

THE STRUGGLE OVER TORT REFORM AND THE OVERLOOKED LEGACY OF THE PROGRESSIVES

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Some recent scholarship has focused on the origins of the current tort reform movement. The scholarly account of the current tort reform movement depicts the current movement as a reaction to judicial expansion of tort rights in the 1950s and 1960s aimed at retracting those expanded rights. In attempting to distinguish the 1950s and 1960s tort expansion from the current tort retraction, the scholarly account depicts the tort expansion as primarily a judicial movement led by legal academics devoid of any self-interest. In contrast, this account holds out the current tort retraction as a mainly political movement driven by the economic self-interest of its proponents. Using Ohio as my primary example, I want to make three points about this account of tort reform. First, contemporary tort reform, rather than solely being a reaction to tort expansion in the 1950s and 1960s, is part of a continuing debate between corporate, professional and insurance interests on one side and consumer interests and the trial bar on the other side. This debate began as early as the late Nineteenth Century and the interests and arguments advanced in the debate have remained relatively constant. Second, contrary to the academic construction, there is nothing new about the political nature of the current tort reform debate, nor was judicial involvement in the development of tort law unique to tort expansion. Rather, both sides of the debate have resorted to both the judicial and political branches in the battle over tort reform and political battles have been waged by interested actors on both sides. Third, as a result of this scholarly neglect of Progressive Era history, the debate about the validity of state tort reform measures has focused primarily on traditional areas of constitutional inquiry. Instead, a focus on Progressive Era history would direct one to several Progressive Era constitutional provisions aimed at altering the balance of power among the legislature, the judiciary and the

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jury with respect to common law tort remedies.

I. BACKGROUND

Beginning in the mid-1970s various corporate, professional and insurance interests began to advocate the need for what they termed “tort reform.”¹ By tort reform, these groups mean legislative measures aimed at limiting the availability of relief and the amount of relief in personal injury actions.² For example, these tort retractors advocate statutory measures limiting non-economic and punitive damages and abolishing joint and several liability and the collateral source rule.³ They also advocate statutory measures requiring arbitration, instituting screening panels to screen the merits of lawsuits before they were filed and heightening pleading requirements.⁴ They contend that such measures are needed to remedy an insurance crisis.⁵ They argue that an increase in the number of filings and in the size of jury verdicts has driven up insurance premiums and driven out insurance carriers in certain industries. They argue that reform measures are needed to reduce frivolous lawsuits and, thereby, decrease insurance premiums.

Various consumer interests and the trial bar have responded to the tort retractors, in part, by challenging the constitutionality of these tort reform measures in state courts.⁶ These tort expansionists have challenged the tort retractors’ measures under numerous state constitutional provisions, including due process, equal protection, separation of powers, right to a jury trial, special legislation prohibitions and open court provisions.⁷ They have met with mixed success before

1. See Nancy L. Manzer, Note, *1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability*, 73 CORNELL L. REV. 628, 632-35 (1988).

2. Robert L. Rabin, *The Politics of Tort Reform*, 26 VAL. U. L. REV. 709, 715 (1992). Because both sides of the tort reform debate have cloaked themselves in the mantle of tort reform and because this side of the debate generally has advocated measures aimed at restricting tort rights and remedies, I refer to this side of the debate as “tort retractors.”

3. *Id.*; Manzer, *supra* note 1, at 633-35.

4. Manzer, *supra* note 1, at 635.

5. Rabin, *supra* note 2, at 715; Manzer, *supra* note 1, at 630.

6. Because these groups generally favor more expansive tort rights and remedies, I refer to this side of the debate as “tort expansionists.”

7. See, e.g., *Moore v. Mobile Infirmary Ass’n*, 592 So.2d 156, 158 (Ala. 1991) (challenging a cap on non-economic damages as violative of the right to a jury trial, due process and equal protection); *Garhart v. Columbia/Healthone L.L.C.*, 95 P.3d 571, 575 (Colo. 2004) (challenging a cap on non-economic damages as violative of the right to a jury trial, separation of powers and equal protection); *Smith v. Dep’t Ins.*, 507 So.2d 1080, 1087 (Fla. 1987) (challenging a cap on non-economic damages as violative of the open courts protection); *Kirkland v. Blaine County Med. Ctr.*, 4 P.3d 1115, 1116 (Idaho 2000) (challenging a cap on non-economic damages as violative of the

state courts.⁸ Regardless of whether state courts uphold or strike down tort reform measures, the state courts' reasoning tends to be devoid of any historical analysis of the origins of these state constitutional provisions.⁹ Instead, state courts have focused on other methods for interpreting state constitutions.¹⁰

Ohio's experience with tort reform has been illustrative of this pattern. The Ohio General Assembly first passed the Ohio Medical Malpractice Act ("OMMA") in 1975. The OMMA made several changes to remedies available in medical malpractice cases and the practice for administering medical malpractice cases. For example, the OMMA mandated arbitration, shortened the statute of limitations and

right to a jury trial, special legislation prohibition and separation of powers); *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1063 (Ill. 1997) (challenging a cap on non-economic damages as violative of the right to a jury trial, special legislation prohibition and separation of powers); *Murphy v. Edmonds*, 601 A.2d 102, 107 (Md. 1992) (challenging cap on non-economic damages as violative of equal protection and the right to a jury trial); *Phillips v. MIRAC, Inc.*, 685 N.W.2d 174, 179 (Mich. 2004) (challenging a cap on non-economic damages as violative of the right to a jury trial, due process and equal protection); *Rhyne v. Kmart Co.*, 594 S.E.2d 1, 7 (N.C. 2004) (challenging a cap on non-economic damages as violative of the right to a jury trial, separation of powers, due process and equal protection); *Lucas v. United States*, 757 S.W.2d 687, 687 (Tex. 1988) (challenging a cap on non-economic damages as violative of due process and the open courts protection); *Judd v. Drezga*, 103 P.3d 135, 138 (Utah 2004) (challenging a cap on non-economic damages as violative of the right to a jury trial, separation of powers, due process, equal protection and the open courts protection); *Etheridge v. Med. Ctr. Hosp.*, 376 S.E.2d 525, 528-33 (Va. 1989) (challenging a cap on non-economic damages as violative of the right to a jury trial, special legislation prohibition, separation of powers, due process and equal protection); *Ferdon v. Wisc. Patients' Comp. Fund*, 701 N.W.2d 440, 446 (Wis. 2005) (challenging a cap on non-economic damages as violative of equal protection).

8. *Compare Kirkland*, 4 P.3d at 1116 (capping non-economic damages does not violate the right to a jury trial, special legislation prohibition or separation of powers in Idaho); *Murphy*, 601 A.2d at 118 (capping non-economic damages does not violate equal protection or the right to a jury trial in Maryland); *Phillips*, 685 N.W.2d at 179 (capping non-economic damages does not violate the right to a jury trial, due process or equal protection in Michigan); *Rhyne*, 594 S.E.2d at 14 (capping non-economic damages does not violate the right to a jury trial, separation of powers, due process or equal protection in North Carolina); *with Best*, 689 N.E.2d at 1081 (capping non-economic damages violates special legislation prohibition and separation of powers in Illinois); *Lucas*, 757 S.W. 2d at 687 (capping non-economic damages violates the open courts protection in Texas); *Ferdon*, 701 N.W.2d at 468 (capping non-economic damages violates equal protection in Wisconsin).

9. See Jonathan M. Hoffman, *By the Course of Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1281 (1995). ("[C]ourts which undertake to decide cases based upon distinct state constitutional provisions must first overcome an inconvenient and too-often overlooked impediment: the absence of serious historical research into the origins of these provisions."); See also David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1200, 1205-17 (1992) (noting that state courts have only occasionally looked to the origins of open court protections to interpret such provisions and describing the various state court approaches to interpreting state open court provisions).

10. See Schuman, *supra* note 9, at 1205-17.

imposed a statute of repose, strengthened the required qualifications for medical experts, and partially abrogated the collateral source rule.¹¹ The OMMA also marked the amount recoverable as non-economic damages to \$200,000.¹²

The OMMA was apparently passed in response to a perceived crisis in the market for malpractice insurance. While the OMMA was pending before the Ohio Senate, the Ohio State Medical Association submitted a report to the General Assembly that concluded that “within the next several days, the number of physicians unable to continue medical malpractice in Ohio because of the lack of adequate malpractice coverage will reach crisis proportions.”¹³ The preamble to the OMMA stated: “The reason for such necessity lies in the fact that immediate action is necessary to insure a continuance of health care delivery to the citizens of Ohio.”¹⁴

Opponents of the OMMA challenged several of its provisions in Ohio courts. By 1981, the Ohio Supreme Court had upheld the provisions of the Act pertaining to expert witnesses and requiring arbitration.¹⁵ Between 1980 and 1986 the Court issued a series of decisions concerning the validity of the shortened statute of limitations and statute of repose.¹⁶ Ultimately, the Court concluded that a four-year statute of repose was unconstitutional as applied to minors.¹⁷ In 1991, the Court confronted the constitutionality of the damage cap in *Morris v. Savoy*,¹⁸ where the Court held that the damage cap violated the due process protections in the Ohio Constitution.¹⁹ The Court applied traditional due process analysis, concluding that the cap violated due process because it did not bear a rational relationship to the state’s interest in enacting the cap.²⁰ The Court concluded that no evidence established a relationship between the cap and its stated goal of reducing malpractice insurance premiums.²¹ Likewise, the Court concluded that

11. 136 OHIO LAWS, PART II 2809.

12. *Id.* at 2813.

13. *Morris v. Savoy*, 576 N.E.2d 765, 768 (Ohio 1991) (citing Gongwer News Service, Inc., Ohio Report (July 1, 1975)).

14. 136 OHIO LAWS, PART II 2809.

15. *Morris*, 576 N.E.2d at 768 n.2.

16. *Id.* at 763 n.3.

17. *Id.* (citing *Schwan v. Riverside Methodist Hosp.*, 452 N.E.2d 1337 (Ohio 1983)).

18. *Id.* at 765.

19. *Id.* at 771.

20. *Id.*

21. *Id.* at 770. The Court reasoned that the cap did not bear a rational relationship to the stated goal of reducing medical malpractice insurance premiums. *Id.* The Court noted that the Act required the state Superintendent of Insurance to study several provisions of the Act to determine

the cap was arbitrary. The Court reasoned that if the purpose was to benefit the public at large by ensuring health care, it was arbitrary to impose the cost of this goal on only the most severely injured victims of malpractice.²²

Writing in concurrence and dissent, one justice would have concluded that the damage cap also violated the right to a jury trial, the equal protection clause, the open courts protection and the special legislation prohibition in the Ohio Constitution.²³ Justice Sweeney, like the majority, placed no emphasis on the historical underpinnings of these Ohio Constitution clauses. Instead, he reasoned that the right to a jury trial extended to the determination of damages in a malpractice case and that the cap substantially interfered with the jury's ability to assess damages.²⁴ Likewise, Justice Sweeney reasoned that the Ohio open courts provision required courts to be open specifically to provide redress for injuries.²⁵ Justice Sweeney reasoned that the cap interfered with a party's ability to obtain redress for injuries and, hence, violated the open courts provision.²⁶ Finally, reasoning from prior precedent, Justice Sweeney concluded that the damage cap violated the special legislation prohibition.²⁷ Justice Sweeney explained that a statute violates the special legislation provision when the statute limits the liability of a class without a rational justification.²⁸ Justice Sweeney concluded that the cap limited the liability of a class of tortfeasors at the expense of their victims but failed to provide this same benefit to any other class of tortfeasors.²⁹

In 1996, the Ohio General Assembly passed a new tort reform statute. The statute, like its predecessor, imposed a cap on non-economic damages, limited the collateral source rule and joint and several liability and imposed a statute of repose, among other provisions.³⁰ Additionally, the statute extended beyond medical

their effect on insurance premiums. *Id.* However, the Court observed that the damage cap was not among those provisions to be studied. *Id.* The Court also noted that the parties to the litigation put forth no evidence to support a connection between damage awards and insurance premiums. *Id.* The Court concluded that without such support the damage cap could not withstand constitutional scrutiny. *Id.* at 771.

22. *Id.*

23. *Id.* at 777 (Sweeney, J., concurring in part and dissenting in part).

24. *Id.* at 778-79.

25. *Id.* at 782-83.

26. *Id.* at 784.

27. *Id.* at 783.

28. *Id.*

29. *Id.*

30. 146 OHIO LAWS, PART II 3867.

malpractice claims to claims for professional negligence generally, as well as for physical personal injury claims generally.³¹

The General Assembly enacted the 1996 statute after a heated debate. A group of business interests known as the Ohio Alliance for Civil Justice was one of the strongest proponents of the statute, spending more than \$1 million to lobby the General Assembly for its passage.³² The Alliance and its supporters contended that the statute would help lower prohibitively high insurance premiums.³³ Ohio trial lawyers and consumer activists lobbied against its passage.³⁴

The Ohio Academy of Trial Lawyers sought a writ of prohibition and mandamus from the Ohio Supreme Court challenging the constitutionality of the Act. In *Ohio Academy of Trial Lawyers v. Sheward*,³⁵ the Court, as it had in *Morris*, struck down the Act.³⁶ This time, the Court concluded that the Act violated separation of powers because it re-enacted provisions that the Court previously had declared unconstitutional and because the legislative findings purported to proclaim the constitutionality of the Act and “disagree” with the previous Ohio Supreme Court holdings.³⁷ Unlike in *Morris*, the *Sheward* Court chronicled the history of the relationship between the judiciary and the legislature and the separation of powers in Ohio’s Constitutions of 1802 and 1851, concluding that the “power of constitutional adjudication was secured exclusively in the judiciary, essential to its integrity and independence, serving, fundamentally and intrinsically, as a check upon the other branches.”³⁸ Specifically, the Court concluded that the provisions adopting statutes of repose, the provisions imposing a certificate of merit requirement in medical malpractice actions, the provisions abrogating the collateral source rule and provisions capping punitive and non-economic damages re-enacted previous laws without rectifying their constitutional infirmities and hence violated separation of powers.³⁹

In 2005, the General Assembly passed a comprehensive tort reform

31. *Id.*

32. Margaret Newkirk, *House OKs Tort Reform in New Vote*, AKRON BEACON J., Sept. 27, 1996, at A1.

33. Margaret Newkirk, *Tort Reform Focus of Ohio House Vote*, AKRON BEACON J., Sept. 27, 1996.

34. Newkirk, *supra* note 32; Newkirk, *supra* note 33.

35. 715 N.E.2d 1062 (Ohio 1999).

36. *Id.* at 1091.

37. *Id.*

38. *Id.* at 1079.

39. *Id.* at 1085-96.

statute.⁴⁰ Like its predecessor, the 2005 Act imposed a cap on non-economic damages,⁴¹ limited the collateral source rule⁴² and joint and several liability⁴³ and imposed a statute of repose,⁴⁴ among other provisions. Additionally, the statute extended beyond medical malpractice claims to claims for professional negligence generally as well as for physical personal injury claims generally.

Like its predecessors, the 2005 statute was enacted to remedy perceived insurance problems caused by excessive jury verdicts.⁴⁵ The Ohio Alliance for Civil Justice as well as the Ohio Manufacturers Association, the Ohio Chamber of Commerce and the Ohio chapter of the National Federation of Independent Businesses were the leading proponents of the statute, while the Ohio Academy of Trial Lawyers advocated against the statute.⁴⁶

II. THE SCHOLARLY ACCOUNT OF TORT REFORM

Some recent scholarly commentary has focused on the origins of the current tort retraction movement. While recognizing the tort retraction movement as a general reaction to tort expansion over the first three-quarters of the Twentieth Century,⁴⁷ the commentary sets up the current tort retraction movement more particularly as a foil to the tort expansion in the 1950s and 1960s.⁴⁸ This commentary depicts the current tort retraction movement as an attack on the tort system that is unprecedented in its use of the legislative process to further the economic interests of its proponents. The commentary seeks to distinguish tort expansion from the current tort retraction and ultimately demonstrate the inherent superiority of tort expansion. In so doing, this commentary takes a limited historical view, emphasizing the tort

40. See Am. S.B. 80, 125th Gen. Assem. (Ohio 2004).

41. OHIO REV. CODE ANN. § 2315.18 (2006).

42. OHIO REV. CODE ANN. § 2315.20.

43. OHIO REV. CODE ANN. § 2315.32.

44. OHIO REV. CODE ANN. § 2305.10.

45. See John Byczkowski, *Ohio Sets New Lawsuit Limits*, CIN. ENQUIRER, December 10, 2004, at B1; John Byczkowski, *Reform or Restriction*, CIN. ENQUIRER, November 28, 2004, at B1.

46. *Id.*

47. See, e.g., John T. Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021, 1022 (2005) "This Article holds that tort retrenchment represents one manifestation of business and industrial reaction to social, political, and economic forces that transformed the American civil justice system during the first three quarters of the twentieth century." *Id.* "Classical tort reform [of the 1970s-1991] . . . sees itself as an effort to correct the excesses of Progressive Era reform." Note, "*Common Sense*" Legislation: *The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1767 (1996).

48. See *infra* notes 49-54 and accompanying text.

expansion of the 1950s and 1960s. By limiting its focus to the 1950s and 1960s, this commentary is able to identify what it sees as two essential distinguishing characteristics of tort expansion. First, the commentary describes tort expansion as primarily a judicial process. Second, the commentary attributes tort expansion to the work of legal academics. In so doing, the commentary seeks to characterize tort expansion as a process driven by selfless actors devoid of any economic interest in tort expansion.

Scholarly commentary distinguishing tort expansion from current tort retraction efforts acknowledge that the evolution of tort law began with Progressive Era reform measures such as workers' compensation. However, this scholarship has focused on tort expansion in the 1950s and 1960s as the primary motivator for current tort retractors. For example, while acknowledging other contributing factors, Professor Page depicts the current tort reform movement as a response to the expansion of tort rights in the 1950s and 1960s.⁴⁹ Likewise, Professor Nockleby and student commentator Curreri posit that major tort expansions in the 1960s, 1970s and 1980s triggered tort retraction.⁵⁰

As a result, these commentators describe tort expansion as taking place primarily in the courts.⁵¹ These commentators also describe tort expansion as driven primarily by disinterested academics. For example, Professor Page recognizes that the rise of an organized trial bar after World War II produced "aggressive front-line pressure for judicial adoption of doctrines that favored plaintiffs" and "development of

49. Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649, 652-53 (1990) (reviewing PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988)).

Although the stirrings of old tort reform can be traced through the judicial decisions during the first half of the century, the pace did not quicken until the 1950s and 1960s. With an extraordinary outburst of energy, the courts recognized their new duties, abolished immunities, and adopted expansive rules for measuring damages. Perhaps the most dramatic development was the judicial adoption of a rule of strict tort for harm caused by defective, unreasonably dangerous products.

Id.

50. See Nockleby & Curreri, *supra* note 47, at 1026-33 (describing the "dramatic upheaval" to the tort system beginning in the 1960s and three "waves of tort retrenchment" during the 1970s, 1980s and 1990s).

51. See *id.* at 1029. "While scholars and the courts were largely responsible for shaping prior changes to tort law, the movement self-described as tort reform was and remains 'fueled by the economic self-interest of those who perceive themselves as adversely affected by the tort system.'" Page, *supra* note 49, at 654. "So situated, then, contemporary political battles over tort reform can be explicitly linked to the politics of an earlier era that at one time was confined to debates in the courtroom." Nockleby & Curreri, *supra* note 47, at 1024. "Classical tort reform also differs from progressive reform in that it focuses on the legislative, rather than the judicial arena." Note, *Common Sense Legislation*, *supra* note 47, at 1768 n.25.

tactical skills enabling plaintiffs to win substantial jury verdicts.”⁵² However, Professor Page ultimately gives credit to legal scholars for the theoretical reforms advanced by the trial bar and adopted by the judiciary, observing that “[t]he work of legal scholars provided much of the theoretical framework for the old tort reform. These scholars created an intellectual climate for what occurred in the 1950s and 1960s.”⁵³

By painting tort expansion as an intellectual movement of scholars and judges taking place in the courtroom and the legal academy, these commentators attempt to characterize the expansion of tort rights as unconnected to any economic interests of the actors advocating reform. Indeed, in emphasizing this distinction some of these scholars seek not only to distinguish tort expansion from current tort retraction but also to elevate tort expansion as superior to tort retraction. For example, Professor Page concludes:

Despite their apparent similarities, there is an important difference between the old and new tort reform. The former derived inspiration and major impetus from the ideas of scholars and has its primary influence on the courts. The latter is fueled by the economic self-interest of those who perceive themselves as adversely affected by the tort system. In essence, the new tort reform is a political attack on tort law in the legislative arena.⁵⁴

Moreover, in these scholarly accounts of tort expansion, business and corporate interests appear to be absent or at least silently acquiescing in this expansion of individual rights, awakening only after their economic interests are harmed by the tort expansion of the 1950s and 1960s and responding solely to those economic interests.

III. THE OVERLOOKED PROGRESSIVE ERA

While this picture is accurate, it is incomplete. As Professor Page ultimately concedes, the tort expansion of the 1950s and 1960s was “but one swing of a pendulum” and the current tort retraction may be a return swing seeking to “restore equilibrium.”⁵⁵ However, the pendulum began swinging much earlier than the 1950s and 1960s. Indeed, the pendulum began swinging as early as the 1890s. A more complete review of this

52. Page, *supra* note 49, at 654. Professor Page notes that the National Association of Claimants’ Compensation Attorneys was founded in 1946 and that the NACCA evolved over time, eventually reconstituting itself as the Association of Trial Lawyers in 1964. *Id.* at 654 n.30.

53. *Id.* at 653-54; *see also* Note, *Common Sense*, *supra* note 47, at 1766.

54. Page, *supra* note 49, at 654-55.

55. *Id.* at 654.

evolution, including its early history, reveals that the struggle over tort reform has taken place in both the judicial and political branches throughout the history of the development of tort law. Moreover, a more complete review reveals that with each swing of the pendulum economically interested actors were present and pushing from both sides in both the judicial and the political arenas.

A. The Political Successes of the Progressive Era Tort Expansionists

1. The Legislative Front

As discussed above, the scholarly account of tort reform paints tort expansion as primarily a judicial process. However, a more complete review of the evolution of tort law demonstrates that tort expansion has been a political as well as judicial process. As early as the 1890s, the Progressive movement gained prominence in American politics and society. The Progressive movement sought greater government regulation of America's emerging industrial economy to protect workers and promote social welfare.⁵⁶ That government regulation included, in part, expansion of tort rights. Progressive Era tort expansionists did not resort solely to the courts in their battles for tort expansion and against tort retraction. Instead, they also sought tort expansion through the political branches. In fact, Progressive Era reformers succeeded in winning significant legislative expansion of tort rights.

For example, the quest for safe working conditions was one of the hallmarks of the Progressive movement. As a part of this, Progressive reformers sought better access to compensation for workers injured in workplace accidents. To this end, Progressive Era reformers won legislative expansion of the judicially enforced common law tort rights of injured workers. Traditionally, the common law recognized three absolute defenses to tort claims brought by employees against their employers for workplace accidents: (1) the fellow-servant rule which precluded an injured worker from recovering if his injuries were caused by the negligence of a co-worker rather than a superior; (2) contributory negligence; and (3) assumption of the risk.⁵⁷ These defenses had the

56. MAXWELL BLOOMFIELD, *PEACEFUL REVOLUTION: CONSTITUTIONAL CHANGE AND AMERICAN CULTURE FROM PROGRESSIVISM TO THE NEW DEAL* 27 (2000); JAMES W. ELY, JR., *RAILROADS AND AMERICAN LAW* 225 (2001); *see also* Rabin, *supra* note 2 at 710 (noting that the Progressive Era emphasized a wide variety of workplace reforms and produced the first wave of consumer health and safety legislation).

57. *See* PROSSER AND KEETON ON TORTS § 80 (W. Page Keeton, Dan B. Dobbs, Robert E.

practical effect of precluding most relief for workplace accidents.⁵⁸ Progressive Era reformers challenged these common law defenses in legislatures. In response to these challenges, several state legislatures adopted Employers' Liability Acts that statutorily abrogated the fellow servant rule in cases of injuries to railroad employees⁵⁹ and employees working in other industries.⁶⁰ Progressive efforts on this front even had success on a national level. In 1906 and again in 1908, Congress enacted the Federal Employers' Liability Act.⁶¹ The Act statutorily created a cause of action for any railroad employee injured in a workplace accident. In essence, FELA abrogated the fellow servant rule and contributory negligence.

Progressive Era efforts to provide better compensation to injured workers culminated in the replacement of the tort system with an administrative compensation scheme. As a result of Progressive lobbying and campaigning, almost all states enacted workers' compensation legislations. Indeed, 42 of the then 48 states adopted workers compensation laws by 1920.⁶² These workers' compensation statutes substituted the injured employee's judicially enforced tort rights

Keeton & David G. Owen eds., 5th ed. 1984); ELY, *supra* note 56, at 216; Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 52-58 (1967) (chronicling the rise of the fellow-servant doctrine and the assumption of the risk defense).

58. PROSSER AND KEETON ON TORTS, *supra* note 57, at 569. Indeed, Professor Prosser found these defenses so restrictive that he labeled them alternatively "the 'unholy trinity' of common law defenses, and the "three wicked sisters of the common law." *Id.* at 569, 573.

59. For example, the Georgia legislature passed an employers' liability law in 1856 that attempted to statutorily abrogate the fellow servant rule in railroad accidents. Iowa, Arkansas, Florida, Kansas, Minnesota, Missouri, Montana, Nebraska, North Carolina, North Dakota, Oklahoma, South Dakota, Texas, Indiana and Wisconsin passed laws abrogating the fellow servant rule by 1900. ELIZABETH SANDERS, *ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE 1877-1917* 371 (1999). See also ELY, *supra* note 56 at 215; JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 67 (2004); Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 791 n.42 (1982). At least 25 states adopted laws abrogating the fellow servant rule, instituting comparative negligence or limiting assumption of the risk by 1911. WITT, *supra*, at 67; Friedman & Ladinsky, *supra* note 57 at 64. Professor Sanders attributes this legislative success to the political strength of the railroad unions and also to the large number of railroad accidents and the public visibility of these accidents. SANDERS, *supra*, at 371-72.

60. SANDERS, *supra* note 59, at 371-72. The Nevada legislature abrogated the fellow servant rule and eliminated the defense of contributory negligence in cases of injuries to miners as well as railroad workers. Colorado statutorily abrogated the fellow servant rule in all cases arising from workplace accidents. *Id.*

61. 45 U.S.C. § 51 (1908). The Supreme Court struck down the initial version of FELA on the grounds that it covered railroad employees who were not engaged in interstate commerce. *Employers' Liability Cases* (Howard v. Illinois C. R. Co.), 207 U.S. 463 (1908).

62. WITT, *supra* note 59, at 127.

for an administrative remedy funded by the employer. Employers were held strictly liable under the administrative scheme. Thus, the administrative system afforded the worker a more guaranteed recovery with lower transaction costs than the tort system. However, the administrative remedy awarded lesser compensation than was theoretically available through the tort system and the costs of the system were spread across all employers. Thus, the system was less costly to employers.

The Ohio experience is illustrative of this pattern. The Ohio General Assembly passed employer's liability legislation attempting to abrogate the common law defenses and expand employers' liability for workplace accidents as early as 1890.⁶³ The Ohio Act of April, 2 1890 prohibited railroad operators from requiring employees to waive their right to sue for workplace injuries as a condition to employment or requiring employees to contribute to a relief association or waive their right to sue as a condition to receiving benefits from a relief association.⁶⁴ The Act of 1890 also created a cause of action for railroad workers injured by a defect in a locomotive or any car, machinery or other attachments to the locomotive.⁶⁵ Finally, the Act of 1890 limited the fellow-servant rule. Under the fellow-servant doctrine, an employee could not recover from his employer if his injuries were caused by the negligence of a co-worker. However, the employee could recover if his injuries were caused by the negligence of a superior. The Act of 1890 codified this rule and clarified that employees in any branch of a corporation were superior employees for purposes of this rule.⁶⁶

The General Assembly passed additional statutes attempting to abrogate the fellow-servant and assumption of the risk defenses in other industries.⁶⁷ For example, in the Act of April 1902, the General Assembly further abrogated the fellow-servant rule by creating a cause of action for an employee who was injured due to a defect in the condition of any workplace machinery that the employer negligently

63. *Vayto v. River Terminal*, 28 Ohio Dec. 401, 404 (Ohio C.P. 1915); Stanton G. Darling II, *History of Ohio Products Liability Law*, in II THE HISTORY OF OHIO LAW 591, 596 (Michael Les Benedict and John F. Winkler eds., 2004).

64. H.B. 200, 69th Gen. Assem., Reg. Sess. (Ohio 1890). Fearful of personal injury claims, some railroads created employee relief associations to provide medical assistance and compensation to injured workers. These relief associates were funded by contributions by employees. Some railroads made contributions to the relief association mandatory. Railroads also made waiver of suit against the railroad a condition to receiving benefits. ELY, *supra* note 56, at 216-17.

65. H.B. 200, *supra* note 64.

66. *Id.*; *Railroad Co. v. Margrat*, 37 N.E. 11 (Ohio 1894).

67. *Vayto*, 28 Ohio Dec. at 404; Darling, *supra* note 63, at 596.

failed to detect or repair even if it was a co-worker who was negligent in the inspection or repair of the machinery.⁶⁸ In the Act of April 1904, the General Assembly created a cause of action for a worker who was injured when the employer negligently failed to guard or protect the machinery, appliances or workplace even if the injured worker learned of the defect and continued to work with the machinery or in the workplace after learning of the defect.⁶⁹ The Act of 1904, thus, abrogated the assumption of the risk doctrine.

The Ohio legislature's efforts to alleviate the effects of the common law defenses culminated in the Norris Act of 1910.⁷⁰ The Norris Act further abrogated the defenses of assumption of the risk and the fellow-servant rule and also adopted comparative negligence in lieu of contributory negligence. For example, the Norris Act clarified that any employee charged with inspecting or repairing the workspace or machinery within the workspace or transmitting warnings or instructions to employees was not a fellow-servant.⁷¹ The Act also prohibited application of the fellow-servant defense when the worker's injuries were caused by the negligence of a co-worker who was following instructions given by the employer and when the employer failed to provide necessary and sufficient supervision of employees to ensure a safe workplace.⁷² The Act provided that an employee would not be deemed to have assumed the risk of injury if his injuries were caused by the negligence of a fellow-servant who was following instructions given by the employer, nor would an injured employee be deemed to have assumed the risk of injury when the employer had failed to provide adequate supervision to ensure a safe workplace.⁷³ Finally, the Act provided that the negligence of an employee would not bar recovery "where his contributory negligence is slight and the negligence of the employer is gross in comparison."⁷⁴ The Act substituted comparative negligence in these situations.⁷⁵

Like other states, Ohio eventually sought to replace tort remedies for workplace injuries with an administrative workers' compensation scheme. The General Assembly first adopted a workers' compensation

68. H.B. 31, 75th Gen. Assem., Reg. Sess. (Ohio 1902).

69. H.B. 122, 67th Gen. Assem., Reg. Sess. (Ohio 1904).

70. See *Vayto*, 28 Ohio Dec. at 404.

71. H.B. 24, 78th Gen. Assem., Reg. Sess. (Ohio 1910).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

law in 1911.⁷⁶ After the Ohio Constitution was amended in 1912 to expressly authorize the legislature to enact workers' compensation legislation,⁷⁷ the General Assembly adopted new legislation in March 1913. The new legislation strengthened the workers' compensation system, in part, by making participation in the system mandatory.

2. The Progressive Era Constitutional Conventions

Progressive Era reformers did not confine their political efforts to the state and federal legislatures. Instead, Progressive Era reformers used state constitutions to expand tort rights. Progressive Era reformers sought and won constitutional amendments aimed at limiting the legislature's ability to curb common law torts and remedies. Eighteen states convened constitutional conventions between 1870 and 1915.⁷⁸ During these conventions, Progressive Era reformers sought constitutional provisions aimed at expanding tort rights outright and at limiting the legislature's control over common law tort actions. For example, South Carolina amended its constitution in 1895 to constitutionally ban the fellow-servant rule.⁷⁹ In several other states, reformers proposed and won measures prohibiting the legislature from adopting special statutes of limitations aimed at shortening statutes of limitations in lawsuits against railroads and corporations.⁸⁰ Likewise, in many states, reformers sought measures prohibiting the legislature from limiting damages in personal injury and wrongful death actions.⁸¹

76. S.B. 127, 79th Gen. Assem., Reg. Sess. (Ohio 1911).

77. See *infra* notes 127-28 and accompanying text.

78. CYNTHIA E. BROWNE, *Introduction* to RICHARD H. LEACH, *STATE CONSTITUTIONAL CONVENTIONS FROM INDEPENDENCE TO THE COMPLETION OF THE PRESENT UNION, 1776-1959* xxvii-xxix (1973).

79. ELY, *supra* note 56, at 215.

80. See, e.g., ARIZ. CONST. art. 2, § 31, art. 4, § 19 (1912) (prohibiting statutory limits on damages in personal injury actions and wrongful death actions and prohibiting special statutes of limitations); COLO. CONST. art. V, § 25 (1876) (prohibiting the legislature from enacting special statutes of limitation and from enacting rules of procedure for the Colorado courts).

81. See, e.g., ARIZ. CONST. art. 2, § 31, art. 4, § 19 (prohibiting statutory limits on damages in personal injury actions and wrongful death actions and prohibiting special statutes of limitations); ARK. CONST. art. 5, § 32, art. 17, § 12 (1874) (prohibiting statutory limits on damages in personal injury actions and providing that railroads must be liable for injuries that they cause); COLO. CONST. art. V, § 25 (prohibiting the legislature from enacting special statutes of limitation and from enacting rules of procedure for the Colorado courts); KY. CONST. § 54 (1890) (prohibiting statutory limits on damages recoverable in personal injury and wrongful death actions); N.Y. CONST. art. I, § 18 (1894) (prohibiting abrogation of wrongful death actions or limits on damages recoverable therein); OKLA. CONST. art. XXIII, § 7 (1907) (prohibiting abrogation of wrongful death actions or limits on damages recoverable therein); UTAH CONST. art. XVI, § 5 (1895) (prohibiting abrogation of wrongful death actions or limits on damages recoverable therein).

Illustratively, in 1873 Pennsylvania delegates proposed and adopted a constitutional amendment prohibiting the legislature from limiting damages in personal injury and wrongful death actions and from shortening the statute of limitations in lawsuits against corporations. As amended, Article III, Section 21 provided:

[No act of] the general assembly [shall] limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property; and, in case of death from injuries, the right of action shall survive, and the general assembly shall prescribe for whose benefit such actions shall be prosecuted. No act shall prescribe any limitations of time within which suits may be brought against the corporations for injuries to persons or property, or for other causes different from those fixed by general laws regulating actions against natural persons, and such acts now existing are void.⁸²

Progressive Era reformers sought these constitutional provisions expressly because they feared corporate interests' influence in state legislatures. For example, in 1891, Kentucky amended its constitution, in part, to prohibit the legislature from limiting the amount to be recovered for injuries resulting in death, or for injuries to a person or property⁸³ and to provide that "[w]henver the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same."⁸⁴ The provisions apparently were enacted because delegates feared that the legislature had granted privileges and immunities to railroads and other corporate interests because of their political power.⁸⁵

Ohio's experience follows similar lines. Ohio convened a

82. PA. CONST. art. III, § 18.

83. KY. CONST. § 54 (1891).

84. KY. CONST. § 241 (1891).

85. See *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809, 811-12 (Ky. 1991). "[Sections] 54 and 241 . . . were enacted along with many other provisions to limit the power of the General Assembly, which was then widely perceived as abusing its power with the grant of privileges and immunities to railroads and other powerful corporate interests." See *Debates, Constitutional Convention of 1890*, Vol 4.

'Most of the delegates to the Constitutional Convention felt that the real root of Kentucky's governmental problems was the almost unlimited power of the General Assembly. One of them even said that ' . . . the principal, if not the sole purpose of the constitution which we are here to frame, is to restrain its [the Legislature's] will and restrict its authority. . . .' They distrusted the General Assembly, so they wrote many details of law into the Constitution.' p. 161, Research Report No. 137, Legislative Research Commission, Jan. 1987.

Id.

constitutional convention in 1912. Delegates to the convention ultimately adopted Proposal 240 prohibiting the legislature from imposing statutory limits on the amount of damages recoverable in wrongful death actions. As originally submitted, Proposal 240 also would have expressly prohibited the legislature from abrogating the right of action in wrongful death cases.⁸⁶ Comments of the delegates reveal that at least some of the delegates supported Proposal 240 specifically because the Ohio General Assembly had passed legislation that reduced mining companies' liability in wrongful death actions.⁸⁷ In opposing an amendment to Proposal 240 which eliminated the prohibition on abrogating the right of action, Delegate James Tallman a lawyer from Bellaire stated:

I do regard this one thing of importance, and that is the power of the legislature to take away from the next of kin the right of action in case of the death of a child or unmarried man. You take the law as it now exists with reference to a man who works in a mine, and he may be under age or he may be an adult and in neither case does his next of kin, father, mother, brothers or sisters, have a right of action, and the amendment of the gentleman from Erie leaves to the legislature the power to pass a law of that kind.⁸⁸

B. The Motivations of the Progressive Era Tort Expansionists

Likewise, by focusing on the tort expansion of the 1950s and 1960s, the scholarly account of tort reform is able to credit a legal academy unmotivated by self-interest for driving the expansion.⁸⁹

86. See II PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 1411 (1912).

87. See *infra* notes 110-18 and accompanying text.

88. PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF OHIO, *supra* note 86, at 1712.

89. This scholarly account can be criticized for understating the influence of academics on the tort retraction movement as much as it overstates the role of academics in tort expansion. Several scholars have argued in favor of tort retraction. See, e.g., W. Kip Viscusi, *Jurors, Judges and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107, 135-36 (2001) (proposing increased judicial discretion over punitive damage awards as well as eliminating punitive damages based on environmental and safety risks); George L. Priest, *Modern Tort Law and Its Reform*, 22 VAL. U. L. REV. 1, 22-36 (1987) (proposing that standards of liability focus on accident reduction); Steven A. Shavell, *An Economic Analysis of Accident Law* 231 (1987). Indeed, George Priest has identified "academic efforts to reexamine [tort] law" as one of the two reasons that "serious and systematic reform of modern tort law is inevitable." George L. Priest, *The Inevitability of Tort Reform*, 26 VAL. U. L. REV. 701, 701 (1992); see also Manzer, *supra* note 1 at 629 (1986) ("Although the 'insurance crisis' was the most widely publicized factor that led states to adopt tort reform legislation measures, state legislators also were responding to scholarship indicating that the tort system failed

Contrary to this account, the history surrounding the struggle for legislative tort expansion demonstrates the political nature of Progressive (and Populist) tort expansion. For example, in her book, *“Roots of Reform: Farmers, Workers, and the American State 1877-1917,”* Professor Sanders chronicles this struggle and describes a coalition of multiple interests that ultimately brought about federal legislative reform.⁹⁰ She identifies three groups responsible for legislative tort expansion. First, she identifies a group of middle class reformers or “urban social intelligentsia.”⁹¹ This group most closely resembles the detached legal academy that the current scholarly account credits with the tort expansion of the 1950s and 1960s in that these middle class reformers appear unmotivated by any economic self-interest.⁹² However, she also identifies a group of labor interests and a group of “periphery agrarian” interests composed of farmers in the southern, plains and western states.⁹³ She describes how legislative expansion of tort rights was a product of a consensus of these groups. For instance, she notes that agrarian states were the first to legislatively abrogate common law defenses in workplace accident cases.⁹⁴

In contrast, Progressive Era reformers sought but were unable to obtain federal workers compensation legislation for railroad employees because this coalition fell part. Initially, a coalition of labor unions, middle class reformers and railroad interests along with rural interests supported a bill that would have abrogated an employee’s private cause of action for railroad workplace injuries and replaced it with an administrative compensation scheme.⁹⁵ Reported estimates predicted that the administrative system would increase the amounts paid by railroads for workplace injuries by 25% and eliminate litigation transaction costs bore by injured workers.⁹⁶ After labor unions began to withdraw their support for the bill on the grounds that it was too

to achieve its objectives and therefore should be substantially modified or even eliminated.”); *but see* Note, *Common Sense*, *supra* note 47 at 1766 (arguing that scholars have “overestimated the influence of legal scholarship on tort reform”).

90. SANDERS, *supra* note 59, at 373, 375.

91. *Id.* at 375.

92. *Id.* Indeed, Professor Sanders holds out Louis Brandeis as an example of the urban-based intellectuals she describes. *Id.* at 3.

93. *Id.* at 328, 373-75.

94. *Id.* at 371-72. Professors Friedman and Ladinsky similarly note that the first such liability statutes were enacted in agrarian states. They conclude that the timing “suggests . . . that some of these statutes were connected with the general revolt of farmers against the power of the railroad companies.” Friedman & Ladinsky, *supra* note 57 at 62-64.

95. *Id.* at 373.

96. *Id.*

beneficial to railroads, several Democratic congressmen from these periphery agrarian states withdrew their support for the legislation.⁹⁷ These congressmen ultimately were able to block adoption of the bill. Professor Sanders notes that these congressmen objected to the bill on the grounds that compensation was too low and that it precluded any judicial remedy.⁹⁸ These congressmen offered amendments to the bill that would have allowed injured workers to opt out of the administrative scheme and seek a common law remedy and would have preserved state court jurisdiction over such tort suits.⁹⁹ Professor Sanders also observes that many of these congressmen were plaintiffs' attorneys who represented railroad workers in lawsuits against railroads as a "significant part of their practices."¹⁰⁰

At the Ohio convention at least some of the strongest proponents for tort expansion were economically motivated actors. For instance, one of the most forceful advocates for Proposal 240 to prohibit caps on wrongful death damages was D. F. Anderson, an apparent plaintiffs' attorney¹⁰¹ and delegate from Youngstown.

C. The Role of the Would-Be Tort Retractors

While the scholarly account of tort reform overlooks the political activities of the early tort expansion movement, the scholarly account utterly disregards any of the early activities of tort retractors. Contrary to the perception left by the scholarly account corporate, professional and insurance interests were not absent from the early struggle for tort expansion. Instead, predecessors-in-interest to the current tort retractors sought legislative measures similar to those sought by the tort retractors of today as early as the late Nineteenth Century. These predecessors-in-interest also resisted efforts to legislatively expand tort expansion. Finally, tort retractors challenged legislative tort expansion in the courts.

1. The Legislative Activities of Early Tort Retractors

In the mid and late Nineteenth Century, corporate interests wielded significant power in state legislatures. Indeed, many Progressive Era

97. *Id.*

98. *Id.*

99. *Id.* at 374.

100. *Id.* at 373-74.

101. Delegate Anderson described his legal experience as follows: "Now, I have had some experience—I suppose I have had more experience where the individual is on one side and the corporation on the other than most here." PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF OHIO, *supra* note 86, at 1411.

reforms evidenced a distrust of legislatures because of the influence that corporations held over legislators. Many of the most recognizable Progressive Era innovations attempted to make legislative bodies more accountable to the general public rather than corporate interests. For example, Progressives were instrumental in bringing about the ratification of the Seventeenth Amendment, providing for the direct election of U.S. Senators.¹⁰² Progressives argued that direct election was necessary to make the Senate responsive to the popular will. They contended that appointment of Senators by state legislatures had made senators beholden to corporate interests because corporate interests wielded strong influence over the state legislators who selected senators.¹⁰³ Most notably, in a series of articles titled “Treason of the Senate,” one leading Progressive Era reformer attempted to document the influence of corporate contributions on the voting records of many sitting senators.¹⁰⁴

Progressives advocated direct democracy measures such as initiative, referendum and recall as the centerpiece of progressivism. Indeed, many states adopted such measures during the Progressive period.¹⁰⁵ These measures allowed citizens to bypass the legislature and enact legislation themselves or repeal statutes enacted by the legislature. This type of direct democracy was seen as a counterbalance to corporate influence over legislators. For example, in the 1912 Constitutional Convention, Ohio adopted initiative and referendum. In a pamphlet prepared by the President of the Convention for the U.S. House of Representatives, the President described adoption of the initiative and referendum provisions as follows:

Faith in the initiative and referendum is the acid test of the progressive. Ohio’s vote upon this amendment will be heralded far and wide. If it were defeated Wall Street would go into ecstasies of delight. If, on September 3, the initiative and referendum amendment is adopted by an impressive majority, the returns will come like the handwriting upon the wall to those who revel at the feast of privilege. . . . It will be the beginning of the end of the rule of big interests.¹⁰⁶

Corporate interests wielded some of this influence to win tort

102. BLOOMFIELD, *supra* note 56, at 43.

103. *Id.* at 43.

104. *Id.* at 43-44.

105. See, e.g., CAL. CONST. art. 2 § 8-9 (1849), amended by CAL. CONST. art. 2 § (1911); COLO. CONST. art. V § 1 (1876); MO. CONST. art. 3 § 49 (1908); OKLA. CONST. art. 5 § 1 (1907).

106. HERBERT S. BIGELOW, NEW CONSTITUTION FOR OHIO: AN EXPLANATION OF THE WORK OF OHIO’S FOURTH CONSTITUTIONAL CONVENTION 11 (1912).

retraction measures and to successfully block or limit tort expansion in state legislatures. In some states, railroad and other corporate interests won shortened statutes of limitation in personal injury actions. Tort retractors blocked, stalled or weakened workers' compensation legislation. Indeed, many commentators contend that most Progressive Era legislation succeeded only after significant corporate input and ultimately represented a compromise between corporate and reform interests.¹⁰⁷

Ohio's experience followed suit. In Ohio, for example, mining interests blocked Progressive efforts to strengthen mine safety laws. At the turn of the century, Ohio mine safety laws were relatively lax as compared to the laws of other states in which significant mining activities were conducted.¹⁰⁸ Reformers were able to garner only insufficient legislative support to strengthen the mine safety laws to levels in keeping with reasonable standards.¹⁰⁹ In March 1908, reformers ultimately succeeded in persuading the legislature to create a commission to investigate mine safety and make recommendations.¹¹⁰ That commission eventually submitted an entirely redrafted and strengthened mining code to the General Assembly which unanimously voted to enact the new code.¹¹¹ However, reformers were unable to garner legislative support for the commission until state mine operators

107. See, e.g., BLOOMFIELD, *supra* note 56, at 47. "In fact, the constitutional changes inspired by Progressivism stopped far short of creating a 'mobocracy.' Although muckraking journals hailed the passage of each new regulatory measure as a victory for 'the people,' lobbyists for major industries often helped to draft such legislation and to blunt its intended effects." *Id.* See also SANDERS, *supra* note 59, at 372-74 (noting that employers had come to recognize a need for workers compensation by the time that Congress considered federal workers' compensation legislation; that railroad interests supported federal legislation creating a workers' compensation system for railroad workers; and that agrarian Democrats rather than railroad interests ultimately defeated the proposed workers' compensation system because the agrarian Democrats perceived the law as too favorable to the railroads); Professor Friedman and Ladinsky observe that by 1911 the National Association of Manufacturers perceived of workers' compensation as inevitable and sought to play a role in shaping the law. The authors conclude that "[i]n short, when workmen's compensation became law, as a solution to the industrial accident problem, it did so on terms acceptable to industry." Friedman and Ladinsky, *supra* note 57 at 69.

108. WILLIAM GRAEBNER, COAL-MINING SAFETY IN THE PROGRESSIVE PERIOD: THE POLITICAL ECONOMY OF REFORM 77 (1976). "In 1900 Ohio had the vaguest safety legislation of the major coal-mining states." *Id.*

109. *Id.* at 77-78. Professor Graebner notes several proposals that were adopted by only one house of the General Assembly or were killed in committee. *Id.*

110. *Id.* at 78-79. Professor Graebner notes that the Ohio state chief inspector had recommended forming a commission to investigate mine safety and reformulate mine safety laws four years before the General Assembly ultimately adopted the proposal. *Id.*

111. *Id.* at 79.

evidenced support for the commission.¹¹²

Populist Era reformers had won enactment of a mine safety bill as early as 1880.¹¹³ However, mine operators won concessions to this law. For example, the mine safety code provided a cause of action for workers injured as a result of a violation of the safety code or for the families of workers killed as a result of a violation.¹¹⁴ The right to a cause of action in the mining code eliminated wrongful death claims by unmarried mine workers and underage mine workers.¹¹⁵ Such claims would have been permitted under the generally applicable wrongful death statute.¹¹⁶

Likewise, corporate interests were able to obtain concessions in Ohio's workers' compensation act. The act permitted employers to self-insure. If an employer was able to post an adequate bond, it did not have to pay insurance premiums into the state compensation fund. Instead, an employer posting the requisite bond paid compensation directly to an injured worker. In this way, the employer only needed to pay if an employee was actually injured. This provision inured to the benefit of larger employers.¹¹⁷

2. Judicial Challenges to Tort Expansion

Much like today's tort expansionists, early tort retractors challenged the legislative victories of the Progressive Era tort expansionists in the state and federal courts.¹¹⁸ For example, corporate and railroad interests challenged statutes abrogating the fellow-servant rule and the assumption of the risk defense on equal protection grounds and state single-subject legislation limitations.¹¹⁹ In response to a

112. *Id.* Professor Graebner opines that large scale mine explosions in West Virginia and Pennsylvania triggered the industry's interest in mine safety and explained the nature and scope of these explosions. *Id.* at 15, 18, 78.

113. *Id.* at 77.

114. 101 OHIO LAWS 52, 86-87 (1910); GRAEBNER, *supra* note 110, at 77 (characterizing this right of action as a "redemptive" feature of the mine safety code).

115. 101 OHIO LAWS 52, 86-87 (1910) (restricting recovery to "the widow and lineal heirs" of a person killed by a violation of the Act's safety provisions). *See also* Harris v. Rail & River Coal Mining Co., 87 Ohio St. 450, 451 (1913), (sustaining the dismissal of a wrongful death action brought by the estate of a 16 year old killed in a mining accident on behalf of his parents).

116. 49 OHIO LAWS 117 (1851).

117. *Vayto*, 28 Ohio Dec. at 413. "These sections were evidently inserted in the act to placate a few large employers who are able to organize and maintain special accident or claim departments." *Id.*

118. JOHN FABIAN WITT, LESSONS FROM HISTORY: STATE CONSTITUTIONS, AMERICAN TORT LAW, AND THE MEDICAL MALPRACTICE CRISIS 4-5 (2004); *see also* ELY, *supra* note 56, at 215.

119. WITT, *supra* note 120, at 31-32.

challenge by railroad interests, the U.S. Supreme Court declared unconstitutional the original version of the Federal Employers' Liability Act. Tort retractors also challenged workers' compensation statutes.¹²⁰ In one of the most high profile decisions of the time, the New York Court of Appeals struck down New York's first workers' compensation statute. In *Ives v. South Buffalo Railway*, the Buffalo Railway challenged New York's statute on the grounds that it violated due process.¹²¹ The New York Court of Appeals agreed, concluding that the statute violated due process because it required the employer to compensate the employee for his injuries even when the negligence of the employee, rather than the employer, caused the injuries.¹²² Indeed, several Progressive Era reform measures evidenced as much distrust of the judiciary, in particular the federal judiciary, as they evidenced distrust of the legislature,¹²³ and conventional wisdom among historians has been that federal, and sometimes state courts, were sympathetic to tort retractors' claims.¹²⁴

Again Ohio's experience mirrored this general pattern. For example, corporate and railroad interests challenged the Norris Act and other statutes expanding common law liability and abrogating the common law defenses of the fellow-servant rule and assumption of the risk. Corporate interests also challenged the original Ohio workers' compensation statute. In response, the Ohio Supreme Court questioned the validity of the law, ultimately upholding the law only because of its voluntary nature.¹²⁵ The *Creamery* decision challenged the constitutional basis of workers' compensation enough that Progressive reformers sought and obtained a constitutional amendment expressly authorizing the legislature to enact a workers' compensation statute at the Ohio Constitutional Convention of 1912.¹²⁶

120. WITT, *supra* note 120, at 37-43; Melvin I. Urofsky, *State Courts and Protective Legislation during the Progressive Era: A Reevaluation*, 72 JOURNAL OF AMERICAN HISTORY 63, 86-88 (1985).

121. *Ives v. South Buffalo Rwy.*, 94 N.E. 431 (N.Y. 1911).

122. *Id.* at 441.

123. For example, President Theodore Roosevelt called for the direct recall of judicial decisions. Some recall proposals allowed for the recall of popularly elected judges. *Id.*

124. Urofsky, *supra* note 122, at 63 (noting the conventional wisdom but arguing that state courts were sympathetic to Progressive Era reforms).

125. *State ex rel. Yapple v. Creamer*, 97 N.E. 602 (Ohio 1912).

126. The delegates adopted Proposal No. 24, authorizing the legislature to enact a workers' compensation scheme. PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF OHIO, *supra* note 86, at 1347. In introducing Proposal No. 24, Delegate Cordes remarked:

Proposal No. 24 undertakes to write into the constitution of Ohio a constitutional provision making secure workmen's compensation law passed by the last legislature, and

D. The Early Debate About Tort Expansion

The arguments that these predecessor tort retractors advanced in support of tort retraction and against tort expansion mirror the arguments that the current tort retractors advance in favor of tort reform. For example, the debate at the Ohio Constitutional Convention of 1912 surrounding Proposal 240 to constitutionally prohibit the legislature from statutorily limiting damages in wrongful death actions sounds eerily familiar to debates concerning current tort reform measures such as statutory damage caps on non-economic and punitive damages. The reasons advanced by the proponents and opponents of Proposal 240 mirror the reasons advanced by proponents and opponents of damage caps today.

H.M. Crites, a grain dealer and delegate from Circleville, opposed the measure, arguing that limitless liability could bankrupt small manufacturers:

We are not all corporations doing business in this state and they are not all big corporations who are doing business. The Proposal No. 240 has in it no limitation. It says that the amount of recovery shall not be subject to statutory limitations. Take some small manufacturing concern, organized by a man of small means. Say a man has been working twenty or thirty years and he has made \$5,000 or \$10,000. He goes into a manufacturing business and after running a few weeks he may have an accident, not from his own negligence, but still the case may be decided against the manufacturer, and it will take every dollar the man has earned for twenty or thirty years. It would bankrupt him.¹²⁷

Likewise, opponents argued that Proposal No. 240 would drive up insurance premiums to prohibitive levels. James W. Halfhill, a lawyer and delegate from Lima, argued:

When you start into a manufacturing business, whether you are an individual or a big corporation, one of the fixed expenses incident to that business is the carrying of all kinds of insurance that you can get. One of this kind frequently carried is casualty insurance. What insurance company can write casualty insurance except at an

declared constitutional by the Ohio supreme court by a vote of 4 to 2. Labor asks that this proposal be adopted, because we believe that by writing it into the constitution it will make it possible to continue this beneficial measure without any further fear of a constitutional question being raised again on this matter.

Id. at 1346.

127. PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF OHIO, *supra* note 86, at 1708.

exorbitant premium, where there is no limit to the possible liability?¹²⁸

Delegate Halfill also argued that the proposal would disrupt any workers' compensation law enacted pursuant to the 1912 Constitution.¹²⁹

But I call your attention to the fact that under workmen's compensation laws the commissioners that control the fund have to be governed by the same theory that casualty insurance companies are governed by, and they have premiums of a certain amount in certain kinds of factories, according to the class of risk. Where the risk is great, the premium would be higher; where the risk was less, the premium would be less, so that you absolutely throw down the bars so far as safeguards are concerned and take away the foundation rule which permits courts at the present to cut down verdicts if excessive, and you have established a rule whereby the commissioners of the workmen's compensation fund are not able to figure and to make a right premium.¹³⁰

Finally, opponents argued that potentially limitless liability would place undue settlement pressure on defendants. H.G. Redington, a lawyer¹³¹ and delegate from Elvira, argued:

[I] know from observation and experience that nine out of ten of wrongful-death cases are settled and do not get into the court. First we bluff settlements in a good many of the cases. We try to get by the court. We nearly always trust the jury if we have the other side and we try to block everything so as to let it get by the court. The purpose of this whole proceeding is for some attorney who has the side against the corporation or persons blamed. This is wanted to make a bluff for a great big settlement so that a small corporation or an individual who has been sued would rather pay a larger amount of money than to take

128. *Id.* at 1709.

Do you want to wipe out corporations? . . . If you put this thing in you will break up a good many institutions attempting to do a legitimate business. Today we have certain definite rules to follow in determining the damages in any particular case. Under these rules the employer can get insurance and, as well stated, no insurance company would dare to take the hazard under this provision that is now offered, or if they did take it they would want to raise the rates.

Id. at 1713 (comments of Delegate Redington).

129. The delegates adopted Proposal No. 24, authorizing the legislature to enact a workers' compensation scheme. *See supra* notes 127-28 and accompanying text.

130. PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF OHIO, *supra* note 86, at 1710.

131. Delegate Redington purported to serve both plaintiffs and defendants. "For at least twenty-five years I have been interested on both sides of personal injury cases." *Id.* at 1713.

the chances of a jury trial.¹³²

Proponents of Proposal No. 240, like current tort expanders, argued that judicial review of jury verdicts provided sufficient protection from excessive verdicts. For example, D. F. Anderson, an apparent plaintiffs' attorney¹³³ and delegate from Youngstown, argued:

Now it may be said that the corporations, or those causing death, would not be properly protected, but they are protected, first in the trial court by a motion for a new trial, which goes to the learned judge, and the judge can cut down a verdict to any sum he thinks proper. Not only that, but if the common pleas judge fails to cut down the amount given by the jury then the circuit court or the court of appeals has the absolute right to cut down the amount, provided the learned judges believe it to be too large.¹³⁴

Delegate Anderson later continued:

The point I want to demonstrate under the laws of Ohio is that no hardship can arrive; I mean with the limitation being taken off Under our statutes it is provided that if an amount indicates passion or prejudice the judge must give a new trial, and if the common pleas judge fails to do his duty it goes to three learned gentlemen . . . the court of appeals . . . Then it can go to the court of appeals where the three judges are sitting. Two of them may cut down the verdict of the jury that is influenced by passion or prejudice if they conclude that it is too large, and they can cut it down to any figure they want.¹³⁵

IV. IMPLICATIONS FOR THE CURRENT TORT REFORM DEBATE

As the above review of the Progressive Era's struggles over tort reform reflects, tort law in this country has developed through a push-and-pull process driven by actors with competing economic interests. This push and pull has taken place in the legislative and judicial branches, and tort law represents an amalgamation of the efforts of these two institutions. By neglecting consideration of the Progressive Era struggles over tort reform, the scholarly account of current tort reform fails to capture this dynamic history. This neglect of early efforts at tort

132. *Id.* at 1713.

133. Delegate Anderson described his legal experience as follows: "Now, I have had some experience—I suppose I have had more experience where the individual is on one side and the corporation on the other than most here." *Id.* at 1411.

134. *Id.* at 1412.

135. *Id.* at 1707-08.

reform produces several results.

First, by disregarding these Progressive Era struggles over tort reform, the scholarly account may inadvertently bolster current tort retraction. Current tort retractors claim that “reform” is needed because the civil justice system is “in crisis.” They contend that runaway juries award excessive damages to plaintiffs with only minimal injuries.¹³⁶ They also contend that overzealous plaintiffs’ attorneys recruit clients with only minimal injuries and use past excessive verdicts to pressure defendants into settlement.¹³⁷ Tort retractors contend that the costs of these frivolous suits and settlements drive up insurance premiums and drive out of business providers of necessary products and services.¹³⁸ Implicit in these arguments is the assumption that this problem is new—that the tort system was functioning properly but now has gone awry. Further, they contend the system has gone awry, in part, because judges have expanded tort rights too far.¹³⁹

As described above, the current scholarly account suggests that as tort expanders won battles in the courts, tort retractors took to the state and national legislatures as well as to the “court of public opinion” to push back against this expansion. In so doing, the scholarly account of tort expansion leaves out entirely the role that corporate, professional and insurance interests played in that tort expansion. In the scholarly story of tort reform, these actors emerge only after the consequences of tort expansion have materialized and only as a reaction to tort expansion in courts. Further, when they do appear, they emerge to wage their battles in a new arena—the legislature. The scholarly account suggests

136. See, e.g., American Tort Reform Assoc., *ATRA’s Mission: Real Justice in Our Courts*, <http://www.atra.org/about/> (last visited 4/4/2006). The American Tort Reform Association is a non profit organization that lobbies for tort reform legislation and campaigns for pro-tort reform political candidates. In describing the mission of the ATRA, the organization’s website describes what it perceives to be the crisis in the civil justice system. *Id.* See also U.S. Chamber of Commerce, Institute for Legal Reform, *Issues: Medical Liability*, available at <http://www.instituteforlegalreform.com/issues/index.php?p=medical> (last visited 4/4/2006).

137. U.S. Chamber of Commerce, *supra* note 138.

138. *Id.*; see also Institute for Legal Reform, *About ILR: Who We Are*, available at <http://www.instituteforlegalreform.com/about/> (March 1, 2006).

America’s legal crisis is putting employees out of work, raising consumer prices, driving down shareholder value and bankrupting companies. Many plaintiffs’ lawyers are exploiting flaws in our legal system in pursuit of jackpot justice. Meanwhile, frivolous lawsuits clog our courts, denying those most deserving of justice their right to a speedy trial.

Id.

139. See, e.g., American Tort Reform Association, *Judicial Hellholes 2005* (March 1, 2006), available at <http://www.atra.org/reports/hellholes/> (listing “the willingness of courts to expand liability through novel theories” as a factor that contributes to a “judicial hellhole” designation).

that this entrée into the political arena was a new approach.¹⁴⁰

By painting the reaction of tort retractors as a novel reaction to concerns raised by tort expansion, scholars may inadvertently add credence to the tort retractors' contentions that the problems caused by judicial tort expansion in the 1950s and 1960s are new problems. If tort expansion had posed similar concerns sooner, tort retractors would have come forward to raise concerns before the tort expansion of the 1950s and 1960s. Because they have not raised concerns before, perhaps the tort expansion of the 1950s and 1960s did raise novel concerns.

Contrary to the perception left by the scholarly account, however, corporate, professional and insurance interests were not absent from the struggle for tort expansion. Instead, predecessors-in-interest to the current tort retractors sought legislative measures similar to those sought by the tort retractors of today as early as the late Nineteenth Century and resisted tort expansion in the legislature. Additionally, tort retractors sought to set aside legislatively expanded tort rights in the courts. Moreover, their arguments in opposition to tort expansion and in favor of tort retraction have remained relatively static from these early battles until today. As discussed above, the arguments advanced by Progressive Era tort retractors in the political institutions mirror the arguments advanced by tort retractors today.¹⁴¹ Additionally, early tort retractors challenged legislative measures expanding tort rights on some of the very same grounds that current tort retractors claim courts use to strike down legislative measures restricting tort rights.¹⁴² Viewed in the full

140. See Nockleby & Curreri, *supra* note 47, at 1021.

Unlike previous reform efforts that sought to change rules of law through case-by case adjudication in the courts, the self-styled tort "reform" movement pursued a much grander vision: transforming the cultural understanding of civil litigation. . . by attacking the system itself. Success would be measured not by remaking the rules of law through conventional litigation or even legislation but by changes to the public perception of how the civil justice system operates.

Id.

[T]he contemporary political battles over tort reform can be explicitly linked to the politics of an earlier era that at one time was confined to debates in the courtroom. By bringing debates over substantive law into the political arena, tort reformers have made explicit what was once implicit: competing forces that marshal arguments from political, economic, moral and social theory shape the content of tort rules.

Id. at 1024-25. See also Page, *supra* note 49 at 654-55 (distinguishing the "new tort reform" from the tort expansion of the 1950s and 1960s by describing the new tort reform as "a political attack on tort law in the legislative arena").

141. See *supra* notes 129-34 and accompanying text.

142. See *supra* notes 120-28 and accompanying text. See also American Tort Reform Association, *Judicial Nullification of State Civil Justice Reform* (March 1, 2006), available at <http://www.atra.org/issues/index.php?issue=7350> (listing state decisions that have struck down recent tort reform measures) (last visited 6/6/2006).

light of history, the current tort retractors seems less like the four horsemen predicting the apocalypse and more like chicken-little ever predicting the sky is falling.

Second, by focusing on judicial tort expansion in the 1950s and 1960s, tort expansionist have neglected what may turn out to be the most powerful reform achieved by the Progressive Era tort expansionists and the most powerful weapon for those seeking to preserve tort expansion from challenges by current tort retractors. Opponents of current tort retraction, in part, have challenged the validity of tort retraction measures such as damage caps under state constitutions.¹⁴³ As Ohio's experience demonstrates, thus far, the debate about the constitutionality of tort reform measures such as damage caps has focused primarily on traditional areas of constitutional inquiry such as due process, equal protection, separation of powers, the right to a jury trial and the right to open access to the courts. Further, the debate has taken place without much serious consideration of the historical origins of these state constitutional provisions and, instead, has focused on other normative theories of constitutional interpretation.

However, as discussed above, Progressive Era reformers sought and obtained constitutional amendments designed to preserve tort expansion from the very same types of tort retraction sought today. For example, in Ohio, Progressive Era reformers sought and won a constitutional amendment to prohibit the legislature from statutorily limiting damages in wrongful death actions.¹⁴⁴ Further, these reformers sought such a reform in response to an existing statutory cap on damages in wrongful death actions.¹⁴⁵ This provision on its face would seem to preclude damage caps in wrongful death actions. Indeed, as a testament to the continuing vitality of this provision, each of the contemporary Ohio tort reform statutes has contained a damage cap but has excluded wrongful death actions from the reach of the damage cap.

Moreover, the debates surrounding this provision may shed light on the meaning of the traditional areas of constitutional inquiry. Supporters of Proposal 240, supported the measure, in part, because they believed it was necessary to equalize recovery in personal injury and wrongful death actions. For example, Delegate Bowdle remarked:

I expect to assist this provision with my voteToday in the state of Ohio it is far more profitable for a negligent corporation to kill a man

143. See *supra* note 7, and accompanying text.

144. See *supra* notes 86-88 and accompanying text.

145. *Id.*

outright than to injure him.

* * *

I think we should see to it that this proposal is incorporated in the constitution so that those who are left may in some fair way be compensated for those who are taken away. Under the present condition it would be very much more profitable for a motorman busily engaged in serving his employers, whenever he saw there was no reasonable chance for one imperilled [sic] to escape, to turn on power and kill the person rather than injure him.¹⁴⁶

Likewise, supporters emphasized the statutory nature of wrongful death actions in explaining why such a statutory prohibition was necessary. For example, in explaining why other states had adopted constitutional amendments prohibiting legislatures from abrogating wrongful death claims, Delegate Anderson remarked:

In the first place, the right to recover for wrongful death does not exist in common law. It is entirely created by statute. Consequently, I presume that was in the minds of the constitution makers when they placed these words preventing the abrogation of the rights of recovery for wrongful death in the constitution.¹⁴⁷

Delegate Peck suggested the Ohio Constitution needed to be amended to include Proposal 240 because recovery for wrongful death had never “reached the level of natural justice” but instead was merely a matter of legislative grace.¹⁴⁸ Including Proposal 240 in the Constitution would elevate the right to recovery for wrongful death to a foundational law of natural justice.¹⁴⁹ These comments suggest that the proponents of this measure believed that Proposal 240 was necessary because the legislature had greater ability to restrict recovery in wrongful death actions because wrongful death actions were statutorily created rights. Conversely, the proponents may have understood the legislature to have limited ability to restrict remedies available for common law torts.

Finally, the bulk of the discussion surrounding Proposal 240 dealt with the recovery of damages for non-pecuniary losses. Indeed, the

146. PROCEEDINGS & DEBATES OF THE OHIO CONSTITUTIONAL CONVENTION, *supra* note 86, at 1710-11. See also, *id.* at 1713, for the following remarks by Delegate Dunn: “It seems that this proposal is another one in the direction of genuine reform. . . It is a fact that some of the railroads would rather kill a person than wound that person because the damages would be far less.”

147. *Id.* at 1707.

148. *Id.* at 1712.

149. *See id.*

proponents of the proposal seemed to believe that the then-existing cap on damages prevented recovery for non-pecuniary losses and that recovery of such losses was necessary for full compensation. For example, Delegate Peck argued:

Would not natural justice say that whoever causes the wrongful death of another shall compensate those who have lost by his wrongful act? What does compensation mean? It means pay, and that would be the amount lost No statutory limitation can be fixed which will authorize persons bringing that kind of action to recover the amount they ought to recover—in other words, enough to repay them for what they have lost by the death of that relative.

. . .there are phases of the situation in which the sentimental aspect of which Mr. Bowdle speaks has come in and could not be kept out, when a man is injured and sues for compensation and he recovers compensation for his suffering. It is a suggestive matter. His feelings, his sufferings, his pain, his internal injuries—for those there would be no recovery. There should be a recovery which would fully compensate for every sort of injury, for the loss of companionship, the loss of good advice, the loss of friendly assistance and a thousand and one things that an affectionate relative can render to another. These are the things that the jury can estimate, and to say that the damage should be limited only to the pecuniary loss is to say that full compensation is not to be made.¹⁵⁰

Taken as a whole, these comments suggest that the proponents of Proposal 240 felt that it was necessary to ensure full compensation in wrongful death actions and that full compensation included recovery for non-economic losses. Further, they suggest that a constitutional amendment was necessary to protect recovery of these losses in wrongful death actions because such recovery was available as a matter of common law in personal injury actions.

These comments, in turn, could shed light on the meaning of Ohio's open courts provision and separation of powers doctrine. Additionally, the inclusion of this provision could bolster equal protection arguments. For example, the principles underlying the amendment demonstrate that the framers of the Ohio Constitution intended to provide full recovery for tort victims and that full recovery included full compensation for non-economic as well as economic losses. Further, the debates surrounding the adoption of Proposal 240 suggest that the drafters

150. See *id.* 1711 (setting forth remarks of Delegate Bowdle); *id.* at 1713 (setting forth remarks of Delegate Dunn).

believed that only a jury subject to judicial review could fully assess the value of those damages. This may demonstrate that the Ohio Constitution implicitly recognizes the right to a jury determination of non-economic damages as a fundamental right.

V. CONCLUSION

The scholarly account hopes to distinguish and elevate tort expansion over tort retraction by contrasting the process through which each was achieved. The scholarly account of tort reform depicts the current tort retraction efforts as a primarily political movement driven by the economic self-interest of its proponents. In contrast, it depicts tort expansion as a judicial process led by legal scholars unmotivated by self-interest. Those seeking to distinguish tort expansion from tort retraction would be better served to do so on normative grounds rather than on procedural grounds for several reasons. First, the scholarly account paints an accurate but incomplete picture. By overlooking the efforts to achieve tort expansion during the Progressive Era, this account overlooks the political nature of tort expansion. Instead of a completely judicial expansion, tort expansion in the Progressive Era was a political movement led by interested actors as well as detached reformists. In so doing, this account inadvertently bolsters the current tort retraction by diverting attention from the relatively constant nature of objections and concerns advanced by tort retractors. Finally, the scholarly account also overlooks the important political contributions Progressive Era tort reformers made to state constitutions and the effects that those constitutional contributions may have had on the balance of power among the legislature, the judiciary and the jury with respect to common law tort remedies. Ironically, this account has caused the defenders of tort expansion to overlook what may be the most powerful defense of tort expansion.