THE LONG HISTORY OF STATE CONSTITUTIONS AND AMERICAN TORT LAW

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In the modern tort reform movement that dates to the mid-1970s, courts have struck down a number of reform statutes as unconstitutional under state constitutions. Commentators on all sides have treated these decisions as a new phenomenon in American law. In fact, American tort law has developed for over a century in the shadow of state (and occasionally federal) constitutional law. Beginning in the late nineteenth-century, state tort reform legislation came under sustained constitutional critique. The legislation at issue included employers' liability laws that expanded liability for work accidents; spark fire statutes that made railroads liable for fires caused by engine sparks; stock statutes that made railroads liable for cattle killed on the tracks; wrongful death statutes that capped the damages available in death cases; and workmen's compensation statutes.

Late nineteenth and early twentieth-century state courts developed a small number of outer bounds on the legislative power to alter the rules of tort law. In many relatively uncontroversial cases, courts enforced specific and express constitutional rules to strike down statutes such as those that capped wrongful death damages despite a constitutional provision barring such caps. In another well-established line of cases, courts limited legislatures' authority to allocate accident costs to parties with no causal connection to the accident in question. Such legislative allocations of accident costs without causation amounted to an illegitimate legislative taking. But on those occasions in which courts reached outside these limited rationales to strike down legislative changes in the common law of torts, courts caused political uproar and helped to bring on themselves the great Progressive Era court crisis. In particular, constitutional interventions to block the enactment of workmen's

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> *compensation statutes at the opening of the twentieth-century produced political attacks on the legitimacy of judicial review that nearly stripped state courts of their power to review the constitutionality of legislation.*
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> *The long history of the American constitutional law of torts is a cautionary tale for all involved. Supporters of modern tort reform efforts have little occasion for seeing unprecedented threats to basic constitutional principles like separation of powers and popular sovereignty. But those who would use state constitutional litigation to ward off legislated tort reform should be wary, too. Under the guise of judicial review, state courts have all too often used state constitutional provisions to interfere with experiments in public policy that over time have come to be widely respected.*

Judging from the heated rhetoric of the plaintiff and defense bars over the past several years, one could be forgiven for thinking that the constitutionalization of American tort law must be a novel development. State court decisions striking down tort reform statutes on state constitutional grounds, say defense-side commentators, constitute a new kind of "judicial nullification" of legislatures' legitimate public policy choices.[1] Such decisions are "state constitutionalism run wild,"[2] exhibiting a "fundamental disrespect" for separation of powers principles.[3] They exhibit the kinds of "*Lochner* Era"[4] theories of the judicial role that were elsewhere "repudiated in 1937,"[5] and the result is described fantastically as "perhaps the most severe crisis of legitimacy of law and legal institutions that we have faced since *Dred Scott*."[6]

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1. Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 RUTGERS L.J. 907, 917 (2001) (internal quotation marks omitted).

2. *Id.* at 919 (internal quotation marks omitted).

3. Victor Schwartz, *Judicial Nullification of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 SETON HALL L. REV. 688, 692 (2001).

4. George L. Priest, *The Constitutionality of State Tort Reform Legislation and* Lochner, 31 SETON HALL L. REV. 683, 683 (2001) (citing Lochner v. New York, 198 U.S. 45 (1905)).

5. *Id.* (citing W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)).

6. Stephen B. Presser, *Separation of Powers and Civil Justice Reform: A Crisis of Legitimacy for Law and Legal Institutions*, 31 SETON HALL L. REV. 649, 649 (2001).

On the plaintiffs' side, the Association of Trial Lawyers of America has initiated a constitutional litigation program designed to fend off a new tort reform campaign[7] that threatens to result in the "restriction of constitutional rights."[8] Putative tort reformers, plaintiffs' advocates say, want "nothing less than the elevation of the designs of today's transient legislature over the words and intent of those who framed each state's organic law"; when courts today strike down tort reform legislation, they are thus upholding and even "reviving" the traditional principles of American constitutional law.[9] Indeed, some on the plaintiffs' side have even argued that state constitutional decisions striking down tort reform legislation are evidence of the ways in which the supposed capture of state legislatures by defense interests has made courts the guardians of majoritarian will.[10] Yet what virtually everyone apparently agrees on is that the introduction of state constitutionalism to American tort law is a relatively novel phenomenon. Even those who style themselves centrists see state constitutionalism as a newly important development in American tort law.[11] Commenting on the most recent effort to reform the nation's tort laws—an effort that began with the first medical malpractice crisis in the mid-1970s—one such observer has called the disputes over whether such reforms are constitutional a "battle, with roots over twenty-five years deep."[12] Few suspect that such constitutional questions go much deeper still into the history of American law.[13]

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7. *See* Robert S. Peck, *Defending the American System of Justice*, TRIAL, Apr. 2001, at 18, 18.

8. Robert S. Peck, *In Defense of Fundamental Principles: The Unconstitutionality of Tort Reform*, 31 SETON HALL L. REV. 672, 677 (2001).

9. Peck, *supra* note 7, at 26.

10. Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 556 (1999).

11. *See, e.g.*, Stephen J. Werber, *Ohio: A Microcosm of Tort Reform Versus State Constitutional Mandates*, 32 RUTGERS L.J. 1045, 1045-46 (2001).

12. *Id.* at 1047.

13. After completing this Article, John C. P. Goldberg sent me a draft of his publication, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. (forthcoming 2005). Professor Goldberg's interesting defense of relatively robust state constitutional review of legislation in the torts area delves into the long history of constitutional review of tort legislation, graciously citing this Article among others. To my mind, Professor Goldberg's account overstates the extent to which the history of Anglo-American tort law has exhibited a commitment to providing redress for private wrongs. Only through the casuistry of redefining injuries for which the law fails to provide redress as not having been wrongs at all can the claim be made plausible. But by vesting in the

But this widespread impression of novelty in the constitutionalization of American tort law is wrong. American tort law and the law of American state constitutions have developed hand-in-glove over the past 125 years. Indeed, virtually from the beginnings of the field that we today label "tort law," American lawyers have been arguing about the constitutional limits of legislated tort reform. Tort law as a field emerged roughly from the 1850s into the 1880s.[14] And from at least the 1870s onward, state constitutions powerfully influenced the development of the law of torts.[15] Moreover, tort law and state constitutions have had reciprocal effects on one another, for even as constitutions shaped the law of torts, legislation in the torts area helped to construct basic principles in state constitutional law. Indeed, in the first decade and a half of the twentieth-century, state constitutional cases over reforms in the law of accidents generated political controversies that contemporaries saw—rather more realistically than some defendant-side lawyers today—as the lowest moment in the history of American courts since the *Dred Scott* case.[16]

The current generation of state constitutional decisions reviewing tort reform legislation is merely the latest incarnation of what has been almost one and a half centuries of interaction between American constitutions at the state and sometimes federal levels, on one hand, and the law of torts, on the other. The lesson of this interaction, however, is not simply to legitimize the current generation of state court decisions by providing them with historical precedents. Constitutional interventions into the making of American tort law have led American state courts into some of their most ill-fated decisions. In particular, constitutional interventions to block the enactment of workmen's compensation statutes at the opening of the twentieth-century produced political attacks on the legitimacy of judicial review that almost stripped state courts of their power to provide binding review of legislation. The history of the American constitutional law of torts, in short, is a cautionary tale for all involved. Supporters of modern tort reform efforts have little occasion for seeing unprecedented threats to basic constitutional principles like separation of powers and popular sovereignty. But those who

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legislature virtually unlimited discretion over the definition of a wrong, the history-based theory that Professor Goldberg advances risks being reduced to mere wordplay.

14. *See* JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 51-70 (2004).

15. *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 148 (1998).

16. *See* WITT, *supra* note 14, at 152.

would use state constitutional litigation to ward off legislated tort reform should be wary, too. Under the guise of judicial review, state courts have all too often used state constitutional provisions to interfere with experiments in public policy that over time have come to be widely respected.

I. AN INTRODUCTION TO STATE CONSTITUTIONS

For much of the twentieth-century, state constitutions were a backwater in American law. As one widely commented-on survey found, in the late 1980s only one in two Americans even knew their state had a constitution.[17] Experts in matters of state constitutional law regularly bemoan the paucity of attention paid to their field by the profession more generally.[18] Indeed, though the earliest state constitutions predate the widely revered Federal Constitution by more than twenty years, they remained largely ignored by lawyers and lay-people alike for much of the last century.

Yet state constitutions are critically important documents in our system of governance. The Supremacy Clause of the U.S. Constitution provides that federal law is supreme—even a mere federal regulation trumps state law, including state constitutional law.[19] But the U.S. Constitution, as political scientist Donald Lutz has noted, is an "incomplete text."[20] It enumerates certain areas of authority for the federal government, but outside those areas it takes for granted that power will be left in the hands of the states. In turn, the governments of those states are constituted by state constitutions, which (so long as they create a "republican form of government"[21] and otherwise comply with federal law, including the Federal Constitution) have wide discretion to establish the systems of governance within the state as the constitution-makers see fit. State constitutions, in Lutz's formulation, "complete" the text of American constitutionalism.[22]

State constitutions not only complete American constitutionalism, they sometimes threaten to overwhelm it. For the most remarkable distinctions

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17. John Kincaid, *The New Judicial Federalism*, 61 J. ST. GOV'T 163, 169 (1988).

18. *See, e.g.*, ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS, at xv (3d ed. 1999); Helen Hershkoff, *State Constitutions: A National Perspective*, 3 WIDENER J. PUB. L. 7, 8-9 (1993).

19. *See* U.S. CONST. art. VI.

20. *See generally* Donald S. Lutz, *The United States Constitution as an Incomplete Text*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 23 (1988) (suggesting that the U.S. Constitution is incomplete without the inclusion of state constitutions and the Declaration of Independence).

21. U.S. CONST. art. IV, § 4.

22. Lutz, *supra* note 20, at 29-32.

between the practice of state constitutions in the United States and the practice of the Federal Constitution are the length and detail of many state constitutions and the regularity with which state constitutions are revised, amended, and even redrafted. State constitutions cover an enormously wide range of topics, from freedom of speech and the death penalty to "ski trails and highway routes, public holidays and motor vehicle revenues."[23] In general, they average three-times the length of the Federal Constitution.[24] The fifty state constitutions currently in force average about 120 amendments each, for a total of more than 5900 amendments adopted out of some 9500 proposed amendments.[25] And yet in a sense the historical constitutions of the states dwarf even this. Americans have held over 230 constitutional conventions.[26] They have adopted no fewer than 146 constitutions.[27] Some note that as compared to the veritable orgy of constitutional drafting and redrafting in the nineteenth-century, state constitution-making has slowed in the twentieth- century.[28] And yet even in the twentieth-century, eighteen states ratified entirely new constitutions.[29] Ten states did so after 1960.[30] Taking just the seven years from 1986 to 1993, there were no fewer than fifty-two amendments to state declarations of rights alone.[31]

Given the length and detail of the American state constitutions, it should hardly be surprising that they have come to have significant bearing on modern debates over tort reform. Beginning in the mid-1970s, liability insurers, product manufacturers, and other repeat-play tort defendants began a concerted effort to enact laws that would limit tort liability that they contended had run amok.[32] Typical tort reform legislation included statutory

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23. TARR, *supra* note 15, at 2.

24. *Id.* at 10.

25. *Id.* at 24.

26. *Id.* at 25.

27. Alan Tarr, *State Constitutional Politics: An Historical Perspective*, *in* CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 3, 3 (G. Alan Tarr ed., 1996).

28. *See generally* James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819 (1991) (explaining the "dynamism of the state constitutional tradition before 1920").

29. *See* TARR, *supra* note 15, at 137 tbl.5.1.

30. *See id.*

31. *Id.* at 13.

32. *See* MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES 787 (7th ed. 2001).

limitations on punitive damages awards (twenty-five states) and statutory caps on damages for pain and suffering (twenty-three states).[33] Other reforms included limitations on plaintiffs' attorneys' fees; statutes of repose that protect products manufacturers and other potential defendants from suits for injuries caused by older products;[34] and limitations on the common law joint-and-several liability rule, which often allowed a plaintiff to recover the full extent of her damages from any one defendant.[35] In all, some forty-eight state legislatures enacted tort reform legislation of one sort or another.[36]

Even as state tort reform efforts picked up, however, a parallel development got underway in state constitutional law. Plaintiffs responded to state tort reform by contending (among other things) that statutes that capped punitive damages, limited pain and suffering damages, and imposed new limitations periods on tort suits violated provisions in state constitutions.[37] As a result, for almost two decades now state courts have been asked to decidewhether certain reforms in the law of torts are within the power of the legislature of their state.[38] The results of such constitutional challenges to tort reform statutes have been mixed. Between 1983 and 2001, courts upheld challenges to tort reform legislation in at least 139 cases.[39] And yet during the same time period, courts have struck down tort reform statutes as violations of state constitutions in at least eighty-three cases.[40]

Not surprisingly, these cases have generated considerable attention: praise from plaintiffs' advocates and bitter opposition from defendants' interests. And yet what neither side has realized is just how deeply such cases run in the history of American law.

II. THE WRONGFUL DEATH STATUTES

For much of the first century of tort reform in Congress and in American state legislatures, tort reform meant legislation that expanded liability rather than contracted it. The first examples of this liability-expanding reform were

33. *Id.* at 788.
34. *Id.*
35. *Id.*
36. *Id.*
37. *See* Schwartz & Lorber, *supra* note 1, at 928-30.
38. *Id.* at 913.
39. *See id.* app. 2, at 952-76.
40. *See id.* app. 1, at 939-51.

wrongful death statutes enacted beginning in 1847.[41] At common law, tort actions were often said to expire with the plaintiff; a victim's estate had no survival action against a tortfeasor, nor did the victim's dependents have a wrongful death action against the tortfeasor.[42] After Lord Campbell's Act authorized actions for wrongful death by dependents in Great Britain in 1846, American states quickly followed,[43] enacting statutes that typically provided for the recovery of damages in cases of death "caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages."[44] The result was a dramatic expansion in tort liability and a significant redistribution of entitlements from tortfeasors to the families of victims. Where once damages had been generally unavailable in death cases, now tortfeasors confronted the prospect of significant damages.

And yet what is remarkable about the wrongful death statutes is how little constitutional litigation they generated. As the leading nineteenth-century authority on wrongful death observed, "[t]he constitutionality of the various acts which give a remedy in case of death has rarely been questioned."[45] There are therefore virtually no reported mid-nineteenth-century cases recording arguments by defendants that the wrongful death statutes impermissibly reallocated rights from defendants to plaintiffs; the one reported case indicating that such an argument had been made gave the argument such short shrift that defendants no doubt shrank from making it again.[46] At least in part, this may have been because most state wrongful

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41. *See* John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 LAW & SOC. INQUIRY 717, 734 (2000).

42. *See* Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1044 (1965). Several American jurisdictions allowed death actions prior to the enactment of wrongful death legislation. Nonetheless, state wrongful death legislation was generally understood as substituting rather than supplementing the common law actions. *See* Witt, *supra* note 41, at 732-33, 740.

43. Witt, *supra* note 41, at 734-35.

44. *Id.* at 734 n.45 (quoting Act of Dec. 13, 1847, ch. 450, § 1, 1847 N.Y. Laws 575).

45. FRANCIS B. TIFFANY, DEATH BY WRONGFUL ACT: A TREATISE ON THE LAW PECULIAR TO ACTIONS FOR INJURIES RESULTING IN DEATH § 31, at 28 (1893).

46. *See* Sw. R.R. v. Paulk, 24 Ga. 356, 363 (1858). The Georgia Supreme Court responded to the defendant's constitutional argument as follows:

> As to the constitutional competency of the legislature to pass the act, there cannot be a shadow of doubt: neither a corporation nor a citizen can have a vested right to do wrong; to take human life intentionally or negligently. To prevent so serious an evil,

death legislation was general in its application, applying across the board to all tort defendants rather than singling out some class of defendants. But even legislation in the New England states in the 1850s that authorized wrongful death actions only against common carriers produced no reported mid-century cases on the question whether such statutes impermissibly singled out some class of actors for special burdens.[47]

Regular constitutional challenges to state tort legislation began to appear only after the Civil War in the mid 1870s. In the wrongful death cases, for example, the Georgia Supreme Court in 1874 upheld the constitutionality of the wrongful death provisions of the state's employers' liability law against a challenge that it impermissibly singled out railroads by applying only to railroad employees.[48] More typical of late nineteenth-century constitutional cases involving wrongful death were challenges to damages provisions. At least one wrongful death statute—the statute in Missouri—opted not for a cap on damages but for a mandatory damages figure of $5000 in death cases.[49] Missouri courts upheld the mandatory damages provision in 1885

> the General Assembly may compel the wrong-doer, whether private or corporate, to make pecuniary compensation. The act is general; applicable alike to all, and making no odious discriminations against railroads. The legislature might make a reckless destruction of life like this a capital felony on the part of the employees of the road, if it be not one already. And for myself I believe it would, as a preventive, be better to do this than to treat human life as stock, to be paid for in money.

Id.

47. *See, e.g.*, Law of July 1, 1853, ch. 74, § 8, 1853 Conn. Pub. Acts 132, 135; Law of March 16, 1855, ch. 161, 1855 Me. Acts 159, 160; Law of July 13, 1850, ch. 953, § 7, 1850 N.H. Laws 925, 928; Law of January, 1855, § 8, 1855 R.I. Acts 13, 15; *see also* Law of March 23, 1840, ch. 80, 1840 Mass. Acts 224 (creating a quasi-criminal liability in cases of passengers killed by the negligence or carelessness of common carriers).

48. Ga. R.R. & Banking Co. v. Oaks, 52 Ga. 410, 414 (1874); *see also* Pensacola Elec. Co. v. Soderlind, 53 So. 722, 723 (Fla. 1910) (declining to reach the issue of the constitutionality of a statute that excluded individuals, but not corporations, from negligence which caused the wrongful death of child because the claim could be decided on other grounds); Mobile, Jackson & Kan. City R.R. Co. v. Hicks, 46 So. 360, 364-65 (Miss. 1908) (upholding statute that extended liability only to railroad corporations because of the inherent danger present in railroad work), *aff'd sub nom.* Mobile, Jackson & Kan. City R.R. Co. v. Turnipseed, 219 U.S. 35 (1910). *But see* Ballard v. Miss. Cotton Oil Co., 34 So. 533, 582 (Miss. 1903) ("[T]he act . . . violates the [F]ourteenth [A]mendment of the Constitution . . . in that it imposes restrictions upon all corporations, without reference to any difference arising out of the natures of their businesses, which are not imposed upon natural persons, and thus denies to corporations the equal protection of the law.").

49. *See* Carroll v. Mo. Pac. Ry. Co., 88 Mo. 239, 242-43 (1885) (discussing the Missouri wrongful death statute).

against constitutional challenges under state and federal jury trial and due process guarantees.[50] More typically, however, mid-century wrongful death legislation authorized the recovery only of "pecuniary damages" and often set caps on those pecuniary damages, usually at $3000 or $5000.[51] The interplay between these statutory provisions and state constitutional provisions relating to damages recoverable in tort produced a number of relatively minor, though locally significant, cases throughout the end of the nineteenth and beginning of the twentieth centuries.[52]

What is most significant about the late nineteenth-century constitutional law of wrongful death, however, is not so much the constitutional decisions of state courts but rather the enactment of new state constitutional provisions expressly addressing torts issues. In particular, democratic dissatisfaction with statutory caps on damages in death cases produced a wave of state constitutional provisions and amendments. State courts, after all, are not the only makers of state constitutional law. The people of a state have the opportunity to amend and redraft their constitutions, and in the late nineteenth-century a number of states did just that to abolish and prohibit statutory limits on the damages recoverable in death cases. Pennsylvania led the way here, providing in its constitution of 1874 that the General Assembly could not "limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property."[53] That same year, Arkansas adopted a similar bar on statutory limits on recoveries in cases of fatal and nonfatal injuries.[54] Wyoming, 1890,[55] Kentucky, in 1891,[56] and Arizona, in 1910,[57] followed. Oklahoma made the availability of wrongful death actions in cases

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50. *Id.* at 246-47.

51. States with damages caps under their wrongful death statutes included Colorado, Connecticut, Illinois, Maine, Massachusetts, Minnesota, Missouri, Nebraska, New York, Oregon, Wisconsin, and Wyoming. By the 1890s, caps in the District of Columbia, Indiana, Kansas, New Hampshire, Ohio, Oklahoma, Utah, Virginia, and West Virginia had been lifted to between $7000 and $20,000. TIFFANY, *supra* note 45, at 175-76.

52. *See, e.g.*, Louisville & N.R. Co. v. Lansford, 102 F. 62, 63-66 (5th Cir. 1900); Richmond & Danville R.R. Co. v. Freeman, 11 So. 800, 802-03 (Ala. 1892); Wright v. Woods' Adm'r, 27 S.W. 979, 980-81 (Ky. 1894); Hull v. Seaboard Air Line Ry., 57 S.E. 28, 29 (S.C. 1907); March v. Walker, 48 Tex. 372, 374-75 (1877).

53. PA. CONST. art.III, § 18.

54. *See* ARK. CONST. art. 5, § 32.

55. *See* WYO. CONST. art. 10, § 4.

56. *See* KY. CONST. § 54. Kentucky's 1891 constitution also constitutionalized the theretofore statutory wrongful death cause of action. *See id.* § 241.

57. *See* ARIZ. CONST. art. II, § 31.

for which a plaintiff could have recovered "had death not occurred" part of its constitution in 1907.[58] And New York, in 1894,[59] Utah, in 1896,[60] and Ohio, in 1912[61] prohibited statutory damages maxima in death cases. Indeed, late nineteenth and early twentieth-century state constitution-makers included an array of specific tort law provisions in their constitutions. Texas's 1876 constitution provided that those who committed homicide by willful act or gross neglect were liable for exemplary damages to the decedent's survivors.[62] Colorado's 1876 constitution barred employers from requiring their employees to waive their tort rights against the employer as a condition of employment.[63] Wyoming's 1890 constitution did the same,[64] and also provided for tort actions on behalf of miners injured or killed because of the violation of the constitution's rules regarding mines and mining.[65] Mississippi's infamous 1890 Jim Crow constitution mandated exceptions to employers' common law defenses in employers' liability cases, established the availability of wrongful death actions, and prohibited waivers of tort liability as a condition of employment.[66] Oklahoma's 1907 constitution provided that the defenses of contributory negligence and assumption of the risk were "in all cases whatsoever" a "question of fact" and therefore "at all times" to be "left to the jury."[67]

This is not to say that there were no further constitutional challenges in the courts to the wrongful death statutes around the turn of the twentieth-century. Defendants and plaintiffs alike lodged a variety of miscellaneous challenges against, for example, state statutes that authorized wrongful death actions only by resident administrators of the decedent's estate[68] or distinguished between injuries to citizens of the state and non-citizens of the

58. OKLA. CONST. art. IX, § 36.
59. *See* N.Y. CONST. of 1894, art. I, § 18.
60. *See* UTAH CONST. art. XVI, § 5.
61. *See* OHIO CONST. art. I, § 19a.
62. TEX. CONST. art. XVI, § 26.
63. COLO. CONST. art. XV, § 15.
64. WYO. CONST. art. XIX, § 7.
65. *Id.* art. IX, § 4.
66. MISS. CONST. art. VII, § 193.
67. OKLA. CONST. art. XXIII, § 6.
68. *See, e.g.*, Maysville St. R.R. & Transfer Co. v. Marvin, 59 F. 91, 96 (6th Cir. 1893) (upholding a Kentucky statute authorizing wrongful death actions only by resident administrators).

state;[69] state statutes that were said to impinge on Congress's authority to regulate interstate commerce;[70] and state statutes that impermissibly failed to express their purpose in their title.[71] When Missouri's legislature eliminated the mandatory damages provision of its early wrongful death scheme and conferred on juries the discretion to award damages ranging from $2000 to $10,000 in death cases, defendants unsuccessfully challenged the legislation as an abdication of the legislature's responsibility to fix penalties.[72] Constitutional challenges to nineteenth-century tort reform have even continued into our own time. Many state wrongful death statutes, for example, provided greater benefits to widows than to widowers until 1980, when the United States Supreme Court ruled that such gendered asymmetries discriminated unconstitutionally on the basis of sex.[73]

But what the wrongful death statutes suggested was that when the people of a state sought to enshrine in their constitution some rule to limit the legislature's authority over the law of torts, they were capable of doing so quite expressly. Indeed, the Pennsylvania Constitution of 1874 suggested a remarkably sophisticated and highly promising approach to the state constitutional law of torts. In addition to prohibiting limits on the amount recoverable in death cases, the 1874 constitution also prohibited the General Assembly from setting different statute of limitation periods for suits "brought against corporations," on one hand, and brought "against natural persons," on the other.[74] The concern, evidently, was either the possibility that powerful corporations might capture the Assembly to advance their own interests, or that popular anti-corporation ideas would lead to discrimination

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69. *See, e.g.*, Chambers v. Balt. & Ohio R.R., 207 U.S. 142, 151 (1907) (upholding an Ohio wrongful death provision distinguishing between state resident decedents and non-state resident decedents on the ground that the provision did not distinguish between citizen and non-citizen parties), *aff'g on other grounds* 76 N.E. 91 (Ohio 1905) (holding that the Ohio wrongful death provision did not violate the Privileges and Immunities Clause of the U.S. Constitution, because the constitutional provision "applies to fundamental and universal rights, not to special privileges"); Schell v. Youngstown Iron Sheet & Tube Co., 16 Ohio Cir. Dec. 209, 218-19 (1904) (interpreting the Ohio wrongful death provision so as to avoid conflict with the Privileges and Immunities Clause of the U.S. Constitution).

70. *See* S. Ry. v. King, 217 U.S. 524, 525 (1910), *aff'g* 160 F. 332 (5th Cir. 1908).

71. *See* Croft v. S. Cotton Oil Co., 65 S.E. 216, 217 (1909).

72. Young v. St. Louis, Iron Mountain Co., & S. Ry., 127 S.W. 19, 20-21 (Mo. 1910), *overruled by* Boyd v. Mo. Pac. Ry. Co., 155 S.W. 13 (Mo. 1913).

73. *See* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 149, 152-54 (1980) (striking down disparity in workers' compensation statute that made it more difficult for widowers to claim benefits than for widows).

74. PA. CONST. art. III, § 21.

against the use of a legal form (the corporation) that the constitution-drafters wanted to encourage. To counter these prospects, state constitution-makers were able to craft specific and express provisions. There would be no need for courts in Pennsylvania or elsewhere to resort to vague and open-ended clauses in the constitution in order to determine whether a damages cap for wrongful death cases was constitutional,[75] or whether a distinct limitations period—especially for railroad injuries—was permissible; for the drafters of late nineteenth-century constitutions such as Pennsylvania's had specified with precision the limits on the legislature in the torts area.

III. NINETEENTH-CENTURY RAILROAD LIABILITY LEGISLATION

Judicial review of reform legislation became increasingly significant at the end of the nineteenth-century, and tort lawyers quickly learned to make constitutional challenges to legislation part of their litigation strategies.[76]

In the area of tort reform, two kinds of legislation took center stage in the drama of constitutional review: legislation regarding railroad injuries and legislation amending the law of employers' liability. In a number of these cases, courts disregarded the lesson of the state constitutional provisions regarding wrongful death by striking down reform legislation under vague and open-ended constitutional provisions.[77] But most courts resisted this temptation, upholding the overwhelming majority of challenged tort reform statutes.[78] In doing so, however, during the half-century following the end of the Civil War, the railroad injury cases in particular became a forum in which courts articulated an important principle of American constitutional law.[79] Legislatures were generally free, these courts said, to allocate and

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75. *See* Palmer v. Phila., Balt. & Wash. R.R. Co., 66 A. 1127, 1129-30 (Pa. 1907) (upholding statutory rule barring recovery of punitive damages by plaintiffs in wrongful death actions notwithstanding constitutional provision barring legislated limits on damages in death cases); Pa. R.R. Co. v. Bowers, 16 A. 836, 837-38 (Pa. 1889) (striking down a statutory damages cap of $5000 under the constitutional provision barring legislated limits on damages in death cases); Utah Sav. & Trust Co. v. Diamond Coal & Coke Co., 73 P. 524, 526 (Utah 1903) (striking down statutory damages cap of $5000 under Wyoming law).

76. *See* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 37-58 (1991). *See generally* Melvin I. Urofsky, *State Courts and Protective Legislation During the Progressive Era: A Reevaluation*, 72 J. AM. HIST. 63 (1985) (examining state legislation during the Progressive Era).

77. *See infra* text accompanying notes 144-54.

78. *See infra* text accompanying notes 139-43.

79. *See infra* Part III.A.

reallocate the risk of accidents on railroads and in employment, but they could only allocate the costs of accidents among parties who were causally related to the accident.[80] Tort reform, in other words, could not constitutionally become a vehicle for the redistribution of property from those outside the causal chain leading up to an injury to those inside the chain. The way courts policed this line was to require that legislatures not allocate accident costs to parties who lacked a causal relationship to the costs in question.[81]

A. Railroad Liability Legislation and the Constitutional Causation Requirement

The first line of railroad injury cases arose out of statutes making railroads strictly liable, regardless of negligence, for any injury done to buildings or other property of others by fire communicated by sparks from railroad engines. Massachusetts enacted the first such spark fire statute in 1840.[82] Similar statutes followed quickly in Maine and New Hampshire,[83] and over the course of the next several decades, legislatures across the country enacted legislation substantially reproducing the original 1840 Massachusetts legislation.[84] Railroads, however, claimed that legislation

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80. *See infra* Part III.A.

81. *See infra* text accompanying notes 111-38.

82. MASS. GEN. LAWS ch. 85, § 1 (1840); *see also* Lyman v. Boston & Worcester R.R. Corp., 58 Mass. (4 Cush.) 288, 291 (1849) ("We consider this provision of the statute of 1840 . . . as one of those general remedial acts passed for the more effectual protection of property, against the hazards to which it has become subject by the introduction of the locomotive engine."). The strict liability approach was only one approach to the general problem. In 1837, Massachusetts enacted legislation making railroads liable for injuries to buildings or other property "unless the said corporation shall show that they [sic] have used all due caution and diligence." 1837 Mass. Acts 256. Vermont enacted similar legislation a few years later. *See* R.R. Co. v. Richardson, 91 U.S. 454, 456, 472 (1875). In Connecticut, the legislature made communication of a fire from a railway locomotive prima facie evidence of negligence. *See* 1840 Conn. Pub. Acts 32.

83. *See* Chapman v. Atl. & St. Lawrence Rail Rd. Co., 37 Me. 92 (1854); Hooksett v. Concord R.R., 38 N.H. 242 (1859).

84. *See, e.g.*, Act of Apr. 2, 1907, act 141, 1907 Ark. Acts 336, 336 ("[A]ll corporations . . . engaged in operating any railroad . . . shall be liable for the destruction of . . . any property . . . which may be caused by fire, or result from any locomotive, engine, machinery, train, car, or other thing . . . ."); Act of Apr. 12, 1881, ch. 92, 1881 Conn. Pub. Acts 48, 48-49 ("Where any injury is done to . . . property of any person or corporation, by fire communicated by a locomotive engine of any railroad corporation . . . the said railroad corporation shall be held

making them strictly liable for damages caused by fire communicated from railroad locomotives, even where the railroad had exercised all due care to prevent such damages, constituted a taking without compensation and without a public purpose.[85] Damages payments from railroads to property owners in such cases were, they argued, the kind of illegitimate redistributive transfers of property from *A* to *B* that had been proscribed going as far back as Justice Samuel Chase's opinion in the 1798 case of *Calder v. Bull*.[86]

Railroads pursued this contention in litigation from the mid-nineteenth-century on into the early twentieth-century, yet the railroads lost their constitutional claims in every case.[87] As the Iowa Supreme Court explained in 1875, legislation making a railroad strictly liable for property damages in fires communicated from the railroad's locomotive simply made a choice as between two available and equally appropriate applications of the common law principle *sic utere tuo ut alienum non laedas*: use your own property so

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responsible in damages to the extent of such injury . . . ."); Act of Mar. 3, 1911, ch. 107, 1911 Ind. Acts 186-87 ("[E]ach railroad corporation . . . shall be responsible in damage [for] property . . . injured or destroyed by fire communicated directly or indirectly by locomotive engines . . . ."); IOWA CODE § 1289 (1873) ("[A]ny corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway . . . ."); 1887 Mo. Laws 101 ("Each railroad . . . shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated . . . by locomotive engines.); S.C. CODE § 2135 (1902) ("Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines . . . ."); Act of Feb. 25, 1907, ch. 215, 1907 S.D. Sess. Laws 448 ("Each railroad corporation . . . shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon the railroad . . . .").

85. *See, e.g.*, Grissell v. Housatonic R.R. Co., 9 A. 137, 138 (Conn. 1886); Pittsburgh, Cincinnati, Chi. & St. Louis Ry. Co. v. Home Ins. Co., 108 N.E. 525, 527 (Ind. 1915), *superseded by statute*, Act of Mar. 11, 1986, 1986 Ind. Acts 1959 (repealed 1998), *as recognized in* Shirley v. Russell, 663 N.E.2d 532 (Ind. 1996); Pittsburgh, Cincinnati, Chi. & St. Louis Ry. Co. v. Chappell, 106 N.E. 403, 405 (Ind. 1914); Rodemacher v. Milwaukee & St. Paul Ry. Co., 41 Iowa 297, 306 (1875).

86. 3 U.S. (3 Dall.) 386, 388 (1798).

87. *See, e.g.*, St. Louis & S.F. Ry. Co. v. Mathews, 165 U.S. 1, 26-27 (1897); St. Louis & S.F. Ry. Co. v. Shore, 117 S.W. 515, 516-17 (Ark. 1909); *Grissell*, 9 A. at 138-40; *Home Ins. Co.*, 108 N.E. at 527; *Chappell*, 106 N.E. at 405; *Rodemacher*, 41 Iowa at 310; Brown v. Carolina Midland Ry., 46 S.E. 283, 286-87 (S.C. 1903); Jensen v. S.D. Cent. Ry. Co., 127 N.W. 650, 651 (S.D. 1910); *c.f.* Lyman v. Boston & Worcester R.R., 58 Mass. (4 Cush.) 288, 290-91 (1849) (upholding judgment for the plaintiff in an action under a strict liability fire statute without reaching constitutional question).

as not to injure that of others.[88] Such statutes "simply recognize[d] . . . that sometimes, notwithstanding the exercise of the highest care and diligence, [a railroad locomotive] will emit sparks and cause destructive conflagrations."[89] "[W]hen this occurs loss must fall upon one of two innocent parties," and though at common law "that loss has been borne by the owner of the property injured," the legislature was free to prescribe that "hereafter it shall be borne by the owner of the property causing the injury."[90] As the courts recognized, nineteenth-century tort law had struggled to allocate the costs of accidents as between nonnegligent injurers and faultless victims.[91] In the fire statute cases, courts simply upheld legislative adoptions of the strict liability approach over the negligence approach.[92] Such statutes, the Connecticut Supreme Court reasoned in 1886, represented merely "a new application" of the common law principle that as between two innocent parties, it was permissible to place the loss "on the one who caused the loss."[93]

The spark fire statutes were ultimately upheld by the United States Supreme Court in *St. Louis & San Francisco Railway Co. v. Mathews*.[94] Like state courts in Iowa, Connecticut, and elsewhere before it, the U.S. Supreme Court upheld the strict fire liability statute at issue in the case.[95] In an opinion by Justice Horace Gray, the Court described the statutes as raising a deep problem for tort law: how to allocate accident costs as between equally faultless actors.[96] "[R]educed to its last analysis," the argument of the railways was that the state had "authorized" them to propel railroad cars by steam and fire, and that as they were therefore "pursuing a lawful business, they [we]re only liable for negligence in its operation."[97] But as Justice Gray observed, precisely the same arguments were available to the other side: "To this the citizen answers: 'I also own my land lawfully. I have the right to grow my crops and erect buildings on it, at any place I choose. I did not set

88. *See Rodemacher*, 41 Iowa at 305.

89. *Id.* at 309.

90. *Id.*

91. *See* WITT, *supra* note 14, at 43-70; *see also* Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 1033-34 (recognizing "vast spheres" in tort law pertaining to such recovery).

92. *See, e.g.*, cases cited *supra* note 87.

93. Grissell v. Housatonic R.R. Co., 9 A. 137, 139 (Conn. 1886).

94. 165 U.S. 1 (1897).

95. *Id.* at 27.

96. *See id.* at 26-27.

97. *Id.* at 19.

in motion any dangerous machinery.'"[98] In fact, Justice Gray continued, the plaintiff landowner had just as powerful a takings argument as the railroad: "[T]he State, which owes me protection to my property from others, has chartered an agency which, be it ever so careful and cautious and prudent, inevitably destroys my property, and yet denies me all redress. The State has no right to take or damage my property without just compensation."[99] Yet to allow the state to impose the costs of such fires on the landowner would be to allow the state to do "indirectly, through the charters granted to railroads"[100] "what the State cannot do directly."[101] In such cases, he ruled, "it is perfectly competent for the State to require the company" that set the fire to pay the ensuing damages.[102] Justice Gray's approach was unanimously adopted by state courts; by 1914 and 1915, courts remarked on the "harmonious concurrence"[103] of authority with which the fire statutes had been "uniformly sustained."[104]

At the heart of the fire statute cases lay the intuition that the railroads were best understood as the causes of the injuries in question. As a matter of logic, of course, late nineteenth-century railroad fire cases presented a range of causal stories.[105] The neighboring property owners who suffered fire damage, after all, were also necessarily but-for causes of the injuries in question themselves. In many cases, neighboring property owners had engaged in behavior that contributed significantly to their own injuries: building structures near the tracks,[106] allowing the accumulation of flammable debris,[107] or (in the most famous example) storing flammable flax

98. *Id.*

99. *Id.* (internal quotation marks omitted).

100. *Id.* at 20.

101. *Id.* at 19.

102. *Id.*

103. Pittsburgh, Cincinnati, Chi. & St. Louis Ry. Co. v. Home Ins. Co., 108 N.E. 525, 527 (Ind. 1915), *superseded by statute*, Act of Mar. 11, 1986, 1986 Ind. Acts 1959 (repealed 1998), *as recognized in* Shirley v. Russell, 663 N.E.2d 532 (Ind. 1996).

104. Pittsburgh, Cincinnati, Chi. & St. Louis Ry. Co. v. Chappell, 106 N.E. 403, 405 (Ind. 1914).

105. *See, e.g.*, Rodemacher v. Milwaukee & St. Paul Ry. Co., 41 Iowa 297, 298 (1875) (alleging a spark ignited dry and dead grass); Lyman v. Boston & Worcester R.R., 58 Mass. (4 Cush.) 288, 290-91 (1849) (alleging a spark ignited a building); Grissell v. Housatonic R.R. Co., 9 A. 137, 138-40 (Conn. 1886) (alleging a spark ignited fences and nearby herbage).

106. *See, e.g.*, Brown v. Carolina Midland Ry. Co., 46 S.E. 283, 284 (plaintiff property owners' buildings five to six feet from tracks).

107. *See, e.g.*, *Rodemacher*, 41 Iowa at 297 (accumulation of dry, dead grass and weeds).

close to the tracks.[108] Yet the fire statute cases held that although causation questions in railroad fire cases were often vexed, legislatures could reasonably describe railroads as the causes of the injuries, even if only in the aggregate.[109] It was thus the railroads to whom legislatures in the spark fire statutes assigned causal responsibility; they—not the property owners—"set in motion," as Justice Gray put it, the "dangerous machinery" of the railway locomotive.[110]

The constitutional principle that emerged from the spark fire cases was what we might call a kind of constitutional causation requirement. Legislatures were generally vested with the discretion to allocate the costs of accidents among the causally related parties.[111] But courts made clear that allocating accident costs without regard to causation ran afoul of constitutional limits on the redistribution of property.[112] Liability without causation, in short, was what early twenty-first-century lawyers would call a taking. Illinois, for example, had in 1855 enacted a statute making railroad companies liable for the expenses of coroners' inquests and burials for "all persons who may die on the cars, or who may be killed by collision, or other accident occurring to such cars, or otherwise."[113] In *Ohio & Mississippi Railway Co. v. Lackey*, the Illinois Supreme Court struck down the statute as an impermissible attempt to reallocate costs "no matter how caused, even if by the [decedent's] own hand."[114] The Illinois statute, in other words, made railroads liable even in cases in which the death would have happened whether the decedent was a railroad passenger or not. The Illinois statute was thus a statute providing for liability without causation. As a result, where the decedent was a person of means, the statute effectively reallocated costs to the railroads that properly lay with the estate of the decedent.[115] Where the decedent was poor, the statute placed on the railroads costs that were

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108. *See* LeRoy Fibre Co. v. Chi., Milwaukee & St. Paul Ry., 232 U.S. 340, 353 (1914); *see also* Mark F. Grady, *Common Law Control of Strategic Behavior: Railroad Sparks and the Farmer*, 17 J. LEGAL STUD. 15, 30-31 (1988) (discussing *LeRoy* case); Victor P. Goldberg, The Coase Theorem and Some Puzzles on the Tort/Contract Boundary 1-4 (Mar. 28, 2002) (unpublished manuscript, on file with author).

109. *See supra* notes 87-93 and accompanying text.

110. St. Louis & S.F. Ry. Co. v. Mathews, 165 U.S. 1, 19 (1897).

111. *See supra* notes 94-110 and accompanying text.

112. *See infra* note 115 and accompanying text.

113. *See* Ohio & Miss. Ry. Co. v. Lackey, 78 Ill. 55, 56 (1875) (internal quotation marks omitted) (quoting 1855 Ill. Laws 170).

114. *Id.* at 57.

115. *Id.*

"properly a public burden . . . which should be borne by all alike, and discharged out of public funds raised by equal and uniform taxation." [116] The Illinois statute, in other words, created an unconstitutional class transfer of resources from railroads to wealthy railroad passengers, or alternatively (and for the court more troubling) a transfer of resources from the railroads to the public at large.[117]

The *Lackey* case quickly became a prominent citation in the second important series of late nineteenth-century constitutional tort reform decisions. Unlike the decisions upholding spark fire statutes, however, this second strand of decisions struck down statutes making railroad corporations liable for injuries to animals run over by corporations' engines or cars.[118] The difficulty with these stock statutes, and the key distinction between the stock statutes and the fire statutes, was that the stock statutes sought to charge railroads with liability in cases in which questions of causation were perceived as considerably more difficult than in the fire cases. In Washington State, the supreme court complained that the state's statute would charge a railroad with liability even where "the owners of animals, hitched to a vehicle, with gross negligence drove them along a highway in front of a passing train."[119] In Colorado, courts observed that railroad company defendants were "precluded from showing the contributory negligence, or even design, of a plaintiff in causing the injury"; indeed, the Colorado statute failed to relieve railroads of liability when the owner engaged in "wanton and intentional acts in subjecting his animals to injury or destruction."[120] And in Montana, the state supreme court, quoting *Lackey*, held that the legislature could not constitutionally impose costs on a railroad that the railroad had not caused.[121]

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116. *Id.* at 57-58.

117. *See id.* at 57.

118. *See* Zeigler v. S. & N. Ala. R.R. Co., 58 Ala. 594, 599 (1877); Wadsworth v. Union Pac. Ry. Co., 33 P. 515, 520 (Colo. 1893); Denver & Rio Grande Ry. Co. v. Outcalt, 31 P. 177, 180 (Colo. App. 1892); Cottrel v. Union Pac. Ry. Co., 21 P. 416, 417 (Idaho 1889); Bielenberg v. Mont. Union Ry. Co., 20 P. 314, 316 (Mont. 1889); Atchison & Neb. R.R. Co. v. Baty, 6 Neb. 37, 47 (1877), *overruled in part by* Graham v. Kibble, 2 N.W. 455 (Neb. 1879); Jensen v. Union Pac. Ry. Co., 21 P. 994, 996 (Utah 1889); Or. Ry. & Nav. Co. v. Smalley, 23 P. 1008, 1009 (Wash. 1890); Schenck v. Union Pac. Ry. Co., 40 P. 840, 840 (Wyo. 1895).

119. *Smalley*, 23 P. at 1009.

120. *Outcalt*, 31 P. at 180.

121. *Bielenberg*, 20 P. at 315.

For state supreme courts, the stock statutes raised important questions as to "individual rights of property" and the extent of "legislative power over such property," including "whether the title to the same can be divested without the assent of the owner."[122] As a result, state courts uniformly decided that the stock statutes were unconstitutional.[123] To be sure, they conceded that owners of private property held such property "under the implied liability that . . . use of it shall not be injurious to others";[124] this was the lesson of *sic utere* taught by the spark fire statute cases.[125] Moreover, legislatures could effectively accomplish the same end by imposing a duty to fence in the railroad and then making the railroad liable for injuries caused by the railroad's failure to fence; in such cases, the railroad's failure to satisfy a legal duty was the legal cause of the injury.[126] But absent causation to establish the injuriousness of a particular use of property, statutes making property owners liable for others' injuries violated the rule that "'private property cannot be taken for strictly private purposes at all, nor for public without compensation.'"[127] Such statutes presented "a case of great injustice"[128] and improperly took "from the defendant company the right of way over its track . . . confer[ring] it upon the cattle and horses of the

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122. *Baty*, 6 Neb. at 40.

123. *See* cases cited *supra* notes 119-22. A number of state courts in the South upheld the statutes by reinterpreting them as merely shifting the burden of proof on negligence to the railroads. *See, e.g.*, Mobile & Ohio R.R. Co. v. Williams, 53 Ala. 595, 598-99 (1875); Nashville & Chattanooga R.R. Co. v. Peacock, 25 Ala. 229, 231 (1854); Tilley v. St. Louis & S.F. Ry. Co., 6 S.W. 8, 10 (Ark. 1887); Little Rock & Fort Smith R.R. Co. v. Payne, 33 Ark. 816, 821-22 (1878); Macon & Augusta R.R. Co. v. Vaughn, 48 Ga. 464, 466 (1873).

124. *Baty*, 6 Neb. at 42.

125. *See supra* text accompanying note 88.

126. *See, e.g.*, Indianapolis & Cincinnati R.R. Co. v. Kercheval, 16 Ind. 84, 84-87 (1861) (finding a railroad company liable for damages under an enactment that requires fencing); Gorman v. Pac. R.R., 26 Mo. 441, 452 (1858) (finding that, where a railroad company fails to comply with fencing requirements, "the liability to damages is imposed for not erecting the fence or cattle-guards; and howsoever great a degree of care may have been employed by the agents of the company, it will be no defence"); Thorpe v. Rutland & Burlington R.R. Co., 27 Vt. 140, 148-49 (1855) (finding that "a statute requiring division fences between adjoining land proprietors, to be built of a given height or quality, although differing from the former law, would bind natural persons and equally corporations").

127. *Baty*, 6 Neb. at 44 (quoting People v. Morris, 13 Wend. 325, 328 (N.Y. Sup. Ct. 1835)).

128. Bielenberg v. Mont. Union Ry. Co., 20 P. 314, 316 (Mont. 1889).

country."[129] The statutes, in other words, were instances of "class legislation," transferring the property of *A* to *B* without *A*'s consent.[130]

It should be clear in retrospect that courts decided the stock statute cases wrongly, at least with respect to the basic causation test. The stock statutes can reasonably be interpreted as legislative determinations that, in the aggregate, railroads tended to be the most useful causal forces to which to attribute in cattle deaths on the tracks, and that the administrative costs of exempting railroads in the exceptional cases outweighed the benefits of doing so. Moreover, under the stock statutes, railroad defendants' operations were necessary antecedents for any cattle death for which the railroads could be held liable. The stock statutes were therefore very different from the coroner's inquest and burial costs statute struck down in *Lackey*.

Yet notwithstanding that in practice many nineteenth-century courts seemed to apply it wrongly, the constitutional causation requirement in principle served to ensure that legislative allocations of accident costs were not merely naked transfers. The requirement played itself out in a variety of further tort reform cases in the late nineteenth-century. Courts upheld statutes that made railroads strictly liable for injuries to railroad passengers absent gross negligence by the passenger.[131] Under the "conditions which exist in and surround modern railroad transportation," Justice McKenna explained for the U.S. Supreme Court in the *Zernecke* case of 1902, railroads had vastly greater control over rail transportation than did passengers; in a world of imperfect fact-finding and fallible civil procedure, the strict liability statute fairly approximated cause-based liability and ensured that railroad liability would not be "avoided by excuses which do not exist, or the disproof of which might be impossible."[132] And in *Bertholf v. O'Reilly*,[133] decided by the New York Court of Appeals in 1878, landlord James O'Reilly appealed from a jury verdict awarding damages under the New York Civil Damages Act to the owner of a horse killed by the owner's drunken son.[134] O'Reilly contended that the statute, which made lessors of premises (who

129. Jensen v. Union Pac. Ry. Co., 21 P. 994, 996 (Utah 1889).

130. Denver & Rio Grande Ry. Co. v. Outcalt, 31 P. 177, 179 (Colo. App. 1892); *see also Baty*, 6 Neb. at 46 (noting how the statute in question applied only to one class of people, distinguishing between the rich and the poor).

131. *See, e.g.*, Chi., Rock Island, & Pac. Ry. Co. v. Zernecke, 183 U.S. 582, 588 (1902).

132. *Id.*

133. 74 N.Y. 509 (1878), *superseded by statute* Law of Apr. 4, 1963, ch. 576, § 11-101, *as recognized in* D'Amico v. Christie, 518 N.E.2d 887 (N.Y. 1987).

134. *Id.* at 511.

knew that intoxicating liquors were sold on the premises) liable for damages caused by a person intoxicated by liquors acquired on the premises, "invade[d] the legal protection guaranteed to every property owner, that his property shall not be taken against his will for private use."[135] The New York Court of Appeals, however, upheld the statute as satisfying the causation requirement inherent in the *sic utere* maxim: "We do not mean that the Legislature may impose upon one man liability for an injury suffered by another, with which he had no connection."[136] But here the legislature had merely allowed "a recovery to be had against those whose acts contributed, although remotely, to produce it."[137] The statute was therefore "an extension," albeit a far-reaching one, "of the principle expressed in the maxim, '*Sic utere tuo ut alienum non laedas.*'"[138]

B. Employers' Liability Legislation: The Vindication of Legislative Discretion

Constitutional decisions under the railroad liability statutes suggested the beginnings of a comprehensive theory of the constitutional law of torts. Absent some express constitutional provision such as a bar on legislative limits on damages, legislatures were generally free to allocate accident costs among the parties reasonably described as causing the accident in question, even where those parties were themselves without fault.

The wave of employers' liability legislation enacted in the second half of the nineteenth-century and into the first decade of the twentieth sorely tested the constitutional settlement that seemed to have been achieved in the railroad cases. Employers' liability legislation typically amended or abolished employers' defenses in tort cases brought by their employees. Statutes narrowed the fellow servant rule, which barred employees from recovering damages for injuries caused by the negligence of a coworker, by carving out exceptions for injuries caused by the negligence of a superior servant or by the negligence of an employee in a different department of the employer's operations.[139] Other statutes abolished the fellow servant rule

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135. *Id.* at 510.

136. *Id.* at 524.

137. *Id.*

138. *Id.*; *see supra* text accompanying note 88.

139. *See* Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, *in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL

altogether[140] or limited employers' abilities to defend themselves on the ground of the injured employee's assumption of the risk or contributory negligence.[141] In all, some twenty-five states had enacted employers' liability legislation by 1911,[142] and taking these employers' liability statutes together, it is fair to say that few other kinds of tort reform legislation before or since have generated as many constitutional challenges as the employers' liability laws. A review of the case law reveals well in excess of one hundred reported appellate cases. And yet for the most part, constitutional attacks on employers' liability legislation failed. Such legislation, courts held again and again, fell well within the legislature's discretion to make reasonable rules for the pursuit of the public welfare.[143]

There were, to be sure, important outlier opinions striking down employers' liability legislation. Employers' liability legislation which made employers liable for injuries to an employee caused by the negligence of a superior employee, for example, was struck down under state constitutions' equal protection clauses for impermissibly distinguishing among injured employees,[144] or for applying only to (and thus impermissibly discriminating against) some class of employers such as corporations[145] or common carriers.[146] Courts adopted similar equal protection rationales to strike down employers' liability legislation amending the law of assumption of risk for employees of corporations but not for employees of partnerships and natural persons.[147] Other courts struck down employers' liability laws or portions thereof under miscellaneous state constitutional provisions,[148] ranging from a

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PERSPECTIVES 269, 275 (Lawrence M. Friedman & Harry N. Scheiber eds., enlarged ed. 1998).

140. *See id.*

141. *E.g.*, Federal Employers' Liability Act, ch. 149, 35 Stat. 65 (1908).

142. Friedman & Ladinsky, *supra* note 139, at 275.

143. *E.g.*, Mo. Pac. Ry. Co. v. Mackey, 127 U.S. 205 (1888) (upholding state legislation altering the fellow servant rule).

144. *See* Kane v. Erie R.R. Co., 128 F. 474, 477 (N.D. Ohio 1904), *rev'd by* 133 F. 681 (6th Cir. 1904); Froelich v. Toledo & Ohio Cent. Ry., 13 Ohio Dec. 107, 114 (Ct. Com. Pl. 1902), *aff'd on other grounds by* 5 Ohio C.C. (n.s.) 6 (1903); Maltby v. Lake Shore & Mich. S. Ry., 13 Ohio Dec. 280, 283-84 (Ct. Com. Pl. 1902).

145. *See* Bedford Quarries Co. v. Bough, 80 N.E. 529, 534-35 (Ind. 1907).

146. *See* Chi., Milwaukee & St. Paul Ry. v. Westby, 178 F. 619, 631-32 (8th Cir. 1910).

147. *See* Ballard v. Miss. Cotton Oil Co., 34 So. 533, 557 (Miss. 1903).

148. *E.g.*, Atchison, Topeka & Santa Fe Ry. Co. v. Sowers, 99 S.W. 190, 192 (Tex. Civ. App. 1907) (striking down a provision in New Mexico territorial law purporting to prohibit suits outside the territorial courts for personal injuries received in the territory as in

ban on unfavorable treatment of in-state railroads,[149] to single-subject and clear-title requirements,[150] to procedural requirements relating to the keeping of the legislative journal,[151] to prohibitions on the delegation of legislative functions to state administrative agencies.[152] And in the same years, courts struggled with the constitutionality of legislation that made unenforceable the contractual waiver of employees' tort claims against their employers. Though ultimately most courts settled on the conclusion that such statutes were permissible,[153] a number of courts (especially in early cases) held otherwise.[154]

Yet cases in which courts upheld state constitutional challenges to statutory employers' liability law reform far predominated. Legislation singling out certain dangerous industries such as railroading for special employers' liability rules, for example, was consistently upheld against equal protection challenges on the ground that the legislature could reasonably

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violation of the Full Faith and Credit Clause of the U.S. Constitution), *aff'd by* 213 U.S. 55 (1909).

149. *See* Crisswell v. Mont. Cent. Ry. Co., 44 P. 525, 527-28 (Mont. 1896).

150. *See* Mitchell v. Colo. Milling & Elevator Co., 55 P. 736, 739 (Colo. Ct. App. 1898).

151. *See* Rio Grande Sampling Co. v. Catlin, 94 P. 323, 325-26 (Colo. 1907); *see also* Portland Gold Mining Co. v. Duke, 164 F. 180, 185-86 (8th Cir. 1908).

152. *See* Schaezlein v. Cabaniss, 67 P. 755 (Cal. 1902).

153. *See, e.g.*, Chi., Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 574 (1911) ("It was, however, entirely competent for the legislature in enacting the prohibition, for the purpose of securing the enforcement of the liability it had defined, to limit it to those cases in which the liability arose.").

154. *See, e.g.*, Shaver v. Pa. Co., 71 F. 931, 936-38 (N.D. Ohio 1896) (finding that an employee was bound by a contract that waived his rights, and legislation barring such contracts was unconstitutional); Hoxie v. N.Y., New Haven & Hartford R.R. Co., 73 A. 754, 761 (Conn. 1909) (upholding the rights of private contracts); Caldwell v. Balt. & Ohio Ry. Co., 14 Ohio Dec. 375, 381 (Ct. Com. Pl. 1904) (finding that an employee who "voluntarily made [a] contract with the company [is] bound by its terms"); Cox v. Pittsburgh, Cincinnati, Chi. & St. Louis Ry. Co., 2 Ohio Dec. 323, 325 (Ct. Com. Pl. 1895) (recognizing that "the state cannot interfere with the dealings and contracts of such companies with their employees . . . any further than it lawfully can with those of other employers of labor"); *see also* Charles W. McCurdy, *The "Liberty of Contract" Regime in American Law*, *in* THE STATE AND FREEDOM OF CONTRACT 161, 173-79 (Harry N. Scheiber ed., 1998) (discussing cases that upheld the right of private parties to contract freely); George E. Beers, *Contracts Exempting Employers from Liability for Negligence*, 7 YALE L.J. 352, 355-60 (1898) (discussing cases that upheld the rights of parties to contract individually).

distinguish between industries on the basis of their dangerousness.[155] Courts also rejected corporate defendants' arguments that legislatures were barred by state constitution contract clauses and analogous provisions from amending their charters by altering their liability for employee injuries.[156] And courts typically upheld statutory safety regulations that created causes

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155. *See, e.g.*, Minn. Iron Co. v. Kline, 199 U.S. 593, 597-98 (1905) (finding "no objection to legislation being confined to a peculiar and well-defined class of perils, and [that] it is not necessary that they should be perils which are shared by the public, if they concern the body of citizens engaged in a particular work"); Tullis v. Lake Erie & W. R.R. Co., 175 U.S. 348, 351 (1899) (upholding a statute that imposes liability on railroad companies for injuries to their employees on the job); Chi., Kan. & W. R.R. Co. v. Pontius, 157 U.S. 209, 211 (1895) (finding a railroad company liable for plaintiff's injury and noting that "although the plaintiff's general employment was that of a bridge carpenter, he was engaged at the time the accident occurred, not in building a bridge but in loading timbers on a car for transportation over the line of defendant's road"); Minneapolis & St. Louis Ry. Co. v. Herrick, 127 U.S. 210, 211 (1888) (upholding a law that imposed liability on railroads for "injuries to employes [sic] in its service, though caused by the negligence or incompetency of a fellow-servant"); Mo. Pac. Ry. Co. v. Mackey, 127 U.S. 205, 210 (1888) ("[T]he hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employes [sic] as well as the safety of the public."); Ga. R.R. v. Ivey, 73 Ga. 499, 501-04 (1884) (determining that railroad company was liable for death of employee caused by the negligence of other employees); Atchison, Topeka & Santa Fe R.R. v. Koehler, 15 P. 567, 571 (Kan. 1887) (rejecting railroad company's contention that liability statutes were invalid class legislation). The equal protection challenges to employers' liability statutes were by far the most common challenges. Courts' skepticism about the challenges' validity, however, did not mean that such challenges had no success at all. Courts upholding such statutes on the ground that the legislature could reasonably create special rules for dangerous industries often put teeth into their interpretations by construing the statutes to apply only to those industries as to which a legislative determination of dangerousness could be upheld. *See, e.g.*, Johnson v. St. Paul & Duluth R.R. Co., 45 N.W. 156, 157 (Minn. 1890) (construing state employers' liability statute to apply only for the benefit of those injured in the course of employment by those characteristic hazards of the industry that justified the legislature's discrimination). For a discussion on the abandonment of judicial policing of legislative dangerousness determinations in *Ward & Gow v. Krinsky*, 259 U.S. 503 (1922), see WITT, *supra* note 14, at 192-93.

156. *See* Ozan Lumber Co. v. Biddie, 113 S.W. 796, 798 (Ark. 1908); Dean v. Kan. City, St. Louis & Chi. R.R. Co., 97 S.W. 910, 911 (Mo. 1906); Tex. & New Orleans R.R. Co. v. Gross, 128 S.W. 1173, 1175-76 (Tex. Civ. App. 1910); Tex. & New Orleans R.R. Co. v. Miller, 128 S.W. 1165, 1171 (Tex. Civ. App. 1910).

of action for people injured because of an actor's failure to comply with the regulation.[157]

The employers' liability law cases made clear that as a matter of state and federal constitutional law, legislatures were generally free to amend the basic doctrines of the law of tort. Nothing in the common law of contributory negligence, fellow servants, or assumption of the risk made these doctrines constitutionally mandatory. In combination with the contemporaneous railroad liability cases arising under spark fire and stock injury statutes, the first generation of constitutional tort reform cases established that legislatures were free to amend liability rules articulated in common law tort doctrine, but could not use tort law to redistribute wealth from parties with no causal relationship to the injury.

It did not follow from this that within these bounds employers' liability legislation in the late nineteenth and early twentieth centuries was completely free from constitutional scrutiny. To be sure, within the scope of their authority, legislatures had wide discretion to amend the law of employers' liability. But the constitutional structure of American federalism placed limits on both the power of states to regulate interstate commerce and the power of Congress to regulate intrastate tort law. State employers' liability statutes generally survived constitutional review against challenges that they invaded the regulatory domain of the federal government.[158] But courts reacted differently when Congress enacted the Federal Employers' Liability Act ("FELA") in 1906, purporting to amend the law of employers' liability for injuries to "any" employee of a common carrier engaged in interstate commerce.[159] Some lower courts upheld the Act as within Congress's Commerce Clause powers,[160] but others ruled that Congress had exceeded its power.[161] And in 1908, the U.S. Supreme Court agreed with the

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157. *E.g.*, Mo., Kan. & Tex. Ry. Co. v. McDuffey, 109 S.W. 1104, 1108 (Tex. Civ. App. 1908).

158. *See* Mo., Kan. & Tex. Ry. Co. v. Nelson, 87 S.W. 706, 707 (Tex. Civ. App. 1905) (upholding a state employers' liability statute as it applied to an injured railroad employee in interstate commerce).

159. Ch. 3078, 34 Stat. 232 (1906).

160. *See, e.g.*, Snead v. Cent. of Ga. Ry. Co., 151 F. 608, 616-17 (C.C.S.D. Ga. 1907); Kelley v. Great N. Ry. Co., 152 F. 211, 238 (C.C.D. Minn. 1907); Plummer v. N. Pac. Ry. Co., 152 F. 206, 208-10 (C.C.W.D. Wash. 1907).

161. *See, e.g.*, Howard v. Ill. Cent. R.R., 148 F. 997, 1004 (C.C.W.D. Tenn. 1907), *aff'd by* 207 U.S. 463 (1908), *superseded by statute*, FELA, ch. 149, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51-60, *as recognized in* Rogers v. Consol. Rail Corp., 948 F.2d 858 (2d Cir. 1991).

latter approach, striking down the Act for impermissibly amending the law of railroad employers' liability to injured employees who were not themselves engaged in interstate commerce.[162]

The Court's 1908 decision produced a swift and heated political reaction. President Theodore Roosevelt reacted angrily, excoriating the Court for its opposition to what was in Roosevelt's view a salutary change in the law of torts given what had become a railroad employee accident crisis.[163] And within months, Congress had re-enacted the FELA to skirt the Court's review, making it applicable only to those employees of common carriers injured while themselves engaged in interstate commerce.[164] The FELA debate, however, was only the beginning of what would be almost a decade of heightened controversy about the role of constitutional law in the making of American tort law. For even more than the wrongful death and employers' liability statutes that preceded it, a new generation of work accident reform legislation promised not to amend but to wholly supersede the common law of employers' liability in tort.

IV. WORKMEN'S COMPENSATION

The enactment of workmen's compensation legislation occasioned one of the nation's great battles over judicial review of reform legislation. As we have seen, the enactment of nineteenth-century tort reform legislation led to relatively few cases striking down legislation. But the enactment beginning in 1910 of workmen's compensation legislation (as today's gender-neutral workers' compensation statutes were then known) led several of the nation's courts to strike down the new compensation programs.[165] The result was a political crisis for some of the nation's leading state courts, the New York Court of Appeals chief among them.[166]

In one sense, it is perhaps surprising that workmen's compensation statutes produced such constitutional struggles in the 1910s. As one drafter

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162. *Howard*, 207 U.S. at 504.

163. 2 THEODORE ROOSEVELT, *The Employers' Liability Law*, *in* THE ROOSEVELT POLICY: SPEECHES, LETTERS AND STATE PAPERS, RELATING TO CORPORATE WEALTH AND CLOSELY ALLIED TOPICS, OF THEODORE ROOSEVELT, PRESIDENT OF THE UNITED STATES 699, 702 (1908).

164. *See* FELA, ch. 149, 35 Stat. 65 (1908).

165. *See, e.g.*, Ives v. S. Buffalo Ry. Co., 94 N.E. 431, 438 (N.Y. 1911); Cunningham v. Nw. Improvement Co., 119 P. 554, 564-66 (Mont. 1911).

166. *See* WITT, *supra* note 14, at 152-86.

of compensation legislation put it, the drafters "maimed and twisted" the legislation to meet constitutional requirements "so that it might commend itself to the judges."[167] Some states recommended elective compensation statutes that gave employers and employees the right to opt out of the new compensation system, out of fear that compulsory statutes would face successful due process or freedom of contract challenges.[168] Other state commissions limited compensation programs to dangerous industries such as railroading and coal mining[169] to take advantage of the special leniency that courts in the employers' liability cases had seemed to show for legislation applicable to dangerous industries.[170] And in New York, which enacted the most important early workmen's compensation statute in 1910, drafters of the legislation provided injured employees with the option to either sue in tort or bring a compensation claim, at least in part because of constitutional concerns about whether the legislature could take away injured employees' state constitutional rights to a jury trial and to uncapped damages in death cases.[171]

In another sense, however, the fact that constitutional challenges for workmen's compensation legislation would be more significant that those faced by employers' liability law reform makes sense. Rather than merely further amending the law of employers' liability, the workmen's compensation system sought to substitute a socially rational compensation system organized not so much around doing justice in individual cases—a goal that workmen's compensation reformers had come to think quixotic—but around creating rational social policy in the aggregate. Work accident cases would no longer get bogged down in litigating thorny questions of fault or arcane questions about superior servants or different departments. Instead, injured employees would be compensated for virtually all injuries arising out of and in the course of their work. Damages would not be at the discretion of a jury or designed to make the injured employee whole, as in the law of torts,

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167. HENRY R. SEAGER, LABOR AND OTHER ECONOMIC ESSAYS 260 (1968), *quoted in* WITT, *supra* note 14, at 137-38.

168. *See* WITT, *supra* note 14, at 137-38.

169. *Id.* at 138, 191-93. Reformer Charles Richmond Henderson focused on just this point in arguing that the carefully drafted compensation programs ought to be upheld. *See* CHARLES RICHMOND HENDERSON, INDUSTRIAL INSURANCE IN THE UNITED STATES 141 (1908).

170. *See, e.g.*, cases cited *supra* note 155.

171. NEW YORK STATE COMMISSION ON EMPLOYERS' LIABILITY, REPORT TO THE LEGISLATURE OF THE STATE OF NEW YORK BY THE COMMISSION APPOINTED UNDER CHAPTER 518 OF THE LAWS OF 1909 TO INQUIRE INTO THE QUESTION OF EMPLOYERS' LIABILITY AND OTHER MATTERS: FIRST REPORT, MARCH 19, at 46-48 (1910).

but would instead be scheduled at one-half or two-thirds the injured employees lost wages, plus medical costs.[172] The result would be a kind of rough-justice in any one case, splitting the difference as between employers and employees.[173] In particular cases, employers might be required to compensate injuries for which few reasonable observers would have held them responsible. And in other cases, injured employees would not be made whole as they would have been under the law of torts. But in the aggregate, these cases would wash one another out for a kind of systemic (if not individualized) justice.

Whether a legislature could constitutionally sacrifice the pursuit of individualized justice in favor of the actuarial strategy of the workmen's compensation statutes, however, was not clear. As constitutional lawyer Ernst Freund warned, "the constitutional status of workmen's compensation was one of uncertainty" if not downright confusing.[174] And in the first and most important of the constitutional challenges to workmen's compensation legislation, the answer returned was in the negative. New York had been the first state to enact a wide-ranging compensation system in the summer of 1910.[175] The New York legislation applied to a group of specifically enumerated dangerous industries. And as we noted above, it reserved to the injured employee the right to sue in tort in order to skirt the constitutional obstacle of the plaintiffs' jury trial rights under the New York Constitution.[176] Nonetheless, the New York Court of Appeals—the state's highest court—struck the legislation down in the case of *Ives v. South Buffalo Railway Co.*, decided in March of 1911.[177] Notwithstanding the "attractive and desirable" "economic, philosophical, and moral theories" embodied in the legislation, wrote Judge William E. Werner for the court,[178] the compensation program required that employers compensate employees for injuries as to which the employee, rather than the employer, was responsible.[179] This, the due process tradition of the New York and Federal Constitutions would not allow. Requiring compensation in such cases would

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172. *See* WITT, *supra* note 14, at 138.

173. *Id.*

174. Ernst Freund, *Constitutional Status of Workmen's Compensation*, 6 ILL. L. REV. 432, 432 (1912), *quoted in* WITT, *supra* note 14, at 151.

175. *See* WITT, *supra* note 14, at 136.

176. *See supra* text accompanying notes 172-73.

177. 94 N.E. 431, 448 (N.Y. 1911).

178. *Id.* at 437.

179. *Id.* at 436-37.

result in "taking the property of [*A*] and giving it to [*B*], and that cannot be done under our Constitutions."[180]

The *Ives* decision quickly produced a political firestorm. As one participant in the compensation movement described it, *Ives* "was severely criticized, as, perhaps, no decision of a higher court has ever been criticized before," by even some of the "most conservative lawyers and writers."[181] Observers commented on the "storm of protest"[182] and the "outcry of surprise and indignation"[183] that accompanied the court's decision.[184] Theodore Roosevelt, in particular, who had been sharply critical of the U.S. Supreme Court's 1908 decision striking down the FELA, saw the *Ives* decision as an outrageous misuse of judicial authority.[185] Roosevelt, who as governor of New York State eleven years earlier had been Werner's political patron and had even appointed Werner to the Court of Appeals, now described the work of his one-time protégé as "a most flagrant and wanton abuse of a great power."[186] The *Dred Scott* case from half a century before may have been "worse in degree, but not in kind," Roosevelt announced, and the kinds of judges who made such decisions had "no right to sit on the bench."[187] Foreshadowing the arguments of his distant cousin, Franklin Delano Roosevelt, in 1937, the first Roosevelt President derided the judges of the New York Court of Appeals as "six . . . elderly men."[188] Most importantly, perhaps, the *Ives* decision became a powerful motivating force in Roosevelt's campaign for the recall of judicial decisions by popular referendum.[189] Adopted in Colorado in 1912, and initially part of the 1911 state constitution submitted as part of the application of Arizona for admission to the Union, proponents of the recall sought to create a

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180. *Id.* at 440.

181. ISAAC M. RUBINOW, SOCIAL INSURANCE 174 (1913), *quoted in* WITT, *supra* note 14, at 175.

182. Hal H. Smith, *Workmen's Compensation in Michigan*, 10 MICH. L. REV. 278, 280 (1912), *quoted in* WITT, *supra* note 14, at 175.

183. John Mitchell, *The Wage Earners*, UNITED MINE WORKERS' J., Oct. 5, 1911, at 2, *quoted in* WITT, *supra* note 14, at 175.

184. *See* WITT, *supra* note 14, at 175.

185. *See id.* at 175-76.

186. CHARLES HENRY BETTS, BETTS-ROOSEVELT LETTERS 9-10 (1913), *quoted in* WITT, *supra* note 14, at 176.

187. BETTS, *supra* note 186, at 16, *quoted in* WITT, *supra* note 14, at 176.

188. *Slap at Roosevelt in Barnes Reply*, N.Y. TIMES, Oct. 6, 1913, at 5, *quoted in* WITT, *supra* note 14, at 185 (omission in original).

189. *See* WITT, *supra* note 14, at 176.

mechanism by which voters could readily overturn unpopular judicial decisions.[190] Understood at the time as a grave threat to judicial independence and the authority of the rule of law, popular recall of judicial decisions became one of the central planks of Roosevelt's 1912 Progressive Party campaign for the presidency.[191]

Yet for all the criticism of the decision, the *Ives* case powerfully reshaped the trajectory of the American workmen's compensation movement. In 1910 and early 1911, the momentum in the political movement for compensation statutes was towards statutes that made compensation a supplement to, rather than a substitute for, an injured employee's tort claim.[192] The English legislation of the late nineteenth-century on which many of the early American statutes were based had adopted this approach, as had the New York statute struck down in *Ives,* as well as an early Montana statute and federal bills proposing workmen's compensation for interstate railroads.[193] The early compensation movement also had strong momentum for compulsory programs rather than elective systems into which employers could opt at their pleasure. But after *Ives*, both of these features of the statutes seemed to be precluded.[194] Compulsory statutes seemed to interfere with employers' and employees' freedom of contract. Statutes that supplemented employers' liability in tort with compensation claims seemed to be impermissible legislative redistributions of wealth from employers to injured employees, with nothing received by the employers in return.[195] States thus restructured their compensation proposals to adopt elective statutes and to frame those statutes as substitutes for the law of employers' liability rather than supplements to it, providing employers with immunity from tort claims in return for the employers' voluntary agreement to provide employees with compensation benefits.[196]

The *Ives* decision—and constitutional law—thus had a powerful constitutive role in the making of our modern workers' compensation system. Our compensation statutes are quid pro quo statutes; unlike the English workmen's compensation system to this day (which has never faced

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190. WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937, at 152 (1994).

191. *Id.* at 133-36; *see also* WITT, *supra* note 14, at 176.

192. WITT, *supra* note 14, at 180-81.

193. *Id.* at 181-82.

194. *See id.* at 183.

195. *See id.* at 182.

196. *Id.* at 181-83.

judicial review under a written constitution), American workers' compensation systems take away injured employees' tort actions against their employers in return for the guaranteed insurance benefit of compensation payments.[197]

Yet it seems clear that courts like the New York Court of Appeals and others[198] got it basically wrong when they struck down compensation statutes. They had forgotten the lessons of the wrongful death statutes. State constitution-makers were perfectly capable of writing specific tort reform prohibitions into their constitutions when they saw fit to do so. As we have already seen, a number of them had done so to prohibit the statutory caps on wrongful death damages characteristic of the early wrongful death statutes.[199] But no state constitution expressly barred legislatures from adopting an aggregate rather than individualized approach to work accident cases. To the contrary, in the wake of cases like *Ives*, a number of states around the country adopted constitutional amendments expressly authorizing compensation legislation, either to reverse adverse state court decisions (as in New York),[200] or to ward off such decisions.[201] Strong democratic majorities made clear the dubious legitimacy of early decisions like *Ives*.[202] And after the political maelstrom that followed *Ives*, other state courts appear to have gotten the message. New York voters were able in 1913 to express their ire for the author of the *Ives* opinion, defeating him in his campaign to be Chief Judge of the New York Court of Appeals.[203] And after the *Ives* debacle, not a

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197. The growth of tort actions by injured employees against third parties such as the manufacturers of products or machinery involved in work accidents has gone a long way to restoring employees' tort causes of action in work-related accident cases. Observers estimate that some two-thirds of all products liability suits today are brought by employees injured in the course of their work as a supplement to the compensation they are able to receive through the workers' compensation system. *See* John Fabian Witt, *Speedy Fred Taylor and the Ironies of Enterprise Liability*, 103 COLUM. L. REV. 1, 49 (2003).

198. *See, e.g.*, Cunningham v. Nw. Improvement Co., 119 P. 554, 564-66 (Mont. 1911). Courts also struck down earlier compensation-like experiments such as a 1902 insurance scheme for employees of railroad and streetcar companies and of mining and quarry companies. *See* WITT, *supra* note 14, at 137.

199. *See supra* Part II.

200. *See* N.Y. CONST. of 1894, art. I, § 19 (1913) (amendment submitted to the people and adopted in November, 1913).

201. Amendments were ratified in California, Ohio, Vermont, and Wyoming. WITT, *supra* note 14, at 180.

202. The vote on New York's state constitutional amendment authorizing workmen's compensation legislation was overwhelmingly in favor of the amendment. *Id.* at 176.

203. *Id.* at 177.

single state supreme court held a workmen's compensation statute unconstitutional. The U.S. Supreme Court upheld workmen's compensation in a trio of cases decided in 1917.[204] And in 1919 the Court made clear that even statutes like the one that had been struck down in *Ives*—statutes that supplemented rather than substituted for the employer's tort liability—were constitutionally permissible.[205]

In the workmen's compensation experience, many of the nation's courts put their institutional reputations at risk by extending constitutional law into the complicated and hotly controversial public policy problems attendant on the law of accidents. The result was a critical moment in the already-brewing crisis of legitimacy for early twentieth-century courts. When commentators today suggest (rather improbably) that state constitutional decisions in the tort reform area have caused a "crisis of legitimacy of law and legal institutions" greater than any "since Dred Scott,"[206] they forget all too quickly about the constitutional crisis of the workmen's compensation cases, a crisis that presaged both the New Deal constitutional revolution of 1937 and the tort reform decisions of the late twentieth-century.

V. THE RISE OF INTEREST GROUPS AND THE TWENTIETH-CENTURY RECONSTITUTIONALIZATION OF AMERICAN TORT LAW

The great irony of the encounter of constitutional law with the workmen's compensation statutes is that its lessons were quickly lost in a development that the compensation statutes themselves ushered in. Constitutional review of workmen's compensation had brought state constitutional law into considerable disrepute. It had even occasioned wholesale attacks on the practice of judicial review. But once workmen's compensation programs were underway, the constitutional crisis safely in the past, those very programs contributed to the formation of new interest groups who had a vested interest in generating constitutional arguments about limits on tort reform.

The earliest interest groups to form around the state compensation programs were made up of employers and (perhaps more importantly) liability insurers. Employers' organizations like the National Association of

204. *See* N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 208-09 (1917); Hawkins v. Bleakly, 243 U.S. 210, 212 (1917); Mountain Timber Co. v. Washington, 243 U.S. 219, 243-46 (1917).

205. *See* Ariz. Copper Co. v. Hammer, 250 U.S. 400, 420-21 (1919).

206. Presser, *supra* note 6, at 649.

Manufacturers had been involved in the workmen's compensation movement early in the discussions that ultimately led to the wave of legislation in the 1910s.[207] And with the enactment of workmen's compensation, both employers' organizations and employers' liability insurers developed powerful new interests in the legislative amendments to the compensation system.[208] In turn, on the claimants' side, lobbying over workmen's compensation benefit rates in state legislatures called forth a new kind of organized interest group among plaintiffs' lawyers.[209] In 1946, plaintiffs'-side workmen's compensation lawyers came together to form the National Association of Claimants' Compensation Attorneys ("NACCA").[210] By the mid-1960s, the NACCA changed its name and became the Association of American Trial Lawyers ("ATLA").[211] Workmen's compensation systems, in short, had given rise to the creation of the modern plaintiffs' bar.[212] As Philippe Nonet has put it in a study of California, workmen's compensation had called into existence competing coalitions of chambers of commerce and liability insurers, plaintiffs' lawyers and labor unions, making up "a special kind of adversary system—the permanent confrontation of organized interest groups."[213]

Newly organized interest groups of plaintiffs' lawyers and liability insurers revived the constitutional arguments about tort reform during early discussions of replacing tort law in the automobile accident area with an administrative, workers'-compensation-like system of no-fault compensation.[214] By 1910 and 1911, certain farsighted participants in the workmen's compensation debates understood that automobile accidents

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207. *See* JAMES WEINSTEIN, THE CORPORATE IDEAL IN THE LIBERAL STATE: 1900-1918, at 47-49 (1968).

208. WITT, *supra* note 14, at 194-96.

209. *Id.* at 196.

210. *Id.*; *see also* Sara Parikh & Bryant Garth, *Philip Corboy and the Construction of the Plaintiffs' Personal Injury Bar*, 30 LAW & SOC. INQUIRY 269, 278 (2005).

211. WITT, *supra* note 14, at 196.

212. Parikh & Garth, *supra* note 210, at 274.

213. WITT, *supra* note 14, at 196; *see also* JOHN G. FLEMING, THE AMERICAN TORT PROCESS 140-86 (1988) (discussing the role of lawyers and insurers as "chief players" in the handling of tort claims); Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1584-90 (2004) (discussing the influence of employers' liability insurance on settlement practices); Parikh & Garth, *supra* note 210, at 282 ("Elite plaintiff and defense lawyers helped to define the rules that governed their growing field.").

214. *See* WITT, *supra* note 14, at 195.

would likely be the next forum for public policy debate over the relative merits of tort law and administrative alternatives.[215] By the end of the 1910s, automobile accident compensation systems were being widely discussed in the legal periodical literature.[216] And in the beginning of the 1930s, a decade and a half of such discussions came to fruition in the Columbia Plan for automobile injury compensation.[217] The Columbia Plan would have replaced tort law and imposed limited, scheduled liability on motor vehicle owners for damages caused by the operation of their vehicles.[218] But the Columbia Plan, like other less prominent automobile accident compensation proposals, quickly encountered the massive opposition of the entrenched interests.[219] Plaintiffs' lawyers, insurance lawyers, and the bar associations to which they belonged "vociferously opposed" the Plan, which soon collapsed under the weight of what Fleming James called the "many vested interests in the status quo."[220]

On some occasions such as the debates over automobile no-fault proposals, plaintiffs' lawyers organizations and defense lobbies have shared a common aim of preserving the status quo of tort law against legislative reforms.[221] On other occasions, however, the interests of the plaintiffs' bar and insurers and other repeat-play defendants have divided, and in such instances the plaintiffs' bar has shown little hesitation to make use of the same constitutional claims that repeat-play defendants advanced in the era of the *Ives* decision.[222] In the 1920s and 1930s, for example, when approximately one half of the states enacted so-called "guest statutes," precluding personal injury suits by guest passengers against owners and operators absent wanton or willful misconduct,[223] plaintiffs' lawyers launched dozens of challenges to the statutes. Early courts rejected almost all

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215. *Id.* at 194.

216. *Id.* at 195.

217. *Id.*

218. *Id.*; Jonathan Simon, *Driving Governmentality: Automobile Accidents, Insurance, and the Challenge to Social Order in the Inter-War Years, 1919-1941*, 4 CONN. INS. L.J. 521, 571 (1998).

219. *See* WITT, *supra* note 14, at 195.

220. Flèming James, Jr., *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 COLUM. L. REV. 408, 423 (1959), *quoted in* WITT, *supra* note 14, at 195.

221. *See* FLEMING, *supra* note 213, at 141, 167.

222. *See* WITT, *supra* note 14, at 197.

223. *See* Sidle v. Majors, 341 N.E.2d 763, 767 (Ind. 1976).

of the challenges.[224] But in 1973 the California Supreme Court struck down the California guest statute under the state constitution's guarantee of equal protection, reversing long-standing California law.[225]

The California guest statute episode was hardly well-calculated to instill confidence in the use of broad constitutional guarantees to strike down tort legislation. A short three years after striking the statute down, the state's supreme court wrote that its decision had illegitimately substituted "judicial policy determination for established constitutional principle."[226] Two years after that, yet another shuffling of the court's personnel led it to reverse itself once more.[227] Nonetheless, the California decisions opened the floodgates for a new generation of state constitutional challenges.[228] Indeed, the guest

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224. *See, e.g.*, Silver v. Silver, 280 U.S. 117, 123-24 (1929); Pickett v. Matthews, 192 So. 261, 266 (Ala. 1939), *overruled by* Jackson v. Mannesmann Demag Corp., 435 So. 2d 725 (Ala. 1983); Roberson v. Roberson, 101 S.W.2d 961, 968 (Ark. 1937); Forsman v. Colton, 28 P.2d 429, 431 (Cal. Ct. App. 1933); Vogts v. Guerrette, 351 P.2d 851, 862 (Colo. 1960); Silver v. Silver, 143 A. 240, 243 (Conn. 1928); Coleman v. Rhodes, 159 A. 649, 654 (Del. Super. Ct. 1932); Hillock v. Heilman, 201 So. 2d 544, 546 (Fla. 1967); Delany v. Badame, 274 N.E.2d 353, 356 (Ill. 1971); Ludwig v. Johnson, 49 S.W.2d 347, 351 (Ky. 1932); Naudzius v. Lahr, 234 N.W. 581, 583-84 (Mich. 1931); Rogers v. Brown, 260 N.W. 794, 797 (Neb. 1935); Romero v. Tilton, 437 P.2d 157, 160 (N.M. Ct. App. 1967), *overruled by* McGeehan v. Bunch, 540 P.2d 238 (N.M. 1975); Smith v. Williams, 1 N.E.2d 643, 645-46 (Ohio Ct. App. 1935); Perozzi v. Ganiere, 40 P.2d 1009, 1016-17 (Or. 1935), *overruled in part by* Smothers v. Gresham Transfer, Inc., 23 P.3d 333 (Or. 2001); Campbell v. Paschall, 121 S.W.2d 593, 594-95 (Tex. 1938), *overruled by* Whitworth v. Bynum, 699 S.W.2d 194 (Tex. 1985); Shea v. Olson, 53 P.2d 615, 622 (Wash. 1936).

225. Brown v. Merlo, 506 P.2d 212, 231 (Cal. 1973). *But see Forsman*, 28 P.2d at 431 (finding that the California Legislature did not err by enacting the California Vehicle Act that restricts the circumstances under which an injured party may recover).

226. Schwalbe v. Jones, 546 P.2d 1033, 1036 n.2 (Cal. 1976), *overruled by* Cooper v. Bray, 582 P.2d 604 (Cal. 1978); *see also* FLEMING, supra note 213, at 72-79 (describing the California guest statute controversy).

227. *See* Cooper, 582 P.2d at 612 (overruling *Schwalbe* decision because "the statutory classification violates the state and federal equal protection guarantees").

228. *See* Beasley v. Bozeman, 315 So. 2d 570, 570 (Ala. 1975); White v. Hughes, 519 S.W.2d 70, 71 (Ark. 1975); *Brown*, 506 P.2d at 214; Richardson v. Hansen, 527 P.2d 536, 536 (Colo. 1974); Justice v. Gatchell, 325 A.2d 97, 98 (Del. 1974); Thompson v. Hagan, 523 P.2d 1365, 1366-67 (Idaho 1974); Keasling v. Thompson, 217 N.W.2d 687, 688 (Iowa 1974); Henry v. Bauder, 518 P.2d 362, 364 (Kan. 1974); Manistee Bank & Trust Co. v. McGowan, 232 N.W.2d 636, 637 (Mich. 1975), *overruled in part by* Harvey v. State, 664 N.W.2d 767 (Mich. 2003); Botsch v. Reisdorff, 226 N.W.2d 121, 124 (Neb. 1975); Laakonen v. Eighth Judicial Dist. Court of Nevada, 538 P.2d 574, 574 (Nev. 1975); McGeehan v. Bunch, 540 P.2d 238, 239 (N.M. 1975); Johnson v. Hassett, 217 N.W.2d 771, 772 (N.D. 1974); Primes v.

statute episode seems to have inspired the trial bar.[229] In the decades since, plaintiffs' lawyers' organizations (led by ATLA) have led the charge against tort legislation in the name of constitutional principles.[230] Much of the recent controversy over the American constitutional law of torts has been generated by ATLAs creation in 2001 of the Center for Constitutional Litigation, an outfit committed to bringing "lawsuits that challenge tort restrictionist laws," such as damages caps.[231]

VI. CONCLUSION

What, then, are we to make of the long history of the American constitutional law of torts? For one thing, it should be clear that the first generation of tort reform in the United States—the wrongful death statutes of the 1840s and 1850s[232]—was subject to remarkably few constitutional challenges. Our oldest tradition in the area of tort reform is thus one of wide legislative discretion. Yet since the 1870s, constitutional challenges to tort legislation have been extremely important in the development of our law of torts.[233] Indeed, the rise of tort law as a field in American law from the 1850s through the 1880s coincided with the rise of a new culture in American law of constitutional litigation over reform legislation. The result is that constitutional pressures—for better or for worse—have exerted powerful shaping influences on the course of American tort law since at least the 1870s.

Tyler, 331 N.E.2d 723, 725 (Ohio 1975); Duerst v. Limbocker, 525 P.2d 99, 105 (Or. 1974); Behrns v. Burke, 229 N.W.2d 86, 87 (S.D. 1975); Tisko v. Harrison, 500 S.W.2d 565, 566 (Tex. Civ. App. 1973); Cannon v. Oviatt, 520 P.2d 883, 884-85 (Utah 1974), *overruled in part by* Malan v. Lewis, 693 P.2d 661 (Utah 1984).

229. For an account of the California guest statute episode by the plaintiffs' bar, see RICHARD S. JACOBSON & JEFFREY R. WHITE, DAVID V. GOLIATH: ATLA AND THE FIGHT FOR EVERYDAY JUSTICE 110 (2004).

230. For a discussion of the plaintiffs' bar from opposing constitutional limits on legislative tort reform to favoring such limits, see the forthcoming chapter, "The King and the Dean: Private Administration in the Common Law Polity," on Melvin Belli, Roscoe Pound, and the making of the modern plaintiffs' bar in JOHN FABIAN WITT, AMERICAN NATIONALISM AND ITS DISCONTENTS: LEGAL HISTORIES OF THE UNITED STATES (forthcoming 2006).

231. America Trial Lawyers Association, "In the Courts," http://www.atla.org/IntheCourts/IntheCourts.aspx (last visited Oct. 30, 2003).

232. *See supra* notes 41-47 and accompanying text.

233. *See supra* notes 48-67 and accompanying text.

Indeed, constitutional litigation in the tort area seems to confirm that the litigation process—like the legislative one—is, as Professor Einer Elhauge has contended, "susceptible to interest group influences."[234] One of the central features of twentieth-century tort law (beginning with the workmen's compensation experience) was that constitutionalized argument about tort reform became the province of entrenched interest groups.[235] But no one interest group has had a monopoly on the resort to constitutionalism. At different times and in different places, virtually all of the contending interest groups in the American tort debates have found themselves advancing constitutional arguments against amendments to the existing law of torts.[236] In the late nineteenth and early twentieth centuries, when legislation in the accident law area tended to be liability-expanding rather than liability-contracting, constitutional challenges emerged most often from repeat-play defendants.[237] More recently, after three decades of liability-contracting tort reform legislation, the plaintiffs' bar has led the way in bringing constitutional challenges to tort reform efforts.[238] It should hardly be surprising if in the not-too-distant future, the political pendulum swings back once again such that defendants seek refuge in the very same constitutional rhetoric in which ATLA seeks to drape itself today. Defendants, after all, pioneered the strategy.

Yet if the pendulum of tort reform is likely to swing back and forth over time between plaintiffs' and defendants' interests, it raises the question whether the law of torts and tort reform ought to be constitutionalized at all. What, after all, is the function of state constitutional review of reform legislation? One aim, drawn from interest group theory and the theory of public choice, might be the protection of politically disempowered groups at the mercy of organized interests.[239] But as a preliminary matter, it is not at all

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234. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 67 (1991).

235. *See* WITT, *supra* note 14, at 194.

236. *See supra* Part V.

237. *See* Issacharoff & Witt, *supra* note 213, at 1581-83.

238. *See supra* text accompanying note 230.

239. *See* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 718-31 (1985); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 130-34, 144, 151 (1989). Another aim advanced in the state constitutional law literature for constitutional review of legislation is ensuring that state legislatures enact legislation designed to achieve some "explicit public goal" set out in the state constitution. Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1156 (1999). The difficulty in the tort

clear that the litigation process solves the collective action problems to which the interest group theory responds. If diffuse interests such as the class of prospective tort plaintiffs find themselves overmatched in the legislatures, they are likely to encounter the same disadvantages in the courts.[240] Moreover, even setting this threshold objection aside, it seems that if history is any guide, the political fortunes of the interest groups in the tort area are likely to wax and wane over time. Interest group theory has had an enormously difficult time making sense of the relative balance of political power between the trial bar, on one hand, and repeat-play tort defendants, on the other.[241] The swinging pendulum of tort law in history may begin to suggest why.

This is not to say that no constitutional limits are appropriately applicable to tort reform legislation. Perhaps courts ought to police a version of the constitutional causation requirement laid down in the railroad liability cases of the late nineteenth-century to ensure that tort law does not impinge on constitutional takings limits. Even here, however, the fact that many institutions and individuals may end up on either side or both sides of tort litigation diminishes the threat that politically powerful groups will seek to redistribute wealth to themselves through the vehicle accident law.[242] And courts probably ought to enforce the specific and express tort law provisions that state constitution-makers have regularly adopted throughout our history.[243] But the emergence of powerful political constituencies on both

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reform area is that the controversial tort reform decisions in this area have tended to rest on broad, open-ended provisions of the state constitutions such as equal protection guarantees.

240. *See* Elhauge, *supra* note 234, at 66-87.

241. *Compare* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 14-16 (1987) (predicting few interest group distortions in the torts process), *with* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 134-37, 167-68, 192-95 (1994) (describing courts as better institutions than legislatures for many personal injury law regulatory problems because of the disadvantages of plaintiffs' interests in legislative settings), Abel, *supra* note 10, at 536 (contending that defendants' interests outgun plaintiffs' interests in legislatures), Marc Galanter, *Makers of Tort Law*, 49 DEPAUL L. REV. 559, 564 (1999) (contending that tort law is unjust given the enrichment of plaintiffs' lawyers by large settlements), *and* Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807, 815-20 (1994) (contending that plaintiffs' lawyers concentrated interests in tort issues give them an advantage in the political process).

242. *See* LANDES & POSNER, *supra* note 241, at 14-16.

243. Such constitutional amendments continue to be enacted today. See, for example, Texas's Proposition 12, a constitutional amendment approved by Texas voters on September 12, 2003, limiting non-economic damages in medical malpractice cases. *See* Mary Alice

sides of the tort reform debate suggests that courts ought not worry that the politics of tort reform will be dominated by one side or the other because of some defect in the political process.[244] Both sides of the tort reform debate make just that argument, of course. Defense interests contend that the large damages awards received by plaintiffs encourage the corruption of state legislators and judges whose campaigns are bankrolled by plaintiffs' lawyer contributions.[245] Plaintiffs' interests point to the relative disorganization of diffuse classes such as consumers and to the power of organized interests such as manufacturers, physicians, and insurance companies.[246] The history of the tort reform debates over time, however, suggests that the power balance between the contending sides is not irrevocably and inevitably tipped in one direction or the other. Indeed, the very process of reforming the law of torts in the twentieth-century has called forth interest groups on all sides with considerable investment in fighting against any imbalance that might arise.

In this regard, it is a telling fact that plaintiffs' interests have managed for some three decades now to hold off federal tort reform efforts in areas like products liability, and that they have held off state tort reform referenda and initiatives as well.[247] State constitutional decisions striking down

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Robbins, *Will Key Win on Caps Lead to More?: Voters Approve Med-Mal Caps; Texans Split on Whether More Will Come*, NAT'L L.J., Sept. 22, 2003, at 6. Pennsylvania is currently considering a similar constitutional amendment. *See* John Kennedy, *Caps on Non-Economic Damages Could Go Beyond Medical Liability*, PA. L. WKLY., June 9, 2003, at 11 (showing malpractice reform laws from various jurisdictions from 1983-2001).

244. In particular, the rise of the plaintiffs' bar may help to solve the political process defects identified by scholars like Neil Komesar. *See* KOMESAR, *supra* note 241, at 192-95. Whether the trial bar solves the problem of diffused prospective plaintiffs versus concentrated repeat-play interests *sufficiently*, of course, is virtually unanswerable absent resort to claims about what the law would be and ought to be were the parties properly balanced. *See* Elhauge, *supra* note 234, at 48-65.

245. *See* Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation: Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1219; *cf.* Galanter, *supra* note 241, at 564 (noting in the context of tort law that plaintiffs' lawyers "have cross-cutting incentives not to eliminate uncertainty and risk from the remedy process").

246. *See* Abel, *supra* note 10, at 537.

247. In the current generation of tort reform politics, ballot initiatives and constitutional amendments calling for tort reform have been defeated by political coalitions of plaintiffs' interests in a number of states, including Arizona, *see Tort Revision Continues to Occupy Headlines But Its Progress Is Not Always Triumphal*, NAT'L L.J., Dec. 26, 1994, at C12 [hereinafter *Tort Revision*]; California, *see* Victoria Slind-Flor, *Tort Revision "Lost Cause" in California?: Voters Rejected Capped Fees, No-Fault, and Losers Pay*, NAT'L L.J.,

defendant-friendly tort reform legislation continue apace.[248] But the history of the debate suggests that, for all we know, the tables may soon turn. If they do, we can expect the arguments about the American constitutional law of tort to flip, as it already has before, from plaintiffs' arguments to defendants' arguments. It may well follow that courts would be best advised to avoid using judicial review too aggressively. With the perspective of history, tort reform seems to be both an arena of robust political contestation in the nation's legislative fora, and an area in which judicial interventions have all too often come to seem misguided.

Apr. 8, 1996, at B1; Michigan, *see Tort Revision*, *supra*, at C12; and Oregon, *see* Richard H. Middleton, *Beating Back Tort Reform*, NAT'L L.J., Aug. 7, 2000, at A19.

248. *See, e.g.*, Ferdon *ex rel.* Petrucelli v. Wis. Patients Comp. Fund, 701 N.W.2d 440, 468-69 (Wis. 2005) (striking down damages cap on non-economic damages in medical malpractice cases as "not rationally related to the legislative objective of lowering medical malpractice insurance premiums").