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THE BURDENS OF ALL: PROGRESSIVE ORIGINS OF ACCIDENT COST SOCIALIZATION IN TORT LAW, 1870–1920

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Scholars who have studied the Progressive Movement's contributions to American law have paid little attention to its impact on tort law. This Article helps fill the gap by examining the ways in which Progressivism shaped the rise of employer liability law, workers compensation, and comparative negligence during the late-nineteenth and early-twentieth centuries. The Article places these reforms within the broader social history of American tort law—a gradual, often tortuous transition from free-labor beliefs that the law should encourage personal responsibility and economic growth above all else to a realization that injuries are an unavoidable cost of economic modernization, accompanied by a long-running debate over the extent to which the costs of accidents should be socialized.

The Article first examines the common law origins of the contributory negligence doctrine, which allowed only completely faultless victims to recover for their injuries. It then describes the post-Civil War rise of statutes and judicial decisions which tried to preserve notions of personal responsibility while modestly expanding victims' ability to recover through devices such as expansion of employers' liability for negligence of a victim's fellow workers and of their duties to maintain a safe workplace. These reforms evolved in highly piecemeal fashion.

Workers' compensation and comparative negligence, both products of the Progressive Era, represented a revolution in tort law. The former took workplace accidents out of tort law and put them into no-fault systems funded largely by employers. The latter overturned contributory negligence, allowing many negligent victims to recover in proportion to defendants' fault. The Article describes the Progressive campaign for workers compensation, in which Progressive reformers employed stereotypically "masculine" arguments

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based on deductive reasoning and statistics as well as stereotypically "feminine" arguments based on stories, told most notably by Crystal Eastman, that brought home to middle-class Americans the human cost of industrial accidents. American courts almost universally upheld workers-compensation laws' constitutionality against substantive-due-process challenges; the Article argues this was due in part to Progressive anger at perceived judicial resistance to other reforms, an anger that many judges implicitly heeded. Comparative negligence advanced more slowly. After Congress and several states adopted it for railroad workers (1907–19) and Mississippi adopted it for all injury cases (1910), the movement went into a long period of dormancy, prompted, the Article argues, by lingering fears that its expansion of juries' powers would lead to abuse of that power.

I. INTRODUCTION

On a cold winter day in 1836, one Roper, while driving his sleigh down a steep hill near Utica, New York, ran into and seriously injured two-year-old William Hartfield, a child who had wandered onto the highway.[1] Who would bear the cost of those injuries? In *Hartfield v. Roper* (1839), New York Justice Esek Cowen and his colleagues delivered a harsh answer: the child and his parents must bear the entire cost. Cowen chastised William's parents for letting him go without supervision; he concluded that their negligence must be imputed to William and that therefore, he would not be allowed to recover against Roper. "[W]hen [a plaintiff] complains of wrong to himself," said Cowen, "the defendant has a right to insist that he should not have been the heedless instrument of his own injury. He cannot, more than any other, make a profit of his own wrong."[2]

Hartfield was one of the first American cases to adopt the doctrine of contributory negligence, holding that any negligence on an accident victim's part, no matter how minor, barred recovery.[3] The doctrine reflected two powerful currents of early-nineteenth-century American thought: free labor and instrumentalism. The free-labor ethic, which had its origins in sources as diverse as Adam Smith and antislavery orators including Abraham Lincoln, celebrated individual self-reliance and hard work and held that success, defined in terms of both prosperity and personal independence, would come to all who practiced those virtues. Free-labor adherents insisted that individual rights went hand-in-hand with individual responsibility, and they looked with suspicion on those who sought government assistance or any sort of wealth redistribution as a means of ameliorating social and economic inequality.[4] Legal

1. Hartfield v. Roper, 21 Wend. 615, 617 (N.Y. Sup. Ct. 1839).

2. *Id.* at 630.

3. Some historians have pointed to two English cases, Butterfield v. Forrester, 103 Eng. Rep. 926 (K.B.1809) and Flower v. Adam, 127 Eng. Rep. 1098 (C.P. 1810) as the cases most responsible for implanting contributory negligence in American law, but American state courts relied more frequently on *Hartfield* and other American authorities than on English cases. *See* Smith v. Smith, 19 Mass. 621, 622 (1824); and Lane v. Crombie, 29 Mass. 177 (1831); Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127, 1189–92 (1990); Fleming James Jr., *Contributory Negligence*, 62 YALE L.J. 691, 692–93 (1953). Another early American contributory negligence case is Bush v. Brainard, 1 Cow. 78, 79–80 (N.Y. 1823).

4. Smith described control over one's own labor as a fundamental property and liberty right. 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 146–75 (1776). In an 1859 speech, Lincoln praised American workers who, he said, "ask[] no favor of capital on the one hand, nor of hirelings or slaves on the other. . . . If any continue through life in the condition

instrumentalism, formed during an era in which release of individual creative energy was the dominant value, was a preference among lawmakers "for property put to creative new use rather than property content with what it is."[5] Many legislators and courts shaped the law to accommodate that preference, rejecting the common law's traditional preferences when they conflicted with the interests of enterprises–some of which, particularly railroads and factories, became a regular source of accidents and injuries.[6]

Contributory negligence would remain a dominant part of tort law for many decades, but as the twentieth century approached, dissenting voices and new sensibilities appeared. Many Americans came to view accidents and injuries in social rather than individual terms, as an inevitable byproduct of an urbanizing, industrializing society, and they questioned the fairness and practicality of a doctrine which, in the words of Florida Chief Justice George McWhorter, "says you were both at fault and draws from that premise the conclusion that one alone must bear all the damage, provided that one is the plaintiff."[7] In 1907, Wisconsin's legislature enacted a comparative-negligence law that allowed railroad workers to recover from their employers when the railroads' negligence "was greater than the negligence of the employe [sic] . . . and contribut[ed] in a greater degree to such injury."[8] The following year, Congress enacted the Federal Employers Liability Act (FELA), a "pure" comparative-negligence law that allowed interstate railroad workers a recovery proportional to their employer's negligence even where the worker's negligence was greater,[9] and in 1910, Mississippi enacted the first comparative-negligence law that applied to all types of accidents.[10] Comparative negligence was not the

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of the hired laborer, it is not the fault of the system, but because of either a dependent nature which prefers it, or of improvidence, folly, or singular misfortune." ROY P. BASLER, ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 500–01 (1946) (speech at Milwaukee, Wisconsin, Sept. 30, 1859).

5. JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 28 (1956).

6. *Id.* at 28; *see also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860, at 16–30 (1977). Some scholars have questioned whether nineteenth-century judges applied instrumentalism in the tort arena. *See*, *e.g.*, Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981) (study of New Hampshire and California court decisions); James L. Hunt, Note, *Private Law and Public Policy: Negligence Law and Political Change in Nineteenth-Century North Carolina*, 66 N.C. L. REV. 421 (1988); Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641 (1989) (Delaware, Maryland and South Carolina); Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946) (New York and Illinois); Nathan Honson, Note, *Iowa Tort History, 1839–1869: Subsidization of Enterprise or Equitable Allocation of Liability?*, 81 IOWA L. REV. 811 (1996).

7. Louisville & Nashville R.R. Co. v. Yniestra, 21 Fla. 700, 737 (1886).

8. 1907 Wis. Sess. Laws 903; WIS. STAT. § 1816(4) (1911).

9. Federal Employers Liability Act, 45 U.S.C. §§ 51–53 (1908).

10. 1910 Miss. Laws 125.

only reform that broke through at that time. In May 1910, New York enacted the nation's first workers compensation law, a law which marked the culmination of a thirty-year campaign.[11] The law removed the bulk of workplace-accident cases from tort law altogether and allowed injured workers to recover compensation, albeit limited in amount, regardless of fault.[12] Individually and collectively, workers compensation and comparative negligence represented an unprecedented advance in the socialization of accident costs in the United States.

The Progressive Movement's contributions to American law have been extensively studied,[13] but the movement's impact on tort law has been curiously neglected. This Article will partly fill the gap by examining the social and legal evolution of comparative negligence and workers compensation and analyzing the ways in which Progressive sensibilities shaped those reforms. The Article first addresses the origins of contributory negligence, comparative negligence's predecessor and counterpoint, with a particular focus on early attempts to soften or repudiate it, including Georgia's and Illinois's experiments with rudimentary forms of comparative negligence during the 1850s and attempts by several Midwestern courts during the same decade to cabin the fellow-servant rule, which shielded employers from liability for injuries caused by the employer's other workers.[14]

Next, the Article traces the growing realization after the war that workplace accidents were inevitable in a mature industrial economy, that the free-labor doctrine was not well suited to such an economy, and that both a moral and an economic case could be made for greater socialization of accident costs. During the 1860s and 1870s, several Midwestern states, driven by anti-railroad sentiment, enacted employer liability laws abolishing the fellow-servant rule for railroad employees.[15] During the ensuing decades, states across the nation enacted a variety of employer-liability laws, ranging from modest codifications of existing law to abolition of the fellow-servant rule and other employer

11. 1910 N.Y. Laws 625.

12. *Id.* at 674; *see infra* notes 250–54 and accompanying text.

13. *See e.g.*, ROBERT F. WESSER, CHARLES EVANS HUGHES: POLITICS AND REFORM IN NEW YORK, 1905–1910 (1967); HOYT LANDON WARNER, PROGRESSIVISM IN OHIO, 1897–1917 (1964); DAVID P. THELEN, THE NEW CITIZENSHIP: ORIGINS OF PROGRESSIVISM IN WISCONSIN, 1885–1900 (1972); ROBERT S. MAXWELL, LA FOLLETTE AND THE RISE OF THE PROGRESSIVES IN WISCONSIN (1956); HERBERT F. MARGULIES, THE DECLINE OF THE PROGRESSIVE MOVEMENT IN WISCONSIN, 1890–1920 (1968); DEWEY GRANTHAM, SOUTHERN PROGRESSIVISM: THE RECONCILIATION OF PROGRESS AND TRADITION (1983).

14. *See infra* Parts II.B and II.C.

15. *See infra* notes 132–40 and accompanying text.

defenses for most occupations.[16] American courts also developed duties and rules designed to soften contributory negligence, such as an employer's duty to furnish safe work conditions and competent fellow workers and a "grace period" rule which temporarily exempted workers from liability for contributory negligence if they notified their employers of workplace hazards. Courts and legislatures also placed restrictions on employers' right to insist that workers waive accident liability claims as a condition of employment.[17] The Article examines the holistic evolution of these laws and rules over the course of the late-nineteenth century.[18]

These reforms set the stage for the workers compensation and comparative negligence movements, to which the Article next turns. The American workers compensation movement began in the 1880s with studies that underscored the seriousness of industrial accidents as a social problem.[19] Progressives used their considerable public-relations and lobbying skills to generate a steady stream of research monographs, magazine articles, and legislative studies supporting reform; that stream reached a critical mass during the years 1900–1911.[20] The Article argues that the movement had two sides: a masculine side reflected in the data-driven analyses of reformers such as Carroll Wright, John Commons, and other reformers, and a more feminine side epitomized by Crystal Eastman, whose *Work Accidents and the Law* (1910) used stories to portray the human cost of accidents to workers and their families. Both sides were essential to the movement's success.[21]

Next, the Article examines the practical issues considered by the lawmakers who enacted early workers compensation laws and the constitutional obstacles that the laws faced. It analyzes the New York Court of Appeals' rejection of its state's pioneering law in *Ives v. South Buffalo Railroad. Co.* (1911);[22] the opinions that issued soon afterward from Massachusetts, Washington, and Wisconsin courts upholding their states' laws; and later decisions in other states and in the U.S. Supreme Court that cemented workers compensation's place in American law.[23] The Article argues that these decisions reflected a broader judicial move away from free-labor sensibilities, a move that was in part a

16. *See infra* Parts III.B-III.E.

17. *See infra* Parts III.B.ii, III.D.

18. *See infra* Part III.

19. *See infra* Part IV.A.

20. *See infra* Part IV.B.

21. *See infra* notes 213–32 and accompanying text.

22. Ives v. S. Buffalo Ry. Co., 94 N.E. 431 (N.Y. 1911).

23. *In re* Op. of Justs., 96 N.E. 308 (Mass. 1911); State *ex. rel.* Davis-Smith Co. v. Clausen, 117 P. 1101 (Wash. 1911); Borgnis v. Falk Co., 147 Wis. 327, 133 N.W. 209 (1911); *see infra* notes 273–87 and accompanying text.

response to vocal, Progressive criticisms of judges' perceived propensity to override juries and strike down reform laws.[24]

The Article then turns to the question of why comparative negligence blossomed during the Progressive Era. It traces the origins of the pioneering comparative-negligence laws enacted by Wisconsin and Mississippi and by Congress between 1907 and 1910;[25] it then analyzes the constitutional challenges that the laws faced and briefly traces the evolution of comparative negligence following the Progressive Era. The Article asks why comparative-negligence laws spread only slowly after 1910 and concludes that the primary reason was fear of the increased power that comparative negligence gave to juries.[26] The Article concludes by summarizing the ways in which late-nineteenth century tort reforms set the stage for Progressive Era breakthroughs in tort law, and by considering the place of Progressivism in the larger history of American tort law.[27]

II. CONTRIBUTORY NEGLIGENCE AND ITS EARLY CRITICS

A. Tempering Negligence by Degrees

The individualist mindset that undergirded the free-labor doctrine made it difficult for most early-nineteenth century American jurists to accept a system that would allow negligent injury victims to recover any compensation from negligent defendants.[28] Nevertheless, from the beginning many American judges realized that the contributory negligence doctrine would often lead to harsh results, and they tried to soften it by viewing negligence in terms of degrees. They formulated two degree-based frameworks, one based on gross, ordinary, and slight negligence and the other based on remote and proximate cause.[29] Esek Cowen formulated a degrees of negligence framework in

24. *See infra* Part V.C.

25. *See infra* Part VI.A; 1907 Wis. Sess. Laws 903; WIS. STAT. § 1816(4) (1911); 1910 Miss. Laws, 125; Federal Employers Liability Act, 45 U.S.C. §§ 51–53 (1908); *see infra* notes 358–79 and accompanying text.

26. *See infra* Parts VI.B, VII.B.

27. *See infra* Part VII.

28. *See supra* notes 3–6 and accompanying text. For examples of that mindset's influence on early American tort law, *see* Hartfield v. Roper 24 Wend. 615 (N.Y. Sup. Ct. 1839); Bush v. Brainard, 1 Cow. 78 (N.Y. 1823); Smith v. Smith, 19 Mass. 621 (1824); and Lane v. Crombie, 29 Mass. 177 (1831).

29. *See infra* notes 30–42 and accompanying text.

Hartfield:[30] he held that William Hartfield's parents were grossly (that is, willfully or recklessly) negligent, which would have barred recovery even if Roper had been ordinarily negligent (that is, had failed to exercise ordinary care), although in Cowen's view, Roper was not negligent at all.[31] The degrees-of-negligence framework benefited the defendant in *Hartfield*, but it could also be used, and was used in other cases, to benefit plaintiffs where a defendant's conduct was egregious.[32]

Vermont Justice Isaac Redfield and his colleagues made the first important connection between tort liability and proximity of causation in *Trow v. Vermont Central Railway Co.* (1852).[33] *Trow* was a "livestock" case: when Jones Trow's horse wandered onto the Vermont Central's right-of-way, it was struck and killed by a locomotive.[34] Trow did not sue the engineer; instead, he based his negligence claim on the railroad's failure to erect protective fencing.[35] The railroad responded that Trow was contributorily negligent because he had failed to keep his horse under control.[36]

Redfield was no fan either of Cowen or his degrees-of-negligence framework,[37] and in *Trow*, he and his colleagues focused on degrees of causation rather than of negligence. They concluded that each party's negligence "was the remote cause of the injury, and equally contributed to the result."[38] The justices explained that "remote negligence" meant negligence remote in time from the injury, and that where both parties' negligence was remote, the plaintiff could not recover.[39] But they then carved an opening in

30. *Hartfield*, 21 Wend. at 617. Cowen derived the distinction between gross and ordinary negligence from English bailment law, which provided that bailees (persons charged with the care of others' property) would be held to a standard of extraordinary, ordinary, or no care depending on their relationship with the bailor (customer). English courts had previously indicated that the degrees of bailment care might be usefully translated into degrees of negligence, but *Hartfield* was the first American case in which that translation was made. *See also* Coggs v. Bernard, 2 Ld. Raym. 909 (1703); *see* Kaczorowski, *supra* note 3, 1133–36.

31. *Hartfield*, 21 Wend. at 622–23.

32. *See*, *e.g.*, Kerwhacker v. Cleveland, Columbus & Cincinnati R.R. Co., 3 Ohio St., 172 (1854); Evansville & Crawfordsville R.R. Co. v. Lowdermilk, 15 Ind. 120 (1860); Whirley v. Whiteman, 38 Tenn. 610 (1858), *abrogated by* McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992).

33. Trow v. Vt. Cent. R.R. Co., 24 Vt. 487 (1852).

34. *Id*. at 488.

35. *Id*. at 489.

36. *Id*. at 488–89.

37. ISAAC F. REDFIELD, A PRACTICAL TREATISE UPON THE LAW OF RAILROADS 330 (1858). In his influential treatise on railroad law, Redfield characterized *Hartfield v. Roper* (1839) as an unusually harsh case and noted that other state courts had already tried to develop devices for tempering contributory negligence's inherent harshness.

38. *Trow*, 24 Vt. at 494.

39. *Id.*

the wall of contributory negligence: a plaintiff whose negligence was remote could recover if the defendant's negligence proximately caused his injury.[40] The justices then sent the case back for a new trial, suggesting to Trow that he should consider making a claim against the engineer.[41] If Trow could show that the accident "might have been avoided by the defendant, in the exercise of reasonable care and prudence" despite Trow's earlier negligence—in the words of later commentators, if the engineer had a "last clear chance" to avoid the collision—then the engineer's negligence would be considered a proximate cause and Trow could recover.[42]

Cowen's degrees-of-negligence framework was fashionable for a time, but in the end, it proved too difficult to apply. Other courts began to criticize it in the 1850s,[43] and in 1885, Charles Beach, the author of one of the era's leading tort law treatises, pronounced the framework dead, criticizing the gross-ordinary-slight negligence distinction as "a troublesome and unnecessary refinement."[44] Cowen's successors too retreated from the framework,[45] but confusion lingered in its wake[46] and it would resurface as comparative negligence evolved.[47] Vermont's framework of remote and proximate cause proved more durable, but American courts constantly struggled to''sl define proximate cause, and these efforts also produced more confusion than clarity.[48] Even luminaries such as Massachusetts Chief Justice Lemuel Shaw conceded that "[t]he whole doctrine of causation . . . is of profound difficulty, even if it

40. *Id.* at 494–95.

41. *Id.* at 494.

42. *Id.* at 495. As to the evolution of the "last clear chance" rule, *see* Fleming James, Jr., *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704, 704–07 (1938); Malcolm M. MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225, 1225–32 (1940).

43. *See* Neal v. Gillett, 23 Conn. 437 (1855); *see also* Catawissa R.R. Co. v. Armstrong, 49 Pa. 186 (1865).

44. THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE §§ 16, 37 (1869); *see also* THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 630–31 (1879); CHARLES FISK BEACH, JR., A TREATISE ON THE LAW OF CONTRIBUTORY NEGLIGENCE, OR NEGLIGENCE AS A DEFENSE § 17 (2d ed. 1892).

45. Fero v. Buffalo & State Line R.R. Co., 22 N.Y. 209 (1860); Wells v. N.Y. Cent. R.R. Co., 24 N.Y. 181 (1862); Wilds v. Hudson River R.R. Co., 24 N.Y. 430 (1862).

46. *See*, *e.g.*, Randall v. Nw. Tel. Co., 54 Wis. 140, 148, 11 N.W. 419, 423 (1882).

47. *See infra* notes 353, 397 and accompanying text.

48. Early decisions adopting the Vermont framework produced definitions including acts "directly contributing" to an accident, acts after which the accident became unavoidable, Button v. Hudson River R.R. Co., 18 N.Y. 248, 254, 258 (1858); acts "which directly or by natural consequence conduces to the injury," Richmond v. Sacramento Valley R.R. Co., 18 Cal. 351, 357 (1861); and acts "simultaneous in operation with that of the defendants, of the same kind, immediate, growing out of the same transaction." Isbell v. N.Y. & New Haven R.R. Co., 27 Conn. 393, 406 (1858).

may not be said of mystery,"[49] and tort law scholars such as Shearman and Redfield[50] and Michigan Chief Justice Thomas Cooley were unable to cut the knot of confusion.[51] Proximate cause became a malleable concept, often tailored to fit individual cases based on judges' sensibilities, and by the middle of the twentieth century most American courts would openly acknowledge that fact.[52]

B. Small Rebellions, Part One: Comparative Negligence in Georgia and Illinois

In the 1850s, Georgia's Supreme Court took the first step toward comparative negligence. Chief Justice Joseph Lumpkin, a jurist of national reputation who viewed use of degrees of negligence as "impracticable,"[53] was the chief inventor. In *Macon & Western Railroad Co. v. Winn* (1856), he endorsed the "last clear chance" rule; he then added that "[h]e who is most negligent, can never ask a Court for compensation [but] he who is least so, may or may not, according to the facts and circumstances of the case."[54] This statement in itself did not conflict with contributory negligence but soon afterward, in *Flanders v. Meath* (1859), Lumpkin said his decision in *Winn* really meant that "when both parties are in fault, but the defendant most so, the fault of the plaintiff may go in mitigation of damages."[55] This was the breakthrough, and two years later a committee charged with recodifying Georgia's statutes added a law that incorporated the *Flanders* holding.[56]

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49. Marble v. City of Worcester, 70 Mass. 395, 397 (1855). For an example of the continuing confusion in one state, see Pritchard v. La Crosse & Milwaukee R.R. Co., 7 Wis. 200 (1858) (attempting to equate proximate cause with gross negligence); Stucke v. Milwaukee & Miss. R.R. Co., 9 Wis. 182 (1859); Chi. & Nw. R.R. Co. v. Goss, 17 Wis. 428 (1863); Galpin v. Chi. & Nw. R.R. Co., 19 Wis. 637 (1865); Fisher v. Farmers' Loan & Tr. Co., 21 Wis. 73 (1866).

50. *See* SHEARMAN & REDFIELD, *supra* note 44, § 33 (stating that "proximate" means "near in the order of causation").

51. COOLEY, *supra* note 44 at 68–69 (defining a proximate cause as one "from which . . . the injury followed as a direct and immediate consequence" and suggesting that the foreseeability of the harm might play a role in determining proximity).

52. *See*, *e.g.*, Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 100–01, 103–04 (N.Y. 1928); Osborne v. Montgomery, 203 Wis. 223, 231–32, 234 N.W. 372, 376 (1931); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 45 (1st ed. 1941); *see also* FOWLER HARPER & FLEMING JAMES, JR., THE LAW OF TORTS (1956); Roscoe Pound, *Causation*, 67 YALE L.J. 1 (1957); Leon Green, *Duties, Risks, Causation Doctrines*, 41 TEX. L. REV. 42 (1962).

53. Macon & W. R.R. Co. v. Davis, 18 Ga. 679, 684 (1855).

54. Macon & W. R.R. Co. v. Winn, 19 Ga. 440, 446 (1856).

55. Flanders v. Meath, 27 Ga. 358, 362 (1859).

56. R.H. CLARK, T.R.R. COBB & D. IRWIN, THE CODE OF THE STATE OF GEORGIA § 2979 (1861); *see also* 1855–1856 Ga. Laws 155; Francis S. Philbrick, *Loss Apportionment in Negligence*

Illinois Supreme Court Justice Sidney Breese and his colleagues also experimented with modern comparative negligence in the 1850s, but their experiment was less successful. In 1852, they too adopted the last-clear-chance rule, but unlike their Georgia counterparts they explicitly linked the rule to proximate cause, thus complicating a concept of causation that was already confusing to many litigants.[57] In *Galena & Chi. Union R.R. Co. v. Jacobs* (1858), Breese tried to clarify the situation, but he only created more confusion. "The true doctrine," he said, " . . . is, that in proportion to the negligence of the defendant, should be measured the degree of care required of the plaintiff . . . where there are faults on both sides, the plaintiff shall recover, his fault being to be measured by the defendant's negligence."[58] Breese injected the slight-ordinary-gross framework for good measure: a plaintiff, he said "need not be wholly without fault" provided that his "negligence is comparatively slight, and that of the defendant gross."[59] Most Illinois trial courts interpreted these statements as a directive to implement comparative negligence, but subsequent supreme court decisions, including some written by Breese, put their interpretation in question: the court suggested that in the *Jacobs* case, Breese had merely tried to reaffirm the last-clear-chance rule, albeit awkwardly.[60] In 1894, the court finally put the matter to rest by formally rejecting comparative negligence.[61]

Early gestures toward comparative negligence were muddled in part because the concept elicited sharply conflicting feelings. Georgia's and Illinois's efforts reflected a general unease over contributory negligence, a feeling that it was unjust to deny an injury victim whose lapse had been minor any right to recover. Chief Justice McWhorter's open denunciation of contributory negligence came in 1886; a year later Florida's legislature, perhaps influenced by his statement, adopted Georgia's comparative negligence statute, but no other courts or legislatures followed.[62] Kansas Supreme Court Justice (and future U.S. Supreme Court Justice) David Brewer explained their hesitancy: "[M]any considerations," he said, "especially the difficulty of

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Cases Part II: Some Proposals for Reform in Pennsylvania, 99 U. PA. L. REV. 766, 778–80 (1951); Charles J. Hilkey, *Comparative Negligence in Georgia*, 8 GA. B. J. 51, 56–59 (1945).

57. Moore v. Moss, 14 Ill. 106 (1852); *see also* Joliet & N. Ind. R.R. Co. v. Jones, 20 Ill. 221 (1858); Leon Green, *Illinois Negligence Law*, 39 ILL. L. REV. 36, 44–50 (1944); Philbrick, *supra* note 56, at 780–81.

58. Galena & Chi. Union R.R. Co. v. Jacobs, 20 Ill. 478, 496 (1858).

59. *Id.* at 496–97.

60. *See* Green, *supra* note 57, at 50; Calumet Iron & Steel Co. v. Martin, 3 N.E. 456 (Ill. 1885) (collecting cases).

61. City of Lanark v. Dougherty, 38 N.E. 892 (Ill. 1894); Green, *supra* note 57, at 52–53.

62. Louisville & Nashville R.R. Co. v. Yniestra, 21 Fla. 700, 737 (1886); 1887 Fla. Laws 117.

correctly apportioning the damages, and determining to what extent the wrong of the respective parties was instrumental in causing the injury, uphold the rule so universally recognized."[63] That hesitancy also arose in part from fears of expanding juries' power. Georgia's Supreme Court had considered the extent to which judges could cabin juries' apportionment of negligence under its comparative-negligence system and had concluded that the system gave them no means of doing so. "For the apportionment of damages according to the relative fault of the parties," said Justice Logan Bleckley, "there seems to be no standard more definite than the enlightened opinion of the jury."[64] That specter prompted judges who were open to reform to explore more indirect means of helping accident victims.

C. Small Rebellions, Part Two: The Fellow-Servant Rule Attacked

During the pre-industrial era, the doctrine of respondeat superior governed employers' liability to injured workers for the negligence of fellow employees: employers were liable for all harm that their employees caused to others.[65] But as corporations proliferated and employer-employee relationships became less intimate and more contractual, jurists suggested that existing doctrine was too paternalistic and should be circumscribed. In *Priestley v. Fowler* (1837), Lord Abinger, the chief judge of England's Court of Exchequer, refused to hold an employer liable to a worker for an injury caused by the negligence of a fellow employee,[66] and in *Farwell v. Boston & Worcester Railroad Corp.* (1842), Massachusetts's Chief Justice Lemuel Shaw and his colleagues followed suit.[67]

Echoing free-labor and instrumentalist principles, Shaw concluded that Nicholas Farwell, an engineer who was injured in a derailment caused by a switchman's negligence, had agreed to assume the "natural and ordinary risks and perils incident to the performance of such services" in return for higher pay which reflected that risk.[68] Shaw also reasoned that workers were in at least as

63. Kan. Pac. Ry. Co. v. Pointer, 14 Kan. 37, 50 (1874).

64. Ga. R.R. & Banking Co. v. Neely, 56 Ga. 540, 544 (1876).

65. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 430 (3rd ed. 1765).

66. Priestly v. Fowler, 150 Eng. Rep. 1030 (1837); *see also* Jerrilyn Marston, Comment, *The Creation of a Common Law Rule: The Fellow Servant Rule, 1837–1860*, 132 U. PA. L. REV. 579, 584–86 (1984).

67. Farwell v. Bos. & Worcester R.R. Corp., 45 Mass. 49 (1842).

68. *Id.* at 57. Shaw's conclusion was not without evidentiary support: in some instances, railroad workers in high-risk positions received premium pay and some railroads agreed to continue workers' employment or make severance payments and to cover part or all of their medical bills after injury. Robert J. Kaczorowski, *From Petitions for Gratuities to Claims for Damages: Personal Injuries and*

good a position as employers to detect and prevent unsafe practices by their fellow workers: if their employer refused to remedy such practices, they could always quit and work elsewhere.[69] Shaw recognized that workers could not always detect safety violations, for example those of workers in company departments different from their own.[70] But because "it would be extremely difficult to establish a practical rule" determining when an injured worker did and did not have the power to prevent other workers' negligence, he would not allow any exceptions to the new fellow-servant rule.[71]

Many courts endorsed Shaw's decision and adopted the fellow-servant rule,[72] but the doctrine encountered resistance in the South and Midwest. Southern courts applied the rule to white workers,[73] but several refused to extend it to enslaved workers whose owners hired them out to businesses, absent an express agreement between the hirer and the slaveowner to the contrary.[74] However, this refusal benefited only slaveowners, not injured slaves.[75] Several Midwestern courts criticized Shaw's reasoning and cabined the fellow-servant rule for free workers. In *Little Miami Railroad Co. v. Stevens* (1851) the majority, speaking through Justice William Caldwell, criticized *Farwell* as "contrary to the general principles of law and justice" and adhered to respondeat superior.[76] But Caldwell's colleague Rufus Spalding argued in dissent that deviation from the fellow-servant rule would produce "'alarming consequences', when carried into the practical details of business."[77] The justices had very different images of workingmen: Caldwell wished to protect "innocent person[s] who had no control or management of the thing that

Railroads During the Industrialization of the United States, 57 AM. J. LEG. HIST. 261, 298–301 (2017); Schwartz, *supra* note 6, at 708–11; KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11 28–52 (2008); PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA 116 (1997).

69. *Farwell*, 45 Mass. at 59, 61.

70. *Id.* at 60.

71. *Id.*

72. *See*, *e.g.*, Murray v. S.C. R.R., 26 S.C.L. 38 (1841); Brown v. Maxwell, 6 Hill 592, 594 (N.Y. 1844); Ryan v. Cumberland Valley R.R. Co., 23 Pa. 384 (1854); Honner v. Illinois Cent. R.R. Co., 15 Ill. 550 (1854); Michigan Cent. R.R. Co. v. Leahey, 10 Mich. 193 (1862).

73. *See*, *e.g.*, *Murray*, 26 S.C.L. 385; Scudder v. Woodbridge, 1 Ga. 195 (1846); Hubgh v. New Orleans & Carrollton R.R. Co., 6 La. Ann. 495 (1851); Forsyth & Simpson v. Perry, 5 Fla. 337 (1853).

74. *See Scudder*, 1 Ga. at 199; *see also Forsyth*, 5 Fla. 337; Louisville & Nashville R.R. Co. v. Yandell, 56 Ky. 586 (1856); Howes v. Steamer Red Chief, 15 La. Ann. 321 (1860); White v. Smith, 12 Rich. 595 (S.C. 1860).

75. *See generally* Paul Finkelman, *Slaves as Fellow Servants: Ideology, Law, and Industrialization*, 31 AM. J. LEG. HIST. 269 (1987); Frederick Wertheim, Note, *Slavery and the Fellow-Servant Rule: An Antebellum Dilemma*" 61 N.Y.U. L. REV. 1112 (1986).

76. Little Mia. R.R. Co. v. Stevens, 20 Ohio 416, 436 (1851).

77. *Id.* at 440 (Spalding, J., dissenting).

produced [the injury],"[78] but Spalding warned against workers who, through "the negligence of others, . . . [would] grasp the treasures of the company, and procure a competency for life."[79] Indiana's Supreme Court went in another direction: in *Gillenwater v. Madison & Indianapolis Railroad Co.*, it limited the doctrine to cases where the victim and the fellow worker were in the same "department" and their concurrent negligence produced injury.[80]

III. PROGRESSIVE ANTECEDENTS: THE RISE OF EMPLOYER LIABILITY LAWS

A. The Changing Array of Accident Cases

The American Industrial Revolution, which had begun in the early nineteenth century with scattered water- and steam-powered factories and railroad construction in eastern states, entered a second phase around 1870. The Second Industrial Revolution was marked by the rise of large corporations and factories that relied on wage workers and increasingly sophisticated production and management techniques,[81] and it was also marked by rapid population growth and steady urbanization.[82] Industrialization and urbanization brought Americans ever more frequently into contact with each other and with potentially hazardous situations. The number of passenger and freight trains and the speeds at which they traveled rose steadily, creating an increased level of danger that crossing signs, whistles and other safety devices could never completely overcome.[83] Electrified streetcars brought similar dangers, as did the new municipal electric systems that made them possible.[84] Workplace

78. *Id.* at 432.

79. *Id.* at 450 (Spalding, J., dissenting).

80. Gillenwater v. Madison & Indianapolis R.R. Co., 5 Ind. 339, 345–46 (1854).

81. *See* ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 79–376 (1977).

82. In 1870, the nation's population was just over 38 million people; there were twice as many agricultural workers as manufacturing workers in the American workforce, and American agricultural output and manufacturing output were roughly equal in value. By 1910 the population had grown to 92 million, nearly half of whom lived in the towns and cities where industry was concentrated; manufacturing workers outnumbered agricultural workers by forty percent and industrial output was worth more than twice as much as agricultural output. *See* FRANCIS A. WALKER, COMPENDIUM OF THE NINTH CENSUS 594–95, 692, 796, 872 (1872); ABSTRACT OF THE THIRTEENTH CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1910, at 137 288–89, 437–38 (1914).

83. *See* MARK ALDRICH, SAFETY FIRST: TECHNOLOGY, LABOR, AND BUSINESS IN THE BUILDING OF AMERICAN WORK SAFETY, 1870–1939, at 9–40 (1997)*; see generally* ROBERT B. SHAW, DOWN BRAKES: A HISTORY OF RAILROAD ACCIDENTS, SAFETY PRECAUTIONS AND OPERATING PRACTICES IN THE UNITED STATES OF AMERICA (1961).

84. *See* SAM BASS WARNER JR., STREETCAR SUBURBS: THE PROCESS OF GROWTH IN BOSTON, 1870–1900, at 21–29 (2d ed. 1978). Streetcar accidents accounted for six percent of all tort cases from

machinery, ever more complex and dangerous, took an increasing toll: "[T]he power was always turning—and it did not respond to shouts or to a hand, arm, or body caught in a machine or belting or by the turning shafts."[85]

During the Second Industrial Revolution, the number of tort cases coming before American courts increased sharply. A survey of five sample state supreme courts during the era has shown that railroad-accident and workplace-accident cases came to dominate their tort dockets.[86] Railroad cases divided about equally between injuries to livestock wandering onto tracks, persons struck by trains, and passengers injured in collisions or in boarding or alighting from trains.[87] Trains and rail yards, factories, lumber operations, and construction sites accounted for the largest number of workplace accidents.[88] In 1900, workplace-accident cases exceeded railroad-accident cases for the first time, but in the 1910s they would diminish in number as workers compensation laws were enacted.[89] Railroad-employee accidents were at the intersection of the two categories, and they provided the catalyst for the most important legal reform of the era: employer liability laws.[90]

1870 to 1920 in the five-state survey referenced in JOSEPH A. RANNEY, THE BURDENS OF ALL: A SOCIAL HISTORY OF AMERICAN TORT LAW 199 app. (Carolina Academic Press, 2021).

85. 3 ROBERT C. NESBIT, THE HISTORY OF WISCONSIN: URBANIZATION AND INDUSTRIALIZATION 1873–1893 225 (William Fletcher Thompson ed. 1985).

86. The survey examined tort decisions of the New York, North Carolina, Wisconsin, Texas, and California supreme courts at ten-year intervals from 1870 to 1920. The survey methodology and the cases examined are set forth in RANNEY, *supra* note 84, Appendices 2 and 3.

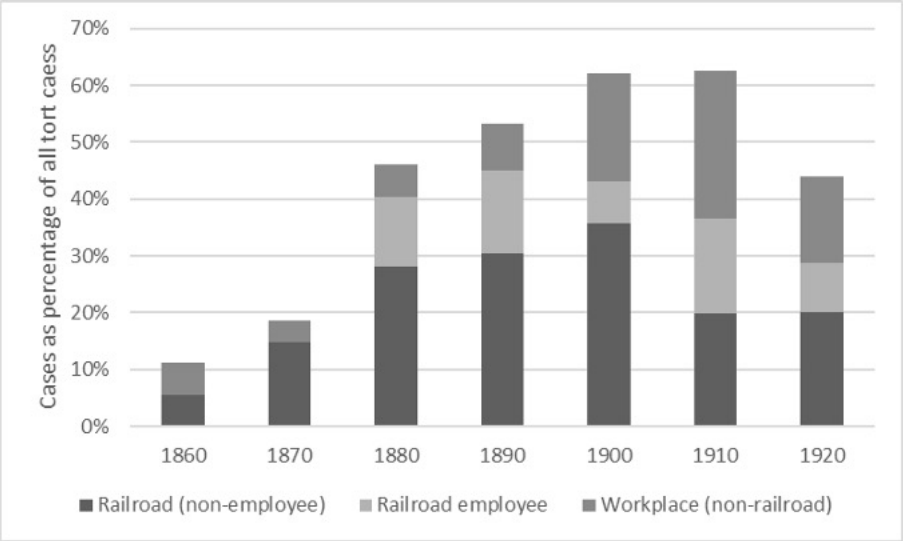
87. RANNEY, *supra* note 84, Appendices 2 and 3.

88. *Id.*

89. *Id.*

90. *Id.*; *see infra* notes 125–35 and accompanying text.

The Rise of Railroad and Workplace Accidents, 1860–1920 [91]



B. The Push Against Contributory Negligence Begins

In 1870, contributory negligence was still firmly established in American tort law, and it had given rise to an important corollary principle: assumption of risk. Lord Abinger had stated in *Priestley* that an employer was "bound to provide for the safety of his servant,"[92] but no workplace could ever be completely risk-free. In Abinger's view, workers knew this when they made their employment agreements, and being closer to the work than their employer, they were in a better position to assess its dangers.[93] American courts soon adopted the assumption of risk principle; in 1854, Pennsylvania Justice Walter Lowrie warned against liberal construction of employers' safe-place duties because that might lead to "a guarantee for the accidents that may befall [workers] in the use of the machinery which they profess to understand, and which they ought so to understand as to be able to inform their employers when it is out of order."[94]

Nevertheless, by 1870 there were already signs that contributory negligence was not a good fit for an industrialized America. Wage workers, mostly unskilled and dependent on corporations for their livelihood, now outnumbered

91. The figure is compiled from data in RANNEY, *supra* note 84, Appendices 2 and 3.

92. Priestly v. Fowler, 150 Eng. Rep. 1030, 1032 (1837).

93. *Id.* at 1033.

94. Ryan v. Cumberland Valley R.R. Co., 23 Pa. 384, 385 (1854); *see also* Ill. Cent. R.R. Co. v. Cox, 21 Ill. 20 (1858).

craft workers whose special skills gave them greater ability to negotiate working conditions, and the numerical disparity between the two groups was growing steadily.[95] Wage workers often were a single part of a larger production process, dependent on other workers' proper performance of tasks over which they had no control, and on the proper functioning of machines whose inner workings and flaws were invisible or incomprehensible to them.[96] As the number of work accidents rose, a faint but nagging sense also arose among jurists and the public that they might to some extent be an unavoidable byproduct of industrialization and economic growth. If accidents were inevitable, should fault continue to serve as a guiding principle for allocation of accident costs?

Some jurists defended the rule of no liability without fault as a bulwark against governmental encroachment on private liberty and autonomy, but Francis Hilliard, Thomas Cooley, Thomas Shearman, and Amasa Redfield, all authors of leading nineteenth-century treatises on tort law, took a softer approach. They suggested that adherence to the no-liability-without-fault rule provided the best answer *if* negligence were defined as a lack of ordinary care. The ordinary-care standard would preserve the fault principle, but the irreducible elasticity of the term "ordinary" would give juries some leeway to take accidents that others might see as fault-free out of that category, for example by finding negligence in acts of an employer or exonerating an injured worker from contributory negligence where others might not.[97] The treatise writers' proposed rule was quickly recognized as imperfect, not least by the writers themselves: their idea of jury leeway grated against the formalist ideal that law should be neutral, consistent, and predictable.[98] Abinger's and Lowrie's argument proved more durable, but it clashed with the new reality that workers had limited control over the conditions in which they worked.[99] During the Second Industrial Era, American judges responded to these tensions by making regular efforts to soften the free-labor principles articulated in *Priestley* and its progeny without breaking with them altogether.[100]

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95. JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 31–33, 35–36 (2004).

96. *Id.* at 35–41; *see also* ABRAHAM, *supra* note 68, at 28–52.

97. 1 FRANCIS HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS 122–23, 137–38 (4th ed. 1874); COOLEY, *supra* note 44, at 667–87; SHEARMAN & REDFIELD, *supra* note 44 , §§ 53–54; WITT, *supra* note 95, at 46–49.

98. Charles C. Goetsch, The Future of Legal Formalism, 24 AM. J. LEGAL HIST. 3 (1980). HILLIARD, *supra* note 97, at 122–23, 137–38; COOLEY, *supra* note 44, at 667–87; SHEARMAN & REDFIELD, *supra* note 44, §§ 53–54; WITT, *supra* note 95, at 46–49.

99. WITT, *supra* note 95, at 33.

100. *See infra* Parts III.B.i, III.B.ii, and III.C.

i. Distractions and Emergencies

Two new devices for softening contributory negligence, the distraction rule and the emergency rule, took hold at the beginning of the Second Industrial Era. As early as 1860, the argument was made to Massachusetts's Supreme Court that people are often distracted by their own thoughts or unexpected events happening nearby and that in such situations, their failure to be mindful of hazards is not inconsistent with ordinary care and should not be treated as negligence.[101] The justices rejected the argument, stating that it was "equivalent to a positive declaration that [the plaintiff] was utterly incautious,"[102] but a few years later they relented: juries could consider distraction as an excuse for what would otherwise be contributory negligence.[103] Beginning in the early 1870s, other state courts also endorsed the idea of distraction as a defense against claims of contributory negligence, and by the turn of the century the rule was generally accepted in American courts.[104]

Late-nineteenth century courts also recognized that plaintiffs might be confronted with an emergency—for example, an unexpected but imminent train collision—that required them to make an instant choice between several risky alternatives—such as jumping off or staying with the train. In such cases, a choice that proved mistaken would not be treated as lack of ordinary care.[105] The emergency rule first appeared in the early nineteenth century;[106] it did not

101. Gilman v. Inhabitants of Deerfield, 81 Mass. 577, 580–81 (1860).

102. *Id.* at 581.

103. *See* Smith v. City of Lowell, 88 Mass. 39 (1863) (indicating that plaintiffs were not required to be constantly attentive to their surroundings); Weare v. Inhabitants of Fitchburg, 110 Mass. 334, 339 (1872) (stating: "Previous knowledge of the existence of the defect, and a residence in its immediate neighborhood, are not conclusive" of contributory negligence).

104. *See*, *e.g.*, Wheeler v. Town of Westport, 30 Wis. 392 (1872); Cohen v. Eureka & Palisade R.R. Co., 14 Nev. 376 (1879). Courts interpreted the rule with varying degrees of liberality: *compare* Dale v. Webster Cnty., 41 N.W. 1 (Iowa 1888) (noting that plaintiff walked onto bridge and fell off it while reading a newspaper; held, distraction rule did not apply) *with* Van Praag v. Gale, 40 P. 555 (Cal. 1895) (noting that plaintiff walked into an elevator shaft while reading a newspaper; held, rule applied; court emphasized that the shaft had been closed earlier but was not closed at the time of the accident). *See generally* SHEARMAN & REDFIELD, *supra* note 44, § 375.

105. *See* authorities cited *infra* notes 106–08.

106. Jones v. Boyce, 171 Eng. Rep. 640 (N.P. 1816) and Stokes v. Saltonstall, 38 U.S. 181 (1839).

emerge as a defense to contributory negligence until the 1850s,[107] but it was widely adopted after that time.[108]

ii. Reinforcing Employers' Safe-place Duties

As workplace accidents grew in number, American courts modestly expanded the scope of employers' safe-place duties. During the 1850s and 1860s, a consensus emerged that, in addition to ensuring that workplaces and equipment were safe when originally provided to workers, employers must also eliminate defects and hazards brought to their attention.[109] Whether that duty included a continuing obligation to inspect for hazards proved to be a more difficult question. In *Warner v. Erie Railroad. Co.* (1868), New York's highest court answered it by applying the ordinary-care standard: employers must monitor equipment "with frequency, and with such tests as custom and experience have sanctioned and prescribed."[110] Thus, the extent of an employer's obligation to monitor equipment would depend on customs determined by employers themselves. For instrumentalist reasons, the court refused to impose a duty of continuous monitoring: that would come too close to an absolute standard of care, which would "carry [employers'] corporate liability beyond reason" and impose an "intolerable burden."[111] Other states soon adopted the *Warner* standard,[112] although a few courts indicated that a duty of continuous monitoring should be adopted and others described the duty

107. Cook & Scott v. Parham, 24 Ala. 21 (1853). *Cook* involved a slaveowner's claim against defendant for loss of his slave; as in other such cases, the court considered the slaveowner's economic interest more than humanity toward slaves in determining who should bear the loss. *See supra* notes 74–75 and accompanying text.

108. *See*, *e.g.*, Ingalls v. Bills, 50 Mass. 1 (1845); Frink v. Potter, 17 Ill. 406 (1856); Hegan v. Eighth Ave. R.R. Co., 15 N.Y. 380 (1857); Sw. R.R. Co. v. Paulk, 24 Ga. 356 (1858); Jeffersonville R.R. Co. v. Swift, 26 Ind. 459 (1866); and Schultz v. Chi. & Nw. R.R. Co., 44 Wis. 638 (1878). *See also* SHEARMAN & REDFIELD, *supra* note 44, § 89 and authorities there cited.

109. *See*, *e.g.*, Keegan v. W. R.R. Corp., 4 Selden 175 (N.Y. 1853); Carle v. Bangor & Piscataquis Canal & R.R. Co., 43 Me. 269 (1857); Hallower v. Henley, 6 Cal. 209 (1856); Indianapolis. & Cincinnati R.R. Co., 10 Ind. 554 (1858); Hard v. Vt. & Can. R.R. Co., 32 Vt. 473 (1860), *abrogated by* Davis v. Central Vt. R.R. Co., 55 Vt. 84 (1882); Snow v. Housatonic R.R. Co., 8 Allen 441 (Mass. 1864); Chi. & Nw. R.R. Co. v. Swett, 45 Ill. 197 (1867).

110. Warner v. Erie R.R. Co., 39 N.Y. 468, 475 (1868).

111. *Id.* at 475–76.

112. *See*, *e.g.*, Columbus & Indianapolis Cent. Ry. Co. v. Arnold, 31 Ind. 174 (1869), *overruled in part by* Dill v. Marmon, 73 N.E. 67 (Ind. 1905); Houston & Tex. Cent. Ry. Co. v. Dunham, 49 Tex. 181 (1878); Norfolk & W. R.R. Co. v. Jackson's Adm'r, 8 S.E. 370 (Va. 1888); SHEARMAN & REDFIELD, *supra* note 44, § 194(a).

in terms so strong as to suggest that more than ordinary care was required of employers.[113]

Priestley did not address whether employers' safe-place duty included an obligation to employ competent workers, but British and American courts soon held that it did.[114] Again, the difficult question was whether the duty continued after the workers were hired. In 1855, Ohio's Supreme Court held that employers would be liable for continuing to employ workers after they had been "shown to be incompetent or unsuitable,"[115] but in 1868 the House of Lords held, and New York's highest court suggested in *Warner,* that the employer's duty ended after the hiring process was completed.[116] A few states agreed with New York,[117] but others did not. For example, Illinois Chief Justice Sidney Breese reasoned that in an age where railroads and other large corporations had "countless lives and unnumbered property committed daily to their care," employment of responsible workers was a public, not merely a private matter.[118] And many states that refused to impose a continuing duty of care to monitor employees' reliability adopted a "grace period" rule which mitigated the harsh effects of that refusal.[119] The rule provided that if a worker warned his employer of a dangerous workplace condition and the employer promised to fix it, that would trigger a grace period during which the worker could continue to work in the presence of the condition without being held to have assumed the risk of injury.[120] The rule gained near-universal acceptance and was soon extended to cover warnings about problematic fellow workers.[121] The rule had

113. *See*, *e.g.*, *Swett*, 45 Ill. 197 (1867); *Davis*, 55 Vt. 84 (1882); Peschel v. Chi., Milwaukee & St. Paul Ry. Co., 62 Wis. 338, 351–53, 21 N.W. 269, 274–78 (1885) (dissent of Justice David Taylor suggesting that unconditional duty should be imposed).

114. *See*, *e.g.*, Mad River & Lake Erie R.R. Co. v. Barber, 5 Ohio St. 541 (1856); Frazier v. Pa. R.R. Co., 38 Pa. 104 (1861); Hutchinson v. York, Newcastle & Berwick Ry. Co., 155 Eng. Rep. 150 (1850); Wigmore v. Jay, 155 Eng. Rep. 155 (1850); *see also* THOMAS BEVAN, NEGLIGENCE IN LAW: GENERAL RELATIONS 663–65 (3d ed. 1908) (discussing British cases).

115. *Mad River*, 5 Ohio St. at 561.

116. Wilson v. Merry & Cunningham*,* (1868) 4 Scot. 568; Warner v. Erie Ry. Co 39 N.Y. 468, 475 (1868) (citing *Wilson* with approval and stating: "[T]he duty of the master was to select proper and competent persons to do the work . . . , and when he had done that, he had performed his whole duty").

117. *See*, *e.g.*, Heine v. Chi. & Nw. Ry. Co., 58 Wis. 525, 531–32, 17 N.W. 420, 422–23 (1883).

118. Ill. Cent. R.R. Co. v. Jewell, 46 Ill. 99, 101–02 (1867).

119. *See infra* Parts III.C-III.E.

120. SHEARMAN & REDFIELD, *supra* note 44, § 96; *see infra* notes 124–26 and accompanying text.

121. *See*, *e.g.*, Kroy v. Chi., R.I. & Pac. R.R. Co., 32 Iowa 357 (1871); Snow v. Housatonic R.R. Co., 8 Allen 441 (Mass. 1864); Clarke v. Holmes, (1862) 258 Eng. Rep. 751; SHEARMAN & REDFIELD, *supra* note 44, § 96; FRANCIS WHARTON, *A Treatise on the Law of Negligence* §§ 220–21 (1874); Francis H. Bohlen, *Voluntary Assumption of Risk: II*, 20 HARV. L. REV. 91 (1906) (citing cases).

limitations: the grace period would last only a reasonable time;[122] workers could not invoke the rule if the condition at issue was obviously and imminently hazardous;[123] and in cases of injury resulting from latent defects in machinery and equipment, the worker would be deemed to have assumed the risk and must bear his own loss.[124]

C. The Rise of Employer Liability Laws

American legislatures also wrestled with allocation of liability for railroad and workplace injuries, and they did so in a much more public way. Between 1870 and 1910, they enacted a wide variety of employer liability statutes that ranged from codification of judicially created tort rules to elimination of the fellow-servant rule and other employer defenses.[125] The statutes were a barometer of changing American attitudes toward concepts of fault and allocation of accident costs.

The employer liability law movement arose out of a broader legal reaction to railroads that had begun in the 1850s. Before the Civil War, American states and municipalities had subsidized railroad construction heavily through stock purchases and bond issues.[126] Loss of those investments due to railroad bankruptcies—and judicial rejection of local governments' efforts to recoup their losses through arguments that subsidies to private corporations were constitutionally invalid—left a strong residue of resentment toward railroads.[127] After the war, railroads, buoyed by improved economic conditions, consolidated their lines and enacted complex and often discriminatory freight and passenger rates, acts that were economically defensible but deeply unpopular.[128] They also gained a reputation for poor treatment of customers, a

122. *See*, *e.g.*, Patterson v. Pittsburgh & Connellsville R.R. Co., 76 Pa. 389 (1874); WHARTON, *supra* note 121, §§ 210, 220.

123. *See*, *e.g.*, Greenleaf v. Ill. Cent. R.R. Co., 29 Iowa 14 (1870); East Tenn., Va. & Ga. R.R. Co. v. Gurley, 80 Tenn. 46 (1883); SHEARMAN & REDFIELD, *supra* at 44, §§ 185, 185b; WHARTON, *supra* note 121, §§ 206, 208–209.

124. *See*, *e.g.*, Paulmier v. Erie R.R. Co., 34 N.J.L. 151 (1870); Gibson v. Pac. R.R. Co., 46 Mo. 163 (1870); Chi. & Alton R.R. Co. v. Platt, 89 Ill. 141 (1878); Ballou v. Chi., Milwaukee, & St. Paul Ry. Co., 54 Wis. 257, 11 N.W. 559 (1882); Atchison, Topeka & Santa Fé R.R. Co. v. Ledbetter, 34 Kan. 326 (1885); WHARTON, *supra* note 121, §§ 209–11.

125. *See infra* Parts III.C-III.E.

126. CARTER GOODRICH, GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS 1800–1890 51–120 (1960).

127. 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864–1888, pt. 1, at 918–19 (1971); *see*, *e.g.*, Nichol v. Mayor of Nashville, 28 Tenn. 252 (1848); Sharpless v. Mayor of Phila., 21 Pa. 147 (1853).

128. GEORGE H. MILLER, RAILROADS AND THE GRANGER LAWS 82–97 (1971); GOODRICH, *supra* note 126, 207–64.

problem evidenced by the steady stream of tort suits filed by passengers who had been ejected from trains over fare disputes or had been denied help and shelter while waiting for trains.[129]

The end of the 1860s brought both legislative and judicial action. Between 1870 and 1875, Midwestern states enacted a series of "Granger laws" creating railroad regulatory agencies vested with regulatory powers and limiting rates and rate discrimination.[130] Their supreme courts and ultimately the U.S. Supreme Court upheld the laws, thus laying a foundation for modern regulatory government in America.[131] Midwestern Grangerites included tort law in their reform efforts. Iowa's legislature enacted the nation's first employer liability law in 1862.[132] The law effectively eliminated the fellow-servant rule for railroads by making them "liable for all damages sustained by any person, including employes [sic] of the company in consequence of any neglect of the [company's] agents"; it also prohibited railroads from forcing workers to waive injury claims as a condition of employment.[133] Wisconsin and Kansas enacted

129. During the 1860s and 1870s, such incidents accounted for nearly ten percent of all tort cases in Wisconsin and roughly two percent in other survey states. *See* RANNEY, *supra* note 84, at Appendix 2. Mark Twain deemed the problem worthy of satire, *see* MARK TWAIN & CHARLES DUDLEY WARNER, THE GILDED AGE: A TALE OF TO-DAY 316–326 (1901); and Charles Francis Adams Jr., a descendant of two presidents and a national authority on railroad management, complained publicly that railroad employees' manners "are probably the worst and most offensive to be found in the civilized world." Charles F. Adams Jr., *The Granger Movement*, 120 N. AM. REV. 394, 402 (1875).

130. *See*, *e.g.*, 1871 Ill. Laws 618, 636, 640; 1871 Minn. Laws 78, 84; 1874 Wis. Sess. Laws 599. A number of states, beginning with Massachusetts in 1869, also created railroad commissions but gave them few regulatory powers. *See* MASS. GEN. LAWS ch. 408 (1869); CHARLES FRANCIS ADAMS, JR., RAILROADS: THEIR ORIGIN AND PROBLEMS 138–40 (1878). In 1869 and 1870, the Michigan, Wisconsin, and Iowa supreme courts, speaking respectively through Chief Justices Thomas Cooley and Luther Dixon and Justice John F. Dillon—all jurists of national reputation—held, contrary to prevailing prewar legal opinion, that railroads should be viewed as private rather than public enterprises and that public subsidies were unconstitutional except in very limited circumstances. Hanson v. Vernon, 27 Iowa 28, 29 (1869), *overruled in part by* Stewart v. Board of Sup'rs of Polk City, 30 Iowa 9 (1870), *overruled in part by* Bonnifield v. Bidwell, 32 Iowa 149 (1871); People *ex rel.* Detroit & Howell R.R. Co. v. Township Bd. of Salem, 20 Mich. 465 (1870); Whiting v. Sheboygan & Fond du Lac R.R. Co., 25 Wis. 167 (1870).

131. Munn v. People, 69 Ill. 80 (1873), *aff'd*, Munn v. Illinois, 94 U.S. 113 (1877); *see also* Blake v. Winona & St. Peter R.R. Co., 19 Minn. 418 (1872), *aff'd*, Winona & St. Peter R.R. Co., 94 U.S. 180 (1876); State *ex rel.* Atty. Gen. v. Chi. & Nw. Ry. Co. (The Potter Law Case), 35 Wis. 425 (1874); SOLON J. BUCK, THE GRANGER MOVEMENT: A STUDY OF AGRICULTURAL ORGANIZATION AND ITS POLITICAL, ECONOMIC, AND SOCIAL MANIFESTATIONS 1870–1885 102–08 (1913); MILLER, *supra* note 128, at 107–16, 126–31, 161–65; JOSEPH A. RANNEY, WISCONSIN AND THE SHAPING OF AMERICAN LAW 73–78 (2017).

132. 1862 Iowa Acts 197.

133. *Id.* at 198. In 1856 Georgia had enacted a law, more limited than Iowa's, that abolished the fellow-servant rule for train operators "who cannot possibly control those who should exercise care

similar employer liability laws in 1874.[134] The laws did not abolish fault altogether: railroads could still invoke employee contributory negligence and assumption of risk as defenses.[135] The laws were an important step toward shifting the cost of accidents to employers, but only a partial one. Legislators focused exclusively on railroads and gave little thought to eliminating the fellow-servant rule for other employers.

Railroads challenged all three states' employer liability laws, arguing that the laws violated constitutional guarantees of equal protection by singling out railroads for regulation and that they interfered with railroads' constitutional liberty and property rights and their right to contract with employees on terms of their own choosing.[136] All three states' supreme courts summarily rejected the challenges, holding that railroads and the safety hazards they posed were unique in many respects and, therefore, could be the subject of laws limited to their field.[137] They also held that the laws did not violate employers' liberty, property or contract rights: those arguments had been dealt with in their earlier Granger law decisions which affirmed in strong terms state power to regulate corporations.[138] Wisconsin Chief Justice Edward Ryan had warned railroads in his Granger Law decision that public discontent must be heeded: regulatory laws were akin to "the surgeon's wholesome use of the knife, to save life, not to take it"; and he underscored that warning when he upheld his state's employer liability law.[139] The U.S. Supreme Court agreed: it upheld Kansas's employer liability law in *Missouri Pac. Railroad Co. v. Mackey* (1888) and Iowa's law in *Minneapolis & St. Louis Railroad Co. v. Herrick* (1888).[140]

New American employer liability laws appeared after 1880 when Parliament enacted a sweeping Employers Liability Act (hereinafter "British Act") in response to a decades-long campaign to limit or abolish the fellow-

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and diligence in the running of trains." 1855–1856 Ga. Laws 155. *See* Marland C. Hobbs, *Statutory Changes in Employers' Liability*, 2 HARV. L. REV. 212 (1888). The territories of Wyoming and Montana also enacted early employer liability laws. Montana went the furthest, extending to employees the enhanced duty of care that railroads owed passengers. 1879 Mont. Sess. Laws 471; 1876 Wyo. Sess. Laws 512; Hobbs, *supra* note 133, at 213, 220.

134. 1874 Wis. Sess. Laws 599; 1874 Kan. Sess. Laws 143.

135. *See id.*; Donald J. Berthrong, *Employer's Liability Legislation in Wisconsin, 1874–1893*, 34 SW. SOC. SCI. Q. 57, 59–60 (1953).

136. Ditberner v. Chi., Milwaukee & St. Paul Ry. Co., 47 Wis. 138, 2 N.W. 69 (1879); McAunich v. Miss. & Mo. R.R. Co., 20 Iowa 338 (1866); Missouri Pac. R.R. Co. v. Haley, 25 Kan. 35 (1881).

137. *Ditberner,* 2 N.W. at 71–72; *McAunich,* 20 Iowa at 342–43; *Haley*, 25 Kan. at 38.

138. *Ditberner,* 2 N.W. at 71.

139. *The Potter Law Case*, 35 Wis. at 580 (upholding Wisconsin's Granger law); *Ditberner,* 2 N.W. at 71.

140. Mo. Pac. Ry. Co. v. Mackey, 6 P. 291 (Kan. 1885), *aff'd*, Mo. Pac. Ry. Co. v. Mackey, 127 U.S. 205 (1888); Minneapolis & St. Louis Ry. Co. v. Herrick, 127 U.S. 210 (1888).

servant and assumption of risk rules in Great Britain.[141] The British Act was not limited to railroads but applied to a broad variety of industries. It eliminated common-law defenses available against workers where a worker's injury resulted from workplace and equipment defects;[142] from negligence of vice-principals, that is, officials and supervisors with authority to direct workers;[143] from a worker's compliance with a boss's order or from acts of fellow employees undertaken in compliance with company rules or a boss's order;[144] or from acts of railroad workers in charge of locomotives, trains and signal points.[145] Alabama adopted the British Act nearly verbatim in 1885[146] and Massachusetts (1887),[147] Colorado (1893),[148] and Indiana (1893)[149] soon followed suit.

Between 1880 and 1910, approximately nineteen other states and territories fashioned their own employer liability laws.[150] Some states followed the early Midwestern model by eliminating the fellow-servant rule for specified railroad personnel, usually engineers, train crews and switch operators.[151] Some states adopted one or two of the 1880 Act's categories of exemption from the fellow-servant rule or combined such categories with codification of other softening features introduced by American courts.[152] Other states took unique paths, most

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141. 1880, 43 & 44 Vict. c. 42 (Gr. Brit.); *see* CONRAD RENO, A TREATISE ON THE LAW OF EMPLOYERS' LIABILITY ACTS 363–77 (1896).

142. 1880, 43 & 44 Vict. c. 42, § 1(1) (Gr. Brit.); *see* ALFRED HENRY RUEGG, K.C., THE EMPLOYERS' LIABILITY ACT, 1880, AND THE WORKMEN'S COMPENSATION ACT, 1906, 523–24, 544 (7th ed. 1907).

143. 1880, 43 & 44 Vict. c. 42 §§ 1(2), 1(3) (Gr. Brit.).

144. *Id*. at § 1(4); 1902 Ohio Laws 114 (doctrine inapplicable to vice-principals' negligence; employers liable for workplace defects).

145. 1880, 43 & 44 Vict. c. 42 § 1(5) (Gr. Brit.).

146. 1885 Ala. Laws 115.

147. 1887 Mass. Acts 899.

148. 1893 Colo. Sess. Laws, 129.

149. 1893 Ind. Acts 294; *see* RENO, *supra* note 141, at 375–77.

150. *See infra* notes 152–155; *see generally* CARROLL D. WRIGHT, TENTH SPECIAL REPORT OF THE COMMISSIONER OF LABOR: LABOR LAWS OF THE UNITED STATES, WITH DECISIONS OF COURTS RELATING THERETO (1904).

151. *See* 1891 Fla. Laws 113; LA. STATS. ANN. § 2320 (1897); 1887 Minn. Laws 69; 1897 Mo. Laws 96; 1897 N.C. Sess. Laws 108; 1903 N.D. Laws 202; 1903 Or. Laws 20; 1897 Tex. Gen. Laws 14.

152. *See* 1893 Ark. Acts 68; 1901 Ariz. Sess. Laws 734; (fellow-servant rule inapplicable if the employer had prior notice of the fellow worker's incompetency); CAL. CIV. CODE § 1970 (Deering 1909) (rule inapplicable if fellow-servant hiring was negligent); CONN. GEN. STAT. § 4702 (1901) (inapplicable to vice-principal's negligence); 1893 N.M. Laws 43–44 (similar to Arizona law); 1902 Ohio Laws 114 (similar to New York law); 1903 Or. Laws 20 (rule inapplicable to negligence of vice-

notably Maryland. In 1902, it abolished the fellow-servant rule for miners and quarry and streetcar workers and provided that they could recover half the value of their injuries from their employer even if they were contributorily negligent.[153] Employers would be exempted from the law if they agreed to pay premiums to a benefit fund administered by the state insurance commissioner for workers killed in accidents, or if they created a company death-benefit fund approved by the commissioner.[154] None of the Midwestern states that had pioneered employer liability statutes for railroads expanded their statutes to apply to all industries in line with the British model. That seems curious, but it is consistent with a broader American pattern: most states that enacted employer liability laws created basic statutes reflecting their choice among these options and then left them in place making only marginal adjustments in subsequent legislative sessions. [155]

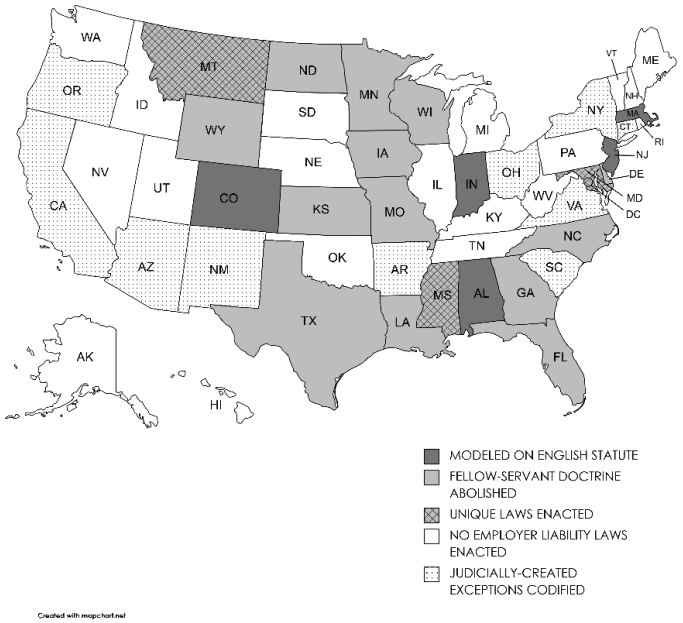
principals and railroad crew members); S.C. CONST. art. IX, § 15 (similar to Oregon law; doctrine also inapplicable to workers in different departments); VA. CONST. art. XII, § 162 (similar to South Carolina law).

153. George E. Barnett, *The Maryland Workmen's Compensation Act*, 16 Q. J. Econ. 591, 591 (1902).

154. 1902 Md. Laws 219. In 1904 a lower state court struck down the law on the ground that it impermissibly delegated legislative power to the commissioner and deprived employers of the right to a jury trial. The decision was not appealed, and no further reform took place in Maryland until the advent of workers compensation. *Id.*; George E. Barnett, *The End of the Maryland Workmen's Compensation Act*, 19 Q. J. ECON. 320, 320–22 (1905). In 1890, Mississippi codified the vice-principal and departmental exceptions to the fellow-servant rule and abolished the assumption-of-risk defense except for conductors and engineers. MISS. CONST. art. II, § 193. In 1903, Montana codified the vice-principal and departmental exceptions and applied them to miners as well as railroad workers. 1903 Mont. Laws 157.

155. Wisconsin was a rare exception. *See* 1880 Wis. Sess. Laws 270–71 (repealing 1874 law); 1889 Wis. Sess. Laws 613 (rule not applicable to acts of certain railroad supervisors and equipment operators); 1893 Wis. Sess. Laws 263 (same); 1903 Wis. Sess. Laws 741 (rule not applicable to any accidents that involved "risk or hazard peculiar to the operation of railroads."). Labor unions were the main force behind the 1880s renaissance, but it also drew support from conservatives such as Frank Flower, the head of the state's Bureau of Labor and Industrial Statistics, who "f[ou]nd a sentiment in favor" of reinstating the old law and argued that "[o]ur laws as well as justice should keep pace with the advance of civilization." FRANK A. FLOWER, SECOND BIENNIAL REPORT OF THE BUREAU OF LABOR AND INDUSTRIAL STATISTICS 1885–1886 xlv-xlvi (1886) [hereinafter "WBLIS"]. A Progressive-dominated legislature enacted the 1903 expansion at Governor Robert La Follette's behest. S. JOURNAL, 46th Sess., at 97–98 (Wis. 1903); *see generally* Berthrong, *supra* note 135, at 60–68.

The Evolution of Employer Liability Laws, 1860–1904 [156]
(*Map generated from a template provided by courtesy of mapchart.net*)



Post-1880 employer liability laws continued to elicit constitutional challenges, usually on the ground that the lines they drew between covered and non-covered workers violated federal and state constitutions' equal-protection clauses. American courts rejected most of these challenges. The U.S. Supreme Court effectively put an end to challenges to laws limited to railroad employees in 1888 in *Mackey* and *Herrick.*[157] In *Tullis v. Lake Erie & Western Railway Co.* (1899), the federal high Court upheld Indiana's law adopting the 1880 British Act's classifications,[158] and courts in several other states with laws

156. *See* Wright, *supra* note 150; RENO, *supra* note 141, both *passim*. The figure is based on information in these sources.

157. *Mackey*, 127 U.S. 205 (1888); *Herrick*, 127 U.S. 210 (1888). Later statutes that varied from the Iowa and Kansas employer liability laws in minor respects were challenged but were upheld by state supreme courts based on *Mackey* and *Herrick. See*, *e.g.*, Coley v. N.C. R.R. Co., 40 S.E. 195 (1901); Bodie v. Charleston & W. Carolina Ry. Co., 39 S.E. 715 (S.C. 1901); Lewis v. N. Pac. Ry. Co., 92 P. 469, 472 (Mont. 1907); RENO, *supra* note 141, § 84; John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159, 1181–82 (2005).

158. Tullis v. Lake Erie & W. R.R. Co., 175 U.S. 348, 353–54 (1899).

based on the 1880 Act rejected challenges to those laws based on *Tullis*.[159] A few employer liability laws did not survive challenge. In 1903 Mississippi's supreme court struck down a law that abolished the fellow-servant rule for all corporations, concluding that the law's omission of individual employers was unconstitutionally arbitrary, but it agreed that employer liability laws could validly target railroads and other businesses that involved a special degree of hazard.[160]

Employer liability laws that survived constitutional challenges were sometimes cabined by narrow judicial construction. Courts uniformly held that the laws did not eliminate contributory negligence as a defense.[161] Some liability laws codified the grace-period rule, but courts enforced those laws grudgingly indicating, as they had before enactment of the laws,[162] that worker protections would not apply if the hazard posed an imminent threat of injury, and that grace periods would not extend indefinitely.[163]

D. Anti-Waiver Statutes

Many legislatures also responded to the changed workplace conditions of the Second Industrial Revolution by enacting anti-waiver statutes. During the late nineteenth and early twentieth centuries, many American railroads established worker benefit plans, participation in which was often compulsory, or informally provided temporary support for injured workers and their families, and some also provided jobs for permanently disabled workers.[164] They did so out of paternalism and out of a desire to avoid the costs and risks of litigation, but they and other employers also tried to protect themselves by inserting waiver clauses in their workers' contracts.[165] These included absolute-waiver clauses requiring workers as a condition of employment to waive all right to file lawsuits in case of injury and benefit-receipt clauses

159. *See*, *e.g.*, Ryalls v. Mechanics' Mills, 22 N.E. 766 (Mass. 1889); Colo. Milling & Elevator Co. v. Mitchell, 58 P. 28, 30 (Colo. 1899); Quigley v. Lehigh Valley R.R. Co. of N.J., 79 A. 458, 462 (N.J. 1911).

160. Ballard v. Miss. Cotton Oil Co., 34 So. 533, 557 (Miss. 1903); Bradford Constr. Co. v. Heflin, 42 So. 174, 178 (Miss. 1906). Indiana's supreme court agreed. Bedford Quarries Co. v. Bough, 80 N.E. 529, 530 (Ind. 1907).

161. *See*, *e.g.*, Mobile & Birmingham Ry. Co. v. Holborn, 84 Ala. 133, 137 (1887), *overruled in part by* Birmingham Ry. & Elec. Co. v. Allen, 13 So. 8 (1892); Daugherty v. Midland Steel Co., 53 N.E. 844, 847 (Ind. App. 1899); *see also* RENO, *supra* note 141, § 113.

162. *See supra* notes 123–24 and accompanying text.

163. *See*, *e.g.*, Kroy v. Chi., Rock Island & Pac. Ry. Co., 32 Iowa 357 (1871); Indianapolis & St. Louis Ry. Co. v. Watson, 14 N.E. 721, 728 (Ind. 1887); *see also* RENO, *supra* note 141, §§ 218, 239.

164. WITT, *supra* note 95, at 35–41; Kaczorowski, *supra* note 68, 298–301.

165. Kaczorowski, *supra* note 68, at 268–69, 289, 292.

requiring workers to waive such rights if they accepted the guaranteed but limited benefits that company plans provided.[166]

Nineteenth-century British courts generally upheld both types of clauses as consistent with free-labor principles of liberty of contract,[167] but American legislatures and courts gave the clauses a cooler reception. Between 1860 and 1910, at least nineteen states enacted anti-waiver statutes prohibiting absolute-waiver clauses and, in some cases, benefit-receipt clauses.[168] American courts generally upheld benefit-receipt clauses in the absence of prohibitory statutes,[169] but many struck down absolute-waiver clauses even in the absence of statutes, reasoning that because they required workers to give up legal rights that had not yet sprung into existence, they were contrary to public policy and void.[170] Judicial hostility to absolute-waiver clauses insulated prohibitory statutes that were limited to such clauses from any serious constitutional challenge, but American courts divided over benefit-receipt clauses. Some courts upheld state statutes banning benefit-receipt clauses, stating that such clauses were against public policy because they required workers to elect a remedy prior to injury without providing any immediate benefit in return.[171] Other courts enforced benefit-receipt clauses, reasoning that benefit election operated as a voluntary settlement between employers and workers.[172] In 1908, Congress explicitly banned use of benefit-receipt clauses by railroads engaged

166. One scholar has concluded that after 1880, railroads and their employees inclined more toward litigation. Railroads did so because of increasing pressure to reduce costs and increase efficiency; workers did so because they feared that acceptance of paternalistic benefits would threaten their independence and bargaining power as to other issues. *Id.* at 266–78, 282–98.

167. *See*, *e.g.*, Griffiths v. Earl of Dudley, 9 Q.B. Div. 357, 357 (1882); Clements v. London & Nw. Ry. Co., 2 Q.B. (Eng.) 482 (Eng.1894).

168. *See*, *e.g.*, 1893 Wis. Sess. Laws 263; 1903 Wis. Sess. Laws 741. *See also, e.g.,* COLO. CONST. art. XV, § 15 (1876); 1891 Fla. Laws 113–14; 1895 Ga. Laws 292; 1902 Mass. Acts 918; MISS. CONST. art II, § 193 (1890); MONT. CONST. art. XV, § 16 (1889); 1903 N.D. Laws 171; 1903 Or. Laws 20; 1897 Tex. Gen. Laws 14; VA. CONST. art. XII, § 162 (1902); WYO. CONST. art. XIX, § 7 (1890).

169. *See*, *e.g.*, Graft v. Balt. & Ohio R.R. Co., 8 A. 206 (Pa. 1887); Spitze v. Balt. & Ohio R.R. Co., 23 A. 307 (Md. 1892); Eckman v. Chi., Burlington & Quincy R.R. Co., 48 N.E. 496 (Ill. 1897); Chi., Burlington & Quincy R.R. Co. v. Bell*,* 62 N.W. 314 (Neb. 1895); Beck v. Pa. R.R. Co*.,* 43 A. 908 (N.J. 1899).

170. *See*, *e.g.*, Kan. Pac. Ry. Co. v. Peavey, 29 Kan. 169 (1883); Lake Shore & Mich. S. Ry. Co. v. Spangler, 8 N.E. 467 (Ohio 1886); Little Rock & Fort Smith Ry. Co. v. Eubanks, 3 S.W. 808 (Ark. 1887); Johnson's Adm'x v. Richmond & Danville R.R. Co., 11 S.E. 829 (Va. 1890); Hissong v. Richmond & Danville R.R. Co., 8 So. 776 (Ala. 1891); *see also* RENO, *supra* note 141, §§ 7–9.

171. *See*, *e.g.*, Pa. Co. v. Chapman, 77 N.E. 248 (Ill. 1905); Atlantic Coast Line R.R. Co. v. Beazley, 45 So. 761, 793 (Fla. 1907); Barden v. Atlantic Coast Line R.R. Co., 67 S.E. 971, 975 (N.C. 1910).

172. *See*, *e.g.*, Pittsburgh, Cincinnati, Chi. & St. Louis R.R. Co. v. Cox, 45 N.E. 641 (Ohio 1896); Colaizzi v. Pa. R.R. Co., 101 N.E. 859 (N.Y. 1913).

in interstate commerce, which led to a sharp reduction in their use.[173] The U.S. Supreme Court upheld the 1908 law and nearly all state courts followed its lead thereafter.[174]

E. Safety Statutes

Workplace safety statutes arose in tandem with employer liability laws. Between 1870 and 1910, most states, particularly those at an advanced stage of industrialization, enacted safety laws, but they did so in piecemeal fashion. Early laws were directed at isolated problems and were often enacted in reaction to a particularly bad factory fire or explosion.[175] Less industrialized states did not enact workplace safety laws until the twentieth century,[176] and no state would attempt to create a comprehensive industrial safety code until 1911 when Wisconsin established an Industrial Commission charged with preparing and enforcing such a code.[177] Like the core tort concepts of fault-based liability and contributory negligence, the piecemeal approach to safety was a product of the era's focus on individual responsibility. That focus also shaped the early work of state labor bureaus, most of which were empowered only to monitor workplace conditions and suggest improvements; very few lawmakers were prepared to give the bureaus power to create and enforce safety regulations.[178]

Though early safety statutes were sketchy, still they were available for enforcement. Beginning in the 1880s, the question arose whether violation of such statutes would impose absolute liability on employers in case of worker injury, or whether employers could still assert contributory negligence as a

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173. 35 Stat. 149 (1908); *see* Am. Law Reports, *Validity of Contract Providing that Acceptance of Benefits from Relief Association Shall Bar Action Against Employer*, 12 A.L.R. 477, 494–95 (1921).

174. Chi., Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 574–75 (1911); *see* Am. Law Reports, *supra* note 173, 494–95 and cases there cited.

175. New York and Wisconsin provide good examples. *See* 1886 N.Y. Laws 629; 1887 N.Y. Laws 575; 1889 N.Y. Laws 752 (fire escape law, enacted after an 1889 factory fire killed thirty-eight people); Fred R. Fairchild, *The Factory Legislation of the State of New York*, 6 PUBS. OF AM. ECON. ASS'N 29–35, 44–56, 78–80 (1905); 1878 Wis. Sess. Laws 424; 1885 Wis. Sess. Laws 42, 346, 213 (fire escape laws enacted after an 1883 Milwaukee hotel fire killed seventy-one people); 3 ROBERT C. NESBIT, THE HISTORY OF WISCONSIN: URBANIZATION AND INDUSTRIALIZATION 1873–1893 452 (William F. Thompson ed. 1985).

176. *See*, *e.g.*, 1908 N.C. Sess. Laws xi-xviii; 1911 Tex. Gen. Laws iii-vii; and see table of contents in 1905 CAL. CIV. CODE.

177. 1911 Wis. Sess. Laws 581; *see* Donald W. Rogers, *From Common Law to Factory Laws: The Transformation of Workplace Safety Law in Wisconsin Before Progressivism*, 39 AM. J. LEGAL HIST. 177, 207, 210 (1995).

178. 3 JOHN R. COMMONS, HISTORY OF LABOR IN THE UNITED STATES, 1896–1932 628 (1935); *see* FAIRCHILD, *supra* note 175, at 24–27; A. J. ALTMEYER, THE INDUSTRIAL COMMISSION OF WISCONSIN: A CASE STUDY IN LABOR LAW ADMINISTRATION 13 (1932); Rogers, *supra* note 177, at 196–97.

defense.[179] American courts had useful precedents to look to: during the 1860s and 1870s, many had considered that question in the context of statutes requiring railroads to fence their rights of way.[180] Several state supreme courts had interpreted their fencing statutes to impose absolute liability on railroads whose failure to fence led to livestock and crossing accidents;[181] others refused to go that far, holding that violation of fencing statutes was sufficient to establish negligence on the railroad's part but that contributory negligence was still a defense,[182] and in some cases holding that imposition of absolute liability regardless of fault would be unconstitutional.[183]

The courts divided over the effect of workplace safety laws in much the same manner. Most held that workplace safety laws did not bar use of contributory negligence and assumption of risk defenses against injured adult workers unless the laws contained explicit wording to that effect,[184] but some were not so reluctant: they liberally construed safety statutes to preclude employers from asserting contributory negligence and assumption of risk based on building and equipment defects.[185] Those defenses, said Kansas Justice Henry Mason, were at bottom based on a worker's express or implied agreement to be responsible for the risks that attended unsafe machinery, and such an agreement could hardly be said to exist if the legislature had placed that responsibility on the employer through a safety statute.[186] Many courts that allowed contributory negligence and assumption of risk as defenses to claims

179. *See infra* notes 184–88 and accompanying text.

180. *See infra* notes 181–83 and accompanying text.

181. Shepard v. Buffalo, N.Y. & Erie R.R. Co., 35 N.Y. 641, 644 (1866). Other early cases upholding absolute liability included Jeffersonville, Madison & Indianapolis R.R Co. v. Ross, 37 Ind. 545, 549 (1871) and Wilder v. Me. Cent. R.R. Co., 65 Me. 332, 340 (1876); *see also, e.g.,* Ill. Cent. R.R. Co. v. Crider, 19 S.W. 618, 622 (Tenn. 1892).

182. *See*, *e.g.*, Curry v. Chi. & Nw. Ry. Co., 43 Wis. 665, 671–73 (1878); Jolliffe v. Brown, 44 P. 149, 152 (Wash. 1896). After *Curry* was decided, Wisconsin's legislature amended the state's fencing law to preclude contributory negligence as a defense. 1881 Wis. Sess. Laws 221; *see* Quackenbush v. Wis. & Mich. R.R. Co., 62 Wis. 411, 415–17, 22 N.W. 519, 519–21 (1885) (upholding 1881 law).

183. *See*, *e.g.*, Zeigler v. South & N. Ala. R.R. Co., 58 Ala. 594, 599 (1877); Bielenberg v. Mont. Union Ry. Co., 20 P. 314, 316 (Mont. 1889); *see also* Witt, *State Constitutions and Tort Law*, 1177–78.

184. *See*, *e.g.*, Thompson v. Edward P. Allis Co., 89 Wis. 523, 528, 62 N.W. 527, 529 (1895); Knisley v. Pratt, 148 N.Y. 372, 379 (1896); Langlois v. Dunn Worsted Mills, 57 A. 910, 911 (R.I. 1904); Mika v. Passaic Print Works, 70 A. 327, 329 (N.J. 1908); Jones v. Am. Caramel Co., 74 A. 613, 614 (Pa. 1909).

185. W. Furniture & Mfg. Co. v. Bloom, 90 P. 821 (Kan. 1907); *see also, e.g.,* Kilpatrick v. Grand Trunk Ry. Co., 52 A. 531, 533–34 (Vt. 1902) and Narramore v. Cleveland, Cincinnati., Chi. & St. Louis R.R. Co., 96 F. 298, 300–02 (6th Cir. 1899).

186. *Western Furniture & Mfg. Co.*, 90 P. at 822–23.

by adult workers made an exception for claims by children against employers who hired them in violation of minimum-age statutes,[187] although a minority, led by Massachusetts, did not, holding that use of liability defenses against children would not be barred unless that was explicitly provided by statute.[188]

In sum, by the dawn of the twentieth century, most American legislatures and courts had accepted that pure contributory negligence was not a good fit for a maturing industrial economy and had taken action to soften its harsh effects. But injured workers and other accident victims still faced high hurdles to recovery, and their chances of compensation were still highly uncertain and varied from state to state. However, the Progressive Movement was rapidly gaining strength in American political and legal circles, and the state of tort law was about to change dramatically.

IV. THE CAMPAIGN FOR WORKERS COMPENSATION

A. Origins of Workers Compensation

Workers' compensation originated in Europe. In 1884, German Chancellor Otto von Bismarck created the world's first compensation system that abandoned the concept of fault in the workplace. The system was compulsory; it was funded by employers' mutual insurance associations and administered by workers' sickness associations.[189] Unions and employer associations were powerful forces in German politics, and Bismarck hoped the new system would defuse worker discontent and promote cooperation between the two groups, which was essential to his goal of making Germany a world power.[190] Great Britain continued to rely on its 1880 Employers Liability Act, but criticism of

187. *See*, *e.g.*, Marino v. Lehmaier, 66 N.E. 572, 574 (N.Y. 1903); Perry v. Tozer, 97 N. W. 137, 140 (Minn. 1903); Ornamental Iron & Wire Co. v. Green, 65 S.W. 399, 401 (Tenn. 1901); Sipes v. Mich. Starch Co., 100 N.W. 447, 448 (Mich. 1904); Am. Car & Foundry Co. v. Armentraut, 73 N.E. 766, 768 (Ill. 1905); Lenahan v. Pittston Coal Mining Co., 218 Pa. 311, 314 (1907); Leathers v. Blackwell's Durham Tobacco Co., 57 S. E. 11, 13 (N.C. 1907); Sanitary Laundry Co. v. Adams, 208 S.W. 6, 7 (Ky. 1919) (collecting cases). *See generally* LINDLEY D. CLARK, THE LAW OF THE EMPLOYMENT OF LABOR 126 (1911).

188. Berdos v. Tremont & Suffolk Mills, 95 N.E. 876, 879 (Mass. 1911); *see also, e.g.,* Sterling v. Union Carbide Co., 105 N.W. 755, 757 (Mich. 1905); Rolin v. R.J. Reynolds Tobacco Co., 53 S.E. 891, 896 (N.C. 1906). *See also* Note, *Construction of Child Labor Statutes*, 23 YALE L.J. 175, 176–77 (1913) (criticizing the *Marino* decision and arguing that no exception should be made unless explicitly stated in a child-labor statute).

189. Michael L. Perlin, *The German and British Roots of American Workers' Compensation Systems: When is an "Intentional Act" "Intentional?",* 15 SETON HALL L. REV. 849, 855 (1985). P. Tecumseh Sherman, *Can the German Workmen's Insurance Law Be Adapted to American Conditions?*, 61 U. PA. L. REV. 67, 68–70 (1912).

190. Sherman, *supra* note 189, at 68–70.

the British Act's patchwork nature grew steadily, and in 1897 Parliament enacted a workers compensation system which superseded the Act.[191] Parliamentary supporters of the new system, including Joseph Chamberlain and future prime minister Herbert Asquith, stressed that accidents should be viewed as an inevitability rather than as a product of carelessness, and they used a military analogy that was to become popular among American reformers.[192] "If a soldier in the army of industry is wounded or dies he is entitled in the one case to a pension, and in the other case that his dependents are to be provided for," said Asquith, and "you cannot leave the application of that principle to the hazard chance, as to whether the captain of the company is solvent or insolvent."[193] The 1897 English law was limited to railroad workers and other selected occupations, but it was extended to nearly all workers in 1906.[194] Participation in the new system was compulsory: employers were made liable for worker injuries regardless of fault, and workers were foreclosed from bringing suit under the common law.[195]

A good argument can be made that the American workers compensation movement originated with Carroll Wright. Wright was born into an upper-middle-class New England family in 1840.[196] Like other members of his class, he viewed the labor movement with more detachment than sympathy; but as a devout Universalist, he believed in humanity's ability to progress toward perfection, and he viewed statistical study and social science as keys to that perfection.[197] Wright's background made him a near-perfect exemplar of the professionals and reform-minded businessmen, devout believers in rationality and expertise as the keys to good government and social prosperity and security, who were a core element of the Progressive coalition.[198] In 1873, Wright was appointed to head Massachusetts's Bureau of Labor Statistics; he soon made

191. W. ADDINGTON WILLIS, THE WORKMEN'S COMPENSATION ACT, 1906 611 (18th ed. 1919); J.D. BECK, THIRTEENTH BIENNIAL REPORT OF THE BUREAU OF LABOR AND INDUSTRIAL STATISTICS, STATE OF WISCONSIN 1907–1908 122–34 (Chamberlain), 134–43 (Asquith) [hereinafter "1907–1908 WBLIS REPORT"].

192. 1907–1908 WBLIS REPORT, *supra* note 191, at 134.

193. *Id.* at 138.

194. WILLIS, *supra* note 191; *Id.* at 3.

195. WILLIS, *supra* note 191; *Id.* at 3; *see generally* Sherman, *supra* note 189, at 68–72; 66 The Contemporary Review, *Employers' Liability*, 66 CONTEMP. REV. 137 (1894); 1907–1908 WBLIS REPORT, *supra* note 191, at 121–37; R. Newton Crane, *Personal Injury Actions and Workmen's Compensation in England*, 18 GREEN BAG 216, 217 (1906).

196. JAMES LEIBY, CARROLL WRIGHT AND LABOR REFORM: THE ORIGIN OF LABOR STATISTICS 7 (1960).

197. *Id.* at 12–15.

198. *See* CHARLES MCCARTHY, THE WISCONSIN IDEA 162 (1912); HERBERT CROLY, PROGRESSIVE DEMOCRACY 397 (1914).

the bureau a leader in the study and quantitative measurement of industrial conditions.[199] In 1882, his bureau undertook a study of employer liability laws at the legislature's request;[200] the project sparked Wright's interest, and in 1892, after becoming the U.S. Commissioner of Labor, he commissioned a federal study of the German workers compensation system. The study recommended that Americans wait to see if the German system would succeed before proceeding with similar reform, but Wright emphasized that the subject was important, and the study attracted national attention.[201]

In 1898, the Bureau sponsored William Willoughby's *Workingmen's Insurance*, the first treatise that squarely advocated the adoption of workers compensation systems in America and explained how that might be done.[202] At the same time, the influential Social Reform Club of New York City made its own study of workers compensation and prepared a bill for a rudimentary form of no-fault compensation that was introduced in New York's 1898 legislature, although it was tabled.[203] In 1903, the Massachusetts legislature asked Wright, now back in his home state, to head a committee to propose legislation; the following year, Wright and his fellow members proposed a no-fault compensation plan that would give workers "a more certain, even if more moderate, compensation" than would litigation under existing employer liability laws.[204] Wright made the point that many industrial accidents were the result of bad luck, not employer or worker fault, and that traditional tort law fault concepts were not adequate to meet the social problem of industrial accidents.[205] The Wright committee's report to the 1903 Massachusetts legislature marked an inflection point. Even though the committee failed to persuade lawmakers to adopt workers compensation, its report marked the first time a comprehensive system had been directly recommended to a legislature,

199. LEIBY, *supra* note 196, at 28–32, 62–65.

200. 1882 Mass. Acts 242; COMMONS, *supra* note 178, at 628; J.E. Rhodes, *The Inception of Workmen's Compensation in the United States*, 11 ME. L. REV. 35, 35–37 (1917).

201. LEIBY, *supra* note 196, at 110–13; JOHN GRAHAM BROOKS, FOURTH SPECIAL REPORT OF THE COMMISSIONER OF LABOR: COMPULSORY INSURANCE IN GERMANY 13–14 (1895); Rhodes, *supra* note 200, at 38–39.

202. Rhodes, *supra* note 200, at 41–42; WILLIAM FRANKLIN WILLOUGHBY, WORKINGMEN'S INSURANCE 328–59 (1898).

203. Rhodes, *supra* note 200, at 39–40.

204. 1903 Mass. Acts 57; COMMONWEALTH OF MASS., REPORT OF COMMITTEE ON RELATIONS BETWEEN EMPLOYER AND EMPLOYEE 44–45 (1904) [hereinafter "Massachusetts 1904 Committee Report"]; LEIBY, *supra* note 196, at 69–80; WITT, *supra* note 95, at 10–11.

205. Massachusetts 1904 Committee Report, *supra* note 204, at 44–45.

and Wright's reputation caused lawmakers in Massachusetts and elsewhere to take notice.[206]

B. The Movement Gains Strength

The workers compensation movement accelerated after 1904, both in state capitals and in the forum of public opinion. The American Association for Labor Legislation (AALL) and the National Civic Federation, influential organizations that counted both reformers and industrialists as members, concluded that workers compensation provided a better answer to the workplace-accident crisis than existing tort law, and they began promoting workers compensation throughout the nation; they were soon joined by the National Association of Manufacturers (NAM).[207] Articles describing the hazards workers faced in industries such as coal, steel, and railroads; the prevalence and human cost of accidents; and the failings of existing employer liability law began to appear regularly in popular magazines such as *Outlook*, *McClure's*, and *Overland* that were sympathetic to Progressive causes.[208] Scholarly journals and highbrow general-circulation magazines such as *Atlantic Monthly* and *North American Review* also educated their readers about the nature and advantages of workers compensation,[209] and the New York Charity Organization Society published supportive articles in its *Charities and The Commons* magazine (later renamed *Survey*).[210] Theodore Roosevelt also

206. *Id.* at 44–46; 1903 Mass. Acts 57; LEIBY, *supra* note 196, at 123–30; WITT, *supra* note 95, at 10–11.

207. James Weinstein, *Big Business and the Origins of Workmen's Compensation*, 8 LAB. HIST. 156, 162–65 (1967); Robert Asher, Workmen's Compensation in the United States, 1880–1935 190–220 (1971) (June 1921) (Ph.D. thesis, University of Minnesota) (on file with the University Microfilms); COMMONS, *supra* note 178, at 570–72.

208. *See*, *e.g.*, Clarence H. Mark, *Waste Heap of Industry*, 49 OVERLAND MONTHLY 123 (Feb. 1907); Arthur B. Reeve, *Is Workmen's Compensation Practicable*?, 85 OUTLOOK 508, 509 (Mar. 2, 1907); John Graham Brooks, *Moralized Insurance*, 39 COLLIER'S MAG. 25 (June 15, 1907); Launcelot Packer, *The Hazards of Industry: Should the Workman Bear the Whole Burden?,* 92 OUTLOOK 319, 319–20 (June 5, 1909); John M. Gitterman, *The Cruelties of Our Courts*, 35 MCCLURE'S MAG. 151, 152–54 (June 1910).

209. *See*, *e.g.*, Frank A. Vanderlip, *Insurance for Working-Men*, 181 N. AM. REV. 921, 922–32 (1905); Josiah Strong, *Our Industrial Juggernaut*, 183 N. AM. REV. 1030, 1030–32 (1906); Frank W. Lewis, *Employers' Liability*, 103 ATL. MONTHLY 57 (1909); Frank W. Taussig, *Workmen's Insurance in Germany: Some Illustrative Figures*, 24 Q. J. ECON. 191, 193 (1909); *see also* Epaphroditus Peck, *The Massachusetts Proposition for an Employers' Compensation Act*, 14 YALE L.J. 18, 18–19 (1904); Ernst Freund, *Constitutional Aspects of Employers' Liability Legislation*, 19 GREEN BAG 80, 80–83 (1907).

210. *See*, *e.g.*, Crystal Eastman, *The Temper of the Workers Under Trial*, 21 CHARITIES AND THE COMMONS 561 (Jan. 2, 1909); Crystal Eastman, *A Year's Work Accidents and Their Costs*, 21 CHARITIES & COMMONS 1147 (1909).

supported the cause in speeches and articles, most notably in a 1907 speech given at the tricentennial celebration of the founding of Jamestown and in a 1908 special message to Congress.[211]

Reformers who shared Carroll Wright's love of data also contributed to the campaign. New York's labor statistics bureau presented a brief statistical study of accident rates in hazardous occupations in its 1899 annual report,[212] and Wisconsin's bureau devoted more than one hundred pages of its 1904 report to an article by Milwaukee attorney William D. Kerr, who compiled existing statistical literature and presented a shocking picture of the high rates of injury and death in various industries.[213] Kerr recognized that some American critics viewed workers compensation, particularly compulsory workers compensation, as socialistic, but he argued that the public must bear the cost of accidents in any event, whether through increased product prices or taxation, and that workers compensation system would greatly reduce the transactional costs exacted by predatory plaintiffs' lawyers and profit-hungry insurers.[214] Kerr also appealed to labor. He recognized that many workers still considered themselves craftsmen and viewed workers compensation as carrying a taint of government paternalism and charity, and he implored them to move beyond that view: compensation for industrial accidents was "an item distinctly apart from wages," a social obligation to labor at a time when labor, "through no fault of its own, [could be] overtaken by adverse circumstances which are beyond its means to regulate."[215]

Momentum continued to build. In 1905, an Illinois legislative committee addressed an issue that would give reformers continuing concern: whether employers and workers should be compelled to participate in workers compensation systems or whether participation should be voluntary.[216] The Illinois committee's report raised concerns about the constitutionality of a compulsory system: imposing liability for accidents on employers regardless of fault and depriving both sides of the right to litigate might be viewed by judges

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211. Rhodes, *supra* note 200, at 48; WITT, *supra* note 95, at 3.

212. JNO. MCMAKIN, SEVENTEENTH ANNUAL REPORT OF THE BUREAU OF LABOR STATISTICS 564–65 (1900).

213. HALFORD ERICKSON, ELEVENTH BIENNIAL REPORT OF THE BUREAU OF LABOR AND INDUSTRIAL STATISTICS, STATE OF WISCONSIN 1903–1904 425–27 [hereinafter "WBLIS, 1903–04 REPORT"].

214. *Id.* at 452. Kerr noted that in the United States, 70 percent of employers' insurance premiums went to pay administrative costs but in Germany, only 23 percent did. *Id.* at 526.

215. *Id.* at 538.

216. Charles R. Henderson, WORKINGMEN'S INSURANCE IN ILLINOIS *in* PROCEEDINGS OF THE FIRST ANNUAL MEETING, AM. ASSN. FOR LABOR LEGIS. 69–84 (1908); 1907–1908 WBLIS REPORT, *supra* note 191, at 117–20.

as an infringement of liberty and property rights and of the right to try disputes to a jury.[217] The committee recommended that any Illinois law be voluntary, but it also prepared and attached to its report a model law for a compulsory system.[218] The Illinois legislature did not enact either proposal, but the committee's model law was widely circulated and proved useful to other legislatures.[219]

In 1907, Wisconsin's bureau published a new statistical study of industrial accidents in its state.[220] The study bore the stamp of University of Wisconsin professor John Commons, a nationally recognized authority on industrial economics and labor reform who was gaining recognition as one of the leading intellectual lights of Progressivism.[221] Commons had come to view workplace accidents as an inevitable byproduct of industrial capitalism and had adopted workers compensation as a part of his decades-long crusade to "save Capitalism by making it good," and he now presented a detailed economic calculation in the Wisconsin bureau's 1907 Report showing that workers compensation would deliver more benefit to workers at lower cost to employers than the traditional tort system.[222]

The momentum for reform reached critical mass in 1909. In that year, Wisconsin's bureau published another study sympathetic to workers compensation;[223] Minnesota's bureau published an article similar to Kerr's 1904 article, with statistics for its state;[224] and Crystal Eastman made her first appearance on the national reform stage.[225] Eastman came from a world similar

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217. Rhodes, *supra* note 200, at 46–47; *see* WITT, *supra* note 95, at 137.

218. 1907–1908 WBLIS REPORT, *supra* note 191, at 117–20; *see* Henderson, *supra* note 216, at 79.

219. Rhodes, *supra* note 200, at 46–47; Henderson, *supra* note 216, at 80–81.

220. 1907–1908 WBLIS REPORT, *supra* note 191, at 2–70.

221. *Id*. at 1 (footnote); JOHN R. COMMONS, MYSELF 101–06, 140–43 (1934); MAXWELL, *supra* note 13, at 80–82; JAMES LEIBY, A HISTORY OF SOCIAL WELFARE AND SOCIAL WORK IN THE UNITED STATES 122 (1978).

222. 1907–1908 WBLIS REPORT, *supra* note 191, at 2–70; *see also* REPORT OF THE BUREAU OF LABOR AND INDUSTRIAL STATISTICS, STATE OF WISCONSIN 1909–1910 71–72 [hereinafter "1909–1910 WBLIS REPORT"]; COMMONS, *supra* note 221, at 143. The Bureau found that fifty-two percent of all accidents surveyed were due to hazards of the industry; twenty-three percent and eleven percent were the fault of workers and employers respectively; in seven percent, both employer and worker were at fault; and six percent were due to the negligence of fellow servants. 1907–1908 WBLIS REPORT, *supra* note 191, at 2.

223. 1909–1910 WBLIS REPORT, *supra* note 222, at 71–72.

224. GEORGE T. SIMPSON, BIENNIAL REPORT OF THE ATTORNEY GENERAL TO THE GOVERNOR OF THE STATE OF MINNESOTA 144–64 (1910).

225. *See* Eastman, *The Temper of the Workers Under Trial*, *supra* note 210 at 561; Eastman, *A year's Work Accidents and their Costs, supra* note 210, at 1147; CRYSTAL EASTMAN, "EMPLOYERS' LIABILITY": A CRITICISM BASED ON FACTS (1909).

to Wright's, but she brought an element of intimacy and feeling to her reform work that Wright lacked. Raised in Massachusetts and New York in a family of reform-minded activists, she was a member of the first generation of American women given a genuine opportunity to make their mark in the professions.[226] After earning graduate degrees in sociology and law, she attracted the attention of the Russell Sage Foundation, and was hired to work on a survey of industrial conditions in Pittsburgh's steel mills.[227] The Pittsburgh Survey became a model for other social research projects, and after recounting her findings in a series of magazine articles, Eastman published *Work Accidents and the Law* (1910), generally regarded as the Survey's most influential report.[228] *Work Accidents* was unlike anything previously seen in reform literature. Eastman combined statistical and policy analysis with stories of the post-accident lives of individual workers and their families, stories told in an intimate style that spoke of the poverty and desperation that followed in the wake of injuries.[229] The book's impact was enhanced by its tasteful typeface and layout; by drawings and photographs of affected workers and families created by Joseph Stella and Lewis Hine, both major American artists;[230] and by its dramatic statistical illustrations, including a "death calendar" showing the number of work-related deaths in Pittsburgh each day from July 1906 through June 1907 and a statue of a worker diagrammed to show the average compensation paid for each limb lost in an industrial accident.[231] *Work Accidents* brought the problem of industrial injuries home to upper-middle-class Americans without whose support change could not occur, and it added weight to arguments for workers compensation in ways that Wright and others who wrote in a more masculine style could not match.[232]

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226. AMY ARONSON, CRYSTAL EASTMAN: A REVOLUTIONARY LIFE 17–40 (2020).

227. *Id*. at 41–48, 51–57, 61.

228. CRYSTAL EASTMAN, WORK-ACCIDENTS AND THE LAW (Paul Underwood Kellogg ed., 1910); ARONSON, *supra* note 226, at 69–96.

229. EASTMAN, *supra* note 228, at 11–118; WITT, *supra* note 95, at 126–30; JASON PUSKAR, ACCIDENT SOCIETY: FICTION, COLLECTIVITY, AND THE PRODUCTION OF CHANCE 154–62, 176–83 (2012); Ruth Crocker, *From Gift to Foundation: The Philanthropic Lives of Mrs. Russell Sage*, *in* CHARITY, PHILANTHROPY, AND CIVILITY IN AMERICAN HISTORY, 119, 211–12, 236–37 (Lawrence J. Friedman & Mark D. McGarvie eds., 2003).

230. *See* EASTMAN, *supra* note 228, at xi-xii (list of illustrations and photos).

231. *Id*., frontispiece 126.

232. Wright's work on workers compensation was secondary to his other work in statistics, labor relations and education and came near the end of his life. He died in 1909 and did not see the reform he had advocated six years earlier come to fruition. Eastman's life turned in a different direction after 1910. She moved to Wisconsin in 1912 to work on an unsuccessful campaign for women's suffrage; she then returned to New York, where she became an important figure in national women's-rights,

By 1910, hardly any writers were still defending existing employer liability systems. Labor leaders such as the United Mine Workers' John Mitchell had overcome their initial skepticism of reform: they concluded that trading accident litigation rights for guaranteed, if limited, compensation would likely benefit workers, and for the first time they openly favored workers compensation.[233] Many American business associations had reached the same conclusions as the AALL and NAM, and they too turned their energies toward shaping new systems rather than opposing them.[234]

Most strikingly, a handful of judges temporarily abandoned the formal neutrality that their position required; they openly expressed their unhappiness with existing employer liability laws and their desire for change. Wisconsin Justice Roujet Marshall provided the most notable example.[235] Marshall was devoted to free-labor principles; he consistently applied a critical eye to Progressive reform measures and defended his court against charges that it favored employers over injured workers,[236] but he became increasingly frustrated with the harsh results that existing tort law often produced in workplace-accident cases.[237] In *Houg v. Girard Lumber Co.* (1910),[238] Marshall and his colleagues overturned a jury verdict in favor of a lumber-mill worker whose foot had been caught and mangled in a sprocket, holding that the evidence compelled a finding of contributory negligence, but Marshall added an appendix in which he lamented the result and bluntly made the case for workers compensation:

> Why [should] not inevitable incidents of activities upon which all depend to satisfy demands of legitimate human desire, be laid at once upon the subjects of consumption where they must in the end inevitably go for final liquidation? . . . Why should not the sacrifices for all be taken at once as the burdens of all;

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pacifist and civil liberties circles before her untimely death in 1928. LEIBY, *supra* note 196, at 123–206; ARONSON, *supra* note 226, at 97–278; ROBERT E. HUMPHREY, CHILDREN OF FANTASY: THE FIRST REBELS OF GREENWICH VILLAGE 158, 166 (1978).

233. John Mitchell, *Automatic Compensation–The Injured Workman's Right*, 17 AM. FEDERATIONIST 971, 975 (1910).

234. Weinstein, *supra* note 207, at 162–65; Asher, *supra* note 207, at 190–220; COMMONS, *supra* note 178, at 570–72.

235. *See infra* notes 237–41 and accompanying text.

236. *See* JOSEPH A. RANNEY, TRUSTING NOTHING TO PROVIDENCE: A HISTORY OF WISCONSIN'S LEGAL SYSTEM 366–68, 374–77 (1999); State v. Redmon, 134 Wis. 89, 109–10, 114 N.W. 137, 141 (1907); Bonnett v. Vallier, 136 Wis. 193, 201, 116 N.W. 885, 887 (1908).

237. 2 ROUJET D. MARSHALL, THE AUTOBIOGRAPHY OF ROUJET D. MARSHALL 53–63 (Gilson G. Glasier ed., 1931); *see* Houg v. Girard Lumber Co., 144 Wis. 337, 352–53 129 N.W. 633, 639 (1911) and Monaghan v. Nw. Fuel Co., 140 Wis. 457, 466–67, 122 N.W. 1066, 1070 (1909) (Marshall, J., dissenting in part).

238. *Houg*, 144 Wis. at 352–53 (Marshall J., concurring).

> not scattering by the way human wrecks to float as derelicts for a time, increasing the first cost till the accumulation disappears from view in the world of consumable things? . . . Only the law-making power can answer. At its door lies the duty to do so, and will lie any sin there may be in not laboring to that end.[239]

It was well established in common law that legislatures had nearly unlimited power to modify tort rules of recovery; thus, Marshall did not see workers compensation as revolutionary.[240] In 1908, he quietly contacted acquaintances in the Wisconsin legislature to offer help in drafting a workers compensation law, and he subsequently played a behind-the-scenes role in the drafting process.[241] Other judges would second Marshall's dissatisfaction with the existing system, if not his activism, when they were asked to strike down their states' newly-enacted workers compensation laws.[242]

C. Workers Compensation Breaks Through

In 1909, the New York, Wisconsin, and Minnesota legislatures created committees to study the workers compensation models reformers had advanced and to propose laws for enactment.[243] Fifteen other states followed suit in 1910 and 1911.[244] New York was the first to complete the study-and-enactment process. Its committee, headed by state senator Jonathan Wainwright with Eastman serving as secretary, conducted hearings throughout the state; it also examined European compensation systems and the history of employer liability in America, and compiled detailed industrial-accident statistics for New York.[245] The Wainwright committee's report echoed Wright more than

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239. *Id.* (Marshall, J., concurring); *see also* Driscoll v. Allis-Chalmers Co., 144 Wis. 451, 468–69, 129 N.W. 401, 408 (1911) (similar comments by Chief Justice John Winslow).

240. *See* MARSHALL, *supra* note 237, at 53–54.

241. Robert Asher, *The 1911 Wisconsin Workmen's Compensation Law: A Study in Conservative Labor Reform*, 57 WIS. MAG. HIST. 123, 126–29 (Winter 1973–74); MARSHALL, *supra* note 237, at 53–59, 239–46.

242. *See infra* notes 271–85 and accompanying text.

243. 1909 N.Y. Laws 1310; 1909 Wis. Sess. Laws 664; Shawn Everett Kantor & Price V. Fishback, *How Minnesota Adopted Workers' Compensation*, 2 INDEP. REV. 557, 563 (1998).

244. In 1910 and 1911, New Jersey, Pennsylvania, Maryland, West Virginia, Ohio, Michigan, Iowa, Missouri, Texas, Nebraska, Oregon, and Washington created similar commissions. U.S. DEP'T OF LAB., BULLETIN NO. 203: WORKMEN'S COMPENSATION LAWS OF THE UNITED STATES AND FOREIGN COUNTRIES 14–31 (1917). *See generally* Robert Asher, *The Origins of Workmen's Compensation in Minnesota*, 44 MINN. HIST. 142, 146 (Winter 1974); Kantor & Fishback, *supra* note 243, at 559.

245. COMMISSION APPOINTED UNDER CHAPTER 518 OF THE LAWS OF 1909 TO INQUIRE INTO THE QUESTION OF EMPLOYERS' LIABILITY AND OTHER MATTERS, REPORT TO THE LEGISLATURE OF THE STATE OF NEW YORK: FIRST REPORT 1–55 (1910) [hereinafter "Wainwright Commission"].

Eastman: it focused on the existing tort system's economic inefficiency and its tendency to promote labor unrest, with little direct discussion of the need to alleviate injured workers' suffering.[246]

The committee concluded that reform should be introduced gradually, and it made two proposals. The first was a workers compensation system limited to hazardous occupations such as railroad, construction, and electrical work; workers would be allowed to opt out of the system and rely on existing remedies, but employers would not.[247] Injured workers would be paid according to a statutory schedule based on the severity of their injuries.[248] The committee also proposed a separate system that employers and workers could mutually agree to join. The voluntary system would make employers liable for all machinery- and premises-related hazards, but it was not a no-fault system: it preserved the fellow-servant rule in reduced form.[249] After brief debate, the legislature enacted both proposals with little change in June 1910.[250]

A legislative rush followed: between March and July 1911, nine other states across the country enacted workers compensation laws.[251] Like New York, other early-adopting states wrestled with many questions of detail, most importantly, whether the new systems should apply to all businesses or only to limited industrial categories and whether the systems should be compulsory or voluntary. Nearly all early-adopting states viewed their new laws as experiments and chose to limit them to hazardous occupations. Some laws' lists of hazardous occupations were short, but some were so extensive as to encompass nearly all industrial work.[252] Most states exempted farm workers and domestic servants from the laws, categories which accounted in 1910 for more than forty-percent of the American workforce, a few states also exempted small businesses.[253]

Whether the new systems should be compulsory or voluntary was a more difficult issue. Many legislators shared the concern of Illinois' 1905 committee

246. WAINWRIGHT COMMISSION, *supra* note 245, at 1–55.

247. *Id.* at 50.

248. *Id*. at 50–56.

249. *Id*. at 57–66.

250. 1910 N.Y. Laws 625, 1945.

251. 1911 Kan. Sess. Laws 382–83; 1911 Wash. Sess. Laws 345; 1911 Nev. Stat. 362; 1911 Cal. Stat. 796; 1911 N.H. Laws 181; 1911 Wis. Sess. Laws 43; 1911 Ill. Laws 315; 1911 Ohio Laws 524; 1911 Mass. Acts 998.

252. *See*, *e.g.*, 1911 Cal. Stat. 797; 1911 Nev. Stat. 362; 1911 Kan. Sess. Laws 384–85; 1911 Ill. Laws 316; 1911 Ohio Laws 528; 1911 Wash. Laws 346.

253. *See*, *e.g.*, 1911 Kan. Sess. Laws 385 (agricultural workers and companies with five or fewer employees); 1911 Ohio Laws 528; U.S. BUREAU OF THE CENSUS, THIRTEENTH CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1910: ABSTRACT OF THE CENSUS 285, 437 (1913).

that in an age where American courts were suspicious of reforms that imposed limits on employers' freedom and were protective of traditional concepts of fault, compulsory systems imposing liability on employers without fault would be held unconstitutional.[254] They addressed that concern by creating voluntary systems that allowed both employers and employees to opt out and rely on common-law remedies. Among the early-adopting states, only New York, Nevada, and Washington, whose legislature stressed the economic and equitable need to "withdraw[] [industrial disputes] from private controversy," enacted compulsory systems.[255]

The voluntary states gave employers powerful carrot-and-stick incentives to join their new systems. Nearly all workers compensation laws established fixed rates of payment for temporary and permanent work-related injuries and for deaths and set absolute limits on total recovery.[256] In an age of ever-improving risk statistics and risk-assessment techniques, the fixed rates and caps enabled employers to calculate and predict their accident-related costs with some certainty, and that was worth a great deal.[257] The stick was that employers who refused to join would be deprived of their common law defenses of assumption of risk and fellow-servant liability, which would give juries freer rein to render verdicts in injured workers' favor and would reduce judges' power to overturn those verdicts.[258] Conversely, workers whose companies elected to join the system had an incentive to do likewise: if they did not, the company could invoke contributory negligence and other existing defenses against them.[259] Several voluntary states also encouraged participation by providing that employers and workers would be deemed to have chosen to participate in the new system unless they specifically notified the state otherwise.[260]

V. RUNNING THE CONSTITUTIONAL GAUNTLET

A. The Ives *Crisis*

The workers compensation movement received a temporary setback in late March 1911 when New York's highest court struck down its state's workers

254. *See* Rhodes, *supra* note 200, at 46–47; *see* WITT, *supra* note 95, at 137; 1907–1908 WBLIS REPORT, *supra* note 191, at 117–20; *see* Henderson, *supra* note 216, at 79.

255. *See* 1911 Wash. Laws 345; 1911 Nev. Stat. 362.

256. *See*, *e.g.*, 1911 Kan. Sess. Laws 387–88; 1911 Ill. Laws 317; 1911 Wash. Laws 356.

257. *See* Asher, *supra* note 241, at 132–35.

258. *See id*. at 126–27.

259. *Id.* at 136–37; *see*, *e.g.,* 1911 Ohio Laws 529; 1911 Wis. Sess. Laws 43–44.

260. *See*, *e.g.,* 1911 Ill. Laws 315; 1911 Wis. Sess. Laws 44 (imposing notice requirement on workers but not employers).

compensation law in *Ives v. South Buffalo Railway Co*.[261] *Ives* brought the constitutional worries of workers compensation supporters to a boil, even though a careful reading of the decision revealed that it did not pose as grave a threat as feared. Speaking for the court, Justice William Werner rejected an attack on the New York law's abolition of traditional tort defenses, adhering to the principle that the legislature had nearly unlimited power to modify tort rules.[262] Werner also rejected an argument that applying a uniform rule to all covered employers regardless of the degree of worker hazard in their businesses violated constitutional equal protection guarantees,[263] and he also declined to consider a challenge based on the law's failure to provide for trial by jury.[264] But Werner drew the line at the law's compulsory elimination of fault. Imposing liability on an employer "who has omitted no legal duty and has committed no wrong . . . based solely upon a legislative fiat that his business is inherently dangerous," he said, ". . . is taking the property of A. and giving it to B., and that cannot be done under our Constitutions."[265] Werner conceded that the law was supported by "cogent economic and sociological arguments" and appealed to "a recognized and widely prevalent sentiment,"[266] and he hinted that amendment of New York's constitution and revision of the statute might resolve the flaws the court had found.[267]

The *Ives* decision created an uproar which grew louder when, the day after the decision was issued, a fire broke out at the Triangle Shirtwaist Factory in Manhattan. The factory's fire escape doors were illegally locked, and as a result 146 trapped garment workers died, either of asphyxiation or of injuries from leaping out of windows.[268] Legislatures on the verge of enacting their own workers compensation laws pressed on with the enactment process. Massachusetts lawmakers asked their supreme court to give an advisory opinion whether their proposed elective law would pass constitutional

261. Ives v. S. Buffalo Ry. Co., 94 N.E. 431 (N.Y. 1911).

262. *Id*. at 437–38.

263. *Id*. at 438.

264. *Id*. at 438–39.

265. *Id*. at 440.

266. *Id*. at 439–40.

267. *Id.*

268. *See* WITT, *supra* note 95, at 175–77; Arthur F. McEvoy, *The Triangle Shirtwaist Factory Fire of 1911: Social Change, Industrial Accidents, and the Evolution of Common-Sense Causality*, 20 LAW & SOC. INQUIRY 621, 621–22 (1995).

muster,[269] and lawsuits were soon filed in Washington and Wisconsin to test the validity of those states' new laws.[270]

In May 1911, the Massachusetts court advised its legislature that the state's proposed elective law would be constitutional,[271] and in September, Washington's supreme court upheld its state's compulsory law.[272] In a terse opinion, Massachusetts's justices pointed to the legislature's broad power to modify tort rules and found that the proposed law's exemption of farm workers and servants from its scope was reasonable.[273] They also stressed that the law's voluntary feature eliminated any concern about deprivation of liberty or property rights or lack of a jury trial.[274] That saving feature was not available to Washington's justices, but they did not need it. In *State ex rel. Davis-Smith Co. v. Clausen* (1911), the court, speaking through Justice Mark Fullerton, rejected Werner's argument that legislatures could not impose liability without fault.[275] Fullerton pointed out that in the past many railroad fencing statutes upheld by American courts had done just that. Washington's new law, even though compulsory, was well within the scope of the state's police power to promote public safety and welfare.[276] That fact, he said, justified any collateral limitation the law imposed on employers' and workers' freedom to contract as they saw fit, and it justified the legislature's decision not to provide for trial of compensation disputes by jury.[277] Fullerton carefully refrained from denouncing *Ives* but said openly that "we have not been able to yield our consent to the view there taken."[278]

In November, Wisconsin's supreme court followed suit in *Borgnis v. Falk Co*. (1911).[279] Like their Massachusetts and Washington counterparts, Wisconsin's justices adhered to a broad view of legislative power to modify common law tort defenses and rejected an equal protection challenge to the state's new law.[280] They agreed with the Massachusetts court that because the new law was elective, it did not violate employers' or workers' property and

269. *See In re* Op. of Justices, 96 N.E. 308 (Mass. 1911).

270. State *ex rel.* Davis-Smith Co. v. Clausen, 117 P. 1101 (Wash. 1911); Borgnis v. Falk Co., 147 Wis. 327, 133 N.W. 209 (Wis. 1911).

271. *In re* Op. of Justices, 96 N.E. at 315–16.

272. *Clausen*, 117 P. at 1113–14.

273. *In re* Op. of Justices, 96 N.E. at 315–16.

274. *Id*. at 316.

275. *Clausen*,117 P. at 1106–10.

276. *Id*. at 1111–13.

277. *Id*. at 1118–19.

278. *In re* Op. of Justices, 96 N.E. at 309; *Clausen*, 117 P. at 1120.

279. Borgnis v. Falk Co., 147 Wis. 327, 133 N.W. 209 (Wis. 1911).

280. *Id.* at 357–58.

liberty rights or deprive them of any right to a jury trial.[281] *Borgnis* illuminated both the common ground that Progressive sympathizers and conservatives had found as to workers compensation and the differences in their perspectives. Winslow viewed himself as a "constructive conservative": he believed that constitutions must be interpreted flexibly in light of modern conditions,[282] a philosophy which he distilled in a famous passage in *Borgnis*. To say that a constitution's "general provisions [must] be construed and interpreted by an eighteenth century mind in the light of eighteenth century conditions and ideals," said Winslow, was "to command the race to halt in its progress, to stretch the state upon a veritable bed of Procrustes."[283] Marshall agreed that the new law was well within the scope of the legislature's established authority to modify tort law,[284] but as a committed constitutional originalist, he viewed Winslow's discourse on constitutional flexibility as misguided and dangerous. "If the constitution is to efficiently endure," he argued, "the idea that it is capable of being re-squared, from time to time, to fit new legislative or judicial notions of necessities . . . must be combated whenever and wherever advanced."[285]

B. Workers Compensation Settles In

Emboldened by these decisions, eleven additional states adopted workers compensation laws in 1912 and 1913,[286] and by 1920 such laws were in place throughout all regions of the United States except the deep South.[287] The Washington supreme court's decision also encouraged several states to switch from elective to compulsory systems.[288] Events in New York following *Ives* underscored the strength of the tide. Legal commentators criticized Werner's statement that there could be no liability without fault, pointing out, as had Justice Fullerton, that absolute liability had long played a role in both the

281. *Id*. at 357.

282. *See*, *e.g.,* JOHN BRADLEY WINSLOW, THE PATRIOT AND THE COURTS 7–9 (1909) [hereinafter WINSLOW PAPERS]; John B. Winslow, *An Understanding Heart: Does the American Judge Possess It?*, 31 *SURVEY* 17 (1914).

283. *Borgins*, 147 Wis. at 349. Winslow took the Procrustes metaphor from the Greek myth of a giant who racked too-short victims and mutilated too-tall victims in order to fit all to his iron bed.

284. *Id*. at 380 (Marshall, J., concurring).

285. *Id.* at 375 (Marshall, J., concurring).

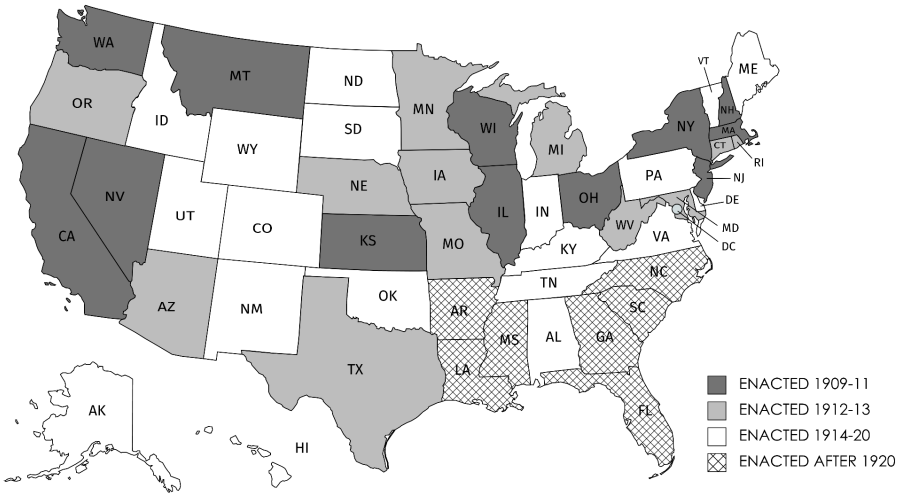
286. LINDLEY D. CLARK & MARTIN C. FRINCKE, JR., WORKMEN'S COMPENSATION LEGISLATION OF THE UNITED STATES AND CANADA 9 (1921).

287. *Id*.

288. *See*, *e.g.,* 1911 Cal Stat. 796; 1913 Cal. Stat. 279.

common law and statutory law.[289] Theodore Roosevelt made *Ives* a centerpiece of his argument for recall of unpopular court decisions during his unsuccessful 1912 campaign to regain the presidency,[290] and in order to put all doubt to rest, the AALL launched a campaign to amend state constitutions to authorize workers compensation.[291] The AALL's campaign bore fruit in five states including New York, whose voters ratified a workers-compensation amendment in 1913 and subsequently rejected Werner's bid to become chief justice.[292] In 1915 New York's legislature enacted a new elective system, which the state's highest court subsequently upheld.[293]

The Spread of Workers Compensation, 1909–19 [294]
(*Map generated from a template provided by courtesy of mapchart.net*)



289. *See* Andrew A. Bruce, *The New York Employers' Liability Act*, 9 MICH. L. REV. 684, 694–95 (1910); James Parker Hall, *The New York Workmen's Compensation Act Decision*, 19 J. POL. ECON. 694, 697 (1911); EDITH M. PHELPS, SELECTED ARTICLES ON THE RECALL INCLUDING THE RECALL OF JUDGES AND JUDICIAL DECISIONS 248–50 (2d ed. 1915).

290. SIDNEY M. MILKIS, THEODORE ROOSEVELT, *THE* PROGRESSIVE PARTY, *AND THE* TRANSFORMATION OF AMERICAN DEMOCRACY 57–58 (2009); *see, also, e.g.,* Theodore Roosevelt, Address at the Ohio Constitutional Convention: A Charter of Democracy, (Feb. 21, 1912); Theodore Roosevelt, President, Address at Carnegie Hall: The Right of the People to Rule, (Mar. 20, 1912).

291. WITT, *supra* note 95, at 180–81.

292. N.Y. CONST. art. I, § 19 (amended 1913); WITT, *supra* note 95, at 180–81.

293. 1915 N.Y. Laws 554–55, 2259; Jensen v. S. Pac. R. Co., 109 N.E. 600, 604 (N.Y. 1917).

294. The figure is compiled from CLARK & FRINCKE, *supra* note 286, at 9.

The workers compensation tide did not completely exorcise the specter of constitutional challenge, particularly for compulsory laws. In 1909, Montana had enacted a limited compensation system that required mining companies and their workers to contribute to a state insurance fund that paid fixed sums for injury and death,[295] but at the end of 1911 its supreme court struck down the law on the ground that unlike other compensation laws, it did not grant employers exemption from common law liability or any other benefit in return for their forced contributions.[296] In 1914, Kentucky's supreme court struck down its state's elective law by a 4-3 vote based on a state constitutional provision that prohibited enactment of any limits on damages for personal injury or property damage.[297] The court also criticized the legislature's decision to require employers and workers to give notice if they wished to opt out of the statute, concluding that this effectively made the law compulsory and deprived all parties of their freedom of contract.[298]

In 1915, California's supreme court upheld both its state's 1911 elective law and a superseding 1913 compulsory law,[299] but Justice Lucien Shaw, a well-respected jurist whose reputation extended beyond his state, raised two disturbing and potentially important points of doubt in his concurring opinion. Shaw argued that California's compulsory law was saved only by the fact that, like Washington's law, it required employers to pay premiums into a common, state-administered fund as a sort of tax.[300] He reasoned that if the law had required employers to procure insurance or assume liability individually (as was the case in some other states), that would impermissibly have allowed imposition of liability without fault and, thus, would have created an unconstitutional taking of property.[301] Shaw also believed that the legislature could not constitutionally provide benefits to workers who were entirely responsible for their own injury without any fault of others.[302] Such workers

295. 1909 Mont. Laws 81.

296. Cunningham v. Nw. Improvement Co., 119 P. 554, 566 (Mont. 1911).

297. Ky. State. J. Co. v Workmen's Comp. Bd., 170 S.W. 1166, 1169–1171 (Ky. 1914). Two years later, Pennsylvania's supreme court peremptorily rejected a challenge to that state's elective law based on a state constitutional provision similar to Kentucky's. Anderson v. Carnegie Steel Co., 99 A. 215, 217 (Pa. 1916); PA. CONST. art. III, § 21 (1874).

298. *Ky. State. J. Co.*, 170 S.W. at 116869; 1914 Ky. Acts 226; Ky. CONST. § 54 (1891).

299. W. Indem. Co. v. Pillsbury, 151 P. 398, 406 (Cal. 1915); 1911 Cal. Stat. 796; 1913 Cal. Stat. 279.

300. *Pillsbury*, 151 P. at 406–07 (Shaw, J., concurring).

301. *Id.*

302. *Id.*

could perhaps be compensated through general public welfare programs but not by forcing employers to pay.[303]

Despite these setbacks and doubts, after *Ives* every new workers compensation law, whether elective[304] or compulsory,[305] survived constitutional challenge except for Montana's 1909 law and Kentucky's 1914 law; and both of those states promptly enacted new laws that their supreme courts upheld.[306] Arguments used by opponents in the early Massachusetts, Washington, and Wisconsin cases–legislative lack of power to alter tort law and abolish traditional employer defenses, violation of due process by departing from a fault-based system, and deprivation of the right to trial by jury–were regularly raised but uniformly rejected.[307] Equal protection challenges also continued to arise in a variety of forms. Some states excluded small companies from their workers compensation laws, partly because they believed workers in small companies were in closer contact with their employer's operations and, thus, had more opportunity to guard against hazards, and partly because small employers complained loudly that they had limited resources and could not easily pass on insurance costs to consumers. State supreme courts uniformly rejected equal protection challenges to such classifications;[308] they also rejected

303. *Id*.

304. Decisions upholding elective laws include State *ex rel.* Yaple v. Creamer, 97 N.E. 602, 607–08 (Ohio 1912); Sexton v. Newark Dist. Tel. Co., 86 A. 451, 452 (N.J. 1913); Deibeikis v, Link-Belt Co., 104 N.E. 211, 212 (Ill. 1914); Shade v. Ash Grove Lime & Portland Cement Co*.,* 139 P. 1193, 1193 (Kan. 1914); Matheson v. Minneapolis State Ry. Co., 148 N.W. 71, 73 (Minn. 1914); Hunter v. Colfax Consol. Coal Co., 154 N.W. 1037, 1041 (Iowa 1915); Mackin v. Detroit-Timkin Axle Co., 153 N.W. 49, 51 (Mich. 1915); Wheeler v. Contoocook Mills Corp., 94 A. 265 (N.H. 1915); Evanhoff v. State Indus. Acct. Comm., 154 P. 106, 111 (Or. 1915); Jensen v. S. Pac. R. Co., 109 N.E. 600, 604 (N.Y. 1917); Anderson v. Carnegie Steel Co., 99 A. 215, 217 (Pa. 1916); Sayles v. Foley, 96 A. 340, 342 (R.I. 1916); De Francesco v. Piney Mining Co., 86 S.E. 777, 778 (W.Va. 1915); and Middleton v. Tex. Power & Light Co., 185 S.W. 556, 558 (Tex. 1916). *See generally* CLARK & FRINCKE *supra* note 286, at 69–90.

305. Decisions upholding compulsory laws include *Pillsbury*, 151 P. 198 at 406; Solvuca v. Ryan & Reilly Co., 101 A. 710, 714–16 (Md. 1917); Anderson v. Hawaiian Dredging Co., 24 Haw. 97, 115 (1917); and Inspiration Consol. Copper Co. v. Mendez, 166 P. 278, 285 (Ariz. 1917).

306. 1915 Mont. Laws 168; 1916 Ky. Acts 354; Greene v. Caldwell, 186 S.W. 648, 649 (Ky. 1916); Shea v. North-Butte Mining Co., 179 P. 499, 502 (Mont. 1919).

307. Examples include the following. *Rejecting argument of no power to change tort law: Deibeikis*, 104 N.E. at 215; *Matheson*, 148 N.W. at 73; *Contoocook Mills*, 94 A. at 265; *Middleton*, 185 S.W. at 559. *Rejecting argument of deprivation of right to jury trial: In re Op. of Justices*, 96 N.E. 308, 316 (Mass. 1911); *Creamer*, 97 N.E. at 607; *Sexton*, 86 A. at 457; *Hunter*, 154 N.W. at 1066; *Shea,* 179 P. at 499; *Sayles*, 96 A. at 346–47. *Rejecting argument that absence of fault component violated due process and freedom of contract: see* the cases previously cited in this note. *See generally* CLARK & FRINCKE, *supra* note 286, at 72–79, 95–99.

308. Borgnis v. Falk Co., 147 Wis. 327, 357, 133 N.W. 209, 217–18 (Wis. 1911); *see also, e.g*., *Sexton,* 86 A. at 458; *Matheson,* 148 N.W. at 74; and *Mackin,* 153 N.W. at 55.

challenges to laws that limited workers compensation to listed occupations deemed to be hazardous, deferring to legislators' choices of classification.[309] In some states, opponents argued that laws requiring employers and workers who wished to opt out to give written notice amounted to coercion and violated their rights to due process of law, but most courts other than Kentucky's disagreed.[310]

Several of the unsuccessful state-court challenges made their way to the U.S. Supreme Court, and in 1917 the Court issued three decisions involving New York's new workers compensation law and Washington's and Iowa's laws.[311] The decisions ended virtually all doubt as to the constitutionality of both elective and compulsory workers compensation.[312] In an era when the high Court scrutinized reform laws closely and often skeptically,[313] the absence of skepticism in its workers compensation decisions was striking. Justice Mahlon Pitney firmly endorsed the view that employers' traditional tort defenses–which, in his view, were "of comparatively recent origin" and not worthy even of designation as traditional[314]–could be freely altered by the legislature.[315] The image of workers as soldiers in the battle for industrial production, deserving of care if they fell, resonated with Pitney and his colleagues;[316] they also accepted the view that accidents should be viewed in terms of inevitability and risk rather than individual fault.[317]

The high Court had no difficulty rejecting other arguments against workers compensation laws. Such laws did not violate employers' and workers' property rights, said Pitney: they were designed to address a genuine social

309. *See*, *e.g.,* Johnston v. Kennecott Copper Corp., 248 F. 407, 409 (9th Cir. 1918) (Alaska law limited to miners); *Middleton*, 185 S.W. at 558, *aff'd,* 249 U.S. 152 (1919) (law excluded cotton-gin workers).

310. *See*, *e.g., Mackin* 153 N.W. at 51; compare with Ky. State. J. Co. v. Workmen's Comp. Bd., 170 S.W. 1166 (Ky. 1914) (criticizing notice requirements).

311. N.Y. Cent. R.R. Co. v. White, 243 U.S. 188 (1916) (upholding New York's elective second law); Mt. Timber Co. v. Wash., 243 U.S. 219 (1917) (upholding Washington's compulsory law); Hawkins v. Bleakly, 243 U.S. 210 (1917) (upholding Iowa's elective law).

312. *N.Y. Cent. R.R. Co*., 243 U.S. 188; *Mt. Timber Co.*, 243 U.S. 219; *Hawkins*, 243 U.S. 210. In 1915, the Court had sent an early signal of encouragement to supporters, holding that Ohio's exclusion of small employers from its workers compensation system was a reasonable classification. Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571 (1915).

313. *See infra* notes 333–36 and accompanying text; *see also, e.g*., 8 Owen M. Fiss, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, *in* THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1, 178 (Stanley N. Katz ed., 1993); EDWARD KEYNES, LIBERTY, PROPERTY, AND PRIVACY: TOWARD A JURISPRUDENCE OF SUBSTANTIVE DUE PROCESS 97–128 (1996).

314. *White*, 243 U.S. at 198; *Mt. Timber*, 243 U.S. at 239–40.

315. *White*, 243 U.S. at 200; *Hawkins*, 243 U.S. at 213; *Mt. Timber*, 243 U.S. at 236.

316. *See White*, 243 U.S. at 202–03; *Mt. Timber*, 243 U.S. at 239–40.

317. *White*, 243 U.S. at 203; *Mt. Timber*, 243 U.S. at 239–40.

problem, and although each side was compelled to forego former advantages, each received new benefits in return.[318] Echoing Lucien Shaw's critique, Pitney indicated that a constitutional boundary line still existed: no system could set aside old rules "without providing a reasonably just substitute," but he also indicated that the Court would take an indulgent view of what that included.[319] The Court held that there was little difference for constitutional purposes between elective and compulsory systems: given workers compensation's compelling public purpose, even compulsory systems would pass muster if charges to employers were reasonable in amount and "fairly distributed."[320] Pitney also rejected equal protection challenges to the laws, again indicating that the Court would be highly deferential to state legislatures' classification decisions,[321] and he firmly rejected challenges based on the lack of trial by jury: initial determination of compensation awards by administrative tribunals was appropriate, and nearly all laws allowed court review of tribunal decisions.[322]

In 1919, the high Court finished mapping the basic constitutional parameters of workers compensation when it addressed unusual features of the Texas and Arizona systems.[323] Texas's law allowed employers to elect before their workers whether they would join the system, but it made the system compulsory for all workers whose employers so elected.[324] Pitney upheld this apparent discrimination, reasoning that employers and workers made different types of investments in the industrial system; that both sides benefited from the security the system provided; and that uniformity among workers, even compelled uniformity, would promote harmony.[325] Arizona tested the limits of the Court's tolerance: the state's constitution mandated a system that was compulsory for hazardous industries but allowed workers to elect their remedy at any time before or after an injury, thus, depriving employers of a large part of the predictability that had made workers compensation attractive to them.[326] Some states had recognized the problem and had required workers to elect before they were injured,[327] but in *Arizona Copper Co. v. Hammer* (1919), the

318. *White*, 243 U.S. at 203; *Mt. Timber*, 243 U.S. at 240–41.

319. *White*, 243 U.S. at 201.

320. *Mt. Timber*, 243 U.S. at 238.

321. *White*, 243 U.S. at 208; *Hawkins*, 243 U.S. at 217–18; *Mt. Timber*, 243 U.S. at 23–40.

322. *White*, 243 U.S. at 208; *Hawkins*, 243 U.S. at 216–17; *Mt. Timber*, 243 U.S. at 235.

323. Middleton v. Tex. Power & Light Co., 249 U.S. 152 (1919); Ariz. Employers' Liability Cases, 250 U.S. 400, 403 (1919).

324. 1913 Tex. Gen. Laws 429.

325. *Middleton*, 249 U.S. at 161–62.

326. ARIZ. CONST. art. XVIII, § 8 (1912); 1912 Ariz. Sess. Laws 23.

327. *See*, *e.g.*, 1911 Wis. Sess. Laws 45–46; Asher, *supra* note 241, at 136–37.

Court narrowly upheld Arizona's law.[328] Four dissenters argued that the law violated employers' due process and equal protection rights: "[W]hile the employer is declared subject to new, uncertain and greatly enlarged liability" notwithstanding use of the utmost care, Justice James McReynolds complained, "nothing has been granted him in return."[329] *Arizona Copper* was a reminder that the Court would not grant legislatures unlimited leeway in replacing fault-based tort systems, but it also confirmed the Court's strong blessing on the workers compensation movement.

C. Progressives' Influence on Judicial Attitudes

Judicial receptivity to workers compensation laws was influenced by an ongoing clash between Progressives and conservatives over the proper balance of power between reform-minded legislators, judges, and juries. Late-nineteenth-century jurists accepted as a truism that juries were unduly sympathetic to accident victims and, in the words of one state supreme court judge, were "apt to find . . . corporations liable for losses and injuries under circumstances where an individual would not be held responsible."[330] Future North Dakota Justice Andrew Bruce, writing in 1902, noted public awareness that "the tendency is steadily growing toward a stricter control of the jury by the courts,"[331] and he worried that this would soon produce a crisis:

> An injured man can rarely be brought to see the justice of a verdict which is returned against him by a jury. Much less can he be induced to acquiesce when a Supreme Court judge, whom he has not seen and who knows only of the case as it is presented to him on the printed record, is responsible for his overthrow. As things now are, it is perhaps not an exaggeration to say that every personal injury case is a factor in the increase of social discontent.[332]

Furthermore, beginning in the 1890s federal and state judges, many of whom believed devoutly in free-labor principles and conceived property and liberty rights and freedom of contract in broad terms, closely scrutinized Progressive-endorsed reform laws addressing political corruption, taxation,

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328. *Ariz. Employers' Liability Cases*, 250 U.S. at 421–23.

329. *Id*. at 450 (McReynolds, J., dissenting).

330. Pike v. Chi., Milwaukee & St. Paul Ry. Co., 40 Wis. 583, 586 (1876); *see also* James R. Burnet, *Critical Opinions Upon Recent Employers' Liability Legislation in the United States*, 50 J. SOC. SCI. 53–54 (1902) (expressing a similar opinion in stronger language).

331. Andrew Bruce, *Employers' Liability in the United States*, 33 FORUM 46, 48 (1902).

332. *Id.* at 49.

workplace safety, utility regulation, and other pressing social issues.[333] They upheld most reform laws, as the workers compensation experience illustrated, but they struck down enough laws to elicit Progressive ire.[334] *Lochner v. New York*, a 1904 U.S. Supreme Court decision that struck down a law limiting bakers' hours of work despite evidence that their overlong hours affected public health, became the Progressives' leading specimen of judicial overreach,[335] but there were many others.[336]

Progressives who felt that judges went too far in overriding juries and scrutinizing reform laws eventually launched a movement to curb judicial power through popular recall of judges and of court decisions. In 1908, Oregon became the first state to provide for recall of judges; several other states followed suit, and the movement reached a climax in 1912.[337] During that year, Ohio voters ratified a new constitution explicitly authorizing judicial recall as well as several other Progressive reform measures that had previously been struck down by the state's supreme court,[338] and Theodore Roosevelt made recall of unpopular decisions a key theme of his campaign to regain the presidency as the Progressive Party's candidate.[339] Roosevelt privately hoped that judges would make recall measures unnecessary by engaging in self-correction, but he warned that judicial overreaching was "turning large classes

333. FISS, *supra* note 313, at 178; KEYNES, *supra* note 313, at 97–115; Michael Les Benedict, *Laissez-Faire and Liberty: A Re-evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L. & HIST. REV. 293, 328–30 (1985).

334. *Id.*

335. Lochner v. New York, 198 U.S. 45, 52 (1905); *see also*, *e.g.,* GILBERT E. ROE, OUR JUDICIAL OLIGARCHY 34–40 (1912), FISS, *supra* note 313, at 170–75.

336. Other decisions cited by Progressives as examples of judicial overreach included, *e.g.,* Adair v. United States, 208 U.S. 161, 175 (1908) (striking down law banning "yellow dog" contracts, which required workers as a condition of employment to agree not to join a union) and Employers' Liability Cases, 207 U.S. 463, 504 (1908) (striking down federal law liberalizing injured railroad workers' recovery rights). *See* ROE, *supra* note 335, at 40–43, 117–20, 129–31, 142–45; WILLIAM L. RANSOM, MAJORITY RULE AND THE JUDICIARY 16–17 (1912); EDITH M. PHELPS, SELECTED ARTICLES ON THE RECALL: INCLUDING THE RECALL OF JUDGES AND JUDICIAL DECISIONS 82–94 (1915).

337. OR. CONST. art. II, § 18 (1908). Other states that enacted judicial recall measures included California, Arizona, Colorado, North Dakota, and Wisconsin. CAL. CONST. art. II, § 15 (1911); ARIZ. CONST. art. VIII, § 1 (1912); COLO. CONST. art. XXI, § 1 (1912); N.D. Const. art. III, §§ 1, 10 (1920); WIS. CONST. art. XIII, § 12 (1926). *See also* THOMAS GOEBEL, A GOVERNMENT BY THE PEOPLE: DIRECT DEMOCRACY IN AMERICA, 1890–1946 65–68 (2002).

338. CLARENCE E. WALKER, PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 384–86 (Roosevelt), 669 (comments by William Jennings Bryan to convention regarding judges) (1912); OHIO CONST. II:38 (1912) (recall provision).

339. *See In re* Op. of Justices, 96 N.E. 308 (Mass. 1911); State *ex rel.* Davis-Smith Co. v. Clausen, 117 P. 1101 (Wash. 1911); *see also* Roe, *supra* note 335, at 207–19.

of people against the life, liberty and property clauses" and toward socialism.[340] A few judges, most notably North Carolina Chief Justice Walter Clark, sympathized with the Progressives. Between 1906 and 1915, Clark argued in a series of speeches and articles that use of judicial power to strike down reform laws was directly responsible for Progressives' ire and for the recall movement.[341] He singled out *Lochner* for particular criticism, charging that it "was in truth based upon unwillingness to curb the power of the employer over the employee," and he intimated that recall was an appropriate solution: all branches of government, he said, "are subject to only one reviewing body and that is the Sovereign–the people themselves."[342]

But Progressives were far from united on judicial recall. The idealized image of judges as detached appliers of rules divorced from politics, an image that was particularly powerful among the legal community and the public during the late nineteenth century,[343] meshed with the broad Progressive vision of a government administered by experts based on scientific principles,[344] and Wisconsin Chief Justice John Winslow took great care to promote the idealized judicial image.[345] In 1909, he embarked on a campaign of speeches and articles designed to explain conservatives and Progressives to each other and to promote his vision of constructive conservatism. Winslow urged conservatives to bear in mind that "as individual life has more and more given place to crowded community life, the rights and privileges once deemed essential to the perfect liberty of the individual are often found . . . to breed wrong and injustice to the community at large," language that he would echo in the *Borgnis* case.[346]

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340. MILKIS, *supra* note 290, at 91 (quoting Roosevelt campaign address at Omaha, Nebraska, Apr. 27, 1912).

341. Walter Clark, *Some Defects in the Constitution of the United States*, 54 AM. L. REG. 263, 277–82 (1906); Walter Clark, Chief Justice of the Supreme Court of North Carolina, address delivered at Cooper Union, New York City, Government by Judges (Jan. 27, 1914); Walter Clark, *Letter*, 19 LAW NOTES 178, 178–79 (Dec. 1915); Walter Clark, *Back to the Constitution*, 50 AM. L. REV. 1, 13 (1916).

342. *Letter*, *supra* note 341, at 179 (quotation re: sovereignty); Clark, *Back to the Constitution*, *supra* note 341, at 8 (*Lochner* criticism).

343. Morton J. Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251, 254–55, 257–62, 264 (1975).

344. *See* MCCARTHY, *supra* note 198, at 169; CROLY, *supra* note 198, at 397–400.

345. *See infra* note 347 and authorities there cited.

346. WINSLOW PAPERS, *supra* note 282, at 9; Borgnis v. Falk Co., 147 Wis. 327, 348, 133 N.W. 209, 215–16 (Wis. 1911). For other examples of Winslow's campaign, *see* WINSLOW, *Understanding Heart supra* note 282*; see also* John B. Winslow, *The Judicial Recall: Is it a Remedy or a Nostrum?*, Proceedings of the Thirteenth Annual Session of the Kansas Conference of Charities and Correction 106 (1912); and WINSLOW PAPERS, *supra* note 282, at 26–27 (Winslow, *Some Tendencies of Modern Legislation and Judicial Decisions* (lecture notes, May 3, 1916)).

But he also reminded Progressive critics that "[j]udges are sworn to protect and support . . . constitutions as they are, and not as they would like to see them."[347]

Others in the legal community mounted a vigorous campaign against judicial recall, decrying it as an assault on the foundations of American democracy,[348] but judges took note of the criticisms, and as the Progressive era advanced, several state courts that had shown a high propensity to strike down reform laws began to take a substantially more deferential view of new reforms coming before them for review.[349] That response also manifested itself in the readiness with which courts agreed that workers compensation laws were constitutional. Temperamentally conservative judges such as Marshall overcame any scruples about the new laws by reasoning that workers compensation was a special case, essentially a program for the greater public good whose cost was ultimately borne by the public at large, and that employers lost some benefits but received others in return.[350] But other judges, like Winslow and Pitney, took note of public criticism of later-nineteenth-century judges' perspectives on constitutionality and more openly accepted the idea that new perspectives were called for.[351]

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347. WINSLOW PAPERS, *supra* note 282, at 9.

348. Nicholas Murray Butler, *Why Should We Change Our Form of Government?,* 62d Cong., 1st Sess., Sen. Doc. No. 238, *reprinted in* PHELPS, SELECTED ARTICLES ON THE RECALL, 50–53 (1915); Rome G. Brown, *The Judicial Recall: A Fallacy Repugnant to Constitutional Government*, 43 ANNALS AM. ACAD. 239 (1912); William B. Hornblower, *Independence of the Judiciary the Safeguard of Free Institutions*, 22 YALE L.J. 1, 10 (1912); *see also* PHELPS, *supra* note 336, at *passim*.

349. Leading examples include: New York, *compare, e.g.,* People *ex rel.* Rodgers v. Coler, 59 N.E. 716, 723 (N.Y. 1901) (striking down law pegging wages on public-works projects to prevailing wages) and People v. Williams, 81 N.E. 778, 779 (N.Y. 1907) (striking down maximum-work-hours law for women) *with* People *ex rel.* Williams Eng. & Contracting Co. v. Metz, 85 N.E. 1070, 1071 (N.Y. 1908) (upholding new public works wage law following enactment of amendment to New York constitution allowing such laws) *and* People *ex rel.* Hoelderlin v. Kane, 139 N.Y.S. 350, 357 (S.Ct. 1913), *aff'd,* People v. Hoelderlin, 146 N.Y.S. 1105 (App. Div. 1914) (upholding maximum-work-hours law). Ohio: *Compare, e.g.,* City of Cleveland v. Clements Bros. Const. Co., 65 N.E. 885, 886 (Ohio 1902) (striking down maximum-work-hours law for public works projects) *with* Stange v. City of Cleveland, 114 N.E. 261, 262 (Ohio 1916) (upholding new public-works hours law). Illinois: *Compare, e.g.,* Ritchie v. People, 40 N.E. 454, 455 (Ill. 1895) (striking down maximum-work-hours law for women) *with* W. C. Ritchie & Co. v. Wayman, 91 N.E. 695, 696 (Ill. 1910) (upholding new law). *See generally* RANNEY, *supra* note 131, at 135–38 and particularly the authorities cited at *id*., 136–37, note 87–102.

350. *See supra* notes 237–40 and accompanying text.

351. *See supra* notes 282–85, 341–47 and accompanying text.

VI. THE SLOW RISE OF COMPARATIVE NEGLIGENCE

A. Key Progressive-Era Laws

After the Georgia and Illinois experiments of the 1850s, comparative negligence made no further advance for fifty years except for Florida's adoption of the Georgia system in 1887,[352] but a new breakthrough came shortly after 1900. Once again, the path to reform ran along rails. Between 1905 and 1907, three states enacted degree-based negligence statutes allowing railroad workers a recovery, albeit a reduced one, in cases where a worker's negligence was slight and the employer's negligence was gross.[353] In 1906, after four years of deliberation, Congress enacted the Federal Employer Liability Act (FELA) which applied a similar degrees-of-negligence approach.[354] Section 2 of the law provided that a railroad worker's negligence would not bar recovery "where his contributory negligence was slight and that of the employer was gross in comparison,"[355] and that the worker's damages award would be reduced "in proportion to the amount of negligence attributable" to him.[356]

Section 2's origin, like that of the 1905–07 state statutes, was obscure. Each of the statutes reflected a lingering reluctance to let go of contributory negligence altogether, notwithstanding the criticism that the slight-ordinary-gross negligence framework had encountered half a century earlier.[357] Georgia Senator Augustus Bacon claimed that Section 2 was derived from his state's comparative negligence law,[358] but Georgia's law did not mention a slight-ordinary-gross framework.[359] Indiana Representative Edgar Crumpacker, a leading critic of the bill, viewed the bill as "revolutionary": he likely focused on the bill's proportional-recovery feature rather than the slight-gross distinction.[360] Others believed the bill was merely a federal version of existing state laws.[361]

The FELA passed by a comfortable margin with bipartisan support, but in early 1908 the U.S. Supreme Court struck it down on the narrow ground that it

352. *See supra* notes 7, 62, and accompanying text.

353. 1910 Ohio Laws 319; 1907 Neb. Laws, ch. 48; 1907 N. D. Laws 333.

354. Ch. 2073, 34 Stat. 232 (1906); *see* 59 CONG. REC. 1742, 1744 (1906).

355. Ch. 2073, 34 Stat. 232 (1906).

356. *Id*.

357. *See supra* notes 30–47 and accompanying text.

358. 59 CONG. REC. 1746–47 (1906).

359. CLARK, COBB & IRWIN, *supra* note 56, § 2979; *see also* 1855–1856 Ga. Laws, 155.

360. 59 CONG. REC. 4605–06 (1906).

361. *Id*. at 4607 (statement by Rep. Robert Lee Henry of Texas that the bill only "modifies and mitigates" contributory negligence).

was not limited to interstate commerce, as the federal Constitution required.[362] The high Court did not rule on whether Section 2's change in tort liability rules violated due process, but it referred to earlier cases upholding state employer liability laws, thus, giving supporters hope that an amended law would withstand court scrutiny.[363] In the meantime, Wisconsin's 1907 legislature enacted a law for railroad workers that contained the first truly modern formulation of comparative negligence.[364] The Wisconsin law stated that:

> In all cases where the jury shall find that the negligence of the company . . . was greater than the negligence of the employe so injured, and contributing in a greater degree to such injury, then the plaintiff shall be entitled to recover, and the negligence, if any, of the employe so injured shall be no bar to such recovery.[365]

This formulation jettisoned contributory negligence and degree systems in favor of a simple balancing test, one that gave juries much more latitude than did the old rules. That fact did not go unnoticed. Edward Hyzer, a railroad lobbyist, argued during pre-enactment hearings that comparative negligence would allow juries to render verdicts "according to caprice" and would risk a "return to barbarism."[366] But the formulation preserved an important free-labor element: accident victims could recover only if they were not primarily at fault. If their fault equaled or exceeded the defendant's, they must take full responsibility for their loss, and they could not recover any damages.[367]

When FELA supporters introduced a new bill in Congress in 1908, they modified the comparative negligence section (now § 3 of the bill) substantially.[368] Like Wisconsin's 1907 law, the new bill dropped all reference to degrees and provided that contributory negligence would no longer be a bar to recovery; but unlike Wisconsin's law, it adopted "pure" comparative negligence, allowing partial recovery even where a plaintiff's negligence equaled or exceeded the defendant's negligence.[369] There was lively debate in the House Judiciary Committee, which was assigned the task of evaluating the

362. Employers' Liability Cases, 207 U.S. 463, 503 (1908).

363. *Id.* Article I, § 8 of the U.S. Constitution grants Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." U.S. CONST. art. 1, § 8.

364. 1907 Wis. Sess. Laws 903; WIS. STATS. § 1816a (1911).

365. WIS. STATS. § 1816a(4) (1911).

366. EDWARD M. HYZER, ARGUMENT ON NEGLIGENCE BILLS PENDING BEFORE THE LEGISLATURE OF 1907 10 (1907).

367. WIS. STATS. § 1816a(4) (1911). In 1913, the legislature amended the 1907 law to confirm that plaintiffs' damages would be reduced in proportion to their negligence. 1913 Wis. Sess. Laws 840.

368. H.R. 20810, 60th Cong. § 149 (1st Sess. 1908).

369. *Id.*

bill. The committee rejected criticisms similar to Hyzer's; it concluded that comparative negligence was "nearer ideal justice" than contributory negligence, a fact that outweighed any practical difficulties of comparison.[370] Opponents also argued that the law should be confined to extra-hazardous railroad jobs, but supporters replied impatiently that it was too late to raise the issue: the law would apply to all railroad employees, from engineers to shipping clerks.[371] In the end, the new FELA passed with large majorities in both houses.[372]

Both the Wisconsin law and the 1908 FELA elicited constitutional challenges. The Chicago, Milwaukee & St. Paul Railroad (Milwaukee Road) challenged the Wisconsin law after its employees Michael Kiley, a fence builder whose eye had been put out by a flying staple, and John Zeratsky, a brakeman injured in a train collision, secured judgments against it.[373] The railroad made an equal protection challenge in Kiley's case, arguing that the legislature had improperly extended the law to railway employees engaged in nonhazardous jobs and had improperly ignored other hazardous businesses.[374] The state supreme court disagreed, holding that unique nature of railroads and their hazards justified singling them out for special legislation.[375] In Zeratsky's case, the Milwaukee Road tried another line of attack. The 1907 law required juries to determine whether each party's negligence "directly contributed to the injury," and the railroad argued this violated the long-standing rule that defendants could be held liable only if their negligence proximately caused injury.[376] The court again disagreed: it interpreted "direct contribution" as meaning proximate cause.[377] The Milwaukee Road also argued that juries must be given standards for making comparisons and that there would be no standard unless the old three-degree system was read into the law, an invitation that the court summarily declined.[378]

Justice Marshall was the lone dissenter in the *Kiley* and *Zeratsky* cases, and his dissents illustrated the limits of conservative judges' tolerance for tort

370. CONG. REC., 60TH CONGRESS, 1ST SESS., 4435 (House of Representatives, Apr. 6, 1908) (citation omitted), 4526–38 (Senate, Apr. 9, 1908).

371. *Id*. at 4428–30, 4435–36 (House of Representatives, Apr. 6, 1908), (Senate, Apr. 9, 1908).

372. *Id*. at 4438–39 (House of Representatives, Apr. 6, 1908), 4550 (Senate, Apr. 9, 1908).

373. Kiley v. Chi., Milwaukee & St. Paul Ry. Co., 138 Wis. 215, 217, 119 N.W. 309, 311 (Wis. 1909); Zeratsky v. Chi., Milwaukee & St. Paul Ry. Co., 141 Wis. 423, 424–25, 123 N.W. 904, 905–06 (Wis. 1909).

374. *Kiley*, 138 Wis. at 219.

375. *Id*. at 223–24.

376. *Zeratsky*, 141 Wis. at 428.

377. *Id*. at 430.

378. *Id*. at 432–33.

reform.[379] Marshall was willing to decouple fault from liability if, as with workers compensation, that was done by creating a system formally separated from tort law and directed to a distinct social problem.[380] But comparative negligence was different: the 1907 law did not identify railroads as an institution uniquely in need of comparative negligence, and in his view, the law violated equal protection guarantees because it was not limited to hazardous railroad jobs.[381] The specter of uncontrolled jury discretion in negligence apportionment was also very much on Marshall's mind. In his view, the 1907 law allowed juries to hold railroads liable no matter how remote their negligence or how proximate the plaintiffs to the accident.[382] But Marshall could not persuade his colleagues, and in *Mondou v. New York, New Haven & Hartford Railroad Co.* (1912), the U.S. Supreme Court unanimously rejected a challenge to the 1908 FELA that was based on an equal protection argument similar to that made in the *Kiley* case.[383]

In 1910, Mississippi became the first state to enact a comparative negligence law for all personal injury cases.[384] It adopted the "pure" formula of the 1908 FELA rather than Wisconsin's diluted formula, which denied recovery to plaintiffs whose negligence equaled or exceeded the defendant's negligence.[385] Opponents challenged the Mississippi law's constitutionality, arguing that apportionment of negligence was a judicial function that could not be delegated to juries.[386] Mississippi's supreme court disagreed: in its view, negligence apportionment was really a determination of fact, a function traditionally given to juries, and judges retained their power to overturn apportionments that were unsupported by evidence.[387]

B. A Post-Progressive-Era Stall

The FELA proved to be an important early catalyst for comparative negligence: between 1908 and 1920, sixteen states adopted little-FELA laws

379. *Kiley*, 138 Wis. at 232–57 (Marshall, J., dissenting); *Zeratsky*, 141 Wis. at 437–46 (Marshall, J., dissenting).

380. *See supra* notes 243–45 and accompanying text.

381. *Kiley*, 138 Wis. at 240–41 (Marshall, J., dissenting).

382. *Id*. at 253 (Marshall, J., dissenting).

383. H.R. 20810, 60th Cong. § 149 (1st Sess. 1908); Mondou v. N.Y., New Haven, and Hartford R.R. Co., 223 U.S. 1, 55–56 (1912).

384. 1910 Miss. Laws 125.

385. *Id*.

386. Natchez & S. R.R. Co. v. Crawford, 55 So. 596, 598–99 (Miss. 1911).

387. *Crawford*, 55 So. At 598–99. Mississippi's 1910 law may have been inspired in part by the FELA. William H. McMullen, *Torts–Effect of Mississippi's Comparative Negligence Statute on Other Rules of Law*, 39 MISS. L.J. 493, 494–97 (1968).

applying the FELA model to intrastate railroads,[388] three states extended the FELA model to certain other occupations,[389] and, in 1920, Congress extended the FELA to maritime workers.[390] Two states also adopted Wisconsin's diluted comparative-negligence model for railroad workers.[391] But comparative negligence systems spread only slowly after 1920.[392] The American Bar Association (ABA) illuminated the depth of resistance to change when, in 1925, it considered whether to recommend extension of comparative negligence to property-damage claims arising out of maritime accidents.[393] Opponents argued that apportionment of negligence was unjust because negligence could not be measured with perfect precision, and that the task of apportionment would impose substantial new burdens on judges and juries.[394] Supporters replied that courts that had administered FELA cases and early state comparative negligence laws had had no difficulty with apportionment issues and had not had to take on extra work,[395] but in its final report (1929), the ABA recommended that comparative negligence not be expanded.[396]

There were other signs of resistance. Two states were uneasy about denying slightly negligent plaintiffs all chance of recovery but felt that pure and diluted comparative negligence went too far; they looked to the old slight-gross distinction, enacting laws applying comparative negligence in cases where the plaintiff's negligence was found to be slight.[397] In 1931, Wisconsin joined Mississippi in extending comparative negligence to all torts,[398] but it was able

388. *See* 1909 Tex. Gen. Laws 278–79; 1910 Ohio Laws 197; 1911 Kan. Sess. Laws 437; 1911 Mont. Laws 47–48; 1911 Nev. Stat. 362; 1911 S.D. Sess. Laws 294; 1913 Fla. Laws 383; 1913 Neb. Laws 311–12; 1913 N.C. Sess. Laws 41; 1913 Wyo. Sess. Laws 200; 1915 Iowa Acts 181; 1915 Minn. Laws 253; 1915 N.D. Laws 311; 1916 Va. Acts 762; 1916 S.C. Acts 970–71; 1918 Ky. Acts 153; 1913 Ark. Acts 734 (all corporations).

389. *See* 1911 Or. Laws 16 (building and contracting trades); 1912 Ariz. Sess. Laws 491 (hazardous work in mining, manufacturing and transportation); 1919 Ark. Acts 734 (mining companies). *See also* A. Chalmers Mole & Lyman P. Wilson, *A Study of Comparative Negligence: Part II*, 17 CORNELL L. Q. 604, 608–13 (1932).

390. 41 U.S.C. § 988 (1920).

391. MICH. COMP. LAWS § 2078 (1915); 1913 Ark. Acts 734 (all corporations). *See generally* William L. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 489–91 (1953).

392. Two more states adopted little-FELA laws after 1920. 114 ILL. COMP. STAT. § 323 (1927); 1937 Colo. Sess. Laws 513.

393. T. CATESBY JONES, REPORT OF THE STANDING COMMITTEE ON ADMIRALTY AND MARITIME LAW 278, 279 (1929); Mole & Wilson, *supra* note 389, at 348.

394. Mole and Wilson, *supra* note 389, at 348–50.

395. *Id*. at 348, 350–51.

396. *Id*. at 348–49.

397. 1913 Neb. Laws 311–12; 1941 S.D. Sess. Laws 184; *see also* Prosser, *supra* note 391, at 470.

398. 1931 Wis. Sess. Laws 375.

to do so only because conservatives dropped their opposition in order to head off passage of a bill that would have created a state-administered no-fault insurance system; they also persuaded Wisconsin lawmakers to retain a diluted system.[399] Comparative-negligence bills were introduced in the 1930 New York legislature and in Minnesota, Pennsylvania, Michigan, and Illinois in the 1940s, but none passed.[400] Nearly all legal commentators who addressed comparative negligence viewed it favorably, including William Prosser, the leading tort reformer of the age;[401] but Prosser devoted his energies mainly to products liability law,[402] and none of his colleagues saw fit to launch a comparable crusade for comparative negligence. The conservative impulses that had persuaded the ABA in the 1920s not to recommend expanded use of comparative negligence continued to hold sway.[403]

That would not change until the 1950s and 1960s, when an increasing number of commentators pointed out that no evidence had surfaced in comparative-negligence states to support concerns about juries' abuse of apportionment power or increased court workloads and that it was inappropriate to encourage the overlooking of slight negligence as a substitute for comparative negligence;[404] they also redoubled their criticism of contributory

399. *See* Joseph A. Padway, *Comparative Negligence*, 16 MARQ. L. REV. 3, 4 (1931); Gerald P. Hayes, *Rule of Comparative Negligence and Its Operation in Wisconsin*, 23 OHIO ST. BAR ASSN. REP. 233, 234 (1950); Prosser, *supra* note 391, at 466 n. 6.

400. Prosser, *supra* note 391, at 466.

401. *See*, *e.g.,* CHARLES O. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS: A STUDY IN ADMINISTRATIVE ASPECTS OF COMPARATIVE NEGLIGENCE AND CONTRIBUTION IN TORT LITIGATION 59–65 (1936); PROSSER, *supra* note 52, § 53; A. R. H., Note, *Comparative Negligence in Pennsylvania*, 17 TEMPLE U. L. Q. 276 (1943); Robert A. Leflar, *The Declining Defense of Contributory Negligence,* 1 ARK. L. REV. 1, 16–20 (1947).

402. *See*, *e.g*., William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer),* 69 YALE L.J. 1099, 1099 (1960); William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer),* 50 MINN. L. REV. 791 (1966); Kenneth S. Abraham & G. Edward White, *Prosser and His Influence*, 6 J. TORT L. 27, 32 (2013).

403. *See* John J. Haugh, *Comparative Negligence: A Reform Long Overdue*, 49 OR. L. REV. 38, 41 (1969).

404. *See generally* Philbrick, *supra* note 56; Prosser, *supra* note 391; James, Jr., *supra* note 3, at 732; Note, *Tort–Comparative Negligence Statute*, 18 VAND. L. REV., 319, 327–29 (1964); HARPER & JAMES, *supra* note 52, §§ 27.2–4, 27.10; Frank E. Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135, 160–63, 174 (1958); *see also* Haugh, *supra* note 403. Prosser took a fairly detached view of comparative negligence in the first edition of his *Handbook*; he became progressively more supportive in his 1953 article and in the second (1955) and third (1964) editions of his treatise. *See generally* PROSSER, *supra* note 52, § 53; WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54 (2d ed. 1955); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 66 (3d ed. 1964).

negligence as unjust.[405] Perhaps more important, between 1920 and 1960 the Great Depression, World War II, and the Cold War, together with less dramatic events such as the creation of a national highway system and national radio and television networks,[406] had instilled in Americans an unprecedented sense of national community and shared experience and an unprecedented receptivity to socialization of risk and accident costs.[407] Even then, holdouts remained: in 1957, future U.S. Supreme Court Justice Lewis Powell wrote that "the contributory negligence rule is a necessary – indeed the only – means of exercising some limited judicial control."[408] But many conservative lawmakers now came to view comparative negligence not as a curiosity, but as a line of defense against more thoroughgoing socialization of tort law and as a means of preserving at least a core element of fault in the law.[409] The breakthrough came

405. In 1953, Prosser memorably denounced contributory negligence as "a rule which visits the entire loss caused by the fault of two parties on one of them alone, and that one the injured plaintiff, least able to bear it, and quite possibly much less at fault than the defendant who goes scot free. No one has ever succeeded in justifying that as a policy, and no one ever will." Prosser, *supra* note 391, at 469.

406. *See*, *e.g.*, JOHN A. HEITMANN, THE AUTOMOBILE AND AMERICAN LIFE 77–78 (2009); DAVID BLANKE, HELL ON WHEELS: THE PROMISE AND PERIL OF AMERICA'S CAR CULTURE, 1900–1940 27–31 (2007); U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970 42, 795–96 (1975) (radio and television stations and use); JAMES BAUGHMAN, THE REPUBLIC OF MASS CULTURE: JOURNALISM, FILM, AND BROADCASTING IN AMERICA SINCE 1941 (3d ed. 2006).

407. *See*, *e.g.*, WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 1932–1940 84 (1963); DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945 363–80 (2001); JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974 16 (1996); GEORGE M. MARSDEN, THE TWILIGHT OF THE AMERICAN ENLIGHTENMENT: THE 1950S AND THE CRISIS OF LIBERAL BELIEF 22–24, 108–12 (2014); ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY: EMPIRICAL FOUNDATIONS, CAUSAL MECHANISMS, AND POLICY IMPLICATIONS (2000).

408. Lewis F. Powell, Jr., *Contributory Negligence: A Necessary Check on the American Jury*, 43 A.B.A. J. 1005, 1062 (1957); *see also, e.g.,* Frederick S. Benson, *Comparative Negligence–Boon or Bane*, 23 INS. COUNS. J. 204, 214 (1956).

409. *See* ABRAHAM, *supra* note 68, at 69–70, 92–100; G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 166–67 (1980); Samuel H. Hofstadter, *A Proposed Automobile Accident Compensation Plan*, 328 ANNALS AM. ACAD. POL. & SOC. SCI. 53, 59 (1960); Hilen v. Hays, 673 S.W.2d 713, 718 (Ky. 1984) (stating that courts "must accommodate justice by evolution or anticipate revolution").

at the end of the 1960s: between 1969 and 1984, thirty-seven states adopted comparative negligence, some by statute[410] and some by court decision.[411]

VII. CONCLUSION

Progressivism is sometimes viewed, inaccurately, as a movement that arose suddenly, a movement created whole cloth by a band of reformers fighting against entrenched forces of monopoly and corruption.[412] The truth is more complicated. Many Progressive reforms originated in the late nineteenth century; some were advanced in their early stages by the conservative elements the Progressives claimed they were fighting.[413] The Progressives' contribution was to refine and expand those reforms–for example, political primary systems, civil service laws, tax and utility reform, and industrial safety laws–and, in

410. Early modern-era pure comparative-negligence statutes include 1971 R.I. Pub. Laws 786; 1973 Wash. Sess. Laws 425; 1975 N.Y. LAW 94; 1979 La. Acts 1165; 1984 Ariz. Sess. Laws 878; *see also, e.g.,* Hoffman v. Jones, 280 So.2d 431, 434 (Fla. 1973*);* Li v. Yellow Cab Co., 532 P.2d 1226, 1229 (Cal. 1975); Kaatz v. State, 540 P.2d 1037, 1047 (Alaska 1975); Kirby v. Larson, 256 N.W.2d 400, 413 (Mich. 1977); Scott v. Rizzo, 634 P.2d 1234, 1240–41 (N.M. 1981); Alvis v. Ribar, 421 N.E.2d 886, 895 (Ill. 1981); Gustafson v. Benda, 661 S.W.2d 11, 16 (Mo. 1983); *Hilen*, 673 S.W.2d at 720. Early modern-era diluted comparative-negligence statutes include 1969 Haw. Sess. Laws 422–23; 1969 Mass. Acts 685; 1969 N.H. Laws 178; 1969 Minn. Laws 1069; 1970 Vt. Acts & Resolves 193; 1971 Or. Laws 1516; 1971 Colo. Sess. Laws 496; 1971 Idaho Sess. Laws 862–63; 1973 N.D. Laws 143; 1973 Utah Laws 710–12; 1973 Wyo. Sess. Laws 30; 1973 Conn. Acts 1458 (Reg. Sess.); 1973 Nev. Stat 1722; 1973 N.J. Laws 300; 1973 Okla. Sess. Laws 40; 1973 Tex. Gen. Laws 41; 1974 Kan. Sess. Laws 828; 1975 Mont. Laws 126–27. For comprehensive surveys of modern-era comparative negligence laws, *see* Arthur Best, *Impediments to Reasonable Tort Reform: Lessons From the Adoption of Comparative Negligence*, 40 IND. L. REV. 1 (2007); and VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE §§ 1.1, 2.1 (2d ed. 1986).

411. Early court decisions adopting pure comparative negligence include *Hoffman*, 280 So.2d at 434; *Li*, 532 P.2d at 1232; *Kaatz,* 540 P.2d at 1049; *Kirby*, 256 N.W.2d at 403; *Scott*, 634 P.2d at 1240–41; *Alvis*, 421 N.E.2d at 895; *Gustafson*, 661 S.W.2d at 16; *Hilen*, 673 S.W.2d at 720. (Only one court adopted diluted comparative negligence). Bradley v. Appalachian Power Co., 256 S.E.2d 879, 883 (W.Va. 1979).

412. Some of the movement's leaders, most notably Wisconsin's Robert La Follette, cultivated this image in order to further their cause and their personal mystique. *See* ROBERT M. LA FOLLETTE, LA FOLLETTE'S AUTOBIOGRAPHY: A PERSONAL NARRATIVE OF POLITICAL EXPERIENCES 176–277 (1913).

413. *See*, *e.g.*, CHARLES E. MERRIAM & LOUISE OVERACKER, PRIMARY ELECTIONS 1–5, 24–25 (1928) (early history of election reform); THELEN, *supra* note 13 at, 6–8, 192–93 (same); ARI HOOGENBOOM, OUTLAWING THE SPOILS: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT, 1865–1883 53–63 (1961) (early history of civil-service reform); RANDOLPH E. PAUL, TAXATION IN THE UNITED STATES 16–17, 65–70 (1954) (early history of tax reform); Magoun v. Illinois. Tr. & Sav. Bank, 170 U.S. 283, 287–88 (1898) (same); Werner Troesken, *Regime Change and Corruption: A History of Public Utility Regulation*, *in* CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY 259, 260–62 (Edward L. Glaeser & Claudia Goldin, eds., 2006); *see also supra* Part III as to the early history of workplace reform.

many cases, bring them to fruition.[414] The same is true of Progressive-era tort reform.

A. Progressivism and Workers Compensation

Workers compensation's decoupling of fault from liability was a dramatic departure from traditional tort law, but it was not entirely without precedent: during the mid-nineteenth century, many states had enacted fencing statutes imposing absolute liability for livestock loss on railroads that failed to fence their rights of way, [415] and the road to workers compensation's political life began well before the turn of the twentieth century.[416] Critics of contributory negligence's harsher aspects appeared almost as soon as the doctrine took hold in American courts, led by some of the judges who were being asked to apply it.[417] As early as the 1850s, judges in the South and Midwest softened or rejected the fellow-servant rule;[418] judges across the nation attempted less successfully to soften contributory negligence through degrees-of-negligence classifications and creative definitions of proximate cause.[419] Efforts to soften contributory negligence continued after the Civil War, as railroad and workplace injuries multiplied and were increasingly seen as a social, not just an individual misfortune.[420] Most states abolished the fellow-servant rule for railroads, and in some cases for other industries as well; they also created and elaborated employer duties of safety, and some enacted industrial-safety and anti-waiver statutes.[421] These changes were not a panacea for accident victims, but they provided a counterbalance to the advantages that contributory negligence had long given to employers.

Progressivism did not become a well-defined political movement until the turn of the twentieth century[422] but the upper-middle-class reformers, drawn heavily from business and the professions, who formed a core element of the Progressive Movement began speaking out as early as the 1860s.[423] They

414. *See supra* Part IV; *see also* RANNEY, *supra* note 236, at 259–332 and authorities cited *supra* note 13.

415. *See supra* notes 180–83 and accompanying text.

416. *See supra* Part III.

417. *See supra* Parts II.B, II.C.

418. *See supra* Part II.C.

419. *See supra* Part II.A.

420. *See supra* Part III.

421. *See supra* Part III.

422. *See* LA FOLLETTE, *supra* note 412, at 176–277; *see also, e.g.,* WESSER, *supra* note 13, WARNER, *supra* note 13, at vii.

423. *See* HOOGENBOOM, *supra* note 413, at 53–63; FREDERICK C. MOSHER, DEMOCRACY AND THE PUBLIC SERVICE 35–36 (1968); RANNEY, *supra* note 236, at 259–60, 271–72.

played key roles in advancing early civil service reform[424] and in opening debates over diversification of the American tax system[425] and railroad and utility regulation,[426] and they played a similar role in the workers compensation movement. Carroll Wright, whose work in the 1880s and 1890s first brought widespread attention to the full magnitude of the industrial-accident problem and to the availability of a no-fault alternative, was an exemplar of this class;[427] but many other members of that class joined him in that task both before and after Progressivism entered its partisan phase.[428]

The fact that the workers compensation movement accelerated, and the first workers compensation laws were enacted during the years that marked the height of the Progressive Movement was no coincidence. Workers' compensation reflected Progressives' devout belief in expertise and scientific rationalism as the foundation of democracy and economic security,[429] and without the energy and publicity skills of Progressives such as Crystal Eastman, John Commons, and a host of other writers and lobbyists,[430] workers compensation might never have come to pass. Progressive ire over judicial overriding of juries and rejection of reform laws also played a role. American judges took note of that ire and deemed it important enough to be worthy of response.[431] There is evidence that as the Progressive Era advanced, judges in some states became more cautious about striking down reform laws;[432] and this trend, together with the striking lack of judicial opposition when workers compensation laws were challenged in state and federal courts,[433] strongly suggests that progressive ire contributed to the laws' survival.

B. Progressivism and Comparative Negligence

Why comparative negligence blossomed during the Progressive Era is a more difficult question. Georgia's comparative-negligence system, adopted during the 1850s, remained in place throughout the nineteenth century,[434] but at the dawn of the Progressive Era, apart from Florida[435] and a failed experiment

424. RANNEY, *supra* note 236, at 259–60.
425. PAUL, *supra* note 413, at 16–17, 65–70; RANNEY, *supra* note 236, at 296–97.
426. Troesken, *supra* note 413, at 260–62; RANNEY, *supra* note 131, at 124–25.
427. *See supra* notes 196–98 and accompanying text.
428. *See supra* notes 212–32 and accompanying text.
429. *See supra* note 198 and accompanying text.
430. *See supra* Part IV.B.
431. *See supra* Part V.C.
432. *See supra* notes 351–56 and accompanying text.
433. *See supra* Part IV.C.
434. *See supra* notes 53–56 and accompanying text.
435. *See supra* notes 7 and 62 and accompanying text.

in Illinois,[436] no other state had followed suit. The legislative history of Wisconsin's 1907 law[437]–the first modern comparative negligence law, one which provided guidance for the 1908 FELA, for the wave of little-FELA state laws that followed and for Mississippi's 1910 pure comparative negligence law[438]–contains no accounts of spirited debates or intellectual revelation; but we do have several clues as to Wisconsin lawmakers' thinking. Justice Bleckley of Georgia had made clear that apportionment of comparative negligence was almost entirely at the jury's discretion,[439] and Wisconsin's lawmakers rejected lobbyists' complaints that comparative negligence would allow juries to run riot,[440] but they cabined jury recovery by creating a diluted system that allowed accident victims a proportional recovery only if they were less negligent than the defendant.[441] These clues indicate that for the comparative-negligence movement, the key to success was overcoming fear of juries.

That conclusion is supported by several other pieces of evidence. First, by 1907 Progressives were freely expressing ire over judicial overriding of juries. During their time in power, they also tried to cabin judicial power over juries in two ways. First, several state legislatures abolished, entirely or in part, judges' traditional power to direct juries to enter a particular verdict where the judge believed the evidence permitted only one result.[442] Second, Progressives advocated the jury-friendly "scintilla" rule, which held that a case must go the jury where there was "*any* evidence . . . tending to prove each material fact put in issue,"[443] over the traditional English rule, which held that judges must take cases away from juries unless there was evidence "upon which the jury can

436. *See supra* notes 57–61 and accompanying text.

437. 1907 Wis. Sess. Laws 903; WIS. STATS. § 1816a (1911).

438. *See supra* Part VI.A.

439. Georgia R.R. & Banking Co. v. Neely, 56 Ga. 540, 544 (1876); *see supra* note 60 and accompanying text.

440. *See supra* note 366 and accompanying text.

441. 1907 Wis. Sess. Laws 903; WIS. STAT. § 1816a(4) (1911).

442. 1912 Va. Acts 83; 1913 Minn. Laws 336; 1923 Wis. Sess. Laws 38. American judges resisted this reform vigorously: several state courts either circumvented the laws or struck them down. *See* Zimmerman v. Chi. & Nw. Ry. Co., 151 N.W. 412, 413 (Minn. 1915); Small v. Va. Ry. & Power Co., 99 S.E. 525, 528 (Va. 1919); Thoe v. Chi., Milwaukee & St. Paul Ry. Co., 181 Wis. 456, 195 N.W. 407, 409 (Wis. 1923). Barksdale v. S. Ry. Co., 148 S.E. 683, 686 (Va. 1929). *See generally* Renee Lettow Lerner, *The Rise of Directed Verdict: Jury Power in Civil Cases Before the Federal Rules of 1938*, 81 GEO. WASH. L. REV. 448, 503–05 (2013).

443. Lerner, *supra* note 442, at 475–86.

properly . . . find a verdict."[444] Supporters of the scintilla praised it as "the personified sentinel of the right of trial by jury," one essential to true justice,[445] while opponents countered that that allowing cases with clear outcomes to go to juries would be an "idle exercise" and that the scintilla rule as a tool for delay and coercion of defendants.[446] Bleckley's comments indicated that comparative negligence offered another way to reduce judges' overriding powers.[447] Roujet Marshall dissented in the *Kiley* and *Zeratsky* cases because he recognized that fact.[448]

The message of trust in juries sent by Progressives, together with an increasing sense that comparative negligence provided a fairer outcome than contributory negligence, played key roles in opening the door for the wider adoption of comparative negligence fifty years later. Conversely, comparative-negligence opponents continued to invoke fears of rogue juries as the twentieth century progressed, ranging from the American Bar Association's 1929 report that rejected extension of comparative negligence to maritime law to Lewis Powell's 1957 plea that the walls of contributory negligence be kept in place.[449] Americans' increasing acceptance between 1920 and 1970 of the legitimacy of collective action and of the desirability of socializing accident costs finally turned the tide.[450]

Workers' compensation and comparative negligence were fundamental steps in the United States' transition from an accident cost allocation system based on the nineteenth-century principles of instrumentalism and individual responsibility to a modern system that recognized the inevitability of accidents in an urbanized industrial society and accepted a large degree of accident cost

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444. *Id.* The scintilla rule enjoyed favor in many early-nineteenth-century American courts, *id.,* but as the century advanced, American elites became increasingly distrustful of juries and the English standard enjoyed a new vogue. *Id*. at 475–78, 488–90; *see* Pleasants v. Fant, 89 U.S. 116, 121 (1885) (emphasis added).

445. *See* M.A. Foran, *The Scintilla Rule and Its Relations to Trial by Jury*, 4 W. RSRV. L. J. 143, 143 (1898); M.J. Fulton, *Directing Verdicts*, 16 VA. L. REG. 241, 241–45 (1910).

446. *See* James Troup, *Should the Scintilla Rule Be Abolished*?, 4 W. RSRV. L. J. 117, 119–21 (1898); Samuel C. Graham, *Directing Verdicts*, 16 VA. L. REG. 401, 402–03, 406 (1910). A number of jurists questioned whether the dispute had any real meaning. Harvard law professor James Bradley Thayer sided with jury defenders, but he could "hardly believe that the difference is, at bottom, anything more than a difference over words." Letter from J.B. Thayer to editors, reprinted in *The Scintilla Rule–A Symposium*, 4 W. RES. L. J. 169, 177 (Dec. 1898). *See also* JOHN H. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 4:§ 2494 (1905) (stating that "There is no virtue in any form of words" for stating the rule).

447. *See supra* note 64 and accompanying text.

448. Kiley v. Chi., Milwaukee & St. Paul Ry. Co. 138 Wis. 215, 253, 119 N.W. 309, 317, 324 (Wis. 1909) (Marshall, J., dissenting); *see supra* notes 380–82 and accompanying text.

449. *See supra* notes 392–403 and accompanying text.

450. *See supra* notes 406–07 and accompanying text.

socialization. Workers' compensation legitimized the principle of direct cost socialization and applied it on a scale never seen before, albeit to a single defined class of Americans. Comparative negligence represented a broader and, in some ways, more radical form of cost socialization: it directly attacked the principle that a victim responsible in any way for his own injury must bear the entire loss, replaced it with the principle of allocation of cost in proportion to fault and put primary responsibility for allocation in the hands of juries. Because of its radical cast, comparative negligence had to travel a longer and more arduous path to success than did workers compensation.[451] Progressives played a central role in the American transition from a rural, agricultural society to an urbanized, mature industrial nation; they likewise played a central role in tort law's transition to a partly-socialized cost allocation system. Tort law's history cannot be fully understood without an appreciation of the Progressive ethic and the contributions that Progressives made, and of the late-nineteenth-century tort reform efforts that paved the way.

451. *See supra* Parts IV, VI.