

Commentary

Dan Popeo: Activist state judges, officials harming economy

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WASHINGTON -

Justice Anthony Kennedy recently acknowledged in a speech before the Economic Club of New York that past U.S. Supreme Court decisions were in part to blame for U.S. markets losing ground to overseas competitors. When the Supreme Court decided those cases, it's unlikely that the court or the American public fully grasped how our legal system can impair economic prosperity and competitiveness.

But as recent Supreme Court decisions reflect, the justices are beginning to understand that connection, issuing opinions that strengthen economic rights and restrict lawyer-driven litigation. The court's recent antitrust and securities rulings are anchored in the belief that litigation should redress actual harm done to real plaintiffs, rather than be a money-making enterprise for lawyers. The justices are reviewing more business-oriented cases, which brings increased uniformity and predictability to the legal environment.

Unfortunately, for every bit of fairness and predictability business enterprises secure from the U.S. Supreme Court, they continue to lose ground in America's dysfunctional and high-risk state courts. Free enterprise must deal with far too many state judges who embrace the philosophy of former West Virginia Supreme Court Justice Richard Neely.

He once wrote, "As long as I am allowed to redistribute wealth from out-of-state companies to in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families and their friends will re-elect me."

Some "magic jurisdictions," as noted plaintiffs' lawyer Dickie Scruggs likes to call them, have become breeding grounds for novel legal theories, and taxation and regulation by judicial fiat. Oblivious to the effect on the nation or even their own states, state attorneys general, trial lawyers and activists seek fame, fortune and radical policy change through litigation. Judges in these states, many of whom are former politicians or recipients of political plums, may relish the role of uber-legislator.

It's much easier, after all, to impose "solutions" without the burden of the democratic process. Thus, state judges may be tempted to deal with knotty national or international issues through judicial pronouncements. For example, in Rhode Island, judges, at the behest of the state attorney general and his private plaintiffs' lawyers, are imposing judicial regulation on lead paint.

In Kentucky, the state attorney general is asking a court to punish a pharmaceutical company for state residents' illegal diversion and abuse of the company's drug. If these issues are worth addressing, shouldn't they be debated openly in state legislatures or through public rulemaking?

And the activism of the Wisconsin Supreme Court has gotten so bad that a former member of that court took it to task in a speech, saying, "This is a court willing to aggressively assert itself to implement the statewide public policies it deems to be most desirable."

Countless studies have shown that a Wild West, anything-goes legal environment attracts thousands of forum-shopping plaintiffs' attorneys while deterring business growth, investment and job creation.

Ironically, if states devoted as much time and effort to addressing their courts' litigious reputations as they do to economic development junkets, America's competitive standing in the world market might not be in so much jeopardy. Even when some states legislatively address lawsuit abuse, state judges have struck down such reforms as unconstitutional.

No other industrialized country has a legal and regulatory system that punishes wealth creation, profit and innovation quite like America's. Voices as diverse as Mayor Michael Bloomberg, Sen. Charles Schumer and Treasury Secretary Henry Paulson have all sounded the same alarm — America must fix its broken legal system or be left behind in the world market.

The U.S. Supreme Court appreciates that markets work best when judges interpret and apply laws, not make them. If the

most litigious state courts don't soon follow suit, the majority of commercial activity left in their communities will be Americans suing each other.

You don't need a black robe to figure out that countries with the least restrictions on economic freedom are more prosperous than those that strangle free enterprise.

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