

Public-nuisance lawsuits are stifling innovation



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With arcane rule changes and different policies on absentee voting, we are bracing for lawsuits and recounts that could keep both presidential candidates' legal teams busy until New Year's. For once, thankfully, it will not be Florida's fault.

This is another reminder of how much we have allowed our country to be captured by the legal profession. Whether it's elections, climate change or the latest corporate scandal, lawsuits have become as American as apple pie.

In the past year alone, personal injury or tort lawsuits have risen more than 7 percent to a whopping 73,000 a year, according to the Department of Justice.

One surprising legal principle that has helped fuel these cases is "public nuisance."

In the past few decades, plaintiffs' attorneys have expanded the claim of public nuisance — meant to cover pollution or obstructions that cause harm to property — to include widespread social problems such as climate change and opioid addiction.

The goal is to extract large paydays from firms because of either real or perceived damage. Most companies would rather settle than be publicly dragged by the media. Just ask Elon Musk.

There are, no doubt, legitimate cases where real harm has been done. But many of these cases stem from complex issues that require public-policy solutions rather than judicial rulings, which distort our legal system and set dangerous precedents.

Originally, public nuisance was invoked as a way for local governments to protect the public's right to access public roads, local parks, and waterways, or to halt domestic disturbances like prostitution or gambling.

But recently, state and local courts have been more open to looser interpretations of public nuisances, leading to gross abuses of our already overly litigious justice system.

For example, in 2000, attorneys went to localities in California to sign on as plaintiffs in a massive lead-

paint lawsuit. The claim was that lead paint, later known to be dangerous, was "aggressively marketed" by the producers, constituting a public nuisance.

Over \$1 billion was ordered to be paid to the California cities and counties, eventually reduced to \$305 million in a settlement. Trial lawyers pocketed \$65 million, and judges became empowered to use the law to address larger societal problems. Then came the opioid crisis.

In 2019, Oklahoma used the state's overly broad public-nuisance statute to sue companies that marketed and distributed opioids. While other drugmakers settled, Johnson & Johnson went to trial. Even with a small share of the opioid market and no causal link found between its products and widespread opioid addiction, they were ordered to pay \$572 million in damages, of which \$85 million went to the lawyers.

From vaping to plastics to environmental cleanups, the public nuisance legal strategy has increasingly become an effective and profitable way to skip the legislative process and push political agendas against innovation.

Environmental foundations, including one headed by Mike Bloomberg, have funded lawyers and activists to recruit governments to join lawsuits against energy companies for climate change. These attorneys then seek friendly courts where public-nuisance statutes exist or where activist judges are willing to embrace this legal theory.

Some judges have dismissed these public-nuisance claims, ruling that energy producers have contributed significantly to our economic development. But federal appeals courts have allowed California cities, as well as the city of Baltimore, to advance their cases against fossil-fuel producers. And more could be coming.

This trend shows how our legal system is being used to advance anti-innovation political agendas.

This makes our legal system unpredictable, undermines the rule of law and increases the cost of doing business as companies must prepare for future lawsuits, whether they caused any actual harm or not. All of that ends up increasing prices for all consumers. We need smart and better policies, not more lawsuits.

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Statue of Liberty is an iconic symbol of America's freedoms.

Freedoms come at a cost. Americans willing to pay



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lections are really complex accounting practices. It's not just a final vote count that is fraught and difficult. Citizens going to the polls must consciously make multiple personal calculations: Will taxes rise? How much should individuals pay for health-care? Must we spend heavily on defense?

In America's democracy, we also reckon — often unconsciously — what we are willing to pay for our fundamental liberties. What is the price of freedom? It seems like a straightforward question. The answer, however, is anything but simple.

The desire for freedom has deep historical roots. Philosophers have forever talked about free will and the nature of liberty. In the modern era, American colonists fought a revolution to be free from oppressive "taxation without representation" levied by the British crown.

Throughout the 20th century, freedom has been the battle cry of democracies and would-be democracies around the globe. In his first campaign for the White House, Woodrow Wilson successfully ran on a "New Freedom" platform. During his State of the Union address on Jan. 6, 1941, President Franklin

D. Roosevelt famously advocated for four freedoms: freedom of speech; freedom of worship; freedom from want; freedom from fear.

But what is freedom's price tag?

The cost is borne by individuals, institutions and society. People sacrifice blood and treasure to achieve independence, as well as to maintain and defend it. For some, the cost may be perceived as too high. Sadly, some freedoms are lost, frittered away or taken.

Although we pay lip service — and are bound by international treaty — to respect universal human rights, freedom's details differ from one country or culture to another. In the United States, we hold freedom of speech, assembly and belief as fundamental to our national identity. They are enshrined in the documents that established America as independent and sovereign. They are constitutionally codified and traditionally cherished.

Those fundamental freedoms have been hard won in the Anglophone world. They are also unavailable or, at best, exclusively limited privileges to the majority of the planet's population.

During the last few years in these pages, I've argued and advocated for universal freedoms. My columns have echoed the fundamental belief that every person on Earth should have the right to life, liberty and the pursuit of happiness. At the moment, this is not a universal view. In fact, it is not even a consistently held aspiration in countries enjoying or seeking to achieve

those rights.

Many in the United States believe that America should promote democratic rights and liberal freedoms everywhere. Others argue that the costs of doing so are too high.

Even guaranteeing freedom domestically, for example to ensure universal suffrage, comes with a cost that is politically high and often highly partisan. We witness frequent efforts to manage, marginalize or entirely disenfranchise large swaths of the public. Meanwhile, the price of promoting democracy in places such as Afghanistan and Iraq has been enormous with marked consequences at the ballot box back home.

Those wars, initially fought in unilateral retribution and with imperial hubris, have humbled America's greater global ambitions. The failed policy, lost war and squandered allocation of precious national resources created discord at home. They have also given the space and time necessary for America's most menacing competitor, the People's Republic of China, to act more assertively on the world stage.

We've seen the costs of liberty up close:

- Freedom of speech cost dissident Saudi Arabian journalist Jamal Khashoggi his life. His October 2018 murder and dismemberment shocked the world and underscored the difference in values between the United States and its close Saudi ally.

- Freedom of religion cost French schoolteacher Samuel Paty his life. He was beheaded last month. President Emmanuel Macron

reacted to the gruesome homicide by saying it contradicts everything that the French Revolution fought to achieve — *liberté, égalité, fraternité* — as well as "the freedom to believe and the freedom not to believe."

- Freedom of assembly and to protest has had a very high cost in Ukraine, Belarus, Hong Kong and Venezuela. For decades, these places erupted in unprecedented democratic uprisings followed by brutal, dictatorial suppression.

- Freedom of life. There might be none greater than the right to live and thrive as a fully actuated human being, in dignity, without fear and to achieve one's God-given potential. That basic freedom of breath and a heartbeat too often is wantonly taken by dictators and authoritarians.

Good health is increasingly threatened by the global pandemic. Some governments have managed better responses than others. COVID-19 has given illiberal states fresh cause to challenge free democratic systems and their failure to contain the virus. Authoritarian China argues it is better able to protect its citizens.

As America waits out the presidential election's final tally, it is also doing an accounting of what it values most: freedom. The costs are always high, and the accounting always difficult.

In the end, however, Americans always figure the price is worth paying.

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