

How Did We Get Here? What Litigation Was, What It is Now, What It Might Be

By Stephen B. Presser¹

Introduction: Law and Litigation on a Pernicious Precipice

In America, litigation is now a multi-billion dollar business.² This country has more lawyers as a percentage of the population than any other – a fact which is now notorious³ – but less well understood is that our current civil justice system is not at all the way it used to be. We hardly blink at multi-billion dollar verdicts in class actions against corporations, and it is now common place for state attorneys general to seek million or billion dollar settlements against whole industries, an undertaking that New York Attorney General Spitzer, for example, has perfected to a high art. The suggestion that I will make here is that this is a departure from our heritage, and a marked change in the perception of what civil justice was supposed to be all about. Our English common

¹ Raoul Berger Professor of Legal History, Northwestern University School of Law, Professor of Business Law, Kellogg School of Management, Legal Affairs Editor, *Chronicles: A Magazine of American Culture*, Member, Common Good Advisory Board.

² See, e.g. <http://www.insurancejournal.com/news/national/2004/09/13/45775.htm>: “Today, the average family of four pays a \$3,236 annual “tort tax,” a cost added to the price of products and services needed to cover the costs of litigation. No other industrialized country reportedly pays more as a percentage of its Gross Domestic Product.” (American Tort Reform Association’s estimate, quoted on September 13, 2004). With the United States Population estimated at about 300, 000,000, this would work out to be 242.7 Billion dollars.

³ See, e.g., <http://www.answers.com/topic/lawyer>:

The United States Department of Labor's Bureau of Labor Statistics estimates that in 2001, there were 490,000 practicing lawyers in the U.S. It is frequently said that there are more lawyers per capita in the US than in any other country in the world. . . .

law heritage was that lawsuits were supposed to be about settling intractable disputes between private parties about private rights, but the lawsuit, and particularly the class action, has now become more of an effort for wholesale vindication of purported constitutional or statutory policies.⁴

Our boast used to be that ours was a government of laws not men,⁵ but the prejudices of particular litigants, the cooperation of complacent judges, and the misunderstandings of regulators and legislators have undermined what we used to have. Instead of a government of laws designed to protect the property and civil rights of individual citizens we may now have institutionalized lawsuit oppression and redistribution through the civil justice system. Instead of a civil justice system concerned with the preservation of individual liberty, and, in particular the liberty of entrepreneurs who furthered the economic well-being of society, we now have a civil justice system in which entrepreneurial actors can never be certain that they can avoid ending up as defendants in unpredictable lawsuits.⁶

How we got to the pernicious precipice on which we now stand is not an easy thing to discern, as it happened slowly and almost imperceptively as a part of a broader cultural change. Having no monarchy, no aristocracy, and no established church, we

⁴ For the classic piece discovering a change in the conception of litigation in the twentieth century, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 *Harv. L. Rev.* 1281, 1282, 1284 (1976) (Contrasting the traditional view of lawsuits as settling private rights with the recent conception of lawsuits as policy-vindicating devices.) See also William Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America 1886-1937* 8 (1998) (“In nineteenth-century law . . . the individual was the exclusive focus of concern in legal, moral, and political reasoning. Lawyers of the time did not think of society as a congeries of groups, which is the assumption of interest-group pluralism that dominates twentieth-century political analysis.”)

⁵ See, e.g. John Marshall’s famous opinion in *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”)

⁶ On this lawsuit unpredictability, see, e.g. Philip Howard, *The Death of Common Sense: How Law is Suffocating America* (1996), and, on related developments in criminal law see, e.g. Gene Healy, ed., *Go Directly to Jail: The Criminalization of Almost Everything* (2004).

Americans have had only our law to bind us together, and, from the beginning, as Toqueville famously observed, the law was a vulgar tongue in this country.⁷ Legislation and enlightened judges were early relied on to transform our English common law heritage into a body of doctrines and rules suitable for a young republic,⁸ and the constitutional system of checks and balances, federalism, and judicial review in particular were supposed to ensure that the work of legislatures and trial courts did not undermine the protection of life, liberty, and property for which our revolution was fought and our Constitution ratified.⁹ It does not go too far to say that the American Revolution ought to be conceived of as Englishmen fighting Englishmen for the rights of Englishmen, for the preservation of the rule of law and the English Common Law's protection of individuals against arbitrary power. The post-revolutionary institutions, and, in particular the federal Constitution ratified in 1789 had as its aim the preservation of the rule of law in general, and of individual liberty and private ownership of property in particular.¹⁰

Somehow, however, in the second half of the Twentieth Century, these checks and balances, that system of federalism, and the institution of judicial review came loose from their original moorings. The federal government, which had been set up as a means of protecting the rights of Americans, began instead seriously to encroach on them. It had been the early theory of the framers that the state and local governments ought to be the primary regulators, since the notion was that the government closest to the people would

⁷ I Alexis de Toqueville, *Democracy in America* (1840, Reeve, tr.) , Chapter 31 (“The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, where it descends to the lowest classes, so that the whole people contracts the habits and the tastes of the magistrate.”)

⁸ See, e.g. William Nelson, *The Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society 1760-1830* (1975).

⁹ Probably the best introduction to understanding this conception of the federal constitution is Gordon Wood, *The Creation of the American Republic 1776-1787* (reprint ed. 1998).

¹⁰ See generally, Wood, *supra*, and for a recent brief treatment of this theme see, e.g. John Phillip Reid, *Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries* (2004).

be most responsive to it.¹¹ From the fourth decade of the twentieth century, however, the administrative agencies spawned in the New Deal, and the federal courts combined to set national policy in a manner that began more seriously to restrict what state and local governments could do, and which rendered private property and individual liberty more precarious.

Expansively interpreting the Fourteenth Amendment and the bill of Rights, the federal courts decided that state legislatures had failed substantially to deliver justice to all, and the federal legislature, federal agencies,¹² and the federal courts subsequently emerged as major policy-makers for the nation.¹³ Simultaneously, a significant part of the legal profession, which had formerly seen its role primarily as the preservers of property and the guardians of the civil rights of the citizenry now tended to become advocates against those running publicly-held corporations. Taking advantage of the contingency fee system unavailable in other industrialized nations, plaintiffs' lawyers

¹¹ See, e.g. the Tenth Amendment, which provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," giving rise to the notion that the federal government is one of limited and enumerated powers, reserving the others to the state and local governments, those closest to the people. The idea that the government closest to the people was best appears to have been early associated with Jeffersonian Republicans, but most recently it has been embraced by the modern Republican party. See e.g. the remarks of Senator Fred Thompson, made on May 3, 1995:

I would remind many of my Republican brethren that we ran for office and were elected last year on the basis of our strong belief that the government that is closest to the people is the best government; that Washington does not always know best; that more responsibility should be given to the States because that is where most of the creative ideas and innovations are happening. Whether it be unfunded mandates, welfare reform, or regulations that are strangling productivity, we took the stand that the States and local government should have a greater say about how people's lives are going to be run, and the Federal government less.

141 CONG. REC. S6047 (1995). Quoted in Robert M. Ackerman, "Tort Law and Federalism: Whatever Happened to Devolution?," 14 Yale L. & Pol'y Rev. 429, n.4 (1996).

¹² On the manner in which federal agencies and their regulations can stifle American business, see, e.g. Philip Howard, *The Death of Common Sense: How Law is Suffocating America* (1994).

¹³ There are dozens of works telling the tale of what the federal courts have done since the New Deal to change the nature of the allocation of legal powers among the local, state, and federal governments. My own attempt is Stephen B. Presser, *Recapturing the Constitution: Race, Religion, and Abortion Reconsidered* (1994). See also Stephen B. Presser & Jamil S. Zainaldin, *Law and Jurisprudence in American History* (5th ed. 2003).

proceeded to transform the nature of litigation.¹⁴ In order to understand the magnitude of the change it is important to understand what litigation once was, and what it might perhaps once again become.

What Litigation Once Was

Litigation as we now know it did not exist in our colonial past nor in our mother country. It is true that seeking redress through the courts is as old as the beginnings of British North America. The Massachusetts body of liberties agreed to by the colonists of Massachusetts Bay in 1641 provided that there was a “right of every citizen with a grievance to have some court adjudicate it,” but the focus was very much on the individual rights of citizens,¹⁵ and not on any group of similarly situated litigants. The common law, our English heritage of following precedents previously laid down, evolved a system of “common law” pleading whereby causes of action were clearly defined, and each one had a designated “writ” that would begin proceedings, and each one had particular pleadings that were to be filed as the proceedings were contested and litigated. It was a maxim that for every wrong there was a remedy at law, but the truth was that

¹⁴ Walter Olson, *The Litigation Explosion* 38 (1991) (indicating that contingency fees first arose as a means of ensuring that worthy and impecunious plaintiffs might still be able to gain redress, but that eventually contingency fees encouraged litigation that might well be meritless, but was driven by the possibility that lawyers might make more money.)

¹⁵ To similar effect see III William Blackstone, *commentaries on the Laws of England* 2 (1768) (“The more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined, and wrongs prohibited.”), and *Id.*, at 23 “it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, but suit or action at law, whenever that right is invaded.” See also the Massachusetts Constitution of 1780, Declaration of Rights, Article XI, “Every subject of the Commonwealth ought to find a certain remedy by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character. He ought to obtain right and justice freely, and without being obliged to purchase it; compleatly, and without any denial; promptly, and without delay; conformably to the laws.”

there were a myriad of matters that simply were outside the court system. Acts of God, inevitable accidents, sickness, death, and many other matters simply did not give rise to private causes of action. If one's case did not fit in the narrow definitions of trespass, trespass on the case, trover, replevin, assumpsit or the rest, one was simply out of luck.

Rather than seeking to eliminate this specialized system of redress for some, but clearly not all grievances, Americans as diverse as Alexander Hamilton, Thomas Jefferson, Joseph Story, and Abraham Lincoln all praised the wisdom of the common law and wished to preserve it for America, although abandoning the elements of the common law that sustained the English Aristocracy and Monarchy. Those parts of the common law that dealt with what we would now call contracts, property, torts, and civil rights, however, were preserved entire and intact. Thus, in a famous passage in Thomas Jefferson's Notes on Virginia, he reports that when, in 1776, he was assigned the task of suggesting revisions to the law of the new state of Virginia, he wanted to abolish slavery, to diminish the number of crimes that were punished capitally, and to set up an hierarchical public school system, but he wanted to preserve wholesale these parts of the common law of contracts, property, torts, and civil rights¹⁶ (although he objected to the English practice of wearing of wigs in court).

It probably does not go too far to say that the old common law system of pleading, through specialized writs and arcane practices, because it required the assistance of lawyers, was designed to preserve and protect that class, and the obfuscatory character of common law pleading led some Americans even to suggest that

¹⁶ Jefferson describes these as "The Common law of England, by which is meant, that part of the English law which was anterior to the date of the oldest statutes extant," which Jefferson stated was "the basis" of the 1776 revisal of the laws of Virginia. Thomas Jefferson, Notes on the State of Virginia (1781), excerpted in Stephen B. Presser and Jamil S. Zainaldin, Law and Jurisprudence in American History 123 (5th ed. 2003).

lawyers ought not to be a necessary class in our republic.¹⁷ Nevertheless, common law pleading, in some form, persisted until the first third of the twentieth century. One suspects that not only did common law pleading protect and advance the interest of lawyers, but this specialized system, by raising the costs of litigation, and by narrowing the bases for it, actually discouraged going to court. It was originally a mainstay of the Anglo-American legal culture that one should try one's best to resolve disputes out of court, that litigation was something of an evil,¹⁸ and that it ought to be resorted to only if all other means failed. A litigious society was a fractured society, and many Americans valued community enough to erect roadblocks to discourage recourse to the courts. Common law pleading was a part of that, as were the old common law doctrines of champerty and maintenance that punished lawyers who actively stirred up litigation.¹⁹ Indeed, Sir William Blackstone, the greatest Eighteenth Century commentator on the English Common Law, railed against those who promoted litigation, seeking to bargain for what we would now label contingency fees, calling them "the pests of civil society, that are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering in other men's quarrels."²⁰

One of America's greatest lawyer-presidents made a similar point when he wrote, in an apparently undelivered law lecture, that good lawyers should

¹⁷ The most famous such assertion is Honestus [pseud. of Benjamin Austin], *Observations on the Pernicious Practice of the Law* (Boston, 1819), reprinted in 13 *Am. J. Legal Hist.* 241 (1969) (Arguing that lawyers are simply not a "necessary order" in a republic.)

¹⁸ See, e.g. Olson, *supra* note __, at 2, where he observes that litigation in America was originally seen as an evil.

¹⁹ Olson, *supra* note __, at 17 observes that "ambulance chasing," was punished by a 1-3 year jail term as late as 1954.

²⁰ IV William Blackstone, *Commentaries on the Laws of England* 135-136 (1769), discussing champerty, "being a bargain with a plaintiff or defendant . . . to divide the land or other matter sued for between them, if they prevail at law," as a species of "maintenance," "an offence [that consists of] officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it."

[d]iscourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.

Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereon to stir up strife, and put money in his pocket? A moral tone ought to be infused into the profession which should drive such men out of it.²¹

Code Pleading and Other Changes in Litigation

Somehow all of that began to change in the twentieth century, if not before. As early as the middle of the nineteenth century David Dudley Field (the lawyer who founded the first modern great law firm, Sherman and Sterling) successfully convinced New York legislators to replace the system of common law pleading with “code pleading.”²² This was a simplified procedure, dictated by statute rather than the common law, whereby litigants were no longer bound by the forms of action, but could much more simply state their cases and reply to their adversary’s charges. The Field Code of Civil Procedure was adopted in whole or in part in twenty-four other states (and also in England and Ireland),²³ but common law pleading lingered well into the twentieth

²¹ From a document fragment dated July 1, 1850 by Lincoln's White House secretaries and later biographers, John Nicolay and John Hay, available on the web at <http://www.hatwhite.com/lincoln.html>.

²² On Field see, e.g. Henry M. Field, *The Life of David Dudley Field* (Originally published 1898, reprint ed. 1995), Alison Reppy, ed. *David Dudley Field: Centenary Essays Celebrating One Hundred Years of Legal Reform* (1949), Daun Van Ee, *David Dudley Field and the Reconstruction of the Law* (1986).

²³ David Ray Papke, “Codification,” in Kermit L. Hall, et.al. eds., *The Oxford Companion to American Law* 121 (2002).

century, and, oddly enough, was still being taught to first-year law students in one civil procedure classes at Harvard in the fall of 1968.²⁴

By 1937, however, the pressure to do away with common law pleading was irresistible, and in that year rules were promulgated for the federal courts that obliterated the writ system.²⁵ These new federal rules, or something like them, were soon adopted by many state courts as well, and the foundation for what Walter Olson has called “the litigation explosion”²⁶ was beginning to be erected. The notion that lawyers shouldn’t encourage litigation was dealt a fatal blow by two key decisions, *Bates v. State Bar of Arizona* (1977),²⁷ in which the United States Supreme Court, in an opinion by justice Blackmun, who apparently wanted to encourage lawsuits and deplored the “underutilization” of lawyers’ services,²⁸ held that the First Amendment protected lawyers “commercial speech” rights to advertise the availability and price of routine legal services, and *Zauderer v. Office of Disciplinary Counsel* (1985)²⁹, in which the Court permitted lawyers to solicit specific legal business against particular manufacturing defendants.³⁰

Decisions such as *Bates* and *Zauderer*, and the increased availability of class actions, created a situation in which it was open season on assorted purported corporate wrongdoers. Litigation, in effect, became a pro-active means of redistribution, if not

²⁴ I know, it was mine, and taught by the great evidence scholar James Chadbourne. His method was to compare the common law forms of action to code pleading and to the federal rules of civil procedure. Contrary to what is implicitly argued in this essay, Chadbourne thought code pleading was a huge advance for the law.

²⁵ See generally, Stephen N. Subrin, “How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective,” 135 U. PA. L. REV. 909 (1987).

²⁶ Walter Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (1991).

²⁷ 433 U.S. 350.

²⁸ Olson, *supra* note ____, at 29.

²⁹ 471 U.S. 626.

³⁰ See generally Olson, *supra* note ____, at 21, 23-24.

class warfare. With the rise of “public interest” lawfirms, or private or publicly-funded “legal aid” clinics, groups of lawyers were subsidized not by their potential clients, but by taxpayer or charitable contributions, and, as a result, even more litigation against particularly unfavored corporate or institutional defendants became possible.³¹ Lawyers, rather than clients often came to control and encourage litigation. Blackstone and the old common lawyers would have been horrified.

Cultural Change led to Litigation Change

The changes in the nature of litigation undoubtedly were part of much broader cultural changes in this country, cultural changes which accelerated during the sixties and seventies. The story is a familiar one to those of us who lived through it, but since Americans tend to have little appreciation for their history, even their recent history, it may not be amiss to review some of those developments. Probably as a result of the deeply unpopular Vietnam conflict and the nearly contemporaneous Watergate affair (which still captures the imagination of many, as the recent revelation of “Deep Throat” shows) most Americans, and certainly most of what we now call the “mainstream media,” appear to have come to believe that government could not be trusted, and that this was also true generally of large purportedly impersonal corporations. Perhaps as a result of the culture becoming increasingly dominated by the “baby boom” generation,

³¹ Cf. Chayes, *supra* note ___, at 1291, observing that the class action “responds to the proliferation of more or less well-organized groups in our society and the tendency to perceive interests as group interest, at least in very important aspects.” See, to similar effect, Olson, *supra* note ___, at 52-53, concluding that lawsuits were originally understood to be a dispute between two private citizens over private rights, but came to be understood as a tool to liberate people whose rights had been taken away, and to prevent such rights from being taken away in the future.

and because that generation was characterized by much less religious and civic commitment than prior generations, and by a rather hedonistic individualism, it is not surprising that the law and legal institutions changed as well. As Americans searched for “self-actualization,” as the conservative aspects of the legal profession which discouraged litigation began to erode, and as “public interest” law firms arose to become, as it were, professional plaintiffs, the law itself was eventually dramatically altered.

In particular, it became more and more difficult to argue that those who suffered any kind of harm, especially from use of commercially-manufactured products, were not entitled to compensation from the corporations who manufactured those items. Thus it was that “strict products liability” replaced negligence as the basis for manufacturer’s liability to consumers, tenants became more easily able to look to landlords for any injury suffered by renters, and consumers found it easier to escape from contracts by arguing that businesses had taken “unconscionable” advantage of them.³²

In the nineteenth century, in a period dominated by a culture of self-sacrifice and religious obligation, it may have been believed that limiting the liability of active individuals and organizations eventually redounded to the benefit of all, and by limiting such liability there would be more investment in productive enterprise, which would eventually result in greater overall wealth for the citizenry.³³ These were the days of “laissez-faire” when law and lawyers apparently believed that it was best to leave entrepreneurs substantially alone, and to let the market rather than the state or federal

³² For these developments See generally, Presser and Zainaldin, *supra* note ____, Chapter VII.

³³ For some classic accounts of the story of how Nineteenth Century American law favored the active individual and limited his or her liability, see, e.g. Roscoe Pound, *The Formative Era of American Law* (1938), James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (1956), Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (1977).

governments regulate enterprise.³⁴ New private law doctrines, however, seemed to have been spawned by a legal culture that favored regulation over acquiescence, and redistribution over private enterprise.

These private law developments, principally in the state courts, were the analogues of the public law developments, primarily in the federal courts, which also signaled major cultural change. Thus the Warren Court struck down school prayer and bible riding in the public schools in the states, mandated an end to racial segregation, declared that population was the only permissible basis for elections to either branches of the state legislature (even though the United States Senate itself furnished a glaring argument to the contrary), and dictated the reformation of state criminal procedure in order to prevent police abuse of criminal defendants, many of whom were believed to be members of disadvantaged minorities. Much of this was accomplished through the work of organizations formed at least in part to promote litigation, such as the American Civil Liberties Union (ACLU), and the National Association for the Advancement of Colored People (NAACP). Litigation, formerly a tool of last resort for individuals, now became a first choice method of social transformation for groups. None of this is necessarily to suggest that many or most of these individual decisions did not advance the cause of justice in their particular cases, but, taken together they contributed to a culture in which many more actors were subject to lawsuits, and in which bureaucracy could (even unintentionally) stifle enterprise.³⁵

³⁴ For some important studies of this period see Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (1994); Arnold M. Paul, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench 1887-1895* (Peter Smith ed., 1965); William M. Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America 1886-1937* (1998).

³⁵ For the manner in which adherence to regulations promulgated by state and federal bureaucrats paralyze entrepreneurs, see generally Philip Howard, *The Death of Common Sense: How Law is Suffocating America* (1995), and for further evidence that the current lawsuit culture has lost its way, see Philip

Where We Are Now

The last few years have seen the culmination of many of these efforts in even more daring judicial decisions, such as those that have found prohibitions in the Constitution against restricting abortions³⁶ and against punishing consensual homosexual acts,³⁷ or those that have read the Fourteenth Amendment to require mandatory busing of students to achieve racial balance in the schools,³⁸ or to permit affirmative action on the basis of race, at least in college and graduate school admissions.³⁹ All of these were United States Supreme Court decisions, but dramatic decisions in the state courts, such as that of the Supreme Judicial Court of Massachusetts which found in the Massachusetts state constitution a right to gay marriage,⁴⁰ were similar in spirit. In the Massachusetts gay marriage case, in fact, the Court relied heavily on the so-called “mystery passage” from one of the United States Supreme Court’s abortion decisions, which stated that “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not

Howard: *The Collapse of the Common Good: How America’s Lawsuit Culture Undermines our Freedom* (2001).

³⁶ See, e.g. *Roe v. Wade*, 410 U.S. 113 (1973) (Finding a Fourteenth Amendment right for women to terminate pregnancies, particularly in the first trimester of pregnancy), *Planned Parenthood v. Casey*, 505 US 833 (1992) (Redefining the constitution’s protection for abortions in a manner that prohibited regulations which impose an “undue burden” on a woman’s right to terminate pregnancy), *Stenberg v. Carhart*, 530 US 914 (2000) (In effect removing all abortion regulation, even as to “partial birth” abortions, which did not allow abortions to preserve the “health” of the mother.)

³⁷ *Lawrence and Garner v. Texas*. 539 US 558 (2003).

³⁸ *Swann v. Charlotte-Mecklenburg Bd. of Ed.* 402 US 1 (1971).

³⁹ *Gutter v. Bollinger*, 123 S. Ct. 2325 (2003) and *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003), read together indicated that while racial quotas were impermissible, considering race as one of many factors used to achieve “diversity” in the classroom was permissible. This was widely perceived as a green light for affirmative action based on race in college and law school admissions. For a critique of the decisions see, e.g. Stephen B. Presser, “A conservative comment on Professor Crump,” 56 *Fla. L. Rev.* 789-817 (2004) (Arguing the arbitrariness and disingenuousness of these decisions).

⁴⁰ *Goodridge v. Dept. of Public Health*, 798 NE2d 941 (Mass. 2003).

define the attributes of personhood were they formed under the compulsion of the state.”⁴¹ A more naïve or more extreme statement of hedonistic individualism would be difficult to articulate, and it summed up in few words the legal ethos of the age.

Again, however, it should be noted that the wisdom of the policies favoring abortion, the legalization of consensual homosexual acts, or gay marriage are not the issue addressed here. Instead it is the attitude of the Supreme Court that it should be the ultimate authority on these matters, guided by the philosophy encapsulated in the “mystery passage,” and by a sense that it should authoritatively expand and alter the meaning of the Constitution in order to keep it in tune with the times. The mystery passage’s philosophy leads to a view of society in which there is little common purpose, and an invitation to litigate against all traditional practices, instead of leaving matters to be worked out on a state-by-state basis through the emergence of a consensus among the people.

The reforms of Rule 23 which led to the class action as we know it were undoubtedly instituted because of a belief that an approach to litigation that enabled groups that had formerly been the subject of discrimination to join in seeking remedies would result in a more just society. Unfortunately, because of all the other cultural factors suggested here, the net effect of current class action practice may be to produce more harm than good.

Once the restrictive characteristics of the forms of action had been abandoned, and once an individualistic philosophy of the kind expressed in the mystery passage had taken hold, it might have been expected that a plethora of new causes of action would be created, and it was only a matter of time before the lawsuit as political tool could come

⁴¹ *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

into being. All that was needed was the abandonment of traditional institutional and cultural restraints on litigating.

This came when the individualistic philosophy of the mystery passage, for most purposes, obliterated an older Athenian or Judeo-Christian ethos, still dominant in the Nineteenth Century, which understood reversals of fortune or accidental bereavement as occasions for spiritual growth, rather than opportunities for seeking redress in the courts. As the federal courts continued to render decisions which all but obliterated the legitimacy of religious expressions in the public square,⁴² the restraining character of religion eroded, and the “litigation explosion” occurred.

And thus we have the current situation where plaintiffs’ lawyers, in effect, manufacture classes suffering injury, often in an effort to seek settlements for their “nuisance value,” rather than actually to recover compensation for purported victims. Similarly, as indicated earlier, we have state attorneys general pursuing actions against whole industries, as has been done, for example, against the tobacco industry, seeking to enhance state revenues through spectacular recoveries, or, as New York Attorney General Eliot Spitzer has done against the Insurance and Mutual Fund industries, to reinforce his political standing and solidify a possible bid for higher office (or so his critics suggest).⁴³

⁴² See, e.g., *Lee v. Weisman*, 505 US 577 (1992) (Holding, by a 5-4 majority, that middle-school graduations could not include a prayer delivered by a clergyman selected by the school), *Santa Fe Independent School Dist. v. Doe*, 530 US 290 (2000) (Prohibiting, in a 6-3 ruling, school-endorsed student-led prayer at high school football games. Chief Justice William H. Rehnquist, in his dissenting opinion, joined by Justices Antonin Scalia and Clarence Thomas, observed that “even more disturbing than its holding is the tone of the Court’s opinion; it bristles with hostility to all things religious in public life. Neither the holding nor the tone of the opinion is faithful to the meaning of the Establishment Clause, when it is recalled that George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of “public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God.” 530 U.S., at 318.

⁴³ Attorney General Spitzer recently lost a high-profile case brought against a former Bank of America Corporation broker whom Spitzer accused of improperly trading mutual funds. The Wall Street Journal observed:

In short, litigation conceived as a remedy for the redress of individual grievances has become a political device to be used by ambitious office-holders as well as an instrument of intimidation by ambitious private lawyers.

Some Ameliorative Efforts

There have been some successes in reigning in the bringing of lawsuits and the activities of professional plaintiffs in the securities fraud area, in medical malpractice awards, and in other areas of civil justice reform, but there are still difficulties unique to the American legal system at the moment, and utterly unknown to the common law.

The most prominent of these has already been mentioned; the ability of plaintiffs' lawyers to take on cases on a contingent fee basis, and to advertise for clients, thus generating litigation on their own. Another is that we have not yet adopted the English "loser pays" rule, requiring that successful litigants have their counsel fees reimbursed by the unsuccessful party. Still another difficulty is our extraordinary system of pre-trial discovery, in which depositions, interrogatories, requests for document production, and other means of obtaining evidence from adversaries can easily run the costs of litigation

The acquittal is a high-profile setback for Mr. Spitzer, who has made a name for himself while largely avoiding the courtroom. He has extracted multi-million dollar settlements from corporate defendants, forced executives to resign and launched sweeping changes of practices on Wall Street and in the mutual fund and insurance industries. Buoyed by his victories and the cheers of supporters, Mr. Spitzer has announced plans to run for governor in 2006.

But critics have complained that he uses tough and headline-grabbing tactics to damage businesses, charges he vigorously disputes. . . .

Kara Scannell and Arden Dale, *Sihpol Verdict Deals a Blow to Spitzer: In Crucial Courtroom Test, Jury Spurns Prosecutors on Claims of Criminal Acts*, *The Wall Street Journal*, Friday June 10, 2005, page A1. For another fine description of Spitzer and his tactics, see, e.g. Daniel Gross, *Eliot Spitzer: How New York's attorney general became the most powerful man on Wall Street*, *Slate*, October 21, 2004, <http://slate.msn.com/id/2108509/>.

for large publicly-held corporations into the millions, and can serve as powerful incentives to settle even meritless cases.

The United States Supreme Court, and some state legislatures have begun to take steps to reduce the colossal punitive damage verdicts we have seen in recent years,⁴⁴ but these efforts, especially by the state legislatures have sometimes been frustrated by state courts.⁴⁵ For the time being it is likely that the possibility of colossal punitive damages will continue to threaten corporate defendants, and, when the threat of punitive damages is combined with adverse inferences to be drawn from a failure to produce items for discovery, as recently occurred in the Morgan Stanley case,⁴⁶ it can be understood what a distance we have traveled from the time when litigation was about compensation, and compensation to individuals, not punishment of purported corporate miscreants.

Conclusion: What Ought to be Done

The organization that has sponsored this conference, Common Good, is devoted to reminding us of what our American ancestors understood, that social problems can be exacerbated rather than ameliorated by excessive litigation. As Philip Howard has recently demonstrated, for example, the encouragement of litigation by school children and their parents has resulted in a situation where order simply cannot be maintained in

⁴⁴ See, e.g. *BMW of North America v. Gore*, 517 U.S. 559 (1996) (Holding that excessive punitive damages can amount to a violation of due process).

⁴⁵ See, e.g., *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451 (1999), and *Best v. Taylor Machine Works*, 179 Ill. 2d 267, 689 NE2d 1057 (1997), in which the Supreme Courts of Ohio and Illinois, respectively, overturned legislative civil justice reform efforts on the basis of questionable interpretations of their states' constitutions.

⁴⁶ The Supreme Court does seem to have begun to understand that adverse inferences because of failures to produce may have gone too far, or at least this is one interpretation of the recent decision the Arthur Andersen case, where a unanimous court threw out a criminal prosecution based on jury instructions which condemned a possibly lawful document destruction policy.

the classroom – where it is necessary to bring in the police to handcuff and cart away young miscreants lest some teacher be sued for an attempt physically to restrain an unruly child.⁴⁷ The lack of order in classrooms, of course, impedes their educational mission, and while encouraging litigation against educators was suppose to improve education, it has had the opposite effect.

Similarly, to the extent that class action litigation against corporations, along with its attendant evils of contingency fees, excessive discovery expenses, the threat of punitive damages, the capricious behavior of juries, and the bringing of class-action lawsuits with the aim of settlement for their nuisance value,⁴⁸ continues, the competitive position of American corporations in the global economy will be undermined, and those who depend on such corporations for their livelihood, employees, creditors, consumers and stockholders will suffer. There will continue to be a few spectacular winners in the “lawsuit lottery,” but most Americans may be worse, rather than better off.

Congress may have begun to travel the appropriate road to recovery with the recent reform regarding class actions,⁴⁹ but this has yet to be tested in the courts, and

⁴⁷ Phillip K. Howard, “Class War,” *The Wall Street Journal*, Page A12, May 24, 2005.

⁴⁸ As one of the leading civil procedure scholars, my colleague Martin Redish has observed “Though on its face the class action appears to be nothing more than an elaborate procedural joinder device, in recent years it has become the focal point of much political and legal debate. Courts have noted ‘the intense presser to settle’ caused by the very filing of a class action, while others believe the procedure amounts to ‘judicial blackmail.’” Martin H. Redish, “Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals,” 2003 *The University of Chicago Legal Forum* 71. (footnotes omitted). Redish does go on to observe, however, that “Those who take a more positive view of the class action consider it to be an effective means of policing corporate behavior and an assurance that injured victims will be compensated in the most efficient manner.” *Id.* (footnote omitted). Redish’s own view is that current class action practice is inconsistent with popular sovereignty, or “the essential democratic precepts of accountability and representation.” *Id.*, at 137.

⁴⁹ The Class Action Fairness Act of 2005, which passed the House in a 279-149 vote and the Senate by a vote of 72-26, would move lawsuits seeking over \$5 million, and thus “shift most large class-action lawsuits involving parties from different states to federal courts.” The goal of the measure is to lessen the perceived arbitrary behavior of state court judges and juries. See generally William Branigin, “Congress Changes Class Action Rules,” *Washington Post*, February 17, 2005. The new law does not, however, prevent the bringing of any class actions in federal courts, nor did it have any retroactive effect. In addition to shifting some class action lawsuits to federal courts the new law also should have the effect of

other Congressional measures, such as Sarbanes-Oxley, suggest that our legislators may still be imposing measures whose costs far exceed their benefits.⁵⁰ One recent estimate “puts investors' loss in stock value on passage of that act at around \$1.4 trillion, an expensive bit of retribution for a few multi-million dollar defalcations.”⁵¹ There is no denying that transparency in American entrepreneurial activity is a worthy goal, and the disclosure mandated by our securities laws and the efforts of the SEC and the courts to ferret out and punish securities fraud are certainly laudable. Nevertheless, it is time for intelligent leaders in and out of the Congress boldly to seek to change not only the pernicious practices and rules that have encouraged lawsuit abuse, but perhaps the very culture that has spawned them.⁵²

As indicated above, there was a time when lawsuits were discouraged, and when the legal rules clearly favored the American active entrepreneur. There has always been some uncertainty to American law, dictated by its need simultaneously to implement

reducing the recovery of counsel's contingency fees in class action litigation that results in coupons being distributed to members of the class. The contingency fees are to be figured on the basis of the value of the coupons redeemed rather than on the aggregate value of the coupons issued. “The Class Action Fairness Act was drafted and ultimately passed into law in response to a growing belief that class action lawsuits were nothing but vehicles for attorney abuse and large fees.” Ruth Bahe-Jachna, Frank Citera and Collin Williams, “GT Alert:New Federal Legislation: The Class Action Fairness Act of 2005 (March 2005), available on the web at <http://www.gtlaw.com/pub/alerts/2005/0302.asp>.

⁵⁰ For this line of criticism against Sarbanes/Oxley see, e.g. Thomas J. Donohue, “Opening Keynote Address,” Securities Industry Association, March 3, 2005, http://www.uschamber.com/press/speeches/2005/050303tjd_securities.htm (“When CEOs spend more time on regulatory compliance than they do strategizing, expanding, developing new product lines, and hiring new workers, the pendulum has swung too far . . . When qualified and responsible board directors are resigning their posts for fear of being held liable for a bad outcome, the pendulum has swung too far. . . . When board members become overly concerned with protecting themselves and have less time and incentive to aggressively pursue the interests of the company and its shareholders, the pendulum has swung too far.”), and Henry Manne, “Life After Donaldson,” Wall Street Journal, June 6, 2005, Page A10 (Decrying the former Chairman of the SEC's championing of strict enforcement of Sarbanes/Oxley “in spite of mounting evidence that it is costly beyond any conceivable benefits.”)

⁵¹ Manne, supra note ____, referring to “The most widely discussed of these new estimates, a careful and scholarly work by Ivy Xiying Zhang of the University of Rochester.”

⁵² See, to similar effect, Redish, supra note ____, who argues that “it is important to keep in mind a central fact often ignored in modern procedural scholarship: the class action was never designed to serve as a free-standing legal device for the purpose of ‘doing justice,’ nor is it a mechanism intended to serve as a roving policeman of corporate misdeeds or as a mechanism by which to redistribute wealth.” 2003 The University of Chicago Legal Forum, at 74.

popular sovereignty, economic development, restraints on arbitrary power, and the securing of a maximum amount of freedom from government regulation.⁵³ Before the middle of the twentieth century our legal and cultural regime discouraged litigation, and entrepreneurs had the freedom successfully to develop our economy to the point where it became the envy of the world.

That economy still flourishes, but it now does so in a climate in which no entrepreneur, and perhaps no American can be confident that he or she will not find themselves the subject of a lawsuit brought by a disgruntled competitor, an ambitious politician, or misguided government regulators. Surely at some point this climate will discourage the kinds of activities that Americans must engage in if we are to remain competitive in an increasingly-global economy. It is time for a change. We Americans tend to believe that one can't turn back the clock, but, as C.S. Lewis reminded us, when the clock fails to give you the correct time, that is precisely the move one should make.⁵⁴ If we really do want to alter a culture in which entrepreneurial actors and ordinary Americans, instead of being protected by law may too often end up its victims, there are lessons we could surely learn from our past.

⁵³ On these four aims as dominating American law, see generally, Stephen B. Presser, "Legal History" or The History of Law: A Primer on Bringing the Law's Past into the Present, 35 Vanderbilt Law Review 849 (1982).

⁵⁴ see C.S. LEWIS, We have Cause to Be Uneasy, in MERE CHRISTIANITY (1952), excerpted in THE ESSENTIAL C.S. LEWIS 309 (Lyle W. Dorset ed., 1988) ("First, as to putting the clock back. Would you think I was joking if I said that you can put a clock back, and that if the clock is wrong it is often a very sensible thing to do? But I would rather get away from that whole idea of clocks. We all want progress. But progress means getting nearer to the place where you want to be. And if your have taken a wrong turning, then to go forward does not get you any nearer. If you are on the wrong road, progress means doing an about-turn and walking back to the right road . . .").