



DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

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March 20, 2000

Litigative vs. Legislative Democracy

by Doug Bandow

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As the U.S. presidential race moves into high gear, the candidates are talking about everything from health care to election reform. But they have ignored one of the most important issues: lawmaking through lawsuit.

The liability explosion has entered its third decade with few signs of abating. No one disputes the importance of holding people responsible for damages or injuries caused by their negligence. Unfortunately, today the law increasingly imposes liability irrespective of blame or causation.

The consequences have been many. There are a few winners: trial attorneys now collect not just millions, but billions of dollars in fees.

The losers, in contrast, are legion. Everyone pays higher insurance premiums. Kids suffer when fear of liability suits causes nonprofit groups and governments to curtail recreational activities and close parks.

School and subway systems pay big judgments to burglars and drunks. Companies, such as the producers of silicone breast implants, end up in bankruptcy even when research demonstrates their innocence.

And the public finds itself living under rules made by lawyers rather than legislators. Whether products or services are available, how much they cost, what kind of advertising can appear, and more are now decided in courtrooms without the public's input.

Curiously, many of the strongest proponents of lawmaking by lawsuit otherwise style themselves as populist defenders of the masses. They routinely advocate more democracy and citizen control.

But not in this instance. In their view, the business goose must be plucked - and it doesn't matter how.

Former Labor Secretary Robert Reich articulated this view last year, when he argued that the era of big government really wasn't over, since litigation was supplanting regulation. It might not be efficient, he said, "but perhaps regulating through lawsuits is better than not regulating at all."

However, this attitude presupposes that regulation, and a particular kind of regulation, is necessary. And that the public doesn't have the right to say no.

For instance, lawyers simultaneously enriched themselves and made policy through suits against the silicone breast implant and tobacco industries.

In the breast implant case, they created a national scare. Yet science subsequently demonstrated the hysteria to be unfounded.

The tobacco litigation had equally dramatic effects, hiking cigarette prices and restricting advertising. The companies settled for \$246 billion, a de facto tax hike imposed without the approval of any legislature. Yet cigarettes were already one of the most heavily taxed products.

These dubious successes have motivated a spate of lawsuits against gunmakers. Other targets include the alcohol industry, lead paint producers, HMOs, and even the dairy industry.

Indeed, lawyers could end up running the entire economy. There are few goods and services that could not be attacked as dangerous, harmful, or wasteful; there are few ads that could not be criticized as inaccurate, misleading, or useless. All could be legally suspect.

The results of more lawmaking by lawsuit aren't likely to be pretty. The legislative process is imperfect, but a refusal to act is, in fact, a legitimate answer by the democratic political system. The nation's founders wanted to inhibit government meddling and force policy-making to incorporate at least some possibility of deliberation and compromise.

Not so litigation. Neither lawyers nor judges have any expertise to regulate individual companies, let alone entire industries.

What makes litigious lawmaking particularly dangerous is the fact that many cases never even reach a judge. This point may have helped cause Robert Reich to lose his enthusiasm for mass torts. The goal of actions like those against tobacco and guns, he wrote earlier this year, "is to threaten the industries with the risk of such large penalties that they'll agree to a deal."

That is, laws are being made by litigants, the most special of special interests.

This process obviously threatens the basis of a democratic republic. Such lawsuits, worries Reich, represent "blatant end-runs around the democratic process," especially when dependent on "the discretion of administration officials operating in utter secrecy."

Sure, democracy is flawed. But turning government over to lawyers is no solution. Instead, as Reich now argues, "the answer is to make democracy work better." And to accept no regulation as a legitimate political response.

Politics is a bad way to make policy. Litigation is worse. If Americans want to preserve more than the mere pretense of a republic, they must reject attempts to legislate through lawsuits.

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