Hurrah for Voluntary Art!

BY JAMES L. PAYNE

My heart sank when I first heard about the New York City art project known as "The Gates." One thousand workers were to put up 7,500 gates along the paths in Central Park and drape saffron-colored fabric from each one. I wasn't reacting to the art. In fact, I hadn't even decided if the project should be considered art. What depressed me was thinking about how it was funded.

I assumed that tax money was involved, and that casts a shadow. The problem is that taxes are funds taken by force and the threat of force; it's always disappointing to see any project, even the noblest, founded on coercion.

But this was not the case. To my surprise, I learned that the $21 million cost of "The Gates" was being entirely paid by the artists, who go by the names of Christo and Jeanne-Claude. This isn't their first large-scale "environmental" art project. They've done 18 such works, including the "Valley Curtain" in Rifle, Colorado; "Surrounded Islands" in Biscayne Bay, Florida; and "The Pont Neuf Wrapped" in Paris. And none of them were tax funded! In each case, they earned the money by selling preparatory drawings of the proposed environmental art—at prices ranging from $30,000 to $600,000—and selling other of their artwork.

It's not just government money that Christo and Jeanne-Claude reject. They refuse any funds that might compromise their artistic independence. They don't take grants from foundations or businesses. And they don't take money from books, posters, films, or videos of the projects after they are completed. They feel that if they had post-production sales in mind when they were creating a piece, that could influence their art. With "The Gates," they have turned over post-production rights and royalties to two nonprofits, Nurture New York's Nature and the Central Park Conservancy.

In economic terms, the project was a remarkable success. In addition to the funds raised for the environmental nonprofits, city businesses gained economically to the tune of an estimated $254 million from the spending of several hundred thousand tourists who came to see the event. And the 1,000 temporary workers who put up the exhibit and took it down earned some extra cash. Significantly, these benefits were an incidental byproduct. It was not the artists' intention to serve society. "We create for us," Jeanne-Claude told a reporter. "We don't create for the public. But, of course, those who like it, that's a bonus for us."

By all reports, the public enjoyed "The Gates." Of course, there were a few critics. One *New York Times* columnist bemoaned the fact that creating the project used up energy and therefore contributed to global warming. A letter writer put him down as a "selfish naysayer" who had been "oblivious to the thousands of people who were bursting with joy and enthusiasm upon viewing this unique phenomenon."

Many people got a lot out of "The Gates," but to my mind, the most moving aspect of it was how it *wasn't* funded. In a day and age where practically everyone thoughtlessly accepts government's coercively gathered funds, Christo and Jeanne-Claude have given the world a shining example of voluntary art.

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Do's and Don'ts of Tort Reform

BY ROBERT A. LEVY

Five years ago a Florida jury somehow conjured up punitive damages of $145 billion for a class of tobacco plaintiffs. Two years later a California jury recommended a $28 billion treasure trove for a single claimant. And in 1998 four major cigarette companies agreed to the grandmother of all awards—a quarter-trillion-dollar settlement to reimburse the states for smoking-related Medicaid costs.

So it goes. Not just tobacco, but guns, asbestos, and a cross-section of American industry described by one think tank as the Mass Tort Monster: DDT, Bendectin, the Dalkon Shield, fuel tanks, silicone breast implants, lead paint, fen-phen, and on and on.

Since 1930, litigation costs have grown four times faster than the overall economy. Federal class actions tripled over the past ten years. Class actions in state courts ballooned by more than 1,000 percent. The U.S. Chamber of Commerce estimates that the annual cost of the tort system translates into $809 per person—the equivalent of a 5 percent tax on wages. The trial lawyers' share—roughly $40 billion in 2002—was half again larger than the annual revenues of Microsoft or Intel. In 2002 the estimated aggregate cost of the tort system was $233 billion, according to the actuarial firm Tillinghast-Towers Perrin. That cost represented 2.23 percent of our gross domestic product. Over the next ten years the total "tort tax" will likely be $3.6 trillion.

When costs explode, proposals for reform are never far behind. So we have been deluged by congressional schemes to curb class-action litigation, ban lawsuits against gun makers and fast-food distributors, cap medical-malpractice awards, and otherwise enlist the federal government in the tort-reform battle.

My objective in this article is not to document that tort reform is necessary or desirable. That has been effectively done by many others. Instead, I want to examine the types of reforms proposed—especially the extent to which they are compatible with our system of federalism.

The underlying premise is straightforward: No matter how worthwhile a goal may be, if there is no constitutional authority to pursue it, then the federal government must step aside and leave the matter to the states. If Congress decides to act, it has to identify authorization for each proposed reform.

One possible source of authority is the all-encompassing Commerce Clause. As the country grew, some people believed that many of its problems required national regulatory solutions. So Congress earmarked a specific constitutional power to justify its ambitious federal agenda. The Commerce Clause was the vehicle of choice.

But the central reason that the clause appeared in the Constitution was quite different. Under the Articles of Confederation the national government lacked the power to regulate interstate commerce. Each state was free to advance local interests and create barriers to trade, without regard to prejudice against out-of-state interests. The solution: a constitutional convention at which, according to Justice William Johnson, "If there was any one object riding over every other . . . it was to keep the commercial intercourse among the States free from all invidious . . . restraints."

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