

## FROM WORK INJURY LAW TO WORKERS' COMPENSATION: CONTRACT AND HUMAN ABILITY

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### I. WORK INJURY LAW: WORKERS CONTROL CIRCUMSTANCES OF THE WORK PLACE THROUGH CONTRACT

Chief Justice Lemuel Shaw's 1842 *Farwell v. Boston and Worcester* decision controlled work injury law until state legislatures replaced it with workers' compensation acts in the second decade of the twentieth century.<sup>1</sup> Shaw's ruling was widely commended for half a century, but in the late nineteenth century it came under increasingly bitter attack. By 1910 *Farwell's* opponents convinced state legislators to reverse doctrines that the 1842 decision had entrenched in American common law. Before the nation's entry into World War I it was obvious that in time every state would replace *Farwell-spawned* work injury doctrines with compensation law.

Scholars have examined *Farwell* with care; others have analyzed the evolution of compensation acts that displaced it.<sup>2</sup> Some have traced the

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\*4 Met. [Mass.] 49.

<sup>1</sup>Leonard, w. levy, the Law of the commonwealth and Chief justice Shaw: the Evolution of AMERICAN law, 1830-1860 (Cambridge, 1957), 166-82; Christopher L Tomlins, A Mysterious Power: Industrial Accidents and the Legal Construction of Employment Relations in Massachusetts, 1800-1850, *Law and History Review*, 6 (Fall 1988), 375-438; Alfred S. Konefsky, As Best to Subserve Their Own Interests': Lemuel Shaw, Labor Conspiracy, and Fellow Servants, *Ibid.*, 7 (Spring 1989), 219-39; James Weinstein, Big Business and the Origins of Workmen's Compensation, *Labor History*, 8 (Spring 1967), 156-74; Roy Lubove, Workmen's Compensation and the Prerogatives of Voluntarism, *Ibid.*, 254-79; Robert Asher, Business and Workers Welfare in the Progressive Ear: Workmen's Compensation Reform in Massachusetts, 1880-1911, *Business History Review*, 43 (Winter 1969), 452-75; see Anthony Bale, The Enactment of the State Workers' Compensation Laws in American Legal Studies, *Legal Studies Forum*, 13 (Number 1,1989), 48-73 for an extensive review of the literature. See R.W. Kostal, Legal Justice, Social Injustice: An Incursion into the Social History of Work-Related Law in Ontario, 1860-86, *Law and History Review*, 1-24 for an analysis of work injury law in A Canadian province

development from work injury to compensation.<sup>3</sup> This essay builds on existing scholarship to offer a new perspective on the change from work injury to compensation acts. It argues that both the work injury doctrines and workers' compensation reflect widely-held notions about contract and human ability. Work injury doctrines were premised on the belief that individuals could control the circumstances of their work place. By way of contrast, compensation acts affirmed that workers had relatively little control over their working environments. The sense that workers had little control undermined the foundation of work injury law and forced lawmakers to create an alternative. Compensation acts provided that new law, but whether it was work injury or compensation, contract and notions about human ability were central to both. The essay further argues that implications of the way that compensation acts used contract brought a new dispensation in contract law that transformed the legal environment of business.

*A. Farwell's Injury And Claim Against The Railroad*

Nicholas Farwell, a machinist for the Boston and Worcester Railroad, was promoted to an engineer in 1835, which gave him different responsibilities and better pay. In October 1837 Farwell lost a hand when it was crushed by a derailment. Farwell sued the railroad, but Shaw wrote a unanimous opinion for the Massachusetts high court that found against him.<sup>4</sup> According to Shaw, one of Farwell's co-workers negligently threw a switch that derailed the train. For Shaw, "The question" was whether a worker injured by a co-worker's negligence "has a remedy against the common employer:" could Farwell recover from the railroad for the injury that a fellow worker evidently inflicted on him?<sup>3</sup>

*B. Chief Justice Shaw Rejects A Tort Analysis Of Agency And Common Carrier Law*

According to the Chief Justice, Farwell's claim was "an action of new impression in our courts, and involve[d] a principle of great importance." He insisted that "considerations of policy and general convenience" provided the basis for deciding the case." Shaw's policy concern led him to reject a tort analysis in favor of a contractual one. Shaw might have used a maxim of

contemporaneously to Farwell.

<sup>3</sup> Lawrence M. Friedman and Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, COLUM. L REV, 72 (January 1967), 50-82 and LESTER G. LIND LEY, *THE IMPACT OF THE TELEGRAPH ON CONTRACT LAW* (New York, 1990), 145-269, from which this essay builds.

Tomlins, *A Mysterious Power*, offers the most extensive factual background to the case.

<sup>4</sup> 4 Met. 55.

agency law--*respondeat superior*, the responsibility of a master for his agent's acts-and found for Nicholas. "But," Shaw reasoned, the maxim did not apply "to the case of a servant bringing his action against his own employer to recover damages for an injury arising in the course of that employment . . ." He indicated that the rule controlled only when agents injured strangers. Since Farwell was not a stranger, the agency rule afforded Farwell no relief.<sup>6</sup>

Shaw conceded that Farwell could recover if his employment contract with the railroad had "an implied promise" of employer liability for injuries that co-workers caused. As an example of an implied promise, Shaw said that society imposed duties on common carriers beyond specific contractual terms with shippers. In addition to those specific terms, he noted that the law made common carriers responsible for "all losses of goods not caused by the act of God or a public enemy." Outside of those narrowly-defined categories, carriers were liable for losses independent of their own negligence. However, Shaw ruled that employers were not related to their employees as carriers were to shippers. Consequently, implied duties did not extend to injuries from co-workers. If they had, Shaw insisted that "it would be a rule of frequent and familiar occurrence," and would have been "settled by judicial precedents."<sup>7</sup> In sum, Shaw declared that neither the rule of agency law, which made masters responsible for negligent agents, nor the general duty of common carriers applied to Farwell's claim. Having rejected a tort analysis, Shaw based his opinion squarely on contract law.

### *C. Contract: The Consent And Limitation Principles*

Contract has been a central institution in American life since **its** beginning at water's edge in the seventeenth century. Whether it is the social contract, as it evolved from the Mayflower Compact of 1620 to the **Constitution** of 1787, **or** commercial **contracts**, the two principles of **consent** and limitation explain contract's social utility.

Parties to contracts want exchanges that improve their respective circumstances. The first party to a contract exchanges a scarce good for an even scarcer item. The second party does likewise; each gives up something scarce for something it values more. Having exchanged something of a lesser value for an item of greater value, each improves its relative circumstances. **However**, neither party **receives** as much as it would like. Each would like to have made a better deal, but the competing hopes of one party limits the other. As a result, neither makes as profitable an exchange as it wants to, but each benefits-if only to a limited extent-from the exchange.

<sup>6</sup>*Ibid.*, 55, 58, 56.

Neither party has to accept any proposed exchange; each can search the best deal. Consequently, contracting parties are not forced into particular agreements. Each is free to either accept or reject a proposed exchange; if they accept, they do so voluntarily, on their own accord. The ability to decide is the consent principle—the notion that each party to a contract decides, on its own volition, what to give up in exchange for what it receives. The limitation principle is a reflex of the consent principle. By consenting to an exchange, the hopes and ambitions of the first party limits the second party, and the first is limited by the countervailing ambition of the second. Neither receives as much as it would like since the hopes of the other tempers its gain; in the process each limits the other. These two principles of consent and limitation are the core meaning of contract.®

*D. Contract Correlates Wages With Risks: Workers' Control And The Assumption Of Risks Doctrine*

Shaw based his opinion that Farwell had no grounds for recovery on Farwell's employment contract. He reasoned from two fundamental premises. First, Shaw believed that Farwell had an expansive ability to minimize accidents, if not to prevent them. Second, he believed that employees and employers had roughly equal bargaining power and concluded that employment contracts correlated a job's pay with its dangers. From these premises, Shaw developed the twin work injury doctrines of assumption of risks and the fellow servant rule.

GUAN C. VERPLANCK, AN ESSAY ON THE DOCTRINE OF CONTRACTS (New York, 1825); WILLIAM W. STORY, A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL (Boston, 1844), reprinted by Arno Press, 1972; THEOPHILUS PARSONS, THE LAW OF CONTRACTS (2 vols., Boston, 1883); ROBERT E CUSHMAN, "Contract," ENCYCLOPEDIA OF THE SOCIAL SCIENCES, IV, 323-42; MORRIS R. COHEN, "The Basis of Contract," in LAW AND THE SOCIAL ORDER; ESSAYS IN LEGAL PHILOSOPHY (New York, 1933), 69-111; HAROLD C. HAVIGHURST, THE NATURE OF PRIVATE CONTRACT (Evanston, 1961); Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, HARV. L. REV., 87 (1974), 917-56. Qi page three of volume one of his treatise. Parsons indicated that contract "may be looked upon as the basis of human society." He claimed that "Almost the whole procedure of human life implies, or rather, is, the continual fulfillment of contracts." However, in forming those contracts, the parties value things differently and exchange something they value less for an item they value more. In his 1825 work, Verplanck put it this way: "It is not true in any sense, that bargains and sales are made with a view of giving and receiving equal values. All contracts in the way of trade . . . are expressly and avowedly made with a view to profit. . . . So in the pettiest traffic of retail: Every man judges for himself, whether or no the book, the hat, the whip, or the gun which he is about to buy, is not worth more to him in use or in pleasure, than the money asked for it. If he does not think so, he does not buy it." [emphasis in the original], AN ESSAY ON THE DOCTRINE OF CONTRACTS, 98. See Story, A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL, 63-73 for a similar statement.

In developing the assumption of risks doctrine, Shaw claimed that as a "general rule" workers assumed "the natural and ordinary risks and perils incident" to their work and that "in legal presumption" their compensation was "adjusted accordingly." This claim was the heart of his opinion. Before concluding employment contracts would-be employees could assess the risks of their prospective work. Dangers "incident to the service" were foreseeable, so applicants could weigh the benefits of a job against its risks. Presumably, Shaw went on, higher salaries offset high risks. Applying these general observations to Farwell's claim, Shaw found that Farwell accepted a higher paying job "voluntarily" and assumed "with full knowledge" its greater risks.<sup>9</sup>

Just a year before *Farwell*, a South Carolina court affirmed the connection between the rate of pay and risk in these terms: "No prudent man would engage in any perilous employment unless seduced by greater wages than he could earn in a pursuit unattended by any unusual danger."<sup>10</sup> However, the South Carolina court did not develop the point to the extent that Shaw did. Although he did not say it explicitly, Shaw intimated that Farwell's suit bordered on bad faith; having succumbed to the enticements of a contract that offered higher wages for greater risks, now he wanted to reject stipulations about higher risks, after the fact. The railroad fulfilled its obligation with the higher pay; Farwell must fulfill his. He, not the railroad, must bear the unfortunate consequences of his earlier seduction.

*E. Contract Can Promote Safety: Workers' Control And The Fellow Servant Rule*

In addition to rejecting Farwell's claim on the grounds that he assumed the job's risks, Shaw also relied on the fellow servant rule. Employers not at fault were not liable for injuries that co-workers caused. Shaw believed that public policy should promote safe working environments, but he thought that employees could insure work-place safety better than employers. Workers' safety depended on their "care and skill" and the "duty" to observe "the conduct of the others." Workers could "give notice of any misconduct, incapacity or neglect of duty," or resign if the master did not take precautions to employ competent workers. Shaw thought that this arrangement "more effectually secured" the safety of each worker "than could be done by a resort to the common employer for indemnity in the case of loss by the negligence of each other."<sup>11</sup>

The New England jurist likened the policy objectives of the fellow servant rule to purposes behind common carrier liability and reasoned analogically from common carrier law to the fellow servant rule. The law imposed liability

<sup>9</sup>*Ibid.*, 57, 59.

<sup>10</sup>*Murray v. South Carolina Railroad Company*, 1 McMul. 402 (1841). <sup>11</sup>4 Met. 59.

without fault on common carriers since they could "best guard against all minor dangers," and if losses occurred, "it would be extremely difficult for the owner to adduce proof of embezzlement, or the actual fault or neglect" by the carrier. Consequently, the law imposed the risk of loss "upon the carrier, and he receive[d] ... a premium" for assuming it. Shaw said that the implied duty imposed on carriers was "founded on the expediency of throwing the risk upon those [who can] best guard against it."<sup>12</sup>

Neither public authorities nor private parties could police common carriers and blunt their temptations to stage accidents and abscond with the goods. Carrier law was a policing tool that required carriers to use extraordinary effort to safeguard goods they transported or be responsible for losses. Strict liability offered customers a measure of security for their goods. It was equally imperative to make railroading safe. Shaw believed that workers could insure a safer working environment by watching their fellow workers better than their masters could. He feared that a decision for Farwell would shift the responsibility for work place safety to a group who could not secure it.<sup>13</sup>

Although neither common carriers nor workers had complete control over their endeavors, Shaw thought each could control their respective spheres better than anyone else. Just as law nudged carriers to develop their potential for care, analogously it should school workers in caution. If they were exempted from accountability, Shaw suspected that workers would lose their vigilance, become careless and cause more accidents. Instead of accepting workers' indifference to their duty, judicial policy should energize their capacity for care and prod them away from the "proneness to forget the stern cares of business."<sup>14</sup> A decision for Farwell would have given him an important immediate benefit, but Shaw feared it might sacrifice the workers' larger interest in safety, and "would not conduce to the general good." Farwell had a remedy, but his suit must be "against the actual wrongdoer," and not jeopardize workers' security.<sup>15</sup>

<sup>12</sup>*Ibid.*, 58-59.

<sup>13</sup>*Ibid.*; see JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS (Cambridge, 1832 and later editions) for an extensive treatment of carrier law; LEVY, THE LAW OF THE COMMONWEALTH, 140-65 analyzes Shaw's common carrier cases; for specific reference about the relation between carrier liability and staging accidents, see JAMES KENT, COMMENTARIES ON AMERICAN LAW (5th ed., 2 vols. New York, 1860), II, 603-604.

<sup>14</sup>Christian Koerner, *Negligence and the Rule of Damages in Actions Therefor*, AM. L. REG, 23 (May 1875), 265.

<sup>15</sup>4 Met. 61, 59.

Shaw noted that Farwell had not charged the railroad with negligently using faulty equipment or hiring careless workers. Whether he would have had a successful claim against the company if 'a defective or ill-constructed steam engine' caused his injury, or if it resulted from "willful misconduct, or gross negligence" by the employer were matters that Shaw did not examine. However, he said that masters owed workers "implied warranties" in exchange for their implied assumption of risks and injuries from fellow servants. *Ibid.*, 61. It was as though employment

Taking the assumption of risks and fellow servant rule together, Shaw reasoned that workers used, or could have used, contract to exercise a good deal of control over the economic circumstances of their employment. He further reasoned that by using contract to control their economic affairs, workers directly or indirectly used it to promote work-place safety.<sup>16</sup>

## II. WORK INJURY LAW REFLECTED PRE-CIVIL WAR CULTURAL VALUES

Turn-of-the century critics argued that *Farwell* was judicial legislation, based on "specious reasoning," not on realities that workers faced.<sup>17</sup> However, accept Shaw's premise and his conclusions follow. He reasoned from widely-accepted cultural values of pre-Civil War America. There is no gainsaying that his decision favored economic development, a point about which scholars agree. For example, Shaw's rejection of *Farwell*'s claim against the Boston and Worcester came at a critical stage of its growth and relieved it "of an enormous financial burden for industrial accidents."<sup>18</sup> But however

contracts had two parts; one, a bargained-for-exchange of hours and work for a salary and the other, an exchange of implied warranties by the masters for implied assumptions by the workers.

"Courts also used the doctrine of contributory negligence as grounds for rejecting claims of injured workers. The doctrine held that if a worker's own negligence contributed to his injury the worker was barred from recovering. However, this essay does not consider contributory negligence since it was not a function of contract. See Francis H. Bohlen, *Contributory Negligence*, HARV. L. REV., 21 (February 1908), 233-60.

<sup>17</sup>E. H. DOWNEY, HISTORY OF WORK ACCIDENT INDEMNITY IN IOWA (Iowa City, 1912), 36.

"LEVY, THE LAW OF THE COMMONWEALTH, 166.

Like his contemporaries, the Massachusetts jurist valued economic growth and individual freedom. *Farwell* issued logically from those two values. Hopes for economic development were linked with internal improvements in the nation's early decades. The internal improvements craze first centered on roads and bridges, then canals, steamboats, telegraphs and railroads. To an age with faith in progress and one that "placed science and invention at the very center" of that faith, railroads were ideal for realizing unique potentials of the American experiment in democracy. Hugo A. Meier, *Technology and Democracy, 1800-1860*, MISS. VALL. HIS. REV. 43 (March 1957), 618; CARTER GOODRICH, GOVERNMENT PROMOTION OF American Canals 1800-1890, (New York, 1960).

Railroad financing was a major economic challenge to pre-Civil War Americans. Public spirit and hopes for immediate gain joined together in promoting the iron horse. Local, state and national governments gave money and land, but the market with thousands of individual investment decisions was the dominant institution for mobilizing scarce development capital. Additionally, Americans used their legal institutions as an instrument to encourage innovation and to help minimize or control costs. Legislators on the state and local level gave railroads tax breaks and courts devised and expanded their use of eminent domain law to control costs of securing rights of way. W. ELLIOTT BROWNLEE DYNAMICS OF ASCENT: A HISTORY OF THE AMERICAN ECONOMY. (New York, 1974), 167; JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES, (Madison, 1956), 3-70.

much Shaw's ruling mirrored the economic aspirations of his generation, it registered a fulsome confidence in the ability of self-seeking individuals to shape their world and create an improving future through contract. The sense that individuals defined their personal ends and pursued them as they knew best was implicit, if not explicit, in Shaw's analysis. After defining their objectives, individuals made agreements to secure them. Each bargained independently and formed contracts or, failing to strike a bargain, found other parties more inclined to bargain. Whether contracts were completed or not, individual bargainers were their own person, seeking to promote their own, self-defined ends.<sup>19</sup>

A. *Farwell: A Machinist On The Make*

From Shaw's perspective Farwell, the machinist epitomized the self-making, calculating man; he started as a wage-earning machinist, became a higher-paid engineer, and might have gone far with the Boston and Worcester. Given the rapid growth of the rail industry, he might have become a foreman or manager. For all that Shaw knew, Farwell exemplified today's laborer who was striving to be tomorrow's capitalist. He seemed proof that realistic opportunities existed for achievement and advancement. Whatever motivated him to transfer from his first job to become an engineer, Farwell demonstrated one of the purposes of work: "acquisition for ascent."<sup>20</sup>

Farwell's apparent ambition reflected a notion that probably helped Abraham Lincoln gain the presidency. In 1853, *Harper's New Monthly Magazine* noted that success had long meant achievement in business and making money to most Americans. "The idea instilled into the minds of most boys, from early life," the periodical continued, was "getting on."<sup>21</sup> Lincoln embodied this ideal and it largely explained his public appeal. According to Lincoln, success issued from character and ability. His belief in "opportunity

Farwell was part of a larger pattern of using law instrumentally to promote economic growth. Court-made law was not a one-shot boost to railroad development, such as a grant of land or money. Farwell established precedents that helped financially the rail industry decades after the 1830s and '40s. Shaw's decision relieved the business community of some financial burdens by passing them to other groups. Theoretically, injured workers could recover from their fellow workers, but since most workers could not pay damages, innocent accident victims were usually remediless. In reality, if not in legal presumption, innocent victims, such as Farwell, incurred liability without negligence. Shaw influenced resource allocation as effectively as if he had been a legislator voting on aid to railroads or other industrial projects.

"A system that might initially seem chaotic and unruly to outside observers, had order and limits. The society that encouraged individuals to create their own present and define their futures through contract was largely self-regulating: ambition checked ambition.

"MARVIN MEYERS, *THE JACKSONIAN PERSUASION: POLITICS & BELIEF* (Stanford, 1957), 127.

<sup>21</sup>Quoted in IRVIN G. WYLLIE, *THE SELF-MADE MAN IN AMERICA: THE MYTH OF RAGS TO RICHES* (New Brunswick, 1954), 9.

for the self-made man" was the "key to his entire career."<sup>22</sup> He thought that opportunities were available since the nation had a fluid society that did not arbitrarily reward some and condemn others to failure. When men failed to become more than wage earners, it was "not the fault of the system, but because of either a dependent nature, . . . improvidence, folly or singular misfortune." Diligent work gave rewards. To Shaw it appeared that Farwell, the machinist acted on that belief.<sup>23</sup>

*B. Farwell An Individualist In An Equalitarian Society*

To latter-day observers it might appear that *Farwell* was part of a capitalist conspiracy against labor, but such a view oversimplifies the issue. The calculus that placed the immediate burden of work accidents on injured workers and their families might have been wrong, even wrongheaded, but given the view of human ability that Shaw and his generation held, it was no wonder he ruled as he did. With his contemporaries, Shaw celebrated individualism. Religious leaders of his era replaced the determinism of Calvinism with free will. Revivalists still believed that individuals were fallen creatures, but "held forth a boisterously happy prospect for all men in their invitations for regeneration."<sup>24</sup> If fallen creatures, tarnished as they were by original sin, could open heaven's door, surely they could take thought of their work-place circumstances.

Ralph Waldo Emerson voiced a related theme in a prominent essay published a year before *Farwell*. "Trust thyself," since "Every true man is a cause . . . the Sage wrote.<sup>25</sup> While Emerson was not applauding the bargaining process, his words fit. In an expanding market economy that placed a premium on private decisions, every true man could become self-reliant and become his own cause through contract. That most famous of foreign commentators, Alexis de Tocqueville, underscored the theme of both the revivalists and Emerson in his Democracy in America. Writing in the 1830s,

<sup>22</sup>RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* (New York, 1948), 105.

<sup>23</sup>Quoted in ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (New York, 1970), 23,20.

Lincoln hated slavery. It repudiated the norms he thought had built the nation; it legalized extortion and permitted masters to appropriate the fruits of the slave's labor. Slavery denied slaves the prospect of getting ahead through contract. That fact alone, he suspected, kept 'he American people from being a chosen nation, and made them only "an almost chosen people.'

WILLIAM J. WOLF, *THE ALMOST CHOSEN PEOPLE: A STUDY OF THE RELIGION OF ABRAHAM UNCOLN* (Garden City, 1959).

<sup>24</sup>PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* (New York, 1965), 215.

<sup>25</sup>SELECTIONS FROM RALPH WALDO EMERSON, ed. by Stephen E Whicher, (Boston, 1957), 148,154.

Tocqueville informed his readers that "nothing struck [him] more forcibly than the general equality of condition among the people." Time and reflection confirmed his initial impression. He affirmed that "The more I advanced in the study of American society, the more I perceived that this equality of condition is the fundamental fact from which all others seem to be derived and the central point at which all my observations constantly terminated."<sup>24</sup> Equal to his employer, Farwell had the capacity to balance risks and pay in contracts that he formed. The railroad did not impose a contract on him; he consented to work first as a machinist and later as an engineer. *Farwell* was a judicial equivalent to the revivalists' optimism about easy, self-controlled regeneration, to Emerson's exaltation of the self, and to Tocqueville's celebration of American equality.

*Farwell* rested squarely on cultural values that celebrated individual striving. Its premise was confirmed in contemporary economic, political, religious and philosophic trends, where the assumptions underlying the idea of the self-made man "were so generally accepted they existed below the level of open discussion."<sup>27</sup> The notion of self-help was simple and unsophisticated. "Its history [was] not the history of a great abstraction, but the saga of an idea that had great power among the people"—and the courts.<sup>24</sup> In turn-of-the-century America, sociological jurisprudence gained the attention of the nation's legal community.<sup>29</sup> It implied that judges should weigh the social and economic implications of their decisions. No need existed for "sociological jurisprudence" in mid-century work injury cases. Shaw considered the economic and social implications in *Farwell* without having it pressed upon him in legal or popular journals, or in elaborate arguments by plaintiffs.

### III. LAW'S ROLE IN UNDERWRITING HUMAN ABILITY

Courts and legal commentators accepted *Farwell* not because they were parties to secret dealings or faulty reasoning; they accepted the premises from which Shaw reasoned. This new man, this American—mankind's second great chance and new Adam—would build a new heaven and a new earth, if given the chance.<sup>30</sup> In trying to define "the American, this new man," and distinguish him from Europeans, J. Hector de Crevecoeur noted that

<sup>24</sup>DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Henry Reeve Text, New York, 1945), 3.

<sup>27</sup>RICHARD WEISS, THE AMERICAN MYTH OF SUCCESS: FROM HORATIO ALGER TO NORMAN VINCENT PEALE (New York, 1969), 6.

<sup>29</sup>WYLLIE, THE SELF-MADE MAN, 7.

<sup>30</sup>Alfred H. Kelly, «\* *al.*, the American constitution: its origins and DEVELOPMENTS (6th ed., New York, 1983), 466-67.

\*THE NEW EDEN: CONSENSUS AND REGENERATION IN AMERICA ed. by SAM B. GIRGUS, O *AL.* (Dubuque, Iowa, 1988).

Americans acquired "a great degree of sagacity" through "the early knowledge they acquire" and "the early bargains they make . . ."<sup>31</sup> Building the new society meant preserving a system that nurtured sagacity among its citizenry, and freedom of contract was at the core of that system. Farwell, the upward-bound machinist, epitomized the new American making his own destiny through contract.

Shaw wanted to preserve a process that permitted individuals to reach or approach their potential. Individuals could shape their world only if the process that allowed self-making men to become self-made was preserved. In contract formation this meant that individuals made judgments about agreements that they hoped would promote their interest. Bargainers were not forced, but formed contracts after balancing benefits against likely risks. On the one hand, risk-takers must enjoy the fruits of their ventures, however spectacular or modest; on the other hand, they had to abide their failures.

Success for ambitious individuals was problematical, not guaranteed. Law might nudge men in the direction of success and promote economic growth. However, failure, as well as success, resulted from bargains, and sanctioning or underwriting failure schooled hasty, careless judgments. Ambition was important, but law might make ambitious workers even more successful by forcing them to make careful, disciplined decisions. To be sure, Shaw's era was more "profit-minded and risk-minded" than "security- and thrift-minded," but workers with ambition, tempered by reasoned choices, were likely to conclude bargains with good prospects for success.<sup>32</sup> By making good deals after cautious forethought, they would prosper and enjoy upward mobility, both of which conduced to social progress. For the system of free opportunity and rewards to work, its internal dynamics had to be protected from outside interference, even from the very judicial intervention that Farwell himself sought.

#### IV. SHAW'S BOLD CLAIM: INDIVIDUALS CONTROLLED WORK PLACE SAFETY

The boldest aspect of Shaw's ruling was his faith that by taking thought, individuals could control industrial environments and prevent work accidents. Shaw used creatively existing cultural values to celebrate human potential for economic success; his was one voice among many in that regard. However, he broke new ground and initially spoke in the singular in asserting that individuals could control their work environment. Careful dealings by free agents in social and economic matters could lead to personal success; careful work with men and machines by the same free agents, could lead to

"CREVECOEUR, LETTERS FROM AN AMERICAN FARMER. (1782), in AMERICAN GROUND: VISTAS, VISIONS 4 REVISIONS (New York, 1988), 127.

"GLYNDON G. VAN DEUSEN, THE JACKSONIAN ERA. 1828-1848 (New York, 1959),

accident-free work, or at least hold accidents to a minimum. Social and economic failures were linked to personal failing; analogously, Shaw tied work accidents to personal shortcomings.

Work injury law held that the cause of industrial accidents could be determined, whether by masters who carelessly selected machinery or tools, by negligent workers, or by workers who suffered reckless co-workers in their midst. Negligent parties could be identified, the locus of responsibility determined and liability fixed. Since individuals could create safe work places if only they took thought of themselves and their work, law had the positive obligation of urging workers to be mindful of their duty and realize their full potential. As harsh as work injury decisions seemed in specific instances, courts feared that deviation invited a lapse of caution by employees and could foster disorder or even chaos in industrial work. The stakes were high, so the law must be sure and applied with an undeviating consistency. But however sound the fellow servant rule and assumption of risks doctrine might have seemed at mid-century, the legal community carried a heavy burden in defending them at century's end.

#### V. WORKERS' COMPENSATION: CORRECTING FLAWS OR EXCESSES IN *FARWELL*

As the pace of industrialization accelerated, Americans criticized intensely *FanveW*-related law. Popular and legal writers insisted that the 1842 decision exemplified judicial miscarriage. Disparities between the theory behind work injury law and industrial realities embarrassed lawmakers; lawyers jeered the work injury doctrines. A writer in the *American Law Review* put it this way in 1904: "Having recently reread [*Fanvell*] we are forced to the painful conclusion that it involved a wabbling, struggling, wriggling and almost conscious effort to do injustice."<sup>33</sup> Early twentieth century lawmakers overturned work injury law by adopting workers' compensation acts. The acts abolished the common law defenses that employers used effectively in post *-Fanvell* litigation. Starting in 1910 the states replaced work injury with compensation programs.

Compensation acts varied from state to state, but they had common origins and features. The acts were the fruit of industrial and labor commissions established after 1900 to investigate work accidents. The commissions heard testimony from employers, employees, insurance companies and lawyers. The evidence convinced legislators that work injury law was unjust and that the cost of compensation programs would be less expensive than injury litigation. Fixing liability on the industry regardless of

<sup>33</sup>Unsigned review of CB. Labbatt, *Commentaries on the Law of Master and Servant* (3 vols., Rochester, 1904), in 38 AM. L. REV., (May-June 1904) 472.

fault was the common character of all compensation acts. The acts abolished the work injury defenses that *Farwell* had enshrined and replaced case-by-case litigation with administrative handling of claims. Without exception the acts reflected the notion that individual workers did not and could not control the circumstances of the work place that *Farwell* had assumed. A new dispensation in contract law, based on revised notions about workers' control over their economic affairs and work-place safety, was imperative to correct the flaws that had developed in *Farwell*.<sup>M</sup>

A. *Imbalance In Bargaining Power Destroyed Consent and Limitation Principles*

Work injury doctrine presumed that bargaining parties stood on equal ground; to use Tocqueville's term, "equality," the hallmark of American life, implied equal bargaining power. If that were true, then certainly Shaw decided *Farwell* properly. The presumption of equality continued to exist in American law and practice through most, if not all, of the nineteenth century. Perhaps it reached its ultimate expression from Andrew Carnegie in 1886. From an "employer's view of the labor question," Carnegie argued that labor's struggle against capital had been successful since a "revolution" had occurred between the "serfdom of the past" and labor's present status. Continuing, he claimed, "Now the poorest laborer in America or in England, or indeed throughout the civilized world, who can handle a pick or a shovel, stands upon equal terms with the purchaser of his labor ... He negotiates and thus rises to the dignity of an independent contractor."<sup>36</sup> However, dramatic shifts of economic power in industrial America undermined any semblance of equal bargaining power between employers and employees.

As Shaw used the idea in *Farwell*, freedom of contract implied that workers and corporations had roughly equal bargaining power. Applied to the early twentieth century, such a theory held that a steel worker and United States Steel bargained as **equals**. It was, to use Roscoe Pound's phrase, as if both "parties were individuals-as if they were farmers haggling over the sale of a horse."<sup>36</sup> However, if it did nothing else, the emergence of "big business" in the second half of the nineteenth century created a growing disparity of bargaining power between individual employees and major employers.<sup>37</sup>

<sup>M</sup>*Case and Comment*, 22 (September 1915) examines workers' compensation; also see Eugene Wambaugh, *Workmen's Compensation Acts: Their Theory and Their Constitutionality*, HARV. L. REV, 25 (December 1911) and DURAND H. VAN DO REN, *WORKMEN'S COMPENSATION* (New York, 1918).

<sup>36</sup>Carnegie, *An Employer's View of the Labor Question*, FORUM, 1 (April 1886), 114-15. <sup>37</sup>Pound, *Liberty of Contract*, YALE L. REV, 18 (May 1909), 454.

<sup>38</sup>See GLENN PORTER, *THE RISE OF BIG BUSINESS, 1860-1910* (New York, 1973) for an excellent analysis of "big business."

Industrializing America, roughly the period bounded by *Fanvell* and the Supreme Court's approval of the compensation acts in 1917, was a monumental economic success. The nation experienced a sustained era of economic growth, reductions in "the real cost, per unit, of producing goods and services," and efficiencies in "output per man hour [that] have been so large as to stagger the imagination."<sup>1</sup> However, a "managerial revolution" accompanied the economic transformation. In his magisterial work on that period, Alfred Chandler, Jr. argued that the "visible hand of management replaced what Adam Smith referred to as the invisible hand of market forces' in many sectors of the economy. In the process, management became "the most powerful institution in the American economy and managers the most influential group of economic decision makers."<sup>39</sup>

The managerial revolution raised fears about economic power and its abuse. By the time the first compensation acts were adopted in the second decade of the twentieth century, Populist and Progressive reformers had worried the growing managerial power for over two decades. As managerial power expanded, the ability of individual workers to impose limitations on employers through contract diminished. But if individual workers suffered a decline in their bargaining power, it appeared that they had little if any control over preventing accidents.\*<sup>0</sup>

#### B. *The War Analogy: Loss of Control*

Critics of work injury developed the war analogy to discredit the work injury doctrines. They found greater similarities between injured and killed industrial workers and battlefield casualties than the free enterprise, contractual model. The free enterprise notion exaggerated features of the real world by assuming "a condition of perfect competition: the existence of numerous firms, perfect markets, perfect knowledge, and freedom of entry or exit from business."<sup>41</sup> This peacetime business model fit the image that *Fanvell* invoked: the existence of numerous jobs, a high correlation between work dangers and pay, full knowledge of work opportunities and easy movement from one job to another. Workers purportedly controlled their own destinies through prudent calculations and rational decisions, and had or

"JONATHAN R.T. HUGHES, 'Industrialization,' INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES (18 vols., New York, 1968-1979), VII, 252.

"CHANDLER, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (Cambridge, 1977), 1.

"MORTON KELLER AFFAIRS OF STATE; PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA (Cambridge, 1977), 565-87; GEORGE E. MOWRY, THE ERA OF THEODORE ROOSEVELT AND THE BIRTH OF MODERN AMERICA 1900-1912 (New York, 1958); KELLY, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT, 372-96, 419-44.

"STUART BRUCHEY, THE ROOTS OF AMERICAN ECONOMIC GROWTH 1607-1861 (New York, 1965), 7.

could have had near-perfect knowledge of the risks of their work. If all of this were true, perhaps they should have borne the burden of occupational injuries.

The war analogy challenged these assumptions on every point. During war a well-defined system of authority replaced self-determination and overrode individual control of circumstances. From privates to generals, military personnel subordinated ambitions to battlefield success. Individualism among soldiers destroyed fighting efficiency and could mean defeat. Soldiers did not have freedom of entry or exit from their units or opportunities to determine which battles to fight and which to shun. Their length of service and assignments were determined for them, and their pay was unrelated to dangers they faced. Hopefully, well-organized, efficient fighting units would win victories, but no matter how well soldiers were trained and in spite of the shrewdest military strategy, battlefield casualties were the inevitable results of armed conflict. Likewise, no matter how careful workers might be, industrial casualties inevitably flowed from industrial production.

### C. Industrial Production Likened To War

Work injury critics used the war analogy to argue that injuries and deaths were as inevitable in industrial production as in military conflict. President Benjamin Harrison gave the war analogy an early prominence in his annual message to Congress in December 1889. He informed Congress that over 2,000 railroad workers were killed and over 20,000 injured in the year that ended on June 30, 1888. The President insisted that it was "a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war."<sup>42</sup> After using the war analogy, Harrison urged Congress to pass legislation that required automatic couplers to make railroading safer, which it did in 1893.<sup>43</sup> However, the war analogy received its fullest employment in the early years of the new century.

In a richly illustrated 1910 *McClure's* article John Gitterman made the most explicit comparison between war and industrial work. He found "the analogy between fighting and railroading" to be "an illuminating one," since Railroading [was] a State of War." Gitterman insisted that courts and

<sup>41</sup>HARRISON, MESSAGES AND PAPERS OF THE PRESIDENTS, compl. by James D. Richardson (20 vols., 1897-1922), 11, 5486.

<sup>42</sup>Safety Appliance Act, 27 Statutes at Large, 531; see United States Congress, House of Representatives, *Safety of Railway Employees and the Traveling Public*, House Report 1678, 52d Congress, 1st Session, June 27, 1892 for a report that supported the measure; see Charles H.

*The Development of the Semicautomatic Freight-Car Coupler, 1863-1893*, TECHNOLOGY AND CULTURE, 13 (April 1972), 170-208 for an analysis of the technical development of the coupler and a brief discussion of the 1893 safety act.

commentators who celebrated the "ordinarily prudent" person were out of touch with conditions that rail workers faced. The "prudent man presupposed by the courts [was] on the bench or behind the ribbon counter; he [did] not go into railroading at all," according to Gitterman. He argued that if railroad employees "comported themselves as 'ordinarily prudent persons,'" the nation's commerce would stop since rail workers faced hazardous conditions under the best circumstances. He thought it was no more possible to move trains with a crew of "prudent persons" than it was to "fight a battle with an army of them," and concluded that a rail employee had "decidedly the smaller chance of dying in his bed" than did the soldier.<sup>44</sup> E.H. Downey, a careful student of work injuries, applied the war analogy to industry generally and noted that "the industrial casualties of a single year in this country alone" equalled the "average annual casualties of the American Civil War, plus all those of the Philippine War, increased by all those of the Russo-Japanese War."<sup>43</sup>

The evidence indicated that the best efforts to minimize and eliminate accidents were holding actions only. The best efforts to insure soldiers' safety might hold the number of killed and wounded to a minimum, but "The State assumes that if it goes to war somebody is bound to be hurt. . ."<sup>46</sup> The same was true of industrial production. Safety campaigns among workers and safety legislation dampened accident rates, but the safest industrial pursuits, like the most careful military engagements, produced inevitable casualties. In spite of concerted safety campaigns, injuries increased "both absolutely and relatively to the numbers employed" as industrialization progressed.<sup>47</sup> Statisticians could determine the number of injuries and deaths that would occur per hundred tons of coal mined or the ratio of injured and killed rail workers to ton-miles of freight. The mathematical ratios of industrial accidents to work done "were as remorseless and as certain as the death rate on which the tables for life insurance [were] based."<sup>48</sup>

The evidence also proved that most industrial accidents were chargeable to conditions, not to individuals. Downey noted that "Broadly considered, the injuries which so arise in the course of employment are nobody's 'fault,' in a personal sense-workmen [did] not intend suicide nor [did] employers desire the death or maiming of employees . . . Humanly speaking," Downey continued, "as all intensive studies of mass statistics go to show-work injuries,

<sup>43</sup>Gitterman, "The Cruelties of Our Courts," 164.

<sup>44</sup>Downey, *History of Work Accident Indemnity in Iowa*, 2. See Henry C. Adams, *The Slaughter of Railway Employees*, FORUM, 13 (June 1892), 501-506 for an example of the war analogy in a popular periodical, and U.S. Congress, House, *Safety of Railway Employees and the Traveling Public* for an early use of the analogy in Congress.

<sup>45</sup>John Gitterman, *The Cruelties of Our Courts*, MCCLURE'S, 35 (June 1910), 164.

<sup>46</sup>Downey, *History of Work Accident Indemnity in Iowa*, 2.

<sup>47</sup>GILBERT L. CAMPBELL, *INDUSTRIAL ACCIDENTS AND THEIR COMPENSATION* (New York, 1911), 77.

in the main are attributable to inherent hazards of industry." He concluded that peace had its perils no less than war, and in the aggregate, industrial accidents were "equivalent to the losses of a perpetual campaign."<sup>49</sup>

The reality of inevitable accidents in industrial endeavors gave the lie to the theory that workers controlled their working environment. Determining causes of accidents and fixing responsibility for negligence seemed like searching for the carelessness that shattered a soldier's arm or severed his leg. Individuals might be negligent and fault could be determined in isolated cases, but generally it was impossible to fix responsibility with precision. The war analogy openly repudiated the free market and freedom of contract models for resolving work injury claims.

Without control over their circumstances, workers could not make rational correlations between the salaries they received and the risks they incurred. Additionally, if accidents were inevitable, they could not be attributed to fellow workers. Whatever control of work-place safety that workers had at one time was undermined by industrial conditions. Having lost control over risks and dangers from fellow workers, employees could not have consented to assuming either. Without effective consent, workers lost their ability to limit employers.

In sum, whether they used the war analogy or pointed to an expansive managerial power, critics of work injury law argued that workers had little bargaining power with employees and that comparably, had little if any control over work-place safety. Contract's weakened consent and limitation principles needed reinforcement. Reformers believed that a governmental response to management's expansive power and the employees' reduced power was imperative. They insisted that the nation needed institutional, not moral reform. If managers abused power and individual workers seemed powerless, the problem was not a defective or flawed human nature, but institutional defects that could be remedied.

<sup>49</sup>DOWNEY, WORKMEN'S COMPENSATION (New York, 1924), 8,1.

War and industrialization not only produced casualties that were beyond individual control, but like war, the enormous blood-tax of industrial processes fell unevenly on the young.\* The homes of thousands of workers of all ages were disrupted annually by injuries and deaths, but younger workers suffered the greatest. Crystal Eastman analyzed every industrial fatality that occurred in Allegheny County, Pennsylvania (Pittsburgh area) between July 1, 1906 and June 30, 1907 and found that "Eighty-four percent of the men in the year's list were not over forty, 58 Percent were not over thirty." For the most part, injured and dead workers had family responsibilities, so accidents took a much larger toll than what was inflicted on the immediate victims. In one decade, "over ten thousand orphans" were "charged to the account of American coal production . . ." Industrial production, like war, produced an abundance of widows and orphans, as well as injured and maimed workers. EASTMAN, WORK-ACCIDENTS AND THE LAW (New York, 1910), 13.

VI. GOVERNMENTAL POWER REDRESSED THE IMBALANCE  
WITH COMPENSATION PROGRAMS

Something was needed to offset or limit the inordinate economic power that managers wielded in forming contracts with employees and to restore the consent and limitation principles. Proponents of compensation insisted that government intervention was essential to redress the imbalance. Workers' compensation flowed from the premise that an expanded public oversight of insurance clauses of employment contracts was imperative to balance the weakened consent and limitation principles of private contract making. Hopefully, government's oversight would give workers accident insurance they might have secured if the limitation and consent principles functioned properly. However, in implementing the acts, states displaced the individualism of work injury law with a "bureaucratic orientation."<sup>30</sup>

A. *Bureaucratic Orientation Displaced Individualism of Work Injury Law*

The bureaucratic method, with its emphasis on collective social behavior, replaced the individual as the unit of social analysis. It seemed better suited to the nation's fluid, impersonal society. Individualism was not completely repudiated, but increasingly rules that governed human behavior would have an "indeterminate quality because perpetual interaction was itself indeterminate." Under the bureaucratic view, legal science was not the discernment and application of a body of pre-existing, discoverable body of law. Instead, it became a method that administrators used to gather statistics to prove that society was a vast tissue of interwoven and interdependent activities. The new orientation arrived by 1900 and gained momentum after 1910.<sup>31</sup>

Since accidents had passed beyond individual control and attempts to fix individual accountability seemed futile, the collective unit of all workers in specific industries replaced the individual as the unit of law's concern. Replacing the individual with the collective required statistical analysis of losses from accidents in each industry, not the case-by-case determination of losses that characterized work injury law. The amount of accident insurance that an industry needed had to be calculated from continually collecting and analyzing accident information. It was impossible to make such an analysis

<sup>30</sup>ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877-1920* (New York, 1967), 148.

<sup>31</sup>*Ibid.*, 145. For a critique of Wiebe's thesis, see Richard L. McCormick, 'The Discovery that Business Corrupts Politics': A Reappraisal of the Origins of Progressivism,' *AM. HIST. REV.*, 86 (April 1981), 247-74.

with nineteenth century institutions, so legislatures created compensation bureaus.<sup>52</sup>

Compensation replaced the individualism of accident law but compensation bureaus assumed roles that individuals held under the common law and served the same ends. The acts were to provide equitable apportionment of accident losses, a hope they shared with the work injury law they displaced. Injured workers received awards based on pre-determined schedules and the severity of their injuries. In essence, compensation replaced chaotic and contradictory common law traditions with "a rational, actuarial method of apportioning losses."<sup>53</sup>

#### *B. Law's Role in Promoting Work-Place Safety*

In addition to providing a more rational way of apportioning losses from industrial accidents, the compensation measures were designed to prevent accidents, similar to work injury law. Although industrial safety might be beyond the control of individual workers, cooperative action by workers and employers alike could reduce accident rates. The dread of personal injury engendered care among workers, but their caution needed complementing with employer constraints. The problem, Crystal Eastman indicated, was not "wicked" employers who needed punishing. Employers, "like most of us," were held closely in the grip of economic motives and unfortunately, production pressures increased accidents as well as output. The market absorbed the products but was indifferent to the injured. Companies would not voluntarily improve safety until "each injury and death" carried "a uniform and unescapable penalty." Market restraints influenced employers' decisions about land, wages and capital but imposed no comparable checks on safety. Economics made it cheap to maim and cheaper yet to kill. If workers were to have safer working conditions, the market defect that favored production at safety's expense needed redressing.<sup>54</sup>

Compensation seemed ideal. Financial liability was "one of the greatest incentives to diligence and care," so "If accidents became a heavy and determinable cost to the business ... directly proportioned to the number of deaths and the number and seriousness of injuries among men on the payroll, then the prevention of them would become of direct economic interest to the

<sup>52</sup>Robert M. Woodbury, 'Statistics: Statistical Practices,\* and Oskar N. Andersen, 'Statistics: Statistical Method,' *ENCYCLOPEDIA OF THE SOCIAL SCIENCES*, ed. by EDWIN R.A SEGLIMAN (15 vols., New York, 1930-1934), XIV, 360-66, 366-73; DANIEL J. BOORSTIN, "Statistical Communities: Communities at Risk," *THE AMERICANS: THE DEMOCRATIC EXPERIENCE* (New York, 1973), 173-87.

Friedman and Ladinsky, "Social Change and the Law of Industrial Accidents," *II. Also see* VAN DOREN, *WORKMEN'S COMPENSATION*, 20-55.

\*EASTMAN, *WORK ACCIDENTS AND THE LAW*, 114-15.

employers." Labor leaders and lawyers agreed. Lucian Chaney of the United States Department of Labor noted that compensation had "the one great advantage ... of accident reduction" since it exerted a "steady and relentless application of economic pressure" on employers and forced businesses to improve plant safety. Chaney believed that those financial pressures would lead to "the prevention of preventable accidents." Perhaps Crystal Eastman summed it up best: "One economic motive would be set off against another" and market forces would compel employers to include safety in their calculations for production if accident losses became an operational cost."<sup>33</sup> If the economic rationale was not enough, the war analogy reinforced it.

### C. Compensation Analogized to Military Pensions

Soldiers provided essential community needs by securing peace and winning wars. The government called soldiers into battle and compensated them for service injuries. Pensions, like weapons and ammunition, were part of the cost of preserving security. Officers had received pensions for centuries, but it was "only in modern times" that common soldiers received disability benefits. Historically, nations "allowed men to whom they owed their continued existence to hang around village inns, broken in health and maimed in body, [to be] chance objects of pity . . . Until lately . . . society treated the soldier as it still treat[ed] the brakeman: it used him for its own profit, and then tossed him into the scrap-heap for the industrially unfit."<sup>36</sup> Compensation proponents thought the states should adopt the military pension example and require industrial accident pensions, or workers' compensation insurance. However, instead of paying for industrial pensions from tax revenues, insurance provisions would be included in workers' employment contracts.

Compensation meant that the consumers of any given commodity made good the wage loss incurred, as well as the wages expended, in the course of production. It would be for industrial employees what pensions were for soldiers—"pensk>ns" for the carnage of peace. Neither military nor industrial pensions restored broken arms or prevented blood shed, but both lightened the post-injury burdens for victims and their families. Both socialized losses by transferring some of the economic costs from individuals, independent of fault, to the larger community that each group served. Just as injured soldiers no longer needed pitifully to beg for help, injured brakemen would not be tossed upon the scrap-heap of an unfit, superfluous humanity.

<sup>33</sup>George W. Payne, *The Effect of Legislation Requiring the Master to Guard Dangerous Machinery*, CENTRAL L J., 66 (February 21,1908), 157; EASTMAN, WORK-ACCIDENTS AND THE LAW, 114; Chaney, "The Compensation Factor in Accident Reduction," *Case and Comment*, 22 (September 1915), 301-303; EASTMAN, WORK-ACCIDENTS AND THE LAW, 114. <sup>36</sup>Gitterman, "The Cruelties of Our Courts, 165.

*D. Courts Use The Loss of Bargaining Power And The War Analogy To Uphold  
Compensation's Constitutionality*

State and federal courts relied on the doctrine of state police powers to sanction compensation programs, but they also used the war analogy to explain why states could expand their authority over industrial accidents. Washington's Supreme Court sustained that state's compensation act in September 1911, only weeks after it went into effect. Writing for the court, Justice Mark Fullerton summarized both the new perspective and the older view that it displaced. As if to pay homage to *Farwell* and *Carnegie*, Fullerton noted that "Theoretically, the employer and employee, on entering into a contract by which the one engages the services of the other stand on the same plane . . ." However, he acknowledged early twentieth century industrial realities and noted that "in practice, as it is well known, this ideal condition very seldom exists."<sup>57</sup>

In essence, Fullerton believed that industrial organization in turn-of-the century America undermined the limitation and consent principle of contract. The claim of contractual freedom between employers and employees lived on, but the substance had changed. Where *Crevecoeur* celebrated the sagacity that Americans gained from the early bargains they made and *de Tocqueville* celebrated equality, Fullerton noted that differences in bargaining power assured that "Greed and sagacity" were "on the one side; and necessity and incapacity on the other . . ." Where *Carnegie* insisted that laborers could become independent contractors, Fullerton found that imbalances in bargaining strength led, in many instances, "to contracts that create[d] conditions little short of peonage . . ." Finally, Fullerton concluded, employers' inordinate bargaining power allowed employers to impose such one-sided contracts on employees that "our own reports abound with instances where men have been induced to work in situations so dangerous to life and limb that the wonder is not that some of them were injured, but rather that any of them escaped injury."<sup>58</sup> The problem was clear: well-organized corporations with expansive market power were aligned against unorganized employees who operated in a highly competitive labor market.

Fullerton also used the war analogy to justify compensation programs. He noted that industrial accidents had "become frequent and inevitable" and "that no matter how carefully [safety] laws . . ." were enforced, "accidents cannot be eliminated . . ."<sup>59</sup> Two months later Wisconsin's Supreme Court rejected a challenge to that state's compensation act. Wisconsin's Chief Justice John Winslow used the war analogy more explicitly than Fullerton had. He noted that the high rate of industrial accidents was a recent development and that

<sup>57</sup>State v. Clausen, 117 Pac. 1118 (1911).

<sup>58</sup>*Ibid.*

<sup>59</sup>State v. Clausen, 117 Pac. 1103, 1113.

historically, "There was no army of injured and dying, with constantly swelling ranks marching with halting step and dimming eyes to the great hereafter." Like Fullerton, Winslow observed that the most "stringent" safety measures would not prevent an "increase" in "the army of the injured . . ." <sup>60</sup>

Justice Mahlon Pitney of the United States Supreme Court gave the analogy even more prominence in upholding the constitutionality of Washington's compensation law. He noted that states gave "pensions to disabled soldiers and to the widows and dependents of those killed in war." He did not think states were powerless to "compensate, with pensions" individuals who were "disabled" or dependents of those who were killed "in the industrial occupations that are so necessary to develop the resources and add to the wealth and prosperity of the state." Continuing, he affirmed that "A machine as well as a bullet may produce a wound, and the disabling effect may be the same." Finally, quoting Washington's Industrial Commission, Pitney wrote, "Under our statutes the workman is the soldier of organized industry, accepting a kind of pension in exchange for absolute insurance on his master's pension." <sup>61</sup>

## VII. WORKERS' COMPENSATION: A NEW DISPENSATION IN CONTRACT LAW

Contract was central to compensation programs, just as it was for work injury law; both used a common tool in promoting the individual's good, but contract under compensation had a dramatically different face than it did for work injury. Under work injury law courts searched the implications of employment contracts for risk allocation after accidents occurred. Compensation replaced *post facto* findings with compulsory insurance, a condition precedent of employment contracts. State administrative agencies were given powers that courts had exercised. The shift from the judiciary to bureaucratic control was institutionalized by political majorities as represented in legislative bodies and brought a new dispensation in American contract law that transformed the legal environment of business.

### A. *Workers' Compensation, Contract and Checks and Balances*

American school children learn about a system of checks and balances in their civics classes. In high school and college they study refinements of the system. <sup>62</sup> Compensation reflects checks and balances at work. As Americans

<sup>60</sup>Borgnis v. Falk, 133 NW 215.

<sup>61</sup>Mountain Timber v. State of Washington, 243 U.S. 239-40 (1917)

<sup>62</sup>MICHAEL FOLEY. LAW, MEN AND MACHINES: MODERN AMERICAN GOVERNMENT AND THE APPEAL OF NEWTONIAN MECHANIC (London, 1990), 45-79 provides an excellent analysis of the socialization of Americans in ideas about checks and balances.

accepted the view that workers lost the ability to limit employers and create safe working conditions, courts could have abandoned their judicially-created work injury doctrines, but they clung to them. If state courts would not reverse *Fanvell* state assemblies could. State legislatures overrode the work injury doctrines and imposed insurance provisions on employment contracts. Whatever else employment contracts might include, compensation provisions were required; the state became a counterbalance to managerial power. The legislature checked or balanced the judiciary by overriding judicial decisions that seemed long outdated.

*B. Contract Subjected To The Legislative Or Majoritarian Branch of Government*

As the twentieth century progressed, the process of using assemblies to override court-made law and impose terms on employment contracts accelerated and spread to the national level. States imposed other specific terms on contracts, such as minimum wages and maximum hours. The New Deal followed the state example and used national legislative authority to add its own requirements to contract, such as social security and minimum wages. Equally important, if not more so, the New Deal also used the legislative branch to modify procedure in contract law. Courts had historically policed the contract-making process and intervened in cases of fraud, coercion and undue influence-factors that destroyed both the consent and limitation principles of contract.

In the 1935 Wagner Act Congress used national power to transform contract procedure by encouraging collective bargaining. If earlier, states used legislative authority to offset the imbalance between management and workers by imposing specific terms on contracts, the New Deal tried to achieve the same end by protecting a procedure which permitted collective labor to offset collective management.<sup>63</sup> If nothing else, collective bargaining might restore the limitation principle in employment contracts. The Wagner Act, like the earlier compensation measures, exemplified checks and balances at work. If judicial excesses produced labor injunctions, sanctioned yellow dog contracts

<sup>63</sup>William e. leuchtenburg, franklin d. Roosevelt and the new deal (New York, 1963), 41-166 and DAVID P. TWOMEY, LABOR & EMPLOYMENT LAW, TEXT & CASES (8th ed., Cincinnati, 1989), 41-124. It was as though the Wagner Act enacted Justice Oliver Wendell Holmes' 1896 dissent in *Vegeahn v. Guntner*. In *Guntner* the Supreme Judicial Court of Massachusetts enjoined a "patrol of two men" in front of the defendant's factory. Holmes dissented on the following grounds: "One of the eternal conflicts out of which life is made up is that between the efforts of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way." The case is reprinted in *^QMey. Labor \* employment Law. 11-12.*

and gave decisions hostile to labor, legislative enactments could overrule them.<sup>64</sup> Legislative checks on the judiciary also applied to a third area of contract law.

Historically, courts refused to enforce contracts that violated public policy. The judiciary had the larger voice in deciding what subject matter affronted public policy. However, that changed in the 1890s on the national level when Congress said that certain contracts violated the public good. Since its enactment of the Sherman Anti-Trust Act, Congress expanded its list of prohibited contractual terms to include matters as diverse as using child labor, and striking down age, gender and race discrimination.<sup>65</sup>

The implications of the changes that imposed specific requirements on contracts, that modified contract procedures and that expanded the list of prohibited contract provisions seem clear. Twentieth century contract law was opened to the political process more than it was ever dreamed of in the nineteenth century. Most Americans are monumentally unconcerned about contract's legal doctrines; they are content to leave that to the courts and legal profession. However, they are vitally interested in the specific terms that legislative bodies impose on contracts, in the bargaining process and in defining prohibited contracts. Unlike the twentieth century, nineteenth century contract law was generally beyond majoritarian control. However, such control over contract is central to the twentieth century. The difference between the nineteenth and twentieth century perspective is evident in comparing *Lochner v. New York*<sup>M</sup>, with *NLRB v. Jones & Laughlin Steel Corp.*<sup>61</sup> and *West Coast Hotel Co. v. Parrish*.<sup>M</sup>

The three cases have implications beyond using checks and balances as a counterweight to managerial power. The expansion of legislative power over contract accepted a basic premise of the war analogy. Minimally, the war analogy held that workers had little control over their economic destinies. Economic individualism was weakening not because of lack of character or moral fiber among workers. Workers lost power over their fortunes because of expansive managerial power. The economic individualism of *Farwell* could not exist among workers because it had long ceased to exist among employers. Employers used the corporation to self-organize. There was no comparable economic counterweight for workers. However, another forum existed. If economic individualism was on the decline relative to management, political individualism provided an antidote.

<sup>M</sup>*Ibid.*, 6-86.

<sup>M</sup>KELLY, THE AMERICAN CONSTITUTION, 386-90, 616-625.

<sup>61</sup>198 U.S. 45 (1905) (overruled New York's maximum hour legislation for bakers). <sup>47</sup>301 U.S. 1 (1937) (upheld the constitutionality of the Wagner Act).

<sup>M</sup>300 U.S. 397 (1937) (upheld Washington State minimum wage legislation).

*C. Speech and Press Freedoms Become Surrogates for Liberty of Contract*

The 1905 *Lochner* case accepted many of the premises that *FarweU* affirmed and that Carnegie later celebrated, especially the notion that isolated workers carved out their distinctive place in the American economy by dint of their own efforts. The *Jones & Laughlin* and *Parrish* cases affirmed the premise that individual workers alone are relatively powerless when they face the overwhelming bargaining power of employers. However, individual employees could balance their loss of economic power by carefully using their political power. Although scholars have not used the term, it is as though political individualism of the twentieth century replaced the economic individualism of the nineteenth.

If the liberty clause of the Fourteenth Amendment offered constitutional protection for the freedom of contract, the speech and press clauses of the First Amendment became its moral and legal equivalent during and after the Deal. The liberty clause prevented states from unduly interfering with individuals who strived to improve their circumstances by freely entering into contracts of their choice.<sup>66</sup> Comparably, the speech and press clauses limited government from unduly interfering with individuals who tried to improve their economic circumstances by using the political system to offset managerial power.<sup>70</sup> Employees offset their reduced ability to control their work circumstances through contract by using their ballots to enact legislation that restored some of that control. In the process, contract law became politicized, amenable to majoritarian control.

VII. CONCLUSION: THE NEW DISPENSATION OF CONTRACT LAW,  
AS REFLECTED IN WORKERS' COMPENSATION,  
TRANSFORMED THE LEGAL ENVIRONMENT OF BUSINESS

If in 1890 there were primarily two parties to employment contracts, the two private bargainers, long before 1990 there were invariably three Parties—the private bargainers and societal oversight by a governmental agency or agencies. In no area of law was the change more obvious than in the evolution from work injury to workers' compensation. The upshot was obvious: if contract could be regulated by political majorities, little in business would remain free of governmental oversight. The change in contract law

<sup>66</sup>KELLY, THE AMERICAN CONSTITUTION, 397-418.

<sup>70</sup>PAUL MURPHY, THE MEANING OF FREEDOM OF SPEECH FIRST AMENDMENT FREEDOMS FROM WILSON TO FDR (New York, 1972); THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (New York, 1963), 3-15; KELLY, THE AMERICAN CONSTITUTION, 538-41.

registered a comparable expansion of governmental regulation of business generally, which literally transformed the legal environment of business as the century progressed.