have turned to litigation to achieve their goals, as an end-run around the political process.

There is one argument advanced by Krauss with which I am sympathetic, but I find unavailing. Krauss contends that the recent multistate tobacco settlement “contravenes antitrust law and quite possibly the Constitution” (p. 29). Although I certainly agree that the national tobacco settlement is a flawed policy that strengthened the ability of the tobacco industry to behave as a cartel, the agreement with the state governments removed the settlement from the ambit of the antitrust laws. The legal challenges filed by tobacco distributors, which are based on the same arguments advanced by Krauss, have failed repeatedly.

Much of what Krauss says about recoupment litigation has been said elsewhere, but Krauss presents this subject better than most. He cogently explains both the big picture of why this litigation is a threat to liberty and the specific legal and policy flaws of each lawsuit. For any friend of liberty who wants to learn more about this subject, Krauss offers, in forty pages, one of the best starts available.

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REFERENCES

- DeBow, Michael E. 1997. “The States vs. The Tobacco Industry: Smoke and Assorted Mirrors.” *Policy Study* No. 83. Palatine, Ill.: The Heartland Institute.
- Fund, John, and Martin Morse Wooster. 2000. “The Dangers of Regulation Through Litigation.” The American Tort Reform Foundation.
- Levy, Robert A. 1997. “Tobacco Medicaid Litigation: Snuffing Out the Rule of Law.” *Policy Analysis* No. 275. Washington, D.C.: Cato Institute.
- Pryor, Bill. 2000. “The War on Guns.” In *The Rule of Law in the Wake of Clinton*. R. Pilon, ed. Washington, D.C.: Cato Institute. Pp. 135-43.
- Pryor, Jr., William H. 2000. “A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits.” *Tulane Law Review* 74(5/6): 1885-918.
- Regulation By Litigation: The New Wave of Government-Sponsored Litigation*. 1999. Washington, D.C.: Center for Legal Policy at the Manhattan Institute, The Federalist Society, and the U.S. Chamber of Commerce Institute for Legal Reform.
- “Report of the Task Force on Tobacco Litigation.” 1997. *Cumberland Law Review* 27(2): 577-652.
- Schwartz, Victor E., and Leah Lorber. 1999. *Regulation Through Litigation Has Just Begun: What You Can do to Stop It*. Washington, D.C.: National Legal Center for the Public Interest.
- Schwartz, Victor E., Mark A. Behrens, and Leah Lorber. 2000. “Tort Reform Past, Present and Future: Solving Old Problems and Dealing With ‘New Style’ Litigation.” *William Mitchell Law Review* 27(1): 237-69.