Cato scholar has helped produce big changes

The Lawsuit Reform Revolution

Cato senior fellow Walter Olson has been described by the *Washington Post* as an "intellectual guru" of tort reform in the United States, and he has led the charge in highlighting and promoting solutions to restrain destructive abuses of the civil litigation system. dent for *Reason*.

First with the Manhattan Institute and then after joining the Robert A. Levy Center for Constitutional Studies in 2010, Olson has authored a series of books on the need for reform. He was also a pioneer of online law, blogging for popular consumption with his website *Overlawyered*. That website, launched in 1999 and concluded in 2020, was widely regarded as the first of its kind and for many years was one of the most popular. Olson also holds a rare distinction: despite being one of the nation's most influential legal pundits, he is not a lawyer himself. In some ways, this has given him a salutary outsider's perspective on the system.

People often despair about ever changing America's litigious culture and its negative consequences. But since he first began writing about reform, Olson has seen many positive changes as both courts and legislators considered the issues he and other critics raised.

In the 1930s, courts began to liberalize the standards for civil litigation, including class action lawsuits. By the 1960s, they also began to replace an older standard of pleadings-driven litigation with a new system of "notice pleading" that allowed extensive discovery to be used to determine whether there was any claim to be made, in so-called fishing expeditions. As Olson puts it, under this system, "You didn't have to tell people why you were suing them."

This led to what became known as the litigation explosion, a phrase Olson borrowed in 1991 for the title of his first book. Lawsuits, long seen as a necessary evil, began to be reconceived as outright good, with positive social externalities—what Olson described as the "invisible-fist theory." Visionaries in the law schools and elsewhere began promoting the use of litigation to tackle almost every societal ill.

These changes not only made civil litigation easier to file and more lucrative, but also made lawsuits more attractive to use as a weapon, threatening to inflict the costs of response, now ballooning because of the wide-open discovery rules. Even for a defendant who had not injured anyone, the process could be the punishment. Very often, that left settlement as the more rational option against speculative or baseless lawsuits.

By the 1980s, the Supreme Court had begun to rein in the most extreme liability theories and revamp plaintiff-friendly procedure. But the onerous discovery stage and problems with loose "notice pleading"—both major targets of Olson's criticism—remained.

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Cato News Notes

WALTER WILLIAMS, RIP

Famed economist and longtime Cato adjunct scholar Walter Williams passed away in early December. Williams was a pioneer in public education and the popularization of free market ideas. His contributions to Cato included the 1989 book *South Africa's War against Capitalism*, explaining how the notorious apartheid regime was acutely hostile to the liberating and equalizing forces of markets. A remembrance by David Boaz for Williams and his contributions can be found on the *Cato at Liberty* blog, along with a link to a full catalog of Williams's contributions for Cato.

PRIZED CONTRIBUTIONS

Natalie Dowzicky recently received the Rising Star Award from America's Future, as part of its Writing Fellows Alumni Awards, for her thoughtful advocacy of liberty as manager of Cato's Libertarianism.org. Separately, Dowzicky also won the Atlas Network's John Blundell Elevator Pitch competition for a 60-second description of her work and organization.

30 UNDER 30

Corey DeAngelis, adjunct scholar at the Cato Institute and director of school choice for the Reason Foundation, was named to the Forbes 30 Under 30 list in the education category, with the magazine naming him "one of the nation's leading authorities on school choice and homeschooling."

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That finally changed with two Supreme Court decisions: *Bell Atlantic Corp. v. Twombly* in 2007 and then *Ashcroft v. Iqbal* in 2009. *Twombly* involved an attempted antitrust suit against major telephone companies, and *Iqbal* was a case involving a Pakistani man arrested after 9/11 who sought to sue senior U.S. government officials. In line with what Olson had urged, the Court adopted restrictions that require more substantive allegations of facts and explanation of the cause of action before plaintiffs can demand wide-ranging and costly discovery.

Another of Olson's critiques concerned the problem known as forum shopping, which had been worsened by doctrinal developments at the high court. State and federal courts require some nexus, usually geographic, to their defined jurisdiction. "Long-arm" theories of jurisdiction allowed suits to be filed in places with only the most fleeting or tenuous of connections to the alleged wrong. For companies conducting business nationwide, long-arm jurisdiction allowed plaintiffs to effectively pick whichever was most favorable among many courts around the country. Many states became notorious havens for plaintiff-friendly courts.

In response, the business community began to push back through political action and by raising the issue in elections and lobbying. Legislatures in states such as Texas soon began adopting reforms narrowing liberal jurisdictional doctrines. There was also cross-ideological alliance for reform on the Supreme Court, with Justice Ruth Bader Ginsburg joining with some of the court's conservatives to tighten the "substantial nexus" requirements as a matter of federal constitutional law. These changes, which had long been a focus of Olson's writing, "helped give litigation more predictable outcomes by preventing jurisdiction-shopping to states where courts were unpredictable or hostile to out-of-state defendants," he explains.

Expert testimony was another area in need of reform. Previously, many courts had been relaxed about letting in whatever expert testimony the parties sought to introduce, reasoning that the fact finder could readily evaluate the credibility of conflicting testimony. This policy led to a proliferation of pseudo-scientific evidence and experts for hire who made wild claims departing from consensus in the field. But jurors, ill-qualified to assess the credibility of scientific theories, were often persuaded based on junk science. In 1993, the Supreme Court was persuaded to strike out on a new course and require judges to follow stricter guidelines requiring that expert testimony be based on legitimate science.

Another problem, often seen as peculiarly American, was that jurors would award massive damages, including punitive damages in absurd amounts far beyond the actual sums in the original dispute. These cases would often garner headlines, and at *Overlawyered* and in his books, Olson helped increase awareness of the issue. In 1996, the Supreme Court again intervened to impose much more restrictive limits on punitive damages in *BMW of North America v. Gore*, requiring judges to review such awards for proportionality. "This had a big practical effect on runaway jury verdicts," according to Olson.

Not all changes that Olson advocates have been adopted: loser-pays rules and readier availability of sanctions against lawyers for meritless litigation have still been out of reach. Olson continues to write on these and other topics for Cato.

Trial lawyers remain a powerful political constituency and often fight back against reform efforts. But intellectual arguments that persuade on their merits can ultimately turn around even legal trends that seem to have a lot of momentum. Olson says he knows that some Supreme Court justices have read his books, though he cautions that it is "speculative" to think of the books as having influenced any particular ruling Overall, the impact of reform advocates including Olson has been substantial, helping to shield Americans from some of the worst abuses that were once common in the courts. ■

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Cold comforts

Our books of the year

Open: The Story of Human Progress. By Johan Norberg. *Atlantic Books; 448 pages; $24.95 and £20*

Progress depends on openness, this book contends, yet that creates a backlash, since people are hard-wired to fear rapid change. The author marshals arresting examples from every continent and era, ending on an optimistic, timely note. Recent years have seen the rise of populist demagogues who want to pull up drawbridges—but such leaders eventually lose power because they are hopeless at governing.